



# Police Federation of Australia

The National Voice of Policing

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## **Productivity Commission Workplace Relations Framework Inquiry**

It is with pleasure that I make this submission on behalf of the Police Federation of Australia (PFA). The PFA is a federally registered organisation under the Fair Work (Registered Organisations) Act 2009 and has coverage of almost 59,000 state, territory and federal police officers, through their respective police associations and unions who enjoy almost 99% membership density.

In Issues paper 5: Other Issues, you ask the question?

*How should arrangements in state and public services (and any relevant state-owned enterprise be regulated? In particular, to what extent and why, should WR provisions vary with the public or private status of an enterprise?*

In respect to policing, police industrial and personnel issues are regulated by an array of legislation and regulations both in state or federal industrial Acts and regulations as well as the various Police Acts and Regulations.

Australia's police operate in a range of commission and tribunal style arrangements that makes dealing with our industrial, command & control & disciplinary issues very complex. Police officers are also subject to an extremely high level of scrutiny by an array of oversight bodies, such as Ombudsmen, integrity and corruption commissions, and Parliamentary Inquiries. However, over a long period of time, the various systems & police forces have evolved to take those complexities into account.

The Australian Federal Police and Victoria Police operate under the jurisdiction of the Fair Work Commission, which will be explained in more detail later in this paper, while Queensland, New South Wales, Tasmania, South Australia and Western Australia police all operate under their respective state industrial

regimes and the Northern Territory Police under a discrete Tribunal directly provided for in the Police Administration Act.

### **AUSTRALIAN FEDERAL POLICE –**

The Australian Federal Police operates solely within the Federal Industrial jurisdiction under the provisions of the Fair Work Act 2009. Appointees are deemed employees for the purpose of the FWA, however its jurisdiction is very limited. Employee industrial rights are established through the FWC and the AFP Commissioner is respondent to this environment for the exercise of his employment powers.

For the purposes of the application of the FWA, the Australian Federal Police Act 1979 (AFP Act) precludes such application in respect to Part IV and Part V of the AFP Act, in particular the Commissioners Command Powers and AFP offshore deployments. These matters are normally addressed through Commissioners Determination making powers, however there is no external review mechanism available to review the merit of the Commissioner's decision as the AFP fails to recognize Regulation 24 of the AFP Act as being the review mechanism for Part IV and Part V of the AFP Act.

This process is a major issue of concern for the PFA, as its failure to protect individual rights has been brought into question by issues stemming out of the International Deployment Group (IDG), transfer, promotion, advancement and the draconian AFP professional standards regime.

The FWA, being mindful of the Office of Constable, deems AFP employees to be employees for the purposes of the general application of the Act. (The issue of the 'employee' status of police will be detailed later in this submission). In some respects, AFP employees fall between the cracks of the AFP Act and the FWA with sometimes confused application

Industrially, AFP appointees (excluding the Senior Executive Service) currently work under Enterprise Agreements negotiated collectively. The disputes mechanism of the agreements is limited to the settlement of disputes only relating to the application of the agreements.

### **VICTORIA**

In 1996 the State of Victoria referred its power over industrial relations within the State to the Commonwealth. This referral is dealt with in Part 1 – 3 div2A of the Fair Work Act 2009.

However in the case of Victoria Police matters pertaining to the number, identity, a number as aspects of appointment, probation, promotion, transfer

from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment were not referred matters. (Issue Paper 5 page 8 mentions this issue in relation to the recent Federal Court decision in *United Firefighters' Union of Australia v Country fire Authority* and raises the issue of continuing uncertainty about the constitutional limitations.

The extensive list of non-referred matters created major difficulties in operating in the Federal jurisdiction under the referred powers. While the boundaries of the restrictions have never been fully explored, a significant number of matters that had traditionally been the subject of agreement in Victoria were arguably excluded from the jurisdiction. Much of this has subsequently been rectified in the new referral act.

Other matters of concern relate to agreement-making provisions, as well as dispute settlement procedures.

