

BACKGROUND

The Northern Territory has the smallest (16,100) public sector in Australia. It is also the youngest, having come into existence in 1978 at the time of Self Government and it provides services to a community of 215,000 spread over one sixth of the Australian continent. Thirty-two percent (32%) of the population is indigenous and over seventy percent (70%) of that segment live in remote communities.

The *Public Sector Employment and Management Act* (PSEMA) came into effect in the Northern Territory on 1 July 1993. The previous Public Service Act, which was only fifteen years old at the time, no longer provided an appropriate legislative framework for a public sector undergoing substantial change.

PSEMA created a legislative framework which was described at the time as being 'short on prescription' and which established a model of devolution in public sector management. It was also generally regarded as 'best practise' in the area of public sector administration in Australia.

In the lead up to and immediately after, introduction of the PSEMA and its subordinate legislation in 1993, considerable time and resources were dedicated to ensuring a high level of awareness of the new legislative package both at government and public sector levels. As a result of those efforts there was a general understanding and acceptance of the thrust and intent of the new legislation package.

Since 1993 there have been a number of parliamentary cycles, governments have changed, new Ministers appointed, ministerial portfolios varied and new directions set. The Northern Territory Public Sector (NTPS) has also been subject to substantial evolution with new CEOs and senior executive staff appointed as part of the normal round of retirement and resignations.

That said, the question arises as to whether the legislation fifteen years on, continues to provide the flexibility, simplicity and certainty in terms of responsibility and accountability that was envisaged at its introduction and does it meet the requirements for the NT public sector going forward?

PURPOSE

The Northern Territory Government recently approved the development of a package aimed at the reform and revitalisation of the NTPS, including;

- a review of the Public Sector Employment and Management Act;
- redefinition of 'merit' in the Act to value diversity;
- the development of a whole of service HR Strategic Plan and workforce planning framework;
- a new Leadership Development Framework;
- the Northern Territory Government becoming a financial member of the Australian and New Zealand School of Government (ANZSOG);

- the Department of the Chief Minister establishing and managing a Think Tank whose membership will be drawn from participants in the Leadership Program, to consider strategic issues facing the Northern Territory;
- reviewing current policies including the Work Life Balance Strategy, Willing and Able Strategy and the Indigenous Employment and Career Development Strategy with the aim of increasing the employment of people with disabilities, Indigenous people and other disadvantaged groups in the community and achieving work life balance for all NTPS officers;
- the development of a whole of service Innovation/Recognition and Reward program; and
- undertaking biennial staff surveys in the NTPS in relation to staff satisfaction, agency performance and issues of concern.

Inherent in any reform and revitalisation programme such as this one, is the need to consider the legislation and to assess if it continues to provide a framework which facilitates the effective and efficient management of the NTPS most important asset, its people, and to examine the alternative structural arrangements which any new legislation should embody.

There is a universal view amongst public sector managers and NT public sector unions that the *Public Sector Employment and Management Act* needs an overhaul. What is not clear is the extent of such overhaul.

The Minister for Public Employment, The Honourable Rob Knight MLA, has established a committee to review PSEMA and report to him in early 2009. The committee is to be independently chaired by Barry Chambers who will be joined by Ken Simpson, Commissioner for Public Employment and Naomi Porrovecchio, Regional Director of the Community and Public Sector Union.

The purpose of this discussion paper is to outline the broad structure of the NTPS and provide a brief summary of the various provisions under PSEMA in order to assist stakeholders to participate meaningfully in the preparation of submissions on whether the legislation remains contemporary or where improvements can be made in the area of Human Resource Management. For ease of reference a summary of the intent of each of the relevant clauses is provided, followed by a brief commentary where appropriate.

Submissions are invited on all or parts of the Act, including Regulations, By-Laws and Employment Instructions. Submissions can be emailed to enquiries.ocpe@nt.gov.au or posted to PO Box 4371 Darwin NT, marked "PSEMA Review".

NT PUBLIC SECTOR GOVERNANCE ARRANGEMENTS

Following the 2008 election, the Government implemented a limited restructure of the NTPS. As a consequence, the public sector structure in 2008 is summarised below.

Principal Agencies

- Department of the Chief Minister
- Northern Territory Treasury
- Department of Business and Employment
- Tourism NT
- Department of Regional Development, Primary Industry, Fisheries and Resources
- Department of Local Government and Housing
- Department of Natural Resources, Environment, the Arts and Sport
- Department of Planning and Infrastructure
- Department of Education and Training

- Department of Health and Families
- Department of Justice
- Police, Fire and Emergency Services
- Office of the Commissioner for Public Employment

Government Businesses

- Power and Water Corporation
- Darwin Port Corporation

Other Agencies / Statutory Authorities

- Department of the Legislative Assembly
- Aboriginal Areas Protection Authority
- Land Development Corporation
- Ombudsman and Health Complaints Commission
- Auditor General
- NT Electoral Commission

Commentary

It may be of assistance in understanding the Northern Territory's unique governance arrangements to provide a brief historical overview.

Under the Federal *Northern Territory (Self-Government) Act* (NT SGA) 1978, power to deal with matters pertaining to the relationship between employers and employees was not ceded to the NT Government but retained at Federal Government level through the *Workplace Relations Act*. Under this Act, the principal body for dealing with industrial relations matters is the Australian Industrial Relations Commission (AIRC). The major instruments for setting terms and conditions are awards, certified agreements and individual agreements. While awards and certified agreements are 'settled' through the AIRC, individual agreements are 'settled' through the Federal Office of the Employment Advocate. It should be noted that successive NT Governments have made policy decisions to pursue collective bargaining and to exclude Australian Workplace Agreements (AWA) from the NTPS employment framework. Consequently, unlike the States, at this time the Northern Territory has no general industrial relations powers.

However, despite the lack of industrial relations powers, the NTSGA does grant the NT Legislative Assembly powers to make laws in respect to public sector employment, and to the Commissioner for Public Employment to make determinations for establishing terms and conditions of employment for NTPS employees. To address any inconsistency between these NT laws and Federal awards, the NTSGA prescribes that the latter shall prevail to the extent of any inconsistency.

