

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
REFERENCES COMMITTEE**

**INQUIRY INTO RECRUITMENT & RETENTION
OF DEFENCE PERSONNEL**

SUBMISSION

Submission No: 78

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PRESIDENT
Sharan Burrow
SECRETARY
Greg Combet

14th May 2001

The Secretary,
Senate Foreign Affairs,
Defence and Trade References Committee
Parliament House
Canberra ACT 2600

Dear Sir,

INQUIRY INTO RECRUITMENT AND RETENTION OF DEFENCE PERSONNEL

This advice is the response to the invitation for submissions to the Senate on current recruitment and retention measures for Australian Defence Force personnel.

Following is the ACTU document entitled 'Conditions of Service in the Australian Defence Force'.

Forwarded also for the information of the Committee are the following documents:

- Extract from the Industrial Relations Act 1999 (Qld), Part 3, 'Long Service Leave'
- ACTU Policy 'Reservists Called Out for the Defence of Australia', May 1995.
- Working Paper and Position Briefs for the ACTU Policy 'Reservists Called Out for the Defence of Australia', May 1995.

It is advised that the undersigned, the appointee of the ACTU as its Representative on the Defence Reserves Support Council, is available should an oral submission be required.

Yours sincerely,

Bill Thompson
ACTU Representative



ACTU SUBMISSION RECRUITMENT AND RETENTION

Introduction

A citizen on entering service with the Australian Defence Force foregoes many of the rights and privileges enjoyed by those in the civilian workplace. In peacetime in Australia however, the Australian Council of Trade Unions considers, as a fundamental principle, that ADF personnel should share the conditions of service, occupational health and safety standards and remuneration at levels not less comparable to that of their civilian contemporaries. When training for war, or when in direct support of operations or on active service this clearly may not always apply. Historically, additional measures, some unique to service life, have been introduced in recognition of the demands placed upon individuals when they undertake service peculiar to that of the armed forces. This document is not intended to diminish those measures, many of long standing, but seeks to enhance them, and in some instances indicates, where they are deficient or should be refined.

ADF Employment Principles

The ACTU sets out below those matters considered to be of concern, that are relevant to the recruiting and retention of ADF personnel, including Reservists.

In formulating a system of personnel administration for an enterprise, the ACTU expects employers to adhere to not less than the minimum standards prescribed by legislation, including equal employment opportunity, merit based selection procedures and equity in the workplace. Of course, in the instance of the ADF, minimum standards should be exceeded and scrupulously maintained in an organisation where the highest standards of morale are essential if the national interest is to be preserved.

It is understood that it is the intent of the ADF that the deployment standards required for full time duty and on operations, for both part time and full time personnel are to be equal. There is then a need to ensure that as far as practicable there is an alignment of the conditions of service for part time personnel with those undertaking full time service. It follows, therefore, that the two forms of service must be similarly resourced, and that training is provided to part time personnel to the level stipulated in the notice of call out.

In addition, the principle of equity needs to be an ethos reinforced in training to the extent necessary for acceptance by all ADF members. Equity should be an evident virtue of the organisation. The Defence Equity Organisation's 'Guiding Principles and Defence Equity Standards' is a publication worthy of circulation to sub-unit level and used as a standard reference text for all promotion courses.

Reservists

There are employment elements that have particular application to Reservists, who:

- Need to be encouraged to contribute to the ADF by the removal or reduction of disadvantages which accrue to Reserve service;
- Need the combining of civilian employment and defence service in a manner that is complimentary to the interests of the employee, the employer and the nation;
- Require minimisation of the personal disruption of call-out to Reservists and their employers and, at the completion of such service, provision of prompt reinstatement to civilian employment. The exercise of the principle 'managed in - managed out', to ensure a seamless transition into and out of both the ADF and the civilian position.
- Need the prohibition, by legislation, of discrimination resulting from their service with the ADF. This includes the requirement for comprehensive descriptions of both direct and indirect discrimination, examples of acts of commission and omission, to be defined by regulation, together with a mechanism for enforcement when breached. The provision of a means of appeal to an independent conciliator and arbitrator, who is affordable to a reservist with limited financial resources, is necessary as a matter of equity.

Conditions of Service

In reviewing the general conditions of service and other matters relevant to ADF recruitment and retention, it is considered that a number of issues deserve close attention. There is a need, however, that the items listed below are not examined in isolation from the other administrative arrangements, long existing and not in contention. It is appreciated that a holistic approach to a review is essential to ensure that the solving of a problem in one area does not create a problem elsewhere. The items of ACTU concern are:

Health Standards

- The requirement for prospective applicants to attain high medical and dental standards on appointment or recruitment to the ADF is not at issue. It is considered, however, that appropriate measures be developed to enable the maintenance of the required standards by Reservists who, unlike full time members, do not receive medical and dental care from Defence Health Services, except when on duty.
- The health care entitlements of Reservists performing 100 days continuously, but not on 'full time service' (as occurred recently for 'OPERATION GOLD') need to be addressed. It is recommended that Reservists when similarly employed be entitled to the same health care as full time members when the period of continuous service exceeds 40 days.

Health Standards contd

To ensure entry health standards are maintained during Reserve service, membership in a health fund, as a condition of service, could be required. A subscription 'allowance', at an appropriate rate to ensure that the Reservist's health continues at the standard needed for priority deployment, would be efficient and complementary to existing health administrative arrangements.

- There would be no impediment to treatment by ADF medical and dental services, when the Reservist is on full time service (during which the health fund subsidy would be suspended). To facilitate administration and for the convenience of full time personnel who continue service in a part time capacity, Defence Health may well be the convenient fund to provide the coverage. Funding the 'gap' would also need to be considered. There may be need for similar arrangements for currently serving Reservists who are members of other funds.
- The critical issues would be the maintenance of health standards required for operational deployment with health funds willing to accept the necessary administrative arrangements.
- It is noted that the question of health care has been recently explored in the Australian National Audit Office, 'Australian Defence Force Reserves', Audit Report No 33 2000-01, (paragraph 6.69 refers).

Long Service Leave

The provisions in the ADF 'Instruction 2701 – Long Service Leave' (AL3 12 (Aug 98), are inequitable for Reservists and its setting out is unnecessarily complicated. The LSL entitlements for full time and part time members are calculated in entirely different ways. This leads to a disproportionately lesser entitlement for the Reservist.

- Credits for full time service accrue at the rate of three tenths of a month (nine days) for each completed calendar year of service (paragraph 6.a, refers). Looked at in another way, the amount of ordinary time actually worked in a completed year for full time service, is a lot less than a calendar year. For example, in the 52 weeks of each year, there are deductions for 4 or 5 weeks for annual leave (depending upon location in Australia), 96 or 94 days, weekends, plus about 10 public holidays (depending upon the state or territory in which the member serves). The total is about 230 days each year persons are obligated to work. (Note that rostered days off and periods of stand-down, being discretionary matters, have been excluded from the above calculations). Put another way, ADF personnel on full time duty are presently required for duty for about 63% of each calendar year.

