Senate Education, Employment and
Workplace Relations Committee Inquiry into *The Conditions of Employment of State Public Sector Employees and the Adequacy of Protection of their Rights at Work*

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INTRODUCTION

1. This submission is made in my capacity as an academic with expertise in researching, analysing and commenting on police industrial relations (IR) law issues. It draws not just on my scholarly work in this area, but on insights gained from consultations with the Police Federation of Australia (PFA), the Victoria Police Association and the New South Wales Police Association.

2. The submission focuses, firstly, on the operation and impact of the *Fair Work Act 2009* (Cth) (*FW Act*) for members of the Victoria police; and secondly, on the operation and impact of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* NSW for members of the New South Wales Police Force.

3. It addresses in particular the following aspects of the Committee's Terms of the Reference:

> The conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees, including:
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> (i) whether:
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> (A) the current state government industrial relations legislation provides state public sector workers with less protection and entitlements than workers to whom the Fair Work Act 2009 (the Act) applies,
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> …
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> (D) the current state government industrial relations frameworks provide protection to workers as required under the ILO conventions ratified by Australia,
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> (E) state public sector workers face particular difficulties in bargaining under state or federal legislation, and
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> (F) the Act provides the same protections to state public sector workers as it does to other workers to the extent possible, within the scope of the Commonwealth's legislative powers; and
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> (ii) noting the scope of states' referrals of power to support the Act, what legislative or regulatory options are available to the Commonwealth to ensure that all Australian workers, including those in state public sectors, have adequate and equal protection of their rights at work.

INTERNATIONAL LABOUR ORGANISATION STANDARDS AND THE REGULATION OF POLICE EMPLOYMENT IN AUSTRALIA

4. Major International Labour Organisation (ILO) conventions promoting collective bargaining expressly acknowledge the acceptability of restricting the right of police officers to engage in collective bargaining and to strike.[1] However, the ILO has also made it clear that while it is

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[1] In particular, ILO Convention 87 on Freedom of Association, via Article 9, and ILO Convention 98 on the Right to Organise and Collective Bargaining, via Article 5, provide:
'1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.'

permissible to limit the right to strike in relation to essential service and public employees, this must be counter-balanced by a fair and impartial arbitration system. Specifically, the ILO Committee of Experts has said:

> 'If strikes are restricted or prohibited in the public services or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by *adequate impartial and speedy conciliation and arbitration procedures*, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.'[2]

5. By analogy, it seems valid to argue that because State-appointed police officers in Australia operate under the same basic bargaining laws applicable to other employees, they ought to enjoy the same compensatory measures as these workers.[3] In particular, it seems valid to argue that, absent a right to strike, State police officers ought to have access to an 'adequate impartial and speedy' arbitration (or equivalent) procedure for the resolution of disputes. This alternative measure is needed both to safeguard police officers' interests and to protect the community from the flow-on harms of long-running police bargaining disputes.

6. Traditionally, while state-appointed police in Australia have been prohibited from striking,[4] they have had access to binding arbitration procedures for the resolution of bargaining disputes – specifically, compulsory arbitration under the conciliation and arbitration systems of the general State IR Acts.[5] An important feature of these pay-setting systems for our police (consistently with the ILO standards above) has been the right to collectively bargain over employment conditions supported by the availability of binding arbitration to bring closure to negotiations that do not settle.

7. However, as outlined below, moves in both Victoria and New South Wales to significantly limit arbitration for all employees mean that police officers in these jurisdictions have been left without an adequate impartial dispute resolution system as a counterbalance to the loss of the right to strike. This issue lies at the very 'heart' of police industrial regulation in Australia, and must also ultimately impact on operational policing and criminal justice policy.

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[2] International Labour Organisation, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 69th sess, International Labour Office, Geneva (1983) 66 (emphasis added).