In 1993 the NT Legislative Assembly enacted the *Public Sector Employment and Management Act* (PSEMA) for
“..... regulation of the NT Public Sector and the human resource administration and management of other agencies established for government or public purposes, and for related purposes.”

For this reason Government businesses and other agencies noted above have similar terms and conditions of service as NTPS employees in the principal agencies.

The PSEMA also establishes the CPE as the statutory employer of all public sector

employees, creates CEOs, designates the powers, functions and responsibilities of each and the relationship between them. Further details are provided in the relevant part below.

As a result of this mix of Federal and NT law, terms and conditions of employment for NTPS employees are contained in a number of legislative instruments. These include, in descending order of legal authority:

- certified agreements (UCAs certified by AIRC) (Federal)
- awards (Federal)
- PSEMA and its Regulations (NT)
- By-laws, Employment Instructions and Determinations made under the PSEMA (NT).

As indicated earlier, it is NT Government policy to exclude individual agreements from the NTPS employment framework.

It is important to appreciate that this mix of legislative provisions makes the NTPS unique amongst Australian public sector jurisdictions. CEOs in other jurisdictions may have greater autonomy to enter into agency and/or individual agreements and negotiate employment conditions with their employees. The justification for this unique approach stems from the view that in a small jurisdiction like the Northern Territory, the NTPS 'one employer' model supports a career public service and greatly enhances overall flexibility, equitable UCA implementation, mobility and redeployment of staff between agencies in order to meet changing government priorities.

On 25 November 2008, the Federal Government introduced the *Fair Work Bill* into Parliament. Broadly, the Bill will rewrite Australian industrial relations law to create:

- a new institution called Fair Work Australia to replace the Workplace Authority, the AIRC and the Australian Fair Pay Commission;
- a Fair Work Division in the Federal Court;
- an associated body named the Fair Work Ombudsman;
- a legislated system of minimum employment standards titled National Employment Standards;
- a system of modern awards, mainly industry based but with some capacity for occupational awards;
- an emphasis on collective bargaining, with enhanced rights of entry for trade unions and for orders associated with majority representation and bargaining in good faith;
- a new unfair dismissal regime that will cover employees in small businesses after a year's service; and
- provisions for high income earners (set at \$100,000 indexed) to opt out of the award system and move onto common law contracts of employment.

The Fair Work Bill runs to 613 pages plus over 500 pages of explanatory memorandum, it is still being analysed for its impact on the Northern Territory. As a result, information provided in this discussion paper may require updating.

In considering changes to the PSEMA, the scale of new national industrial relations arrangements and their potential impact on the NTPS should not be ignored.

DOCTRINE OF THE SEPARATION OF POWERS

Prior to discussing the PSEMA in greater detail, it is important to understand the concept of separation of powers inherent in Australia's Westminster system of government.

Separation of powers refers to the doctrine, implied within the Australian Constitution, that the three principal functions of government: the executive, the legislature and the judiciary should be exercised by separate and independent bodies ⁽¹⁾.

The doctrine signifies that, although it may be developed and implemented by public servants, government policy is set and approved by Ministers of the elected Government (the executive). This establishment of government policy is undertaken separately and independently from law making (the legislature), which in the Northern Territory is carried out by the Legislative Assembly. Finally, the courts (the judiciary) are responsible for interpreting those laws in respect of matters which come before the courts.

Commentary

The separation of powers doctrine provides a basis for understanding the relationships between the various entities covered by the PSEMA. One of the major benefits of the PSEMA legislation when introduced was that it incorporated the doctrine by explicitly separating and defining the various powers and functions of Ministers, the CPE and CEOs. Further clarification of the relationship is provided in the Code of Conduct.

Three aspects of the separation of powers doctrine that warrant specific emphasis in the context of this discussion paper are public servants' obligations to the government of the day, the requirement for public servants to be politically neutral and restrictions on Ministerial / ministerial staff directions to CEOs. These aspects are discussed below.

- ***Obligation to the Government of the Day***

The Principles of Public Administration and Management (Regulation 2) and the Principles of Conduct (regulation 4), together with the Code of Conduct (Employment Instruction No 13), clearly set out a range of matters concerned with NTPS employees' obligations to the government of the day. In broad terms, the first priority of employees is to carry out government policy in a manner that withstands the closest public scrutiny. Public sector employees are therefore obliged to serve their Ministers, within the law, with skill, impartiality, professionalism and integrity.

- ***Political Neutrality***

The Regulations require NTPS employees to serve whatever government is in power in the same professional and impartial way. This convention of political neutrality is designed to ensure that NTPS employees provide strong support for the good government of the Northern Territory regardless of the political party in power.

NTPS employees are therefore responsible for providing advice to Ministers that is frank, independent, based on an accurate representation of the facts and which is as comprehensive as possible. However, final decisions on policy are the prerogative of Ministers. Public servants must not withhold relevant information, nor seek to obstruct or delay a decision, nor attempt to undermine, nor improperly influence government policy.

- ***Restriction on Ministerial / Ministerial staff Direction to CEOs.***

¹ Macquarie Library. The CCH *Macquarie Dictionary of Law Revised Edition*. CCH Australia Limited (1996) page 158.

The PSEMA sets out the functions of CEOs and states that they are subject to the direction of the portfolio Minister. It must be emphasised this direction is not absolute and there are a number of crucial restrictions on the extent to which a Minister may direct a CEO. While these restrictions are discussed in greater detail below, it is clear that Ministers and their staff are not able to direct CEOs in respect of public employment matters.

OVERVIEW OF THE PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT

The preamble to the PSEMA states:

An act for the regulation of the Public Service of the Northern Territory and the human resource administration and management of other agencies established for government or public purposes, and for related purposes.

The PSEMA is divided into ten parts:

1. Preliminary
2. Administration
3. Commissioner for Public Employment
4. Chief Executive Officers
5. Appointment, promotion, transfer and resignation
6. Secondment and redeployment
7. Inability of employee to discharge duties
8. Discipline
9. Appeals and review
10. Miscellaneous

PART 1 – PRELIMINARY **Section 3 – Interpretation**

Sub clause 3(1) defines various entities and terms under the Act, including inter alia:

“Agency” means a Department or other unit of administration of the Public Sector of the Territory established under section 7, or continued in existence as an agency, by the *Public Sector Employment and Management (Transition and Savings) Act* or an organisation specified in Schedule 1;

“Appropriate Minister” the minister responsible for administering a particular agency;

“Chief Executive Officer: a person appointed under section 19 of the Act, as well as an Acting Chief Executive Officer;

“Commissioner” means the Commissioner for Public Employment appointed under section 10 of the Act, as well as the Acting Commissioner.