Long Service Leave, contd

- The ADF Instruction also states, in paragraph 6,b in regard to the rate of accrual of long service leave credits with the 'Reserve Forces', "Each day on which a member rendered not less than six hours reserve service...and for which the member received a full day's reserve service pay, is to count for the purpose of establishing a period of service in respect of which long service leave credits are accrued at the rate described...".
- This clearly excludes the parades of two and three hours that Reservists commonly are required to attend as part of their obligation to attain 'efficient service' status. The service required of Reservists, of parades of two or three hours, should be admissible service and included in the calculation of the LSL entitlement. The exclusion of 'parades' puts the Reservist in a lesser position compared to their full time counterpart.
- There is a further disadvantage to the Reservist. The reader of the Instruction will conclude that a Reservist is required to render 365, six-hour paid days to be deemed to have completed one year of service for the purpose of calculating LSL. This contrasts with the 230 days or so days of service required of full time ADF members. Clearly, there is an anomaly in the Instruction, which works to the disadvantage of the Reservist. The question of equity arises.
- The comments on leave provisions in the ANAO Audit Report No 33 quoted above (paragraph 6.70 refers), are also noted. In particular the payment of leave loading and penalty rates to civilian part time and casual employees and the denial of such payments to Reservists, raises further concerns.

Offered for consideration, as an appropriate alternative example of how LSL can be calculated for part time employees, is an extract from the 'Industrial Relations Act, 1999', Part 3. The provisions in this Queensland legislation for long service leave calculate LSL for part time staff using the number of hours worked not the number of full days worked. It is a useful text for the purpose of comparison.

Pay and Allowances

Pay and allowances are perennially contentious subjects. The processes and rationale of how pay scales are compiled and allowances formulated, needs to be widely disseminated. Ideally, the processes should be well known and understood by all parties. Where linked to public sector or other industry standards, then the nexus should be disclosed and explained. It is noted that the various service newspapers publish the findings of the Defence Force Remuneration Tribunal and that needs to continue. The understanding of employment rights and obligations is that of continuing self-education throughout the working life.

Pay and Allowances contd

Recommended areas for development of existing processes include the following:

- The Tribunal admits to its deliberations the Returned and Services League and the Armed Forces Federation of Australia as intervening parties. Both these bodies, however, are considered to lack the industrial expertise that might be anticipated of those who offer to represent employees of the ADF. In industrial relations one needs to anticipate rather than to look back and to be aware of the developing changes which are a continuum in industrial relations and human resource management.
- A review of the DFRT web site states, under the heading 'Industrial Democracy', "The Tribunal has a strong commitment to the adoption of participative practices involving staff in decision making. This can be achieved through structures and processes which involve the sharing of information, authority and responsibility in the workplace". How this is achieved in the ADF, where members have to rely on a benign and employee friendly command structure, in the absence of an independent body such as a union to represent them, is problematic.
- In the above circumstances it may be appropriate to add to the Tribunal, a nominee of the ACTU, with a requisite background in industrial relations to advance the interests of ADF personnel. An advocate, with experience in industrial relations tribunals, one who is well versed in the circumstances of the contemporary Australian workplace, when supported by the independent ACTU, will clearly contribute to the essential transparency of the process for providing wage justice for service women and men.
- Advocacy by the ACTU, if accepted, should be at the cost of the Australian Government. It may be noted ADF personnel, are not represented by a union with industrial registration in the usual industrial or conciliation and arbitration tribunals, or affiliation to the ACTU. To that extent, remittance to the ACTU for all travel and accommodation expenses in any intervention or appearance at the Tribunal, in the above circumstances, is considered appropriate.
- The pay, allowances and conditions of service are major morale factors and are the means by which ADF personnel measure the worth placed upon them by the nation. It is considered that many uniformed personnel may have justifiable reservations regarding the independence and effectiveness of parties to the present arrangements and of those who purport to advance their employment interests. This is stated without disrespect to the existing and past members and staff of the Tribunal, or to intervening parties.--

Recruitment and Retention

It is obvious that the ADF has to compete on the labour market for recruits. Of those who gain employment in the general labour market, about two thirds will be employed full time.

Apart from those recruited for officer or specialist appointments, the group most sought by the ADF are those who meet the standard for general enlistment at base level. Those who are available to undertake the lengthy periods of recruit and initial employment training will nearly always have to undertake the training in locations distant from their usual place of residence.

In the recruitment of reservists there are further aspects for consideration. These include a more flexible approach by the ADF in enabling the Reservist to move into and out of part time service without detriment to the civilian job and an ADF personnel administration that reflects the demands made upon the Reservist by family responsibilities and the civilian employer.

The Australian workplace has become increasingly casualised. Over one in three employees are not in permanent employment and many see no prospect of achieving it. For them the future is of intermittent part time and casual employment for the rest of their working life. They hold jobs that are frequently low paid, often with poor prospects for gaining skills or advancement. Those employees with family responsibilities usually seek two or three part time jobs in order to meet their family obligations. There are instances of couples, with responsibilities for children, with five part time or casual jobs between them.

This large pool of potential recruits may not be considered an ideal source by the ADF. There may, however, be much less choice in the future, when the ADF selects its recruits. It will have to cut its cloth according to a competitive labour market, by offering attractions not offered by other employers. For the Reserves, permanent casual workers may present as a recruiting opportunity worth pursuing.

Part time and casual employees are not as a group less fit for service in the ADF. They are a group who, in many instances through no fault of their own, are excluded from full time, permanent employment in the Australian workplace, one that does not provide full time permanent jobs for all. The present labour market has seven job seekers for each full time vacancy, with an unknown number of discouraged job seekers that do not bother to apply.

The discussion points below are a summary of the factors that the ADF must address to counter the difficulties experienced with recruiting:

Recruitment and Retention, contd

- The recruitment objectives of the ADF should aim to reflect, as near as practicable, the gender and ethnic composition of Australian society. Verbal fluency and written ability in languages in addition to English should be given favourable weighting in the assessment of the prospective recruit.
- Recruitment conditions of service should be based on a fixed term of engagement, linked to a guaranteed offer by the ADF, for the opportunity to acquire agreed skills and qualifications that have civil recognition.
- For those who undertake a specified minimum period of full time service, say two years, followed by a commitment to one year of efficient part time service, the conditions of service should include assisted re-settlement in civilian life. This may include provision of job placement, travel to a new location and temporary accommodation.
- For those who render operational or active service, the opportunity should exist for government assisted education at tertiary level. In addition, for those who have rendered say, five years of service or more, a waiver or reduction of higher education charges should apply.
- A guarantee should come from the Australian Government that the minimum ADF salary paid to a full time member will be above that which presently requires the payment of the Family Supplement.
- Members who render five years service should be given financial and other additional benefits deemed appropriate to securing their retention and continuation of service. This could include loan assistance for the purchase of a house.
- For the purpose of calculating LSL, a year of part time service should be deemed to be not more than 230 days. When service is rendered in parts of a day, increments that total six hours should to be counted as one day of part time service..
- At the termination of service of the member, a record of service should be furnished that details, in terms easily understood by prospective civilian employers, the attainments and experience of the member.
- The payments of salaries, allowances and other entitlements be prompt when due. The failure of the ADF, in particular the Army, to meet this basic requirement has been a source of complaints to the ACTU.

