

# POLICE BARGAINING DISPUTES AND THIRD-PARTY INTERVENTION IN AUSTRALIA: WHICH WAY FORWARD?

GIUSEPPE CARABETTA\*

*The essential duties that police officers perform, and the absence of a right to strike, creates the need for an effective, impartial procedure for the resolution of bargaining disputes. This article argues that, with the shift of focus under the Fair Work Act 2009 (Cth) to good-faith bargaining, police officers have been left without an effective dispute resolution mechanism, partly because of the limitations on arbitration but also because of uncertainties surrounding the scope of the ‘protected action’ provisions of the Act for police officers. Following a review of police pay-setting arrangements in comparable jurisdictions, this article examines and proposes options for an alternative model, including a mandatory ‘final-offer’ arbitration (‘FOA’) model as used for police bargaining in Canada, New Zealand and the United States. Research shows that — aside from providing an effective closure mechanism for bargaining disputes where strikes or lock-outs are unavailable — mandatory FOA offers a range of benefits to police bargaining, and could provide an ideal ‘fit’ for the current bargaining-centred system. The article’s findings are of significance not only to police officers, but to all emergency services workers covered by the Fair Work bargaining regime.*

## I INTRODUCTION

The unique and essential duties which law enforcement officers perform, and the absence of a legal and moral right to strike, creates the need for an alternative effective and binding procedure for the resolution of disputes. This alternative measure is needed both to safeguard police officers’ interests and to protect the community from the flow-on harms of long-running workplace disputes.<sup>1</sup> Police officers in Australia have long had access to such a measure

---

\* Senior Lecturer, University of Sydney. The author is grateful to the *Deakin Law Review*’s anonymous referees for their helpful suggestions, to Lyn Lim and Jane Harris for their research assistance, and to Joellen Riley for her professional support. Of course, any remaining errors or omissions are those of the author.

<sup>1</sup> Cf Bernard Gernigon, Alberto Odero and Horacio Guido, ‘ILO Principles Concerning the Right to Strike’ (1998) 137(4) *International Labour Review* 441, 453. As noted in Part II,

in the form of binding arbitration for pay disputes — specifically, compulsory arbitration under the conciliation and arbitration systems of the general industrial relations Acts.<sup>2</sup> A key feature of these systems for police, as with the pay-setting models of comparable jurisdictions, has been the right to collectively bargain over employment conditions supported by the availability of arbitration to bring closure to negotiations that do not settle.<sup>3</sup> However, as has been highlighted now by a number of Australian pay disputes,<sup>4</sup> with the shift of focus under the *Fair Work Act 2009* (Cth) (*'FW Act'*) from arbitration to enterprise bargaining, there is now limited scope for compulsory arbitration of bargaining disputes. Furthermore, while other occupational groups are afforded the right to take protected industrial action in support of bargaining claims under this system, police officers have a limited ability to utilise these aspects of the new regime.

This article originates from an earlier research proposal<sup>5</sup> examining options for the development of a new pay-setting model for police in Australia. The article argues that the shift to a good-faith bargaining regime premised on the right to strike has created uncertainty and potential instability in police industrial relations.<sup>6</sup> While there have been calls for a re-examination of the current model for *all* workers,<sup>7</sup> Part II of the article argues that, for police and other emergency service workers, there are especially pressing needs to consider an alternative approach. Part III reviews the principal police pay-

---

strictly speaking, this represents the position of the International Labour Organisation ('ILO') in relation to essential services and public employees, police being excluded from these categories. See further text accompanying n 38 below.

<sup>2</sup> See Giuseppe Carabetta, 'Fair Work and the Future of Police Industrial Regulation in Australia' (2011) 24(3) *Australian Journal of Labour Law* 260, 265–6.

<sup>3</sup> *Ibid.*

<sup>4</sup> See, in particular, the Qantas, Victorian nurses, Victorian public sector, and Cochlear disputes in 2011–12. See also Anthony Forysth, 'Qantas Case Shows the Need for Interest Arbitration', *The Conversation* (online) 28 November 2011 <<http://theconversation.com/qantas-case-shows-the-need-for-interest-arbitration-4436>>; Justice Roger Boland, 'Some Current Matters of Interest' (Paper presented at the Annual Conference of the Industrial Relations Society of NSW, Kiama, 18 May 2012).

<sup>5</sup> Giuseppe Carabetta and Joellen Riley, *Employment and the Law in Australian Policing: Options for the Development of a New Police Industrial Relations Law Model*, Australian Research Council Linkage Grant proposal, University of Sydney, submitted 17 November 2010. Despite receiving a very favourable assessor's report and government support, this proposal was ultimately unsuccessful.

<sup>6</sup> The *FW Act* currently applies only to members of the Australian Federal Police and the Victoria Police. However, with the advent of a national unitary industrial relations system, the Fair Work regime potentially affects other Australian jurisdictions also: See Carabetta, 'Fair Work', above n 2, 266.

<sup>7</sup> See, in particular, Forsyth, above n 4; Anthony Forsyth and Andrew Stewart, Submission to the Fair Work Act Review Panel, *Fair Work Act Review*, February 2012; see further Boland, above n 4.

setting models and experiences of comparable overseas jurisdictions — the United Kingdom ('UK'), the United States ('US'), New Zealand, and Canada. It is shown that, despite having a variety of approaches to the rules governing bargaining and third-party intervention, those jurisdictions with established police bargaining systems have, unlike Australia, robust regulatory measures in place as a counterbalance to the loss of the right to strike. Part IV of this article examines the principal options for an alternative model, including options for a model based on mandatory 'final-offer' arbitration ('FOA'), as well as some of the potential challenges and obstacles for the introduction of a new model.

## II THE NEED FOR AN ALTERNATIVE MODEL

Major ILO conventions which promote collective bargaining acknowledge the acceptability of restricting the right of police officers to engage in collective bargaining and to strike. The ILO Convention 87 on Freedom of Association,<sup>8</sup> in article 9, and the ILO Convention 98 on the Right to Organise and Collective Bargaining,<sup>9</sup> in article 5, provide:

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.<sup>10</sup>

It would therefore not seem contrary to ILO standards to restrict the collective bargaining rights of police, including the right to strike. However, if police officers operate under a generalised collective bargaining model along with other employees, it seems reasonable to argue that they ought to enjoy the same compensatory measures as other employees in a bargaining context.<sup>11</sup>

---

<sup>8</sup> *Convention concerning Freedom of Association and Protection of the Right to Organise* (ILO Convention 87), opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).

<sup>9</sup> *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (ILO Convention 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).

<sup>10</sup> The same qualification is applied in the *Labour Relations (Public Service) Convention*, opened for signature 27 June 1978 (entered into force 25 February 1981) art 1(3) and the *Convention concerning the Promotion of Collective Bargaining* (ILO Convention 154), opened for signature 3 June 1981, 1331 UNTS 267 (entered into force 11 August 1983) art 1(2). While there is no direct reference to the right to strike in the relevant ILO conventions, this right has been inferred by the supervisory bodies.

