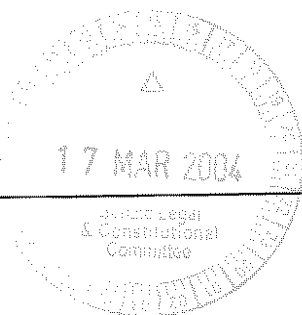


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16 March 2004

Senator Marise Payne
Chair
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator Payne

Inquiry into the Australian Federal Police and Other Legislation Bill 2003

The Senate Legal and Constitutional Committee requested additional information about issues surrounding the provisions of the Australian Federal Police and Other Legislation Bill 2003 in correspondence dated 9 March 2004.

Please find attached the answer to the question on notice taken at the public hearing into the provisions of the Bill on Monday 8 March 2004, and the answers to the additional questions as detailed in your correspondence.

If I can be of any further assistance in this matter, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to be 'John Lawler', written over a horizontal line.

John Lawler
Performing the duties of
Deputy Commissioner

AFP Web site: www.afp.gov.au

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SENATE LEGAL & CONSTITUTIONAL LEGAL COMMITTEE
AUSTRALIAN FEDERAL POLICE AND OTHER LEGISLATION AMENDMENT
BILL 2003
QUESTION ON NOTICE

Senator Ludwig asked the following question at the hearing of 8 March 2004:

Question 1 (Federal Agent Ney - AFP) (p.24, Proof Hansard)

Senator LUDWIG—..... Do we know what will be in that section 24 order?

Federal Agent Ney—It would be pretty much a direct lift of the current MX award or arbitrated award; however, there are certain items in there that cannot be transferred because they clash or conflict with current AFP Act requirements.

... ..

Senator LUDWIG—So which are the provisions that are still not clear or that clash? Have they been conveyed to the work force?

Federal Agent Ney—They have been conveyed in a number of different ways, both through the unions and—

Senator LUDWIG—Is there a document summarising that information that you could make available to the commit

Federal Agent Ney—I do not know that we have a document summarising it.

Senator LUDWIG—Perhaps you could take it on notice just so we have an understanding of which provisions you say will not apply or will conflict.

I am advised that the answer to the honourable Senator's question is as follows:

A summary of all proposed amendments/deletions and the rationale behind such is at Attachment A for the Committee's information.

The section 24/section 27 Determination will replicate the provisions of the *Workplace Relations Act 1996* (WRA) section 170MX Award, the only exceptions being:

- clauses or words that do not impact on the provision of remuneration or conditions;
- clauses that conflict with the Commissioner of the AFP's powers under the *Australian Federal Police Act 1979* (AFP Act), or the WRA; or
- wording or definitions that require changes as a result of the transfer of employment from the Australian Protective Service (APS) into the Australian Federal Police (AFP).

To ensure the section 72 'no less favourable' obligations are met, the section 24 *Public Service Act 1999* (PSA) and section 27 AFP Act Determinations, will contain a

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Savings Clause aimed at reinforcing the intent of preserving the remuneration and conditions that PSOs are currently entitled to under the section 170MX award.

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SENATE LEGAL & CONSTITUTIONAL LEGAL COMMITTEE
AUSTRALIAN FEDERAL POLICE AND OTHER LEGISLATION AMENDMENT
BILL 2003
ADDITIONAL QUESTIONS

Transitional Employment Issues

1. **Of the current provisions of the s170MX award, please specify:**
- (i) which provisions will be picked up by the s.27 determination?**
 - (ii) of those that are picked up, which will be amended and in what way?**
 - (iii) which provisions will be discarded and why?**

(Attachment A provides a summary of the clauses that will be deleted and/or amended, and the rationale behind the changes. These issues have also been in part addressed by the answers provided to Senator Ludwig's Question on Notice. Attachment A should also be referred to in conjunction with the answers provided to questions 1(ii) and 1(iii)).

(i) The section 24/section 27 Determinations will replicate the provisions of the *Workplace Relations Act 1996* (WRA) section 170MX Award, the only exceptions being:

- clauses or words that do not impact on the provision of remuneration or conditions;
- clauses that conflict with the Commissioner of the AFP's powers under the *Australian Federal Police Act 1979* (AFP Act), or the WRA; or
- wording or definitions that require changes as a result of the transfer of employment from the Australian Protective Service (APS) into the Australian Federal Police (AFP).

