



Police Federation
of Australia

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John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter

RE: INQUIRY INTO THE FAIR WORK BILL 2008

It is with pleasure that I make this submission on behalf of the Police Federation of Australia (the PFA). The PFA is a federally registered union under the *Workplace Relations Act 1996* and has coverage of all 52,000 State, Territory and Federal police officers.

INTRODUCTION

The PFA is aware that the Fair Work Bill 2008 is one part of a wider legislative reform scheme being undertaken by the Government. The PFA's submission relates to the current Bill, the further Transitional Bill yet to be introduced to the Parliament and the Victorian referral legislation. The PFA believes that it is important to raise the interrelated workplace relations issues affecting police of which the Fair Work Bill 2008 will be an integral part.

We are cognizant of the new framework for workplace relations and the significant advances through the Fair Work Australia Bill as compared with the Work Choices legislation. The PFA is also supportive of the thrust of the submission to this Inquiry from the Australian Council of Trade Unions (ACTU). There are, however, issues that may arise as a result of the passage of this Bill that we believe may have negative consequences for Australia's police as workers.

Currently we have three (3) police jurisdictions which would potentially be covered by this legislation - the Australian Federal Police, Victoria Police¹ and Northern Territory Police.² All other jurisdictions are covered by state IR systems.

Currently industrial relations for police is subject to a range of tribunal arrangements that makes dealing with the industrial, command and control and disciplinary issues of police very complex. They are also subject to multiple tiers of scrutiny by an array of oversight bodies such as Ombudsman, Integrity and Corruption Commissions, and Parliamentary Committees and Inquiries.

In the lead up to the 2007 election, the Australian Labor Party (the ALP) made a number of commitments in relation to industrial relations. Subsequently, industrial relations became a major electoral issue. The bulk of the commitments given by the ALP were contained in *Forward with Fairness*.³ These policies were reinforced in a *Policy Implementation Plan* released in August 2007.⁴ The Fair Work Bill 2008 is proposed to be the legislative fulfillment of those election promises. In addition, the ALP gave specific election undertakings to the PFA on how it would deal with industrial relation for police if elected.

This submission focuses on:

- The extent to which the Fair Work Bill 2008 delivers on those undertakings; and
- The extent to which the legislative framework will impact on industrial relations for police.

¹ Victoria Police are covered by the Federal jurisdiction as a result of the *Commonwealth Powers (Industrial Relations) Act 1996 (Victoria)*

² The Northern Territory police currently operate under a Police Tribunal model which is established under Part III of the *Police Administration Act (NT)* and which has jurisdiction to hear and determine all matters relating to the remuneration and terms of conditions of service of members of the Police Force other than the Commissioner, an Assistant Commissioner or a member of the rank of Commander.

³ *Forward with Fairness* Labor's Plan for fairer and more productive Australian workplace, April 2007

⁴ *Forward with Fairness Policy Implementation Plan*, August 2007

EMPLOY STATUS OF POLICE

The nature of employment of a police officer is different to other occupations, including other public sector workers. It is an established rule of the common law that members of a police force are not 'employees' in the normally understood industrial relations sense of that term. In 1955 (in Attorney-General (NSW) v Perpetual Trustee Co Ltd), the Privy Council found that the relationship of master and servant does not exist between the Crown and its police officers, but that police constables are independent office holders exercising 'original authority' in the execution of their duties. Australian Courts have had no hesitation in applying and reaffirming this rule.

The rationale behind, and implications of this doctrine are carefully examined in the attached paper published in the Melbourne University Law Review, "*Employment Status of Police in Australia*" by (Giuseppe) Joseph Carabetta. See particularly, "*The Current Position and its Origins – Introduction*" (pp 4 – 5; and pp 8 – 17).

The status of police has significant implications when industrial relations legislation is drafted based on "employee status". The issue that arises is should police be treated differently? If so, how and what 'employee' rights should be extended to police?

