

REVIEW OF THE *PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT* NORTHERN TERRITORY TREASURY SUBMISSION

INTRODUCTION

In preparing Treasury's submission for the Northern Territory Government's review of the *Public Sector Employment and Management Act* (PSEMA) and its subordinate legislation, it became clear that Treasury's response would need to be provided on the basis of an agency within the Northern Territory Public Sector (NTPS) that employs and manages staff in accordance with PSEMA requirements, but also from a broader policy perspective taking into account contemporary labour market principles.

Treasury's submission is therefore provided in three sections:

- Section One provides a broad response and considers the need for such legislation, given that the Territory observes the legislation that applies to employers and employees outside of the public sector, as well as its potential impact on the Territory labour market and the economy of the NTPS observing PSEMA.
- Section Two proposes an alternative structural arrangement to the framework which is underpinned by a clear set of principles.
- Section Three sets out comments in response to the specific issues raised in the Office of the Commissioner for Public Employment's (OCPE) discussion paper.

SECTION ONE

Does the Territory need this legislation and what should its objective be?

National legislation determines the employment framework for all employers and employees in Australia. In addition to these universal requirements, public sectors have had their own legislation covering employment principles and practices. Some years ago there were substantial operational and financial differences between the public and private sectors. In recent years the general trend has been to reduce these differences as far as possible.

In this context, a legitimate question in a review of PSEMA is whether the Territory needs a PSEMA any longer. The employee relations arena has undergone great change in the last few years, promoting greater flexibility for employers and employees. Similarly public sectors have been striving to become more responsive and efficient. It is not clear whether the public sector employment legislation is restricting the achievement of greater efficiency, by imposing restrictions that do not exist for other employers. It is worth considering what is achieved by NT public sector specific employment legislation. Do we still need an Act such as this and, if so, what should its objective be, what does it need to cover and what should be covered by generic employment legislation?

Consistent with the Territory's obligations under the Council of Australian Governments' business regulation and competition reforms, there is a requirement to subject any proposed new legislation that impacts upon business or economic activity to review under the Northern Territory's Regulation Making Framework. This involves the proponent agency examining and articulating the need for legislation and assessing the costs and benefits of the available options. In the process, the agency explains why other alternative regulatory forms such as rules, codes of conduct or practice and accreditation schemes are not suitable. In this case, workplace agreements would fall into this category of other forms of regulation.

While the PSEMA does not directly affect private commerce, the public sector is the largest single employer in the Territory. In 2007-08, the Northern Territory Public Service (NTPS) was made up of 22 000 employees (16 574 full time equivalent¹) which represents 20.1 per cent of all employees in the Territory compared to the national average of 12.7 per cent². In this context, it could be expected that changes in NTPS employment terms and conditions could affect competition in the Territory labour market, influencing other employers and changing their labour costs. As part of the cost benefit analysis, it would be necessary to consider the extent to which changes to PSEMA have the potential to impact on the efficiency of the Territory labour market and economy more generally.

On this basis, Treasury considers that the Regulation Making Framework provides a suitable methodology for reviewing the PSEMA and in determining which option for change would be the most efficient and beneficial for the Territory.

The Council of Australian Governments has also committed to uniform national requirements for a range of regulatory arrangements that affect employment. Occupational health and safety legislation is perhaps the most significant of a number of examples. Superannuation is another area where the same legislative and regulatory framework applies to all employees. These reforms suggest that there is a strong case for limiting the differentiation on employment provisions between public and private sectors.

SECTION TWO

A Possible Framework for Legislation for Northern Territory Public Sector Employment and Management

Section One raised the issue of whether or not public sector employment and management legislation is required. Section Two argues that if legislation is required, it should be high level, principles based with administrative requirements not included in the legislation. If the public sector is to remain the one employment group that has additional legislative requirements to observe, we need to be clear about why these additional provisions are needed and what they are intended to achieve.

Currently the *Public Sector Employment and Management Act* (PSEMA) establishes the main framework for management of the Northern Territory Public Sector (NTPS) with its subordinate legislation providing additional detail to that framework. The framework comprises the following:

- *Public Sector Employment and Management Act* (10 parts and 66 sections);
- Public Sector Employment Regulations (4 parts and 28 sections);
- Employment Instructions (13 instructions);
- By-Laws (7 parts and 54 by-laws);
- Determinations;
- Public Sector Instruments; and
- Union Collective Agreements.

Most users of the framework would argue that because of its volume and the various elements contained therein (sometimes too prescriptive, other times providing only minimal guidance) it has become an unwieldy and complex framework. To consolidate and streamline the current arrangements, consideration could be given to establishing an alternative framework, similar to the ones already in place to manage procurement and financial management in the Territory's public sector, whereby the legislation establishes

¹ Office of the Commissioner of Public Employment 2009.

² Australian Bureau of Statistics 2009, *Employment and Earnings, Public Sector, Australia*, Catalogue No. 6248.0.55.002. Calculations have been done on the average number of employees during the period.

principles to be followed with a series of directions that set out particular processes to be followed, and indicating the extent of flexibility and judgement that can be exercised.