To ensure the section 72 'no less favourable' obligations are met, the section 24 *Public Service Act 1999* (PSA) and section 27 AFP Act Determination, will contain a Savings Clause aimed at reinforcing the intent of preserving the remuneration and conditions that PSOs are currently entitled to under the section 170MX award.

(ii) Clauses and terms that are amended are detailed in Attachment A. These include:

- changed terminology and titles due to the differing legislative and governance frameworks of the APS/Public Service and the AFP;
- substituting the APS Performance Management Plan (existing increment arrangements are protected in the proposed Determination) with the AFP's Performance Development Agreement (as modified to fit the APS Information Technology infrastructure);
- a proposal to refer disputes regarding the implementation of the section 27 Determination to the existing AFP Board of Reference; and
- changes which may be needed in employee representation.

(iii) Deleted clauses are either:

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- no longer applicable or redundant, for example clauses that deal with subject matter such as title, residency and operative dates of the original award; or
- in conflict with the Commissioner's powers as set out in the AFP Act 1979. These include:
 - clause 19.1.2(c) - application of the 'excess employee' clauses and subsequent redundancy provisions. These apply where an employee's duties are to be performed at a location where the employee is not already stationed and is not willing to make the geographical move. This clause conflicts with the Commissioner's powers under section 40H of the AFP Act. This provision gives the Commissioner the power to determine where an employee's duties are to be performed.
 - clause 20 - termination of employment. This clause conflicts with the Commissioner's powers under section 28 and related provisions of the AFP Act.

2. The CPSU (submission 1) argues that protective service officers 'face the prospect that after the compulsory transfer they would be found not to meet [the competency and qualification] requirements [under proposed section 40EB] and be terminated without redundancy.'

- (i) Upon transfer, is it envisaged that there may need to be redundancies?
(ii) If so, what entitlements will be offered?**

The Bill will deem an APS employee who is a protective service officer (PSO) at the time of transfer to be a PSO after the transfer is effected. This preserves the competency and qualification requirements for PSOs post transfer.

The role of a PSO will not change as a result of integration. The full function of the APS will be integrated into the AFP. There is consequently no consideration being given to redundancies in such circumstances.

This does not effect the proposal to include the existing redundancy provisions under the section 170MX award in the section 24 Determination.

3. The CPSU submission then suggests that the Bill be amended to specifically recognise that transferring APS employees automatically hold the required competencies and qualifications. What is your response? What are the advantages and disadvantages of this approach? What problems might such a provision cause?

As outlined in the answer to Question 2, competencies and qualifications will continue to be recognised post-integration by necessary implication under the deeming provisions in the Bill.

Consequently, the AFP sees no benefit in an express provision in the Bill deeming transferred APS employees who hold the necessary competency and qualifications immediately prior to integration as competent and qualified post-integration.

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4. **The CPSU (submission 1) also suggests that the Bill be amended to continue the application of current APS industrial awards (and any side memorandum of agreement that is in place) until new industrial arrangements are developed. What are the advantages and disadvantages of this approach? What problems might such a requirement cause? Why are the mechanisms under sections 24 and 72 of the Public Service Act being used instead?**

The PSA contains a comprehensive "machinery of government changes" mechanism in section 72 through which Government decisions on administrative arrangements and reorganisations can be implemented. This provision contains protections for entitlements of transferred employees.

Both the Australian Public Service Commission and the Department of Employment and Workplace Relations have advised the AFP that section 72 is the appropriate and preferred mechanism to transfer APS employees into the AFP.

5. **Please list the industrial instruments (including determinations and any side memorandum of agreement that is in place) and employment related legislation that:**

- a. **currently apply to APS employees;**
- b. **currently apply to AFP employees; and**
- c. **will apply to APS transferees from the date of transfer into the AFP.**

Attachment B outlines the range of primary industrial instruments that currently apply, and that will apply post-transfer for employees in both the APS and AFP.