[3] See, for example, R J Hawke, 'Do Police Have Industrial Muscle' in K T Serong (ed), *Police Industrial Relations Seminar* (Abaris Printing and Publishing Co, Melbourne, 1982) 105–20. A similar approach to the ILO's standards vis-a-vis police officers has been applied in overseas jurisdictions: see, for example, *In the Matter of an Interest Arbitration Between The Durham Regional Police Association and The Regional Municipality of Durham Police Services Board* (June 2007) <http://www.policearbitration.on.ca/content/stellent/groups/public/@abcs/@www/@opac/documents/awards/07-008.pdf>, at [76].

[4] See G Carabetta, '*Fair Work* and the Future of Police Industrial Regulation in Australia' (2011) 24(3) *Australian Journal of Labour Law* 260, at 263, n 20.

[5] Ibid 265–6; K D Marshall, 'Survival Within the Arbitration System' in K T Serong (ed), *Police Industrial Relations Seminar* (Abaris Printing and Publishing Co, Melbourne, 1982) 105. The use of arbitration under these (and other) models for police follows a long-standing practice in Australia.

POLICE BARGAINING AND ARBITRATION IN VICTORIA

8. Members of the Victoria Police now operate under the *Fair Work Act 2009* (Cth) (*FW Act*), by virtue of the Victorian reference of powers to the Commonwealth.[6] However, as highlighted now by a number of high-profile pay disputes,[7] under the *Fair Work* provisions there is very limited scope for compulsory arbitration of bargaining disputes. In particular, the current framework, while centered on 'good faith' bargaining, does not provide for situations where the parties reach bargaining impasse. Further, because the current 'tests' for arbitration under the Act are so difficult to satisfy – including those for 'good-faith bargaining breaches' – intractable disputes may continue indefinitely.[8] This has particular significance for police bargaining disputes, where the public interest is paramount.

9. In addition, while members of the Victoria Police may be afforded a right to take protected industrial action in support of bargaining claims under the *Fair Work* regime (and the employer the right to 'lock out'), as emergency service workers they have a limited ability to utilise these aspects of the new system. For one thing, as I have argued elsewhere,[9] there are unresolved questions surrounding the scope and validity of the 'protected action' provisions of the *FW Act* for Victoria police officers. A major reason for this is the apparent conflict between the protected action provisions, on the one hand, and the Victoria Police Act and police officers' oath of office on the other.[10]

10. Further, it may be doubted how access to the protected action provisions may be effectively used by police and other emergency service workers in support of bargaining when, by definition almost, any industrial action by them would be a threat to personal health and safety and so would lead to a termination or suspension order under the Act.[11] This has prompted Justice Boland to suggest that consideration be given to a US-style 'mandatory interest arbitration' model for emergency services workers operating under the *FW Act*.[12] Mandatory interest arbitration is especially prevalent in the US and other common law jurisdictions for police and other essential

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[6] *Fair Work (Commonwealth Powers) Act 2009* (Vic) (Referral Act).

[7] In particular, the Qantas, Victorian nurses, Victorian public sector, and Cochlear disputes in 2011–2; see A Forsyth, 'Qantas Case Shows the Need for Interest Arbitration', *The Conversation*, 28 November 2011 <http://theconversation.edu.au/qantas-case-shows-the-need-for-interest-arbitration-4436>; (Justice) R Boland, 'Some Current Matters of Interest' (Paper presented at the Annual Conference of the Industrial Relations Society of New South Wales, Kiama, 18 May 2012).

[8] Forsyth, above n 7; A Forsyth and A Stewart, Submission to the Fair Work Act Review Panel, February 2012, at 22–8, Pt 6.4; and Boland, above n 7, at [16-39]. Justice Boland, speaking extra-judicially, refers specifically to the long-running Victorian nurses dispute.

[9] Carabetta, above n 4.

[10] See Carabetta, above n 4, 268–9, for a more detailed discussion on related limitations.

[11] Boland, above n 7, at [26], referring to the position of emergency services generally under the *FW Act*. See also, Submission of the Australian Nursing Federation (Victoria Branch) (15 January 2013).