In the case of PSEMA, directions could come from the Commissioner. The table below provides an example of each of the series of directions which have been established in the financial management and procurement frameworks.

Financial Management Directions	Procurement Directions
Framework Series	Framework Series
Governance Series	Policy Series
Budget Series	Process Series
Management and Risk Series	
Accounting Series	
Cash Management Series	
Reporting Series	
Corporate Tax Series	

Both models include a specific direction about the framework. This is important as it provides an overview of the central concepts underpinning the framework and an introduction to the legislative framework in question.

The framework for employment and management could be developed in a similar way and could comprise two core elements:

1. Principles – the strategic objectives that the public sector as an employer would strive to achieve and behavioural expectations within which agencies are expected to operate (values), and which serve as a guide for all actions and decisions that employers and employees make; and
2. Contract – the relationship between the employer and the employee and their respective obligations.

Principles

Within the current NTPS employment and management framework, greater importance and emphasis should be placed on the inter-relation of the Act and the principles that underpin the framework.

Contained in the PSEMA's Regulations are the overarching principles of Public Administration and Management, Human Resource Management and Conduct. These principles include merit, natural justice and conduct, accountability and transparency, all concepts that as NTPS employees we should be familiar with and uphold.

However, there is a considerable bias towards the obligations and restrictions on the employer with less attention paid to the obligation of employees. This is an area where restrictions on the public sector are far greater than the private sector. So that there is greater balance between the rights of the employer and the employee, it is proposed that public sector employment and management be undertaken in a manner that is consistent with the following six principles:

1. **Merit:** Currently defined as the principle that an appointment, promotion or transfer under the PSEMA should be on the basis of, and only on 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. The definition contained in the Act will soon be amended to also include regard for the diversity a person from an EEO target group would bring to the workplace.

As mentioned in the Discussion Paper, although it is not explicitly stated in the definition, "in its widest sense, [the merit principle] embodies an ethos targeted at the

achievement of best practice human resource management”, and that wider consideration of the principle encompasses concepts including:

- an apolitical public sector where decisions are made without fear or favour;
- transparency and fairness in selection or promotion decisions;
- public sector leadership that appreciates the uniqueness of each employee and recognises individual qualities, aspirations and potential.

This definition is important. Nevertheless, merit based selection can still be somewhat restrictive in terms of appointing and promoting employees because it does not allow merit to acknowledge demonstrated competence, and advance employees through competency based promotions or salary increases such as broadbanding arrangements.

2. **Natural Justice:** The concept of natural justice is designed to ensure procedural fairness in the exercise of administrative power. As outlined in Employment Instruction 3, natural justice needs to be observed in all dealings with employees under the Act, other than those referred to in section 50 of the Act (Summary Dismissal), and has two fundamental requirements:

- a person directly affected by an impending decision must be afforded a fair hearing prior to that decision being made; and
- the decision maker should be impartial.

It is important to separate the decision-making process from the final outcome of the decision. That is, the decision-making process must comply with natural justice and follow a fair and proper procedure. Whether the decision itself is fair and reasonable can only ever be a matter of subjective opinion.

3. **Reasonableness:** The principle of reasonableness (in conjunction with natural justice) would mean that as long as decisions made or acts taken could be demonstrated to be reasonable (and would be viewed so by an independent, “reasonable”, third party), this is the extent of what is necessary, i.e. it should not be necessary to prove or demonstrate that an action has been taken or a conclusion drawn on the basis of “beyond a reasonable doubt”.
4. **Shared Responsibility:** The principle would serve to emphasise that just as the employer and employee each have their own obligations under the employment contract, each party must accept responsibility for their own conduct and behaviour.
5. **Responsiveness:** This principle would acknowledge that the public sector, necessarily, needs the flexibility to be able to respond to needs or government directions, changes in economic circumstances, labour markets and skills supply so that we can be more efficient and responsive. This goes to the heart of the first of the Principles of Public Administration and Management (in the PSEMA Regulations):
“(a) the Public Sector shall be administered in a manner which emphasises the importance of optimum service to the community”.
6. **Accountability and Transparency:** The principle would encourage the efficient, effective and ethical use of resources. An agency has responsibility for ensuring that any public sector employment and management process is open and transparent and that decisions are justified. Agencies need to have procedures in place to ensure that all processes are conducted fairly and that related actions and decisions are documented, defensible and substantiated in accordance with legislation and government policy.

Contract

When an employee accepts a specific offer of employment (either oral or written), a contract of employment has been established. Under this contract, both the employer and employee have certain obligations or duties to each other.

In addition to offering appropriate payment and entitlements and ensuring a safe working environment, obligations of employers are to provide the employee with access to professional training and development, good management and agreed remuneration.

The employee's main obligations or duties include exercising due care in the performance of the work and performing it competently and professionally; exercising appropriate behaviour, consideration and acting with fairness and equity in all their dealings; not engaging in improper conduct; and, for those with financial responsibilities, exercising due economy and ensuring the efficient and ethical use of resources and facilities.