In respect to industrial matters, Federal/State relationships will always be marked by a degree of uncertainty. Any legislation should endeavor to limit that uncertainty. This could be achieved through the reliance on constitutional powers such as external affairs and ensuring any state referrals are implemented consistent with Australia's international obligations such as the ILO conventions on bargaining and freedom of association.

## **NORTHERN TERRITORY**

The Tribunal referred to earlier in respect to the Northern Territory Police is a discrete body operating for the sole purpose of regulating Police industrial relations and is not subordinate to Commonwealth industrial legislation which applies through the Territory.

The Tribunal is not restrained by direction of a full bench or governed by externally set principles or legislative restrictions. While the Police Arbitral Tribunal operates without jurisdictional oversight, decisions of the Tribunal may be appealed on matters of law to the Supreme Court.

The Act provides that the Tribunal will comprise of three members, each being appointed by the NT Government on the basis of an Oath of Office. Both the Commissioner of Police and the Police Association are invited to nominate persons for appointment. However, the Chairperson is appointed subject to the person being either a member of the AIRC or has suitable qualifications and industrial experience. Each member of the Tribunal is appointed for three-year duration.

### **Workplace Relations Provisions in Policing:**

Referring back to your question in Issues paper 5, "*...to what extent and why, should WR provisions vary with the public or private status of an enterprise?*"

Police officers, due to our Oath of Office, can be prejudiced in their capacity to fully participate in enterprise bargaining, particularly as they are an essential emergency service.

To achieve a desired outcome, enterprise bargaining clearly envisages that negotiations may develop into more than a discussion around claims or a debate on wages policy, but may eventually test the resolve of parties around the principles of supply and demand. To not have the legal ability to fully extract the potential of a bargaining position is to enter into the exercise without the necessary tools to effectively participate. Whilst there is a perception that police unions possess significant industrial strength, they are unable to engage in industrial action in the same way as other members of the workforce.

The ILO in 1998 adopted a Declaration on Fundamental Principles and Rights at Work.

We argue that the 1998 Declaration, as well as Conventions 87 (Freedom of Association) and 98 (Rights to Organise and Bargain Collectively) provide the basis for contemporary enterprise bargaining. However, both of these Conventions permit member states to decide the extent to which these guarantees apply to the police and other forms of essential services.

The Freedom of Association Committee of the ILO dealt with the restriction on police and others from being able to take industrial action in support of collective bargaining. In its digest of decisions of 1996 the Committee noted that the right to strike could be restricted or prohibited but where that occurred, the limitation must be accompanied by certain compensatory guarantees. In particular, the Committee went on to identify the role of an impartial tribunal in dispute resolution referring to conciliation and arbitration processes.

Clearly, it is envisaged that the provision of an independent arbitration tribunal must have the unfettered power to make determinations on merit to ensure that the collective position of police is not adversely affected by removing their ability to maximise their negotiations through the deployment of industrial action. In other words, the Arbitral component must not place police in a less favourable position than might be reasonably achieved in enterprise bargaining.

Simply by constructing a situation at law to effectively restrict police from full participation in enterprise bargaining, as has recently been the case in both NSW and Queensland (see "Public Sector Wages 'Cap': The New

Framework for the Determination of Public Sector Wages and Conditions in New South Wales" (2012) 25 Australian Journal of Labour Law by Giuseppe Carabetta), or providing police with access to an industrial tribunal restricted to dealing only with certain allowable matters, or restricted in the use of its powers during the bargaining period), may very well fail to satisfy these ILO provisions.

Other key features of the Act that are significant for police are the arrangements for collective bargaining and dispute resolution. While we see the Fair Work Commission's role in supervising good-faith bargaining as important, under the current arrangements there is limited scope for arbitration of bargaining disputes. Nor does the Act make any special provision for any alternative procedure for the resolution of police bargaining disputes (See further, 'Fair Work and the Future of Police Industrial Regulation in Australia' (2011) 24(3) Australian Journal of Labour Law 260, 260-80 by Giuseppe Carabetta), highlighting a number of related problems vis-à-vis the current 'protected action' provisions for police.

### *The Bargaining Process in Policing –*

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.

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.

The PFA is concerned as to the effectiveness of these independent bargaining units in police negotiations 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.

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.

The PFA has previously proposed 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.