<sup>11</sup> A similar approach to the ILO's standards vis-à-vis police officers has been applied in other contexts: see, eg, *In the Matter of an Interest Arbitration Between The Durham Regional Police Association and The Regional Municipality of Durham Police Services Board* (Preliminary Award, Paula Knopf, 13 July 2007) [76] <<http://www.policearbitration.com>>

Thus, in relation to essential service and public employees, the ILO Committee of Experts has said:

[I]f strikes are restricted or prohibited in the public services or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.<sup>12</sup>

In other words, the removal of the right to strike is to be counter-balanced by a fair and impartial conciliation and arbitration system. By analogy, it would seem valid to treat police officers in the same manner.<sup>13</sup>

The general position in Australia has been that police officers have been subject to formal prohibitions on striking. These prohibitions have ranged from direct bans on industrial action under the Police Acts and regulations to more general restrictions under essential services provisions.<sup>14</sup> However, while police in Australia have been subject to formal restrictions on striking, they have had access to binding arbitration procedures for the resolution of pay disputes — normally under the generalised industrial relations Acts applicable to all employees.<sup>15</sup> An important feature of these models has been the right to collectively bargain supported by (conventional) compulsory arbitration. However, as has now been made clear by a number of high-profile

---

[on.ca/content/stellent/groups/public/@abcs/@www/@opac/documents/awards/07-008.pdf](http://on.ca/content/stellent/groups/public/@abcs/@www/@opac/documents/awards/07-008.pdf);>  
see further below n 16.

<sup>12</sup> ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 69<sup>th</sup> session, International Labour Office, Geneva (1983) pt IV(B), 66. See further Gernigon et al, above n 1, 453.

<sup>13</sup> R J Hawke, 'Do Police Have Industrial Muscle?' in K T Serong (ed), *Police Industrial Relations Seminar* (Abaris Printing and Publishing Co, 1982) 98. The balancing role provided by arbitration in the police context is often acknowledged in policy discussions on police industrial regulation.

<sup>14</sup> See Carabetta, 'Fair Work', above n 2, 263 citing as examples the *Police Service Administration Regulations 1990* (Qld) reg 5.3 and the *Essential Services Act 1988* (NSW) and *Essential Services Act 1958* (Vic). For an example of a direct ban on police strikes in circumstances where other employees are afforded a right to protected industrial action, see Explanatory Memorandum, Police Service Administration Amendment Bill 2002 (Qld) 1, the object of which was 'to place beyond doubt that a police officer must not ... engage in conduct that, if engaged in by 2 or more officers, would be a strike'.

<sup>15</sup> Carabetta, 'Fair Work', above n 2, 265–6; K D Marshall, 'Survival Within the Arbitration System' in K T Serong (ed), *Police Industrial Relations Seminar* (Abaris Printing and Publishing Co, 1982) 105.

disputes,<sup>16</sup> under the current *FW Act*, there is limited scope for arbitration of bargaining disputes, including police bargaining disputes.<sup>17</sup> Importantly, the current good faith bargaining framework does not provide for situations where the parties have reached a bargaining impasse. Further, because the current ‘tests’ for arbitration — including those for good-faith bargaining breaches — are so difficult to satisfy, intractable long-running disputes may continue indefinitely.<sup>18</sup> This has prompted some commentators, particularly Professor Forsyth, to ask whether the rules for access to arbitration under the *FW Act* need re-examining.<sup>19</sup>

In addition, while employees are afforded only a limited right to take protected action in support of bargaining claims (and employers are afforded the right to ‘lock out’) under the Fair Work model,<sup>20</sup> for police officers, there are *additional* limitations in utilising this aspect of the bargaining regime. For one thing, as the writer has shown elsewhere,<sup>21</sup> there are unresolved questions surrounding the scope and validity of the ‘protected action’ provisions of the *FW Act* for law enforcement officers, particularly state law enforcement officers. A significant reason for this is the apparent conflict between the protected action provisions on the one hand, and the relevant Police Act and police officers’ oath of office on the other.<sup>22</sup> Further, it may be doubted how access to those provisions may be effectively used by police in a bargaining context when, by definition, almost any industrial action by them would be a threat to personal health and safety and so might lead to a termination or suspension order under the Act.<sup>23</sup> It is true that there is a propensity for Australian police and their associations to engage in ‘lesser’ forms of industrial pressure tactics short of striking.<sup>24</sup> Such limited actions (working-to-rule, bans on speeding or traffic infringements, and the like) would seem

---

<sup>16</sup> For example, the Qantas and Victorian Nursing disputes in 2011–12, both intractable disputes concerning complex employment matters, and both causing significant disruptions to sections of the community; see Forsyth, above n 4; Boland, above n 4, [16]–[27].

<sup>17</sup> See Carabetta, ‘Fair Work’, above n 2, 268–71.

<sup>18</sup> Forsyth, above n 4; Forsyth and Stewart, above n 7, 22–8; Boland, above n 4, [16]–[39]. Justice Boland, speaking extra-judicially, referred specifically to the long-running Victorian nurses dispute in 2011–12.

<sup>19</sup> Forsyth, above n 4. As discussed further below, Professor Forsyth argues that there are ‘compelling international examples’ of how interest arbitration, including mandatory interest arbitration often used for public sector employment in the United States, could provide a solution to collective bargaining impasses.

<sup>20</sup> Shae McCrystal, *The Right to Strike in Australia* (The Federation Press, 2010).

<sup>21</sup> Carabetta, ‘Fair Work’, above n 2, 268–9.

<sup>22</sup> *Ibid.*

<sup>23</sup> A view supported by Justice Boland, above n 4, [26] referring, in the context of the Victorian nurses dispute, to emergency services workers generally.

<sup>24</sup> See Carabetta, ‘Fair Work’, above n 2, 265; see further text accompanying n 70 below.

allowable under the protected action provisions of the *FW Act*,<sup>25</sup> and can be an effective form of bargaining pressure. However, such actions are essentially an escalation of bargaining pressure; they do not guarantee closure to bargaining disputes.<sup>26</sup> They cannot therefore be a substitute for other closure mechanisms in resolving bargaining impasses.

A related issue that impacts on police bargaining under the *FW Act* concerns the *exclusion* of a number of police matters from the bargaining framework. ‘Command’ matters (discipline, transfers, promotions and a range of other significant matters)<sup>27</sup> are excluded from bargaining for operational efficiency reasons.<sup>28</sup> This has two main effects: (1) it limits the range of matters that may be the subject of bargaining and arbitration for police; and (2) it limits the matters that may be appealed or reviewed under the Act. In one sense, the limitations may make it easier for the parties to successfully reach agreement because there is simply less to disagree over.<sup>29</sup> Further, a number of the excluded matters are otherwise governed by the ‘detailed paternalistic code’<sup>30</sup> that regulates police employment. Despite this ‘code’, however, significant matters have been excluded from the *FW Act without any alternative compensatory provisions being introduced*.<sup>31</sup> This has forced parties to look to alternative means of managing their affairs. However, the problem with such ‘side deals’ is that they do not provide the parties with sufficient certainty that their rights are enforceable.<sup>32</sup>

---

<sup>25</sup> On the assumption, that is, that these provisions validly apply to police officers covered by the Act.