Recruitment and Retention, contd

- A comprehensive handbook detailing conditions of service should be on individual issue to every member of the ADF.

OTHER CONDITIONS

Superannuation

Superannuation for part time service is now an established entitlement in civilian employment in Australia. This is required to flow to Reservists and should occur promptly. The provision of superannuation for part time members needs to match or exceed the requirements imposed upon civilian employers in terms of the Superannuation Guarantee Levy, portability and contributions. The ACTU endorses the views expressed in the ANAO Audit Report No 33 'Australian Defence Reserves' (paragraph 6.68 refers).

Tax

Tax is one of the most vexing questions regarding the ADF conditions of service for Reservists. The general conclusions set out in the above report (para 6.71 refers), indicates the difficult task ahead to ensure that the tax regime is fair to all ADF members.

The removal of the tax concession from Reservists, if deemed to be part time employees, may be a future determination of the Australian Tax Office. It may have justification under tax legislation, but from a recruitment and retention point of view, it is the least attractive, last resort, option. One can recall when the tax exemption was removed some years ago, the result was a large number who quit the Reserves. If there is to be a future removal of the tax exemption it must be accompanied by appropriate compensation and a comprehensive explanation provided to all Reservists, if the episode is not to be repeated.

Conclusion

Finally, it is strongly held by the ACTU that the taxation question for Reservists would need to be resolved when most, if not all, matters of pay, allowances and conditions of service for the ADF generally, have been aligned. As stated earlier in this document, the ACTU considers that these items need to be considered as a whole if successful recruiting and retention targets for the ADF are to result in outcomes deserving of those who are dedicated to the defence of Australia.

to the extent that the law, instrument or order provides an employee with a benefit that is less favourable to the employee.

PART 3—LONG SERVICE LEAVE

Division 1—Definitions for pt 3

Definitions for pt 3

42. In this part—

“continuous service” of an employee means—

- (a) in section 50⁷—the period of continuous service the employee is taken to have had with an employer under section 50(4); and
- (b) elsewhere—the employee’s continuous service with the same employer (whether wholly in the State, or partly in and partly outside the State).

“owner” of a meat works includes a person who carries on the business of the works.

“period between seasons” includes the period between—

- (a) the end of 1 season and the start of the next season; and
- (b) for a particular employee—the day the employee stops employment in 1 season and the day the employee starts employment in the next season.

“season” means a period (whether falling completely in 1 calendar year or partly in 1 calendar year and partly in the next calendar year) when—

- (a) for the sugar industry—
 - (i) sugar cane is delivered to, and crushed at, a sugar mill; or

⁷ Section 50 (Entitlement—employees in sugar industry and meat works)

- (ii) sugar cane is harvested, or farm work is performed, in the sugar industry; or
- (b) for a meat works—stock are delivered to, and slaughtered at, the works.

Division 2—Employees generally

Entitlement

43.(1) This section applies to all employees, other than seasonal employees.

(2) An employee is entitled to long service leave on full pay of—

- (a) for the first 15 years continuous service—13 weeks; and
- (b) if the employee has completed at least a further 5 years continuous service—another period that bears to 13 weeks the proportion that the employee's further period of continuous service bears to 15 years.

(3) An employee is entitled to a proportionate payment for long service leave if—

- (a) the employee has completed at least 10 but less than 15 years continuous service; and
- (b) the employee's service is terminated by—
 - (i) the employee's death; or
 - (ii) the employee; or
 - (iii) the employer, for a cause other than serious misconduct.

(4) Long service leave is exclusive of a public holiday that falls during the period of the leave.

(5) An employee who is entitled to long service leave elsewhere than under this Act, is entitled to leave that is at least as favourable as the entitlement under this section.

(6) In this section—

“proportionate payment” means a payment equal to the employee’s full pay for a period that bears to 13 weeks the proportion that the employee’s period of continuous service (stated in years, and a fraction of a year if necessary) bears to 15 years.

Working out continuity of service for service before 23 June 1990

44.(1) This section applies to service of all employees who are not casual employees before 23 June 1990.⁸

(2) The repealed *Industrial Conciliation and Arbitration Act 1961*, sections 17, 18, 19 and 20, applies to—

- (a) the determination of the employee’s continuous service before 23 June 1990; and
- (b) the calculation of the employee’s entitlement to long service leave in relation to continuous service before 23 June 1990.

Taking long service leave

45.(1) The commission may insert in an industrial instrument provisions—

- (a) about the time when, the way in which, and the conditions on which, long service leave may be taken; or
- (b) to the effect that leave in the nature of long service leave taken, before the provisions take effect, by an employee bound by the instrument must be deducted from the long service leave that the employee becomes entitled to under the provisions.

(2) An employee and employer may agree when the employee is to take long service leave.

(3) If the employee and employer can not agree, the employer may decide when the employee is to take leave by giving the employee at least 3 months written notice of the date on which the employee must take at least 4 weeks long service leave.

(4) Subsection (3) applies subject to an industrial instrument.

⁸ In all other circumstances, see part 6 (Continuity of service and employment).

Payment for long service leave

46.(1) The employer must pay the employee for long service leave at the ordinary rate being paid to the employee immediately before the leave is taken.

(2) However, if the employee is, immediately before taking the leave, being paid at a higher rate than the ordinary rate, the employer must pay the employee at the higher rate.

(3) An employer must not reduce an employee's usual rate, before an employee starts long service leave, with intent to avoid the employer's obligation under subsection (2).

(4) If satisfied an employer has done so, the commission may order the employer to pay the employee at the usual rate even though the employee was not being paid the usual rate immediately before starting leave.

(5) If, during the employee's leave—

- (a) the ordinary rate is increased above the higher rate—the employer must pay the employee at the increased rate for the part of the leave period that the increased rate applies to; or
- (b) the ordinary rate is reduced—the employer may pay the employee at the reduced rate for the part of the leave period that the reduced rate applies to.

(6) In this section—

“usual rate” the rate at which the employee is being paid for ordinary time, being a rate that is higher than the ordinary rate.