FREEDOM OF ASSOCIATION

Forward with Fairness stated:

*"... freedom of association is a basic democratic right of all Australian **workers**. [emphasis added]*

Under Labor, all workers will be free to decide whether or not to join and be represented by a union, or participate in collective activities. Labor's national industrial relations laws will recognise that freedom of association is vital for the proper functioning of a fair industrial relations system built on the concept of democracy in the workplace.

It will be unlawful for anyone to try to stop a working person exercising this free choice by threats, pressure, discrimination or victimisation.

Labor's national industrial relations legislation will also ensure that working people are not discriminated against because of the nature of the industrial instrument that covers their employment. Should employees elect, within Labor's industrial relations law, to exercise their rights to collectively bargain, take protected industrial action or rely on the benefits of a collective bargain, their choice is respected.

A Rudd Labor Government will ensure Fair Work Australia has the power to make orders to ensure freedom of association is protected."

This position was reinforced by the Minister in her speech to the National Press Club on 17 September 2008:

"As promised in Forward with Fairness our new laws will also guarantee Australians important rights at work.

All Australian workers will be free to join a union and make their own choice about whether or not to participate in activities like collective bargaining and protected industrial action.

*And it will be unlawful to try to stop them exercising this free choice by threats, pressure, discrimination, inducements, victimisation or dismissal."*⁵

In the circumstances of Victorian Police, there is a very real possibility that freedom of association is not adequately protected. Section 4(6) of the *Commonwealth Powers (Industrial Relations) Act 1996* provides:

"The matter of freedom of association, namely the rights of employees, employers and independent contractors in the State to join an industrial association of their choice or not to join such an association to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the power of the Commonwealth."

It appears from the language of section 4(6) that the scope of the referral in respect to freedom of association for non-federal employees may be much narrower than the protection offered to national system employees under Chapter 3 of the Bill. Section 4(6) refers only to the rights of employees to join or not join a union. That police in Victoria will only be granted freedom of association rights pursuant to a referral is apparent (refer to paragraph 1344 of the Explanatory Memorandum).

It is the view of the PFA that the prospect of such a position is untenable in that if the Victorian referral was maintained in its current terms it would leave a large proportion of workers in that state granted significantly less rights than the previous Howard Liberal Government was willing to extend pursuant to WorkChoices. The group of workers currently denied the protection of Part 16 include many of the most vulnerable in the State as well as the State's own employees including police officers.

In the matter of *Dempster v Comrie [2000] FCA 253* (15 March 2000), the issue of the interaction of the freedom of association provisions and the matters excluded from the reference was dealt with. In this matter, *Dempster* alleged that he had

⁵ Gillard J. – Introducing Australia's New Workplace Relations System, National Press Club, 17 September 2008

been transferred because he was a union official, a reason prohibited by the freedom of association protections under the Commonwealth Act. The Full Court of the Federal Court held that the terms of the referral denied *Dempster* those freedom of association protections, even if the actions of the Chief Commissioner were for prohibited reasons of union affiliation. This clearly demonstrates the gross injustice of current situation.

A fundamental democratic right should not be left to the "whim" of referral by a State Government. As a signatory to the ILO Conventions on Freedom of Association,⁶ the Australian Government has an obligation to promote its objectives in its legislation agenda. In *Forward with Fairness* the ALP undertook to "... *rely on all of the Constitutional powers available to it to legislate national industrial relations laws to reduce complexity and duplication.*" In respect to the National Employment Standards, the Bill relies on the external affairs power to underpin some terms.

Police are not the only workers whose employment status is unclear at common law. The basic democratic rights of other employees not employed by a constitutional corporation should also not be subject to the whim of referral by a State.

Democratic rights as clear and unambiguous as those relating to freedom of association should be extended to all Australian workers through amendment to the Bill to expressly rely on the ILO convention.