<sup>26</sup> Ian McAndrew, ‘An Examination of Police Pay Setting Systems with Particular Consideration of the Right to Strike and of Models of Arbitration’ (Unpublished Briefing Paper Prepared for the New Zealand Police Association, NZ Mediators, 2006) 4, 34 (*McAndrew Review*). Nor, based on previous case law, would such limited matters be sufficient of themselves to satisfy the public health and safety test for arbitration.

<sup>27</sup> See Carabetta, ‘Fair Work’, above n 2, 271–5, outlining the current exclusions in relation to the Australian Federal Police and the Victoria Police.

<sup>28</sup> See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *The Provisions of the Australian Federal Police Legislation Amendment Bill 1999* (1999) [2.15]–[2.22].

<sup>29</sup> Studies in the US have shown that the limiting of arbitral subjects impedes effective government and employee performance (discussed further below).

<sup>30</sup> D C Thomson, ‘Employment and the Law in the New South Wales Police Force’ (1963) 4 *Sydney Law Review* 404, 404.

<sup>31</sup> See Carabetta, ‘Fair Work’, above n 2, 274–6.

<sup>32</sup> *Ibid* 279. The intended scope of the exclusions has also been a major area of contention between the parties, producing further complexities: at 274.

### III POLICE PAY-SETTING INTERNATIONALLY

In a comprehensive review of police pay-setting systems in the UK, continental Europe, North America and Australia,<sup>33</sup> Ian McAndrew points out that of the jurisdictions with bi-lateral police pay-setting, the common pay-setting mechanism is collective bargaining.<sup>34</sup> Furthermore, in most cases, the laws providing for collective bargaining also require certain forms of alternative dispute resolution, primarily in the form of conciliation or mediation to assist parties unable to reach an agreed settlement.<sup>35</sup> Significantly, however — unlike Australia — many jurisdictions do not have a strong tradition of compulsory arbitration for police pay-setting. McAndrew notes that in much of Europe, for example, there is no guaranteed closure mechanism for police collective bargaining.<sup>36</sup> Instead, bargaining ‘relies on a propensity to bargain to consensus, grounded in traditions of social partnership’, and on police unions’ strong political links.<sup>37</sup> Similarly, in the US, as will be noted presently, compulsory arbitration is especially prevalent amongst police and other essential service workers, the rationale for which is the desire to prevent strikes that may be harmful to the public interest.<sup>38</sup> However, in some US states where police are granted bargaining rights, there is a form of alternative dispute resolution such as mediation, but no binding arbitration.<sup>39</sup>

---

<sup>33</sup> *McAndrew Review*, above n 26. The purpose of the *McAndrew Review* was to provide a survey on police pay-setting models in other relevant police jurisdictions, ‘focusing in particular on the question of the right to strike and the role, if any, that it plays in police pay-setting elsewhere’: at 5.

<sup>34</sup> *Ibid* 32. Many police officers across the world — in parts of Africa, South America, many (mainly Southern) US States, and elsewhere — have their employment conditions determined unilaterally by governments, or individual police agencies; while others, even in countries with strong traditions of democracy, are expressly denied the right to bargain (eg the Royal Canadian Mounted Police): at 31. It is also worth noting that among public emergency services, including police services, there is a wide variety of rules and limitations governing collective bargaining, including its scope, the levels at which it can take place, and limits on third-party intervention: ILO, *Public Emergency Services: Social Dialogue in a Changing Environment*, International Labour Office, Geneva (2003) (*‘ILO Public Emergency Services’*) 98 <[http://www.ilo.org/public/libdoc/ilo/2002/102B09\\_313\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2002/102B09_313_engl.pdf)>.

<sup>35</sup> *McAndrew Review*, above n 26, 32. This is the case even in European countries where police officers have a right to strike: at 19–20.

<sup>36</sup> *Ibid* 19–20, citing the examples of Germany and the Netherlands.

<sup>37</sup> *Ibid* 32.

<sup>38</sup> *Gale Encyclopedia of US History*, ‘Arbitration’ (online) Answers.com <[www.answers.com /topic/arbitration](http://www.answers.com/topic/arbitration)> cited in Boland, above n 4, 14.

<sup>39</sup> *McAndrew Review*, above n 26, 32; Mike Carrell and Richard Bales, ‘Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining’ (2012) 28(1) *Ohio State Journal on Dispute Resolution* 17 <<http://ssrn.com/abstract=2000185>>.

In other jurisdictions however — particularly Canada, New Zealand, a number of US states, and the UK — the right of the police to bargain is supported by compulsory arbitration designed to bring closure to bargaining disputes that do not settle.<sup>40</sup> As already noted, the policy rationale for the availability of compulsory arbitration, in lieu of a right to strike, is two-pronged: to safeguard police officers' industrial interests; and to protect the community from the consequent harms of police workplace disputes. Legislators have expressed the policy reasoning as follows:

Recognizing the unique and essential duties which law enforcement officers and firefighters perform for the benefit and protection of the people of this State, cognizant of the life threatening dangers these public servants regularly confront in the daily pursuit of their public mission, and fully conscious of the fact that these public employees, by legal and moral precept, do not enjoy the right to strike, it is ... requisite to the high morale of such employees, the efficient operation of such departments, and to the general well-being and benefit of the citizens of this State to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes.<sup>41</sup>

Access to arbitration is approached in varying ways both across and within jurisdictions. The variations are based on considerations such as whether arbitration is to apply after periods of conciliation, or after mediation and/or fact finding has proved unsuccessful, or on other bases.<sup>42</sup> The Ontario *Police Services Act 1990*, for example, provides that:

- If conciliation fails, the parties can jointly agree on an arbitrator/arbitration board, or one will be appointed by the Chair of the Police Arbitration Commission.
- The default method of arbitration is mediation–arbitration — whereby the mediator-arbitrator attempts to mediate, but has authority to determine outstanding matters by arbitration.

---

<sup>40</sup> As noted below, this statement requires qualification in a number of significant respects, including issues relating to the role of the arbitrator in pay disputes.

<sup>41</sup> This extract is taken from the New Jersey *Police and Fire Public Interest Arbitration Reform Act of 1995*, Pub L No 425, NJ Stat Ann, 34:13A–14, which established a specialist process for compulsory interest arbitration for both law enforcement officers and fire fighters.

<sup>42</sup> See generally, *McAndrew Review*, above n 26, 15–28; see also Robert J Martin, 'Fixing the Fiscal Police and Firetrap: A Critique of New Jersey's Compulsory Interest Arbitration Act' (1993) 18 *Seton Hall Legislative Journal* 59. In some cases, binding arbitration applies even in instances where the parties choose not to invoke alternative dispute resolution procedures such as mediation.



