Police Federation of Australia
The National Voice of Policing

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Senate Education, Employment and Workplace Relations Committees
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The conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees

Thank you for the opportunity to make a submission to your Inquiry. The Police Federation of Australia (PFA) is the national body representing the professional and industrial interests of Australia's 56,000 police officers, across all jurisdictions and has almost 99% membership density. The PFA is a federally registered organisation under the Fair Work (Registered Organisations) Act 2009.

This submission will focus on two key issues of concern –

1. Police Capacity to Bargain; and
2. Freedom of Association provisions.

Before reporting on those issues, the following is a short summary of how the various police jurisdictions across Australia operate in an industrial sense.

TASMANIA

Tasmanian police have 2 jurisdictions covering industrial and disciplinary matters; they are respectively:

- The Tasmanian Industrial Commission established by the Industrial Relations Act 1984; and

- The Police Review Board established by the Police Service Act 2003.

The Industrial Relations Act confers on the TIC a range of powers including:

1. Settle industrial disputes relating to an “industrial matter”
2. Make or vary awards with provisions that relate to an “industrial matter”
3. Register industrial agreements
4. Approve enterprise agreements
5. Conduct private arbitrations

Currently the police award relates only from Constables to Inspectors & the ranks of Commander to Commissioner are specifically excluded from the Act in relation to an “industrial matter”.

The Police Service Act confers on the Police Review Board the power to review determinations for the ranks Constable to Inspector relating to:

1. Termination or demotion
2. A reduction of remuneration resulting from disciplinary matters or inability to perform duties
3. A withholding of remuneration resulting from suspension
4. A fine imposed for disciplinary reasons
5. The payment of costs for damage/loss of equipment
6. Promotion appeals

NORTHERN TERRITORY –

The Northern Territory has established a unique industrial mechanism to regulate the terms and conditions for NT Police.

The power is derived from section 6 the *Northern Territory (Self-Government) Act 1978* (Cwlth) – “…the Legislative Assembly has power…to make laws for the peace, order and good government of the Territory”.

The mechanism for dispute resolution is directly provided for in Part III of the *Police Administration Act* as opposed to the system being subordinate to external industrial legislation. The Act provides:

> *There shall be a Police Arbitral Tribunal that shall have jurisdiction to hear and determine all matters relating to the remuneration and terms and conditions of service of members of the Police Force other than the Commissioner, a Deputy Commissioner, an Assistant Commissioner or a member of the rank of Commander.*

The Tribunal is a discrete body operating for the sole purpose of regulating Police industrial relations and is not subordinate to the mechanics of Commonwealth industrial legislation which applies through the Territory, however it is recognised that basic protections such as Commonwealth legislated employment standards and rights to representation apply.

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.

The relevant provisions provide for effective "good faith bargaining" and efforts of conciliation to be demonstrated by the parties, with the Tribunal only intervening on the request of one or both parties where a matter is in dispute. The Act provides for the Tribunal to make "determinations" that are binding "on the Crown, Commissioner of Police and the members of the Police Force to whom it is expressed to relate" – s.43(1).

Division 2 of Part III of the Act provides for the relevant Minister and the Police Association to enter in written "consent agreements" (agreement) from time to time that relate to the remuneration and terms and conditions of service of members of the Police Force other than the Commissioner, a Deputy Commissioner, an Assistant Commissioner or a member of the rank of Commander, to be enforced for a period of up to 5 years upon certification of the Tribunal. If the case arises that the Minister and Police Association cannot agree to the terms and conditions to be set out in such an agreement, the Chairperson of the Tribunal may determine to proceed to a hearing of the matter(s) in dispute and issue a Determination that is binding on the parties.

WESTERN AUSTRALIA –

Persons are appointed as officers and constables of the Police Force under Part 1 and as aboriginal aides under Part III A of the Police Act 1892. A new category of Police Auxiliary Officer appointed under Part 111B s 38F et seq was introduced in

2009. Since 1927 awards and agreements between the Commissioner of Police (COP) and WA Police Union (WAPU) have been registered in the WA Industrial Relations Commission (WAIRC) which is established under Part II of the Industrial Relations Act 1979.

