

Productivity Commission Inquiry into the Workplace  
Relations Framework: Draft Report

Submission by the Australian Public Service Commissioner

The Hon. John Lloyd PSM

## Public Sector Bargaining observations

1. The Productivity Commission's draft report makes a number of observations about workplace relations in the public sector. The Productivity Commission (the Commission) states that the chapter on public sector bargaining 'seeks to identify a preferred approach to future public service workplace arrangements'<sup>1</sup>. As there are no specific recommendations regarding public sector bargaining, there is no preferred approach clearly articulated in the draft report.
2. In the view of the Australian Public Service Commission (the APSC) a number of the observations in Chapter 18 misunderstand the context of workplace relations in the public sector environment.

## Bargaining power

3. One assertion in Chapter 18 is that in certain markets governments enjoy a 'stronger bargaining power than the majority of employers in the private sector.'<sup>2</sup> It is also asserted that governments' roles in making employment laws, setting policies and securing compliance add to their strong bargaining position.
4. This is a superficial misrepresentation of both the structure and operation of bargaining in the public sector. The bargaining dynamics of the public sector do not differ significantly from those operating in the private sector.
5. As the draft report notes, public sector employing organisations often have legislative powers to unilaterally determine the terms and conditions of employment. At the Commonwealth level, it has been the policy of successive governments that terms and conditions of employment are set using mechanisms available to other employers in the federal system.
6. This change began with the abolition of the Public Service Arbitrator in 1984. The change recognised that arguments around the 'unique' nature of Commonwealth public sector employment no longer existed.<sup>3</sup> This acceptance has continued through iterations of pay and conditions fixing policy since that time.
7. The draft report argues that as centralised budget holders, governments have an inherently greater capacity to shape wage bargains with their employees. The recent round of bargaining in the Commonwealth shows that even where there is a strong fiscal imperative for wage restraint, negotiating that outcome through enterprise bargaining is no easier for a public sector employer than it is for a private sector employer. In some respects it can be more difficult as the public sector employer cannot rely on arguments such as business closure should employee costs not be contained.

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<sup>1</sup> p. 630.

<sup>2</sup> p. 630.

<sup>3</sup> *Serving the Nation: 100 years of Public Service*, p.170.

8. Links between the fiscal position and trends encountered by governments and bargaining may be evident, and this would not be surprising. It is almost self-evident that a government's budgetary position will influence bargaining positions. Also, a government's budgetary position is likely to reflect the health or otherwise of the Australian economy. As such a government's bargaining position may not differ significantly from private sector employers.
9. In some areas of government, employees enjoy an unusually strong bargaining position due to the community impact caused by withdrawal or targeted reduction of their services.
10. The draft report's discussion of bargaining power through the capacity to engage in industrial action is misleading. Industrial action in the public sector, like many areas of the private sector, is low. The incidence of strike action is minimal.
11. The argument that industrial action is low in the public sector because there are limitations on the ability of public sector workers to take industrial action overstates the case. There are many areas in the public sector where the action would not give rise to an argument of threat to safety or economic harm.
12. Commonwealth public sector employees have participated in action such as reading messages to clients over the phone, coordinated lunch breaks, and bans on data input. The example provided in the draft report regarding Northern Territory teachers would equally apply to private sector teachers.
13. Many government employees impose bans and limitations when bargaining. Others engage in vigorous public campaigns and protest. The report suggests this is because other action is limited. In public sector disputes there can be a union agenda to put political pressure on governments by appealing to the community through public campaigns.
14. This does not arise because there are no other industrial action avenues, rather there may be a view that this will be a more efficient form of employee response action. Many public sector disputes play out more publicly than private sector disputes.
15. As the report notes, wage growth data shows a sustained trend of higher increases in the public sector compared to the private sector<sup>4</sup>. Also, public sector workers enjoy the benefit of generous conditions of employment. Many of the conditions are significantly in advance of the conditions of employees in small and medium enterprises. These outcomes are not suggestive of an employer bargaining position that is stronger than the private sector.

#### Decision making in bargaining

16. Section 18.2 of the report makes observations about the degree of decision making in bargaining that should sit at the government/central level versus the individual agency level<sup>5</sup>.

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<sup>4</sup> Figure 18.1, p. 635.

<sup>5</sup> pp. 639-640.



The APSC agrees that there should be a judicious balance in bargaining policy frameworks between outcomes to be achieved at the whole of government level and those outcomes achieved at the agency level.

17. The considerations involved in achieving this balance are more complex than outlined in the draft report. Agency heads are conferred significant employer responsibilities pursuant to the *Public Service Act 1999*. Agency heads oversee enterprise bargaining for their organisation.
18. A government will also require agency heads to conduct their workplace relations in accordance with a range of government policies e.g. workplace relations, budgetary and fiscal policies. The draft report argues that to reduce the negotiating discretion of the agency limits scope for productivity. This is not the case, although governments are concerned to avoid the creation of internally competitive labour markets.
19. Significant costs accrue from protracted bargaining. Equally there are significant long term costs to 'soft' bargaining. Decisions to make concessions to resolve bargaining quickly may have significant long term impacts. Over the past twenty years, agency bargaining has delivered enterprise agreements in many agencies that include overly prescriptive processes which make it difficult for agencies to effectively manage decision making and change.
20. One example of such processes is performance management. For example, some current APS agreements contain up to ten pages of complex, detailed processes about managing underperformance. This is in contrast to the *Continuous Improvement in the APS Enterprise Agreement 1995-6*, which covered the whole of the Australian Public Service (APS), where it took up only half a page. There are other examples of complex and extensive consultation processes, of agencies requiring employee agreement prior to changing working hours rather than consultation and consideration of employee views.
21. Across the sector not all agencies have the capacity due to size and workplace relations expertise to skilfully assess the impact of decisions made during bargaining. It is inevitable that decisions made in one agency's negotiations can impact on other agencies' negotiations.
22. This is particularly the case in the APS where employees and their representatives see the APS as one employer. They generally expect that benefits negotiated in one agency should automatically flow on whether there are concomitant circumstances or productivity gains. An example of this was the addition to statutory maternity leave entitlements. Agencies with more male dominated workforces first introduced additional maternity leave, but not parental leave. In these agencies, the cost was minimal. Pressure was then brought to bear on female dominated agencies where the impact of such entitlements was significantly greater.
23. The draft report suggests, based on evidence provided by the CPSU<sup>6</sup>, that there are concerns around governments exercising a high level of control. Governments without exception

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<sup>6</sup> p. 640

employ guidance to every bargaining round. It is inherent in the structure and funding of government agencies.

