
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Australian Federal Police and Other Legislation Amendment Bill 2004**

MONDAY, 8 MARCH 2004

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## WITNESSES

**SENATE**

**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**

**Monday, 8 March 2004**

**Members:** Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Ludwig, Mason and Scullion

**Participating members:** Senators Abetz, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Kirk, Knowles, Lees, Lightfoot, Mackay, McGauran, McLucas, Murphy, Nettle, Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senator Payne *(Chair)*, Senator Ludwig and Mason

**Terms of reference for the inquiry:**

Australian Federal Police and Other Legislation Amendment Bill 2003.

**Committee met at 8.47 a.m.**

**HALL, Mr Evan, Division Secretary, Community and Public Sector Union**

**RAHILL, Ms Alison, Organiser, Community and Public Sector Union**

**CHAIR**—Welcome. I declare open this hearing of the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Australian Federal Police and Other Legislation Amendment Bill 2003. The inquiry was referred to the committee by the Senate on 11 February 2004 for report by 23 March 2004. The Australian Federal Police and Other Legislation Amendment Bill 2003 proposes to complete the integration of the Australian Protective Service into the Australian Federal Police and enable the Australian Federal Police to investigate state offences with a federal aspect.

The committee has received a total of three submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. I remind witnesses of the notes they have received, which relate to parliamentary privilege and the protection of official witnesses. Further copies of those notes are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses do have the right to request to be heard in private session. It is important that witnesses do give the committee notice of their intention to give evidence in camera. I welcome Mr Hall and Ms Rahill. The CPSU has lodged a submission with the committee, which we have numbered 1. Do you wish to make any amendments or alterations to the submission?

**Mr Hall**—No alterations, but I do have an additional document that I would like to hand up.

**CHAIR**—Thank you. The committee will receive the document entitled 'APS all staff position transfer legislation petition'. Is that correct?

**Mr Hall**—Yes.

**CHAIR**—I will invite you to make a short opening statement and at the conclusion of that I will invite members of the committee to ask questions.

**Mr Hall**—The document we have just handed up is a petition that has been has been circulated to Australian Protective Service officers. There are some 650 names on the petition representing the majority of officers and it outlines their concerns about the integration of the Australian Protective Service with the Australian Federal Police. It will be apparent from both that document and our submission that officers are not so much concerned about the integration but its consequences for them—particularly the employment framework set out in the proposed legislation.

I would like to make a couple of opening comments about the legislation. The main thing the legislation needs to do, from the perspective of officers, is provide absolute clarity of their role and powers so that they never find themselves in a position where they are called upon to do that which they do not have the authority to do and that they are protected in that situation. It also needs to clarify the implications for their own rights given that the legislation to take effect would require the compulsory transfer of all existing Australian Protective Service officers out of their current employment framework into a new employment framework under the Australian Federal Police.

We commend certain aspects of the bill, in particular the specific class of employment that has been developed within the bill—the very accurately named 'protective service officer'—and the offences and powers that relate to that role and the very specific definition of function that goes to that. We see this as being a crucial matter in ensuring protective service officers know precisely what it is that they are empowered and required to do. The barriers within the legislation which stop them from being called upon to do other work, namely policing work—which they certainly are not empowered to do—are hard and necessary barriers so that protective service officers have clarity as to their function. We certainly commend that element of the bill to you as being appropriate and necessary.

There are other elements of the bill, however, which have concerned officers. These particularly go to transition arrangements within the bill and their employment framework following the transfer. We would like to point out two areas of concern about the transition arrangements. First of all, although it is perhaps implied by the transition arrangements, there is no specific element of the legislation that recognises the existing competencies and qualifications of officers. All officers automatically transfer: their oaths are assumed to have taken effect, their employment is assumed to be continued and their status as protective service officers is assumed to be continued but there is no provision that their qualifications and competencies are assumed to be accurate. This might be implied from the assumptions in the other transfer, but we think for the sake of clarity—and, frankly, to ease the concerns of officers that they will not be told, having transferred, that they do not meet the minimum competency standards or qualification requirements—it would be best for this to be spelt out in the legislation.

Second, the bill does not provide for any transfer of the existing industrial awards which cover Australian Protective Service officers. It has often been the case in similar transfers of

employment out of the Public Service into a Commonwealth agency that provisions are made in the bill so there is, once again, clarity as to the industrial awards which would cover the transferring employees. I have cited in our submission the example of the Australian Fisheries Management Authority and the provision that current awards will continue.

To put this in perspective: the current award—which I think you have heard much about in the past—has until November. There is certainly no doubt from my understanding of the AFP's intention to manage this transition that no-one is talking about a change in conditions and that, during the period up until November, new industrial arrangements would need to be put into place. Nonetheless, the current legal advice from AFP is that upon transfer all the existing awards will be terminated and that would leave officers without a minimum safety net. I am sure you appreciate that it is a minimum safety net that they struggled very hard to achieve some time ago. There is a battery of determinations, particularly under the Public Service Act, that the AFP intends use to manage the industrial framework, but at the end of the day they are determinations unilaterally determined rather than the industrial award safety net. Given that no-one intends to change the conditions, we think the appropriate way to handle it is to remove all doubt as to the application of those conditions by including a provision that recognises the fact that those awards will apply for their remaining period, which I once again stress is only until November.

Those are the two transition matters that I wish to raise. The last one is under the general grouping of an employment framework. It is true that there are certainly major differences in the employment framework from what Australian Protective Services officers are currently under to what they would be under. I might generally characterise it as this: the accountability frameworks for the Public Service—which they are currently under—and for the Australian Federal Police, while having different avenues, such as going to the Ombudsman instead of, for example, the Public Service Commissioner, are nonetheless very similar in both their intent and the rights involved on the accountability front. I would describe the Public Service Code of Conduct as being far more modern—devised in 1999 when the government initiated changes to the Public Service—and far more extensive.

On the other hand, the accountabilities and, I guess, the range of disciplinary actions that can be placed on a protective services officer under the AFP arrangements are probably a harsher, or more vigorous, regime. Whether there is a substantial difference between the two comes down to, not so much the accountabilities of officers, but to the protections that they have. The accountability regime in the AFP Act arrangements is very much one-sided. It is a downward power, if you like, that ensures the compliance of officers, but it does not provide officers with satisfactory protections if they are ever in a situation where they need, for example, to question the chain of command or the pressure they have been put under. This is a very important point because, unlike the rest of the AFP, particularly the members, who are obviously police, protective services work in a user-pays environment. No matter how firm the chain of command as such, whenever there are millions of dollars moving around in the purchase of services, a certain degree of bargaining power comes with that.

So protective services will remain in the situation where they have fairly extensive powers, but for a very limited protective function, and once again in a Commonwealth uniform—now part of the Federal Police—with the constant pressure to perform a community policing role

for which they are neither trained nor empowered or, frankly, satisfactorily paid. In that situation they need to be able to exercise some independence, insofar as knowing that if they do raise concerns they will not be victimised for doing so.

So this goes to a range of protections that are not available to the protective services officers under the proposed AFP act, which are currently available to them now. The one that is most crucial, which we have highlighted, is the extensive exemption that the Australian Federal Police Act has from the Workplace Relations Act. In short, there is a whole range of employment decisions that are not subject to the jurisdiction of the Industrial Relations Commission. These go from unfair dismissal in cases of alleged but not demonstrated serious misconduct to simply being transferred from one station to another, which could have immense consequences for the earnings and hours of work of an officer. Once again that is a matter over which the Industrial Relations Commission has no jurisdiction.

Similarly, there is no provision for independent review of promotion decisions. There is no body to put in force the merit selection principle. Most of these things are done as a matter of policy or internal practice within the AFP, but there is a significant loss of the legislative right. The last one I would point to is the protection for whistleblowers that exists under the Public Service Act—protection against victimisation and harassment if one alleges misconduct of someone else. They are protected in that process. There is no like protection within the AFP Act.

We think these are appropriate employee rights anyway. We certainly think they are very appropriate in this situation, given that the officers are being compulsorily transferred—they have no choice. The principle, we believe, that goes along with no choice of transfer is that there ought to be no loss of conditions. Finally, given the fact that they do really have two masters to work to in the user-pays system, they need some protections to be frank and fearless in ensuring that their legislative responsibilities are not exceeded.

These are the main concerns that we would like to bring to the Senate committee. On the whole, we think that the employment framework with respect to the classification powers, role, offences and function of protective service officers is very important once again to meet that issue of the user-pays system and the clarity of role, but it is the transition matters and some very significant loss of employment rights involved in the transfer that we are concerned about.

**CHAIR**—Thank you, Mr Hall. Ms Rahill, do you wish to add anything?

**Ms Rahill**—I have nothing to add, thank you.

**CHAIR**—Mr Hall, you have raised a number of issues and you summarised them clearly, but on the whole what does the CPSU say? Should the bill proceed?

**Mr Hall**—It would not be honest of me to say that we have a consistent view from our members as to whether or not the transfer is a good idea. I would characterise it as this: certainly the AFP have shown themselves to be, on the whole, a better management than the previous structure and, frankly, they are a better resourced organisation and there are some benefits to be gained from that. But there are also real dangers insofar as protective service officers are concerned. Instead of being the totality of an organisation, it will become a smaller work force that may well be put under pressure to be flexibly deployed to perform

work that is not within their jurisdiction. There is considerable concern among officers that, having been compulsorily transferred, the standards will be changed and the job for which they previously applied will change substantially—either the physical fitness requirements, the qualification requirements or the work they do on a day-to-day basis. Frankly, they will have lost the opportunity for continuing Public Service employment or redeployment, should that work no longer be suitable. In the context that the transfer is compulsory, that they do not have much choice, it obviously raises a lot of concerns. The primary concern we are hearing from officers relates to the preservation of pay, conditions and rights. Therefore that has obviously been the focus of our submission. I know that is a bit illusive, Chair, but I simply do not have a solid view to put to you from our members.

**CHAIR**—You are right—it is a little hard to pin down. The explanatory memorandum says that when the transfer of APS employees is made to the AFP through sections 24 and 72 of the Public Service Act 1999 it will ensure that conditions and remuneration are 'no less favourable' than those that applied beforehand. This does not address your concerns?

**Mr Hall**—In many ways no, Chair. Firstly, as was confirmed to us late last week, the legal advice provided to the AFP states that the term 'no less favourable' does not apply to legislative rights, that it applies only to remuneration and conditions. For example, the current legislative right to access the Industrial Relations Commission would immediately—not on all issues but on some issues for which there is an exemption in section 69B of the AFP Act—be extinguished, just as the right for an independent review of promotion decisions would immediately be extinguished, the right of whistleblower protection would immediately be extinguished. All these rights currently sit in the Public Service Act. There is no equivalent or they are overridden in the AFP Act, and the determination under section 72 cannot override the AFP Act. So the advice we have that the AFP has passed on is that in the first instance 'no less favourable' does not apply to legislative rights, only to the more traditional industrial employment conditions. On that particular front, it becomes a very complex story. The MX award, which is the main current vehicle of industrial rights, being a somewhat unusual beast under the Workplace Relations Act, is not considered an award for the purposes of section 72. Therefore, the proposal is to turn that award into a determination under section 24 of the Public Service Act, which would be recognised by section 72, but immediately upon doing so it ceases to be an award and becomes a determination which is a very different legal status.

