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Mr. Ken Simpson,
Commissioner for Public Employment,
GPO Box 4371.,
Darwin,
Northern Territory 0801.

Dear Ken,

Thank you for your invitation to provide some comments on the review of the Public Sector Employment and Management Act (PSEMA). I have read the Discussion Paper circulated earlier and, although I have not kept in close touch with events in the Territory since my retirement in December, 2001, I hope that my observations will assist the review process.

In the years since my retirement I have had cause to re-visit the Act as part of my advisory work in the South Pacific. It has been interesting to compare the PSEMA with older styles of legislation, all of which are based on a highly centralised "control" model not well suited to the needs of a modern public sector. I have found the PSEMA to be very relevant to reform projects and am pleased that elements of it have been reflected in some of the new legislation that has been enacted in several countries.

As you are aware, the PSEMA was predicated on the basis of a devolved management model which provided for the establishment of a framework of principles within which Chief Executive Officers (CEOs) would have the authority to manage their agencies as they saw fit and to be accountable for the outcomes of their decisions. This approach was in sharp contrast to the previous model which, as was then the case in most Australian jurisdictions, was based on central personnel agencies which issued detailed instructions which bound CEOs and their agencies in just about every aspect of people management. At the time the legislation was enacted, I described this model as the "lowest common denominator" approach to human resource management.

The PSEMA model recognized the fact that agencies have different needs and different staffing profiles and were affected in varying ways by legislative and policy changes from time to time. The objective of the Act was to provide agencies with sufficient

flexibility to make their own management decisions as needs and circumstances changed while, at the same time, doing so within a set of sector wide principles and standards that would ensure fair and consistent treatment of employees. The need to avoid over-prescription was reflected in the fact that Employment Instructions were relatively few in number and were limited by and large to issues associated with maintaining observance of the merit principle and achieving fair and equitable employment practices. This was in sharp contrast to the previous General Orders arrangements which laid down rules for just about every situation imaginable. One of the most pleasing aspects of the introduction of PSEMA was the fact that CEOs responded by choosing not to reproduce the General Orders as agency rules but instead opted for a far more practical, flexible, less prescriptive, even minimalist, approach.

There is no doubt in my mind that the Act achieved all of the outcomes sought and that it provided an appropriate legislative framework for the management of the Territory's public sector through a period of growth and significant change. It was supported by the Government and observed by CEOs. It was reviewed in the late 90s (from memory) and only minor amendments were warranted at that time. I understand that its national reputation as a robust and modern management model has generally been maintained.

That said, I would be surprised if there is now not a general view that some aspects of the Act warrant modification but I would be even more surprised if there is a view that significant changes are required. I shall identify a number of matters which I think warrant attention but, before doing so, I feel I should make a general observation about the capacity and willingness of CEOs and agencies to make the Act work for them as intended.

As mentioned earlier, the PSEMA was designed to provide CEOs and agencies with the capacity to manage their own affairs within a framework of principles and standards. For that objective to be achieved as intended, CEOs and agencies actually have to develop their own management policies and processes to suit their own needs and circumstances. In my experience up until my retirement, the vast majority of CEOs accepted that challenge in an appropriate manner, thus ensuring that the Commissioner's Office retained its correct advisory/assisting role as well as being a point of reference/appeal through the grievance and appeals processes.

There were instances, however, where a few agencies from time to time would avoid exercising their responsibilities and would instead blame PSEMA (or the Commissioner's Office) for their failure to achieve the outcomes they wished to achieve. Performance management is a good example. The relevant Employment Instruction was clear on the need for agencies to develop and implement effective performance management processes. One of the aims of this Instruction was to limit or avoid entirely the need for action under the inability and disciplinary provisions of the Act. I can recall quite a few instances where this aim was not achieved simply because the agencies in question had failed in their obligations to introduce and observe appropriate agency-based arrangements.

Another example relates to the Code of Conduct. While a sector-wide Code was established under the Regulations, the door was left open for individual agencies to develop their own codes where they believed there was a need to do so. Again, this provision demonstrated acknowledgement of different needs in different circumstances.

To the best of my knowledge (which I emphasise is not current), Corrections was the only agency to respond to this invitation. I would have expected that some other agencies e.g. Power and Water and perhaps Education in relation to teaching staff, would have seen a need for some specific matters to be addressed in separate codes. On the other hand, the fact that the response was so limited may reflect the strength of the Code of Conduct itself.

Whatever the reason, the point is made to demonstrate the need for agencies to manage issues within their own jurisdiction rather than attributing the blame for any difficulties they might encounter to the Act and its associated arrangements. I well recall the mantra about "letting the managers manage". Sometimes, in my experience, managers need to "be made to manage".