[12] Boland, above n 7, at [35], endorsing the earlier observations of Professor Forsyth, above n 7, on the advantages of US and Canadian models of mandatory interest arbitration.

services, echoing the common rationale of preventing strikes that may be harmful to the public interest.[13]

11. Given that mandatory interest arbitration can provide a solution to bargaining impasses, the concept warrants further examination.[14] The concern would be that this may lead the parties to rely on third-party involvement and undermine bargaining — the so-called 'chilling effect'. However, research into police bargaining systems has shown that this depends on the precise enabling measures and processes in place, including the *type* of arbitration.[15] One option may be Final-Offer Arbitration (FOA),[16] used to settle police bargaining disputes in Canada, New Zealand, and in some US States. FOA is said to offer the advantage of a guaranteed closure mechanism, while simultaneously avoiding the perils of convention arbitration. In particular, there is evidence to suggest that it reduces the 'chilling effect' common to conventional arbitration and encourages the parties to present more reasonable, middle-ground offers.[17]

12. Another feature of the *FW Act* regime that significantly affects the determination of employment conditions for Victoria police officers is the limitation on the range of matters that may be subject to the Act.[18] Section 5 of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) excludes a range of matters relating to law enforcement officers.[19] These restrictions significantly limit, purportedly for public policy reasons, the role of the arbitrator in the determination of police employment conditions.[20]

13. To limit the scope of bargaining matters for police as compared with the scope of matters available to other public sector employees seems contrary to the 'good faith' bargaining

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[13] See, for example, New Jersey's *Police and Fire Arbitration Act* establishing a specialist process for compulsory interest arbitration for both firefighters and law enforcement officers. In New Zealand, police are the *only* occupational group with access to compulsory (final offer) arbitration: Ian McAndrew, 'Collective Bargaining Interventions: Contemporary New Zealand Experiments' (2012) 23(2) *The International Journal of Human Resource Management* 495, 495–510.

[14] Cf Forsyth, above n 7.

[15] See, for example, the discussion on the system of final-offer arbitration used to settle police bargaining disputes in New Zealand: McAndrew, above n 13.

[16] By contrast with conventional arbitration, under FOA the arbitrator must choose one of the unalterable offers of one or the other party — either on each issue or an overall 'package' basis — based on the elements of each party's final proposals. It normally applies after periods of conciliation, or after mediation and/or fact finding has proven unsuccessful, or on other bases.

[17] Mike Carrell and Richard A Bales, 'Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining' (6 February 2012) *Ohio State Journal on Dispute Resolution* <http://ssrn.com/abstract=2000185> citing a number of US examples. See also Amy Lok, 'Final-Offer Arbitration' (2008) 10(4) *ADR Bulletin* <http://epublications.bond.edu.au/adr/vol10/iss4/1>.

[18] See Carabetta, above n 4, 272–4, for details.

[19] Law enforcement officers include members of the Victoria Police, police reservists, police recruits and protective service officers: *Fair Work (Commonwealth Powers) Act 2009 (Vic)*, s 3.

[20] Some of the excluded matters are based on separate, constitutional grounds under *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, and apply to all State public servants.

principles of the *FW Act*. It also impacts unfairly on police, especially as they are unable to strike. In Victoria, matters which had previously been regulated by State industrial agreements are now excluded from the *FW Act*. This has forced the parties to look to alternative means of managing their industrial affairs outside of the formal framework;[21] however, such arrangements do not provide police officers with sufficient certainty that these rights are enforceable.

14. Further, there are inherent difficulties in determining the intended scope of the excluded matters. One concern is that it can often be difficult to draw a line between employment issues, on the one hand, and policy or operational matters on the other. However, the fact that the exclusions are described in broad terms only exacerbates this problem. To what extent the exclusions are properly grounded in the uniqueness of police work also seems questionable, now that many police employment conditions substantially reflect general employment conditions.