When either party fails to meet one or more of their respective obligations, the public sector management framework should clearly set out the processes for redressing that non-compliance or failure.

This simple premise of mutual and contractual obligations and duties should be the key principle around which a management framework is structured. Legislative requirements and directions would reflect this principle.

SECTION THREE

Responses to Issues Raised on Specific Provisions of the Legislation

Section Two has argued that a different framework for legislation would provide greater flexibility and clarity than at present. Section Three responds to specific issues raised in the discussion paper on specific provisions of the legislation.

PART 1 – Preliminary

Part 1 defines various entities and terms under the Act and applications thereof.

Government has approved amending the definition of merit in the PSEMA and weighting to be given to EEO diversity, to include “the diversity that a person from an EEO target group brings to the workplace” as well as on 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”.

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.

Agency Comment: Cabinet has approved this amendment and the policy intent is clear. However, it would be useful for the Office of the Commissioner for Public Employment to assist agencies with guidelines for practical and consistent implementation, including in processes other than selection, such as in the probationary process.

PART 2 – Administration

This part details the duties of the Minister responsible for administering the PSEMA, as well as the establishment, change of name and abolition of agencies.

Agency Comment: No proposed amendments.

PART 3 – Commissioner for Public Employment

Part 3 sets out the appointment, delegation, functions, powers and reporting responsibilities of the Commissioner for Public Employment (CPE).

Section 11 – Delegation by Commissioner

This section permits the CPE to delegate to any person any of his or her functions and powers under the PSEMA, after consultation with the appropriate CEO.

Agency Comment: No proposed amendments.

Section 12 – Commissioner Deemed to be Employer

Of note is the PSEMA's unique feature that establishes the CPE as the statutory or central employer on behalf of the Territory Government. The question as to whether this concept of a single employer model still remains viable has been raised.

Agency Comment: This is a positive aspect of the PSEMA, and one that works well for a small jurisdiction such as the Territory. This feature is especially useful as it means that the CPE develops the necessary expertise in industrial relations required for negotiating matters. It would be more efficient, however, if there were fewer (preferably only one) separate workplace agreements, particularly where there is an agreement that deals with only a small number of employees. If separate agreements are required, say for teachers and nurses, the rationale should be transparent and clear, rather than it being a matter of historical approach.

Section 13 – Functions of Commissioner

Section 13 details the CPE's functions in specific terms and emphasises that his/her role is to deal with issues of principle and sector-wide policy rather than operational issues within agencies.

Agency Comment: It is important that the CPE maintains a strategic view of principles and policy, and that it does not deal with operational issues within agencies. However, from time to time there is a need for greater guidance on issues, particularly on complex employee relations matters. Agencies are criticised for not 'getting it right' and can be judged lacking in an appeal or grievance review, but this is often in the absence of practical advice based on understanding agencies' operational environments and real situations. Sometimes advice from OCPE and the Department of Justice can differ. Although it is not proposed there should be any change to this section of the Act, subordinate instruments or separate directions in the PSEMA framework could provide more practical guidance for agencies.

Section 14 – Powers of Commissioner

In addition to carrying out his/her functions, this section empowers the CPE to issue determinations on all matters permitted by the PSEMA eg to determine particular terms and conditions to apply to an individual or class of employees.

Agency Comment: The CPE could delegate some determination type powers to CEOs, such as payment of skills allowances. In order to preserve transparency and maintain some degree of consistency, CEOs could be given guidelines and asked to report at regular intervals.

Sections 15 to 18

These sections provide the CPE powers to undertake various special investigations and issue Employment Instructions (EI). They also require the CPE to keep employee records and report to the Minister on the management of human resources within the NTPS.

Agency Comment: A review of the current 13 EIs is warranted, as there have been minimal amendments made to the set of instructions since they were first developed. In addition, EIs such as EI 1 (Advertising, Selection, Appointment, Transfer and Promotion) are too prescriptive and, together with the numerous specifications for advertising vacancies contained in OCPE's "Recruitment Advertising Policy and Procedures", contradict the PSEMA's fundamental ethos of letting the managers manage. The restrictions often impede quick and efficient recruitment, do not readily acknowledge increasing skills and competence gained in the workplace and do not promote the level of flexibility required in the modern workforce. However, other EIs, such as those dealing with dismissal and discipline, performance management and inability, provide insufficient guidance and do not adequately recognise practical operational requirements in meeting instructions. The lack of clarity promotes a risk averse culture that does not contribute to efficiency and flexibility.

(Please also refer to comments against Part 5, Section 30 below.)

PART 4 – Chief Executive

Part 4 details the appointment, accountability, functions, powers, delegations and reporting responsibilities of Chief Executive Officers.

Agency Comment: No proposed amendments.

PART 5 – Appointment, Promotion, Transfer and Resignation

Part 5 outlines the powers of CEOs to appoint, promote, or transfer employees, as well as the requirement for CEOs to advertise vacancies exceeding six months and for CEOs to adhere to certain conditions when appointing employees.