In relation to employees of the Department of the Legislative Assembly, “Commissioner” means the Speaker of the Legislative Assembly;

“Employee” means a person employed in the Public Sector, excluding the Commissioner or a chief executive officer;

“Minister” means the Minister responsible for administering the *Public Sector Employment and Management Act*, (currently the Minister for Public Employment).

Subclause 3 (2) defines the “merit principle” as follows:

A reference in this Act to the merit principle is a reference to the principle that an appointment, promotion or transfer under this Act should be on the basis of, and only the basis of, the capacity of the person to perform particular duties, having regard to the person’s knowledge, skills, qualifications and experience and the potential for future development of the person in employment in the Public Sector.

Commentary

Subclause 3 (2) establishes the merit principle as the keystone of the employment and management legislative framework and as the sole basis for appointment and promotion within the Public Sector.

Whilst the principle of merit is defined in the Act, it is important to appreciate that the principle, in its widest sense, embodies an ethos targeted at the achievement of best practice human resource management. For example, whilst not explicitly stated in the definition, wider consideration of the principle encompasses concepts including:

- a totally apolitical public sector where decisions are made without fear or favour;
- the exclusion of any hint of nepotism in selection or promotion decisions;
- avoidance of decisions that have the potential to be seen as corrupt or providing unfair advantage to an individual or group;
- public sector leadership that appreciates the uniqueness of each employee and recognises individual qualities, aspirations and potential.

Note.

Government approval has recently been given to amend the definition of merit in PSEMA to include ‘the diversity that a person from an EEO target group brings to the workplace’ as one further aspect of merit-based selection, along with those mentioned above.

The amendment will permit weight to be given to EEO diversity, while still adhering to the well established principles of merit based selection. Selection panels will now be able, in every selection process, to give consideration to the diversity a person from an EEO target group brings to the specific workplace. In this way, consideration of the need for representation from EEO target groups within workplaces becomes standard practice, rather than being ‘special’ treatment of people from those groups. The current identified EEO target groups are: Indigenous persons, persons from non-English speaking backgrounds, persons with a disability and women seeking senior management positions.

PART 2 – ADMINISTRATION

Section 6 – Duties of the Minister

This section details the duties of the Minister responsible for administering the PSEMA, currently known as the Minister for Public Employment. These duties include:

- advising other Ministers of policies, practices and procedures that should be applied to any aspect of human resource management in the NTPS generally or in the agencies for which they have ministerial responsibility;
- advising other Ministers on structural changes required to improve efficiency and effectiveness;
- planning the future management of the NTPS;

- Reviewing the effectiveness and efficiency of the NTPS. A review can be initiated by the Minister, or at the request of another Minister.

Commentary

Whilst responsibility for the management review function rests clearly with the Minister responsible for public sector employment, the work involved is not necessarily performed by the CPE's office. In fact the review and audit function is usually performed by the NT Auditor General or by external consultants contracted for specific reviews.

Note the limitations to the appropriate Minister's role under section 22 below.

PART 3 – COMMISSIONER FOR PUBLIC EMPLOYMENT

Section 11 – Delegation by Commissioner

This section allows the Commissioner to delegate to any person any of his or her functions and powers under the Act, after consultation with the appropriate CEO.

Commentary

This section allows the Commissioner to delegate his/her powers to any person (ie not necessarily an NTPS employee). It may be appropriate, for example, for the CPE to delegate to a person outside the NTPS the power to investigate a certain matter (eg a lawyer or a retired public servant).

Similarly the CPE may wish to delegate some of his/her functions of redeployment to an agency regional manager to ensure prompt and efficient management of the process.

Section 12 – Commissioner Deemed to be Employer

This section establishes the CPE as the statutory or central employer and therefore responsible as principal negotiator for all enterprise bargaining negotiations and respondent to all awards affecting NTPS employees. The CPE retains the industrial relations function, as the central employer, on behalf of the Territory.

Commentary

A unique feature of the PSEMA is that it is based on the concept of a single employer, that is, the CPE on behalf of the Territory Government. Unlike most other jurisdictions that have fragmented the employing power to individual agencies, including separate certified agreements and/or AWAs, successive NT Governments have opted to retain the single employer concept. The question of whether this employment model remains valid is worth considering.

Although the PSEMA establishes the CPE as the central employer, the legislation is based on the fundamental concept of 'let the managers manage'. For this reason the Act and its subordinate legislation set out broad principles and guidelines, rather than detailed practices and procedures.

The PSEMA is designed to clearly identify and define the separate roles and

responsibilities of the CPE and CEOs. CEOs are responsible, and accountable, for the day to day operations of their agencies, the CPE has responsibility for dealing with those issues of principle and broad employment policy that have sector-wide application.

In essence the CPE is responsible for developing the NTPS employment relations policy framework. CEOs are responsible for managing their staff within that framework.

Section 13 – Functions of the Commissioner

This section details the CPE's functions, with the primary emphasis on providing the appropriate employment framework within which CEOs can manage their agencies.

These functions include inter alia:

- determining designations and employees conditions of service;
- ensuring adherence to the merit principle;
- assisting CEOs develop and implement personnel practices and procedures in their agency;
- advise the Minister on public employment policies and monitor their implementation;
- conducting inquiries, investigations, etc into management practices in agencies;
- any other functions imposed by the Act or directed by the Minister.

Commentary

Section 13 sets out the CPE's functions in specific terms and makes it clear that his/her role is to deal with issues of principle and sector-wide policy, not operational issues within agencies.

This section indicates unequivocally that the role of the CPE is not to function in isolation or by issuing detailed general orders on operational directives. A brief glance at the functions of the CPE show heavy emphasis on verbs such as: "advise", "consult", "assist", "coordinate", etc. There is therefore an irrefutable requirement for a constructive "partnership" * between the CPE and all CEOs.