But, upon transfer, section 24 of the Public Service Act would no longer apply so there needs to be a determination made under, I think, section 27 of the AFP Act, which holds conditions equivalent to the section 24 determination. So we have a section 24 determination and a section 72 determination which need to be reciprocated by a section 27 determination. There are two aspects to this. One, those determinations will not pick up all current employment conditions. For example, there are a whole range of agreements that deal with the introduction of 12-hour shiftwork at a lot of the stations which would not be picked up by that section 24 determination because their status comes out of the award—as well as a great deal of customer practice and local agreements at the various stations.

Two, most importantly, a determination is a unilateral decision. All the provisions of the MX award, which are converted into determinations that deal with local flexibility, provisions for the Industrial Relations Commission to resolve disputes or to vary the arrangements on the

ground, disappear because it is not an instrument coming out of the Workplace Relations Act; it is a management decision put in the form of a determination, so it would simply be unenforceable by the Industrial Relations Commission. There is always a great deal of interpretation as to how these employment conditions would apply on the ground, and the commission would have no jurisdiction over them.

**CHAIR**—During the consultation process, how involved was the CPSU with the issues that you raised?

**Mr Hall**—All these issues were raised in the consultation process. I would characterise the consultation process as such; certainly, it has been much better than what we have previously experienced and we will talk too a lot earlier.

**CHAIR**—The committee has raised it once or twice, Mr Hall.

**Mr Hall**—Yes, it certainly has. We had an opportunity to see and discuss the detail of the legislative framework relatively early. As for the significance of things like the determination arrangements, which awards they believe would apply, whether they would transmit and so on and so forth, we got the final clarity only at our last meeting—and their position has changed from one meeting to another. We had flagged these issues long ago and I think it would be fair to say that none of these issues at all have been resolved. So, while there have been discussions, the details and significance came late last week, and although we flagged our concerns earlier there has been no change.

**Senator LUDWIG**—So, if there were concern about a provision under the MX award, post-integration, that then was subject to a section 24 determination by the commissioner and implemented under section 27 of the AFP Act, you could not go to the commission to determine the outcome if there were a dispute over how that provision should operate?

**Mr Hall**—That is correct. The determination is not an industrial instrument of the commission, nor does it arise out of the Workplace Relations Act—

**Senator LUDWIG**—I understand that.

**Mr Hall**—so even if they were to pick up clauses such as 'if a dispute over interpretation arises', no.

**Senator LUDWIG**—I am familiar with that; I am not trying to cut through—

**Mr Hall**—The short answer is no. The commission would not be able to deal with that document per se. Can I also point out—

**Senator LUDWIG**—The next question—and then you can make your point—that flows from that is: can you then go to the commission with a more general dispute? Can you seek an order to resolve the dispute you might have about the previous MX provision which is now subject to a section 24 determination?

**Mr Hall**—This is where we start to get into some very complicated areas of industrial law, which is one of the main reasons we are recommending a straightforward resolution within the legislation. That is possible. The legal advice provided by the AFP—and on this particular point we certainly do not agree with the advice—is that it is currently the AFP award which would then form the safety net. That would be highly problematic, given that the AFP award

would not want to even mention a protective service officer. There would be no salary rate for a protective service officer, so you would have a safety net that was certainly not designed with them in mind—which is what is arguably in place. There would be some capacity for general dispute resolution but to be honest, given the time frames involved, the very fact that the jurisdiction over which instrument had coverage might well end up in the Federal Court. It becomes a highly ineffective way of resolving those issues.

**Senator LUDWIG**—With respect to the power of the commissioner to provide for 'not less favourable' conditions, have those conditions been set out? In other words, has the commissioner made a determination or at least foreshadowed what the determination will look like when you transmit the current employees to the new employment structure?

**Mr Hall**—We have certainly not seen the determination. My understanding of it is that the section 24 determination, which will then become a section 27 determination, might be as simple as a one-page document saying, 'The terms and conditions of protective service officers will be as per the MX award,' or it could simply redraft the MX award. Its main purpose is to pick up the fact that, from their legal advice, the MX award is not considered an award for the purposes of the 'no less favourable' requirement under section 72. So they need to turn it into a determination that is picked up by section 72. Once again, from our perspective, all this is a very complex way of dealing with the transfer. Given that all parties have pretty much agreed that the MX award should continue after the day of transfer until the new industrial instrument is put in place, it is a complex and, I have to say, a one-sided way of trying to achieve that. I would like to make another point on—

**Senator LUDWIG**—Is that the same point you were going to make—because I was going to come back to that question?

**Mr Hall**—Yes—the previous point. The 'not less favourable' requirement certainly does not mean that it cannot be changed; it simply means it cannot be changed and leave conditions which, on the whole, are not less favourable. It could be a matter of interpreting the current words. For that matter, the Federal Police Commissioner could change his own determination at any time—given that it is a unilateral document and not an agreed document—as long as it was not less favourable overall.

**Senator LUDWIG**—So he could have more than 'not less favourable' and then reduce it by X minus 'not less favourable' to still be above 'not less favourable'?

**Mr Hall**—That is correct. In realistic terms, a major fear might be that, without the assistance via the commission or the requirement for agreement, a regime to replace shift penalties with a composite allowance could be introduced. In this case, the Federal Police Commissioner could decide that, overall, we think they are not less favourable. That might not apply to an individual or an individual's particular roster but, given that that document is not a document of the Industrial Relations Commission, protective service officers would have no vote on whether or not they agreed to this new regime—neither would it be a document over which the Industrial Relations Commission would be able to hear evidence or arguments as to whether or not a change was overall less favourable.

**Senator LUDWIG**—And the second point?

**Mr Hall**—That was the second point.

**Senator LUDWIG**—You say that the shift rosters could be changed unilaterally by the commissioner.

**Mr Hall**—Yes. The MX award provides for the introduction of 12-hour shifts if there is an agreement as to the rosters.

**Senator LUDWIG**—Yes, I understand the concept.

**Mr Hall**—The MX award, like most awards, provides a range of what we generally call enterprise flexibility provisions, which essentially means that the provisions can be changed at a local level with agreement between management and those employees affected. The most common in the APS is 12-hour shift rosters, but it is not limited to that. These are all agreements that have force due to the MX award. A very clear interpretation from the AFP is that the MX award does not apply. We are going to treat it as if it does, but it will not apply.

**Senator LUDWIG**—And it is due to expire in November?

**Mr Hall**—Yes.

**Senator LUDWIG**—Have the AFP indicated what they intend to do in terms of your future employment arrangements? There are two issues. One is the transition, where they say 'no less favourable', and there will be a determination under section 24 and then picked up by section 27 of the AFP Act. But post that, you already know that the AFP have a certified agreement with their employees and that expires and comes up for renewal at some point in the future. Has the commissioner indicated to your union what his view is as to whether they will have the same CA or a separate CA in the future or whether it will continue on ad infinitum in relation to a determination under section 27?

**Mr Hall**—From what we can tell—and certainly the Federal Police Commissioner has been clear on this point—there is an intention to negotiate with the parties a new industrial agreement after the point of transfer. They have relayed to us the legal advice that they have received. It says that the two current awards will not continue to apply. The AFP award, which does not mention protective service officers, would apply as the safety net, but the AFP certified agreement would not apply to protective service officers. Therefore, we would be in a situation of negotiating a new agreement, with the safety net being something that simply was not designed for protective service officers. But, without a doubt, it has been the clear intention of the Federal Police Commissioner to negotiate with all the parties on the development of a new agreement as soon as possible. We take that in good faith.

In terms of the intention of the parties to date, there has not been that much disagreement to the extent that everybody is clear on the fact that the current employment conditions should continue until a new agreement is negotiated. It is just that with the legislation in its current form there is no way to maintain the existing safety net to make that so; hence the reliance on the series of existing determinations.

**Senator LUDWIG**—I understand your point in relation to that. In making any new award, do you have to dispute it with the AFP?

**Mr Hall**—A new certified agreement?

**Senator LUDWIG**—Yes. What will underpin that? You say the AFP already has a safety net award but it does not mention PSOs.

**Mr Hall**—Yes.

**Senator LUDWIG**—How do you then negotiate it? For argument's sake, the last time the APS negotiated an agreement it took six years in total. It was at the instigation of the various unions to 'encourage' the employer you had then, and still do, into making an MX award—which was probably not the most advantageous outcome that you would have wanted. There was an inability to have a certified agreement.

**Mr Hall**—That is correct.

**Senator LUDWIG**—Post the transfer, what happens if you end up in the same position?

**Mr Hall**—Theoretically, the determination continues—I think this is what you are asking. The determination would theoretically continue until such time as it was replaced by a certified agreement, however long that took. Alternatively, once again there is nothing to stop the Federal Police Commissioner from changing the determination at any time, so long as it is not less favourable overall.

In terms of the industrial implications post transfer, we clearly see a need for a safety net award to be put in place that recognises protective service officers. There are a number of avenues at our disposal to do that. We could, for example, argue that the previous awards do transmit or, alternatively, we could seek a new dispute finding for protective service officers and seek to make a new award or to vary the existing award to do that. There are a range of options, none of which I think would be all that appealing to us, to the AFP or to the government, particularly considering there is that basic consensus of opinion that employment conditions ought to continue until a new agreement is negotiated. The desirability of having the clarity and the ease of just continuing the existing safety net is very appealing to resolving all those problems.

**Senator LUDWIG**—If you fail to reach a certified agreement, is a new MX award ruled out under 69B, or is that still available? Should you again fail to reach agreement on a new certified agreement with your new employer, what happens? The section 27 determination—which was the section 24 determination—continues. Can you seek an MX award five years later? I know it is not the most satisfactory situation; I am just trying to understand the implication.

**Mr Hall**—You are probably taking me a bit out my depth. I think the arrangements for an MX award and the requirements that need to be met are very specific. My best guess is that an MX award would not be an available option in the future.

**Senator LUDWIG**—Section 69B, 'Limited operation of Workplace Relations Act', states:

(1) The Workplace Relations Act 1996 ... does not apply in relation to any of the following matters:

(a) a matter covered by any of Divisions 2 to 8 of Part IV or any action taken under any of those Divisions;

So to pursue a certified agreement you are limited as to what you can do under the Workplace Relations Act by that provision.

**Mr Hall**—There would be some limitations, but I would not say that the exemption within 69B predominantly applies to pay and conditions. In and of itself I do not think it would rule out an MX award; an MX award would be ruled out for other reasons. It certainly would not

rule out certified agreement making at all. It does, however, put a very large fence around the jurisdiction of the Industrial Relations Commission. So a dispute about transferring officers from one station to another would not be able to fall within the jurisdiction of the commission. That said, the Federal Police Commissioner can still enter into agreements on those matters; it is just that if the matter were going to dispute resolution, I do not think the commissioner would have conciliation and arbitration powers on those matters covered by exemption.

**Senator LUDWIG**—Can you give me a summary of what you understand those exemptions to be? If you cannot, I am happy for you to take that on notice.