ISSUES FOR AUSTRALIA FEDERAL POLICE AND VICTORIA POLICE

Australian Federal Police

Prior to the 2007 Federal election, the PFA sought, amongst a number of other industrial matters, the following undertaking from the ALP:

The PFA seeks your commitment to establish an Australian Federal Police Tribunal under the AFP Act to deal with matters relating to workplace relations, advancement and deployment, and discipline and managerial matters within the Australian Federal Police (AFP).

ALP Response: *In relation to the PFA's proposal for an Australian Federal Police Tribunal (AFP Tribunal) under the Australian Federal Police Act 1979 (the AFP Act), a Rudd Labor Government would be willing to consider this proposal in detail from office. Due to the unique, technical and cross-portfolio nature of*

⁶ ILO Convention 87 Freedom of Association and Protection of the Rights to Organise;
ILO Convention 98 Right to Organise a Collective Bargaining Convention

the proposal, appropriate consideration as an opposition party is extremely difficult.

In relation to our proposal for the establishment of a Tribunal for the AFP under the AFP Act, the PFA submits the following –

Fair Work Australia, and the new system of Enterprise Agreements established under the Fair Work Bill 2008, will only have the capacity to deal with disputes arising out of matters that fall within the scope of such agreements. Therefore, only the remuneration and terms and conditions of service of the AFP are covered.

The Fair Work Bill 2008 leaves out two significant areas of employment decision making without a specific mechanism for review: disciplinary/managerial decisions; as well as advancement/ deployment decisions.

The need for an AFP Tribunal distinct from Fair Work Australia rests on the twin planks of the AFP Commissioner being able to effectively manage the AFP and comply with the AFP values as articulated in the *Australian Federal Police Act 1979* (AFP Act), together with a workforce confident that issues of equity, operationally balanced decision-making and sustainable life balance issues can be addressed by an entity of sufficient authority and credibility.

The AFP Tribunal would achieve these outcomes, amalgamating the functions of the tribunal, commission, board and procedures used by the AFP to date. They include:

- the Australian Federal Police Collective Agreement 2007–2011 Dispute Avoidance and Settlement Procedure;
- Regulation 24 of AFP Regulations; and
- the Australian Federal Police Review Panel (by agreement between AFP and Australian Federal Police Association for non-economic matters outside the AIRC).

The PFA recommends such an AFP Tribunal should have jurisdiction over all aspects of the AFP Act that define the Commissioner's powers including the command and control sections of the AFP Act, the employment powers under the Act, and the provisions concerning disciplinary and managerial action under Part V of the AFP Act.

In particular, the AFP Tribunal should have three (3) divisions and have jurisdiction to hear and determine all matters relating to:

- workplace relations;
- advancement and deployment; and
- discipline and managerial matters.

Now that the Australian Labor Party has taken Government and is reforming the workplace relations system for the future, it is important that the unique nature of Federal policing is recognised through a tribunal independent of Fair Work Australia.

The PFA further recommends that the AFP Tribunal be established under the AFP Act, consequently requiring an amendment to the Fair Work Bill 2008 limiting the operation of Fair Work Australia with respect to matters concerning the AFP.

Victoria Police

In her speech to the National Press Club introducing Australian's new workplace system on 17 September 2008, the Minister stated:

"Under Labor's new legislation parties will be able to bargain over a wider range of content than at present under WorkChoices.

The former Liberal Government dictated a list of 'prohibited content' that could not be included in an agreement regardless of the wishes of the parties. But under the new legislation all matters that properly relate to the work performed and the entitlements of employees in the workplace as well as their effective representation will be to be the subject of bargaining as they should be."

The Commonwealth's powers are constrained by the terms of the referral by the State of Victoria. Currently, Part 21 of the *Workplace Relations Act 1996*:

"... has effect only for so long, and in so far, as the Commonwealth Powers (Industrial Relations) Act 1996 of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect." (Section 859).