The principal pieces of employment legislation that currently apply to the APS are the:

- *Australian Protective Service Act 1987;*
- *Public Service Act 1999; and the*
- *Workplace Relations Act 1996.*

The principal pieces of employment legislation that currently apply to the AFP are the:

- *Australian Federal Police Act 1979; and the*
- *Workplace Relations Act 1996.*

The principal pieces of employment legislation that will apply to the AFP post integration will be the:

- *Australian Federal Police Act 1979; and the*
- *Workplace Relations Act 1996*

Local agreements made under the Flexibility and Consultative Clauses of the s170MX Award on a station by station basis will continue to apply on the same terms as they were made, until they are modified/amended, again using the processes outlined in the section 170MX award, as called up in the section 24/section 27 Determinations.

There are also a large number of determinations made under the PSA that apply in full or in part to the APS. They will continue to apply after integration.

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Determinations made under the Australian Federal Police Act go mainly to overseas terms and conditions, although some AFP instruments call up APS conditions.

6. If, one week after transfer into the AFP (before any new industrial agreement applying to APS transferees is agreed):

- a. **a protective service officer's employment is terminated, what provisions will apply in relation to termination and redundancy? What external review rights and mechanisms will that officer have? (Noting that subsection 170CE(5B) of the *Workplace Relations Act 1996* prescribes a 'qualifying period of employment' of 3 months before a review application can be made to the AIRC).**
- b. **a protective service officer is aggrieved about a decision made in relation to their remuneration, conditions, rosters and other work-related matters, what can they do about that decision? What external review rights and mechanisms will that officer have?**
- c. **a protective service officer is aggrieved with the duties that have been assigned to them (eg shifts/location), what can they do about it? What external review rights and mechanisms will that officer have?**
- d. **Where will officers' levels of remuneration be set out?**

(a) The provisions of the WRA will apply. The redundancy provisions currently applying in the section 170MX award will continue to apply in the proposed section 24/section 27 Determinations with the exception of redundancy in respect of transfer of duties (as outlined in Question 1(iii)).

The transferred employees will not be subject to any probationary period upon transfer into the AFP. In light of this and the fact that the transferred employees will remain Commonwealth Public Sector Employees for the purposes of section 4(1) the WRA, the AFP does not consider that section 170CE(5B) of the WRA applies.

(b), (c) It is the AFP's intention to call up the AFP Board of Reference in the section 24/section 27 Determinations as provided for under section 131 of the WRA, and to give it the same powers of review over remuneration and conditions as it currently has in relation to AFP employees.

(d) An officer's level of remuneration will be exactly as specified in the section 170MX award and will be called up in the proposed section 24/section 27 Determinations.

7. Is the intention to negotiate an entirely new industrial agreement to cover both AFP employees and APS transferees after the transfer? Or will the current AFP Certified Agreement be amended to incorporate protective service officers? What process is required to amend the AFP Certified Agreement to incorporate APS transferees? Has the AFP discussed these issues with all relevant employees? If so, please provide details.

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The Commissioner has communicated his intention to commence negotiations for replacement industrial agreements for transferred APS employees as soon as practicable after integration in an email sent to all APS and AFP staff in March 2004. The existing remuneration and other conditions, which are to be preserved in the section 24/section 27 Determinations, will continue until such time as replacement agreements are finalised. Negotiations with the relevant unions and ultimately the AIRC will determine whether there is a separate agreement to cover the protective service function or a consent variation to the current AFP Certified Agreement.

- 8. If, after transfer, no agreement is able to be reached to incorporate protective service officers into a new industrial agreement, what mechanisms will be available to resolve that dispute? What terms and conditions of employment will apply to protective service officers and for what period of time? Can the AIRC be accessed to resolve the dispute?**

Immediately after integration, the relevant industrial agreements (a section 27 Determination for most PSOs) and the AFP legislative and governance framework will be the source of the full compliment of employment terms and conditions, entitlements and obligations. The remuneration and conditions sourced from the section 27 Determination will continue to apply until replaced by an industrial award or other agreement under the WRA. The normal industrial processes as set out in the WRA will apply to the negotiations for that agreement. Access to the AIRC remains available under these arrangements.

- 9. If an AFP employee is aggrieved with a determination made under section 27 of the AFP Act (relating to remuneration and other terms and conditions), what external review rights and mechanisms does that employee have?**

Section 27 Determinations are subject to the operation of the WRA.

It is also the AFP's intention to include a review mechanism in the section 27 Determination applying to APS transferees (see also answer to Question 6).