In various times action has been taken by the COP and the WAPU in the WAIRC to resolve industrial disputation and before the Industrial Magistrates Court (IMC) established under Part III of the Act to enforce awards, agreements and orders to the WAIRC.

On occasions action was taken under the general provisions of the Act before an Industrial Relations Commissioner and on others before a constituent authority called the Public Service Arbitrator.

The WAPU has always been an industrial organisation of employees registered under Division 4 of Part II of the Industrial Relations Act. However, from time to time the issue of jurisdiction i.e. whether police are employees has been raised in WAIRC but the issue was never settled until November 2000 when the Industrial Relations Amendment Act No. 58 of 2000 resolved the issue by an amendment which indicated that the WAPU is taken to be, and to have always been, an organisation of employees.

Since the coming into operation of the amendment the Act applies to and in respect of a police officer, special constable and aboriginal aides and has effect accordingly as if they are Government Officers with access to Public Service Arbitrator and the COP were the employer.

The Public Service Arbitrator has jurisdiction to enquire into and deal with, or to refer to the Commission in Court Session or the Full Bench an industrial matter (as defined) to which it has jurisdiction, except any matter relating to or arising from a transfer, reduction in rank or salary, suspension from duty, removal, discharge or dismissal under the Police Act. With the exception of transfer there is provision under the Police Act to appeal on these matters.

QUEENSLAND

Whilst Queensland Police operate in an industrial sense under the Industrial Relations Act 1999 and the Queensland Industrial Relations Commission, like all police jurisdictions, not all matters are dealt with in the Industrial Relations Commission.

The Police Service Administration Act 1990 (PSAA) establishes the office of the Commissioner and vests in it a wide range of responsibilities including:

- selection of persons as officers and police recruits;
- determination of levels of salaries or wages and allowances;
- promotion or demotion of officers;

- discipline of members of the service.

However the Act also provides that "in discharging the prescribed responsibility the Commissioner:

- is to comply with all relevant awards or industrial agreements, determinations and rules made by an industrial authority".

A "Review of Decisions" within the Act provides for the appointment of a Commissioner for Police Service Reviews.

The Misconduct Tribunals Act provides for the establishment of the Tribunal and jurisdiction to hear an appeal against a reviewable decision ("misconduct") and decide charges of "official misconduct".

Therefore, reviews of breaches of discipline go before the Commissioner for Police Service Reviews whereas appeals against misconduct decisions are heard in the Misconduct Tribunal and matters of official misconduct go straight to the Official Misconduct Tribunal.

All industrial issues go to the Queensland IR Commission.

Future Wage Cases in the QIRC

The Queensland Government has now legislated to impose additional obligations on the Queensland Industrial Relations Commission (QIRC) in relation to future wage cases. The QIRC is now obliged to take into consideration the financial position of the State and address this in any Wage Case decision. There is also a new process whereby the Government can brief the QIRC "on the state's financial position, fiscal strategy and related matters".

Direct Ballot of Members

Another legislative change introduced by the Government is that employers "have a right to directly request employees to approve a proposed certified agreement by voting for it". That is, if the union does not accept a Government wage offer, the Government could directly ballot all members and if a majority of members vote in favour of the offer, that offer then becomes the next EBA.

NSW

The Police Association of NSW currently applies to the NSW Industrial Relations Commission in the cases of:

- Salary claims
- Disputes re individuals and branches
- OH&S prosecutions

- Unfair dismissals
- Discipline

Matters that are not heard and determined in the NSW IRC include Transfers (excluding transfer cost disputes), Promotions and Death and Disability. These matters are specifically excluded from the jurisdiction of the NSW IRC. Workers Compensation matters are generally heard in the Workers Compensation Commission with the exception of some Hurt of Duty claims for officers employed prior to April 1988 which are now heard by the NSW IRC following the dissolution of the Government and Related Employees Appeals Tribunal (GREAT).

NSW Police are also subject to the processes of the Police Integrity Commission for more serious allegations of misconduct.

In the case of Unfair Dismissals & Discipline these are referred to the IRC under the Police Act & not the IR Act. It is a specific regime for Police established following the Wood Royal Commission.

The new Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 (the Amendment Act), requires the Industrial Relations Commission of NSW when dealing with public sector wages claims, to give effect to certain aspects of government policy on conditions of employment of public sector workers. Whilst police were exempted from this Act in respect to their claim for improvements to salaries and conditions lodged in 2011, all future claims will be dealt with under this Act.

