



## VFBV brief to members – VFBV assessment of the State Government's Firefighters' Assessment Panel process

12 June 2014

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1. VFBV has been pushing for a change to relevant legislation and CFA policy to reverse the onus of proof in the determination of compensation claims by firefighters (volunteer and career) who have contracted one or more of 12 types of Cancer.
2. International studies and the *presumptive* legislation in other Australian and overseas jurisdictions (including Canada and USA) support such change.
3. The Victorian Government has determined not to change the relevant legislation and policy at this time. The Greens Party and the Labor Party support such change and have made this clear to CFA members and their families.
4. The Victorian Government has advised that it is awaiting a further study by Monash University into the substantive matter of the relevant cancers and their incidence/relationship to firefighters' duties with the stated intention of not determining whether or not there will be legislative change until the Monash study is completed and reviewed by Government.
5. In the meantime, the Government made some administrative change to the way cancer based compensation claims are handled for CFA Volunteers.
6. On 20 August 2013, the Minister for Police and Emergency Services Kim Wells and Assistant Treasurer Gordon Rich-Phillips announced the formation of the Firefighters Assessment Panel. It was stated at the time that this Panel was to assist the management and assessment of career and volunteer firefighter cancer related claims. Further, the media release announcing the new Panel said its expert specialists would '*ensure **prompt, compassionate and fair** assessments for all claims*' and '*Each firefighter's claim will be assessed on its **merits, having regard to the existing scientific evidence***'.
7. A week later Assistant Treasurer Rich-Phillips launched the 'Firefighters Advisory Service' hotline "*...dedicated to providing information and advice to*

*career and volunteer fire fighters **considering** lodging a compensation claim for cancer”.*

8. The media release announcing the launch of this hotline said that the new service “...will help firefighters understand the claims process and give further reassurance that their claims will receive prompt, compassionate and fair assessments”.
9. At the time VFBV noted Government assurances that this administrative change and new phone service was intended to help volunteers in relevant cancer based claims, but remained skeptical. We were troubled that the “new system” gave no substantive remedy to applicants regarding cancer based claims. We were concerned that the new process merely added another step in the compensation claims process and did nothing to address the core problem which was preventing firefighters from accessing fair compensation regarding cancer claims. We advised the Government accordingly.
10. There were many Volunteers who thought the Government’s announcements were bureaucratic nonsense and characterised them as “public media ploys” to buy time and give the appearance that the Government was responding to the issue in a responsible manner. This view was supported by the fact that the Monash University team conducting the additional research on causal links between firefighter duties and various types of cancer say that the wait on their report before adopting presumptive legislation is unnecessary. They said last year sufficient evidence already exists and decisions should be made on the basis of available scientific evidence. In a letter to the Greens, researchers Associate Professor Deborah Glass and Professor Malcolm Sim said, “...there is already good evidence from a very large number of previous human studies that work as a firefighter is associated with an increased risk of several types cancer... ...waiting for more research findings, especially in this situation where the results of many cancer studies in firefighters are already available, will lead to unacceptable delays, possibly extending into years. “
11. In a letter to VFBV dated 29 August 2013 Minister Wells gave explicit assurances that the new arrangements for cancer based claims:
  - a) Would, “...ensure and expedite the equitable treatment of any **claims queries and medical assessments** under the existing schemes”;
  - b) That the Panel will comprise expert medical, technical and claims specialists to ensure **prompt, compassionate and fair** assessments for all claims;

- c) *That the formation of the Panel is not in place of presumptive legislation; and,*
- d) *That the Government has not made any decision regarding presumptive legislation, and is awaiting further advice regarding links between specific cancers and firefighting.*

12. Sadly, it is the view of VFBV based on member experience that the new arrangements fall far short of the assurances that were given.
13. The so called hotline is ineffective; volunteers have no confidence in it. Far from providing interactive information on issues related to potential cancer based claims, a call service only takes the inquirer's name, postal address and number and a cancer compensation application pack is then supposed to be mailed to them.
14. We have been advised that even this process is not always successful and it has taken several calls before an application pack has been mailed. In one case a call was made on 29 September last year and the caller was advised that a cancer application pack would be sent straight away. It hadn't arrived two weeks later and he made a further call to the "hotline" only to be told they had never heard of him; there was no record of his previous call. His details were again given and a cancer application pack arrived next day. He was contacted by CFA to confirm that he had received the pack and to apologise for the "stuff-up". Despite the Assistant Treasurer's statements a few weeks before, the caller was unable to discuss information relevant to whether a claim may be warranted in the volunteer's circumstances.
15. In reality, inquirers to the hotline are just told to put in a claim and it will be sent to FAP for assessment. Their mailing address is recorded and they are (supposed to be) sent a cancer compensation application pack forthwith. **There is no inter-active advice provided related to preparing a claim. There is no hands-on help to research and prepare a claim. That is all left up to the unassisted Volunteer.**
16. VFBV know of at least one case where the intending volunteer applicant was too ill to complete details required by the application paper-work and therefore no claim was lodged. That person's condition has deteriorated.
17. A number of volunteers receiving the cancer compensation application pack have noted that the information in the pack was nothing more than a re-statement of the old process with the additional FAP step. **The application form still requires that the applicant identify the days or specific incidents that gave rise to the volunteer's claimed condition.**