- In the arbitration stage, the arbitrator decides by FOA, selecting a final offer from either party on an ‘issue-by-issue’ or ‘total package’ basis.
- In lieu of the default process, the Chair of the Arbitration Commission can direct that the dispute be resolved by mediation–final offer arbitration, FOA or by conventional arbitration if he or she deems it appropriate having regard to the nature of the dispute.<sup>43</sup>

A range of arbitration methods is used in the various jurisdictions — including conventional arbitration, FOA and mediation–arbitration<sup>44</sup> — and, as noted by McAndrew, the arbitrator is drawn from a variety of sources, and may be a single arbitrator or a panel, either tripartite or wholly neutral.<sup>45</sup> FOA (and an absolute ban on strikes) exists for police in parts of Canada, in New Zealand, and in some US states. It was introduced originally in the US and Canada, primarily in the police and fire services, once again reflecting the need to prevent the high cost of strikes in these sectors.<sup>46</sup> In contrast to conventional arbitration, where the arbitrator has complete discretion to determine the dispute within formal parameters, under FOA the arbitrator must choose one of the unalterable offers of one of the parties — either on each issue or an overall ‘package’ basis — based on the elements of each party’s final proposals.<sup>47</sup> As discussed below, FOA can offer the advantages of conventional arbitration in providing a guaranteed closure mechanism, while simultaneously avoiding the perils of conventional arbitration. In particular, FOA aims to address the ‘chilling effect’ common in conventional arbitration by encouraging the parties to present more reasonable, middle-ground offers.

Mediation–arbitration (or ‘Med–Arb’), used in various forms in Canada, the US and New Zealand, normally involves combining mediation and arbitration while utilising the same person as mediator and arbitrator — the aim being to combine the advantages of the two processes. An example is the Ontario

---

<sup>43</sup> See *Police Services Act*, RSO 1990, pt VIII, ss 119–22.

<sup>44</sup> This range of arbitration models applies across both the US and the Canadian provinces: *McAndrew Review*, above n 26, 20, 26.

<sup>45</sup> *Ibid* 32. McAndrew notes that in the US, where states have regulated police labour relations systems, there is frequent use of mediation via state or private services and often some form of arbitration commonly performed by agreed or appointed private arbitrators. These systems are generally administered by a state public employment relations body and modelled on the National Labor Relations Board that administers private sector bargaining under the *National Labor Relations Act* 29 USC §§ 151–69: at 24.

<sup>46</sup> Amy Lok, ‘Final-Offer Arbitration’ (2008) 10(4) *Australian Dispute Resolution Bulletin* 61, 62 <<http://epublications.bond.edu.au/adr/vol10/iss4/1>>.

<sup>47</sup> *Ibid*.

Police model, where the neutral person first attempts to mediate a settlement but, failing that, determines the remaining issues by arbitration. A variation is provided by the New Zealand Police model.<sup>48</sup> If the parties are unable to reach a resolution during ‘informal negotiation’, both a mediator and arbitrator attend ‘formal negotiation’ during which the arbitrator is able to provide feedback and indicate his or her ‘leaning’ on the parties’ respective proposals.<sup>49</sup> Arbitration is on a final-offer package basis, and the parties are able to modify their positions following a formal arbitration hearing. In a 2012 study of this model, McAndrew found that a perceived advantage of having the arbitrator present during mediation is that she/he develops a better understanding of the issues and is able to better focus the negotiations.<sup>50</sup> At the same time, the arbitrator is able to steer the parties by signalling whether or not he or she is impressed by what is being proposed and by asking the parties questions about the basis of their positions.<sup>51</sup>

The criteria guiding arbitrators often cover a range of factors. The capacity of the employer to pay is the most frequently applied criterion.<sup>52</sup> Others include the public interest, wage comparability, and productivity improvements. The *New Jersey Police and Fire Public Interest Arbitration Reform Act* requires the arbitrator to give due weight to nine factors: (1) the interests and welfare of the public; (2) wage comparability; (3) the overall level of benefits presently received by the police or fire fighting employees; (4) the stipulations of the parties; (5) the lawful authority of the employer; (6) the financial impact of a particular award on the municipality, its residents, and its taxpayers; (7) cost of living changes; (8) the continuity and stability of employment; and (9) statutory restrictions imposed on the employer.<sup>53</sup> The

---

<sup>48</sup> See Ian McAndrew, ‘Final-Offer Arbitration: A New Zealand Variation’ (2003) 42(4) *Industrial Relations* 736, 736. The current model is established under the *Policing Act 2008* (NZ), providing for a bargaining impasse procedure in the form of FOA; the parties themselves, however, have designed and ‘moulded’ their own Police Negotiations Framework.

<sup>49</sup> Ian McAndrew, ‘Collective Bargaining Interventions: Contemporary New Zealand Experiments’ (2012) 23(2) *The International Journal of Human Resource Management* 495, 495–510.

<sup>50</sup> *Ibid* 500.

<sup>51</sup> *Ibid* 500–1. McAndrew explains that under the original model, the arbitrator could present an actual ‘interim decision’ before issuing a final decision if required. However, while this feature was viewed as a stimulus to further bargaining, it was also felt it had a ‘chilling’ effect that had preceded the interim decision. Accordingly, the framework was modified to allow the parties to ask the arbitrator to informally provide their ‘leaning’ at any stage: at 499.

<sup>52</sup> *McAndrew Review*, above n 26, 16, 23, 26, 30. As noted below, growing concerns over ‘fiscal responsibility’ and reductions in tax revenue has meant the employer’s capacity to pay has assumed an ever greater significance.

<sup>53</sup> *Police and Fire Public Interest Arbitration Reform Act of 1995*, Pub L No 425, NJ Stat Ann, 34: 13A–16(g).

significance of each criterion depends on the contested issues and evidence presented. A similar approach is followed in other specialist police arbitration systems.<sup>54</sup> In some jurisdictions, the qualifications required for, and the nature of, police work are considered,<sup>55</sup> while in New Zealand, the arbitrator must consider ‘the special conditions applicable to employment in the Police, including the prohibition on strikes by constables’.<sup>56</sup>

In addition to the above observations, three other key features of the current police bargaining and arbitration models must be noted. These features significantly limit normal bargaining, and give the employer distinct advantages in relation to the determination of employment conditions. First, in some cases, as in Australia, some matters are excluded from the bargaining framework.<sup>57</sup> These restrictions significantly limit, purportedly for public policy reasons, the role of the arbitrator in the determination of police employment conditions. The extent of the exclusions varies between jurisdictions, and in some cases there are *no* restrictions.<sup>58</sup> However, in some cases, the arbitrator must have regard to such matters as the Commissioner or responsible minister considers relevant.<sup>59</sup> It is highly unusual that a party to supposedly neutral and fair arbitration has the power to unilaterally impose criteria on the arbitrator in this way.<sup>60</sup>

Secondly, growing concerns with ‘ability to pay’ considerations in recent years have seen further employer predominance in the pay determination

---

<sup>54</sup> See, eg, *Police Services Act*, RSO 1990 pt VIII s 122(5); *Fire and Police Services Collective Bargaining Act*, RSBC 1996, c 142, s 4(6); *Policing Act 2008* (NZ) sch 2 s 5.