I turn now to some possible amendments. I again emphasise the fact that I am speaking from a distance in time of over eight years and expect that current CEOs and other stakeholders will have a more up to date view on the issues I raise and will undoubtedly have others that I do not cover. The historical background to my comments is also relevant

My suggestions are as follows:

- Place the Principles, now contained in the Regulations, at the front of the Act. The Principles establish the essentials of the management framework and it should not be necessary to seek them out in subordinate documents. Their inclusion in the Regulations rather than the Act reflected the fairly conservative approach of the then Parliamentary Counsel in that, at that time, other jurisdictions had not taken such a step. That comment is not made as a criticism of the then Parliamentary Counsel; rather, it reflects the thinking at that time. Events have overtaken this conservative approach and the change would reinforce the basic tenor of the Act and the management model it creates. The Principles may need some editing to reflect current circumstances.
- I believe that the provisions in the Act relating to inability and disciplinary procedures should be reviewed with the objective of eliminating and/or reducing unnecessary process requirements. These provisions were originally inserted to mollify union views that the Act was "going too far" in terms of flexibility and devolution to CEOs. Those of us responsible for drafting the Act always believed that the provisions were over-prescriptive and that many of them could be eliminated or reduced. I would, however, urge retention of the provision that requires the CEO to form a preliminary view on whether inability action is required or whether an offence has been committed. In recent years I have had

some experience within other jurisdictions where the absence of this provision leads to immediate "show cause" action that often proves to be unjustified once some preliminary inquiries are made. Such an approach does not help the development of positive workplace cultures.

- I believe the disciplinary and inability appeal provisions may now be seen to be unnecessarily cumbersome and time consuming and I wonder whether those appeals could be assigned to the federal industrial relations system as has happened with the Australian Public Service. This could open up avenues for more agency-centred processes more suitable to the composition and nature of the workforce e.g., Power and Water, Corrections and the Fire Service.
- There has always been debate about the promotions appeal process with some stakeholders arguing for the elimination of appeals on merit and restricting appeals to process only. I have noted that the Queensland public service has such an arrangement and, from observation, I doubt its efficacy. In my experience, most promotion appeals concern (poor) process more than relative merit, but the Promotions Appeal Board already has the capacity to deal with the former by directing agencies to start again. Why not retain the availability of merit based appeals for the few occasions they may be justified? I have always argued that time spent observing sound process is time well spent; it is much less time than will be occupied in appeals!

Finally, I enter a plea for the retention of the Commissioner's role as employer in terms of the determination and management of terms of conditions of service. While the relatively small size of the NTPS lends itself to this arrangement, particularly in terms of the Government's interest, it is also important to acknowledge the damage that has occurred in other jurisdictions where the employer role has been fragmented and the responsibility for industrial relations matters transferred to other agencies.

I think the strength of my feelings on this issue has always been known and I can say that nothing I have seen in the other Australian jurisdictions since my retirement has caused me to retreat or modify my views. Quite the opposite, in fact, as the attached article from "Public Interest", the quarterly publication of the Queensland Division of the Institute of Public Administration indicates.

In some of my recent work I have detected signs of this matter being reviewed, not just in relation to industrial relations matters, but also in relation to the broader roles and functions of the central agencies and the need for new measures that sustain the career service concept in a modern and appropriate set of management arrangements. In this regard, I believe the PSEMA is appropriately framed and I strongly urge the retention of the employer role in all its aspects.

Ken, there will no doubt be some other matters raised by stakeholders in the course of the review process. The ones I have addressed are, to my mind and from my perspective, the most important. I thank you again for the opportunity to respond to your kind invitation.

Yours sincerely,

A handwritten signature in black ink, appearing to read "David Hawkes". The signature is written in a cursive style with a large, looping initial "D".

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HAWKES'EYE VIEW

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W(H)ITHER THE PUBLIC SERVICE COMMISSIONS?

David Hawkes

25 September 2004

SOME HISTORY

I recently discovered a paper I wrote in 1988 titled "*The Demise of Public Service Boards – A Pattern of Public Service Reform?*" in which I analysed the national trend at that time to abolish, in conjunction with the introduction of new legislation, the highly centralised Public Service Board model (Queensland had just done so) and replace it with a set of devolved management frameworks. Within these frameworks, new style Public Service Commissioners or, at that time in South Australia and Tasmania, Commissioners for Public Employment, would set and monitor broad policy standards in people management. Operational, day to day management would be left to Heads of Departments. This was the heyday of "letting the managers manage".

These changes were an intrinsic part of a range of reforms initiated by the Commonwealth and the States and Territories to free up human resource management policies and practices from the so-called "dead hand" of the highly prescriptive and restrictive arrangements that had formed a common management model for decades. It was no coincidence that these reforms accompanied the award restructuring processes of the federal and state industrial jurisdictions. They, too, were aimed at creating flexibility and innovation in employment arrangements in the workplace generally.

I concluded my paper with these observations:

"There can be no doubt that the potential for the development of a broader vision of human resource management in the public sector is enormous. The need for improvement, in an era of managing with less, is beyond dispute. The sceptics will no doubt claim that the new roles represent apparent rather than real change. Only time will tell the correctness or otherwise of that view but the indications are that significant improvements are attainable and are in fact occurring".