**Mr Hall**—I should be able to give you a relatively brief overview.

**Senator LUDWIG**—Those matters will be denied to you once you transfer.

**Mr Hall**—Yes.

**Senator LUDWIG**—Unless the commissioner agrees to allow the jurisdiction of the Workplace Relations Act to apply.

**Mr Hall**—The exemptions apply to a range of things. I will come back to 1A. Section 1(b), 'the discipline of AFP employees', could be read broadly or in a more limited fashion. That would certainly apply to any matter coming out of the discipline regulations attached to the AFP Act or matters going through the police complaints process. I have been advised by the AFP that it would not apply to a purely employment disciplinary matter as opposed to a disciplinary matter that is covered by the AFP Act or regulations. For example, anything that would contravene the role of the law enforcement officer in terms of the act or regulations would certainly not be open to the jurisdiction of the commission. Where it is a little less certain is on issues like insubordination or failure to follow a lawful employment instruction, if an allegation were made on those matters. Item (c), 'any entitlement of AFP employees to adjustment payments', relates to a previous matter and I gather is not relevant. For any matter covered by the regulations—this goes back to item (a) as well—divisions 2 to 8 of part iv of the AFP Act go to what is known as the 'command powers' of the Federal Police Commissioner. That includes, for example—

**Senator LUDWIG**—I probably only need a flavour of these sorts of issues.

**Mr Hall**—One of the main ones would be the assignment of duties, for example. That is the ability to tell someone that they are now going to this station or that station or they are going overseas and this is their role. I want to make it clear that no-one is questioning the Federal Police Commissioner's ability to do that; that would be true of any employer. It is about the consequences of decisions like that—whether there has been satisfactory notice, whether there are protections for loss of earnings, what the new hours are and whether that fits into family life, how effective the roster is and so on. These are all questions that we think the Industrial Relations Commission should have a role in.

**Senator LUDWIG**—Does it include shift rosters and the like?

**Mr Hall**—Arguably, the assignment of duties would go, at the very least, to a station. By necessary implication that would mean that if you are at a station that has a 12-hour shift roster or an eight-hour shift roster then that is the roster you would end up on. Once again,

that could have significant implications, both for the amount of hours an officer works and the times that they work as well as their earnings.

**Senator LUDWIG**—How much consultation has there been on trying to resolve some of those issues? It seems to me from what you are saying that it is not resolved.

**Mr Hall**—That is correct.

**Senator LUDWIG**—There are a number of ways it can be resolved, in your view: it can be resolved by the commissioner itemising those issues that he intends to make orders about, which will then be picked up under section 27, or detailing exactly what levels and what transfers will occur or what the intention will be in terms of what the 'no less favourable' provisions will be and how they will be protected over time and whether when the renegotiations occur they will be brought in line with the AFP employees in their new certified agreement and what levels are likely to be included. All of that is possible, as I understand it. That is a negotiation that has to be had.

**Mr Hall**—Absolutely. A whole range of options to do with both the transition and the future and how the employment arrangements are dealt with then. As I understand it, the AFP have received legal advice on the legislation they have drafted that says, 'This is how it could be done with the legislative framework that is there'—that is basically the process of determinations—and their position is to go with that legal advice. I am not saying that the legal advice is wrong, but there is a whole range of other options that are open to them that they do not seem to have been prepared to enter into. For example, an industrial agreement could be made now that picks up the MX award, which would mean that there would be absolute clarity upon going over; you would not have to rely on the determinations. There has been little interest expressed in that. It was put to them, and—

**Senator LUDWIG**—The fisheries employees option is another way.

**Mr Hall**—Absolutely.

**Senator LUDWIG**—Even if you take the AFP's view that that is the particular way they want to go, they can still flesh it out into a more meaningful document that explains how all of this will occur: what levels of APS officers will transfer, what their positions and competencies might be and what parts of the MX award will be picked up—what their intention is in relation to the MX award. Surely that is still possible. Even though the document may have no force, it is still a negotiation that parties can have when you are transferring one lot to a new—

**Mr Hall**—Do you mean within the determination?

**Senator LUDWIG**—No—with you.

**Mr Hall**—First and foremost, I have to reiterate that the determination as a form of doing this, from our perspective, is fundamentally flawed.

**Senator LUDWIG**—No, you misunderstand me. All of that which I have said is possible as a negotiation that the AFP can put on the table and say, 'This is what we intend to do.'

**Mr Hall**—Correct.

**Senator LUDWIG**—Have they done that?

**Mr Hall**—Beyond a commitment that they will negotiate with all parties after the date of transfer, no.

**Senator LUDWIG**—So their view, as I understand it from what you are saying, is that they intend to say, 'This is how we will do it'—that is, a section 24 determination, which will be picked up under a section 27 order—'and your terms and conditions and how they will be applied will become a matter that we will tell you about post the transition'?

**Mr Hall**—I think that would be a slightly harsh way of characterising what they are doing. It is true to say that they are saying, 'We have heard your countersuggestions, but this is what is going to happen.' I think they are being clear at this stage about what their intentions are in section 24 and section 27 determinations—that is, they will pick up the MX award and there will basically be no change at the time of transfer, and then the new arrangements will be negotiated after transfer. Their intention about what the employment conditions will be at the time of transfer is relatively clear, although it is absolutely true to say that there has been no movement from them at all on what is the best way to implement that. Issues that we have been highly concerned to deal with are not just about whether or not the MX award applies—for example, on the broader issue of qualifications, even if at the time of transfer their qualifications and competencies were assumed to carry across, what happens if a day, a week, a month later those standards are changed and the officers then face a new barrier to retain their own jobs?

We have talked about this issue because the concern of our officers is that they would then lose their jobs without even the safety net of redundancy payments. The AFP say, 'That certainly would not be our intention.' When we ask: 'How about developing an agreement now so we can assure them before the transfer that this will not occur to them after the transfer?' the answer has been no. And neither are we getting any suggestion that those sorts of issues will be dealt with in the determinations either. The determinations will do precisely what they have described and what the legal advice has said: the minimum that they need to do to give effect to the no worse off principle, and that is to turn the MX award into a determination. They do not deal with the actual transition issues that are arising, such as where people are going to be posted and what people's competency standards are going to be the day after. That is quite aside from the fundamental concerns about the industrial instruments in place.

**Senator MASON**—Senator Ludwig is a famous former industrial advocate. He knows all about terms and conditions for employees. But I can tell you that the committee later on will be asking our friends from the executive of government to explain what the intention of the new act is in terms of APS employees. We will do that later in the morning. I have a very quick question about—and this is another issue Senator Ludwig knows all about—demarcation disputes. When APS is integrated into the new framework, will CPSU still look after APS employees? What are the industrial relations arrangements?

**Mr Hall**—'Dispute' is probably the accurate word for the situation we will be in. In short, CPSU has automatic coverage of all Commonwealth employment unless another union obtains an exemption. There is an exemption in place with the Australian Federal Police Association for members of the AFP. That does not cover protective service officers. Our

belief is that we will continue to have coverage of protective service officers but there is no doubt in my mind that that will need to be resolved in the commission.

I will make some points on the Workplace Relations Act as it is structured at the moment. First of all, freedom of association elements have been brought into the Workplace Relations Act and there are a range of elements there that make the traditional concept of coverage in a lot of areas simply a moot point. The ability to represent someone before the commission and to negotiate terms and conditions does not require coverage in the traditional sense but, nonetheless, we feel it is important and we will go to the commission to resolve it. The Workplace Relations Act does encourage freedom of association and freedom of choice in that element and our belief is that we will face no difficulties in resolving that in the commission.

**Senator MASON**—Will APS members suffer or be privileged to suffer the same disciplinary procedures that AFP officers will be subject to?

**Mr Hall**—Yes. The legislation as written has precisely the same disciplinary regime. There are obviously mixed views on that. I would make the point that, while they do have law enforcement powers, protective service officers are not police. They have a very clear function. What might be seen as safeguards designed primarily for police might not be appropriate. Nonetheless, the actual framework of accountability—the disciplinary code—is not very much different from that which is in place within the Public Service at the moment. There is a high standard of accountability. So we are not particularly concerned about that element per se because it is not that different.

What we are concerned about is the other side of the accountability: where I can say things without fear that I will not get my next promotion or that I will face a disciplinary problem. I should be able to say, 'I'm not sure I ought to be doing this because I am a protective service officer, not a police officer.' I do not want to make too much a point of it, but we saw recently that the AFP has been prepared to put people who are not law enforcement people into roles such as we saw with the presidential cavalcade, with administrative staff being involved. That is a very difficult situation for anyone to be in.

In that particular situation, clearly a protective service officer could fulfil that role. But what if you are walking around an airport and your very job is paid for by the Sydney Airports Corporation? While you are there for a protective function only and are in a Commonwealth uniform, what if there is a crime being committed in a newsagency in the foyer? The expectation of the public and of the Sydney Airports Corporation—which is paying several million dollars for you to be there—is that you will do something. That is a situation that could take people well out of their protective service function and into a community policing role. We believe they need to have the ability to say: 'No, this is not my function. I am not covered by statute to perform this role.' They need to be able to say that honestly without fear of victimisation. They need to have an independent body such as the Industrial Relations Commission say it was a fair call at that point in time to deny to do that, however difficult that might have been.

**CHAIR**—Thank you very much, Mr Hall and Ms Rahill, for assisting the committee this morning. If there are any matters we wish to pursue we will follow them up with you.

[9.36 a.m.]

**Hunt-Sharman, Mr Jonathan, National President, Australian Federal Police Association**

**Shannon, Mr Craig Anthony, Principal Industrial Officer, Australian Federal Police Association**

**CHAIR**—I welcome Mr Hunt-Sharman and Mr Shannon from the Australian Federal Police Association. The AFPA has lodged a submission with the committee, which we have numbered 2. Do you wish to make any amendments or alterations to that submission?

**Mr Hunt-Sharman**—No.

**CHAIR**—Mr Hunt-Sharman, you know the drill. I will ask you to make a short opening statement and, at the conclusion of that, we will go to questions.

**Mr Hunt-Sharman**—Senator, I was thinking we might change it for once. With regard to the opening statement, I would prefer to leave that and address some of the questions you might have that might be more salient.

**Mr Shannon**—By way of preliminary, we would not mind addressing a couple of statements from previous witnesses.

**CHAIR**—I knew you could not resist it.

**Mr Shannon**—It is more of a clarification than a statement.

**CHAIR**—We are creatures of habit, Mr Shannon—I think that is the issue. Go ahead.

**Mr Shannon**—Given that there has obviously been some consideration already this morning of entitlement and industrial framework issues, we would like to address those head-on if we may. Unfortunately, we disagree with our colleagues with regard to some of their interpretations of the AFP environment. I would like to address a couple of matters. It is our advice—and I think it may have been touched on this morning—that after translation the AFP award becomes the safety net award for all employees. In the context of the current AFP certified agreement arrangements, it may be known by the committee that the AFP certified an agreement for its entire existing work force in June 2003. At the time that was negotiated, the parties were very cognisant of the translation of the APS into the AFP. It was a matter of negotiation between the parties at that time in the context of how a new work force component would be addressed. For the benefit of the committee, I would like to read a clause of the agreement. It is clause 8 under 'application of the agreement' in the certified agreement. It reads:

> This Agreement may incorporate employee roles that may be undertaken, at the direction of the Government, after the date of its certification by agreement of the parties and with the approval of the Board of Reference.

There was a very explicit provision put in, in that context, for the APS function to be negotiated and to be incorporated within the context of the AFP certified agreement. To add some further clarification to that, the AFP agreement is somewhat unique in Commonwealth terms, in that we established a disputes resolution procedure that established a board of reference. That board of reference has a fairly encompassing role with regard to both interpretive and dispute resolution matters within the context of our agreement and our

industrial framework. I would like to read two elements of the board of references provisions that address some of the concerns that have been raised this morning with regard to the operation or otherwise of the command powers of the AFP. Under the disputes resolution procedures, clause 8, board of reference, there are two sections—sections (d) and (e). Section (d) states:

d) Workplace disputes not resolved via the Internal Disputes Resolution Procedure can be referred to the BoR by either party.

e) In accordance with section 170LW of the *Workplace Relations Act 1996* the BoR has the power to settle disputes over the application and interpretation of this Agreement and any other matters agreed between the parties.

