

Community and Public Sector Union

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Workplace Relations Framework
Productivity Commission
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Dear Sir/Madam

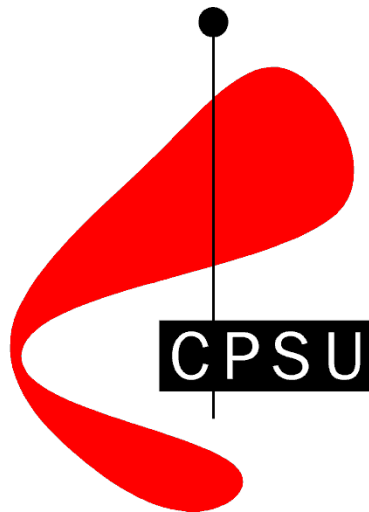
Workplace Relations Framework

Please find attached the submission from the Community and Public Sector Union (PSU Group) to the public inquiry into the workplace relations framework.

For further information please contact Rebecca Fawcett, Acting Director of Legal and Industrial via email.

Yours sincerely

Nadine Flood
National Secretary



CPSU (PSU Group) Submission

Inquiry into the Workplace Relations Framework

March 2015

Introduction

The PSU Group of the Community and Public Sector Union (CPSU) is an active and effective union with approximately 55,000 members. The CPSU represents employees in Commonwealth government employment including the Australian Public Service (APS), as well as the ACT Public Service, the NT Public Service, CSIRO, the telecommunications sector, call centres, employment services and broadcasting.

The CPSU welcomes the opportunity to provide a submission to the Productivity Commission Inquiry into the workplace relations framework.

The CPSU supports fair workplace relations that provide all workers with protection at work and recognises their contribution to the Australian community. Collective bargaining, a strong safety net and legislatively protected workplace rights, including the right of workers to be represented, are all key components.

While it is a substantial improvement on the *Workplace Relations Act 1996*¹, unfortunately the *Fair Work Act 2009*² ("the Act") has, on many occasions, fallen short of these ideals. All too often Australian workers have had to struggle to access collective bargaining and genuine negotiations with their employers. Even the right to representation has been challenged at every step, when it should be an unquestioned, fundamental component of the system.

The issues faced by workers across the private sector and public sector areas in which CPSU members are employed illustrate systemic weaknesses in the workplace relations framework. The CPSU submission addresses these issues with a focus on the matters raised in the Productivity Commission's Issues Paper 3, which deals with the bargaining system established by the *Fair Work Act*. The CPSU submission also highlights particular matters that arise for the public sector workforce in the federal system, canvassed in Issues Paper 5. The CPSU notes there is a strong public policy basis for merit review of certain administrative decisions taken in respect of public service employment.

The CPSU also notes the ACTU is making a comprehensive submission to the Inquiry and endorses that submission.

¹ *Workplace Relations Act 1996* (Cth)

² *Fair Work Act 2009* (Cth)

The operation of the *Fair Work Act*

The *Fair Work Act* comprehensively changed the *Workplace Relations Act 1996* to improve bargaining, the safety net, and protections for employees at work.

The *Fair Work Act* aims to achieve this via:

- The automatic recognition of the union as the bargaining representative for its members ³;
- Good faith bargaining obligations and the potential for bargaining orders (including majority support and scope orders) to enforce those rights and obligations ⁴;
- Removing statutory individual contracts which were often used to undercut wages and conditions in awards and collective agreements;
- Establishing general protections for employees to ensure they are free from adverse action because of their involvement in bargaining or union activities ⁵;
- Restoring unfair dismissal remedies ⁶; and
- Establishing the National Employment Standards ⁷ and reinstating the role of Awards in the safety net ⁸.

The CPSU supports these elements of the system. However, in too many instances Australian workers have not enjoyed the full protection intended to be provided by the Act. These cases demonstrate the need to make substantial improvements to the system.

Bargaining under the *Fair Work Act*

The Act provides a system of collective enterprise bargaining for national system employees ⁹, and recognition of the right of employees to bargain collectively for their wages and conditions¹⁰. The CPSU supports this legislatively enshrined right to collectively bargain. However, the provisions of the Act that give effect to collective bargaining are procedural in nature and do not necessarily assist the parties in reaching a bargaining outcome.

³ Ibid, section 176

⁴ Ibid, section 229

⁵ Ibid, section 346

⁶ Ibid, Part 3-2

⁷ Ibid, Part 2-2

⁸ Ibid, Part 2-3

⁹ Ibid, section 14

¹⁰ Ibid, section 171

The difficulties faced by Australian workers in negotiating their pay and conditions include:

- Getting bargaining started where the employer does not wish to negotiate;
- Resolving bargaining where an employer has no interest in reaching agreement;
- Very limited assistance from the Fair Work Commission to resolve deadlocks in bargaining
- Ensuring their basic right to be represented is respected; and
- Limited options to pursue claims compared with the significant power wielded by employers.