<sup>55</sup> For example, *Fire and Police Services Collective Bargaining Act*, RSBC 1996, c 142 s 4(6)(d); *Policing Act 2008* (NZ) sch 2 s 5(b)(c).

<sup>56</sup> *Policing Act 2008* (NZ) sch 2 s 5(f).

<sup>57</sup> *ILO Public Emergency Services*, above n 34, 98–9, noting policing as the common example for such limitations.

<sup>58</sup> For example, there are currently no such restrictions in New Zealand: Ian McAndrew, ‘“Med-Arb” in the New Zealand Police’ in William K Roche, Paul Teague and Alex Colvin (eds), *Oxford Handbook of Conflict Management in Organizations* (Oxford University Press, 2013) (forthcoming).

<sup>59</sup> See, eg, *Fire and Police Services Collective Bargaining Act*, RSBC 1996, c 142 s 4(6)(f), providing that the arbitrator must give regard to ‘any terms of reference specified by the minister ...’. This provision has been interpreted as conceivably involving a direction to give certain arbitration criteria under the Act more weight than others, or to specify new factors: see *City of Vancouver v Vancouver Fire Fighters’ Union*, *International Association of Fire Fighters* (Collective Agreement Interest Arbitration, John B Hall, 22 March 2012).

<sup>60</sup> Gordon Anderson, ‘Proposed Changes to the Arbitration Regime under the Police Act (Police Amendment No 2) Bill 2001’ (Advice Prepared for the New Zealand Police Association, 28 August 2001) referring to the position under the previous New Zealand *Police Act 1958* (NZ) sch 3 cl 24(g) providing that the arbitrator had to consider ‘such other matters as the Commissioner ... considers relevant’. The police association now has the same right to raise additional matters under the *Policing Act 2008* (NZ) sch 2 cl 5(g).

process. In the UK, for example, if the parties fail to reach resolution, the matter may be referred to the Police Arbitration Tribunal. The awards of the tribunal, however, are treated as agreements of the Police Negotiation Board ('PNB'), which in turn are recommendations to the Home Secretary, the Northern Ireland Secretary and Scottish ministers.<sup>61</sup> The Home Secretary has on occasion rejected recommendations of the arbitral tribunal for budgetary reasons.<sup>62</sup>

Thirdly, and most significantly, a number of jurisdictions — led by several US states — have recently enacted or are considering controversial measures limiting or eliminating public sector bargaining, on the ground that it has contributed to public deficit crises.<sup>63</sup> The measures limit the scope of bargaining, the enforceability of agreements, and arbitrators' powers to award wage increases, and otherwise restrict the activities of public sector unions. A police-specific example is the recent change to the *New Jersey Fire and Police Arbitration Act*, which limits annual base salary increases awarded to police and fire personnel through arbitration to an average of 2 per cent, while also significantly reducing the time-frame for bargaining.<sup>64</sup> A major driver of such changes is an underlying assumption that third-party intervention means that employers lose the ability to contain wage outcomes on 'ability to pay'

---

<sup>61</sup> Office of Manpower Economics, *Arbitration* <<http://www.ome.uk.com/downloads/arbitration.doc>>; Susan Corby, 'Public Sector Disputes and Third Party Intervention' (Research Paper 02/03, Advisory, Conciliation and Arbitration Service, 2003) 2. Corby cites pay determination for the UK police — where the government also has explicit power to, *inter alia*, set issues into the agenda for the PNB — as a classic example of 'overt and formal' predominance by the employer.

<sup>62</sup> See Vincent Keter, 'Police Pay — Booth Review' (Briefing Paper 2008/11, House of Commons, 5 December 2011). Corby notes that the only other time a PNB recommendation was rejected was in 1989 and this was signalled well in advance: Corby, above n 61, 16; see also Hawke, above n 13. It would appear that, as with similar Pay Review Bodies in the UK, the government has the final say in such matters: Corby, above n 61, 15–16.

<sup>63</sup> See Richard B Freeman and Eunice Han, 'The War against Public Sector Collective Bargaining in the US' (2012) 54(3) *Journal of Industrial Relations* 386, 391–3, outlining the major reforms in the US states of Wisconsin and Ohio. See further, Anthony Mapp, 'Arbitration Reform Bill A-3393: New Jersey's Dramatic Change in Compulsory Interest Arbitration' (2012) 9(2) *Rutgers Conflict Resolution Law Journal* <<http://pegasus.rutgers.edu/~rclj/articlespdf/Mapp.pdf>>; Jeff Mitchell, 'The Next Chapter: Public Sector Wage Restraint Debate Continues', *Mondaq Business Briefing* (online), 16 October 2012 <<http://www.mondaq.com/canada/x/201664/employee+rights+labour+relations/The+Next+Chapter+Public+Sector+Wage+Restraint+Debate+Continues>>. Australian public sector workers have not been immune from these trends: see Giuseppe Carabetta, 'Public Sector "Wages-Cap": The New Framework for the Determination of Public Sector Wages and Conditions in New South Wales' (2012) 25(1) *Australian Journal of Labour Law* 65, discussing changes to the *Industrial Relations Act 1996* (NSW) effectively limiting the arbitral tribunal's powers to increase public sector labour costs beyond 2.5 per cent. Police and other public safety employees have on occasion been exempted from the changes.

<sup>64</sup> See Mapp, above n 63.

grounds.<sup>65</sup> However, such predominance by the employer in pay determination processes runs contrary to the purpose of the police arbitration statutes. It is also unquestionably contrary to the ILO's requirement of having in place 'fair and impartial' arbitration principles to counterbalance the loss of the right to strike.

#### IV THE PRINCIPAL OPTIONS FOR AN ALTERNATIVE MODEL

This review of the different models shows that there is a variety of approaches to the rules governing bargaining and arbitration for police. The variations reflect the need to preserve the essentiality of police and other emergency services, to allow them to enjoy the same essential safeguards as other employees, and — increasingly — to curb public spending. These same variations reflect the difficulty in reaching and indeed implementing a single set of solutions for police pay-setting.<sup>66</sup> However, despite the variation, it is clear that, in jurisdictions with police-specific bargaining regimes, the right to bargain is often supported by compulsory arbitration as a counterbalance to the loss of the right to strike. The clear advantage of compulsory arbitration is that it provides a means of resolving bargaining impasses.<sup>67</sup>

The current Fair Work bargaining framework seeks to reconcile a right for essential service workers to take limited industrial action, with a right to binding arbitration.<sup>68</sup> This represents a progressive approach for essential services. Similarly, the ILO itself has asked whether it is worth considering the possibility of avoiding a total ban on strikes in essential services by ensuring a minimum level of service.<sup>69</sup> A minimalist option under the *FW Act* would be to retain the current model but to expressly authorise police officers to take limited industrial action, in order to clarify their right to take protected action under the Act. The advantage of this approach would be that it is consistent with the previous Australian practice of police officers engaging in

---

<sup>65</sup> A number of studies on public sector bargaining have shown this assumption to be open to question, suggesting the main drivers for the limitations appear to be political and ideological: see Freeman and Han, above n 63.