I raise this by way of stating that we share some concerns with our colleagues with regard to the full gamut of the command powers of the AFP Act, but we have utilised these provisions within the AFP certified agreement from time to time to resolve matters that would otherwise be deemed to be inconsistent with the application of the command powers. For instance, they have been used for roster matters. There has been an issue of ongoing debate within the ACT police function about roster variations. Any workplace that deals with amendments to roster structures generally has a dog's breakfast as far as resolution. We now have a mechanism in place as a result of the framework we established for the ACT. They are currently trialling a number of rosters that previously would have been inconsistent with both the view of the members and the association and the existing nature of the command powers.

By way of clarification, we do not believe that there is a bottomless pit that APS officers will fall into as far as the capacity to resolve workplace disputes is concerned. It is certainly our intention to make application in accordance with the provisions of the agreement for the APS functions to be incorporated into the AFP certified agreement, thereby providing a full net of coverage for PSO, SPSO and other roles within the context of the AFP work force.

**Senator LUDWIG**—Has incorporation of those provisions into the agreement been agreed to by the AFP?

**Mr Shannon**—At this stage, as I think my colleague referred to, the AFP's stated intention is to commence negotiations after the translation of the work force. The difficulty, I think—

**Senator LUDWIG**—I just wanted to know that. I did not want to interrupt your train of thought.

**Mr Shannon**—It was certainly very clear in the negotiations we had last year that everybody was aware the APS was coming into the AFP, and the AFPA wanted an explicit provision available within the agreement, if it were subject to legislation being passed, that a new function be codified into the AFP to address these matters. So we would be seeking to make application against that provision of the agreement to resolve that particular issue.

**CHAIR**—Did you want to follow up on any of those other issues, Mr Hunt-Sharman, or are you ready to go to questions now?

**Mr Hunt-Sharman**—I am happy to go to questions.

**CHAIR**—We have asked an overall question in previous hearings along these same lines. What is your assessment of the consultation process?

**Mr Hunt-Sharman**—It certainly has improved greatly as time has gone by. We had a briefing recently that was very thorough, and I believe the CPSU had a briefing just after us and were told the same information.

**Mr Shannon**—We thank the committee for its efforts in past times to encourage that consultation process.

**CHAIR**—Thanks.

**Senator LUDWIG**—Was provision 69B of the Australian Federal Police Act there at the commencement of the act?

**Mr Shannon**—You will have to refresh my memory.

**Senator LUDWIG**—It is on the limited operation of the Workplace Relations Act.

**Mr Shannon**—The AFP Act was extensively amended in around 2000. It was clearly broken into two divisions, one of command powers and one of employment powers. Up until that time, there was some codification of terms of entitlements of employees within the act, but there has been division of those powers since that time—and I think this committee conducted a review of the AFP amendments with regard to that.

**Senator LUDWIG**—I cannot recall—and so I was hoping you might have it in your memory—whether 69B was a new provision inserted in the Australian Federal Police Act 1979 or whether it was an existing provision. Because it is called 'B', one usually understands that it is a later provision.

**Mr Shannon**—I believe there has always been some preclusion.

**Senator LUDWIG**—There may have been preclusion back then.

**Mr Shannon**—As a command force, the AFP has always had some limitations. In fact, the AFP work force is deemed into the Workplace Relations Act. I think we are the only police service that currently has that access to the commission, other than the Victorian police with the transfer of their powers.

**Senator LUDWIG**—That was my next question. How does that compare to other police agencies or forces?

**Mr Shannon**—We have more access. Given the broad scope of our board of reference provisions in our certified agreement, which provide arbitral powers to the commission with regard to disputes which are not generally applicable to any other work force, we think we are better off—although one of the issues that is highlighted by this debate with regard to the command powers is that, where there are valid points made by the CPSU, we believe they are applicable to the entirety of the work force, not only to a component of the APS if they were transferred in.

One of the subsequent matters we would like to address with the committee at a later date is section 28, the dismissal powers. Section 40K, which has been referred to with regard to the dismissal for gross misconduct, where there is no application available to the commission with regard to those matters, is a rarely used power—I think this power has been utilised once or twice. Given that police employees are not generally deemed, by the commissioner or any other party, to be employees for any other purpose, it is very difficult to claim that they have

equal treatment available to them before the commission as an employee would in any other circumstance. For instance, it is often difficult for an industrial commissioner to want to reinstate a police officer into a work force after a period of stand-down and termination, given the nature of the environment. It usually ends up in a damages penalty rather than a reinstatement outcome. We have some concern over whether or not a police officer, being in a non-traditional employee category, can be deemed to be treated like an employee for the purposes of normal dismissal powers. Many state jurisdictions have separate police tribunals which address those matters. In effect, we have created a quasi version of that through our board of reference mechanism.

**Senator LUDWIG**—Is that satisfactory, or are you in telling me that it is not satisfactory and that you would prefer something along the lines that other states have?

**Mr Shannon**—The board of reference provisions in our certified agreement are excellent from our point of view and, I believe, from the AFP's point of view. We believe there are some matters to be resolved with the application of disciplinary matters and terminations, but I think we are in a better position than some of the other police services. I am aware of three unfair dismissal actions in the last 18 months, and all three have been settled.

**Senator LUDWIG**—Do they include the one we are aware of?

**Mr Shannon**—I believe so.

**Senator LUDWIG**—Perhaps you could check on that for me, too.

**Mr Shannon**—Yes. We might confer after the evidence, but certainly all the matters we have been party to have now been settled.

**CHAIR**—That would be helpful, thank you.

**Mr Shannon**—There are some matters that we wish to take up with regard to the way the act operates generally in respect of unfair dismissals. For instance, you cannot win and not bear cost for that win. In the case of a police officer or, in my view, an APS officer being terminated, the processes can become quite lengthy. The employer commits substantial resources to retain the employee's status as a dismissed employee. Even if you win a reinstatement matter it is often difficult to get that member reinstated. The parties bear a significant cost in relation to the exercise. There are issues we would like to address with regard to that, as a separate matter for the whole work force.

The APS being treated, in the context of translation, as a separate and discrete cell within the AFP concerns us, given that the application of the integrity regime in the AFP applies to all employees of the AFP, not just to police employees. Our concern is that, in effect, the APS would become developed as a lower order Chubb type role within the AFP environment if they were treated in some way as a different group from any other group of employees. We believe they should have the same rights of access—and outcomes—to every mechanism that other AFP employees have.

**Senator LUDWIG**—So you agree that the transfer should happen on whatever the date is; you have been consulted about the transfer of the employees you cover; you are satisfied with the commissioner making an order under section 24 to pick up those terms and conditions, on the basis of them being 'no less favourable'; you expect those provisions to be put in by an

order under section 27 of the AFP Act; and, although you are unsure of the employer's view, you will subsequently apply to incorporate those provisions in the current certified agreement and, if that were successful, you would negotiate that again on behalf of all employees in the future. Is that right?

**Mr Shannon**—To pick up the core principle of what you are saying, our view is that the APS should have access to the same core entitlements as all other employees, which have been developed out of an environment which has been mindful of the integrity requirement placed on those employees. We believe there is a framework in place which will allow that to happen. We substantially need this phase of the process to be resolved—the passing of this legislation—before mechanisms can be put in train to address the concerns raised here this morning. We are confident that there is a framework which will allow that to happen.

You might recall that it is not dissimilar to the very recent development at the Australian Crime Commission, where this committee—or at least other parliamentary committees—may have considered matters with regard to very similar issues. In that circumstance, AFP employees were transferred to employment of the ACC, rather than the other way round, under the Public Service Act. Our membership transferred over there throughout that process as a result of a framework being put in place to do that. We are confident that the AFP is mindful of the imperative to address these concerns as a matter of urgency but, without the legislation being in place to effect a chain of events process wise, it is very difficult to tackle these matters head-on.

**Senator LUDWIG**—Can you say with any certainty what the terms and conditions that will apply to APS employees post transition will be?

**Mr Shannon**—I can tell you what I think they should be. But until we go through a process in the industrial environment—unfortunately, the parliament is not the industrial commission—

**CHAIR**—Don't wish that on us!

**Mr Shannon**—it therefore makes it very difficult for me to second-guess exactly what they may be. Sometimes it would be a good thing and sometimes it may not be a good thing. We certainly think that there is an open and transparent framework there that can address the concerns we have and the concerns of the other parties with regard to the entitlement framework. We do not believe that the AFP has an intention to do otherwise than to immediately address these matters once the legislation has passed and it is in a position to effect some control over the environment.

**Senator LUDWIG**—Do you say that the reason that state of affairs exists is the way the transition arrangements will work is that, until such time as they are translated, it is difficult to determine how each employee's remuneration, their terms of conditions and what provisions might apply to them will be worked out?

**Mr Shannon**—Absolutely.

**Senator LUDWIG**—You expect that there will be good faith on behalf of the AFP and you expect that employees will, at least, have terms not less favourable than what they currently have?

**Mr Shannon**—Absolutely. This has been a very tortuous process for everybody—not least this committee, I would have thought—given it has been running now for nearly three years and this is the end game in that process. We have to accept the AFP's good faith prima facie, given that the AFP has incorporated all of our non-policing roles into a set of core common conditions, such as seven weeks recreation leave et cetera that is applicable to our operational and sworn member environment. We do not believe that there is any intention to disenfranchise the APS prima facie with regard to that environment. We certainly would not like to see, for instance, an APS officer receiving less remuneration or entitlements than someone doing their payroll for them or the creation of an inherent inequity or discrimination internally within the AFP environment. It would create a quite dislocating situation. To that extent, we have some confidence that we have a framework in place that can address all those concerns.

**Senator LUDWIG**—Should the disciplinary procedures which apply to Australian Federal Police officers similarly apply to PSOs, in your view?

**Mr Hunt-Sharman**—With regard to that, we are unique compared to other police forces. The disciplinary regulations apply to all employees of the AFP, whether they are sworn or non-sworn, so everyone is covered. Craig was making the point earlier that it has been a unified work force since 1989. We have worked together with the AFP on a number of certified agreements to bring in an integrity regime that is universal across all employees whilst, at the same time, having employment conditions that are universal across all employees. The point we make here is that, if you start separating the APS members when they come over and put them under a different integrity regime or employment regime, then that is destroying the unified work force approach that has been so successful with the AFP.

With regard to the integrity regime that AFP employees are subject to, it is much more thorough than under the normal Public Service Act. We can hand up a table showing the other police forces and ourselves with regard to the integrity programs that are in place. For example, although the APS has whistleblower legislation, the AFP and most other police forces have a similar type program in place. Ours is the Confidante program.

We have testing for illicit drugs. It is targeted and random, and also with regard to critical incidents. We have testing for legal drugs, including alcohol and pharmaceutical products. Again, that is targeted, random and for critical incidents. We have financial disclosure, and that is compulsory. We have a compulsion to answer questions. Avoiding answering questions or misleading can lead to six months jail. We have a serious misconduct section—40K—with regard to dismissal for corruption matters. You can lose your superannuation as a result of that. We are looking at DNA testing at the moment, and that is under discussion. Integrity testing is in all police forces except ours. We are in discussion at the moment about integrity testing. You have the disciplinary regs.

**Senator MASON**—What does integrity testing mean?

**Mr Hunt-Sharman**—I would call it entrapment. Certainly our view is, if you are going to introduce it into the AFP, you would mirror the provisions of the federal legislation with regard to controlled operations. That is what I would pick up there, but that is in negotiation. As we have mentioned, we have the disciplinary regulations. There is a disciplinary tribunal,

so there is a process that can be followed. Of course, we are oversighted by the Ombudsman. There are a lot of processes that the APS do not have at this time. We believe that the employees coming out of the AFP should be recognised for that fact. We argue they should be on the same core terms and conditions as every other employee of the AFP because they are subject to every other disciplinary program.