Section 29 (3) – Appointment on a Permanent or Temporary Basis

CEOs may appoint employees on a permanent or temporary basis. Employment on a permanent basis means that there is no fixed period of appointment and the employment can only be terminated in accordance with the Act. Employment on a temporary basis encompasses fixed term contracts, including executive contracts and casual employment.

Agency Comment: The concept of permanency in the NTPS and the rationale for “a job for life” is no longer clear. Economic prosperity over the past 15 – 20 years, greater education levels and the changed employee relations landscape means that younger workers, particularly but not only Generation Y workers, are less concerned about security of employment. They are more confident of being able to find employment, and employment of their choice and preference. Attraction and retention strategies and management techniques including work/life balance, better engagement with management, professional development opportunities, responsibility and recognition are of greater value than permanency. Also, the historical trade off of lower salary for greater security appears to have diminished as NTPS salary levels now lead the private sector at a number of levels.

The concept of permanency puts the NTPS at odds with the private sector and some other public sector employers. The lack of flexibility in types of appointment may result in greater than necessary use of short-term appointments by agencies.

The option therefore of either fixed term or ongoing contracts for all public servants needs to be explored, with CEOs also having more flexibility to engage and move people around according to need. From the employee’s perspective, natural justice would always prevail, along with merit, reasonableness and shared responsibility, irrespective of the nature of tenure.

Whichever employment arrangements are in place to engage public servants, there should be a clear expression of the simple obligations of each party to the employment agreement or contract, as suggested earlier in this Section Two, regarding framework principles.

Section 29 (4) – Temporary Transfers

Agency Comment: Temporary transfers are a positive and attractive feature of public sector employment, with mobility providing the opportunity to advance careers and develop personal capability and knowledge. If we accept that this is an important feature of our public service because it builds the NTPS’ overall capability and allows our staff to grow, it is also important that it operates in such a way as to not disadvantage donor agencies or unreasonably detract from their ability to meet their obligations and undertake their core business. In practice, temporary transfers, or the way receiving agencies secure them, can present difficulties for donor agencies.

Short-Term Transfers

There is no minimum timeframe for temporary transfers of staff between agencies. Although it is possible to refuse to agree to the transfer of a staff member, the general or common practice is to agree for them to be released, especially when it constitutes a promotion for the employee and therefore a professional development opportunity, even if the transfer period is as short as four weeks. However, short term transfers can prove quite difficult for the donor agency which tries to make a judgement about whether to attempt to fill the consequent vacancy without sufficient knowledge of the receiving agency’s longer term intentions. It can take around four weeks to fill the resulting temporary vacancy so often no recruitment is undertaken because the staff member is expected back after the short transfer. It is not so problematic to manage without someone for four weeks, but it does become a problem when the receiving agency then extends the temporary placement with further short terms. Had the donor agency known the staff member was not likely to return for several months in the first instance, recruitment action would often be taken to manage the consequent vacancy.

(Agency Comment: cont.)*Short-Term Transfers (cont.)*

To provide greater certainty for agencies for workforce planning purposes, it is proposed that temporary transfers of staff between agencies are limited to a minimum of 6 months, unless there is agreement between senior managers for a lesser period. There should also be some requirement for requests for extensions to be made with several weeks' notice rather than at the last minute. These two requirements would have the effect of improving recruitment planning in receiving agencies and enabling greater ability to plan workforce requirements in donor agencies.

Long-Term Transfers

At the other end of the scale, it can also be difficult for agencies to plan, budget and permanently recruit to positions when staff are transferred temporarily to another agency for long periods, say 12 months or more, and particularly when those transfers are then extended further (sometimes repeatedly). Attracting good candidates to a consequential temporary vacancy is usually more successful if it can be advertised as a long-term or permanent vacancy. Six-month vacancies often do not attract many applicants whereas longer term vacancies do, particularly applicants from the private sector.

It is suggested that a transfer of more than say 12 months (including two lots of 6-month temporary transfers) should trigger an automatic s35 transfer of the staff member to the receiving agency.

This should result in agencies considering their recruitment needs more carefully and putting the same level of effort into the selection process for temporary vacancies as for permanent vacancies. It should lead to better recruitment planning by agencies, and avoid situations where staff remain nominally attached to one agency when they may not have worked in that agency for quite some time.

Section 30 – Procedure for Filling Vacancies

Under this section CEOs are required to publicly advertise vacancies exceeding 6 months. It also enables CEOs to request under section 30(1)(b) for the CPE to approve a selection without advertising.

Agency Comment: The policy intent of the requirement to advertise vacancies of six months or longer is clearly to provide access for candidates from within and outside the public sector to job opportunities in agencies, to increase agencies' opportunities to identify suitable candidates and to ensure a proper merit selection process is undertaken. This is a highly desirable policy approach, however, in practice, it can be cumbersome, bureaucratic and restrictive of opportunity as actions can be designed to circumvent or subvert the "rules".