This partnership is achieved through a wide variety of forums including;

- regular consultation with agencies,
- Coordination Committee and Sub Committees,
- Public Sector Consultative Council,
- various agency and project specific working groups,
- various EBA implementation working groups,
- HR forums, including in regional areas,
- Sector-wide remote locality working groups, etc.

* Although this partnership is crucial, it does not detract from the CPE's accountability for sector-wide employment relations nor the requirement to report to the Minister on management of human resources within NTPS. See clause 18 below.

Section 14 – Powers of the Commissioner

Section 14 empowers the CPE to carry out his/her functions, as well as to issue determinations on all matters permitted by the PSEMA or an award, eg to determine particular terms and conditions to apply to an individual or class of employees.

Sections 15 to 18

These sections empower the CPE to undertake special investigations in relation to any matter under the Act (section 15), to issue Employment Instructions relating to the CPE's functions (section 16) and to require the keeping of employee records (section 17). Section 18 requires the CPE to report to the Minister on the management of human resources within the NTPS. The Minister is required to lay a copy of the Commissioner's report before the Legislative Assembly.

Commentary

The CPE's powers to undertake investigations under section 15 are far-reaching including: authority to enter land or buildings occupied by an agency, summon a person whose evidence is material, take evidence on oath and administer an oath and require a person to produce documents that are in the possession of that person. Such an investigation may be appropriate to determine the extent of an agency's compliance with the PSEMA, if the CPE had reason to believe that a serious breach had occurred.

Section 16 empowers the CPE to issue Employment Instructions, which must be Gazetted. The Instructions may require a certain standard of performance to be observed, or specify an approval process. Employment Instructions are the principal instruments by which the CPE exercises his/her practice and procedure functions.

As indicated below, the Instructions are limited in number and not lengthy. As far as practicable, the Instructions ensure that the major policies and principles which must be observed are stated clearly and simply. At the same time, the Instructions provide CEOs and agency staff with the some discretion and flexibility in their application and observance.

There are currently 13 Employment Instructions in operation.

1. Advertising, Selection, Appointment, Transfer and Promotion
2. Probation
3. Natural Justice
4. Performance Management
5. Medical Incapacity
6. Inability to Discharge Duties
7. Discipline
8. Management of Grievances
9. Omitted
10. Employee Records
11. Equal Employment Opportunity Management Programs
12. Occupational Health and Safety Programs
13. Code of Conduct
14. Part-Time Employment

An indication of the comprehensiveness of the Employment Instructions as practice and procedure guidelines is that, with the exception of incorporation of Transfers (EI 9) into EI 1 and some other minor amendments, there have been no major changes or additions to the original list. It therefore maybe appropriate and timely to review and verify whether they continue to represent best practise or remain true to the ethos of 'letting the managers manage'.

Section 18 provides very specific direction on the CPE's reporting requirements and forms a critical element in the CPE's accountability to the Minister and NT Government.

Matters the CPE is required to report include:

- extent to which the principles of human resource management have been observed across the NT Public Sector;
- breaches of the principles;
- improvements in human resource management in the NTPS;
- disciplinary, redeployment and inability action in the Public Sector;
- Commissioner's report as an agency CEO.

PART 4 – CHIEF EXECUTIVE OFFICERS

Section 22 – Directions by Appropriate Minister

This section establishes that every CEO is subject to the direction of the appropriate Minister, with certain crucial exceptions.

Commentary

Section 22 represents a critical element in the establishment and protection of the merit principle. Specifically sub clause 22 (2) prevents any Minister from directing a CEO in relation to:

- appointment, promotion, assignment or terms and conditions (including remuneration) of a person;
- designation or duties of an employee; and
- inability, medical incapacity or discipline action.

Section 23

This section mandates that CEOs are accountable to:

1. the appropriate Minister for the performance of their functions, and
2. compliance with Employment Instructions and directions given by the Commissioner or an Appeal Board.

Commentary

As indicated in the commentary for Clause 18 above, Clause 23 provides a vital element in the accountability framework of CEOs. The two critical facets of this section include:

1. satisfactory achievement of the objectives specified in CEOs performance agreements with the appropriate Minister; and
2. provision of accurate and comprehensive annual and other reporting in compliance with clause 28 of the PSEMA.

Section 28 of the Act provides very specific annual reporting requirements. Each year every CEO is required to report to the appropriate Minister, and hence the broader NT community, what their agencies have been doing, how well their objectives have been achieved and, in particular, what has been done, or key deficiencies, in human resource management.

Section 24 – Functions of Chief Executive Officers

CEOs have broad ranging responsibilities in relation to the effective and efficient management of the agency and its employees. Responsibilities include inter alia:

- devising organisational structures, strategies and operational arrangements;
- meeting performance objectives set by the appropriate Minister;

- assigning duties and designations, directing employees of the agency and evaluating employee performance;
- assisting employees in their development;
- planning, implementing and monitoring the financial and administrative performance of the agency;
- ensuring equal employment opportunities and health and safety standards are implemented and maintained.

Commentary

Section 24 is designed to complement section 13 and makes clear the delineation between the respective roles of the CPE and CEO. The section establishes that, subject to the Employment Instructions and application of the merit principle, CEOs are fully accountable for the total operations of their agency, including management and development of every employee.

Section 25 – Powers of Chief Executive Officers

This is an enabling provision giving CEOs power to carry out their functions. The section ensures CEOs can sign contracts, particularly to employ people.

Section 26 – Chief Executive Officer May Employ Number of Employees Necessary

This section enables a CEO to employ any number of employees, at any designation, but only to the extent that funds are provided and available.

Commentary

This provision reinforces the ‘let the managers manage’ concept by providing CEOs with the flexibility to rearrange staffing quickly to meet changing demands and priorities, while at the same time ensuring fiscal accountability by requiring CEOs to manage their agencies within allocated budgets.

Section 27 – Delegation by the Chief Executive Officer

Allows the CEO to delegate to an employee within his/her agency (as opposed to the CPE in section 16 who can delegate to a person any function or power.

The CEO can still exercise the function or power even if it has been delegated.

Section 28 – Reports by Chief Executive Officers

Similar to accountability of the CPE (section 18), CEOs are required to report annually to the appropriate Minister on the operation of the agency, the performance of its staff and its financial and administrative status.