For analysis of the new regime and its potential longer term impact, see the discussion in: G Carabetta, 'Public Sector "Wages Cap": The New Framework for the Determination of Public Sector Wages and Conditions in New South Wales' (2012) 25(1) *Australian Journal of Labour Law* 65.

SOUTH AUSTRALIA

The SA *Fair Work Act 1994* applies to police officers and provides for enterprise bargaining, dispute resolution, award making and interpretation, and monetary claims. Police are employed under the *Police Act 1998*.

Salary and working conditions for police are prescribed in the Police Officers Award and the SA Police Enterprise Agreement 2011. Disputes regarding salary and general working conditions require the grievance and dispute avoidance procedures contained in the EA to be followed. If the dispute cannot be resolved any party may refer the matter to the Industrial Relations Commission of SA.

The conduct of police officers is governed by the Police Act. It provides the Commissioner with power to terminate a person's appointment for breaching the Code of Conduct. The Police (Complaints and Disciplinary Proceedings Act) 1985 provides an appeal to the Administrative and Disciplinary Division of the District

Court against termination of appointment on the grounds of discipline. There is no unfair dismissal proceeding available to a police cadet.

A police officer dismissed on grounds of mental or physical incapacity, unsatisfactory performance, or during their probation period has a review to the Police Review Tribunal (Magistrates Court) established under the Police Act. A further appeal from a decision of the Tribunal may be made to the Administrative and Disciplinary Division of the District Court.

In relation to promotional reviews, members may make an appeal to the Police Review Tribunal.

In relation to transfer, the Commissioner may transfer any member from their current position to another position under the Police Act. A member aggrieved by a transfer can appeal to the Commissioner, who is required to abide by the relevant section of the Act dealing with natural justice. If a member is transferred and believes that he or she is being punished for particular conduct then they may appeal to Police Review Tribunal for a review of the decision.

AUSTRALIAN FEDERAL POLICE –

Unlike the various State and Territory police forces, the Australian Federal Police employees rely solely upon the protections offered by the Australian *Federal Police Act 1979* (Cth) and *The Fair Work Act 2009* (Cth).

The extent of FWA's functions and powers are subject to any conditions and restrictions placed upon them by section 69B of *The AFP Act.* The *AFP Act* limits the operation of the FWA with respect to matters pertaining to the exercising of the Commissioners Command Powers (s.69B(1)(a)) and offshore deployments. Section 69B(1)(c) entirely prevents an employee from seeking review or relief from FWA in all disciplinary and managerial decisions covered by Part V of the *AFP Act.* Furthermore, there is considerable scope for these restrictions to be broadened by the regulations of the *AFP Act,* pursuant to s.69B(1)(d).

Though the Australian Federal Police Association (The AFPA) and the PFA notes that operational necessity requires certain constraining of the review and coercive powers of FWA, we are concerned the current system has regularly failed to protect individual employee rights in a multitude of matters (specifically issues arising from International Deployment and disciplinary matters investigated by AFP Professional Standards). The current system provides no effective or transparent process for the review of AFP employment and disciplinary decisions contrary to Regulation 24 of the *Australian Federal Police Regulations 1979*. Ultimately, AFP employees often fall between the cracks of the *AFP Act* and *The Fair Work Act* with sometimes confused application. (See G Carabetta, '*Fair Work* and the Future of Police Industrial Regulation in Australia' (2011) 24(3) *Australian Journal of Labour Law* 260 (Carabetta, 2011), for a detailed discussion on the operation and impact of FW Act for members of the AFP).

Industrially, AFP employees currently work under an Enterprise Agreement negotiated collectively. Though we note the difficulties in attaining such agreements since the abolition of Union Collective Agreements whereby both individuals and trade unions representing non-policing interests are able to influence the bargaining of an agreement that applies to sworn police officers. By virtue of s.69B of *The AFP Act,* FWA's ability to review is somewhat constrained. Nonetheless, in the event of significant workplace changes, The Enterprise Agreement requires consultation with employees and their representatives. We note with concern the AFP's inability to abide by this requirement. With regards to disputes directly pertaining to the Enterprise Agreement, employees must utilise a four step dispute resolution mechanism. This may result in mediation, conciliation and finally arbitration by Fair Work.