24. The APS adheres to the good faith bargaining requirements. Government agencies have to comply with the law. The requirements have equal force in the public and private sectors. It would be untenable to have different good faith bargaining requirements in the two sectors. The impact of the government's fiscal position on its bargaining strategies is no different to the influence of profitability on private sector employers.
25. The draft report asserts that reduced negotiating freedom limits the scope to achieve productivity improvements. This assertion is wrong. The attainment of improvements in productivity is very dependent on the scope and emphasis the bargaining guidance gives to productivity improvement. In recent bargaining rounds, productivity improvement has been a central factor in approving bargaining outcomes.
26. Higher level of controls within a particular policy is reflective of the circumstances operating at the time of policy development. Higher levels of control can be reflective of decisions regarding significant reform or change. In this situation it is difficult to argue definitively that protracted bargaining is the result of the higher level of control when there is an equally strong argument that protracted nature of bargaining is due to resistance to the reform or change sought by the government as an employer. The public sector is no different to the private sector where long and difficult negotiations are often the result of the need to achieve structural change.

#### Productivity in public sector bargaining

27. The APSC accepts that there are challenges in measuring and identifying productivity in the public sector. It is an oversimplification that this is a challenge which is peculiar to the public sector. It is generally regarded as a challenge in most service industries as the service output can be difficult to quantify.
28. The difficulties experienced in precisely quantifying the value of productivity improvements does not mean that productivity improvements cannot be achieved in the public sector, including through enterprise agreements.
29. Productivity enhancements achieved through enterprise agreements are important. Changes to agreement terms in the public sector can alter work practices and patterns. A range of matters covered in public sector agreements impact on the ability to flexibly manage and mobilise human resources, for example employee veto powers over changes to working hours or work location.
30. In appropriate circumstances changes to entitlements can deliver efficiency and productivity as well as reducing the excessive costs of entitlements. The combining of multiple allowances into a single rate may reduce costs and also lessen resources allocated to processing.
31. The Commission discusses a concern about the interpretation of what constitutes productivity improvement. It acknowledges that some interpretations suggest a reduction in entitlements



or agreements to work longer hours are productivity enhancements. It goes on to observe that working more hours "could harm productivity, if the worker's effectiveness falls in those additional hours." In reality such agreements call for an employee to work an extra few minutes a day and assertion of potential harm to productivity is fanciful.

32. The Commission reflects on the sheer size of the sector and 'that bargaining processes have the capacity to affect a large number of workers and may even have broader macroeconomic consequences'.<sup>7</sup> While the public sector does not lend itself to be measured against traditional productivity definitions which have arisen out of 'trading' industries, such is the potential impact of the public sector on the economy that some concept of productivity trade-offs or a proxy should be a goal in public sector bargaining.

### **Comments on other recommendations**

#### Award modernisation and coverage

33. The Commission recommends<sup>8</sup> that the four-yearly review of modern awards be ceased, and that the process of ensuring modern awards are 'a fair and relevant minimum safety net of terms and conditions,'<sup>9</sup> be achieved through robust, evidence-based analysis.
34. The APSC supports this recommendation. The modernisation of the APS Award revealed that the way the Fair Work Commission applies the modern award objective can prove to be unpredictable. For example, the decision to retain the 36.75 hour week in the APS Award appeared to be based more on historical custom than on any evidence led by the parties, or an assessment of whether it remains a 'relevant safety net.'

#### Procedural recommendations

35. The Commission correctly highlights the Fair Work Commission's lack of discretion to overlook procedural errors in approving enterprise agreements, with specific reference to recent cases about defective Notices of Employee Representational Rights.
36. We support this recommendation. It has been our recent experience that the Fair Work Commission's lack of discretion to overlook procedural errors, and an absence of certainty about the likely decisions of individual Fair Work Commissioners, has led to significant administrative impost on employers.

#### Industrial action

37. We support the Commission's recommends to provide employers with greater discretion to make or not make deductions from wages for short work stoppages.
38. In recent cases of short stoppages, for example ten minutes, APS employers reported a significantly greater cost associated with processing deductions than from the impact of the stoppage itself.

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<sup>7</sup> P. 632

<sup>8</sup> Draft recommendation 12.1

<sup>9</sup> *Fair Work Act 2009*, section 143

39. The Commission also asks for information from stakeholders about a proposal to allow employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban impacting on the performance of normal duties.
40. In our view, any reform that provides greater flexibility for employers to take response action that is proportionate to the impact of employee-initiated industrial action would better support the scheme of enterprise bargaining. We consider there is merit in a 25 per cent minimum deduction.
41. For example, the Department of Immigration and Border Protection is currently involved in a dispute in the Fair Work Commission. This relates to the appropriateness of the employer's notified deductions with respect to partial work bans. A review of the provisions in the Fair Work Act and Regulations about the employer's ability to determine proportionate deductions may reduce the likelihood of similar disputes in the future.

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