**Mr Shannon**—There is no doubt in the last 15 years, roughly—while the APS has pursued a commercial culture—that the grade value of those roles has been devalued in pursuit of competition rather than recognition of professionalism. We would expect and hope that the moment this translation is completed that those grade values can be reassessed to incorporate them more appropriately into the environment, recognising the obligation on the employees and the professionalism of their function.

**Senator LUDWIG**—That is not a sales pitch, is it?

**Mr Shannon**—No. It is a clear statement of intent.

**Mr Hunt-Sharman**—I certainly think it would be important for the AFP to make a clear statement of intent to the committee that they are supportive of the unified work force and that their plans are to have the same core terms and conditions applied to all employees.

**Mr Shannon**—I want to pick up on the point that Senator Ludwig made. In every submission we have made to this committee about the APS we have raised the issue of commercialisation of the APS function. So in that sense I am not trying to make light of that fact. We see that as the threshold issue with the legislation. It is a core part of the submission we tendered to this process, so to that extent it was not just a sales pitch.

**Senator LUDWIG**—No. I see that.

**CHAIR**—You are certainly consistent, Mr Shannon. There is no question about that.

**Mr Shannon**—Thank you.

**Senator LUDWIG**—In relation to commercialisation I note what you say in your submission but I also do not believe the APS are going to change their view about how they obtain revenue. I will certainly have an opportunity to ask them that, but I have not seen any indication in either submission—from you or the CPSU—that that is about to change. How do you resolve the different policy position that you have adopted?

**Mr Shannon**—If I can turn the table: I hoped that it was this committee's role to change that position to some extent through the recommendations of this inquiry. We have documentation that is considerably onerous and operational in its content that we would like to tender—after today, in confidence for the committee's purposes only—that very clearly indicates the way commercialisation of the function, particularly at the airport fabric, is impacting on the safety of the Australian public. If the committee can make it possible for us to tender that documentation subsequent to today, we will do so. These are matters of public policy, not matters for the industrial representatives to resolve. We believe it is imperative that the parliament itself sees that it is inappropriate for the Commonwealth law enforcement agency to enter into tendering and commercial activities that may make it subject to the scope of its own investigative responsibilities with regard to fraud against the Commonwealth.

You might be aware—and I believe the commissioner himself addressed these matters during the 2002 APS amendment bill discussions—that the immigration contract was withdrawn by the AFP as a result of a very clear understanding from nearly everybody involved that it would have left the scope of the AFP up to investigating its own activities as the contractor. We would have thought that it was important that the parliament not consider supporting commercial functions of the APS as they currently stand being brought into the Commonwealth law enforcement agency. There is a capacity to do cost-recovery and user pays purchasing of functions without allowing, for instance, Sydney Airports Corporation to put their logo on the uniforms of police or protective service officers performing a public safety function or directing the operational activities of such employees and telling them who they may or may not arrest or whether or not a facility will be evacuated for the purposes of a search. That is certainly happening at the moment.

**Mr Hunt-Sharman**—The commissioner made it clear in his evidence on 7 June when he said:

As Commissioner of the AFP, I am subject to ministerial direction under section 37 of the Australian Federal Police Act. But even though that ministerial direction provides overall policy, it still does not allow the minister to direct me operationally. The independence of the office of constable protects me from being directed by the minister on operational matters.

This is our concern—and we have to oppose any perception that commercial imperatives are going to interfere with the operational requirements and the independence of the office of constable.

**Senator MASON**—I note that on page 4 of your submission your recommendation is:

That upon translation the APS employees in operational roles be incorporated into a new classification of Police Protective Officer.

This is not some sort of grab by your union to take over from the CPSU, is it?

**Mr Shannon**—No. In fact, I think our colleagues previously addressed the issue of freedom of association. Classification does not necessarily affect respondency.

**Senator MASON**—No, it does not necessarily—I agree. I just noted the change in nomenclature, and I thought aha!

**Mr Shannon**—It actually relates to the fact that we believe that, over the commercialised existence of the APS, the professionalism of those employees has been undermined by the view in the broader public—and certainly with the clients—that they are nothing more than security officers. In fact, some of the evidence we are going to tender to you, if the committee so grants, in confidence, will very clearly lean to the view that these people are almost being put in a place of jeopardy in the function because they are not being treated with the respect that they deserve for the function they perform. Also, given that we are debating with regard to this act the imposition of a higher integrity regime for those employees—consistent with the policing culture—we think it is important that that recognition be translated through to those employees through the classification structure. They are not Chubb Security; they are in effect a police protective officer—and they are going to be working as part of the protection function within the AFP. Therefore, we think it inappropriate to carry the baggage, if you like, of the old commercialised days of the APS into the AFP.

**Mr Hunt-Sharman**—We see it as a reintegration into the AFP and that the professional function will be moved to where it should be—back into a police protective officer function—recognising the skills of the individuals and removing them from the commercial interests.

**Mr Shannon**—You might recall that it was the Commonwealth police—

**Senator MASON**—Mr Hunt-Sharman, as I mentioned to my colleagues on this committee, I am old enough to have been around—I worked for the Attorney-General's Department during the late 1980s—when the APS and the AFP were pulled apart and two agencies were created. There were very good arguments put forward as to why they had to be given their own special acts and functions—and now they are being merged. I am not saying that is wrong. I would never go against what the government proposes, of course. It is just like the Roman days, in that, any time you need something to do, you just reorganise—though I am sure there are great reasons for it.

**Mr Hunt-Sharman**—I think the reality is that the Australian Federal Police was formed after the Hilton bombing and its primary function was antiterrorism. Of course it had the functions at the airport as part of that function. In fact, if you look up the original documentation on the creation of the AFP, you see that it talks about this high level of integrity regime having to be put in place for anyone who is working in an antiterrorist unit. I think it was purely the fact that there were no terrorist attacks, there was a view that nothing was going to happen, and the role just moved away. Now the environment has changed back to—if not worse than—the Hilton bombing days.

**Mr Shannon**—We believe the APS has been developed over that period of separation as having more of a security function than a counterterrorist function, and in recent times the requirement for that counterterrorist function has been more greatly recognised and the professionalism of the employees has been greatly enhanced, particularly in training and other standards. With 20/20 hindsight we think—perhaps as others do—it was a mistake they were ever split. To that extent you might recall that at the time it was a mergence of two police services—

**Senator MASON**—Yes, I agree.

**Mr Shannon**—and we see the classification element as a rerecognition of that.

**Senator MASON**—I hope we are not back here in 15 years time.

**CHAIR**—I certainly won't be, Senator Mason! I can promise you that much.

**Mr Shannon**—I don't know if we will be either!

**Senator LUDWIG**—If you call yourself a federal protective officer, don't you compound the problem that it was indicated to the committee earlier exists, where there is a confusion in the mind of at least commercial operator as to the use or function of a protective service officer, or do you say that the way that is resolved is by their not doing commercial work?

**Mr Shannon**—That confusion already exists.

**Senator LUDWIG**—Won't that compound it?

**Mr Shannon**—No. We believe it will actually enhance the capacity of the APS officers to tell commercial clients that they are not to direct their operational activity and that they are to

be treated more in the context of a policing environment than a security one. As I have mentioned on a couple of occasions, we have some documentation to hand up to you which clearly indicates that private clients at the airport facilities are directing the operational activities of APS officers. We have referred to this before this committee previously: they do respond to general duties matters in situ as a result of the environment they are placed in without the training, the recognition, the funding or the remuneration for that. We have requested through other committees a review of that function with regard to those broader issues. We believe it is about time that the employees were empowered, in effect, by being moved away from the baggage of the previous culture into a culture where they may feel a bit more independent in their operational activity than when they are bound as a client service.

**Senator LUDWIG**—Forgive me if I do not seem clear on that. What you are saying—if I can summarise—is that there is a confusion about whether or not they should respond to, for example, a theft at a newsagency at an airport. Do you say that they should or should not?

**Mr Shannon**—We are saying that they are.

**Senator LUDWIG**—I think that is right.

**Mr Shannon**—If they are, they should be remunerated, trained and titled appropriately, and that needs to be reviewed as a matter of public policy as a matter of urgency. Sydney airport, for instance, had a hold-up—

**Senator LUDWIG**—That is a lot clearer now. Thank you.

**Mr Hunt-Sharman**—I think that is our great concern with regard to section 69E. As we have said before, we believe it can be done on a cost recovery basis, just as it is when the Australian Federal Police contracts to the Australian Capital Territory and to island territories. It provides a service but there is no interference in operational ability.

**Mr Shannon**—The key performance indicators, for instance, in the Sydney contract are just ridiculous—as you would know if you have ever had a chance to have a look at them—and they impede the operational effectiveness of those people because they are not in a position to exercise their professional judgment.

**Mr Hunt-Sharman**—We believe a title change—with the word 'police' put into their title, so it would become 'police protective officer'—would give a distinction between their old role and new role and would make their role clearer.

**CHAIR**—Thank you very much, Mr Hunt-Sharman and Mr Shannon, for your assistance. We may follow up with you on some of those issues.

**Mr Shannon**—To clarify: are we able to hand the committee subsequent to today documents that would be kept in confidence with the committee?

**CHAIR**—We will come back to you on that.

**Mr Shannon**—Thank you.

**Mr Hunt-Sharman**—I would like to raise one other issue, the multijurisdictional investigations. We are very supportive of that. We have been putting up that proposition since January 2001, as well as the one with regard to the APS becoming an operational division of the AFP.

**CHAIR**—I am prepared to predict that we will have other opportunities to discuss that with you as well. Thank you.

[10.10 a.m.]

**BYRNE, Ms Margaret, Senior General Counsel, Australian Government Solicitor**

**CHAIR**—Ms Byrne, do you wish to make an opening statement?

**Ms Byrne**—I will make a brief opening statement, then I am happy to answer any questions. I will indicate the capacity in which I am here. I was asked by the AFP some time ago to assist them to understand the fairly complex legal environment, industrial relations environment and employment environment in which this integration was taking place. I have given them some assistance in that respect, particularly given the existence of a section 170MX award instead of the usual certified agreement that applies, I think I could probably say, throughout the Commonwealth public sector. All other employees are either under certified agreements or AWAs. The APS is rather unique in having the section 170MX award, which creates its own complications and also, given the terms of the AFP certified agreement, raises some issues. I was particularly asked to advise on transitional issues, which is what I have done. I have now been invited, given those legal complexities, to perhaps assist you to understand these matters as well. Purely the legal/technical issues is really what I am about. Maybe I could note briefly a few of those and then take your questions about them.

The initial point I considered is whether the section 170MX award, which covers the Australian Protective Services officers, would transmit under the Workplace Relations Act and apply to bind the commissioner once they became integrated in the AFP. That is not the case—and that seems to have been generally accepted—for two reasons. First, there is no change in employer. The Commonwealth remains the employer, and the transmission of business provisions of the Workplace Relations Act operate when there is a change of employment from one employer to another. The Commonwealth remains the employer and the AFP Commissioner remains the person representing the Commonwealth in respect of employment. Secondly, there is no provision in the Workplace Relations Act for transmission of a 170MX award.