An extensive list of matters was explicitly not referred by the State of Victoria, including matters pertaining to workers' compensation, superannuation, occupational health and safety, apprenticeships, long service leave, days to be observed as public holidays and equal opportunity.

Section 5(1)(b) of the *Commonwealth Powers (Industrial Relations) Act 1996* expressly identifies matters not referred in relation to police:

"Matters pertaining to the number, identity, appointment (other than matters pertaining to terms of conditions of appointment not referred to in this paragraph), probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers."

The cumulative effect of the provisions is to create a complex and uncertain operating environment in respect to industrial relations for police. This impinges on

the capacity of the parties - the PFA, the Victoria Police Force and the State of Victoria - to manage industrial relations for police.

The PFA believes that two key areas need to be addressed:

- Agreement Making; and
- Matters Pertaining

Agreement Making

Consistent with the Minister's statement, the PFA can see no valid reason why, at least for the purposes of the referral, there should be any fetters placed on the capacity of the parties to enter into agreement about matters in respect of the employment relationship. This can clearly be distinguished from the issues upon which it was held by the High Court of Australia in re: *AEU [1995] HCA 71*, that the AIRC could not regulate by arbitration. At the current time, the Victorian Government policy encourages agencies to use appropriate instruments to settle agreements that would otherwise not be able to be included in workplace agreements under the *Workplace Relations Act 1996*. While that may be an appropriate mechanism to deal with those matters, it seems incongruous that the Victorian Government should be able to restrict matters permissible and in so doing undermine the content of Federal legislation.

The referral has given rise to possible arguments that a number of key issues that have historically been included in industrial agreements for Victorian police are not supported by the referral. The general procedure applying to the movement of Constables and Senior Constables in general duties positions has, since 1995, been provided for in various industrial agreements. Those processes were substantially negotiated at the same time as amendments to the *Police Regulation Act 1958* (Victoria) dealing with the appeals of members against non-selection for transfer to Senior Constable general duties positions were also made. The progression of members from Constable to Senior Constable has been included in agreements since 1998. The general processes for the conduct of selections for transfer and promotion and processes for dealing with ill and injured members have been included in agreements since 1996.

While these matters have been historically included in agreements, the potential for disputation over whether they are supported by the referral has, from time to time, led to significant tensions between the parties and has complicated proceedings to settle disputes over matters that touch on those issues.

Matters Pertaining

The language used in the *Commonwealth Powers (Industrial Relations Act 1996)* in relation to non-referred matters potentially broadens the scope of the restrictions.

For example, in 2006 the Victoria Police Force sought to abolish the Armed Offenders Squad. The PFA notified a dispute arguing a breach of the organisational change provisions in the Victoria Police Force Workplace Agreement 2001, in particular, a failure to consult and sought interim orders constraining the Victoria Police Force until such time as consultation processes under the Agreement had been completed. Deputy President Hamilton in dismissing the application said:

"I cannot, with respect, agree with the submission that consultation and similar matters as provided in clause 8.1 of the Certified Agreement over the transfer from position to position of members of the Armed Offenders Squad can be seriously argued not to be a matter pertaining to the transfer from position to position of law enforcement officers. The consultation must pertain to that transfer otherwise there is no point to it." [Transcript of proceedings]

It is unlikely that the intention of the legislation is to cast the net so wide as to preclude consultation between the industrial relation parties on matters that so directly affect working lives of police officers. It may similarly be arguable that "*Matters pertaining to ... transfer from place to place*" could preclude the payments of relocation expenses. "*Matters pertaining to ... uniform*" preclude the payment of uniform allowances, plain clothes allowances, etc. While it may be argued that the Deputy President was wrong in that decision, given the general principle that exclusions to beneficial legislation should be construed narrowly, the issue has the potential to arise again hampering the orderly resolution of disputes.

In order to provide clarity and reduce complexity in relation to the operation of any referral by Victoria, the referral should be text based rather than the current subject matter based referral.