These issues are being experienced by many CPSU members currently engaged in collective bargaining for agreements in the Commonwealth public sector. Bargaining is underway or imminent for Australian Public Service (APS) employees in 109 agencies with enterprise agreements that expired on 30th June 2014, and for many broader federal public sector workers, including employees in ANSTO, CSIRO, SBS and ABS Interviewers. The CPSU is a bargaining representative in these negotiations. This submission draws on the current round of Commonwealth bargaining to highlight aspects of the bargaining system that should be improved.

Good faith bargaining requirements

In Issues Paper 3 the Productivity Commission seeks submissions on the extent to which the good faith bargaining requirements of the Act are operating effectively¹¹. Although one of the objects of the *Fair Work Act* is the provision of “a simple, flexible framework that enables collective bargaining in good faith”¹² once bargaining commences it does not necessarily follow that employers will negotiate with the objective of reaching agreement and concluding bargaining. There is no obligation for the parties to put reasonable propositions with a view to reaching agreement.

The good faith bargaining requirements¹³ are largely procedural, requiring bargaining representatives to participate in meetings, disclose relevant information, consider and respond to claims made by other bargaining representatives, recognise other bargaining representatives, and refrain from conduct that undermines freedom of association or collective bargaining¹⁴. They do not require employers to genuinely try to reach agreement, and they provide little assistance where the employer has no intention of settling negotiations.

Bargaining in Commonwealth agencies is such a situation. It has been 15 months since the CPSU first provided its bargaining claim to APS agencies, and not one enterprise agreement has been

¹¹ Productivity Commission, Workplace Relations Framework: Issues Paper 3, January 2015, p. 7

¹² Note 2, section 171

¹³ Ibid, section 228

¹⁴ Ibid, s 228

settled. Due to the very harsh approach to bargaining mandated by the Government, APS agencies have been unable to table acceptable offers, and the two agencies that have submitted proposals to a staff vote have seen those proposals strongly opposed. In the Department of Employment, 95% of employees participating in the vote rejected the proposal. In the Australian Financial Security Authority, 82% of voting employees rejected the proposal.

Nineteen APS agencies have now tabled pay proposals, and these proposals include very low pay offers in the order of 0-1% p.a. with drastic rights and conditions reductions, including, but not limited to:

- Abolishing allowances;
- Reducing personal/carers' leave entitlements;
- Increasing working hours;
- Further staff reductions;
- Removal of the guaranteed employer superannuation contribution rate from the enterprise agreement;
- Reduced access to flexible working arrangements;
- Reduced consultation and representation rights; and
- Reduced job security protections.

In some cases where increased working hours are proposed, the pay proposal would see the hourly rate of pay for employees' reduced, thus reducing the actual take-home pay of part-time employees, overwhelmingly women.

These proposals are so injurious to employees' rights and conditions that there is little prospect of public sector employees accepting them. The perception among the APS workforce, and CPSU members and delegates, is that the Government's approach is so harsh and restrictive that their agencies have no power to negotiate acceptable terms, and at this stage, there is no prospect of genuine negotiations.

This underlines a significant weakness in the Act. The situation in Commonwealth bargaining is not directly addressed by the good faith bargaining provisions. Instead, the good faith bargaining provisions provide a procedural check list that an employer can meet without ever having any intention of genuinely negotiating and reaching agreement with employees. The system needs to be significantly re-worked so that it is geared towards genuine bargaining rather than mere compliance with procedure.

Bargaining disputes

The Productivity Commission asks in Issues Paper 3 whether there should be any change to the Fair Work Commission's conciliation and arbitration powers¹⁵. This issue is closely connected to the adequacy of the good faith bargaining procedures.

The Fair Work Commission has a very limited role in resolving deadlocks in bargaining. The Commission can hear bargaining disputes, but its role is limited to conciliation unless the parties agree to arbitration¹⁶. An arbitrated outcome is only available in limited situations, including where the Fair Work Commission makes a workplace determination following the termination of industrial action¹⁷, or where the Fair Work Commission makes a workplace determination following a serious breach declaration¹⁸. This latter option is rarely available given that the good faith bargaining provisions are procedural only and can be met even where an employer has no intention of negotiating an outcome.

The CPSU believes there is cause for a stronger role for the Fair Work Commission to facilitate fair and genuine bargaining and to assist where bargaining is not proceeding in such a manner. The CPSU supports the role of the Fair Work Commission to resolve bargaining disputes through conciliation but notes that conciliation on its own can be limited if there is not clear recourse to arbitration. For example, if the deadlock in public sector bargaining was conciliated, it is unclear whether agencies would be able to agree to conciliated outcomes due to the constraints placed upon them by the Government's policy.

