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The National Voice of Policing

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Review of the Fair Work Act 2009 (the Review)

It is with pleasure that the Police Federation of Australia (PFA) makes this submission to the Fair Work Review. The PFA is a federally registered union under the *Fair Work (Registered Organisations) Act 2009* and has coverage of all 56,000 State, Territory and Federal Police officers. As you would no doubt be aware we have three (3) member jurisdictions that are covered by the Act - the Australian Federal Police, Victoria Police and the Northern Territory Police Force.

In 2009 the PFA made a submission and appeared before the Senate Education, Employment and Workplace Relations Committee's Inquiry into the Fair Work Bill 2008. A number of the issues we raised on that occasion are still relevant to police in this Review.

The PFA generally supports the submissions made by the ACTU and in particular submissions relating to the extension of the NES right to Extend the eligibility for the right to request a change to working arrangements to meet caring responsibilities to include '*any employee who cares or expects to care for a dependant who reasonably relies on the employee for care'*.

We note the Review's Terms of Reference in your Background Paper as well as the list of questions for consideration commencing on page 18 in Attachment B. Our submission will identify the issues under relevant questions from that Attachment. We make the following points in relation to -

Question 3 ***"…take into account Australia's international labour obligations"***
Question 7 ***"…impact of the system being constitutionally underpinned by referrals of subject matters/powers from the states…"***
Question 23 "…***removing the list of "prohibited content"***
Question 29 "...*Good faith bargaining"*
Question 30 "...***Scope orders"***

Australia's international labour obligations (Question 3) and Impact of Referral Legislation (Question 7)

In our 2009 submission on the *Fair Work Act* we argued that the narrow reliance on the corporations' power and particularly the State Referrals put the Commonwealth in a position where the States determine the extent to which the Commonwealth meets its international obligations.

Also in that submission we highlighted, particularly in the case of Victoria Police, that …"there is a very real possibility that freedom of association is not adequately protected". Our view is that the scope of the referral in respect to freedom of association for non-federal employees is much narrower than the protection offered to national system employees. Victoria police are only granted freedom of association rights pursuant to their referral.

In the case of Victoria, consistent with the *Re AEU* matter, matters pertaining to number, identity and appointment were held back in the referral, as was discipline. The list of non-referred matters for police is more extensive than for the rest of the public sector in Victoria.

There is a real question over whether Police have bargaining rights or freedom of association since issues such as discipline, transfer and uniforms are non-referred matters. The patchwork model of rights remains and is a relevant issue today - (see Carabetta, G. (2011) 'Fair Work and the Future of Police Industrial Regulation in Australia', *Australian Journal of Labour Law*, vol.24:3, pp 271-275) (Attached).

An employer could transfer a delegate wholly because of their role as a delegate with impunity, given the regulation of transfers of members of Victoria Police has been retained by the State of Victoria. Similarly, a police officer participating in industrial action could be the subject of discipline action even though the FWA purports to grant them the right to take protected action (see Carabetta *supra* at pp. 260-80, at pp 276-77, nn 108 to 112. As to the general uncertainties re Victoria Police officers' right to protected industrial action under the FW Act, see pp 268-9).

Under the present arrangement, an absurd situation could arise whereby a minor sanction by the employer to deny a delegate a benefit, eg termination of upgrading, could give rise to a general protections claim whereas a major sanction such as transfer or dismissal would have no legislative protection except to the extent permitted by the State of Victoria.

It is therefore the view of the PFA that the current Victorian referral provisions leave a large proportion of workers in that state granted significantly less rights than other workers.

In *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 *Dempster*, it was alleged that the plaintiff had been transferred because he was a union official, a reason prohibited by the freedom of association protections under the then relevant Commonwealth Act. The Full Court of the Federal Court held that the terms of the referral denied the plaintiff 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 the current situation in Victoria.

It is our submission that 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, the Australian Government has an obligation to promote its objectives in its legislation agenda.

Democratic rights as clear and unambiguous as those relating to freedom of association should be extended to all Australian workers through amendment to the *Fair Work Act* to expressly rely on the ILO convention and thereby tie State obligations to the purposes of the *Fair Work Act*.

Removal of "prohibited content" **(Question 23)**

This was a positive in the recent bargaining round in Victoria. In 2007 the Victoria Police /Government were very risk averse to the inclusion of anything that could be construed as prohibited content (including non-referred matters) which resulted in a deed of agreement running in parallel with the workplace agreement. The ability of the parties to put agreed matters into a single document has promoted efficiency through the workforce and management having a clearer understanding of their rights and obligations and has removed the need for alternative dispute settling procedures (see Carabetta *supra* at p. 276, n 106.

Scope orders and Good faith bargaining **(Questions 29 & 30)**

The PFA is of the view that the principles and practices associated with the Good faith bargaining requirements of *The Act*, present a number of shortfalls which have become apparent with its application. Furthermore, the PFA is of the opinion that scope orders currently do not encourage effective bargaining.