15. The current approach to exclusions creates an uncertain and complex environment for police IR in Victoria, including bargaining. A preferred approach would be to replace the existing broad categories of 'matters' and spell out the types of operational situations where (and to what extent) exemptions ought to apply. Even then however, complementary alternative regulatory measures must be put in place, to help avoid costly disputes and remove gaps in the regulatory framework for police.

POLICE ARBITRATION IN NEW SOUTH WALES[22]

16. Like other Australian jurisdictions, for many years New South Wales has had a system of 'conventional' conciliation and arbitration. A well-recognised feature of this system has been broadly cast legislation with significant powers for the Industrial Relations Commission (IRC) to determine pay disputes for NSW employees. NSW had retained this regime for its public sector employees, despite referring the bulk of its private sector IR powers to the Commonwealth in 2009.

17. This scheme has now been significantly modified by the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW). The Act amends the *Industrial Relations Act 1996* (NSW) (*IR Act 1996*) to require the IRC to give effect to certain aspects of government policy on conditions of employment of public sector employees. Section 146C of the IR Act now provides:

> **s 146C Commission to give effect to certain aspects of government policy on public sector employment**
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> (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
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> (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and

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[21] It is understood that a number of matters excluded from the formal *FW Act* bargaining regime are nonetheless included within the parties' collective agreement, but this still raises questions as to enforceability.

[22] This section of the submission draws upon Giuseppe 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.

(b) that applies to the matter to which the award or order relates.

(2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.

(3) An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.

18. The current policy[23] is contained in the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW), providing that increases to employee-related expenses above a 2.5 per cent per annum 'cap' must be offset by employee-related cost savings. The Regulation applies to a wide range of New South Wales public sector employees, and now includes members of the New South Wales Police Force.[24]

19. An important stipulation in s 146C (7) of the *IR Act 1996* is that the above provisions have effect despite s 10 of the IR Act (the Commission's power to fix fair and reasonable conditions of employment) or s 146 of the Act (the Commission's general functions obliging it to take into account public interest, the objects of the Act and state of the economy) or any other provisions. Those two provisions clearly give a broad discretion to the IRC in exercising its wage determination functions but that discretion, when exercised now in relation to public sector employees, is subject to various restrictions when the Commission is dealing with claims that seek to increase salaries or wages and conditions involving employee-related cost.[25]

20. The clear intention of the changes is unilaterally to use the law-making power of the State government to dramatically alter the conditions on which arbitration occurs in favour of the employer. The 2.5% cap was not reached through negotiation between the parties. It was given effect to through legislation. This approach is highly unusual, and clearly contrary to the ILO's requirements for an effective and impartial arbitration procedure.

21. The NSW government has said that the new policy is primarily aimed at cutting public spending – which can hardly be consistent with the ILO's requirements. Such a move is even more contentious when it is considered that unlike other employees, police are unable to strike in support of bargaining claims.

22. Similarly – and as with Victoria – from a practical perspective, if the parties are to have confidence in the arbitration system its impartiality needs to be retained. The new scheme in NSW has the very realistic potential of undermining this goal, partly, because the arbitrator's decision making powers have been greatly diminished, but also because the Police Association's

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[23] Department of Premier and Cabinet (NSW), *NSW Public Sector Wages Policy 2011* (June 2011).

[24] For the purposes of s 146C, 'public sector employee' means a person employed in the Government Service, the Teaching Service, the Police Force, the Health Service, the service of Parliament or any other Crown servant: *Industrial Relations Act 1996* (NSW), s 146C(8). For a time, members of the police force were the one-off exception to the new scheme.

[25] See further, Carabetta, above n 22.

ability to bargain on matters crucial to their members' interests has been diminished via a unilateral change in government legislation.

23. The question of how such a change might affect the community has also been overlooked.[26] A United States study[27] on how police officers responded to changes in compensation found that police performance declined dramatically when arbitrators ruled against the police union. This suggests the changes could have major implications for both productivity and public safety.