In this situation, the ability to access arbitration early in the process would be of assistance. The CPSU believes that this example supports a strong arbitral role for the Fair Work Commission to bring bargaining to a conclusion.

Genuine bargaining with the decision-maker

Australian workers have been denied access to genuine collective bargaining where enterprise bargaining has not required the involvement of the decision maker. Under the terms of the *Fair Work Act* collective bargaining takes place at the enterprise level, yet it is often the case that the 'enterprise' as defined in bargaining is not where decision making takes place. If key decisions about bargaining are being made without negotiation, this undermines the Act's objective to establish a fair system of collective bargaining.

¹⁵ Note 22, pp 5-6

¹⁶ Note 2, section 240

¹⁷ Ibid, section 266

¹⁸ Ibid, section 269

This is the case in bargaining in the federal public sector. In Issues Paper 5 the Productivity Commission identifies that a unique feature of public sector bargaining is the situation in which negotiations for enterprise agreements occur at the agency level, whereas decisions affecting bargaining, for example the decision to approve a pay proposal, are driven centrally by the Government¹⁹.

In Commonwealth bargaining negotiations take place in accordance with the terms of the Act, with the Commonwealth acting through agency management to negotiate agency-level enterprise agreements. Although the requirement for agencies to negotiate within the parameters set by the Government is not new, in previous bargaining rounds agencies were given a higher degree of autonomy to determine outcomes. In this round of Commonwealth bargaining agencies are constrained by the Government's policy to such an extent that they are facing great difficulty formulating proposals to bring to the negotiating table.

The Government is requiring all APS agencies and, where the Minister has the power to make a direction under the relevant legislation, broader public sector agencies, to apply the *Australian Government Public Sector Workplace Bargaining policy* ("the Bargaining Policy")²⁰ in the negotiation of agency-level enterprise agreements. The Bargaining Policy takes a very restrictive approach to bargaining, requiring agencies to:

- Remove content from agreements²¹, which has seen agencies table enterprise agreements that have been reduced by up to half of the document's current size, thereby removing important employee protections;
- Refuse any improvements to "core APS conditions" including hours of work, superannuation, leave arrangements, and redeployment, reduction and redundancy protections²²;
- Gain approval from the Public Service Commissioner (in consultation with the Secretary of the Department of Finance)²³, before discussing pay in bargaining, with the result that agencies cannot genuinely negotiate on the matter of pay; and
- Apply a very narrow and skewed definition of productivity to justify any pay proposal. This limits productivity improvements to cost offsets identified "through enterprise bargaining"²⁴, interpreted by the Australian Public Service Commission (APSC) to require

¹⁹ Productivity Commission, *Workplace Relations Framework: Issues Paper 5*, January 2015, p. 8

²⁰ Australian Public Service Commission, *Australian Government Public Sector Workplace Bargaining Policy*, March 2014, p.3

²¹ Ibid, p.29

²² Ibid, p.20

²³ Ibid, p.32

²⁴ Ibid, p. 17

reduction of employees conditions and excluding genuine productivities delivered by employees through innovation, service improvements and workplace change.

This very restrictive approach to bargaining is not in keeping with the Act's object of supporting cooperative workplace relations²⁵.

The situation in Commonwealth bargaining underlines the limitations of bargaining at the enterprise level established by the *Fair Work Act*. The CPSU also contends that stronger provisions supporting genuine bargaining, backed up by a clearer role for the Fair Work Commission to resolve deadlocks, would be of assistance in limiting industrial disputation.

Bargaining processes: the commencement of bargaining

In Issues Paper 3 the Productivity Commission asks whether there should be changes to the bargaining processes of the *Fair Work Act*. The CPSU would oppose any measures to water down the measures of the Act that support collective bargaining. On the contrary, there is cause to tighten those procedures.

The CPSU contends that the bargaining processes that currently exist do not adequately facilitate the commencement of bargaining where the employer is unnecessarily delaying the start of bargaining or is unwilling to commence at all. As the law stands, there is no prohibition on an employer delaying the commencement of negotiations. It is within the employer's control to issue the Notice of Employee Representational Rights (NERR) and to start negotiations²⁶. This puts employees at a disadvantage in bargaining, including financial disadvantage arising from potentially long stretches without remuneration increases.

An example of this problem resides in the current round of federal public sector bargaining. In December 2013, having surveyed its members and formulated a claim, the CPSU wrote to APS agencies requesting the commencement of bargaining so that negotiations could be concluded in time for replacement agreements to come in to force ahead of the 30th June 2014 nominal expiry date (NED). However, the Government delayed the release of its Bargaining Policy until 28 March 2014, preventing agencies from commencing negotiations until after that date. Agencies then took some time to issue NERRs, and at 30 June 2014, only 5 APS agencies had done so. There was therefore a very substantial delay between the request from CPSU to negotiate and the commencement of formal bargaining.