The appropriate Minister must lay a copy of the report before the Legislative Assembly.

Commentary

It is important to note that, in order to satisfactorily achieve the requirements of sections 13, 18, 24 and 28, it is essential that appropriate audit and reporting mechanisms are established both at agency and OCPE levels.

The value and benefit of these reporting requirements are directly related to the quality and comprehensiveness of the information and data that is provided. In the past some

reporting has been of questionable accuracy due to deficiencies in auditing mechanisms at agency level.

PART 5 – APPOINTMENT, PROMOTION, TRANSFER AND RESIGNATION

Section 29 – Chief Executive Officers to Appoint, Promote and Transfer

This section details the CEOs powers to appoint, promote or transfer an employee and to perform duties in his or her Agency.

This section enables the CEO to appoint employees on either a ‘permanent’ or ‘temporary’ basis. Employment on a permanent basis means there is no fixed period of appointment and the appointment can only be terminated in accordance with the Act. Employment on a temporary basis means employment other than on a permanent basis.

Commentary

Permanent employment characterises the vast majority of public sector employees. This category of worker includes permanent part-time employees.

Employment on a temporary basis encompasses fixed term contracts, including executive contracts and casual employment.

The proportion of permanent workers to temporary employees is effectively managed by the CEO in each agency. The type of employment offered by the CEO is effectively unregulated and consistent with section 26 which enables a CEO to employ any number of employees, at any designation, but only to the extent that funds are provided and available. It also enables CEOs to rearrange staffing quickly to meet emerging priorities.

Section 30 – Procedure for Filling Vacancies

This section requires CEOs to advertise vacancies exceeding 6 months. It also enables CEOs to seek approval from the CPE to select without advertising, a person who satisfies the requirements of section 31.

It also requires CEOs to publish all appointments, promotions and transfers.

Commentary

All selections regardless of whether or not they have been advertised are subject to the merit principle.

Requests from agencies for the CPE to exercise his or her power to allow the CEO to appoint a person without advertising the vacancy are generally limited. An example of when the CPE may approve a request (section 30(1)(b)) is when the agency has recently advertised a vacancy and the preferred applicant has withdrawn their application and the agency seeks to appoint the next most suitable applicant, thus avoiding the costly and time consuming exercise of re-advertising the position.

The legislated requirement to advertise all vacancies greater than 6 months except in limited circumstances is often cited as a barrier to a more efficient and responsive process to the filling of vacancies, notwithstanding the need to retain an open and transparent process when it comes to the appointment of persons to the NTPS.

Transparency and accountability may still be achieved if this limitation was removed or amended provided that all selections are subject to merit and CEOs continue to be required to publish all appointments, promotions and transfers.

Sections 31 to 34

These sections describe the requirement on CEOs to adhere to certain conditions when appointing employees. Requirements such as;

- the need to only appoint, promote or transfer an employee unless they have the necessary educational qualifications and meets such other requirements (including health and physical fitness) that are determined by the Commissioner,
- a requirement for the appointment of a person on a permanent basis to be on probation, and
- the ability to terminate at any time the employment contract of a temporary employee.

Section 34 goes onto empower the CPE with the authority to determine the duties or classes of duties in an Agency or the Public Sector generally that –

- may be performed on an appointment for a fixed period; or
- may only be performed on an appointment for a fixed period.

Commentary

The value and benefit of these sections may in many instances have become redundant.

For example the requirement for employees to have relevant educational qualifications is often prescribed in other specific legislation or policy (trade licensing requirements, professional body membership, professional registration boards, physical fitness requirements) etc.

Equally the requirement that all permanent appointments be on probation assumes that only a legislative requirement will ensure, what ultimately is sound employment practise, observance by CEOs.

The capacity of a CEO to terminate a temporary employment contract is more than capable of being dealt with by the specific terms of that contract. The same observation could equally apply to section 37 – Resignation.

In respect of section 34 the question which arises is whether the CPE should remain the custodian of determining the duties or classes of duties, the duration (up to 5 years), and the terms and conditions of fixed term appointments, including Executive Contract Officers?

Are the CPEs roles here still relevant or contemporary and are they consistent with the principle of 'let the managers manage' by providing CEOs with the flexibility to rearrange staffing quickly to meet changing demands and priorities?

PART 6 – SECONDMENT AND REDEPLOYMENT

Division 1 – Secondment

Sections 39 – 40

This section details the CEOs powers to enter into an agreement for the secondment of an employee for a period not exceeding 3 years, if they consider it is in the public interest to do so.

The secondment arrangement may be with an authority or employer who is not an Agency, for example a private sector employer.

Commentary

The intent of these sections are to enable CEOs to have the flexibility to transfer for a defined period, skilled employees from either other public sector jurisdictions or the private sector and vice versa. Any secondment is not required to adhere to the application of the merit principle nor are they subject to review under section 59.

This facilitative provision is seldom used and may be redundant given the high level of turnover and mobility in the NTPS.

Division 2 – Redeployment and Redundancy

Sections 41– Declaration of Permanent Employee to be Potentially Surplus to Requirements

This is an enabling provision giving CEOs power to declare a permanent employee as potentially surplus to the requirements of their Agency. The CEO in so doing must state the reasons for the declaration and forward a copy of the notice to the Commissioner and the prescribed employee organisation.

Sections 42 – 43

These sections empower the CEO to transfer a permanent employee who has been declared potentially surplus to the requirements of their Agency. In these instances the merit principle does not apply.

Where a CEO is unable to transfer they may request the CPE to give directions to retrain, transfer or terminate employment of an employee.

Where the CPE receives such a request he or she may direct the CEO to;

- take steps in relation to the training and redeployment of the employee, or
- terminate the employment of the employee.

The CPE may also give another CEO directions relating to the transfer of the employee.

Commentary

Inherent in the administration of any public sector is the need to respond quickly and efficiently to Governments restructures. The capacity to do so is an inherent feature of most if not all Australian public sector administrative arrangements.

A distinguishing feature of PSEMA is the ‘one employer’ model. Justification for this unique approach stems from the view that in a small jurisdiction like the Northern Territory, the ‘one employer’ model supports a career public service and greatly enhances overall flexibility by facilitating the mobility and redeployment of staff between agencies when the need arises due to changing government priorities.