AUSTRALIAN RESEARCH COUNCIL GRANT

As a result of the matters raised above and other related structural and constitutional issues the PFA, in conjunction with Giuseppe Carabetta from the University of Sydney, has applied for an Australian Research Council Linkage Grant to undertake study into this area. The Project is to be titled "*Employment and the Law in Australian policing: Options for the development of a new police industrial relations law model*", project ID LP0991995.

This will be the first detailed study of Australia's eight (8) police IR law schemes. The novelty of the project is that it will not only examine each individual scheme; it will also assess each scheme. It will compare the effectiveness of the Australian schemes with those in other, comparable common law jurisdictions, such as United Kingdom, the United States of America, Canada, and New Zealand. Furthermore, the study will take account of past and present schemes, as well as any other Australian or international proposals for such schemes.

The study has the potential to play a key role in informing future directions in police industrial relations law in Australia. We believe its findings will have a number of concrete benefits including improved police IR law practices, greater certainty and stability in police IR laws, a greater degree of satisfaction on the part of those who participate in the police IR system, and a more secure foundation for operational policing. It will also assist the Commonwealth and the States in deciding on the future role of State Governments and their employees under the proposed new national IR system.

The project will have three central objectives:

- (a) To critically examine and assess the nature, scope and effectiveness of the current police IR law arrangements in all Australian police jurisdictions, with a view to identifying common efficiency, equity and structural issues;
- (b) To identify principles that, with the benefit of a clear and secure foundation, would be capable of achieving a stable, integrated police IR law framework in Australia; and
- (c) To develop and propose options for an optimal police IR law model for Australia, within the framework of the Government's broader IR policy agenda.

Another key objective will be to provide an early assessment of the problems associated with the current Victorian referral model, given that the same basic issues will apply in any future federal model. The study provides the opportunity for fresh new ideas as well as the potential for a stable, secure long term foundation for such an important area of the public service.

Importantly, in undertaking its activities, the project will also consider:

- (a) the potential legal and constitutional barriers of all Australia's police officers operating in a national, unitary system of industrial relations;
- (b) the impact that such a system is likely to have on the command and control powers of police commissioners; and
- (c) the impact that such a system will have on the various state and territory governments in relation to dealing with future police industrial issues.

The PFA together with Mr Carabetta, met with the Deputy Prime Minister and Minister for Workplace Relations the Hon. Julia Gillard MP, on 7 April 2008, where we discussed the project. Minister Gillard was receptive to the proposal and we believe it has the potential to play a key role in informing future directions in police employment law in Australia.

RECOMMENDATIONS:

- 1. That the Federal Government take whatever actions are necessary to ensure that all workers have access to equal freedom of association provisions consistent with ILO conventions**

2. That an Australian Federal Police Tribunal be established with jurisdiction to hear all matters relating to:

- **workplace relations;**
- **advancement and deployment; and**
- **discipline and managerial matters.**

3. That any referral legislation should not be able to undermine provisions contained for workers in federal legislation

4. In order to provide clarity and reduce complexity in relation to the operation of any referral by Victoria, the referral should be text based rather than the current subject matter based referral.

5. That the Committee recognize the importance of the proposed study to be undertaken by Giuseppe Carabetta "*Employment and the Law in Australian policing: Options for the development of a new police industrial relations law model*"


CONCLUSION

As pointed out earlier, this submission relates to the Fair Work Bill 2008, the further Transitional Bill yet to be introduced and the Victorian referral.

We have identified and made recommendations around the key issues affecting police currently, and potentially in the longer term should further states refer their industrial powers relevant to police to the Commonwealth. The recognition of the independent office of constable, and the right of freedom of association for all workers, particularly Victorian Police Officers is vital and the PFA would support any action by the Federal Government to ensure that the ILO Conventions in relation to freedom of association are upheld.

We thank you for the opportunity to make this submission and would be more than pleased to appear before the Committee.

Sincerely yours



Mark Burgess
Chief Executive Officer