# Submission No 68 Supplementary to Sub No 7

# Inquiry into the Suitability of the Australian Army for Peacetime, Peacekeeping and War

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**ACTU** 

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WORKING PAPER AND
POSITION BRIEFS FOR

'ACTU POLICY - RESERVISTS

CALLED-OUT FOR THE

DEFENCE OF AUSTRALIA'

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#### INTRODUCTION

National decisions on the structure of Australia's Defence Force require a role for Defence Reservists that is vital to the effectiveness of the Defence Force.

Today, Defence Reservists represent over one-third of the total strength of the Australian Defence Force. Reserves now have specific roles in defending Australia in short warning conflicts, both as individuals and as formed units. Defence Reservists are therefore a fundamental part of Australia's Total Defence Force.

Reservists are also employees or business owners, they are family members and many of them are members of unions. Ninety-five percent of their working lives either side of any period of defence service on call-out is devoted to a civilian career.

#### VISION

The ACTU proposes a policy position on the call-out of reservists for extended periods of defence service that:

- \* Recognises the importance to the reservists of both his or her civilian and defence careers.
- \* Maximises arrangements whereby the civilian and defence careers of the reservist are combined into a complimentary set of training and development opportunities for the reservist.
- \* Realises the benefits of those complimentary roles to the employer, to the employee and to the nation.

#### **PURPOSES**

The objects of the policy position on call-out are:

- (a) To encourage noncareer service in the defence force, by eliminating or minimising the disadvantages to civilian careers and employees that can result from such the service.
- (b) To minimise the disruption to the lives of persons performing service in the defence services as well as to their employers, by providing for the prompt reemployment of such persons upon their completion of such service.
- (c) To prohibit discrimination against persons because of their service in the defence service.

#### KEY STRATEGIES

\* Enactment of effective legislation protecting the civilian career of Defence Reservists. To be effective, legislation needs to be comprehensive in the scope of its protection's and the detailing of its provisions, it needs to be expressed in plain English easily understandable to the employer and the Defence Reservist, and its provisions must be enforceable within the resources made available to the Reservist or the Reservists family.

# The design of legislation should:

- Establish Government as a model employer.
- Provide comprehensive descriptions and definitions of the disadvantages in employment against which the reservist will be protected.
- Provide for exemption for employers and employees from obligations in carefully defined circumstances, in particular, in the situation of undue hardship.
- Provide for protections for the widest range of persons likely to have their employment disadvantaged because of their defence service, including:
  - (i) Volunteers.
  - (ii) Non-volunteers.
  - (iii) Persons who act as advocates or witnesses in actions to have protections given under the legislation enforced.
  - (v) Temporary employees.
- Provide comprehensive description and definitions of rights protections and remedies afforded reservists.
- Provide for assistance to reservists in the investigation of their complaints about the actions of their employers affecting the reservists employment, and in the enforcement of reservists rights under the legislation.
- Require appropriate authorities to report annually on the complaints of reservists and the results of investigations and of actions before the Courts.
- Provide for periodic review of the legislation jointly by the Government, employers and the ACTU.
- Provide for retrospectivity of new legislation to the date (1988) of the amendments to the Defence Act that made reservists subject to "callout".
- \* Establishment and maintenance of co-operative employer/reservist work relationships sharing a commitment to the defence of Australia. To be maintained leading up to and during a period of defence service, the employer/reservist work relationship needs to be supported by Defence procedures regarding continuous defence service obligations that:

- Provide for reasonable warning to the employer and the reservist of any impending obligation.
- Provide for determination of the availabilities of reservists for call-out through flexible arrangements rather than by direction.
- \* Protection of the economic and legal interests of the reservist and his or her family concerning:
  - Income
  - Superannuation, and
  - Insurance, and,

as may be relevant to the circumstances of individuals

- Hire purchase agreements
- Parmerships
- Child support
- Agricultural re-establishment
- Rehabilitation
- Bankruptcy
- Rights regarding limitation periods
- Educational opportunities

# **POSITION BRIEFS:**

Individual briefs on each of the positions derived from these strategies are attached.

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#### LEGISLATION: GOVERNMENT AS A MODEL EMPLOYER

#### POSITION:

Legislation protecting the employment of Defence Reservists should establish Federal and State Governments as model employers.