Division 3—Casual employees**Continuity of service—additional considerations for casual employees**

47.(1) The service of an employee (a **“casual employee”**) who is employed more than once by the same employer over a period is continuous service with the employer even though—

- (a) the employment is broken; or
- (b) any of the employment is not full-time employment; or

- (c) the employee is employed by the employer under 2 or more employment contracts; or
- (d) the employee would, apart from this section, be taken to be engaged in casual employment; or
- (e) the employee has engaged in other employment during the period.

(2) However, the continuous service ends if the employment is broken by more than 3 months between the end of 1 employment contract and the start of the next employment contract.

(3) In working out the length of an employee's continuous service—

- (a) the following service must not be taken into account—
 - (i) service by the employee before 23 June 1990;
 - (ii) if the employee only obtained the entitlement because of the enactment of the repealed *Industrial Relations Reform Act 1994*, section 17⁹—the employee's service between 23 June 1990 and 30 March 1994; and
- (b) subject to subsection (2), a period when the employee was not employed by the employer must be taken into account.

(4) This section does not limit any other entitlement to long service leave that an employee may have.

Taking long service leave—alternative provision for casual employees

48.(1) An employer may agree with a casual employee that the entitlement to long service leave may be taken in the form of its full-time equivalent.

Example—

If an employee—

- (a) is entitled to be paid for 260 hours long service leave; and
- (b) works under an award that provides for a full-time working week of 40 ordinary working hours;

⁹ Section 17 (Definitions for pt 1)

the employee and the employer may agree that the employee take 6½ weeks leave ($260 \div 40 = 6\frac{1}{2}$).

(2) This section applies subject to a provision in an industrial instrument about the employee's long service leave.

Payment for long service leave

49.(1) The minimum amount payable to a casual employee for long service leave is worked out using the formula—

$$\frac{\text{actual service}}{52} \times \frac{13}{15} \times \text{hourly rate.}$$

Example—

An employee who worked 15 600 ordinary working hours over a 15 year period and is being paid an hourly rate of \$10 would be entitled to be paid—

$$\begin{aligned} & \frac{15\,600}{52} \times \frac{13}{15} \times \$10 \\ = & 260 \times \$10 \\ = & \$2\,600. \end{aligned}$$

(2) If a dispute arises between an employee who is paid at piecework rates and the employer about the rate the employee should be paid for long service leave, the commission may decide the rate payable.

(3) An employee and employer may agree on the times when, and the way in which, the employee will be paid for long service leave.

(4) The commission may decide any matter relating to payment for long service leave that the employee and employer can not agree on.

(5) An amount payable for long service leave becomes payable at a time agreed between the employee and employer or, if they can not agree, at a time decided by the commission.

(6) In this section—

“**actual service**” means the total ordinary working hours actually worked by an employee during the employee's period of continuous service.

“casual employee” means an employee mentioned in section 47(1).¹⁰

“hourly rate” means the hourly rate for ordinary time payable to the employee—

- (a) if the employee takes the long service leave—on the day that the employee starts the leave; or
- (b) if the employee’s employment is terminated—on the date that the termination takes effect.

Division 4—Seasonal employees

Entitlement—employees in sugar industry and meat works

50.(1) This section applies to the following seasonal employees—

- (a) an employee employed in seasonal employment in the sugar industry; or
- (b) an employee employed in or about meat works in seasonal employment by the meat works owner.

(2) The employee is entitled to long service leave on full pay of at least the number of weeks worked out using the following formula—

section 43 entitlement x actual service.

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Example—

An employee who worked half of each year, over a 15 year period, is entitled to half the section 43 entitlement, that is, half of 13 weeks leave or $6\frac{1}{2}$ weeks leave ($13 \times \frac{7.5}{15} = 6\frac{1}{2}$).

(3) Service with the employer of an employee engaged in harvesting sugar cane or farm work in the sugar industry before 23 June 1990 must not be taken into account in working out the length of the employee’s continuous service.

¹⁰ Section 47 (Continuity of service—additional considerations for casual employees)

(4) A period between seasons when the employee is not employed by the employer must be taken into account in working out the length of an employee's continuous service if—

- (a) in 1 season—the employee's service with the employer continued until the end of the season or until an earlier day when the employee's employment was terminated by the employer; and
- (b) in the next season—the employee's service with the same employer started on the season's opening or on a later day in the season when the employer required the employee to start employment.

(5) If an employee is employed by the employer between seasons, the part of the period between seasons when the employee is employed must be taken into account in working out the length of the employee's actual service.

(6) An employee who is entitled to long service leave elsewhere than under this Act, is entitled to leave that is at least as favourable as the entitlement under this section.

(7) In this section—

“actual service” means the total ordinary time actually worked by an employee during the employee's period of continuous service.

“section 43 entitlement” means the entitlement to long service leave of an employee under section 43.

Taking long service leave—employees in sugar industry and meat works

51.(1) This section applies to the following seasonal employees—

- (a) an employee employed in seasonal employment in the sugar industry;
- (b) an employee employed in or about meat works in seasonal employment by the meat works owner.

(2) An employee may take long service leave between seasons.

(3) If an employee takes leave between seasons, the leave is taken to have started when the employee last ceased employment with the employer.

Other seasonal employees

52. The commission may decide the entitlement to long service leave of an employee—

- (a) who is employed in seasonal employment, but who is not employed—
 - (i) in the sugar industry, or
 - (ii) in or about meat works; or
- (b) who is employed in other periodic employment that is not defined as casual employment by the relevant industrial instrument.

Division 5—Miscellaneous**Payment instead of long service leave on termination**

53.(1) An employer must not make, and an employee must not accept, payment instead of long service leave except on termination of an employee's employment.

Maximum penalty—40 penalty units.

- (2)** A person must not enter into an arrangement under which—
- (a) an employee or the employer terminates the employee's service with the employer; and
 - (b) the employer pays the employee for all or any long service leave that the employee is entitled to; and
 - (c) the employer re-employs the employee within a period, commencing on the termination date, equal to the period of long service leave that payment was made for.

Maximum penalty—40 penalty units.

(3) If a magistrate finds that a person has contravened subsection (2), the magistrate may, in addition to any order the magistrate may make imposing a penalty, make any other order the magistrate considers appropriate.

Payment instead of long service leave on death

54.(1) This section applies if an employee entitled to long service leave dies—

- (a) before taking the leave; or
- (b) after starting, but before finishing, the leave.

(2) The employer must pay the employee's legal personal representative any amount payable for the employee's entitlement to long service leave that has not been already been paid.

(3) If the employer does not do so, the employee's legal personal representative or an inspector may recover the amount as unpaid wages.¹¹

Continuity not broken by service in Reserve Forces

55.(1) An employee's service in the reserve forces is taken to be continuous service with the employer who employed the employee immediately before the employee starting service with the Forces.

(2) In this section—

“**reserve forces**” means the Australian Naval Reserve, Australian Army Reserve or Australian Air Force Reserve.