More Flexible Approach to Selection

This is an important area where far greater flexibility in recruitment approaches needs to be considered, and applied, in order for NTPS agencies to be able to maximise the opportunities when undertaking recruitment actions. The current legislative requirement to advertise all vacancies greater than 6 months, the vacancy documentation and related processes that are associated with it can be quite restrictive and do not recognise or can not accommodate changes in the labour market over time or the changing nature of work and agency structures.

(Agency Comment: cont.)*Broadbanding*

Under the current legislation and framework, an employee must first apply for and win an advertised position in order to advance to the next designation. A more flexible approach would be to have broadbanding arrangements in place whereby designation levels could be combined into a single broader group, where there is homogeneity or a commonality of functions between positions. This would not only decrease the amount of administrative work for the agency as it would negate the need for advertising, and the labour intensive recruitment process associated with it in establishing a selection panel etc, but would also allow an agency to formally recognise an employee achieving higher standards of performance and skills, as determined through the agency's performance management system.

Performance reviews for many staff can be of variable value, however by using the performance management system as a means to determine whether an employee is suitable to advance to the next level within a broadband would provide employees a genuine scope and purpose in terms of participating in these performance reviews.

In keeping with the NTPS Principles, 'hard breaks' could be placed within the broadbanding structure at appropriate levels which would allow open and competitive merit selection to move up to the next range of broadband levels.

Given that a high proportion of vacancies within Treasury are filled through internal promotions, such an arrangement would allow an agency which has expended time, resources and effort into developing its employees, to recognise and retain them by being able to advance them in this way. This approach would mainly suit work areas where work is similar but higher level staff deal with greater complexity, eg policy analysts and compliance officers.

Taking Advantage of Labour Market Developments

In terms of attracting or recruiting new employees to the public sector, greater flexibility in the recruitment process would be of considerable value, especially where general work requirements need to be filled and this potentially falls across a range of levels, or if agencies within the NTPS might wish to take advantage of certain conditions in the labour market, such as downsizing occurring in a particular sector which may present a unique opportunity for an agency to fill difficult to recruit to positions.

In addition, the ability to keep a wait list of suitable candidates who have been through a merit selection process and can be drawn upon for a period of say up to 12 months would be of great benefit. At the moment the only provision along these lines is if a first ranked applicant declines a position, or if that same position should become vacant again, or an identical position is created and needs filling, a candidate who has been ranked as suitable against that position may only fill it if it is within six months of the date the position was originally advertised. There is precedent for the wait list approach in other public sectors.

As long as agencies ensure that an open and transparent process is adhered to, and that the principles of merit and natural justice are followed, agencies ought to be provided with a greater degree of flexibility in how they approach the mechanics of advertising and recruitment.

Sections 31-34

These sections describe the requirement for CEOs to follow certain conditions when appointing employees, such as the need to only appoint, promote or transfer employees with the necessary educational qualifications; the requirement for a person appointed on a permanent basis to be on probation; the ability to terminate a temporary employee's contract at any time; and the CPE's authority to determine the duties or classes of duties in an agency or the public sector.

OCPE's Discussion Paper suggests that the value and benefit of these sections may now be redundant, and also questions whether the CPE's role is still relevant or contemporary and consistent with the principle of "let the managers manage" when CEOs should have the flexibility to rearrange staffing quickly to meet changing demands and priorities.

Agency Comment: Sections 31-34 provide a good example of the prescription in PSEMA that is no longer required. The Act should focus on more strategic, high level provisions.

For example, the requirement that a person can only be appointed, promoted or transferred if they have relevant educational qualifications does not need to be specified in the Act, rather it is a matter for the job profile and selection criteria for a position to detail such requirements.

On the matter of probation for permanent appointees; good human resource management would ensure that all staff, whether appointed permanently or temporarily, are subject to performance assessment at regular intervals throughout their tenure. In the case of new appointees, there could be greater frequency in the first six to twelve months, before moving on to the agency's more regular schedule (say, six monthly).

Perversely, with the current system, a staff member may have been working in the agency for some time in a temporary capacity (Treasury's 12-month contracts for graduate trainees is a good case in point), including regular performance reviews. However, when they are then appointed to a permanent vacancy, they are subject again to a period of uncertainty by being "placed on probation". If a staff member is not performing as required and has been working for some time before permanent appointment, this should have been resolved well before permanent appointment is made. Indeed, it should not be left to the probation period to use the termination provisions for under-performers. The performance of temporary staff should be reviewed just as regularly and rigorously as permanent staff.

The wider objective should be to ensure agencies and managers have regular performance discussions and provide ongoing feedback to staff as a normal part of business, rather than it being an onerous add-on valueless task, as it is sometimes perceived. This would be assisted if there was no concept of permanency, and all staff were employed on a contract basis and subject to satisfactory performance.

An important aid in the performance assessment process, for both employers and employees, would be a competency matrix for non-executive staff, similar to the executive competencies issued by CPE some years ago. This would provide benchmarks for each level and for each main core competency that are clearly expressed for managers and staff alike to understand what is expected and against which objective assessments should be made.