VICTORIA –

In 1996 the State of Victoria referred its power over industrial relations within the State to the Commonwealth. The current referral is supported by the Fair Work (Commonwealth Powers) Act 2009 Victoria. The FWCR relevantly provides for the Commonwealth to have power in respect to referred subject matters

(a) terms and conditions of employment including any of the following-

(i) minimum terms and conditions of employment (including employment standards and minimum wages);

(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);

(iii) bargaining in relation to terms and conditions of employment;

(iv) the effect of transfer of business on terms and conditions of employment;

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following-

(i) freedom of association in the context of workplace relations, and related protections;

(ii) protection from discrimination relating to employment;

(iii) termination of employment;

(iv) industrial action;

(v) protection from payment of fees for services related to bargaining;

(vi) sham independent contractor arrangements;

(vii) standing down employees without pay;

(viii) union rights of entry and rights of access to records;

(d) compliance with, and enforcement of, the Commonwealth Fair Work Act;

(e) the administration of the Commonwealth Fair Work Act;

(f) the application of the Commonwealth Fair Work Act;

(g) matters incidental or ancillary to the operation of the Commonwealth Fair Work Act or of instruments made or given effect under the Commonwealth Fair Work Act- but does not include any excluded subject matter;

However section 5 provides for a range of subject matters to be excluded from the reference, relevantly

(2) In addition to the matters set out in subsection (1), a matter referred by section 4(1) does not include-

(a) matters pertaining to the number, identity or appointment (including terms and conditions of appointment, to the extent provided for in paragraph (b)) of law enforcement officers;

(b) matters pertaining to probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers except-

(i) matters pertaining to the payment of allowances and reimbursement of expenses and pertaining to notice of termination of employment and payment in lieu of notice of termination of employment; and

(ii) to the extent that Divisions 1 and 2 of Part 6-4 of the Commonwealth Fair Work Act, as originally enacted, deal with the matters.

The complications that arise from the form of referral are dealt with later in the submission.

POLICE CAPACITY TO BARGAIN

The effectiveness, or more rightly, ineffectiveness of police ability to bargain and access to arbitration is the key issue for the PFA.

We made submissions to both the Senate Employment Workplace Relations and Education Committee Inquiries in the Workplace Relations Amendment (Work Choices) Bill 2005 and to the Fair Work Bill 2008. On both occasions, those submissions pointed to a number of other industrial areas where we argue police had had their rights significantly eroded compared with the wider workforce. Whilst those issues were recognised specifically by the Inquiry into the 2008 Fair Work Bill, limited legislative response has occurred to date.

Police officers, due to our Oath of Office, could be prejudiced in our capacity to fully participate in enterprise bargaining, particularly as we 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. We are concerned that following legislative IR changes, particularly in NSW and Queensland, police will be left in a less favourable industrial position.

In 2003 the Queensland Police Union sought a judicial clarification as to the right of police to take industrial action in support of their bargaining position.

Faced with an uncertainty of outcome and a view that police should not be free to strike, the Government proposed introducing legislation to prevent police from taking certain types of industrial action. Clearly, the Government considered the effect of this would prevent police from taking industrial action thus limiting their ability to fully participate in collective bargaining. As such, this solicited consideration of the likely impact of these restrictions, as they affect the rights and obligations flowing from ILO conventions.

In New Zealand (in 2001) the Government attempted to introduce a new clause, (identified as *Clause fa*), into the Police Act. This required any arbitrator to specifically consider “the Commissioner’s ability to fund any resulting Police expenditure as determined by Vote Police appropriation”.

Legal advice received at the time by the New Zealand Police Association from their constitutional legal advisor Sir Geoffrey Palmer said:

> *"tying of the Commissioner's ability to pay to the Vote suggests that the Government will be able to ensure there is never any money for an increase by keeping the Vote screwed down. This comes close to being an abuse of legislative power in circumstances where those subject to the law have no right to strike".*

This matter was resolved for sworn police, by the Government agreeing to "Final Offer Arbitration" (FOA) as police did not have the right to strike or take any real form of industrial action. FOA means that in the event of the parties not reaching a negotiated outcome, the Association or the department's final offer can be accepted by an arbitrator.