That brings us to another characteristic of the 170MX award—that it is not an award as defined in the Workplace Relations Act. The Public Service Act, for the purposes of section 72, picks up the definition of 'award' in the Workplace Relations Act. So an award as defined, for the purposes of section 72, is what I would call an ordinary award—that is, an award made under part 6 of the Workplace Relations Act, and not this special award. I think you are aware that a 170MX award is made only in exceptional circumstances, when parties who are trying to negotiate a certified agreement are unable to reach that agreement after a long time. If there are certain technical circumstances applicable, then the AIRC is able to terminate the bargaining period and impose an award, but it is an award that is instead of a certified agreement, rather than an ordinary award for the settlement of a dispute, which is the ordinary safety net award. Of course, the APS already have that safety net award underlying their MX award, which is the general Australian Public Service award.

Section 72 of the Public Service Act enables the compulsory transfer of employees out of the Public Service and into a Commonwealth authority. The AFP is a Commonwealth authority for the purposes of that provision. When that transfer occurs, a provision of section 72 says that their terms after transfer shall be no less favourable than those to which they were

entitled immediately before the transfer. But there is a caveat on that regarding the terms that apply under a certified agreement, an award, an AWA or a section 24 determination.

The problem here, as you have already heard, is that the main instrument governing terms and conditions is section 170 of the MX award, which is simply not picked up by the terms of section 72. Because of that, an undertaking has been given. It appears in the explanatory memorandum and, I understand, that other public statements have been made. To address the problem of section 72 a determination will be made so there is something for section 72 to operate on. If a determination is made under section 24, that will then mean that section 72(3) can pick up the terms of that determination and any terms and conditions applying after transfer will then have to be no less favourable than those in the section 24 determination. The section 24 determination, unlike the MX award, is picked up by section 72. The no less favourable test continues to apply until a new AWA or certified agreement is made or if there is a variation to a certified agreement. For example, if the AFP certified agreement was varied in a manner that brought in the protective service officers and other people performing protective service functions that would then bring the no less favourable test to an end.

At present, the AFP certified agreement has a provision in it—which is, I believe, in clause 7 of part 1—which effectively means that the protective service officers will not be covered by the agreement. That is in the application clause. It says it applies to all AFP employees—there are a couple of exclusions: senior people and so on—and then there is a clause that excludes any employees performing functions that were not functions of the AFP under the AFP Act at the time the certified agreement was made. The particular protective service functions that will be transferred by the bill were not part of the functions of the AFP at the time the AFP agreement was made, so effectively they are excluded from the certified agreement that applies in the AFP. This is not always the case. Sometimes when people are transferred, because of the terms of the certified agreement they are going to—which might just say 'all employees in this agency'—they might end up being covered by the certified agreement applying in the receiving body. But because of the terms of this particular certified agreement this will not be the case. I should mention there are some people on AWAs within the APS, mainly administrative and managerial people. Our advice is that those AWAs will continue to operate after the transfer. Against that background the section 24(1) determination will then provide the safety net for the purposes of the no less favourable test.

Following transfer—and this is a matter for the AFP but, presumably, it would begin operating on the integration day—there could also be a section 27 determination made under the AFP Act that would provide the certainty and transparency that is required and which would set out the terms and conditions of employment. That provision of the AFP Act allows the commissioner to determine terms and conditions for employees. He can do that for one class of employees or for all of them. That determination itself has a no-disadvantage element in that it is ineffective to the extent that it is inconsistent with an industrial instrument, effectively. That is a bit of an outline of the legal landscape under the Workplace Relations Act. I am happy to address any questions that you may have about those matters.

**CHAIR**—Thank you very much. That certainly addresses some of the issues which we have discussed briefly with witnesses this morning. I ask Senator Ludwig if he wants to pursue some of those matters with you.

**Senator LUDWIG**—So the MX award is not an award as provided for under section 143(1A)(b) of the Workplace Relations Act, which rules it out. Does section 72 of the Public Service Act only say 'award'? I tried to get a copy of it—

**Ms Byrne**—I also forgot to bring my copy of the Public Service Act with me. I had it with me at my desk but forgot to bring it up. It says that in that act an award has the same meaning as award does in the Workplace Relations Act.

**Senator LUDWIG**—Yes, which then rules out the MX award.

**Ms Byrne**—That is right. I am not sure why this was in those terms—

**Senator LUDWIG**—It is probably an oversight.

**Ms Byrne**—There may just have been an assumption that there would be no MX awards. I am not sure what the reason for it was. They are quite a rare beast, as you would understand, which does create special difficulties.

**Senator LUDWIG**—Next they look at the 'no less favourable' test to determine what those provisions will be. If they cannot use the MX award then on the transition date it will cease to have effect, but it is expected that the terms will be no less favourable. I think you had the opportunity to hear from the CPSU that that may not include all of the provisions that currently exist under the MX award; it might only include award based conditions. It may not extend to disciplinary matters or shift matters—those matters that are agreed as a derivative of the MX award.

**Ms Byrne**—I think that is correct. Of course, it does not apply technically to the MX award at all. It depends on when a section 24 determination is made, as the undertaking has been given, as to what is included in the section 24(1) determination and the no less favourable test will then operate on that determination. As the explanatory memorandum to the bill says, a section 24(1) determination will be made, and that is a matter for the AFP.

**Senator LUDWIG**—Yes.

**Ms Byrne**—That is what then forms the basis for the no less favourable test, not the MX award as such.

**Senator LUDWIG**—That makes it a bit clearer. So, until we see what the determination is under section 24, there is no operation of the no less favourable test that can be applied to the current provisions?

**Ms Byrne**—Except I suppose the APS award, which underlies that and forms the safety net. But that quite clearly does not cover everything. One thing I should say is that the section 72 no less favourable test quite deliberately does only apply to industrial instruments and determinations. It does not pick up conditions which are provided by legislation or administratively and so on. For example, some rights that people currently have—those, for example, under section 33 of the Public Service Act, which is a right of review for certain actions with which you do not agree—are statutory rights and do not form part of the no less favourable test.

**Senator LUDWIG**—Post the commission making a determination under section 24 where do you go to exercise your rights to ensure that the conditions are no less favourable if you disagree with the conditions?

**Ms Byrne**—That is an interesting question.

**Senator LUDWIG**—Do you go to the Federal Court?

**Ms Byrne**—You could probably go to the Federal Court or even to a magistrate's court and claim that you are not receiving the rights to which you are entitled under statute if in fact there was something in the section 24 determination that was more favourable than you are subsequently getting. That is just hypothetically; I understand that this is not intended to occur. Presumably you would say, 'I have a statutory right to receive this amount of money,' or whatever it might be. I think you would enforce it just in a court as a matter of failure of a government official to act according to law and provide your benefits.

**Senator LUDWIG**—And then trying to determine what the term 'no less favourable' might be.

**Ms Byrne**—Yes.

**Senator LUDWIG**—That is not easy.

**Ms Byrne**—It is perhaps not the most satisfactory test in the world but it is intended to be there as a protection to ensure that your conditions cannot be reduced after transfer in that interim period before you get your new industrial instrument.

**Senator LUDWIG**—I did not quite follow your argument as to why the MX award does not transfer, given that it is the same employer.

**Ms Byrne**—Because by its terms it is confined to employment in the Public Service.

**Senator LUDWIG**—I just did not have a copy of the MX award either.

**Ms Byrne**—It is an application to prevent a parties bound clause. It binds only the Commonwealth in respect of persons employed as protective service officers who are employed under the Public Service Act. By its express terms it operates only while people are employed in the Public Service.

**Senator LUDWIG**—You might be able to help me here. There are a couple of cases which follow that contracting out provision which say that they otherwise can apply. Why wouldn't it be one of those?

**Ms Byrne**—Those cases were decided in the context of a transmission of business. I think you are thinking of the Employment National case and the Victorian health union's case—

**Senator LUDWIG**—Yes.

**Ms Byrne**—where that approach was taken. We considered that in looking at this issue—

**Senator LUDWIG**—In this instance it was not a transmission.

**Ms Byrne**—Because it is not a transmission. Section 170MZ provides for the operation of MX awards. They operate as specified in the award, which to me says that this operates in respect of people employed under the Public Service Act, and that fundamental condition for its operation will not be present after the integration.

**Senator LUDWIG**—But it must be a transmission then. If you are no longer going to be a Public Service employee, don't you transmit?

**Ms Byrne**—Transmission depends, though, upon a change of employer. All the transmission provisions in the act say—

**Senator LUDWIG**—They seem to be directed in that way, don't they?

**Ms Byrne**—Yes, when there is a change of employer. It falls a little bit between two stools, I suppose you could say. The very early case of Hillman and the Commonwealth demonstrated that where there was no change of the employer the transmission provisions do not operate.

**Senator LUDWIG**—All right. Was then applying for a change in the MX award a consideration? You could go back to the commission and say, 'It's not transmission; we're going to a new employer; we want to maintain the terms of the MX award; therefore we ask that the MX award be varied.' That would seem to be open under the Workplace Relations Act.

**Ms Byrne**—It may be open. I think there is even a question there because it is harder to vary an MX award—

**Senator LUDWIG**—It is harder.

**Ms Byrne**—because it is only to cure uncertainty and ambiguity. I think that is the only reason for which it can be varied. The thinking behind it was that, if you have got to the stage where people have not reached an agreement and you have had to make an MX award, that should pretty much stay in place for those employees. But the problem here is that they will no longer be the employees that this MX award applied to—that is, people employed to perform functions under the Protective Service Act, who were employed under the Public Service Act. That is a matter for the parties to that award to consider.

**Senator LUDWIG**—Did you consider that in your advice to the AFP?

**Ms Byrne**—I considered whether that was a course that was open.

**Senator LUDWIG**—And what was your view?

**Ms Byrne**—Our view was that an application could have been made but there were some obstacles to getting a variation.

**Senator LUDWIG**—As to whether it was an ambiguity?

**Ms Byrne**—Yes, exactly.

**Senator LUDWIG**—It is not an ambiguity in the award; it is an ambiguity that exists with the transmission.

**Ms Byrne**—That is right. It is not even an ambiguity but a change of circumstances that seems to unambiguously mean that the application of the clause is not capable of applying.

**Senator LUDWIG**—Thank you; that is helpful.

**CHAIR**—Thank you very much, Ms Byrne. That was very helpful and we do appreciate the presence of the AGS this morning.

[10.32 a.m.]

**FAGAN, Federal Agent Audrey, Chief of Staff, Australian Federal Police**

**LAWLER, Federal Agent John , Acting Deputy Commissioner, Australian Federal Police**

**NEGUS, Federal Agent Tony, National Manager, Protection, Australian Federal Police**

**NEY, Federal Agent Mark, National Manager, Human Resources, Australian Federal Police**

**BENNETT, Ms Sandra, Legal Officer, Criminal Law Branch, Attorney-General's Department**

**McDONALD, Mr Geoff, Assistant Secretary, Criminal Law Branch, Attorney-General's Department**

**SEEBACH, Mr Anthony, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department**

**CHAIR**—I welcome representatives of the Australian Federal Police and Attorney-General's Department. You must be having a busy day on committee's today, Mr Negus—aren't you at another committee as well?

**Federal Agent Negus**—I have opted out of that one just to be here.

**CHAIR**—We are eternally grateful. The committee has received a submission from the AFP, which has been numbered 3. Do you want to make any amendments or alterations to that submission?

**Federal Agent Lawler**—No, we do not.

**CHAIR**—Before we begin I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy and if necessary must be given the opportunity to refer those matters to the appropriate minister. I assume that Federal Agent Lawler will lead off with a brief opening statement and we will then go to questions, unless the Attorney-General's Department wants to make an opening statement as well—which would be also be brief, wouldn't it, Mr McDonald.