#### PROBLEMS:

The existing legislation protecting the employment of Defence Reservists, the Defence Re-Establishment Act 1965, has never been tested before the Courts in its 30 year existence. Regulations for this Act have never been written.

Legal opinion suggests that this is because of probable defects in the legislation ("probable", because these defects have never been tested before the Courts). The prospects of having to test these defects before the Courts and the costs of doing so have been a substantial obstacle to potential litigants.

One such defect concerns the differential treatment under the Act of employees of the Crown versus other employees. One major example of this is the onus of proof provisions placed on reservists in bringing actions before the Courts. Private sector employees have the benefit of a reverse onus of proof, in that the burden is upon the employer to prove that the reservist, proved to have been penalised or prejudiced in his or her employment, was so penalised or prejudiced for some reason other than the reasons alleged by the reservist. Crown employees appear to have the more difficult task of having to prove, on the balance of probabilities, the employer's motivation for disadvantaging the reservist was the motivation prohibited by the Act.

Various surveys of reservists estimate the percentage of reservists employed in the public sector to be between 30% and 50%.

Further, current legislation does not include examples of "model" procedures that could be available in the Public Sector for positive treatment of situations that could confront public sector employers and reservists following longer periods of defence service.

#### **POSSIBILITIES**

The first clause in the United States Uniform Services Employment and Re-employment Rights Act of 1994 (hence abbreviated to USERRAct) states:

"It is the sense of Congress that the Federal Government should be a model employer in carrying out the provision of this Chapter".

The onus of proof provisions in Australia's legislation could be uniform for public sector employees and private sector employees as it is in the United States.

The legislation could specify special procedures or avenues for assisting Government employees to resolve employment difficulties associated with defence service periods. For example, if it becomes impossible or unreasonable to re-employ a reservist in his or her position within a particular Federal agency, responsibility could be ascribed to an Office in the Government to identify a position in another Federal agency, a position of like seniority status and pay for which the reservist is qualified or could become qualified through reasonable efforts of the second Federal agency. This is provided for in the United States legislation.

#### **PROPOSAL**

The Statement of purpose, that Governments behave as model employers with respect to the administration of the employment of reservists, be included in the legislation.

That the examples described under the heading "Possibilities" above be incorporated into the legislative provisions of revised or new legislation in Australia for the protection of the employment of Defence Reservists.

# LEGISLATION: COMPREHENSIVE DESCRIPTIONS OF DISADVANTAGES

#### POSITION:

Legislation protecting the employment of Defence Reservists should provide comprehensive descriptions of the disadvantages in employment against which the Defence Reservist will be protected.

# **PROBLEM**

Existing legislation in Australia provides to the reservist protection against being penalised or prejudiced in his or her employment:

"Whether by reducing his salary or wages, dismissing him or in any other way".

What is meant by "in any other way" has never been tested in the Courts. It is a meaning that employers and reservists must be clear on, else strong differences of opinion can occur in the workplace spoiling of the employer reservist relationship. The cost of resolving this issue before the Courts is an additional legal cost presently faced by the reservist with an uncertain outcome appealable by a resourceful employer; these additional legal costs need to be met by a reservist (or an employer) before the primary legal contest about events and reasons can begin.

#### **POSSIBILITIES**

The United States legislation provides comprehensive descriptions of what constitutes disadvantages in employment:

- \* A reservist:
  - "... shall not be denied any initial employment, re-employment retention in employment, promotion or any benefit of employment ..." and
- \* A benefit of employment is defined as:
  - "... any advantage, profit, privilege, gain, statue, account or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations and the opportunity to select work hours or locations of employment.

#### **PROPOSAL**

That revised or new legislation protecting the employment of reservists contain the detailed comprehensive descriptions and definitions similar to those contained in the United States legislation concerning the disadvantages in employment against which the reservist is protected.

# LEGISLATION: EXEMPTIONS

#### POSITION:

Legislation protecting the employment of Defence Reservists provide for exemptions for employers and employees from their obligations regarding defence service in carefully defined circumstances, in particular, in situations of undue hardship.

#### PROBLEM:

To date the Defence Force has indicated that it will adopt an authoritative approach to securing the forces it needs to meet a defence requirement short of war or a defence emergency. The Defence Force intends obtaining an annual commitment from its reservists declaring their availability for call-out. Persons who are unable to make this commitment may not be allowed to continue in the Reserve Forces.

