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Mr Ken Simpson
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Cc: PSEMA Review Steering Group


Dear Mr Simpson

**RE: REVIEW OF PUBLIC SECTOR EMPLOYMENT AND
MANAGEMENT ACT AND SUBORDINATE LEGISLATION**

Thank you for the opportunity to provide a submission on the review of the *Public Sector Employment and Management Act* (the Act).

While the Act and related subordinate legislation has served the Northern Territory Public Sector (NTPS) well, and proven remarkably resilient since its enactment in 1993, there are several aspects that could be improved to help the NTPS meet its future challenges.

The Department of the Chief Minister's submission is provided at Attachment A (strategic issues) and Attachment B (technical issues).

Should you wish to clarify any issues raised in the submission, please contact Shaun Hardy, Executive Director, Corporate Services, in the first instance.

Yours sincerely


KEN DAVIES

6 April 2009

**REVIEW OF PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT
ACT AND SUBORDINATE LEGISLATION –
DEPARTMENT OF THE CHIEF MINISTER SUBMISSION ON
STRATEGIC ISSUES**

General

The Discussion Paper raises questions of whether the *Public Sector Employment and Management Act* (PSEMA) continues to provide the flexibility, simplicity and certainty in terms of responsibility and accountability that was envisaged on its introduction, and does it meet the requirements of the Northern Territory Public Sector (NTPS) going forward?

Fundamentally, PSEMA has served the NTPS well since its enactment in 1993. There are several aspects that could be improved, both in the Act and subordinate legislation, but PSEMA has not presented any major barriers to an effective and efficient NTPS. A counter question could be put as to whether reforms in the areas of capability and culture in the NTPS are in fact more necessary to meet future challenges than an overhaul of PSEMA.

As a general observation, the Discussion Paper distributed with the invitation for comment would have been more valuable had it contained some comparative analysis with other jurisdictions in Australasia, and in particular any reforms over recent years that may be considered innovative.

Legislation

PSEMA and subordinate legislation currently comprises the Act, Regulations, By-laws, Employment Instructions and Determinations, in addition to certified agreements. An Act that is considered flexible needs to allow for various processes and procedures to be dealt with by subordinate legislation and a light hand in relation to prescription. One process that could be undertaken by the reviewers is to consider each provision to see what might be left to subordinate legislation in order to simplify PSEMA.

That said, while the purpose and contents of subordinate legislation and relevant certified agreements are familiar to Human Resource practitioners, who reference employment conditions, entitlements and processes on a regular basis, it can at times be difficult for other NTPS employees to readily locate the information they need. It is also worth noting that the more forms of documentation there are, the greater the risk of inconsistencies. As such, there may be both scope and merit in streamlining and rationalising the subordinate legislation series.

Principles

PSEMA does not currently include any introductory purposive or aspirational statements, examples of which have been used in other jurisdictions. Section 62A of the NT *Interpretation Act* is informative in how such statements may be used in interpreting an Act.

The three sets of principles covering public administration and management, human resource management and conduct provide high level guidance on employment and management practices in the NTPS, and set the tone for the culture of the NTPS. As such, rather than the principles being contained in subordinate legislation, consideration should be given to highlighting the principles in PSEMA itself.

Commissioner as employer

The establishment of the Commissioner for Public Employment (CPE) as the statutory employer for all NTPS employees is justifiable in a jurisdiction the size of the Northern Territory. The single employer model is largely limited to enterprise bargaining and establishing the broader employment framework, with day to day management appropriately remaining the responsibility of Chief Executive Officers (CEO).

Adopting a devolved employer model, such as those in place in other jurisdictions, may result in a faster paced spiralling of terms and conditions, higher turnover as existing employees seek placement in the agency with the most generous agreement and difficulties in enterprise bargaining negotiations due to a lack of expertise in line agencies.

Broader employment mobility

While arguably cyclical, the NTPS has experienced challenges arising from greater employee mobility, particularly in recruitment and retention rates and career expectations of younger employees. There are always costs associated with employee turnover but there can also be benefits including potential for greater diversity and breadth and depth of skills and experience.

There may be merit in exploring options to minimise the transaction costs and peripheral considerations of employees when contemplating moving in, out and across other jurisdictions and other sectors, including superannuation and leave entitlements. Provisions for greater flexibility in cross-jurisdictional and cross-sector movements, particularly where this might be targeted at specific skills or experience deficiencies and/or leadership development, could prove very useful.

Security and emergency events

Section 22(6) of the Commonwealth *Public Service Act* allows for security and/or character clearances for potential employees prior to engagement. This is applied on a discretionary basis by Commonwealth agencies and usually for potential employees in positions where considerable financial responsibility and/or access to highly sensitive or confidential information are required. Section 13 of the Code of Conduct under PSEMA provides for criminal history disclosure but with an onus on employees to disclose details, which has obvious potential risks. Consideration could be given to strengthening this area by mandating criminal history checks for positions of trust in the NTPS, which could be identified at CEO discretion, as a prerequisite for employment.