While subsequent experience and further changes have confirmed the general validity of that conclusion, I have had more recent cause to question whether the outcomes of the reforms have been as successful as we have sometimes allowed ourselves to believe. I suspect that, as with most reforms, we have only managed to get some of it right and that further consideration of the role of the new style central personnel agencies is warranted.

The Fragmentation of the Employer Role

In all jurisdictions except South Australia and the Northern Territory, the earlier traditional employer role of the old Board model has been fragmented in several ways. First, and most importantly, the responsibility for the negotiation and

determination of salaries and conditions (except, in most cases, senior executive levels) has been transferred to other organizations, usually the relevant Department of Industrial Relations. The employment aspects of pay and conditions for the majority of employees are thereby treated as separate from all other aspects of employment.

Thus, on the one hand, employees and their unions deal with one "employer" on the former and, on the other, with another "employer" in relation to matters such as recruitment and selection policies, training and development, conduct, behaviour, grievances and appeals.

Second, employees also have to deal with their own agencies in relation to many of these matters as agencies manage their employees within a broad policy framework of principles, standards, codes of conduct and, in some jurisdictions, agency based Enterprise Bargaining Agreements.

Third, there appears to be no agreed view or practice on what constitutes the "public service" or the "public sector" as between jurisdictions. This leads to some interesting inconsistencies. In Victoria, as just one example, the Commissioner for Public Employment has the capacity to issue Principles of Conduct and Employment that apply to the "public sector" but his capacity to issue Directions is limited to the "public service".

Some Concerns

A number of consequences follow this mish mash of employment arrangements. The first and most important is, I believe, the absence of a clearly identified "employer" to whom the average public servant can relate. While this situation may not necessarily create endemic problems, it does become important when the individual employee seeks redress or guidance. The links between the employee, his/her agency, the Commission, the industrial relations system and other offices such as the Integrity Commissioner and the Ombudsman are such that delay and confusion often attend the search for proper advice and/or the resolution of complaints and grievances.

Second, there appear to be substantial grounds for suggesting that the emphasis on the development of Codes of Conduct, Codes of Ethics, the observance of values and standards has created a situation where there is a lot of seemingly excellent documentation (read regulation) but little effective monitoring and evaluation of outcomes. As I have pointed out in an earlier column, it is difficult, if not impossible, to measure the effectiveness, for example, of agency statements on workplace harassment in the Queensland public service when there is no system for reporting on incidents and their resolution on a service wide basis, let alone a consistent approach through agency Annual Reports.

Third, I seriously question the effectiveness and fairness of redeployment arrangements when, with one or two exceptions, all jurisdictions have effectively devolved responsibility to line agencies. It is an unpleasant fact of life that it is not in the interests of line agencies to accept redeployees from other agencies, no matter how "suitable" they are. The concept of a "benevolent" employer i.e., the

Commissioner, willing and able to protect the interests of individuals caught in such circumstances has been seriously eroded at a time when it is most needed.

Fourth, I suspect that something of a black hole has developed in the majority of jurisdictions in relation to the training and development of employees. The role of the current Commissions is now generally restricted, in the sense of direct responsibility, to the senior executive levels leaving the responsibility for the vast majority of employees to individual agencies.

While I would be the first to argue that the location of that responsibility is absolutely correct as a matter of principle and sound practice, I have reservations about some of the longer term consequences in terms of sector-wide needs, career development flexibility, succession planning and standards. Surely the "employer" should have a role and interest in such matters?

Is it not ironic that one significant consequence of the devolved management framework is an increase in departmentalism¹ in relation to human resource management when, at the same time, the need to develop new attitudes and behaviours towards whole of government policy development and programme implementation is of paramount importance?

Conclusion

There have been many benefits for governments and employees from the devolved management framework model as it has developed in all Australian jurisdictions since the early 1980s. Not the least of these has been greater flexibility in employment conditions, the encouragement of innovative practices as distinct from the "one way suits all" or lowest common denominator approach and the acceptance of continuous improvement as a feature of the modern public sector. There have also been benefits from the award restructuring and enterprise bargaining processes, all of which have been achieved, in all but two cases, in the absence of the traditional "central employer" Commissions.

But I still cannot help but feel that some worthwhile features of the former model may have been lost unnecessarily. It is worth noting in passing that the two jurisdictions which have retained the "central employer" role in industrial relations matters, South Australia and the Northern Territory, appear to have at least matched their larger colleagues in term of innovative policies and practices while at the same time retaining other key roles e.g., in relation to redeployment, to the benefit of employees.

Perhaps a more detailed comparative review might identify some other areas where the gains from adherence to the accepted reform wisdom have not been as beneficial as some would have us believe. In turn, that may lead to a reappraisal of the current role of the Commissions.

¹ "Departmentalism" - a word used extensively by Sir George Cartland in his 1981 Review of the Tasmanian public sector. It denotes an inward looking, agency focused management style that is the antithesis of the whole of government concept.