The policy proposed elsewhere in this discussion paper is for a more flexible approach to securing the forces required for situations short of a War or defence emergency. This approach would seek to secure a maximisation of volunteers while maintaining the effectiveness of the defence force raised for the purposes of each particular call-out.

With either approach, hardship situations will arise in any call-out scenario. These situations need to be allowed for by the legislation; for example:

- \* A small business of 6 staff where 2 staff and the Boss/Owner are in the same Reservist unit. This is a real example described in the Defence Force's own Standish Report on the provisions for "call-out".
- Reservists under financial difficulties may, because of those difficulties, be induced to declare to the Defence Authorities that they are available for "callout" (so as to maintain their reservist incomes) when in fact they are not; for example, single parents, some self-employed situations, employees keeping their reservist service obligations secret from their employers, and reservists facing large debts or bankruptcy.
- \* Businesses that have fallen on bad times while the reservist was on longer periods of defence service.
- \* Persons whose family circumstances or employment circumstances have changed since giving any commitment to call-out to the Defence Force:-
  - family illness divorce or other upset
  - unemployed reservists obtaining employment
  - changes of employment to essential services or reserved occupations

- involvement on critical projects for the employer
- changes in location of employment

#### **POSSIBILITIES**

The legislation could make provision for undue hardship cases, the hardship being a result of significant difficulty or expense having regard to:

- the nature and the cost of the action expected of the reservist or employer
- the overall financial resources of the reservist or employer
- the number of persons employed at the employers facility
- the impact of any action upon the operation of the employer's facility
- the type of operations of the reservist or employer, including the composition, structure, functions, geographic separateness, and administration.

The legislation should place the burden of proving undue hardship on the employer in any circumstances where the employer is claiming an exemption from obligations to re-employ a reservist at the completion of a defence service period.

Provisions similar to the above are contained in the United States legislation.

#### PROPOSAL

Revised or new legislation protecting the employment of reservists should include provisions putting into effect the types of flexibilities outlined under "Possibilities" above.

# LEGISLATION: COVERAGE OF PERSONS PROTECTED

#### POSITION

Legislation protecting the employment of Defence Reservists should protect the widest range of persons likely to have their employment disadvantaged because of their defence service obligations.

#### **PROBLEMS**

Existing legislation in Australia does not protect the employment of Defence Reservists who volunteer for defence service periods. This contrasts with Australia's National Service Act whose provisions for protection of employment did apply to persons who volunteered for the two-year National Service intake.

Additionally, the denial of protection for volunteer reservists acts against the policy proposed in this discussion paper for assembling the defence forces for situations short of war and defence emergencies through flexible procedures rather than authoritative procedures, the former preferred approach benefiting from the attraction of volunteers.

There are circumstance of other types of reservists vulnerable to disadvantages in employment but not covered by existing legislation. Two of these circumstances are as follows:

- Reservists, or non-reservists such as union representatives in the workplace, who are disadvantaged in their employment because they report on their manager or employer for breaches of the Defence Re-Establishment Act, or who act as witnesses or give testimony in support of reservists alleging breaches of the Act.
- \* Temporary employees require specifically defined coverage, to distinguish them from persons employed on very short term non re-current work for whom protections are not sought. Temporary employment is an increasingly common form of employment in many industries and professions and deserves full protection.

Both these circumstances are provided for in the United States legislation.

#### **POSSIBILITIES**

These are discussed under the heading "Problems"

#### PROPOSAL

Revised or new legislation protecting the employment of Defence Reservists in Australia extended that protection to

Volunteers and non volunteers

- Persons who act as representatives, advocates or witnesses for reservists seeking their entitlements under the legislation
- Temporary employees

# LEGISLATION: COMPREHENSIVE DESCRIPTION OF RIGHTS AND REMEDIES

#### POSITION:

Legislation protecting the employment of Defence Reservists provide comprehensive descriptions and definitions of rights, protections and remedies afforded reservists by the legislation.

#### PROBLEMS:

The Defence Re-establishment Act appears to be defective in certain respects regarding the rights and protections of reservists. For example, legal opinion suggests that Defence Reservists are protected while travelling to their place to report for defence service but may not be protected for the time they are travelling from their place of duty to home; also employers may not be prohibited from refusing a person employment because the person has a defence service obligation.