### **Employee Status of Police:**

Similarly, the occupation of a police officer is different to other occupations, including other public sector workers. It is an established rule of common law that members of the police force, like the defence force, are not 'employees'. 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 little hesitation in applying or reaffirming this rule.

This argument is expanded in the paper published in the Melbourne University Law Review, "Employment Status of Police in Australia", by Giuseppe Carabetta. See specifically 'The Current Position and its Origins – Introduction (pp 4 – 5; and pp 8 – 17).

### **Individual Contracts:**

The use of individual contracts is raised in a number of sections of Issues Paper 3, whilst "alternative forms of employment" are raised in Issues paper 5, including independent contractors, owner managers, workers contracted from labour hire firms, skilled migrant workers and casual workers. None of those "alternative forms of employment" exist within policing.

The PFA is totally opposed to the use of individual contracts in policing and any of the other "alternative forms of employment" listed in the issues paper. In a disciplined service in which members are subject to a defined command structure, but also a service in which the Oath of Office is a central feature governing the discharge of duty by Police Officers, the use of individual contracts or other forms of alternative employment are inappropriate. Whilst many argue the merits of alternative employment arrangements, we have concerns about how they could be introduced in an industry that operates on a clearly defined rank structure with specified duty types. And most importantly, are based on Sir Robert Peel's independent office of constable and the principles of independent discretion, as an Officer of the Crown.

As individual contracts or employment agreements cannot be disclosed to a third party, we suspect that any oversight body responsible for policing would have serious concerns as to such a process having the potential to foster corruption in policing.

Who in policing could be given the authority to negotiate such a contract? How would they determine when a subordinate staff member should be offered a contract that is more or less favourable than their colleague of the same rank carrying out the same role or function. The privacy provisions generally contained within an employment contract could be inappropriately used in the hands of someone with questionable integrity. Junior officers could feel compelled to comply with inappropriate orders and directions of senior officers to ensure satisfactory conditions are contained in their contract.

It could also be that a Constable, inclined to exercise his or her powers in a way consistent with the inappropriate prejudices of their superior, will be able to negotiate a better contract than their colleagues.

The productivity component of individual contracts, should they be used, could also be problematic. The Wood Royal Commission into the NSW Police raised a range of concerns relating to potential corruption issues arising from the concept of results-orientated style policing. That is setting targets for police to achieve, which we fear could be contained in individual contracts, if introduced into policing. Paragraph 6.20 of Volume 1 of the Final Report refers to organization factors that emerged as contributing towards corruption. One of these was –

*"an unrealistic management strategy which was arrest rate driven, but not matched with sufficient resources leading to various forms of process corruption"*

Chapter 2, Policing and Corruption, discusses factors that may demonstrate how the job of policing is in itself corrupting. Justice Wood remarks that each of the factors is very real and the opportunity for police to engage in corrupt behaviour can be enhanced by a number of issues; in particular;

*"police are regularly confronted with law and order campaigns calling for an aggressive and result-orientated style of policing that does not cater for due process, and favours both rough justice and the fabrication of evidence."*

Wood, at Chapter 2.33, describes process corruption as –

*"Process corruption in one of the most obvious, pervasive and challenging forms of police corruption, which:*

- *Has its roots in community and political demands for law and order;*
- *Is seen by many police to be in a quite different league from the forms of corruption which attracts personal gain;*

- *Is subject to the confusion which exists over the definition of 'good policing'; and is compounded by ambiguities within the legal and regulatory environment in which police work, and by senior police and members of the judiciary apparently condoning it."*

Whilst the type of "Process Corruption" that emerged in the Wood Royal Commission related to Criminal Investigation areas, Justice Wood concluded that a results-orientated style of policing encouraged, and was indeed a factor, of process corruption.

Police are also the front line of Australia's domestic fight against terrorism, organised crime, civil unrest and also natural disasters. In those types of policing operations, like military operations, Commanders need to be able to understand, at short notice, the general industrial rights and entitlements of officers under their command. The current situation in policing, like the military, has various ranks and duty types remunerated at similar levels, with common terms and conditions of employment on a jurisdiction by jurisdiction basis.