**Mr McDonald**—I will not bother. I will leave it to Federal Agent Lawler.

**Federal Agent Lawler**—I will start off by offering the apologies of the Australian Federal Police Commissioner. The commissioner had two longstanding interstate engagements that he was unable to break, so he gives his apologies. The integration of the Australian Protective Service functions into the Australian Federal Police was one of the counter-terrorism initiatives determined by the government following the September 11 terrorist attacks in the United States in 2001. The integration seeks to ensure the seamless delivery of the APS protective services together with the protection services provided by the AFP.

A staged approach has been adopted to integrate the APS into the AFP. On 1 July 2002, following changes made in the Australian Protective Service Amendment Act 2002, the Commissioner of the AFP assumed responsibility as the agency head of the APS from the Secretary of the Attorney-General's Department. Amendments were also made to the

regulations under the Financial Management and Accountability Act 1997. These changes enabled the commissioner to assume managerial, financial and administrative responsibility for the APS.

The first stage of legislative change was effected to allow sufficient time and administrative authority for the integration process which has been undertaken. During this time, the commissioner has administered two agencies under two acts, resulting in disparate legislative and employment arrangements. This interim arrangement has provided the opportunity to facilitate appropriate consideration and planning for the future employment and HR frameworks for the APS and the AFP, in addition to a unified command and control structure. The staged approach for this integration project has resulted in minimal disruption to the existing employment arrangements, whilst allowing comprehensive planning and consultation with employees of both agencies, particularly within the APS.

Project Merida was established with a charter for progressing issues relating to the establishment of the APS as an operating division of the AFP, using advanced project planning methodologies. The continuing aim of Project Merida is to ensure that all key stakeholders are involved in the implementation of the integration. Employee representative bodies have participated in Project Merida through regular consultation. The AFP also has an active communications strategy that regularly provides information to employees and stakeholders.

The Australian Federal Police and Other Legislation Amendment Bill 2003 has been drafted in response to the extensive consultation and consideration that has been given to this project. The bill makes the necessary changes to the AFP legislative framework so that full integration can be achieved. The bill will repeal the APS Act and establish a protective service function in the AFP Act. The bill will also create a new category of AFP employee—the protective service officer.

To give full effect to the machinery of government transfer, a determination will be made by the Public Service Commissioner, under the Public Service Act, to transfer the APS employees into the AFP. This transfer mechanism acts to protect remuneration and other conditions that employees were entitled to in their various industrial agreements prior to the transfer. This mechanism also operates to protect the transferred remuneration and other conditions until such time as a new award or certified agreement or new AWAs can be negotiated. On 4 March 2004 the commissioner announced to all AFP and APS staff that the AFP intends to commence such negotiations as soon as practicable after the commencement of this legislation.

Another important measure that this bill will implement is the clarification of the jurisdiction of the AFP to investigate a state offence with a federal aspect. This schedule implements an important resolution of the April 2002 leaders summit on terrorism and multijurisdictional crime. Federal, state and territory leaders made a commitment to legislate and develop administrative arrangements to allow investigations by the AFP into state offences incidental to multijurisdictional crime. In July 2003 the Standing Committee of Attorneys-General and the Australasian Police Ministers Council Joint Working Group recommended that the most efficient way of implementing this resolution was to amend

federal legislation, allowing the Australian Federal Police to investigate state offences with a federal aspect.

Often Commonwealth offences are co-committed with offences in other jurisdictions, and in some cases it may be more efficient for the AFP to investigate the state offences. At present, AFP officers are unable to adequately pursue state offences that are incidental to Commonwealth offences. These amendments will allow the Australian Federal Police to investigate the totality of the criminal conduct. Under the bill, a state offence has a federal aspect if the subject matter of the offence is a subject on which the Commonwealth has constitutional power to legislate. For example, the AFP would have power to investigate a state offence where the conduct amounting to the offence involves the use of electronic communication or postal service—for instance, stalking, bribes and threats.

A state offence also has a federal aspect where the investigation of that state offence is incidental to an investigation of a federal or territory offence. For example, during an investigation into a suspected terrorist organisation association, it may become apparent that associates have created a false identity using both state and federal identification documents. These amendments will allow the AFP to investigate the state identity fraud offences, as these would be incidental to, and quite possibly crucial to, the successful investigation of the terrorist organisation association offence.

The AFP will operate under federal procedures and policies and will be able to exercise a range of federal investigative powers under the Crimes Act when investigating a state offence with a federal aspect. These powers will include the power to arrest, obtain search warrants, undertake controlled operations, apply for listening device warrants, acquire and use assumed identities and carry out forensic procedures. These amendments will streamline investigations, avoiding the potential duplication of police resources that arises where the state and AFP services are currently required to investigate different aspects of the same criminal conduct.

We welcome this opportunity to discuss the bill. Before I conclude, may I draw your attention to the close cooperation that has been typified in the development of this bill. Officers from the APS and AFP, with the appropriate insight and expertise, have participated in the various working groups set up to deal with key areas of operations. They were assisted by jurisdictional experts from the Attorney-General's Department, the Department of Employment and Workplace Relations and the Australian Public Service Commission. I would like to thank them for their contribution. Thank you.

**CHAIR**—Thank you very much, Federal Agent Lawler. Do any other members wish to add anything at this stage? As no-one does, we will move on to questions. We have had evidence this morning from the CPSU and the AFPA, and very helpful evidence from the Australian Government Solicitor. I put on the record that we really appreciated the opportunity to engage with Ms Byrne on those matters.

One thing the committee has pursued—some might describe it as relentlessly, but we think of it as constructively—is the issue of consultation in this entire process. Both the CPSU and the AFPA have acknowledged the value of that consultation from your side of the process, and I want to place that on the record as well. You may or may not have had an opportunity to see the CPSU's submission—this hearing has been a very fast process; the Senate has given us a

very tight time frame—but one of their concerns is about the transfer process and the maintenance of employment conditions that they currently experience—that is to say the explanatory memorandum and the legislation as it is drafted talk about remuneration and conditions applying after the transfer which must be 'no less favourable'. But it is quite clear from the evidence that we have received—and in fact Ms Byrne confirmed it—that that does not pick up any of the conditions that are provided legislatively or administratively and that currently pertain to members of the APS. How is it proposed to take account of those issues?

**Mr Ney**—It is quite a complex issue with regard to dealing with the transference. The section 24 determination obviously will pick up the entitlements within the current MX award. All other employees within the Australian Protective Service will basically come across on either their AWA or their current determination. So that class of employee will be automatically protected in terms of their normal entitlements. With regard to the section 24 determination, as Margaret Byrne has pointed out, it cannot clash with current legislation that sits within the Australian Federal Police. I would imagine that there has been some discussion this morning over those particular items that relate to right of review over employment and the determination arrangements within the AFP Act—which are section 28 and section 40H which relates to assignment of duties and the rights of appeal for those particular items.

If you look at those regimes, particularly the AFP integrity regime—which leads up to decisions on determination of employment or continued employment with the organisation—there are rights of repeal that are very similar to the current Australian Public Service Act. In fact, the Industrial Relations Commission and the Federal Court are still the No. 1 arbiters of those decisions, which is a very similar system to the current system for the Public Service Act. In terms of some of the things that do not rightly fall within the determination, although there are different principles or, shall we say, mechanisms, effectively the same levels of protection are afforded the employee on transfer. So the entitlements, the terms and conditions and their take-home pay will not be affected. As for how they are protected within the workplace in their ongoing employment, there are still external review mechanisms which will protect them and which are not fundamentally different to the Public Service Act.

**Senator LUDWIG**—What are they?

**Federal Agent Ney**—Would you like me to discuss the Public Service Act first or go straight into the AFP Act?

**Senator LUDWIG**—Let me put it this way. You are saying what the CPSU and, I think, the AFPA were saying: upon translation you will use a section 24 order. 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**—Have you had discussions about that with the relevant unions and employees?

**Federal Agent Ney**—We have had a number of discussions with the unions based around the preferred way of dealing with these issues. Unfortunately, the unions are at opposite ends of the scale on what they would like to see. One of the issues about negotiating an industrial

document prior to integration, whatever date that may be, is whom we actually negotiate that with. There are issues over who will be the union, which is not really an issue for the AFP but, if we were to negotiate with either the AFPA or the CPSU at this particular point in time, there is no guarantee that they would actually be the employees' representatives on day one. In that same vein, negotiating with the employees at this time would also be problematic. Under an MX award there is an embargo on the manner in which you can commence a bargaining period, so it is problematic to get into a bargaining period with either the members or the unions prior to the extinguishment of the MX award.

**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 committee?

**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. What is the process to resolve those, or have they been resolved?

**Federal Agent Negus**—Perhaps I could jump in. We received the legal advice from the AGS a matter of probably only 10 days ago now. We had an immediate meeting with both the AFPA and the CPSU the following week to pass on the advice we had received, which said that it was remuneration and conditions, not the whole entitlement framework, that would translate through. We have not had the opportunity yet to look at how that might be negotiated but, as the commissioner has said in the explanatory memorandum—and openly for the last six months—he would see a lot of this being discussed in the industrial negotiations post the bill passing later this year.

**Senator LUDWIG**—But what happens to the employees on day one of the transition? That is the important part, isn't it, because at that point they cannot go back?

**Federal Agent Negus**—On day one of the transition their remuneration and their conditions are protected, but again the legal process—

**Senator LUDWIG**—But not all of them, as we understand it.

**Federal Agent Negus**—But not all of them, and that is the point which really has become clear only in the last week or so.

**Senator LUDWIG**—So what do you intend to do on day one?

**Federal Agent Negus**—On day one, the employees would move into the same jobs that they went to on day minus one. They would perform the same functions and be paid the same amount of money. As we said, there are a range of other things that would apply to them then, including the AFP's integrity regime and the AFP's mechanisms, as described, for industrial settlement.

**Senator LUDWIG**—Has that been communicated to the employees?

**Federal Agent Fagan**—Perhaps I could take you back through some history. We started a program, at least a year ago, presenting to new recruits on the AFP integrity regime and the processes that apply. Similarly, we have been discussing that in the supervisory and leadership programs. There is a whole program now in train, subject to the legislation passing, to fully explain to all staff the integrity regime they arrive in within the AFP Act.

**Senator LUDWIG**—So they are not familiar with it at this point in time.

**Federal Agent Fagan**—A number of them are. As I said, we have discussions through all of the recruit programs, and we have APS staff currently in the AFP integrity area. We have been discussing it with the leadership and supervisory level as well over the course of the past year. But we need a saturated program to make that clear, subject to the legislation.

**Senator LUDWIG**—So on day one they will be unsure of their shift rights, their disciplinary procedures, their termination procedures and those matters that are not in the MX award, or those matters which are in the MX which are then in conflict. Is that right?

**Federal Agent Negus**—I do not know about unclear. What we are saying is that the AFP complies—

**Senator LUDWIG**—They will not know what applies to them—or what the commissioner will do. You cannot articulate what the commissioner will say in relation to any of those matters post day one, until discussions occur?

**Federal Agent Negus**—No, that is not quite correct. The AFP's position on this is that the AFP framework would then apply. So we are working very hard to make sure that all members of the APS—and it has been going on for 12 months or so—are very much aware of what the conditions are. There will be increased training programs for things like professional standards and the other things we have discussed. But on day one, the AFP's current framework will apply to members of what was formerly the APS.

**Senator LUDWIG**—So the provisions in relation to who determines shift work, who determines disciplinary procedures, who determines the other legislative entitlements and those that conflict with the MX award will then be at the determination of the AFP commissioner, in terms of the AFP Act and how they would normally treat their current employees.