Recognition of certain exemptions

56.(1) This part does not apply to an employer if—

- (a) the commission has exempted the employer, under the repealed *Industrial Conciliation and Arbitration Act 1961*, from the application of long service leave provisions in that Act or an award; and
- (b) the exemption is in force.

(2) On application, the commission may revoke an exemption.

¹¹ See section 399 (Recovery of unpaid wages etc.).

Person may be “employer” and “employee”

57. If in performing duties in a calling a person is an employee, the person is entitled to long service leave as prescribed under this part despite the person being, by definition for this Act, an employer because of—

- (a) the person’s engagement in the calling; or
- (b) the position the person holds in the calling.

PART 4—REVIEW**Review of general employment conditions**

58.(1) On application by the Minister, an organisation or a State peak council, the full bench may review a condition under this chapter.

(2) The full bench must, before 30 June 2000, review an entitlement to long service leave under this chapter.

(3) The full bench may, by a general ruling under section 287,¹² substitute the condition with another condition that is no less favourable.

**PART 5—EQUAL REMUNERATION FOR WORK OF
EQUAL OR COMPARABLE VALUE****Definition for pt 5**

59. In this part—

“equal remuneration for work of equal or comparable value” means equal remuneration for men and women employees for work of equal or comparable value.

¹² Section 287 (General rulings)

ACTU POLICY
RESERVISTS CALLED OUT FOR
THE DEFENCE OF AUSTRALIA

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May 1995

*ACTU POLICY: RESERVISTS CALLED-OUT FOR
THE DEFENCE OF AUSTRALIA*

INTRODUCTION

The ACTU accepts that national decisions on the structure of Australia's Defence Forces require from part-time Army, Air Force and Naval Reservists a role that is vital to the effectiveness of the Defence Force.

Today, Defence Reservists represent over one-third of the total strength of the Australian Defence Force. Reservists now have specific roles in defending Australia in short warning conflicts, both as individuals and as formed units. In a few areas Defence Reservists have assumed full responsibility for a specific operational capability. Defence Reservists are therefore a fundamental part of Australia's Total Defence Force.

Reservists are also employees and business owners, they are family members and many of them are members of unions. Ninety-five percent of their working lives, before and after any period of defence service on call-out, is devoted to a civilian career.

This document sets out the ACTU policy on Reservist's call-out for the defence of Australia in situations short of war or defence emergencies.

VISION

The ACTU proposes the establishment of

A 'Charter for Defence Reservists, Employers and the Australian Government on Call Out for the Defence of Australia'.

The Charter would provide, in situations short of war or defence emergencies, mechanisms for the regulation and conduct of call-out procedures that are effective for the purposes of the call-out and reasonable towards the interests of the employees and employers involved.

A member of the Australian Defence Force, Regular member or Reservist, is a citizen who is to be accorded all the rights and responsibilities that Australian citizenship entails to the limits only of the inherent obligations peculiar to service with the Australian Defence Force.

In the case of Reservists, who have both a full time civilian career as well as a part-time Reservist career, effective protection of the interests of the Reservists and their employer requires statutory provisions that:

- * Encourage Reservists to make their contribution to the Australian Defence Forces by the removal or reduction of the disadvantages which accrue to Reservists called out in the defence of Australia;

- * Provide for the combining of civilian employment and defence service in a manner which is complementary to the interests of the employee, the employer and the nation;
- * Lessen the personal disruption of call-out to Reservists and their employers, and at the completion of such service, provide subsequent prompt reinstatement of the Reservists to their civilian employment, and
- * Prohibit by legislation discrimination against Reservists resulting from their service with the Australian Defence Force.

PURPOSES

The objects of the policy position on call-out are:

- (a) To encourage part-time career service by Reservists in the Defence Force, by eliminating or minimising the disadvantages to employees and to their civilian careers that can result from such service.
- (b) To minimise the disruption to the lives of Reservists while performing service in the Defence Force, as well as to their employers, by providing for the prompt re-employment of Reservists upon their completion of such service.
- (c) To ensure that individuals that become involved in the Defence Reserves are not discriminated against because of their service in the Defence Force.

KEY STRATEGIES

Three Key Strategies support the purposes of this policy:

- * *Enactment of effective legislation protecting the civilian career of Defence Reservists.* To be effective, legislation needs to be comprehensive in the scope of its protections and the detailing of its provisions, it needs to be expressed in plain English easily understandable to the employer and the Defence Reservist, and its provisions must be enforceable within the resources made available to the Reservist or the Reservist's family.

The design of legislation should:

- Establish the Australian Government as a model employer, with State Territory and Local Governments encouraged to adopt similar legislation.
- Provide comprehensive descriptions and definitions of the disadvantages in employment against which the Reservist will be protected.

- Provide for exemption for employers and employees from obligations in carefully defined circumstances, in particular, in the situation of undue hardship.
- Provide protections for the widest range of persons likely to have their employment disadvantaged because of their defence service, including:
 - (i) Volunteers.
 - (ii) Persons who act as advocates or witnesses in action to have protections given under the legislation enforced.
 - (iii) Temporary employees.
- Provide comprehensive descriptions and definitions of rights protections and remedies afforded Reservists.
- Provide for assistance to Reservists in the investigation of their complaints about the actions of their employers affecting the Reservist's employment, and in the enforcement of Reservist's rights under legislation.
- Require appropriate authorities to report annually on the complaints of Reservists and the results of investigations and the results of investigations and action before the Courts.
- Provide for periodic review of the legislation jointly by the Government, employers and the ACTU.
- Provide for retrospectively of new legislation to the date (1988) of the amendments to the Defence Act that made Reservists subject to "call out".

* *Establishment and maintenance of co-operative employer/Reservist work relationships sharing a commitment to the defence of Australia.* To be maintained leading up to and during a period of defence service, the employer/Reservist work relationship needs to be supported by Defence procedures regarding continuous defence service obligations that:

- Provide for reasonable warning to the employer and the Reservist of any impending obligation.
- Provide for determination of availability of Reservists for call-out through flexible arrangements rather than by direction.

- * *Protection of the economic and legal interests of the Reservist and his or her family.* These interests include:

- Income
 - Superannuation, and
 - Insurance, and,
- as may be relevant to the circumstances of individuals,
- Hire purchase agreements
 - Partnerships
 - Child support
 - Agricultural re-establishment
 - Rehabilitation
 - Bankruptcy
 - Rights regarding limitation periods
 - Educational opportunities

**WORKING PAPER AND
POSITION BRIEFS FOR
'ACTU POLICY - RESERVISTS
CALLED-OUT FOR THE
DEFENCE OF AUSTRALIA'**

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May 1995

INTRODUCTION

National decisions on the structure of Australia's Defence Force require a role for Defence Reservists that is vital to the effectiveness of the Defence Force.

Today, Defence Reservists represent over one-third of the total strength of the Australian Defence Force. Reserves now have specific roles in defending Australia in short warning conflicts, both as individuals and as formed units. Defence Reservists are therefore a fundamental part of Australia's Total Defence Force.