While a rare likelihood, there is always a possibility that emergency or disaster events may affect the Northern Territory. Flexibility for redeployment of staff across NTPS agencies in a timely manner would assist critical operational needs. Consideration could be given to how such provisions could be framed, perhaps drawing on examples in place in other jurisdictions, not only for a pandemic influenza scenario but for cyclones, floods and other emergency events also.

Board indemnities

NTPS employees are on occasion appointed by Ministers as board members for various bodies. Currently, the level of protection provided to NTPS employees appointed to such roles is not always clear or consistent across bodies. As part of the review of PSEMA and subordinate legislation, it may be worthwhile considering inclusion of provisions for a standard level of indemnity, which would automatically apply to NTPS employees when appointed to such roles. By way of reference, the relevant legislation in South Australia contains such a provision.

Disciplinary breaches

Section 8 of PSEMA appropriately covers definitions, procedures and possible outcomes for breaches of discipline. However, a number of scenarios could arise where it would be beneficial to both an employee and an agency to apply a 'no fault' provision prior to separation, rather than pursuing a formal disciplinary procedure. There may also be scope to further streamline discipline-related material in both PSEMA and subordinate legislation based on frameworks and procedures applied in other jurisdictions including the Commonwealth *Public Service Act*.

Non-agency employees

Ministerial staff and staff employed by Northern Territory Government owned companies or statutory corporations (eg Northern Territory Major Events Company) are employed under separate contracts. A range of linkages to PSEMA provisions are evident in such contracts, on a spectrum from none to many. Consideration could be given to creating a statutory framework for such contractual arrangements to encourage greater consistency and transparency.

Board of Commissioners

While there are arguably mechanisms in place in the Northern Territory for broader input and consultation, such as the Coordination Committee and Public Sector Consultative Committee, a recent structural initiative in the Queensland Public Service may be worth further consideration. A Board of Commissioners has been established in the Queensland Public Service Commission, which draws on broader representation and input for strategic guidance and innovation on public service workforce and performance issues. The new Board of Commissioners includes the Commission Chief Executive, the Director-General of the Department of the Premier and Cabinet, the Under-Treasurer, the Director-General of the Department of Employment and Industrial Relations, and at least 3 other persons appointed by the Governor in Council as commissioners, who could include suitable external appointees such as business representatives and academics.

**REVIEW OF PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT
ACT AND SUBORDINATE LEGISLATION –
DEPARTMENT OF THE CHIEF MINISTER SUBMISSION ON
TECHNICAL ISSUES**

Chief Executive Officer appointments and terminations

There is arguably an inconsistency in the appointment of Chief Executive Officers by the Administrator (Section 19) but termination of the appointment is by either party or the appropriate Minister (Section 20). Perhaps one way of overcoming the inconsistency is for the Executive Contract of Employment to spell out the appropriate Minister's absolute discretion to terminate the appointment at any time. If the power to terminate should remain with the Minister, why is it not the Minister who makes the appointment, which would reinforce the relationship with the Minister as highlighted in Sections 22 and 23. Alternatively, perhaps both appointments and terminations should be by the Administrator, on the advice of Executive Council.

The review also presents an opportunity to consider use of the term "Chief Executive", which is used for all practical purposes in the NTPS, with the term "Chief Executive Officer", which appears in PSEMA.

By-laws and instructions

By-law 8 Long Service Leave

Casual employment

Currently a casual employee is not eligible for long service leave by virtue of their employment contract. By-law 8(12) indicates that a casual employee would be entitled to recognition of, and payment of long service leave. However, the provision is excluded through Determination Number 5 of 2007, which states that the By-laws do not apply therefore excluding casual employees from accessing this entitlement by virtue of their contract.

Determination 5 of 2007 states that a casual employee does not accrue or become entitled to utilise any paid leave. While it is a rare case that a casual may be employed on consecutive casual employment contracts that total ten years, there have been situations where this has occurred. Access to this provision may be an incentive in attracting groups such as mature aged employees and women who only want to work on a casual basis for an extended period.

By-law 8 and Clause 47 of the Northern Territory Public Sector 2008-2010 Union Collective Agreement

Cash out of long service leave

An employee is exempt from the requirement to utilise their long service leave entitlement within three years of it accruing in accordance with *Public Sector Employment and Management* by-law 2(b) and clause 47.4 of the Northern Territory Public Sector 2008-2010 Union Collective Agreement (the Agreement).

However, these same employees do not have access to the provision which allows the 10 year long service leave credit to be cashed out in accordance with clause 47.3 of the Agreement without seeking approval from the Commissioner for Public Employment.

This would appear to be inequitable where the Chief Executive has the discretion to approve the cash out of long service leave for some employees but not others. It could be argued that where employees have the advantage of not having to utilise their long service leave within a set period, they can't have it both ways. However, given that employees who are required to utilise their long service leave within three years could have the timeframe temporarily extended beyond the three

years, with the approval of the Chief Executive, giving them discretion to manage their employees, it is not a strong argument.