**Federal Agent Negus**—That is right. With all the review mechanisms we just articulated them.

**Senator LUDWIG**—Has that been conveyed to the employees?

**Federal Agent Negus**—Broadly yes; but we have had the legal advice only in the last week or so, and there is progressive training and other things in place to make sure it is communicated properly.

**Senator LUDWIG**—And I think, Mr Ney, you are going to provide a copy?

**Federal Agent Ney**—Yes.

**Federal Agent Fagan**—The other important point to this is: we are seeking a legislative change with an effect date of 1 July, to enable those communications to take place—not unlike how we did this in stage 1, where we had a 1 July changeover to enable those

communications to take place. Obviously that is subject to the passage of the bill by parliament, but that has been the plan all along.

**Senator LUDWIG**—What is the view post day one, in terms of how the previous APS employees will be integrated or otherwise placed within the overall framework? Is there a written plan that you can provide to the committee? It is a staged process, I am sure.

**Federal Agent Fagan**—Precisely right. The 10 working groups have been meeting—they are a mix of AFP and APS. Already, as you see, Tony Negus is the one person in charge of the portfolio reporting to the deputy commissioner. Those 10 working groups have implementation plans and options to present to the steering committee, which is chaired by the commissioner. The strategic directions set last year envisaged this process—having the legislation passed and a clear framework, having a certified agreement discussion with the organisations, and then coming back from those working groups with those implementation plans for other operational integration, if you like. That is all being discussed but has yet to be signed off or presented.

**Senator LUDWIG**—Assume that I am an APS employee post day one. Do I know what my shift provisions and level of remuneration are, what competencies I have transferred and what my pay scale is? Will I understand all of that and have that written down in front of me so that I can have some appeal rights if I am not satisfied that that is right?

**Federal Agent Negus**—Yes, I think that is right.

**Senator LUDWIG**—I do not want you to think it is right. I need you to tell me how you are going to do it, whether they will have it and what course of action is open to them if they disagree.

**Federal Agent Negus**—The commissioner has clearly articulated that in a number of newsletters. There was a video circulated late last year in which he articulated that again. There have been a number of underpinning guarantees made personally by the commissioner that no-one will be worse off in remuneration or conditions after day one.

**Senator LUDWIG**—I do not know whether that has addressed what I have asked, though. You say they will be no worse off, and saying that the conditions will be no less favourable might be another way of putting that. Does that include the whole gamut of issues? Quite clearly, it cannot. We have already heard that there are some conflicts in relation to the MX award which will have different provisions apply, and there will be some provisions which while they are not captured are no less favourable, as you understand from your legal advice and as we have heard from the Australian Government Solicitor.

**Federal Agent Negus**—That is right.

**Senator LUDWIG**—I am trying to ascertain this. An employee will require certainty of what they can turn to in order to say, 'This is what the commissioner can or can't do.' Then they will say, 'If I disagree with that, where do I go?'

**Federal Agent Ney**—The determination 24 transfer to determination 27 within the AFP Act will fundamentally pick up the entitlements, which I do not think is your point. You are going to the broader issues, for instance, of rostering of shifts, what their work patterns are et cetera.

**Senator LUDWIG**—I am asking about competencies and what training they might be able to access, because they would have been able to access different training regimes prior to the transition. They also may have different competencies and they may have different career paths. They may be at a particular level, with an expectation that they will be working in a particular area.

**Federal Agent Ney**—On day one the employees will not see a difference in what they turn up to work to. I will take it off in bites if I can. On the rostering practices within the AFP: currently the certified agreement—and the philosophy of the certified agreement we would hope to extend in future years—provides flexibility for both staff and management in work practices and patterns. The vision is that on day one there will not be a sudden shake-up of or change to the current work practices within the APS. We would like to move to having a dialogue between us and staff over how their needs can be best met while they are performing their duties. That is what happens within the AFP at the moment under the current certified agreement. It is a fairly mature approach to looking at what works best for the employer and what works best for the employee and balancing that off. Not always do both of those things come together—sometimes we are in opposition—but we have a mechanism through the board of reference with the Australian Industrial Relations Commission where those sorts of items are taken for review. If we cannot come to some sensible outcome, the board of reference sits and then determines what the outcomes should be for the employee and employer.

**Senator LUDWIG**—So, if there is a dispute, there is a board of reference that can—

**Federal Agent Ney**—There is a board of reference. Our vision is longer term to have our industrial issues heard through the board of reference. At the moment, any issues within the Australian Protective Service have to go to the Industrial Relations Commission, although some employees are currently having matters dealt with through the board of reference and they get down to the sorts of issues that you are talking about—what are their work patterns and what sort of remuneration are they getting? We have started that process in the Australian Protective Service, and longer term that is where the transition will be. There is still a lot of work that needs to be done on expectations for training, education and competencies. On day one there will not be a change in the expectations of our employees. I know it is well recognised by the organisation that we have a very professional organisation in the Australian Protective Service and that we do not need to go and tip it on its head. From day one things will stay pretty much the same. However, we would like to think over the longer period as part of integration that there will be stronger career paths built between the two organisations so that there will be a lot more opportunities for both Protective Service officers and AFP officers.

**Senator LUDWIG**—What is the commissioner's view about the commercialisation issue that the AFPA raised?

**Federal Agent Fagan**—The current arrangements are approximately 70 per cent commercial and 30 per cent budget funded. Those are the arrangements that we are under. The government direction is to seek to preserve those commercial arrangements, which is what we are doing.

**Senator LUDWIG**—What sorts of mechanisms are you going to put in place to ensure the confidentiality of those commercial arrangements? I envisage at some point—I suspect it is only the tip of the iceberg—that you will come along here and when we ask you about a matter you will say that it is commercial-in-confidence.

**Federal Agent Fagan**—The commercial arrangements have a robust discussion, obviously, with clients. That is an annual process overseen by Mr Chris Haywood in the Australian Protective Services.

**Senator LUDWIG**—What public scrutiny will there be? How do you investigate a commercial document? It is usually referred to the AFP for investigation if there is a federal offence. So you are referring it to yourselves. There is a breach in agreement.

**Federal Agent Lawler**—Certainly, in relation to your first point, all APS financial activity, including services received free of charge, are audited separately by the Australian National Audit Office and are consolidated with the AFP for reporting in the annual financial statements. So there is that independent audit of these arrangements and this process.

**Senator LUDWIG**—So they will appear in your portfolio budget statement as a separate line item?

**Federal Agent Lawler**—Indeed.

**Senator LUDWIG**—And then in the annual report as a separate item as well?

**Federal Agent Fagan**—Yes; that is right. For the purposes of the FMA Act we have been integrated now for a year and a bit. So we are already in that process of integration as far as financial management is concerned.

**Senator LUDWIG**—That would allow you, it seems to me, to pick up a state offence on the basis that a mobile phone was used and then investigate it. You could use a telecommunications interception warrant. So, although it might be a state offence, if the telecommunications of a mobile phone are used in the commission, and it is ancillary, you could then investigate it as a federal offence. Is that right?

**Federal Agent Lawler**—I may need to take the specific technicalities of that question on notice, because it becomes quite a complex area, but my understanding is that where offences occur more broadly using the telephone service—as I said in my opening statement, threats or harassment and those sorts of things using the telecommunications service—it is applicable in the state context.

**Senator LUDWIG**—That is not very clear to me.

**Federal Agent Lawler**—As I understand the position, it overcomes the issue of duplication where you find criminality going across both state and federal jurisdictions. One example was where you are investigating an importation, for example, and search warrants are executed on particular premises and you find within the premises unlicensed firearms or weapons. What used to happen is that the state police had to be called and had to conduct a separate investigation in relation to those firearms offences. With the proposed amendments under the bill, that will now be no longer necessary. As you can see, there are significant efficiencies in having that prosecuted under the one criminal activity, so that you do not have

then a separate investigation with separate police involved and separate judicial processes et cetera.

**Senator LUDWIG**—I can see the sense in that, but what I was trying to ascertain was the furthermost end of those sorts of things and whether the state offence could be investigated because a mobile phone was involved in terms of the commissioning of or gaining intelligence or whatever—that is, because it is a telecommunications—and then you can use your TI warrants as a consequence. That may not be available in some state regimes. So if you were a state regime, you might ask the Australian Federal Police to investigate a particular offence because a mobile phone has been used and you can obtain a telecommunications interception warrant which may not otherwise be available to a state based organisation or the state police force. I think that is right.

**Mr McDonald**—With telecommunications interception, there is a standard regime. One of the things that we are also trying to achieve at the moment is to get a standard approach with electronic surveillance. We have just finished a process with state and territory justice and police to get a electronic surveillance model in place as well. From a procedural perspective, federal and state are getting closer and closer all the time. But certainly with telecommunications interception there is the same approach—it is a federal act and the states operate under that act.

The big thing to keep in mind here is that it is really incidental to a federal investigation. So the idea here—and this is the reason that the state police were convinced that this was a good idea—is to prevent the situation where the AFP have done their controlled operation, done all the investigation and spent months investigating a matter and then they find that there is a state offence which needs to be dealt with. It just saves bringing in a fresh team. The state police obviously see an advantage in it in that it saves them having to be involved in an investigation that has already been dealt with by another police force.

**Senator LUDWIG**—The *Bills Digest* lists some minor technical drafting issues. Have you had an opportunity to have a look at those?

**Mr McDonald**—Yes, we have them sorted.

**CHAIR**—Can I just clarify what you mean by 'sorted'?

**Mr McDonald**—They are being dealt with.

**CHAIR**—So the *Bills Digest* was accurate in its concerns and we are going to pursue those?

**Mr Seebach**—No.

**CHAIR**—Are these government amendments?

**Senator LUDWIG**—I think the other one that was in the *Bills Digest* was the telecommunications interception definition.

**Mr McDonald**—Yes.

**Senator LUDWIG**—So there are the drafting errors in relation to Commonwealth authority and then there is the separate—

**CHAIR**—And the new subparagraph on the passenger movement charge.

**Senator LUDWIG**—Perhaps you could get back to us and tell us what you intend to do with each one of those matters raised in the *Bills Digest*.

**Mr McDonald**—I think we were getting it confused with the Senate Standing Committee for the Scrutiny of Bills report. Were you referring to scrutiny of bills?

**Senator LUDWIG**—Well, them too then. No, this is the *Bills Digest.*

**Mr McDonald**—I was getting a bit confused as to which document you were referring to.

**Senator LUDWIG**—What did the scrutiny of bills committee suggest you do?

**Mr McDonald**—I do not think we have anything except a very minor cross-reference or something like that.

**Senator LUDWIG**—Perhaps you can get back to us in relation to all of those matters as to whether you are going to have an amendment and whether you accept the *Bills Digest* or disagree with it, and why.

**CHAIR**—We will get those to you. We do not have any more specific questions at this stage but, Mr Lawler, we may want to examine the *Hansard* of our discussion with you as against the *Hansard* of the earlier discussions and we may follow up with some questions on that. I am still not confident in my own mind that we are not still speaking at some cross-purposes on some of these issues that are of particular concern to the employees. So we might come back to you on those. We have a tight time frame—as ever. The Senate has given us a turnaround reporting date of 23 March. So we will be in contact sooner rather than later. I thank you—all of those who have been able to attend—for your assistance to the committee this morning. This has been building up for some time. The committee has been involved in the process for some time, and we appreciate the opportunity to hopefully bring it to fruition successfully for all concerned.

**Committee adjourned at 11.09 p.m.**