Reservists are also employees or business owners, they are family members and many of them are members of unions. Ninety-five percent of their working lives either side of any period of defence service on call-out is devoted to a civilian career.

VISION

The ACTU proposes a policy position on the call-out of reservists for extended periods of defence service that:

- * Recognises the importance to the reservists of both his or her civilian and defence careers.
- * Maximises arrangements whereby the civilian and defence careers of the reservist are combined into a complimentary set of training and development opportunities for the reservist.
- * Realises the benefits of those complimentary roles to the employer, to the employee and to the nation.

PURPOSES

The objects of the policy position on call-out are:

- (a) To encourage noncareer service in the defence force, by eliminating or minimising the disadvantages to civilian careers and employees that can result from such the service.
- (b) To minimise the disruption to the lives of persons performing service in the defence services as well as to their employers, by providing for the prompt re-employment of such persons upon their completion of such service.
- (c) To prohibit discrimination against persons because of their service in the defence service.

KEY STRATEGIES

- * Enactment of effective legislation protecting the civilian career of Defence Reservists. To be effective, legislation needs to be comprehensive in the scope of its protection's and the detailing of its provisions, it needs to be expressed in plain English easily understandable to the employer and the Defence Reservist, and its provisions must be enforceable within the resources made available to the Reservist or the Reservists family.

The design of legislation should:

- Establish Government as a model employer.
 - Provide comprehensive descriptions and definitions of the disadvantages in employment against which the reservist will be protected.
 - Provide for exemption for employers and employees from obligations in carefully defined circumstances, in particular, in the situation of undue hardship.
 - Provide for protections for the widest range of persons likely to have their employment disadvantaged because of their defence service, including:
 - (i) Volunteers.
 - (ii) Non-volunteers.
 - (iii) Persons who act as advocates or witnesses in actions to have protections given under the legislation enforced.
 - (v) Temporary employees.
 - Provide comprehensive description and definitions of rights protections and remedies afforded reservists.
 - Provide for assistance to reservists in the investigation of their complaints about the actions of their employers affecting the reservists employment, and in the enforcement of reservists rights under the legislation.
 - Require appropriate authorities to report annually on the complaints of reservists and the results of investigations and of actions before the Courts.
 - Provide for periodic review of the legislation jointly by the Government, employers and the ACTU.
 - Provide for retrospectivity of new legislation to the date (1988) of the amendments to the Defence Act that made reservists subject to "call-out".
- * Establishment and maintenance of co-operative employer/reservist work relationships sharing a commitment to the defence of Australia. To be maintained leading up to and during a period of defence service, the employer/reservist work relationship needs to be supported by Defence procedures regarding continuous defence service obligations that:

- Provide for reasonable warning to the employer and the reservist of any impending obligation.
- Provide for determination of the availabilities of reservists for call-out through flexible arrangements rather than by direction.
- * Protection of the economic and legal interests of the reservist and his or her family concerning:
 - Income
 - Superannuation, and
 - Insurance, and,as may be relevant to the circumstances of individuals
 - Hire purchase agreements
 - Partnerships
 - Child support
 - Agricultural re-establishment
 - Rehabilitation
 - Bankruptcy
 - Rights regarding limitation periods
 - Educational opportunities

POSITION BRIEFS:

Individual briefs on each of the positions derived from these strategies are attached.

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LEGISLATION: GOVERNMENT AS A MODEL EMPLOYER

POSITION:

Legislation protecting the employment of Defence Reservists should establish Federal and State Governments as model employers.

PROBLEMS:

The existing legislation protecting the employment of Defence Reservists, the Defence Re-establishment Act 1965, has never been tested before the Courts in its 30 year existence. Regulations for this Act have never been written.

Legal opinion suggests that this is because of probable defects in the legislation ("probable", because these defects have never been tested before the Courts). The prospects of having to test these defects before the Courts and the costs of doing so have been a substantial obstacle to potential litigants.

One such defect concerns the differential treatment under the Act of employees of the Crown versus other employees. One major example of this is the onus of proof provisions placed on reservists in bringing actions before the Courts. Private sector employees have the benefit of a reverse onus of proof, in that the burden is upon the employer to prove that the reservist, proved to have been penalised or prejudiced in his or her employment, was so penalised or prejudiced for some reason other than the reasons alleged by the reservist. Crown employees appear to have the more difficult task of having to prove, on the balance of probabilities, the employer's motivation for disadvantaging the reservist was the motivation prohibited by the Act.

Various surveys of reservists estimate the percentage of reservists employed in the public sector to be between 30% and 50%.

Further, current legislation does not include examples of "model" procedures that could be available in the Public Sector for positive treatment of situations that could confront public sector employers and reservists following longer periods of defence service.

POSSIBILITIES

The first clause in the United States Uniform Services Employment and Re-employment Rights Act of 1994 (hence abbreviated to USERRA) states:

"It is the sense of Congress that the Federal Government should be a model employer in carrying out the provision of this Chapter".

The onus of proof provisions in Australia's legislation could be uniform for public sector employees and private sector employees as it is in the United States.

The legislation could specify special procedures or avenues for assisting Government employees to resolve employment difficulties associated with defence service periods. For example, if it becomes impossible or unreasonable to re-employ a reservist in his or her position within a particular Federal agency, responsibility could be ascribed to an Office in the Government to identify a position in another Federal agency, a position of like seniority status and pay for which the reservist is qualified or could become qualified through reasonable efforts of the second Federal agency. This is provided for in the United States legislation.

PROPOSAL

The Statement of purpose, that Governments behave as model employers with respect to the administration of the employment of reservists, be included in the legislation.

That the examples described under the heading "Possibilities" above be incorporated into the legislative provisions of revised or new legislation in Australia for the protection of the employment of Defence Reservists.

*LEGISLATION: COMPREHENSIVE DESCRIPTIONS OF DISADVANTAGES*POSITION:

Legislation protecting the employment of Defence Reservists should provide comprehensive descriptions of the disadvantages in employment against which the Defence Reservist will be protected.

PROBLEM

Existing legislation in Australia provides to the reservist protection against being penalised or prejudiced in his or her employment:

“Whether by reducing his salary or wages, dismissing him or in any other way”.

What is meant by “in any other way” has never been tested in the Courts. It is a meaning that employers and reservists must be clear on, else strong differences of opinion can occur in the workplace spoiling of the employer reservist relationship. The cost of resolving this issue before the Courts is an additional legal cost presently faced by the reservist with an uncertain outcome appealable by a resourceful employer; these additional legal costs need to be met by a reservist (or an employer) before the primary legal contest about events and reasons can begin.