24. Further, experience has shown that — legal and professional constraints notwithstanding — police strikes can occur. Placing the NSW police in such a restrictive bind has the very real prospect of undermining any restrictions on industrial action. NSW police officers and the Association may be unwilling to strike, but other forms of police industrial action will undoubtedly occur if officers believe the role of the Association has been marginalised.[28]

25. For these reasons, the 'wages cap' provisions should be abolished. Alternatively, if the current regime is maintained, one option would be to introduce a fairer and more neutral 'ability to pay' criterion – one that takes account of *both* the interests of police officers and the community's interests as taxpayers.[29]

26. In any event, the current wages cap scheme should be replaced by a more neutral approach, to restore the Association's ability to engage in bargaining, and to provide an effective alternative dispute-settlement mechanism without relying on the right to strike.

CONCLUSION

27. The traditional approach to police employment regulation in Australia has been to simply 'group' police with other workers but then make exceptions based on the requirements of operational policing. The problem with this approach has been a tendency to focus on the *extent* of exclusions, rather than the basis for the exclusions and their relationship with the general IR framework.

28. In most if not all Western countries where police have a right to bargain, *specialist* alternative procedures are used for managing police bargaining disputes. In Australia, this presently occurs only in the case of the Northern Territory Police, who operate under a specialist police arbitral

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[26] Cf Anthony Mapp, *Arbitration Reform Bill A-3393*: *New-Jersey's Dramatic Change in Compulsory Interest Arbitration* (date unknown), Rutgers School of Law-Newark http://pegasus.**rutgers**.edu/~rcrlj/articlespdf/**Mapp**.pdf, discussing similar 'salary-cap' reforms to the New Jersey police and fire arbitration regime, which limit annual base salary increases awarded to police and fire personnel through arbitration to an average of 2 per cent.

[27] Ibid 16–7. The same study, according to Mapp, found that union losses are associated with a 5.5 per cent increase in reported crime rates in the months following arbitration.

[28] Ibid 17–8.

[29] A similar recommendation was made to the New Zealand Police Association in response to a similar government proposal in relation to the New Zealand Police arbitration system in 2001: Gordon Anderson, 'Proposed Changes to the Arbitration Regime under the Police Act (Police Amendment No 2) Bill 2001)', Advice Prepared for the New Zealand Police Association, 28 August 2001. The proposal was ultimately withdrawn.

tribunal model.[30] For Victoria and New South Wales – and perhaps other states – a new approach is needed to answer two key questions:

1) What alternative dispute-resolution arrangements/mechanisms are required for police officers? and

2) What measures ought to be put in place to achieve a more stable, fair and consistent model?

29. Noting the current scope of states' referrals of power to support the *FW Act*, one option for the Commonwealth is to introduce reforms to give effect to Australia's international obligations to provide a fair and independent arbitration scheme for police, based on the 'external affairs' power. The decision of the Full Federal Court in *Konrad v Victoria Police*[31] shows how a federal government could legislate to give employment rights to State police officers by relying on relevant ILO standards.[32] A new federal law could not regulate some of the employment conditions of State police officers, particularly for higher level office-holders.[33] However, within these limits, a new federal framework would generally be capable of displacing any current State laws that do not meet relevant federal standards.

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[30] *Police Administration Act 1978* (NT), Pt III, Div 1, Div 2. Members of the Police Force of the Northern Territory are not within the meaning of 'public sector employment' under the *Fair Work Act 2009*: Fair Work Regulations 2009, reg 6.08(3).

[31] (1999) 91 FCR 95 (*Konrad's Case*).

[32] The Full Federal Court's decision in *Konrad's Case* concerned the former termination provisions of the then *Industrial Relations Act 1988* (Cth), based on the ILO Convention 158 Concerning Termination of Employment at the Initiative of the Employer.

[33] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188. See further (Giuseppe) J Carabetta, 'Employment Status of the Police in Australia' (2003) 27 *Melbourne University Law Review* 1, 21–3, discussing the possibility, based on the High Court's reasoning in *Re AEU*, of additional constitutional limitations where State police officers are subject to federal industrial laws.