The re-employment rights provided to reservists by the Defence Re-establishment Act are simply stated, and thereby do not give guidance to employers and employee reservists facing less simple situations; difficulties with interpretation of rights can arise in situations where the characteristics of the employer's organisation change or where the reservist has become disabled in some respect vital to the performance of his or her original employment.

The Act also does not indicate the compensation that may be paid to a reservist successful in any court action.

#### **POSSIBILITIES**

The United States legislation describes and defines in a comprehensive way those persons with rights under the USERR Act as:

"A person who is a member of, applied to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service ..."

The legislation could provide a priority or a hierarchy of types of positions that should be offered a reservist on his or her return from Defence service, such as:

- \* Firstly, the position in which the reservist would have been employed if continuous employment of the reservist had not been interrupted by the defence service period; if this is not practicable or reasonable, then -
- \* The position in which the reservist was employed at the time of commencement of the defence service period; if this is not possible, then -
- \* A position of like seniority status and pay the duties of which the person is qualified to perform; if the reservist has incurred a disability, then -

- \* Any other position which is equivalent in seniority status and pay, the duties of which the reservist is qualified to perform or would become qualified to perform with reasonable efforts by the employer; if such a position is not available, then -
- \* A position which is the nearest approximation to a position referred to above in terms of seniority, status and pay consistent with the circumstances of each reservist's case.

A priority or hierarchy of such re-employment provisions is contained in the United States legislation.

The legislation could also spell out the calculations of damages to be paid to successful litigants, allowing for:

- compensation for losses
- costs of legal proceedings and preparations
- damages equal to the first two items as an addition to the first two
  payments to the successful litigant, where the employers actions are
  shown to have been wilful.

#### **PROPOSAL**

Revised or new legislation protecting the employment of Defence Reservists should include the provisions described above under the heading "possibilities".

# LEGISLATION: ENFORCEMENT OF RESERVISTS RIGHTS

#### POSITION:

Legislation providing for the protection of the civil employment of Defence Reservists should ensure that reservists are given effective assistance in the enforcement of their rights under the legislation.

#### PROBLEM:

Existing Australian legislation for the protection of the civil employment of reservists leaves reservists to their own resources in enforcing their rights before the Courts.

Reservists, particularly those who have suffered serious financial disadvantages in their civil employment, do not have the resources to match the resources of employers before the Courts. The resources of the unions in which reservists are members are often called on to provide the support to reservists that should be given them by the Government.

This lack of assistance is different to that faced by National Servicemen in Australia who received legal assistance and, in some instances, legal aid in initiating legal proceedings to protect their employment; the absence of assistance for reservists in Australia is also in marked contrast with the very effective assistance and support given to reservists by the Government in the United States.

#### POSSIBILITIES:

Reservists in public sector and private sector employment could be supported by:

- \* A Commonwealth Government Office or Department other than the Defence Department with powers and responsibilities to assist reservists. The Department of Labour held some of the responsibilities listed below during the years Australia had National Service, and the Secretary for Labor has all the responsibilities below in the United States. In particular this Office could:
  - Utilise other agencies and/or volunteer organisations in assisting reservists.
  - Provide technical assistance to employee reservists and their employers in resolving difficulties.
  - Investigate complaints including the acquiring of documents and taking of statements from witnesses.
  - Resolve complaints through reasonable efforts.
  - Notify complainants if efforts to resolve disputes and correct disadvantages being incurred by the complainants are unsuccessful.
  - Refer the complaint, on request of the reservist, to the Attorney General.

- An Attorney General with powers and responsibilities to:
  - Act as an attorney for and or appear on behalf of the complainant.
  - Subpoena employers and seek orders from the Courts enforcing subpoenas.

#### \* Courts with powers to:

- Require employers to comply with the Act.
- Require employers to compensate reservist employees found to have been disadvantaged in their employment because of their defence service obligations.
- Require employers to pay liquidated damages to reservists where the breach of legislation by the employer is found to be wilful.
- Use its equity powers to issue permanent and temporary injunctions, restraining orders and contempt orders.

Reservists employed in Australian Government Departments could be provided with an avenue of complaint to the Merit Protection and Review Agency, and/or the Human Rights Commission, and could be given the support of a special government office that could:

- Appear on behalf of reservists.
- Act as an attorney for reservists.
- Investigate complaints by reservists against Federal Departments.
- Initiate actions before administrative tribunals and the Courts of Appeal.

