



Police Federation of Australia

The National Voice of Policing

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Mr Peter Harris
Presiding Commissioner
Productivity Commission
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Dear Mr. Harris

POLICE FEDERATION OF AUSTRALIA: SUBMISSION ON WORKPLACE RELATIONS FRAMEWORK

The Police Federation of Australia, representing the nation's 60,000 police officers, makes this submission on your August 2015 Draft Report, ***Workplace Relations Framework***.

We wish to comment on three aspects of the report:

- Bargaining representatives;
- Public sector bargaining; and
- Referral by States of workplace relations responsibilities to the Commonwealth.

Bargaining Representatives

We note that your report recommends at 15.5 that

"The Australian Government should amend the *Fair Work Act 2009* (Cth) so that:

- a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted
- a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed

agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.”

Whilst we strongly support the thrust of both recommendations, we believe the five (5%) percent threshold referred should be substantially higher.

In our 2012 submission into the ***Review of the Fair Work Act 2009*** (the Review) the PFA noted with concern the rise in independent 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).

We are of the view that any threshold number in the percentage of the workforce required to nominate a bargaining agent should be at least twenty-five (25%) percent and this should be clearly enshrined in the legislation. Any lesser percentage could still see some smaller workplaces with a significant number of bargaining agents involved in negotiations, which will likely lead to an adverse or at least slower outcome for both the employer and employees.

As an example, in our submission to the ***Review of the Fair Work Act 2009***, we highlighted the number of representatives during the negotiation in the lead up to the Australian Federal Police Enterprise Agreement 2012-2016

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 either their 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.

Though the PFA acknowledges 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.

In our 2012 submission into the *Review of the Fair Work Act 2009* (the Review) the PFA noted in this Inquiry –

“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”.

We also pointed out 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”.

It is our belief that the Australian Government should adopt similar provisions contained in the *National Labor Relations Act 1935* (USA), so that Employer and Employee negotiations can be completed in a timely manner without interference by external Industrially Registered Organisations that have minimum coverage of employees within a specific workforce such as a Police agencies.

Public Sector Bargaining

In our original submission to you in this Inquiry, we pointed out that the police Oath of Office can prejudice us in our capacity to fully participate in enterprise bargaining, particularly as we are an essential emergency service.

We also highlighted our inability, due to that oath of office, to fully extract the potential of our bargaining position through serious industrial action. As we indicated, while there is a perception that police unions possess significant industrial

strength, their members are unable to engage in industrial action in the same way as other members of the workforce.

In that submission we pointed the Productivity Commission to the work of Sydney University academic Giuseppe Carabetta, and in particular his paper, ***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.

While that paper was based on the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW) and *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* (NSW), a similar situation was legislated in Queensland through the *Industrial Relations (Fair Work Harmonisation) and Other Legislation Act 2012*. The Queensland Act made a provision that when the Industrial Relations Commission was dealing with a matter involving a public sector entity, the States' financial position and fiscal strategy together with the financial position of the public sector entity needed to be taken into account in any arbitration. In short this meant that that the Commission could not award pay increases outside the Government Wages Policy.

In March 2014 the Australian Public Service Commission released the 'Australian Government Public Sector Workplace Bargaining Framework'. The Australian Government agreed that these policy arrangements would apply to the Australian Public Service (APS) and non-APS Australian Government agencies. Ministers direct (or where they are not able to direct, strongly encourage) the non-APS agencies in their portfolios to apply the same policies that apply to the APS, so far as this is practical within the context of operations. These arrangements exclude the Australian Defence Force (ADF) but not the Australian Federal Police (AFP). It is the PFA's view that the current bargaining model in the federal public service is based on a command and control model of bargaining and the current APS bargaining policy is not a good faith bargaining policy. This is due to the 'Australian Government Public Sector Workplace Bargaining Policy' ("the Policy") issued by the Public Service Commission ("PSC") that not only influences the substance but also the process of the bargaining taking place. Indeed, it controls the whole theme of the bargaining.

With regard to substance, Agencies are bound by the Policy and must bargain within the boundaries of the policy. For example, when undertaking bargaining between the AFP and AFPA to replace the AFP Executive Level Enterprise Agreement 2011-2015, the AFP could not make any offer of pay increases or enhancements with employees' representatives unless the PSC is satisfied that the cost is offset with savings from productivity and efficiency. It can be said that the government position is not amenable to anything that goes beyond the policy framework.

With regard to the process influenced by the Policy, using the same example as above, the AFP's approach is to obtain approval of its proposals from the PSC prior to disclosure to bargaining representatives. As a result, the bargaining representatives are in the dark entering into bargaining meetings.

As such, bargaining between the AFPA and AFP for an enterprise agreement could be said as a mere formality. The employer is in a completely dominating position and employees, and their representatives, have no influence with any issue under debate. In this circumstance, collective, good faith bargaining regime becomes a semantic with little true meaning and importance.

Referral by States of workplace relations responsibilities to the Commonwealth

In our original submission to you in this Inquiry, we identified the referral of power over industrial relations from the State of Victoria to the Commonwealth in 1996. However, as we pointed out, 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. We also raised the issue of the Federal Court decision in *United Firefighters' Union of Australia v Country Fire Authority* and what this meant in the continuing uncertainty about the constitutional limitations. As we pointed out, the extensive list of non-referred matters created major difficulties in operating in the Federal jurisdiction under the referred powers.

In our 2012 submission to the *Review of the Fair Work Act 2009* (the Review) 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.

We also pointed out that in the case of Victoria Police 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. Victorian police are only granted freedom of association rights pursuant to their referral.

There is a real question about 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. In our earlier submission to your Inquiry, under the heading "Workplace Relations Provisions in Policing" we referred the Commission to the paper *Fair Work and the Future of Police Industrial Regulation in Australia*, from *Australian Journal of Labour Law* 260, 260-80 by Giuseppe Carabetta. That paper encapsulates the issues raised in this and the earlier submission about our concerns.

For example, Victoria Police could transfer an officer who is 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 disciplinary action even though the FWA purports to grant them the right to take protected industrial action.

Under the present arrangement, a situation could arise whereby a minor sanction by the employer to deny a delegate a benefit, e.g. termination of upgrading, could give

rise to a general protections claim, whereas an officer facing a major sanction such as transfer or dismissal would have no legislative protection except to the extent permitted by the State of Victoria.

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.

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 fewer rights compared with other workers.

In relation to industrial matters, Federal/State relationships will always be marked by a degree of uncertainty. Any legislation should endeavor to limit that uncertainty.

We believe that the Commission should note such anomalies and in your final report make recommendations to rectify the problems in Victoria and ensure it cannot happen in other jurisdictions. This could possibly be achieved by insisting on two principles—that all referrals guarantee freedom of association and bargaining rights consistent with those of other workers.

Mark Burgess
Chief Executive Officer