- 10. What procedures, if any, are in place to protect whistleblowers in the AFP? How often have these procedures been used? With what success?**

The AFP Commissioners Order on Allegations by AFP Employees and Special Members About the Conduct of Other AFP Employees and Special Members (CO6) and the AFP National Guideline on Professional Reporting are in place to protect employees who provide information concerning misbehaviour or a breach of professional standards. The order and guideline provide for protection of the identity of the reporter. They also provide protection against direct or indirect harassment, threats, intimidation or any detriment to the reporter. In criminal matters, the Professional Reporting regime cannot guarantee anonymity where matters proceed to a prosecution. However, in conjunction with the Professional Reporting protections the AFP Professional Standards Division have the ability to register persons as informants. This provides greater protection regarding identity, however this too is subject to the discretion of the courts in a criminal proceeding.

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The Professional Reporting Network (formerly known as the Confidant Network) has received in the vicinity of 700 official referrals since its inception in 1996. In addition to this measure, employees can report directly to AFP Professional Standards (formerly known as Internal Investigations). Professional Reporting and Professional Standards are accessible by all employees and both have ongoing marketing strategies.

Extracts from CO6 and the National Guideline are at Attachment C.

11. Are you able to provide the Committee with a copy of the legal advice provided by the Australian Government Solicitor?

No. The AFP advises that the AGS advice is privileged.

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Summary of clauses from Commonwealth Employment (Protective Service Officers) Section 170MX Award 2001 not included in Protective Service Officers Employment Conditions Determination made under s24 (1) of the Public Service Act 1999.

This summary includes:

- Excluded clauses or parts of clauses
- Reasons for non-inclusion
- Details of alternate arrangements
- Amendments

Excluded clauses or parts of clauses

Cl.	Clause title	Reason for non-inclusion	Alternate arrangement (if any)
1	Award title	New title substituted	
2	Type of award	Not applicable	
3	Arrangement	Doesn't reflect new Arrangement	New Arrangement
4	Vision and Mission Statement	Not applicable to Remuneration/Entitlements	
5	Purpose	No longer applicable	Clause 3 Preamble
6	Award Objectives	Doesn't deal with Remuneration/Entitlements	
7	Continuous Improvement	Doesn't deal with Remuneration/Entitlements	
8	Definitions	Partly redundant	
9	Commencement Date	Not applicable to current situation	Clause 32 Savings Clause* Clause 2 Commencement
10	Parties Bound	Not applicable - no party 'bound'	
11	Application of Award	Not applicable - replaced	Clause 4 Application
12	Relationship with other awards	No longer applicable	Clause 5 Relationships
16	Reference of Disputes to the AIRC	Not applicable - s24 Det can't cede jurisdiction	Clause 9 Board of Reference (AWR Act s131)
19.1.2(c)	Meaning of excess employee	Inconsistent with CoP powers of transfer	AFP Act
20	Termination of Employment	Inconsistent with CoP powers	AFP Act
24	Salary increases	No longer applicable - all complete	
26.5/8	Performance Management/Increments	Amended/Part deleted (new AFP scheme)	Clauses 16.6.1 & 32 pick up existing increment arrangements*
30	Transitional Use of RDOs	Redundant Clause - not applicable	Clause 20 picks up current arrangements
Sch 5	Security Assistant Classification	Not used	

* Clause 32 Savings Clause provides that:

"Unless specifically provided for or altered in this Determination, all definitions, remuneration and entitlements provided for in the Commonwealth Employment (Protective Service Officers) Section 170MX Award 2001 will continue to apply".

Other amendments are as follows:

Amended term	Original term
Determination	Award
AFP	APS
AFP Board of Reference established by the AFP Certified Agreement 2003-2006	AIRC
Union or Association with the right to represent AFP employees	CPSU or other employee representative
Performance Development Agreement	Performance Management Scheme
Commissioner	Director