Without dwelling on the Queensland or New Zealand position (as both eventually achieved negotiated outcomes to their wage deals), the reasoning behind this legal approach based on ILO conventions, we argue, remains relevant to police industrial relations, and in particular to current IR trends in both Queensland and NSW.

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 by requiring the tribunal to give effect to certain aspects of government policy on conditions of employment of public sector workers, including police, may very well fail to satisfy these ILO provisions.

Victoria

In 1996 the State of Victoria referred its power over industrial relations within the State to the Commonwealth. In practical terms this allowed the Victoria Police Branch of the PFA to use the dispute settling/award making powers of the then Australian Industrial Relations Commission (AIRC) in respect to Victorian Police without the need for an underpinning interstate industrial dispute which would otherwise have been required.

However in the case of Victoria Police, matters pertaining to the number, identity, 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. In other words, there was no provision for disputes over these types of issues to be resolved. (See Carabetta, 2011, above, for a more detailed discussion on the operation and impact of the exclusions).

As an example, in March 2000 in the matter of *Dempster v Comrie*, the issue of the interaction of the freedom of association provisions and the matters excluded from the reference was dealt with. In this matter, *Dempster* alleged that he had been transferred because he was a union official, a reason prohibited by the freedom of association protections under the Commonwealth Act. The Full Bench of the Federal Court held that the terms of the referral denied *Dempster* those freedom of association protections, even if the actions of the Chief Commissioner were for prohibited reasons of union affiliation.

Another example occurred in 2006 when Victoria Police sought to abolish a whole section, thus forcing a large number of members to find alternate roles. A dispute was notified arguing a breach of the organisational change provisions, namely, a failure to consult, in their Workplace Agreement.

The matter was dismissed in the AIRC which argued that the matter was a transfer issue as a result of the section being disbanded and therefore the Commission had no power to hear the dispute.

These two examples highlight how members of Victorian Police are precluded from having disputes of this nature adjudicated on. Australia is a signatory to the ILO Conventions on Freedom of Association, just not if you happen to be a Victorian Police Officer.

Conclusion:

As can be seen from the foregoing, police operate in a myriad of IR systems across the country. Following the referral of IR powers in Victoria in 1996, we have been conscious that other states could have done likewise, plunging more jurisdictions into the difficult environment that the Victoria Police Association has operated in now for some years. As previously advised, we have made several submissions to

Federal Parliamentary Inquiries outlining the concerns we have about such a scenario with limited legislative response to date.

Of more recent times, it has become apparent that states may just place significant restrictions on the way their industrial tribunal operates, as with NSW and Queensland.

Whatever the outcome, be it a unitary approach to IR or restricted state based environments, there are a number of issues that we argue impact on police to a greater extent than the wider workforce.

We put forward those issues for the consideration of the Committee.

1. **The current system of referral (and non-referral) of industrial matters has created a system where the extent to which the Commonwealth complies with its international obligations is determined by individual States. In our view this is not a situation that a Commonwealth Government should allow to occur particularly since the Commonwealth Government has taken greater responsibility for IR issues;**

2. **The rights of Victorian Police to Freedom of Association is removed by the state retaining its rights to transfer, demote and discipline police because of their decision to participate (or not participate) in the affairs of a registered trade union. In our view this situation is in breach of ILO conventions;**

3. **The rights of public sector employees in some jurisdictions to collectively bargain is being curtailed by the imposition of a legislatively imposed wages cap, as in NSW, or by the State obliging their IRC to take into consideration the financial position of the State in any Wage Case decision, as in QLD, especially when the State does not have to make out its capacity to pay argument in an open court or be cross examined on the issues it raises. These matters are exasperated for police, as our ability to fully maximise our bargaining position is restricted by virtue of our being an essential emergency service. As a result, we argue that this likewise is in breach of ILO conventions.**

4. **In respect to the State having the capacity to direct ballot members as proposed in Queensland, we argue, that unless there was a clearly identified impasse in negotiations between the employer and employee representative organisation, a direct ballot of members by the employee would be a breach of the ILO convention on good faith bargaining;**

The PFA would be pleased to appear before the Committee to elaborate on the above issues on behalf of our 56,000 members.

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