<sup>66</sup> Cf *ILO Public Emergency Services*, above n 34, referring to the public emergency services generally.

<sup>67</sup> See Carrell and Bales, above n 39.

<sup>68</sup> McCrystal, above n 20, 190.

<sup>69</sup> As earlier suggested by the Committee of Experts on the Application of Conventions and Recommendations: *ILO Public Emergency Services*, above n 34, 103.

limited forms of industrial action.<sup>70</sup> It would also promote symmetry between police officers' bargaining practices and those of other employees.<sup>71</sup>

However, providing police officers with direct authorisation to engage in protected action would raise the difficult question of how to properly define the *scope* of allowable industrial action. It would also raise complex issues as to how the right to protected action would interact with police officers' obligations under relevant policing legislation. Further, without more, the problems relating to the practical limitations on police and emergency services workers taking protected industrial action would remain, as would the problems relating to limited access to arbitration under the Act.

It is this kind of issue that has prompted Justice Boland to suggest that consideration be given to a US-style 'mandatory interest arbitration'<sup>72</sup> model for emergency services workers under the *FW Act*.<sup>73</sup> Given that mandatory interest arbitration can provide a solution to bargaining impasses, the concept warrants further examination. Its major strength is that it does not replace collective bargaining; rather, it offers a solution when the conditions for productive collective bargaining have broken down.<sup>74</sup> As Forsyth has pointed out, a number of important policy issues would need to be resolved before mandatory interest arbitration could be introduced, including whether access to arbitration should be automatic, or apply after set time periods, or whether the current 'bad-faith' test should be made easier to satisfy.<sup>75</sup> However, in a policing context, a mandatory interest arbitration model would be simpler to implement, for not only would it provide a closure mechanism for bargaining disputes, but (coupled with an absolute bar on strikes) it would prevent the

---

<sup>70</sup> In 2006, a review team in New Zealand highlighted the point that 'precedents can be found [in particular] in several Australian jurisdictions where police officers have access to limited forms of industrial action': Police Act Review Team (NZ), 'Employment Arrangements' (Issue Paper No 3, New Zealand Police, August 2006) 6, 14–16. As noted earlier, such actions have generally included working-to-rule and bans on speeding or traffic fines and the like.

<sup>71</sup> *Ibid.*

<sup>72</sup> Mandatory interest arbitration, as used in the US, is the process whereby the arbitrator determines some or all of the terms the parties are to have in their collective bargaining agreement when negotiations have been unsuccessful. The process is usually coupled with an absolute bar on strikes for the affected workers.

<sup>73</sup> Boland, above n 4, [35], focusing in particular on the limitations on industrial action for emergency service workers, and endorsing the earlier observations of Forsyth; Forsyth, above n 4, on the advantages of US and Canadian models of mandatory interest arbitration.

<sup>74</sup> Forsyth, above n 4; Boland, above n 4, [32].

<sup>75</sup> Forsyth, above n 4, referring to workers generally.

problem of conflict between a right to protected action and the relevant Police Acts.<sup>76</sup>

The concern with introducing mandatory interest arbitration — leaving aside obvious political obstacles<sup>77</sup> — is that it may lead the parties to rely on third-party intervention and undermine bargaining (the so-called ‘chilling’ and ‘narcotic’ effects). However, research into police bargaining systems has shown that such effects depend on the precise enabling measures in place, including the form of compulsory interest arbitration.<sup>78</sup> One form of mandatory interest arbitration may be FOA, as used in various forms in Canada, New Zealand, and the US.<sup>79</sup> As noted, FOA can offer the advantages of conventional interest arbitration while simultaneously avoiding its ‘perils’.<sup>80</sup> It is particularly advantageous where — as in the case of emergency services — the traditional economic weapons of strike and lock-out are unavailable and the parties are in a ‘locked-in’ relationship, making it difficult to determine value on the open market.<sup>81</sup> A number of US studies have shown that, compared to other dispute resolution mechanisms such as mediation and conventional arbitration, FOA offers at least four advantages:

- FOA encourages the parties to present more reasonable, middle-ground offers because the arbitrator must choose the more reasonable of the two offers.
- FOA provides a strong incentive to the parties to settle during the pre-hearing stage.
- It provides finality — it can provide public officials with a binding decision in a bargaining dispute, which can then be implemented during a new budget cycle.

---

<sup>76</sup> Nor would the broader question as to how a right to industrial action interacts with interest arbitration: *ibid.*

<sup>77</sup> Boland, above n 4, [29]–[30], [39]. He refers to the ‘vociferous’ opposition from employers and political obstacles to any suggestion of even last resort arbitration in respect of bargaining disputes. The recent Fair Work Review has also rejected a general expansion of Fair Work Australia’s arbitration powers: Ron McCallum, Michael Moore and John Edwards, *Towards More Productive and Equitable Workplaces* (Review Report prepared for the Minister for Employment and Workplace Relations, Australian Government, 15 June 2012) 146–8.

<sup>78</sup> See, for example, the discussion on the system of final-offer mediation–arbitration used to settle police bargaining disputes in New Zealand: McAndrew, above n 49. McAndrew argues that the New Zealand experience supports earlier research denying the inevitability of a ‘narcotic’ dependence on arbitration.

<sup>79</sup> FOA has also been used in Britain although mainly in respect of prison officers.

<sup>80</sup> Carrell and Bales, above n 39; Lok, above n 46.

<sup>81</sup> Carrell and Bales, above n 39, 6–7, 24.

- It avoids the politically unpalatable prospect offered by conventional arbitration of an unelected arbitrator drafting the parties' agreement.<sup>82</sup>

Carrell and Bales acknowledge the 'common criticism' of FOA, namely, that there is a possibility that neither party will present a reasonable package, meaning that the arbitrator must choose between two unreasonable offers.<sup>83</sup> However, respondents to this criticism argue that the likelihood of the parties adopting unreasonable offers is small, given that FOA essentially rewards the more reasonable proposal and punishes the extreme proposal.<sup>84</sup> Others argue that using an issue-by-issue approach, as distinct from a 'package' approach, can offer at least a partial solution. Further, according to Carrell and Bales, research on FOA models suggests that the more transparent the FOA process (for example, where it imposes an obligation on the parties to disclose their final offers to the other side), 'the more reasonable the parties' proposals will be and the more likely the dispute is to settle'.<sup>85</sup>

Most FOA statutes require that the parties engage in some alternative dispute resolution procedure prior to the initiation of formal arbitration. Many further require that these processes result either in a settlement or in the parties submitting a final offer. The obvious benefit of the incentive to settle is that this can encourage negotiated agreements. If no agreement is reached, the arbitration process begins in a timely manner.<sup>86</sup> As noted earlier, under most FOA models, such as that in New Zealand, a mediation–arbitration process is applied.<sup>87</sup> While structural and environmental factors must play a part, the experience of applying New Zealand's mediation–arbitration FOA model supports earlier US-based research denying any inevitable 'chilling' effect, and seeing the availability of mandatory arbitration as enhancing the effectiveness of prior non-coercive processes.<sup>88</sup>

---

<sup>82</sup> *Ibid*, citing a number of US examples. Australian commentators, such as Dr Graham Smith, also support a FOA approach as a 'circuit breaker' for at least some kinds of bargaining disputes: see Boland, above n 4, [36]–[37].