The ability of the CEO to terminate a temporary contract, or indeed a permanent appointment, could be dealt with by means other than in the Act, for example within the stipulations of the employment contract itself. The principles of natural justice, shared responsibility (each party taking responsibility for its own behaviour) and reasonableness would apply.

PART 6 – Secondment and Redeployment

Division 1, Sections 39-40 empowers CEOs to enter into an agreement for the secondment of an employee for a period not exceeding 3 years, should they consider that it is in the public interest to do so. The secondment may be with an authority or employer that is not an NTPS agency, such as a private sector employer.

The Discussion Paper comments that this provision is rarely used and may possibly be redundant due to the high level of turnover and mobility in the NTPS.

Agency Comment: This is an outdated concept/term which is very much linked to the concept of permanency and can be dealt with more effectively under other provisions.

Division 2, Sections 41-43 detail provisions for a CEO to declare a permanent employee potentially surplus to the requirements of their agency and empowers them to either transfer or request the CPE to provide directions. The CPE will direct the CEO in training and redeployment of the employee, terminate their employment or direct another CEO in relation to the transfer of the employee.

OPE's Discussion Paper suggests that although the PSEMA empowers the CPE to direct a CEO to terminate the employment of such an employee, this has usually been achieved through voluntary redundancy (even this is a complicated process) and, while redeployment of some categories of staff is possible, there are numerous NTPS employees with specialist skills or limited capabilities that can make this impractical.

Agency Comment: In practice, natural attrition and performance management is sufficient to deal with most downsizing and changing business requirements. However, greater flexibility or authority should be provided to CEOs on the matter of voluntary redundancy.

Currently, exhaustive efforts are made to place a potentially surplus employee in other suitable employment or arrange training for such employment. If, after assessing all relevant information and the circumstances of the case, it is considered the employee is unable to be retrained, the CEO arranges to meet with the employee and the union, to discuss the option of voluntary retrenchment. Even with all the parties' agreement, the CEO still has to request that the Commissioner formally invite the employee to elect to be voluntarily retrenched.

The redeployment process can be very disheartening for the employee, damaging to their self esteem and confidence in their abilities, and it can be very unsettling and disruptive to the workplace around them with the high level of protracted uncertainty that the redundancy situation can create. It should go without saying that staff are valuable resources in whom an agency has invested a great deal of time in training and development, and redundancy would not be considered without exhausting all other avenues available. It should also be the case that managers and agency HR staff can be trusted to know their staff and their capabilities, along with their agency's workforce requirements, and should be left to manage within the parameters of the PSEMA principles and values.

(Agency Comment: cont.)

If a CEO, having determined that an employee is surplus to requirements, has the funding to make the offer of redundancy and the employee elects to be voluntarily retrenched, this should be sufficient. The matter should then be resolved expediently and to the satisfaction of all parties without the requirement for a formal, usually quite protracted, process to be played out first – seemingly, for the sake of it, as it often does not yield any tangible benefit for either party. An employee who is willing to receive a voluntary redundancy payment may not be interested and in fact may be resistant to further training or redeployment, in which case the six months spent in going through the motions of the redundancy and redeployment process can be wasted time and effort on all accounts.

Additionally, provision for involuntary redundancies should also be explored. Agencies are forced to continue to employ people for whom there is no useful work often to the detriment of the efficiencies in the organisation and in many cases to the detriment of the morale of the individual concerned. Such situations would not occur if employment was not permanent, as in the current sense, and if one of the employment contract conditions was that there was sufficient meaningful work to do. It would greatly assist in any change management process and provide staff with greater certainty. The possibility of introducing a scheme for involuntary redundancies should be examined in consultation with the relevant unions.

PART 7 – Inability of Employee to Discharge Duties

Sections 44 – 48 deals with the Inability process, from the time when the CEO is of the opinion, on reasonable grounds, that an employee is not fit to discharge, suited to, capable of or qualified to efficiently perform the duties they were employed to perform; through to the investigation of grounds; action following the investigation; suspension or transfer pending the investigation; and medical incapacity.

Agency Comment: Formal inability is currently a complicated, bureaucratic and labour intensive process. Anecdotal evidence shows that inability processes are infrequently used and also suggests that agencies rarely initiate such a course of action due to the lengthy delays and considerable efforts associated with it, and the detrimental effect it can have on staff.

Over the last few years, Treasury has attempted to initiate two formal inability processes. On each occasion the decision to move from an informal to a formal inability process was only ever reached after following the prescribed and lengthy process of thoroughly assessing the employees' performance through a performance management review period. This involved thorough reports prepared with the employees to document their progress and/or lack of improvement, internal temporary placements in other work areas and doing other types of work endeavouring to identify work suited to the employees. Vocational assessments were also undertaken by professional advisers for the employees which indicated that they did not have the skills and aptitudes to perform in their positions or to their current levels.