If such a situation arose and the operation had issues where life and property were at risk, the blame would clearly be sent home to the police department and the Government that implemented such a process.

We therefore suggest that both the Productivity Commission and the Government should seriously consider these issues before suggesting that individual contracts could be introduced into mainstream policing.

### **Penalty Rates:**

Issues Paper 2 raises a number of questions under the heading Penalty Rates.

It is estimated that more than 80% of officers have worked a non-standard shift in the last 6 months. Further, for almost 70% of officers, 10% of their duties require shift-work and for 50% of officers shift-work (penalty shifts) is likely to make up one third (33%) of their shifts<sup>1</sup>.

The above data indicates how many police officers are required to work shift work as a result of being an operational police officer. Based on the above data, almost 30,000 police officers across Australia work some form of shift work for one-third of their shifts. The bulk of these officers are 24/7 shift workers who could be rostered on any one of the 365 days a year. In fact the larger numbers of police are rostered on those shifts where most in the community get to socialize (weekends and public holidays, late evenings and

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<sup>1</sup> Kronos Roster Shift Data NSW Police Jul-Dec 2014

very early mornings). Very few police have no requirement to work any form of shift work.

Some jurisdictions have moved to a composite allowance, or all up salary that is paid to officers who perform seven day per week, rotational shift work or are required for an operational response capacity involving ad hoc hours. The component parts of such composites include shift work penalties, weekend penalties and Public Holiday penalties. For many of these workers there is also an additional Night Operational Shift Allowance to compensate for the onerous nature of night work.

Composite allowances can have benefits for both the employer and employees and is generally considered to enhance workplace productivity whilst providing appropriate recompense for working onerous/unsociable shifts.

The benefits for employers include being able to provide an appropriate policing response based on operational requirements in a highly reactive industry and also enable a significant reduction in administrative costs. The benefits for employees include ensuring that all employees in a workplace work their fair share of Afternoon Shifts, Night Shifts, Weekend Shifts and Public Holidays whilst also ensuring that there are appropriate limits on the number and nature of penalty shifts. Composite allowances also provide for regular and consistent income for employees.

However composites can only operate equitably if shift allocation is equitable. Policing employs a wide variety of shift patterns and the frequency on which weekends are worked or how many nights a year an officer may be required to work varies. This may create perceptions of inequity in the workforce. Alternatively, the number of unsociable hours are measured and capped potentially creating staffing issues in a responsive occupation like policing.

Composite allowances or all up salaries can also have the effect of experience drift away from locations where it is perceived an unfair number of unsociable hours are being worked, creating problems with filling locations.

It should be recognized that composite allowances, where used, are simply another form of penalty rates to officers who work shift work. Penalty rates therefore remain the most efficient way to ensure equitable reward for working unsociable hours.

The Award safety net should continue to provide for penalty rates and it should be left to enterprises to determine whether to adopt annualised penalties. This has happened in jurisdictions where the industrial parties have determined it is appropriate.

Any attempt to reduce or remove the penalty rate components from policing would have a significant negative impact on policing's ability to provide an appropriate policing response, particularly at night and on weekends.

**Conclusion:**

All State, Territory and Federal police associations and unions, through the PFA, want to ensure that any changes proposed by the Productivity Commission do not adversely impact on our members' industrial rights; but also that they do not disrupt operational policing.

It should also be noted that when any major changes to industrial rights and entitlements of the wider workforce are introduced, they are often met with protest and in some instances civil disorder. It will be Australia's police who will be on the front line of any type of action. It would be somewhat perverse and undesirable if Australia's police were expected to quell community protests about such changes when at the same time being subject the same legislative impacts.

As police we are always conscious that such changes could have the unintended consequence of impacting on our ability to continue to provide a professional policing service to our communities and thus inadvertently undermine the community's safety. The independent Office of Constable is paramount and should not be fettered in a democratic society.

We implore the Commission to not look at police through the same prism that it might apply to other sections of the workforce. Police do not argue that we are better than other workers, however we argue that we are different and have different needs as we believe the forgoing shows.

We would be happy to appear before any hearings the Commission might wish to conduct to elaborate on this submission.

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