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Attachment B

AFP & APS current and future Industrial Arrangements

AFP/APS classification	Number involved	Current award for WR Act 'no-disadvantage' test	Current industrial instrument coverage	Basis of contents of s24 Det	Cover post 1/7	AFP CA applies post 1/7?	Award post 1/7 for WR Act 'no-disadvantage' test	Comments
PSO	1000	APS	170MX 'award' (not an award for s72)	Remuneration & Conditions from 170MX, APS Award	S24-s27 Det	No. AFP CA exclusion clause applies	AFP Award	CA cover excluded because pre-existing AFP 'Function' does not include totality of protective services
ASO (Ongoing)	130	APS	P S Act S24 Det	T & C from s24 Det., APS award	S24-s27 Det	No. AFP CA exclusion clause applies	AFP Award	CA cover excluded because pre-existing AFP 'Function' does not include ASO function
Admin staff (Ongoing)	100	APS	AWA		AWA	Not immediately, maybe later if AWA ceased	AFP Award	AWA unless ceased, then AFP award or AFP CA depending on whether function is AFP or APS function
Admin staff (Ongoing)	29	APS	Contract (awaiting AWA)		AFP CA or AWA	Depends on role - whether AFP or APS	AFP award	If role covered by AFP function, CA over-rides s27 Det
Admin staff (Non-Ongoing)	42	APS	contract		AFP CA or contract	Depends on role - whether AFP or APS	AFP award	If covered by AFP function, CA over-rides s27 Det
All current AFP employees (except SES)	3506	AFP Award	AFP CA	n/a	AFP CA	Yes (except SES)	AFP Award	SES Officers in the AFP are generally covered by CoP determinations

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Attachment C

Commissioners Order 6

Part 2 - Reporting of Allegations

3. Interference With People Who Make an Allegation

3(1) An AFP employee or special member must not, directly or indirectly, harass, threaten, intimidate or cause detriment to anyone who has made, may make, or is in a position to make a report of misbehaviour under this Order or the *Professional Reporting Guidelines*.

(2) An AFP employee or special member must not aid, abet, counsel, or procure, or by any act or omission in any way, directly or indirectly, urge the commission of any act contrary to the provisions of this Order.

AFP National Guideline on Professional Reporting

Confidentiality

Every effort will be made during an investigation to protect the identity of the reporting person from being disclosed explicitly or by implication. In all cases where reports are referred to Professional Standards for investigation, the identity of the reporting person is not to be disclosed without the consent of the reporting person, unless such disclosure is required:

- following the lawful direction of a court, tribunal or similar body or person, if argument in support of non-disclosure is unsuccessful;
- during any investigation, prosecution or other proceedings connected with the report where disclosure is necessary.
- otherwise by law.

Where any attempt is made to compel identification of the reporting AFP personnel, the matter will immediately be referred to the DPRS for attention and advice. Where such disclosure has occurred following the lawful direction of a Court or otherwise, the person making such disclosure must notify the DPRS of that disclosure at the first available opportunity. The DPRS must then notify the reporting person and the relevant confidant of the disclosure.

In any case where the identity of the reporting person is disclosed, either involuntarily under lawful direction as described previously, or voluntarily with consent of the reporting person, the DPRS may, having regard to the status of any investigation and with agreement from the reporting person, forward a summary of the circumstances of the case to the reporting person's General Manager or equivalent.

In such instances and where the reporting person agrees, the General Manager or equivalent, is responsible for personally communicating to all those within the reporting person's workplace, a summary of the circumstances and a reinforcement that the reporting person has fulfilled a professional requirement and will be supported by the AFP.

Interference with a Person Reporting a Breach

It is unacceptable for any AFP employee or special member to interfere with others on the basis that they have provided information concerning a breach of professional standards. Commissioner's Order 6 (Clause 3) prohibits interference with people who make a report of a breach of professional standards. An AFP employee or special member must not, directly or indirectly, harass, threaten, intimidate or cause detriment to anyone who had made, may make, or is in a position to make a report of

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misbehaviour under Commissioner's Order 2 or this guideline. Detriment includes injury, damage or loss; discrimination, disadvantage or injury to a person's employment; and impeachment of reputation.

Where acts of interference by an individual are identified, the AFP will take action appropriate to the circumstances. This action may include an assessment of that individual's suitability for continued employment on the basis that such conduct amounts to a very serious breach of the Professional Standards of the AFP.

On advice from the AFP Confidant Network Co-ordinator, the Chief Operating Officer (COO) will notify the Ombudsman of relevant incidents of interference. In appropriate circumstances, the Ombudsman, in consultation with the AFP, will independently oversee the AFP's handling of the matter.