In spite of the considerable time and effort expended by the agency in the preliminary informal inability process and the well documented evidence that the employees were either not suited or capable of fulfilling the requirements of their positions, the agency was then unable to proceed to the formal process as on both occasions OCPE advised that extended external placements were to be attempted first with further ongoing regular performance reviews. Thus corroborating anecdotal evidence therefore, that the inability process as it stands (even at the preliminary stage) is far too complicated, bureaucratic and labour intensive and is infrequently used because it is just too difficult for agencies to progress these matters.

(Agency Comment: cont.)

Although the agency acknowledges that some employees can eventually be placed elsewhere successfully, occasionally there are others (and agencies are best placed to know) who clearly cannot be considered valuable either to the agency or to any other workplace in the public service. Inability implies physical or mental incapacity and does not include conscious resistance to discharging duties or not taking responsibility for their own behaviour. The latter relies on discipline procedures, but the line can often be blurred between the two where neither is quite the right fit. There are certain personality types that can become involved in these situations, such as narcissists and other manipulative personalities who may appear to give superficial cooperation but actual compliance is essentially lacking. If the two processes were not so prescriptive and cumbersome but relied on reasonable performance management efforts, natural justice and shared responsibility for the employment contract, it should not be so difficult to resolve these issues.

There appears to be a requirement that the public service has an especially greater responsibility than private sector employers to ensure that an employee remains employed, including engaging best possible efforts to place an employee in alternative employment (note that there is little corresponding onus on the employee to exert best efforts to identify alternative employment for themselves). The reason for this greater level of responsibility is unclear in the modern workplace, particularly considering the level of access afforded to staff in the public service through the policy of advertising vacant positions. This type of provision contributes to inefficiency and inflexibility in the public sector which does not exist in other workplaces. As indicated earlier, a framework principle should exist that sets out the basic exchange of obligations in an employment arrangement.

The uncertainty and complexity of the process is often quite stressful for the employee, and can lead to the undesirable consequence of workers compensation. This further complicates matters, especially when the individual is resistant to performance management and knows there is little chance of dire consequences. This could be avoided if the process were not so difficult, protracted and bureaucratic.

The entire process needs to be reviewed and clarified so that closure for both the employer and employee can be effected within relatively tight timeframes.

Competency Matrix

As a final point, Employment Instruction 6 defines inability as “a situation where an employee is not performing his or her duties as defined by the relevant job description, duty statement and/or any competencies determined for the job, to the standard required by the agency.”

Given that employees work to a common employer, and the high level of staff movement across agencies of the NTPS, to ensure consistency over position levels across the public service it may be appropriate to consider a service wide competencies matrix which allows agencies to self assess against these competencies to determine position levels. Moreover, such a competency matrix would set out the identifiable skills, knowledge and behaviour that describe the elements of successful functioning in a position. Such a matrix would span from the most junior through to Executive Contract Officer levels, and could be used by agencies to determine the particular job classification of a position.

Currently, job descriptions, duties and levels are established through the job analysis questionnaire (JAQ) and job evaluation system (JES). However, the job description as established under the JAQ and JES processes do not establish commonly agreed competencies for specific levels. This creates difficulties in assessing an employee's performance and competency at a designated level in a consistent manner particularly where a person has occupied positions in more than one agency.

(Agency Comment: cont.)**Competency Matrix (cont.)**

Treasury has successfully implemented its own competency matrix which has been in use for a number of years now. The competency matrix forms an integral part of Treasury's performance development framework, with the competencies providing employees a clearer understanding of job expectations and their link to Treasury goals, objectives and values. They also help to identify the critical tasks and duties of a job by focusing on knowledge, skills, and behaviours required to perform that job, as well as providing a common structure for developing job requirements, establishing performance expectations, assessing training needs and furthering workforce and strategic planning.

PART 8 – Discipline

Sections 49-54 prescribes the various breaches of discipline that apply to employees employed under PSEMA and the procedures that would apply in respect of these suspected disciplinary offences.

The Discussion Paper comments that as part of this process, in addition to the Act there are procedures under Employment Instructions (EI 7) and Regulations which must be followed. The Act itself details only one occasion where an employee must be provided the "right to be heard" by written submission, yet in the EI there are three separate times in the process where an employee must be invited to make a written submission.

Also, for particularly serious alleged breaches, although section 50 provides the option of proceeding directly to summary dismissal, the CEO must not only be satisfied that the evidence is such that the possibility of the situation being different to what it appears is remote (therefore requiring a "beyond a reasonable doubt" approach), but this first requires consultation with the CPE in order for the CEO to take that action, again contrary to the "let the managers manage" concept.

The Discussion Paper goes on to discuss the fact that dealing with discipline matters in the NTPS is generally more complex and time consuming to accomplish than in most other workplaces, and at the very least a review to streamline and simplify the process is called for. Alternatively, an outcome may be to adopt the federal jurisdiction of the AIRC or the soon to be established Fair Work Australia body, an approach which has been adopted by the Australian Public Service and some other jurisdictions.