<sup>83</sup> Carrell and Bales, above n 39, 23. See further Lok, above n 46. Another criticism of FOA is that in limiting the arbitrator's discretion it can be inflexible: Corby, above n 61, 28.

<sup>84</sup> Martin, above n 42, 72–3.

<sup>85</sup> Carrell and Bales, above n 39, 23.

<sup>86</sup> Martin, above n 42, 97. Under some police FOA models, the parties are allowed to mutually agree on a type of arbitration (conventional or FOA), or a particular type of FOA (eg, single issue or package). The alternatives may also vary depending on the prior dispute resolution procedure applied (eg, mediation or fact-finding): at 76–7.

<sup>87</sup> *Ibid* 106: Martin refers to mediation–arbitration as a 'hallmark' of final offer systems. As noted above, the New Zealand model represents a unique variation on the traditional model.

<sup>88</sup> McAndrew, above n 49.



The timing of submissions of final offers also seems to be an important factor in encouraging bargaining. Evidence from the US suggests that encouraging parties to submit final offers as early as possible prior to arbitration, and then allowing an early 'grace period' in which the parties continue to negotiate before formal hearings begin, provides the parties with an incentive to negotiate their own settlements.<sup>89</sup> According to Carrell and Bales, allowing the parties to extend this grace period and possibly agree on single issues until an award is issued provides an additional incentive to form last-minute agreements.<sup>90</sup> This also seems consistent with evidence showing that the mere existence of last-resort arbitration in a bargaining context has a 'shadow effect', leading the parties to negotiate their own outcomes in most cases.<sup>91</sup>

Serious consideration should also be given to the range of matters that may be subject to arbitration. The limiting of negotiable topics can actually make bargaining more (and not less) difficult, especially under economic conditions where workers are able to use wages and other bargaining subjects as a 'proxy' to obtain gains in other areas.<sup>92</sup> To what extent the practice of excluding topics is properly grounded in the uniqueness of police work also seems questionable, now that many police employment conditions substantially reflect general employment conditions.<sup>93</sup> One concern is that it can be difficult to draw a line between police 'employment' and 'policy' matters.<sup>94</sup> Moreover, the fact that the exclusions are described in broad terms only exacerbates this problem.<sup>95</sup> Whatever its effects on bargaining, the limiting of negotiable topics certainly favours the employer, and, unlike other employees, police officers are not able to influence the scope of such matters by striking. A minimal option would be to at least spell out the types of operational situations where exemptions apply, rather than using the usual 'shopping list' approach. But even then, complementary alternative regulatory measures would need to be put into place to ensure that there were no 'gaps' in the regulatory framework.<sup>96</sup>

---

<sup>89</sup> See Carrell and Bales, above n 39, 25.

<sup>90</sup> Ibid.

<sup>91</sup> See Forsyth and Stewart, above n 7, 27 where they refer to empirical evidence on the effects of first-contract arbitration models in Canadian jurisdictions, in support of an argument for an increased role for arbitration in Australia.

<sup>92</sup> Carrell and Bales, above n 39, 20, citing various studies suggesting the narrowing of bargaining topics can lead to unstable bargaining relationships and even limit performance.

<sup>93</sup> See Carabetta, 'Fair Work', above n 2, 279.

<sup>94</sup> *ILO Public Emergency Services*, above n 34, 98–9.

<sup>95</sup> See Carabetta, 'Fair Work', above n 2, 273–4.

<sup>96</sup> See further Carabetta, 'Fair Work', above n 2, 274–5.

Law-makers would also need to carefully consider the statutory criteria for arbitration, including requirements to consider the interests of the community, the state of the economy, and the capacity of the employer to pay. This would include, in the case of police officers, consideration of government and department budgets. As noted above, the need to control public expenditure has meant that the focus is now firmly on ‘ability to pay’ issues.<sup>97</sup> A recent (extreme) Australian example is the New South Wales ‘wages-cap’ legislation, which effectively ‘caps’ the arbitral tribunal’s powers to increase public sector labour costs at 2.5 per cent.<sup>98</sup> The clear intention of such schemes is to unilaterally alter the conditions under which arbitration occurs in favour of the employer, something which is clearly inconsistent with the ILO’s requirements for an effective, impartial arbitration procedure. The question of how such a change might affect the community is also relevant.<sup>99</sup> A US study on how police officers responded to changes in compensation found that police performance declined dramatically when arbitrators ruled against the police union.<sup>100</sup> Further, if the parties are to have confidence in the arbitration system, its impartiality needs to be retained. A wages-cap requirement can undermine this goal, partly because the arbitrator’s decision-making powers are greatly diminished, but also because police officers’ ability to bargain is diminished. For these reasons, a wages-cap requirement should be avoided or a fairer and more neutral ‘ability to pay’ criterion should be used, taking account of *both* police officers’ and taxpayers’ interests.<sup>101</sup>

## V CONCLUDING REMARKS

A number of the recent commentaries calling for a re-examination of the rules for access to arbitration under the *FW Act* note that, in the US, mandatory interest arbitration is especially prevalent amongst public essential services.<sup>102</sup> Similarly, as the present study has shown, in many overseas jurisdictions

---

<sup>97</sup> See the examples cited in Carabetta, ‘Wages Cap’, above n 63.

<sup>98</sup> *Ibid.*

<sup>99</sup> Cf Mapp, above n 63, discussing similar ‘salary-cap’ reforms to the New Jersey *Police and Fire Public Interest Arbitration Reform Act of 1995*, Pub L No 425, NJ Stat Ann, 34:13A–16(g).

<sup>100</sup> Cited in Mapp, above n 63, 16–7. The same study, according to Mapp, found that union losses are associated with a 5.5 per cent increase in reported crime rates in the months following arbitration.

<sup>101</sup> A similar recommendation was made to the New Zealand Police Association in response to a government proposal in relation to the New Zealand Police arbitration system in 2001: Anderson, above n 60. A further safeguard would be to require the arbitrator (and parties themselves) to give a detailed account of the potential impact of a higher or lower award on government programs, on other employees, and on taxpayers: Martin, above n 42, 99–100.