In an industry where in excess of 95% of sworn police officers are members of their respective police association/union, it seems illogical to allow individual employees an opportunity to pursue individual issues, often at the expense of the greater majority. In practice it slows down the bargaining process which impacts on the greater workforce.

Within the current legislation, section 176(1)(c) of *The Act*, provides that any person may be appointed, in writing, as a bargaining representative. The PFA is concerned as to the effectiveness of these independent bargaining units and the impact that they have on the bargaining process, and in particular, the ability of a professional Registered Industrial Organisation to attain a negotiated and beneficial outcome in a timely manner for the workforce.

Furthermore, the PFA notes with concern the rise in independents bargaining representatives, specifically those nominated from outside of the workplace and union movement, and the emergence of special interests groups "based on geography, gender or simply on specific interests" (Bussell, S., *'Turbulent Times – a Practitioners Perspective of Industrial Relations in* Aviation', Kingsley Laffer Lecture, (University of Sydney, 19 April 2010)

The PFA believes that the current system which recognises Independent Bargainers has produced considerable barriers to good faith bargaining in a timely, fair and transparent manner.

While we note that the current provisions allow for the limitation of independent bargaining representatives through a Bargaining Order (section 230), there are a number of institutional and legislative constraints on attaining such an Order. In practical terms, obtaining a Bargaining Order on the grounds that efficiency or fairness of the process has been compromised due to the multiplicity of bargaining representatives is virtually impossible for an Industrially Registered Organisation.

For example, the Australian Federal Police Association Branch of the PFA (AFPA) commenced bargaining with approximately the following representatives present:

1. Employer
    - 5 bargaining representatives, representing the Organisation consisting of 6,500 FTE
2. AFPA
    - 5 bargaining representatives, representing 4,500 members with the AFPA having industrial coverage of the whole workforce
3. Second Union
    - 5 bargaining representatives, representing 150-200 unconfirmed members (sharing coverage of a class of employees)
4. Independent bargaining units
    - Upwards of 21 individuals representing own interests or claiming to represent the interest of other unconfirmed sub group employees

The PFA believes that the above figures, attributed to the various groups involved in the bargaining process, are disproportionate given the members/employees that they allegedly represent.

In the above example, the process was significantly hampered by the involvement of upwards of twenty-one independent bargainers which resulted in a convoluted and inefficient process. Given the intent of the current system, there should have been reasonable grounds to commence the Bargaining Order process. However, the current system has produced significant practical limitations to attaining a Bargaining Order:-

- The employer may wish to be seen to be inclusive of all employees by continuing with all Bargainers present and accordingly not supporting the Bargaining Order application;

- The employer may perceive a benefit in maintaining multiple independent bargainers, to the detriment of employees;
- A perception that Registered Industrial Organisations undertake such action in order to move behind 'closed doors' and make a 'poor deal' with the employer, giving the secondary Union and Independent Bargainers political capital within the workforce;
- The unclear process of how some Independent Bargainers would be removed whilst retaining others and the issue of transparency and fairness if such a process was to occur; and
- The practical inability to challenge the legitimacy, qualifications or experience of individual employees to represent their own interests or that of other employees without giving the secondary Union and Independent Bargainers political capital within the workforce.

Given the issues outlined above, the PFA proposes the adoption of an exclusive jurisdiction model. This is similar to the provisions contained in the *National Labor Relations Act* 1935 (USA), whereby union representatives designated or selected for the purposes of collective bargaining by the majority (+51%) of the employees in a workplace, are the exclusive representatives of all the employees in such workplace for the purposes of collective bargaining. Furthermore, the exclusive interest afforded to the majority representative should not be defeasible at the will of the employer.

Though the PFA acknowledge that all employees of the workplace should maintain the right to present any grievance throughout the process to the employer, any adjustment to the course of bargaining must not be inconsistent with the principles of good faith bargaining and provided that the majority nominated bargaining representative is made aware of the occurrence and been afforded the opportunity to respond.

Alternatively, if such a proposal is not an acceptable option, the PFA would propose a provision to allow a 'Union Enterprise Agreement based on the *Workplace Relations Amendment (Work Choices)* Act 2005 (Cth) section 96B as articulated below:-

> **96B Union collective agreements**
>
> An employer may make an agreement (a ***union collective agreement***) in writing with one or more organisations of employees if, when the agreement is made, each organisation:
>
> > (a) has at least one member whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and
> > (b) is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.

CONCLUSION:

As the Review would see form the issues raised above, there are a range of jurisdictional, constitutional and policy issues to deal with in relation to police in the federal IR system. Matters such as the jurisdictional issue of the employee status of police, the Victorian referral, ILO considerations including freedom of association, good faith bargaining and scope orders, whilst not strictly unique to police, we argue, have a greater impact on police than other workers, and together present a very complex IR environment in which our Branches in the Federal system operate.

The PFA would be happy to provide any further information to the Review that you might deem necessary.

Sincerely yours

M A Burgess

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