Whilst PSEMA contemplates the possibility of the CPE directing a CEO to terminate the employment of a permanent employee who has been declared potentially surplus this has usually been achieved through voluntary redundancy.

While redeployment of some categories of staff is possible there are numerous NTPS employees with specialist skills that make this impractical.

PART 7 – INABILITY OF EMPLOYEES TO DISCHARGE DUTIES

Section 44 – Inability of Employee to Discharge Duties

This section enables a CEO by notice in writing and based on reasonable grounds to determine that an employee is not:

- fit to discharge, suited to perform or capable of efficiently performing their duties;
- performing their duties efficiently or satisfactorily; or
- qualified for the efficient and satisfactory performance of those duties.

The section requires the CEO to advise the employee of their opinion and the grounds and invite within 14 days a response in writing from the employee explaining any matter referred to in the notice.

Section 45

As soon as practicable after the 14 days, the CEO, if not satisfied with the employee's explanation can arrange for an investigation.

The person/s authorised by the CEO to carry out the investigation may direct the employee to submit to an examination by:

- medical practitioners; or
- other persons having relevant qualifications approved for that purpose by the CPE.

Within 14 days of receiving the investigators findings the CEO must advise the employee of those findings and reasons.

Section 46

This section empowers the CEO to impose the following sanctions in response to the findings of the investigation:

- reduce the salary of employees within the range of the designation;
- transfer an employee within the Agency and at a lower salary; or
- terminate the employment.

If circumstances prevent the CEO from transferring the employee the CEO may recommend to the CPE that the CPE transfer the employee to another Agency (section 35).

Section 47

Allows the CEO to suspend or transfer an employee pending an explanation or investigation. The suspension or transfer can remain in effect for a period not exceeding 3 months or until the employee provides a satisfactory explanation, the CEO no longer holds an opinion about the employee's performance or the CEO decides to take action.

Employees may appeal to an Inability Appeal Board under section 56 of PSEMA.

The section goes on to explain what would happen to an employee's entitlements in the event that the appeal is upheld.

Section 48

This section empowers a CEO to determine (having regard to appropriate medical evidence) that an employee is totally and permanently incapacitated. When this is determined by the CEO they may retire the employee.

Commentary

Inability processes are infrequently used. In 2007 there were no Inability Appeals lodged. In 2008 there were two. Anecdotal evidence suggests that this process is very rarely initiated by

and Agency primarily due to the very prescriptive and often lengthy delays associated with it.

That's not to say that a process of some kind is not warranted.

PART 8 – DISCIPLINE

Section 49 – Breaches of Discipline

Section 50 – Summary Dismissal

Prescribes the various disciplinary offences that apply to employees employed under PSEMA and the procedures that would apply in respect of any suspected breaches. In particular this section establishes that an employee who:

1. Contravenes or fails to comply with the Act;
2. Is found guilty in a court of an offence that affects the employee's employment committed before or after the commencement of the Act;
3. Disregards or disobeys a lawful order/direction given by a person having authority to give such an order/direction;
4. Uses a substance(including liquor or a drug) in a manner that results in inadequate performance of the employee's duties or improper conduct at the place of employment;
5. Is negligent or careless in the discharge of any of the employee's duties or fails to perform the duties assigned to him or her;
6. In the course of employment or in circumstances having a relevant connection to his or her employment, conducts himself or herself in an improper manner;
7. Harasses or coerces another employee;
8. Without good cause, is absent from duty without leave;
9. Except as authorised by his or her CEO, engages in any remunerative employment, occupation or business outside the Public Sector;
10. In relation to an application of the employee for appointment, promotion or transfer to perform duties in an Agency or at any stage in the selection process, provides information to the CEO or the CEO's representative that the employee knows, or ought to know, is false or misleading;
11. Provides information in the course of his or her employment that he or she knows or ought reasonably to know is false or misleading;
12. Fails to remedy previous unsatisfactory conduct or fails to comply with a formal caution;
13. Otherwise disregards or acts in a manner inconsistent with the prescribed principles.

The prescribed principles appear at the end of this paper.

Commentary

A primary purpose of disciplinary action is to protect the integrity and reputation of the workplace rather than to punish the offender. Although specific and general deterrence are important in determining what action the CEO takes at the end of the process, the action is to protect the workplace.

When embarking on possible disciplinary action it is necessary to read the relevant sections in the Act in conjunction with the procedures set out in the "Employment Instructions" and the "Regulations". By way of illustration, section 51 of PSEMA provides only one point at which an employee is provided a 'right to be heard', by written submission. However, Employment Instruction 7 refers to three points in the process where an employee must be invited to make a written submission. Any Disciplinary Appeal Board (and other external review body) will have regard to the Employment Instruction.

The rules of procedural fairness (which is the same as “natural justice”) underpin the disciplinary process and are fairly straightforward. There are two main parts to the rules. First, a ‘right to be heard’. Secondly, a ‘right to an unbiased decision maker’. Various secondary rules hang off these two rights.

For example, ‘the right to be heard’ does not necessarily involve a right to an oral hearing or to legal representation. Part 8 of PSEMA generally requires this right to be exercised by written allegations and submissions. However, the right to be heard will always include the necessity to ‘know the charges’. This requires that any adverse information be advised to the employee. Due to the right to be heard, it is crucial that any letter provided to an employee under section 51 (3) alleging a breach of discipline, includes comprehensive particulars of facts and circumstances which are said to constitute the breach of discipline.

Although Part 8 of PSEMA does not apply to employees appointed on a “temporary basis”, it is still the practise in the NTPS to afford them procedural fairness.

Where an alleged breach of discipline is particularly serious, there is the ability through section 50 to proceed directly to summary dismissal. For this action to be used successfully the CEO must be satisfied that the evidence is so strong that the possibility of the situation being different to what it appears is minuscule.

In 2008 there have been three Disciplinary Appeals lodged. One has been disallowed; one is pending and one withdrawn.