POSSIBILITIES

The United States legislation provides comprehensive descriptions of what constitutes disadvantages in employment:

* A reservist:

“... shall not be denied any initial employment, re-employment retention in employment, promotion or any benefit of employment ...” and

* A benefit of employment is defined as:

“... any advantage, profit, privilege, gain, stake, account or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations and the opportunity to select work hours or locations of employment.

PROPOSAL

That revised or new legislation protecting the employment of reservists contain the detailed comprehensive descriptions and definitions similar to those contained in the United States legislation concerning the disadvantages in employment against which the reservist is protected.

*LEGISLATION: EXEMPTIONS*POSITION:

Legislation protecting the employment of Defence Reservists provide for exemptions for employers and employees from their obligations regarding defence service in carefully defined circumstances, in particular, in situations of undue hardship.

PROBLEM:

To date the Defence Force has indicated that it will adopt an authoritative approach to securing the forces it needs to meet a defence requirement short of war or a defence emergency. The Defence Force intends obtaining an annual commitment from its reservists declaring their availability for call-out. Persons who are unable to make this commitment may not be allowed to continue in the Reserve Forces.

The policy proposed elsewhere in this discussion paper is for a more flexible approach to securing the forces required for situations short of a War or defence emergency. This approach would seek to secure a maximisation of volunteers while maintaining the effectiveness of the defence force raised for the purposes of each particular call-out.

With either approach, hardship situations will arise in any call-out scenario. These situations need to be allowed for by the legislation; for example:

- * A small business of 6 staff where 2 staff and the Boss/Owner are in the same Reservist unit. This is a real example described in the Defence Force's own Standish Report on the provisions for "call-out".
- * Reservists under financial difficulties may, because of those difficulties, be induced to declare to the Defence Authorities that they are available for "call-out" (so as to maintain their reservist incomes) when in fact they are not; for example, single parents, some self-employed situations, employees keeping their reservist service obligations secret from their employers, and reservists facing large debts or bankruptcy.
- * Businesses that have fallen on bad times while the reservist was on longer periods of defence service.
- * Persons whose family circumstances or employment circumstances have changed since giving any commitment to call-out to the Defence Force:-
 - family illness divorce or other upset
 - unemployed reservists obtaining employment
 - changes of employment to essential services or reserved occupations

- involvement on critical projects for the employer
- changes in location of employment

POSSIBILITIES

The legislation could make provision for undue hardship cases, the hardship being a result of significant difficulty or expense having regard to:

- the nature and the cost of the action expected of the reservist or employer
- the overall financial resources of the reservist or employer
- the number of persons employed at the employers facility
- the impact of any action upon the operation of the employer's facility
- the type of operations of the reservist or employer, including the composition, structure, functions, geographic separateness, and administration.

The legislation should place the burden of proving undue hardship on the employer in any circumstances where the employer is claiming an exemption from obligations to re-employ a reservist at the completion of a defence service period.

Provisions similar to the above are contained in the United States legislation.

PROPOSAL

Revised or new legislation protecting the employment of reservists should include provisions putting into effect the types of flexibilities outlined under "Possibilities" above.

*LEGISLATION: COVERAGE OF PERSONS PROTECTED*POSITION

Legislation protecting the employment of Defence Reservists should protect the widest range of persons likely to have their employment disadvantaged because of their defence service obligations.

PROBLEMS

Existing legislation in Australia does not protect the employment of Defence Reservists who volunteer for defence service periods. This contrasts with Australia's National Service Act whose provisions for protection of employment did apply to persons who volunteered for the two-year National Service intake.

Additionally, the denial of protection for volunteer reservists acts against the policy proposed in this discussion paper for assembling the defence forces for situations short of war and defence emergencies through flexible procedures rather than authoritative procedures, the former preferred approach benefiting from the attraction of volunteers.

There are circumstance of other types of reservists vulnerable to disadvantages in employment but not covered by existing legislation. Two of these circumstances are as follows:

- * Reservists, or non-reservists such as union representatives in the workplace, who are disadvantaged in their employment because they report on their manager or employer for breaches of the Defence Re-Establishment Act, or who act as witnesses or give testimony in support of reservists alleging breaches of the Act.
- * Temporary employees require specifically defined coverage, to distinguish them from persons employed on very short term non re-current work for whom protections are not sought. Temporary employment is an increasingly common form of employment in many industries and professions and deserves full protection.

Both these circumstances are provided for in the United States legislation.

POSSIBILITIES

These are discussed under the heading "Problems"

PROPOSAL

Revised or new legislation protecting the employment of Defence Reservists in Australia extended that protection to

- Volunteers and non volunteers

- Persons who act as representatives, advocates or witnesses for reservists seeking their entitlements under the legislation
- Temporary employees

*LEGISLATION: COMPREHENSIVE DESCRIPTION OF RIGHTS AND REMEDIES*POSITION:

Legislation protecting the employment of Defence Reservists provide comprehensive descriptions and definitions of rights, protections and remedies afforded reservists by the legislation.

PROBLEMS:

The Defence Re-establishment Act appears to be defective in certain respects regarding the rights and protections of reservists. For example, legal opinion suggests that Defence Reservists are protected while travelling to their place to report for defence service but may not be protected for the time they are travelling from their place of duty to home; also employers may not be prohibited from refusing a person employment because the person has a defence service obligation.

The re-employment rights provided to reservists by the Defence Re-establishment Act are simply stated, and thereby do not give guidance to employers and employee reservists facing less simple situations; difficulties with interpretation of rights can arise in situations where the characteristics of the employer's organisation change or where the reservist has become disabled in some respect vital to the performance of his or her original employment.

The Act also does not indicate the compensation that may be paid to a reservist successful in any court action.

POSSIBILITIES

The United States legislation describes and defines in a comprehensive way those persons with rights under the USERR Act as:

"A person who is a member of , applied to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service ..."

The legislation could provide a priority or a hierarchy of types of positions that should be offered a reservist on his or her return from Defence service, such as:

- * Firstly, the position in which the reservist would have been employed if continuous employment of the reservist had not been interrupted by the defence service period; if this is not practicable or reasonable, then -
- * The position in which the reservist was employed at the time of commencement of the defence service period; if this is not possible, then -
- * A position of like seniority status and pay the duties of which the person is qualified to perform; if the reservist has incurred a disability, then -

- * Any other position which is equivalent in seniority status and pay, the duties of which the reservist is qualified to perform or would become qualified to perform with reasonable efforts by the employer; if such a position is not available, then -
- * A position which is the nearest approximation to a position referred to above in terms of seniority, status and pay consistent with the circumstances of each reservist's case.

A priority or hierarchy of such re-employment provisions is contained in the United States legislation.

The legislation could also spell out the calculations of damages to be paid to successful litigants, allowing for:

- compensation for losses
- costs of legal proceedings and preparations
- damages equal to the first two items as an addition to the first two payments to the successful litigant, where the employers actions are shown to have been wilful.

PROPOSAL

Revised or new legislation protecting the employment of Defence Reservists should include the provisions described above under the heading "possibilities".