18. The new FAP step in the process equally fails to provide hands-on assistance to the volunteer applicant. (Union members of course have union support to fall back-on with funded union claims officers and they are in turn supported by skilled plaintiff/Workcover lawyers.)
19. From the outset an almost insurmountable bar is raised which practically works to prevent most volunteers succeeding in a cancer based claim. The standard applied by CFA and FAP requires:
  - a) There needs to be evidence of a causative link between the claimed condition and the applicant's CFA member duties; and,
  - b) There needs to be evidence that the applicant's CFA volunteer member duties gave rise to a significantly greater risk of contracting the claimed condition.
20. To establish a "causative link" as required by 19 (a) above requires the volunteer applicant to establish three things:
  - a) What duties (ie. Turnouts/incidents attended, functions carried out on site, what equipment such as BA was used or even available) had the volunteer applicant undertaken during his/her CFA Volunteer career;
  - b) What were the environmental elements that could have reasonably impacted the volunteer applicant in the conduct of those duties; and,
  - c) On balance, the probability that those environmental elements (including required levels or concentrations) are linked to causation of the applicant volunteer's condition.
21. With the resources available to volunteer applicants, no volunteer could accurately prepare such a case.
22. These matters are threshold issues before the requirement of 19 (b) above is even addressed.
23. CFA's individual recording of volunteer service and duty is limited. Volunteers are often not recorded as turning out to incidents they attend. When incident turnouts are recorded they often show as one entry for a volunteer's attendances at large area and/or long duration incidents, regardless of the number of situations they confront during that long deployment or how many deployments they attend over the period of a long duration incident, and there is no detail of the duties they carried out or the risk exposures they would have confronted. There are generally no details of environmental

elements in situ where a volunteer carries out his/her duties in situation (SitReps) or other reports on the incident. Historic CFA records that are important for compensation cases, like cancer cases, are even worse than today's CFA records. In effect, except in rare circumstances, there is no reliable audit trail data available in CFA records of sufficient evidentiary value to prove on balance a "causative link" (see the criteria outlined above in clause 20). Similar can be said for our career brother and sister firefighters although there will be a little more information on their assignments because of payroll requirements.

24. CFA submit for assessment what individual history they do have on a volunteer applicant but as noted above it is so incomplete as to be factually useless for assessing most claims based on cancer. Unfortunately it seems that a body external to CFA involved in a claims assessment process (whether FAP, an outside investigator or medical expert) will be unaware or not have regard to this limitation when provided with CFA information on the volunteer applicant thereby undermining a fair assessment of the applicant's claim. [If each volunteer was required to make detailed records of their duties at each incident and log them with CFA, the Authority would come to a grinding halt - volunteers would undoubtedly leave in the face of such paper work and the administrative costs to CFA would be overwhelming. If career firefighters were required to keep and log such information you should reasonably expect that the number of career staff required for the current level of fire and emergency cover would grow enormously.]
25. The practicality and cost of identifying and logging every environmental element at an incident, if indeed the element's presence is even known (not to mention the relative or even approximate proximity/exposure of different firefighters to those elements at a job) likewise makes the collection and collation of such data unlikely. Ideally, the presence of dangerous elements involved in each job, where known to be present, should be recorded, but to try and assess the relative potential of exposure for individual firefighters and capture the data in reports which may be used for future compensation claims is impractical. In regard to some identified elements present their health impact may not be recognised until a future time. Therefore, they would not be recorded at the time of the incident because they would not be thought to be dangerous. The relevance of this fact to future compensation claims is obvious. In the current process of determining cancer compensation claims the absence of this data works against the applicant and relieves the CFA/Government of their financial responsibility since the assessment of the firefighter's claim is based on what evidence is available to the FAP and their experts and investigator.