<sup>102</sup> In particular, Forsyth, above n 4; Boland, above n 4.

where police have established collective bargaining systems, this is supported by compulsory arbitration as a counterbalance to the loss of the right to strike. Forsyth also makes the point that, despite the prevalence of mandatory interest arbitration in most public sector employment in the US, in the private sector, bargaining arbitration is only voluntary, and that this is in line with the US free enterprise system.<sup>103</sup>

The approach in Australia, by contrast, has been to simply group police with other workers under the *FW Act*, making exceptions based on operational and essential services grounds. No consideration has been given to issues relating to police pay determination, including the potential limits on industrial action.<sup>104</sup> The problem is that, with limited access to arbitration, police officers are left without a guaranteed closure mechanism. While there will not be a return to a compulsory arbitration system in Australia,<sup>105</sup> it is legitimate to ask whether there is scope for at least some form of mandatory interest arbitration for police.<sup>106</sup> It is no coincidence that most Western countries with established police bargaining systems have separate, arbitral procedures in place. In Australia, this occurs only in respect of the Northern Territory Police, who operate under a specialist police arbitral tribunal model.<sup>107</sup>

The advantage of mandatory interest arbitration over other dispute resolution methods such as mediation and conciliation is that it can be used to resolve bargaining impasses, and therefore prevent the escalation of bargaining disputes into strikes or other power bargaining tactics.<sup>108</sup> Furthermore, the threat of an imposed outcome focuses the parties' minds on the need to reach agreement.<sup>109</sup> As verified by empirical evidence mandatory interest arbitration is not a 'substitute' for collective bargaining. Rather, it is a tool to be used where the conditions for productive negotiation have broken down —

---

<sup>103</sup> Forsyth, above n 4.

<sup>104</sup> This is despite submissions of the Police Federation of Australia and recognition by a Senate Committee of Inquiry of the need to address a number of defects in the Fair Work system as it applies to police: see Carabetta, 'Fair Work', above n 2, 280.

<sup>105</sup> Boland, above n 4, [30]. See further the discussion above n 77.

<sup>106</sup> Even the harshest critics of compulsory arbitration have rarely called for its abolition for police officers: Martin, above n 42, 99. As noted, in other jurisdictions (such as New Zealand) where there has been a similar move away from arbitration to enterprise bargaining, police have retained an arbitration system. In the United Kingdom, arbitration is compulsory for police officers, but not for fire fighters: Corby, above n 61, 17.

<sup>107</sup> *Police Administration Act 1978* (NT) pt III divs 1–2.

<sup>108</sup> A large body of research shows that the availability of arbitration substantially reduces the incidence of police strikes: *McAndrew Review*, above n 26, 33.

<sup>109</sup> A large body of empirical evidence supports this: see, eg, Carrell and Bales, above n 39, 11; Forsyth, above n 4; Forsyth and Stewart, above n 7.

something that, as confirmed by recent experience, is more likely during difficult economic times.<sup>110</sup>

Final-offer arbitration, a form of mandatory interest arbitration used in police jurisdictions in the US, Canada and New Zealand, also guarantees settlement of bargaining impasses, providing a stronger incentive to the parties to reach agreement than conventional arbitration does and potentially minimising its chilling effect.<sup>111</sup> Further, because the arbitrator must choose the more reasonable of the parties' final offers, FOA encourages the parties to negotiate towards the 'middle-ground' rather than to adopt polar positions.<sup>112</sup> Despite its relatively limited use to date,<sup>113</sup> research suggests that FOA enhances the effectiveness of non-coercive processes such as conciliation and mediation and thereby produces stable bargaining relationships. A police-specific example is the New Zealand FOA model.<sup>114</sup>

Law-makers, governments and police associations considering adopting FOA as a means of resolving police bargaining disputes would need to consider several issues: (1) the possible adoption of FOA instead of conventional arbitration in instances where further negotiation is unlikely to be productive; (2) the inclusion of mandatory mediation by the Fair Work tribunal (or another mediator) for a fixed time period, to increase the probability of pre-hearing agreements; (3) together with mandatory mediation, a grace period before the hearing during which the parties, after making their final offers, can continue to negotiate; (4) the adoption of an 'issue-by-issue' versus a 'total package' form of FOA; (5) the specification of the range, if any, of bargaining exclusions (and the basis for those exclusions), and of complementary alternative measures; (6) the specification of the criteria for the arbitrator to consider, including the state of the economy and the employer's 'capacity to

---

<sup>110</sup> Forsyth, above n 4.

<sup>111</sup> Carrell and Bales, above n 39, 27, discussing FOA in a general public sector context.

<sup>112</sup> Ibid 12. Carrell and Bales draw a comparison here with FOA as used for Major League Baseball players in the US: 'If [conventional] arbitration was used, the parties might fear an arbitrator would simply split the difference [and] this would encourage the parties to take polar positions in negotiations ... In baseball arbitration, however, the parties have the opposite incentive — they have every incentive to make a reasonable proposal ... This undoubtedly explains why the majority of cases settle before arbitration': at 15.

<sup>113</sup> Ibid. Few public sector statutes permit FOA, even in the United States. It has not hitherto been used in Australia; however, some commentators have expressed support for a limited form of last-offer arbitration as a 'circuit breaker' for negotiations concerning Greenfield agreements: See, eg, Graham Smith, Submission to the Fair Work Act Review Panel, *Fair Work Act Review*, February 2012. The Fair Work Review made a similar recommendation concerning such agreements (only): McCallum, Moore and Edwards, above n 77.

<sup>114</sup> See McAndrew, above n 49.

pay', provided that the arbitrator is required to take into account both police officers' and taxpayers' interests.<sup>115</sup>

Of these, consideration (1) is the most profound because moving to an FOA system would be an unprecedented development in police pay determination in Australia. Regarding consideration (6), uncertainty over the strength of the economic recovery will mean that 'ability to pay' will remain the focus. There may be a temptation to impose a ceiling or wages-cap — à la New South Wales and other jurisdictions.<sup>116</sup> Nevertheless, while such limits may have a certain appeal, they clearly stack the deck in favour of the employer in a way that defies the *FW Act's* good faith bargaining principles and the ILO's requirement for a 'fair and impartial' arbitration system. Nor, for the reasons outlined relating to the potential adverse effects on police productivity and the community's safety, are they likely to serve the public interest in the long term.

---

<sup>115</sup> Cf Martin, above n 42, 99–102; Carrell and Bales, above n 39, 27. Regarding considerations (1) to (3), relating to the question of access to arbitration, Forsyth and Stewart identify various other models of first contract arbitration for private sector disputes in Canada, including: (1) a 'fault'/'exceptional remedy' model — where referrals are made by the Minister of Labour, based on a demonstrated good faith bargaining breach by either party; (2) a 'no fault' model — a party seeking arbitration may apply directly, by demonstrating that bargaining has been dysfunctional; and (3) an 'automatic access' model — if no agreement is reached after 90 days, the arbitrator must determine the dispute within 60 days: Forsyth and Stewart, above n 7, 27.

<sup>116</sup> See, eg, Mapp, above n 63.