The processes for dealing with discipline matters in the NTPS are generally more complex and time consuming to accomplish than in most other workplaces. At the very least an examination of the existing process with a view to streamlining and simplifying them may be warranted. Another possible outcome might include abolishing the need for ‘in-house’ disciplinary review mechanisms and to adopt the federal jurisdiction of the AIRC or the soon to be established Fair Work Australia body. The latter approach has been adopted by the Australian Public Service and some State jurisdictions.

In the likely event that the Federal Government restores through Fair Work Australia a comprehensive unfair dismissal jurisdiction, it might be at the very least, desirable to consider the potential for restricting aggrieved employees from ‘forum shopping’.

PART 9 – APPEALS AND REVIEW

Section 55 – 56 Promotion Appeals/Promotion Appeal Boards

This section establishes that an employee who is aggrieved by the promotion of another employee may within a 14 day period after notification of the selection, appeal to a Promotions Appeal Board against the selection on the grounds of superior merit. (refer to Part 1 section 3 on the revised definition of merit).

An employee cannot appeal unless they were an applicant for the job and they would have been promoted had they been successful. An employee who was not an applicant may appeal only if approved by the CPE.

The procedures in relation to an appeal are at the discretion of the Appeal Board. The Board is constituted by:

- a Chairperson appointed by the CPE
- a person nominated by the CEO
- a person nominated by the prescribed employee organisation

In determining the appeal under this section the Appeal Board may:

- disallow the appeal
- allow the appeal and direct the CEO to promote the appellant
- direct the CEO to re-advertise the vacancy.

Commentary

A promotion appeal cannot be lodged by an employee, unless they were an applicant for the job and they would have been promoted had they been successful, against a selected external applicant, selections at level or transfers.

Whilst sections 55 and 56 deal specifically with Promotion Appeals there is no doubt that the limitations mentioned above do result in employees utilising section 59 – Grievance Reviews as an alternative. As reported in section 59, one of the most common reasons for grievances concerned selection processes.

| Reasons | 2007-08 |
|---|----------------|
| Selection processes | 19 |
| Application of procedures and policies | 18 |
| Bullying and harassment | 16 |
| Application of conditions of service | 15 |
| Management action or decision | 11 |
| Personal conflicts within the workplace | 4 |
| Termination of probationary employment | 1 |
| Total handled | 84 |

The powers of the Appeal Board to overturn the decision of the CEO or to readvertise the vacancy represent significant powers, however only a very small number of appeals are upheld.

| Year | Handled | Allowed | Disallow | Re-advertise | Withdrawn | Vacated | Out standing |
|----------------|----------------|----------------|-----------------|---------------------|------------------|----------------|---------------------|
| 2006-07 | 55 | 3 | 16 | 0 | 4 | 23 | 9 |
| 2007-08 | 81 | 1 | 29 | 12 | 15 | 21 | 0 |

The interaction between sections 55, 56 and 59 may warrant closer examination with a view to assessing if it may be possible to integrate and streamline these grievance review process. It may also be appropriate to examine the scope of any internal grievance review mechanism in the context of the increasing number of other external review bodies and the extent to which 'forum shopping' occurs.

A fundamental challenge for such a review would involve the need to balance an efficient and effective internal review process with the equally important objective of upholding the *Principles of Public Administration and Management* and the *Principles of Human Resource Management*.

Sections 57 – 58 Inability or Disciplinary Appeals/Procedure of Appeals

These sections enable an employee who is aggrieved by the intention of a CEO to take action under the inability or discipline provisions of PSEMA to lodge an appeal.

The appeal may be against the intention or action of the CEO.

The procedure for appeals is quite detailed but in essence requires an Appeal Board to be constituted by:

- a Chairperson appointed by the Minister
- a person nominated by the Commissioner
- a person nominated by the prescribed employee organisation

The person appointed to be Chairperson must be a lawyer who has been admitted to the legal profession for at least 5 years, or have other suitable qualifications or experience deemed by the Minister.

In determining an appeal the Appeal Board can;

- disallow the appeal; or
- allow the appeal in whole or in part and direct the CEO to take action as the Appeal Board considers necessary.

The remainder of section 58 details the procedures for the conduct of Inability and Disciplinary Appeal Board hearings.

Commentary

The number of Inability and Disciplinary appeals is very small. For the 2007-08 reporting period there were 5.

In many Australian public sector jurisdictions appeals of this nature have been abolished and the appropriate State or Federal industrial tribunal jurisdiction applied.

See commentary provided for section 49 and 50.

Section 59 – Review of Grievances

This section details that if an employee is aggrieved by the CEO's intention to terminate the employee's employment on probation they may within 14 days request the CPE to review the decision.

It also prescribes that in any other case where an employee is aggrieved by their treatment in employment in the public sector, within 3 months after the action or decision may request the CPE review the action or decision.

If the CPE believes that an employee has not taken adequate steps to seek redress of the grievance in their agency the CPE may refer the matter to the CEO for consideration within a specified time and not conduct any review until the expiry of that time.

The CPE has the power to deal with a review on the same powers and obligations as an inability or discipline appeal board.

Commentary

According to Promotion Appeal and Grievance Review records, in the 2007 – 08 reporting year 84 grievance reviews were conducted, compared to 79 in the preceding year. The most common issues raised in grievances concern selection processes; application of procedures and policies; bullying and harassment; application of conditions of service; management practices; personal conflicts in the workplace and termination of probationary employment.

The 2007 – 08 CPE annual report noted that “While the grievance process reveals occasional examples of poor management or decisions, the number of grievances does not indicate any general trend towards poor management practices across agencies”.

The comments attributed to streamlining the processes made in sections 57 and 58 are applicable.

PART 10 – MISCELLANEOUS

Section 60 – By-Laws

Prescribes the CPEs power to make By-laws relating to matters that are required or permitted by PSEMA or an award, and in particular, by-laws relating to:

- leave;
- entitlement to and payment of allowances;
- recruitment and transfer expenses;
- conditions applying to employees transferred to the Public Service or a statutory corporation;
- conditions applying to employees in remote localities;
- leave and other fares; and
- other terms and conditions of employment.

Commentary

The provisions of section 60 are crucial to ensuring the CPE has the capacity to make or amend by-laws that relate to conditions of service for the NTPS. This enabling provision ensures that specified conditions of employment can be made or altered as operational or industrial circumstances dictate. The ability of the CPE to make by-laws for the NTPS generally is complimentary to the central employer model.