26. If the assessment body is prepared to accept that certain environmental elements were present at incidents attended by the applicant and on balance the applicant is likely to have been impacted by those elements, the applicant has to then establish that the elements are capable or likely to have caused the condition that is the subject of the claim. Here the question is not only whether the element has a causative relationship with the condition but what is the strength or concentration of the element that is necessary to likely cause the condition and was the element likely to be present at the required strength or concentration at the incident.
27. If an applicant has successfully crossed these thresholds the remaining issue is whether the exposure is sufficient on balance to have elevated the risk to the level of a '**significantly greater risk of contracting the subject condition**'. This is expert subjective and also raises the vexed question "for whom does the expert work" and whether that influences the way the question is weighed and ultimately resolved.
28. In addition to these very significant issues impacting the determination of cancer compensation applications is the perceived bias in the way they are processed, particularly under the new FAP process. There seems to be a pre-occupation in the process of establishing that the cause of a volunteer applicant's cancer is external to the CFA and volunteer's CFA duties. On experience to date, there seems to be a lack of effort to fully and properly investigate and weigh the effects of CFA duties as the likely cause of the firefighter's cancer condition. FAP seems to be acting for the CFA against the applicant who has no-one acting for him/her as part of the process. The unfairness of this approach when added to the absolute failure to provide assistance and support to the applicant volunteer in preparing and advocating the applicant volunteer's case is unacceptable. We are advised that at no time is the volunteer applicant allowed to meet with the FAP to discuss the case; such meetings are not permitted under the process. **The issues of perceived bias, inability of the applicant to meet with the decision makers to discuss the matter including the accuracy of evidentiary material and lack of support, assistance and advocacy for volunteer compensation applicants including unfettered access to relevant CFA records and all material presented as part of the process prior to determination must be urgently addressed.**
29. In absence of accurate or complete CFA records or evidence relevant to the case, fairness would require that the applicant's evidence be accepted unless it can be impeached or the applicant's character, reliability or honesty can be legitimately impugned. Procedural fairness requires that to arrive at such findings about an applicant/witness requires a proper hearings process.

Further, experts providing reports to the assessors or participating as assessors must weigh all of the available evidence rather than start from a predisposition on the causality issue. Experts in these types of cases must truly be in command of the variety of relevant research and err on the side of the applicant when the research results are mixed. It is also important that the information on the applicant's health background and other related issues is correct. **For the assessment process to comply with the principles of natural justice, the information upon which an assessor or assessment panel is to make its decision should be offered up to the applicant for correction of any personal facts and to respond to the other evidence being weighed before a decision is made.** This gives the best chance of getting to the real story of the matter which can then be weighed for a final assessment.

30. This approach is not simply based on good and fair procedural theory but directly arises from a VFBV case study of a recent volunteer's application.

31. In that case the volunteer applicant experienced the following:

- a) There was no personal hands-on support or assistance through the process to the volunteer applicant; The volunteer applicant was required to put large numbers of hours into developing his case rather than being assisted by a paid person operating in support of a long term volunteer;
- b) There was no feedback as to the sufficiency of what he had provided;
- c) The operation of FAP and the circumstance investigation lacked transparency and purported facts pertinent to the case placed before the FAP were inaccurate and others (such as member duties) incomplete;
- d) The oncologist report to FAP got his family history wrong; The oncologist based a negative finding on the incorrect family history and failed to note and consider that his conclusion as to likely cause of the applicant's cancer was found to be either impossible or at least rare by a number of overseas leading authorities; The oncologist failed to consider international studies that supported the applicant's claim and those which have given rise to presumptive legislation in other Australian jurisdictions as well as around the world, particularly in North America;
- e) In his report and findings to the FAP the occupational physician stated there was no evidence that environmental factors played any part in causing the relevant cancer in this case based on the report of the oncologist and the two studies upon which he relied. This is despite

there being a significant number of learned studies available that have identified a variety of environmental factors and elements that could be the cause of the applicant's type of cancer (including factors/elements he could reasonably encounter whilst undertaking his CFA duties). Reputable studies are also available that show the cause for the applicant's condition as advanced by both the oncologist and the occupational physician (genetic pre-disposition) as being rare to unlikely as the cause of the applicant's type of cancer. The occupational physician also noted that exposure to chemicals or combustion products were highly unlikely to have made any contribution to the applicant's cancer (despite overseas studies to the contrary). He also reported that the applicant's exposure to chemicals and combustion products had been minimal. This statement was made despite the fact that there was insufficient information available on the applicant's volunteer operational history to draw such a conclusion;

- f) The existence and content of a plethora of learned reports that contradicted the two reports relied upon by the oncologist and occupational physician was never acknowledged or considered in determining the subject application;
- g) The FAP lawyer reached similar egregious conclusions as the oncologist and the occupational physician without regard to the weight of counter-veiling evidence that was readily available and directly pertinent to the application;
- h) The process took around five months from phone inquiry last November to letter of rejection in February this year; and,
- i) The principles of natural justice were ignored; there was no procedural fairness in the process that determined the application. At no point was the applicant asked to respond to the information before the FAP prior its assessment decision, or for that matter before the final rejection of the claim by the CFA.

32. VFBV's assessment, which contrasts the Government's declared process and the actual experience of volunteer applicants, reasonably establishes that the process as implemented is not '***prompt, compassionate and fair in its assessments for all claims***' and '***Each firefighter's claim is not assessed on its merits, having regard to the existing scientific evidence***'.

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