While the preference is for employees to utilise accrued leave, the cash out provision should be at the discretion of the Chief Executive for all employees. Given the intention of the provision was to manage the Northern Territory Public Sector long service leave liability this would allow the Chief Executive to manage this liability more easily and with less angst to the employee.

By-law 8(25)(b) Payment in Lieu of Long Service Leave

This by-law allows the payment in lieu of long service leave on retirement, if the employee has attained the age of 55 years, after one year of service. Since compulsory age retirement and the minimum retirement age were abolished in the Northern Territory Public Sector (NTPS) in September 2003 and technically there is no age retirement from the NTPS is this by-law still applicable?

Schedule 10, Clause 4.7 of the Northern Territory Public Sector 2008-2010 Union Collective Agreement

Extension of relocation time on redundancy

Schedule 10, Clause 4.7 of the Northern Territory Public Sector 2008-2010 Union Collective Agreement and Determination 4 of 2001 (Executive Contract Officer Terms and Conditions of Employment) state that:

“An employee is entitled to all reasonable removal and relocation expenses. This entitlement should be used within 90 days after the date of retrenchment unless otherwise approved by the Commissioner.”

There doesn't appear to be any reason this provision could not be delegated to Chief Executives. The Commissioner would not approve a request to extend the 90 day timeframe without first consulting the relevant agency. Extensions have usually been a further 90 day period or up to a maximum of 12 months (with agency agreement). A maximum period of 12 months could be applied after which any further extensions would not be available.

Ultimately the agency pays and determines what is “reasonable” expense and they would generally be more familiar with the circumstances behind the request to extend the time frame. It makes sense that the agency should determine how long they are prepared to defer the entitlement.

For the sake of consistency the same process should be applied to Executive Contract Officers.

Relocation expenses on appointment for Temporary employees

By-law 27 and 28

The current legislation does not allow the payment of relocation expenses to a person on temporary appointment. Payment of any relocation expenses in these circumstances may only be determined by the Commissioner as there is no provision under the current legislation which allows the Chief Executive to approve this provision.

This generates some problems for agencies as the Northern Territory is still perceived to be a remote posting in relation to other parts of Australia which creates difficulty in recruiting to specialised or some higher level jobs. The Chief Executive is currently not able to negotiate the payment of any relocation expenses to make an offer of temporary employment more attractive without first consulting the Commissioner

It is an expensive prospect for a potential employee interested in moving to the Territory but who can only be offered temporary tenure eg. Commonwealth funded jobs or backfilling for these jobs with nothing to offset the risk.

The definition of employee in accordance with the *Public Sector Employment and Management Act* excludes temporary appointees from relocation entitlements.

Definition of "employee" means a person employed in the Public Sector other than the Commissioner or a Chief Executive Officer.

Once a person is employed regardless of tenure or period of the transfer, if they are required to move to another location to take up duty they are entitled to what the Chief Executive considers reasonable relocation expenses.

Rewording the legislation to include temporary appointees would give Chief Executives the ability to negotiate limited relocation expenses for temporary appointments. The Chief Executive should have the power to use their discretion in relation to reasonable relocation expenses for temporary appointments if they consider it is warranted.

By-law 5 and Clause 46 of the Northern Territory Public Sector 2008-2010 Union Collective Agreement

Recreation leave loading

Is it necessary for an employee to take one week's recreation leave to be able to access their accrued recreation leave loading?

We often receive requests from employees to cash up their recreation leave loading but they don't want to utilise recreation leave at the same time. As the provision already exists where an employee has two or more recreation loadings as at 1 January, one recreation leave loading is automatically paid on the common cash-up date, should there be any reason an employee can't cash up any accrued recreation leave loading entitlement if they wish to? The fact that the cash up of two recreation leave loadings in one year has taxation implications would be a deterrent for most employees to cash out unless they had a specific requirement to do so.

While it is preferable for people to utilise accrued recreation leave it is unlikely that the provision to take recreation leave in order to access the recreation leave loading encourages people to utilise their leave more than they would otherwise as come January it will be cashed out anyway.

Employment Instruction Number 5 – Medical Incapacity

Remove all references to Form NT12 as this form in its original format no longer exists. The new form is now called Medical Assessment NT12(A) or Medical Assessment NT12(B). It may be better to rename the form and remove all reference to NT12 as this was a carry over from the old Commonwealth Medical Assessment Form and has no link to any current paperwork.

Distribution of information

It may be timely to include additional information either at the beginning of the By-laws or on the OCPE website that employees are required to go through to access information regarding their conditions. There is a need to ensure employees are aware and understand all the relevant legislation and how the Northern Territory provisions links to, or may be overridden by, Federal legislation. This will be particularly important when the Fair Work Bill and successive legislation is introduced in 2010 given that most of the current Enterprise Bargaining Agreements will be due to expire, or have expired, at that time.

It is important that employees understand that the legislation should not be read in isolation, particularly for those employees who don't often have a requirement to use the legislation. Decisions based on reference to conditions employees are entitled to after reading only one part of the relevant legislation (usually the part that suits their purposes), creates problems.