Section 61 – Work Outside Employment

Section 62 – Work on public Holidays

Section 61 prohibits employees from engaging in outside employment except with the approval of the CEO. The CEO can only give such approval if satisfied that the paid employment will not interfere with the performance of the employees duties.

Section 62 enables the CEO to require the whole or part of his or her agency to be kept open on a day observed as a holiday in the Northern Territory.

Commentary

The statutory prohibition on employees engaging in outside employment unless approved by the CEO stems from the long held view that in many instances the potential for a conflict of interest to arise out of that employment should be avoided. This type of requirement whilst contained in the Act, is capable of being prescribed in subordinate legislation (by-law, employment instruction, etc.)

The same can be said for the section 62 which allows a CEO to require an agency to remain open during a public holiday. The implied management prerogative to operate an agency during a public holiday is not reliant on this statutory provision.

Section 64 – Public Sector Consultative Council

Section 64 establishes a Public Sector Consultative Council (PSCC) which is representative of the CPE, agencies and organisations of employees. The main function of the consultative council is to provide a forum for the parties to discuss matters of general interest to the public sector.

Commentary

The provision of a statutory requirement to have a consultative council is very unusual. The fact that such a provision exists is probably a testament to the nature of the relationship between the employer and the public sector unions at the time PSEMA was being developed. The requirement to continue such a provision is worthy of review.

CODE OF CONDUCT

Employment Instruction No 13, Code of Conduct establishes the basic level of conduct expected of all employees. The following Regulations form part of the Code and are applicable to all CEOs, executive contract officers and NTPS employees.

- Regulation 2 – Principles of public administration and management
- Regulation 3 – Principles of human resource management
- Regulation 4 – Principles of conduct

A breach of the Code of Conduct is a breach of discipline under section 49(p) of the PSEMA. For ease of reference Regulations 2, 3 and 4 are repeated below.

Regulation 2 – Principles of Public Administration and Management

- a) the Public Sector shall be administered in a manner which emphasises the importance of optimum service to the community;
- b) formulation and delivery of information and advice to the Government shall be done in an objective and impartial way, and with integrity;
- c) administrative responsibility and authority shall be clearly defined to allow the expeditious discharge of that responsibility and exercise of authority with appropriate levels of accountability;
- d) the Public Sector shall be structured and administered so as to enable decisions to be made and actions taken without excessive formality and with a minimum of delay;
- e) proper standards of financial management and accounting shall be exercised at all times.

Regulation 3 – Principles of Human Resource Management

- a) subject to the Act (PSEMA), selection of persons to fill vacancies in the Public Sector shall be done on the basis of merit;
- b) human resource management actions shall be taken in such a manner as to ensure the exclusion of nepotism, patronage, favouritism and unlawful and unjustified discrimination on any ground in respect of all employees and persons seeking employment in the Public Sector;
- c) employees shall be treated fairly and shall not be subject to arbitrary or capricious administrative acts;
- d) human resource administration and management in the Public Sector shall be consistent with the principles of equal employment opportunity;
- e) employees shall be;
 - i. afforded reasonable, independent avenues of redress against improper or unreasonable administrative acts;

- ii. afforded reasonable access to training and development;
- iii. remunerated at rates commensurate with their responsibilities.

Commentary

A recurring theme throughout this paper has been that, whilst CEOs have the power to appoint or promote staff, the legislation is emphatic that merit is the sole basis upon which vacancies are to be filled.

In the NTPS merit is determined through a fair and transparent assessment process based on the stated principles of merit, natural justice, human resource management and conduct. These guiding principles are detailed in the PSEMA, Regulations and Employment Instructions.

To assist CEOs and agencies, OCPE has published the *Merit Selection Guide*, a set of principles-based guidelines designed to allow for flexible, practical approaches to selection in order to achieve meritorious outcomes.

Whilst merit is defined in the Act and guidelines have been developed, it is one of the fundamental and most crucial of every CEO's responsibilities to ensure its application in his/her agency.

Regulation 4 – Principles of Conduct

- a) employees shall perform their official duties with skill, impartiality, professionalism and integrity;
- b) employees shall disclose their private financial and other interests where those interest may, or may appear to, conflict with their official duties, and shall take all reasonable steps to prevent such conflict;
- c) employees who are responsible for incurring or authorising expenditure shall exercise due economy and ensure the efficient and economical use of government resources and facilities;
- d) employees shall not take advantage of their official duties, status, powers or authority in order to seek or obtain a benefit for themselves or for any other person or body;
- e) employees shall exercise proper courtesy, consideration and sensitivity and shall act with fairness and equity in all their dealings with members of the public and with other employees;
- f) employees shall not engage in improper conduct, in their official capacity or otherwise, that adversely affects the performance of their duties or brings the Public Sector into disrepute.

Code of Conduct

Whilst the above principles establish the philosophical framework for employment and management in the NTPS and are expressed in general terms, the Code of Conduct (Employment Instruction No. 13) is designed to provide more detailed guidance on a range of issues that affect employees from time to time. The Code deals with important matters of ethics and principle, including the relationship between employees and the government of the day.

Commentary

As for the merit principle, the Code of Conduct forms a key component of the NTPS employment and management framework. The principles and Code of Conduct are binding on all employees and must be observed by all, including CEOs and the CPE. Where agencies have special needs that may not be adequately addressed by the Code of Conduct, CEOs may develop agency specific codes of conduct. Such codes must be consistent with the PSEMA, Regulations, By-Laws and Employment Instructions.

ADDITIONAL INFORMATION

Additional information in relation to this topic is available through the following references.

- OCPE website – <http://www.nt.gov.au/ocpe>
- Public Sector Employment and Management Act
- Regulations
- By-Laws
- Employment Instructions
- Booklet – Public Sector Employment and Management Act, Principles and Code of Conduct (OCPE)
- Booklet – Merit Selection Guide (OCPE)
- Document – NTPS Employees and Elections (OCPE)
- Document – Guidance on Caretaker Conventions (DCM)
- Booklet – Executive Contract Employment in the Northern Territory Public Sector (OCPE)

TO PROVIDE FEEDBACK/COMMENTS

http://www.ocpe.nt.gov.au/psema_review