*LEGISLATION: ENFORCEMENT OF RESERVISTS RIGHTS*POSITION:

Legislation providing for the protection of the civil employment of Defence Reservists should ensure that reservists are given effective assistance in the enforcement of their rights under the legislation.

PROBLEM:

Existing Australian legislation for the protection of the civil employment of reservists leaves reservists to their own resources in enforcing their rights before the Courts.

Reservists, particularly those who have suffered serious financial disadvantages in their civil employment, do not have the resources to match the resources of employers before the Courts. The resources of the unions in which reservists are members are often called on to provide the support to reservists that should be given them by the Government.

This lack of assistance is different to that faced by National Servicemen in Australia who received legal assistance and, in some instances, legal aid in initiating legal proceedings to protect their employment; the absence of assistance for reservists in Australia is also in marked contrast with the very effective assistance and support given to reservists by the Government in the United States.

POSSIBILITIES:

Reservists in public sector and private sector employment could be supported by:

- * A Commonwealth Government Office or Department other than the Defence Department with powers and responsibilities to assist reservists. The Department of Labour held some of the responsibilities listed below during the years Australia had National Service, and the Secretary for Labor has all the responsibilities below in the United States. In particular this Office could:
 - Utilise other agencies and/or volunteer organisations in assisting reservists.
 - Provide technical assistance to employee reservists and their employers in resolving difficulties.
 - Investigate complaints including the acquiring of documents and taking of statements from witnesses.
 - Resolve complaints through reasonable efforts.
 - Notify complainants if efforts to resolve disputes and correct disadvantages being incurred by the complainants are unsuccessful.
 - Refer the complaint, on request of the reservist, to the Attorney General.

- * An Attorney General with powers and responsibilities to:
 - Act as an attorney for and/or appear on behalf of the complainant.
 - Subpoena employers and seek orders from the Courts enforcing subpoenas.

- * Courts with powers to:
 - Require employers to comply with the Act.
 - Require employers to compensate reservist employees found to have been disadvantaged in their employment because of their defence service obligations.
 - Require employers to pay liquidated damages to reservists where the breach of legislation by the employer is found to be wilful.
 - Use its equity powers to issue permanent and temporary injunctions, restraining orders and contempt orders.

Reservists employed in Australian Government Departments could be provided with an avenue of complaint to the Merit Protection and Review Agency, and/or the Human Rights Commission, and could be given the support of a special government office that could:

- Appear on behalf of reservists.
- Act as an attorney for reservists.
- Investigate complaints by reservists against Federal Departments.
- Initiate actions before administrative tribunals and the Courts of Appeal.

PROPOSAL:

That revised or new legislation in Australia for the protection of the employment of reservists provide to reservists the types of support and assistance set out under the heading "Possibilities" above.

LEGISLATION: RETROSPECTIVITYPOSITION:

Revisions of existing legislation or new legislation providing for the protection of the civil employment of Defence Reservists should be made retrospective to the date of the 1988 enactment of amendments to the Defence Act that rendered reservists subject to "call-out".

PROBLEM

The community including employers became aware of the 1988 amendments to the Defence Act that empowered the Defence Forces to call-out reservists in conditions short of war for periods from three to twelve months. Previously, the defence service obligations of reservists was two to four weeks per year.

The Government at the time cited the Defence Re-establishment Act as the legislation protecting the employment of reservists subject to call-out.

Legal opinion has convinced the Government of the ineffectiveness of the current legislation in protecting the employment of reservists. The Government is presently seeking to consult with the ACTU regarding revisions of the Defence Re-establishment Act necessary to render the legislation effective.

Reservists disadvantaged in their civil employment at any time since 1988 because of their defence service obligations have not had effective legislative protection against such disadvantages.

Unions have received complaints from members in the Reserve Forces alleging that their employers have penalised and prejudiced them in their employment because of the members obligations to undergo defence service.

POSSIBILITIES

The United States Congress and Senate jointly derived in 1994 amendments to their legislation protecting the civil employment rights of reservists. Particular provisions of that amended legislation, specifically the amendments to the onus of proof provisions and to the definition of discriminatory actions for which the legislation provides protections, have been made retrospective to 1968. This retrospectivity has been achieved by declarations that these amendments are not additions to but are codifications of the existing law and thus were always in force.

PROPOSAL

That revisions to legislation or new legislation protecting the employment of reservists have the same date of effect as the amendments to the Defence Act that increased the defence service obligations carried by the reservists and their employers.

PROTECTION OF ECONOMIC INTERESTS

POSITION:

That the income levels of reservists and their families be protected during call-out periods.

That other economic interests of reservists and their families such as superannuation, life and accident insurance, hire purchase agreements and partnerships be protected during call-out periods.

PROBLEMS:

Surveys indicate that 40% of reservists would lose a significant amount of income if they were called-out on defence service for an extended period.

This loss would occur because the gross pay rates enjoyed by reservists in their civilian jobs are greater than the gross pay rates for the rank they hold in the defence forces. The reservists would, during call-out, also lose their tax exempt reservists pay as they would then be on full time defence service. Income from second jobs would also be lost.

The proposal for call-out developed to date by Australia's Defence Force intend for all defence personnel, regular and reservist, to be paid the same gross pay rates. The defence authorities are not prepared to pay "make-up pay" to reservists to maintain their civilian gross pay rates, as this would, they argue, lead to disparities of pay rates amongst personnel of the same rank and duties within the defence forces.

The defence force authorities propose, in lieu of make-up pay, to pay all reservists a gratuity and to provide financial assistance with home mortgages in defined circumstances. While detailed amounts are not presented, it is expected that significant percentages of reservists and their families will still experience sizeable income loss. Changes in living styles, from home ownership to rentals, and the high level expenses faced by some families in areas such as child support and education are not catered for in the assistance provisions presently contemplated by the Defence Force. Reservists returning from call-out periods with disabilities, would face the permanent loss in superannuation benefits. They and their families would thereafter incur this loss forever, because of the lower military pay rates upon which the superannuation entitlements would be calculated; this loss has also not been addressed by the defence force proposals on the pay rates of reservists while on call-out.

POSSIBILITIES:

The government could maintain the after-tax income level of reservists while on call-out. This could be effected through the tax system, reservists on call-out receiving tax advantages sufficient to bring their after-tax pay rates for the call-out period to levels matching their after-tax pay rates in the year prior to the call-out period.

For overseas service during call-out, the defence force, regular and reservists, could be paid tax free salaries and allowances, thereby following precedents set by past overseas defence force commitments.

On loss of life or on permanent disability, the superannuation entitlements held by reservists in their civilian jobs could be preserved.

PROPOSALS:

That revised or new legislation providing for the protection of the economic interests of reservists while on call-out include provisions bringing into effect the suggestions outlined under the heading "Possibilities" above.