Agency Comment: The proposal to review the current discipline process is strongly supported given the complexity and lengthy delays when dealing with such matters, so that a more streamlined and simplified process can be obtained. The summary dismissal process needs to be more straightforward, as such cases are often time critical.

More would need to be understood about the proposed approach of adopting the federal jurisdiction of the AIRC or the Fair Work Australia body, and the consequences or likely outcomes of doing this, but on the face of it, such an outcome is worth examining given that this approach has already been adopted by other jurisdictions as well as the Australian Public Service.

PART 9 – Appeals and Review

Sections 55-59 outline the promotion appeals and the Promotion Appeals Board (PAB) processes, inability and disciplinary appeals and its procedures, as well as Section 59 Review of Grievances.

A proposal in the Discussion Paper is to examine the interaction between promotion appeals, PAB and the review of grievances with the view to possibly integrating and streamlining these various processes.

In terms of inability or disciplinary appeals, appeals of this nature in many Australian public sector jurisdictions are dealt through the appropriate state or federal industrial tribunal jurisdiction.

Agency Comment: The suggestion of streamlining the promotion appeal and grievance processes appears to be sound and is strongly supported. In essence, they deal with the same types of issues, that is, a party is aggrieved about a decision. The recent change in direction or interpretation of the legislation and associated documents by the Appeals Board is welcome, as it seems to be taking a more reasonable approach to helping resolve issues rather than the previously more bureaucratic, process-driven approach. It would be useful if more advice and support is provided to the parties in a grievance process, as well as to HR areas and recruitment panels in improving the design of selection processes and approaches in agencies.

PART 10 – Miscellaneous

Section 60 – By-laws

Section 60 prescribes the CPE's power to make By-laws required or permitted by the PSEMA or an award, relating to: leave; entitlement to and payment of allowances; recruitment and transfer expenses; conditions for employees in remote localities; leave and other fares; and other terms and conditions of employment.

Agency Comment: Unlike Employment Instructions that have remained mostly unchanged, By-laws have been amended from time to time. Also, provisions in the Northern Territory Public Sector 2008-2010 Union Collective Agreement have replaced all By-law provisions relating to maternity, paternity, parental and adoption leave, in addition to recreation leave for the general NTPS.

A By-law that has remained unchanged is By-law 8 Long Service Leave. In light of numerous requests to Treasury over the years by ceasing NTPS employees, indicates that an amendment is warranted to include a provision which authorises CEOs to pay an employee's accrued long service leave entitlement to another employer. OCPE's view is that payments can only be made to the employee, however, the Act is silent on this matter. Employees moving to another employer that would accept the future liability should be allowed to opt for payment of their long service leave entitlement to their new employer. Either way, the payment is due and it should be of no consequence whether it is paid to another employer or to the employee.

The PSEMA and By-laws should be amended to clarify the option for long service leave entitlements to be paid to another employer at an employee's request on their cessation from the Territory Government.

Section 61 – 64

Section 61 prohibits employees from engaging in outside employment unless they have the approval of the CEO, who first must be satisfied that the paid outside employment will not interfere with the performance of the employee's duties.

The Discussion Paper comments that the statutory prohibition on employees engaging in outside employment unless approved by the CEO is a result from the long held view that in many instances the potential for a conflict of interest to arise out of that employment would be avoided. The Paper continues to suggest that this requirement could just as effectively be prescribed in subordinate legislation such as a by-law or employment instruction.

In the same way, section 62 empowers a CEO to require an agency to remain open during a public holiday. Again, this should not be reliant on this statutory provision.

Agency Comment: The proposal for the provision of Outside Employment to be included in the PSEMA's subordinate legislation rather than the act itself is supported, although the provision may in fact be redundant.

It is not clear that a CEO has any legal right to prevent an employee from engaging in outside employment. If the issue relates to diminished work performance due to the demands of outside employment, the performance management process applies. If the issue relates to potential, actual or perceived conflicts of interest, the agency's conflict of interest policy applies.

Section 64 – Public Sector Consultative Council

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

The Discussion Paper states that the provision of a statutory requirement to have a consultative council is very unusual and suggests that such a provision is worthy of review.

Agency Comment: A review of this provision is supported. There are other mechanisms such as the EBA teams and working groups that may deal with specific issues more effectively and in a more targeted, productive manner.

PSEM Regulations

The PSEM Regulations form part of the Code of Conduct and include the following prescribed set of principles which apply to all employees, including CEOs:

- Principles of Public Administration and Management;
- Principles of Human Resource Management; and,
- Principles of Conduct.

Agency Comment: An equitable balance between the rights of the employer and the rights of the employee needs to be achieved. The legislation, as it stands now, is weighted in favour of the employee in practice. While it is important, that workers are afforded necessary and adequate protections in the workplace, it is also important that the CEO is able to pursue the strategic goals and objectives of the agency with flexibility in applying available resources. In practice, adequate protection and redress would be available to both parties in the employment contract if the additional principles of shared responsibility and reasonableness were included with the existing principles of merit, natural justice, and transparency and accountability. These should form the basis on which the public sector operates.