#### PROPOSAL:

That revised or new legislation in Australia for the protection of the employment of reservists provide to reservists the types of support and assistance set out under the heading "Possibilities" above.

#### LEGISLATION: RETROSPECTIVITY

#### POSITION:

Revisions of existing legislation or new legislation providing for the protection of the civil employment of Defence Reservists should be made retrospective to the date of the 1988 enactment of amendments to the Defence Act that rendered reservists subject to "call-out".

#### PROBLEM

The community including employers became aware of the 1988 amendments to the Defence Act that empowered the Defence Forces to call-out reservists in conditions short of war for periods from three to twelve months. Previously, the defence service obligations of reservists was two to four weeks per year.

The Government at the time cited the Defence Re-establishment Act as the legislation protecting the employment of reservists subject to call-out.

Legal opinion has convinced the Government of the ineffectiveness of the current legislation in protecting the employment of reservists. The Government is presently seeking to consult with the ACTU regarding revisions of the Defence Re-establishment Act necessary to render the legislation effective.

Reservists disadvantaged in their civil employment at any time since 1988 because of their defence service obligations have not had effective legislative protection against such disadvantages.

Unions have received complaints from members in the Reserve Forces alleging that their employers have penalised and prejudiced them in their employment because of the members obligations to undergo defence service.

#### **POSSIBILITIES**

The United States Congress and Senate jointly derived in 1994 amendments to their legislation protecting the civil employment rights of reservists. Particular provisions of that amended legislation, specifically the amendments to the onus of proof provisions and to the definition of discriminatory actions for which the legislation provides protections, have been made retrospective to 1968. This retrospectivity has been achieved by declarations that these amendments are not additions to but are codifications of the existing law and thus were always in force.

#### **PROPOSAL**

That revisions to legislation or new legislation protecting the employment of reservists have the same date of effect as the amendments to the Defence Act that increased the defence service obligations carried by the reservists and their employers.

#### PROTECTION OF ECONOMIC INTERESTS

#### POSITION:

That the income levels of reservists and their families be protected during call-out periods.

That other economic interests of reservists and their families such as superannuation, life and accident insurance, hire purchase agreements and parternships be protected during call-out periods.

#### PROBLEMS:

Surveys indicate that 40% of reservists would lose a significant amount of income if they were called-out on defence service for an extended period.

This loss would occur because the gross pay rates enjoyed by reservists in their civilian jobs are greater than the gross pay rates for the rank they hold in the defence forces. The reservists would, during call-out, also lose their tax exempt reservists pay as they would then be on full time defence service. Income from second jobs would also be lost.

The proposal for call-out developed to date by Australia's Defence Force intend for all defence personnel, regular and reservist, to be paid the same gross pay rates. The defence authorities are not prepared to pay "make-up pay" to reservists to maintain their civilian gross pay rates, as this would, they argue, lead to disparities of pay rates amongst personnel of the same rank and duties within the defence forces.

The defence force authorities propose, in lieu of make-up pay, to pay all reservists a gratuity and to provide financial assistance with home mortgages in defined circumstances. While detailed amounts are not presented, it is expected that significant percentages of reservists and their families will still experience sizeable income loss. Changes in living styles, from home ownership to rentals, and the high level expenses faced by some familities in areas such as child support and education are not catered for in the assistance provisions presently contemplated by the Defence Force. Reservists returning from call-out periods with disabilities, would face the permanent loss in superannuation benefits. They and their families would thereafter incur this loss forever, because of the lower military pay rates upon which the superannuation entitlements would be calculated; this loss has also not been addressed by the defence force proposals on the pay rates of reservists while on call-out.

#### POSSIBILITIES:

The government could maintain the <u>after-tax</u> income level of reservists while on call-out. This could be effected through the tax system, reservists on call-out receiving tax advantages sufficient to bring their after-tax pay rates for the call-out period to levels matching their after-tax pay rates in the year prior to the call-out period.

For overseas service during call-out, the defence force, regular and reservists, could be paid tax free salaries and allowances, thereby following precedents set by past overseas defence force commitments.

On loss of life or on permanent disability, the superannuation entitlements held by reservists in their civilian jobs could be preserved.

# PROPOSALS:

That revised or new legislation providing for the protection of the economic interests of reservists while on call-out include provisions bringing into effect the suggestions outlined under the heading "Possibilities" above.