These issues are not restricted to public sector bargaining. There are private sector employers that have delayed the start of bargaining or walked away entirely. For example, Red Bee Media Australia

²⁵ Note 2, section 3

²⁶ Note 2, section 173

walked away from negotiations in 2010 and only agreed to start negotiations again in December 2014, an extraordinary four years later.

The mechanisms for employees to overcome delays to the start of negotiations or to overcome a refusal by an employer to negotiate are complex and time consuming. A bargaining representative seeking the commencement of bargaining may apply to the Fair Work Commission for a majority support determination²⁷ such that the employer would then be required to bargain or be exposed to good faith bargaining orders²⁸.

However, the CPSU considers that obtaining a majority support determination to force the commencement of bargaining is too onerous and slow, and gives too much scope for employers to delay negotiations. For the determination to be made, the Fair Work Commission must be satisfied, among other requirements, that a majority of employees who are employed by the employer and who will be covered by the proposed agreement want to bargain²⁹.

This is a significant undertaking where there are a large number of employees. In early 2014, in response to the delay to the start of bargaining, the CPSU commenced majority support activities in the Department of Employment, the Department of Education, the Department of Veterans Affairs and the Department of Foreign Affairs and Trade. The Government avoided any majority support determination being made by the Fair Work Commission by releasing the Bargaining Policy which then allowed agencies to commence negotiations and issue NERRs.

However, if the Government had continued to delay and the CPSU sought a majority support determination from the Fair Work Commission for each APS agency, the Commission would have had to satisfy itself as to the preferences of 159,126 public servants³⁰. This process would have unfairly subjected employees to further unnecessary delays to the start of negotiations.

Again, the point is made that provisions of the Act allow the employer to effectively drag out negotiations with no intention of engaging fairly or putting forward proposals that would see bargaining be settled.

²⁷ Ibid, section 236

²⁸ Ibid, section 230

²⁹ Ibid, section. 237(2)(a)

³⁰ Australian Public Service Commission, APS Statistical Bulletin 2013-14, September 2014, <http://www.apsc.gov.au/about-the-apsc/parliamentary/aps-statistical-bulletin/aps-statistical-bulletin-2013-14/main-features#aps> (accessed 5 March 2015)

Agreement content

The *Fair Work Act* places restrictions on agreement content, artificially limiting the matters that the parties can negotiate to “permitted matters”, defined by the Act as matters pertaining to the employer-employee or the union-employer relationship³¹. The result is that there are a number of matters important to workers and employers that they have been unable to negotiate about.

For example there is limited scope for Australian workers to address the continued erosion of their job security in bargaining. The courts have interpreted the scope of the employee-employer relationship narrowly, to prohibit unions from seeking to regulate the use of labour-hire and contractors through agreements as a means of protecting permanent employment. Perversely, this limitation serves to prevent employers and employees negotiating initiatives that improve productivity where those measures involve restricting the use of labour-hire and contractors.

Removal of agreement content in Commonwealth bargaining

Current Government policy in relation to its public sector workforce takes restrictions to what can be negotiated even further. In Commonwealth bargaining, the Bargaining Policy requires agencies to remove otherwise lawful, agreed content from enterprise agreements. This includes content relating to “operational, implementation or administrative matters”³². In practice, the APSC is requiring agencies to reduce documents to half their current size in some cases, thereby removing important employee protections. This approach delivers no savings and no benefits to the employer or to employees, and has the potential to significantly undermine employee morale and productivity in the federal public sector.

The content that is being removed from draft agreements includes, but is not limited to, content relating to:

- Superannuation protections;
- Job security measures;
- Consultation;
- Performance management;
- The right to representation;
- Workplace diversity clauses;
- Protections for part time workers;
- Flexible working arrangements;
- Protections for rostered and shift work employees; and
- Workplace health and safety.

³¹ Note 2, section 172

³² Note 21, pp 29-30

Agreements should contain employees' rights and conditions. This is an important protection of these rights. The terms of an enterprise agreement are subject to a dispute settlement procedure and can be enforced in the Fair Work Commission. Because having conditions, rights, and entitlements enshrined in their enterprise agreements is important to workers, this is currently one of the most contentious issues in Commonwealth bargaining, and it stands in the way of a resolution.

Many public sector agencies have indicated that removing content from enterprise agreements is not their preferred approach to managing their workforce. However, the Bargaining Policy does not leave them free to retain agreement content if that is the preferred approach in that agency. Because retaining employee protections is of great importance to workers, the result is that public sector agencies are at a loss as to how to settle bargaining.

The Act does not require employers to negotiate with the objective of concluding bargaining, and there is no obligation for the parties to put reasonable propositions with a view to reaching agreement. The decision of the Government to require agencies to remove content from enterprise agreements is effectively a decision not to genuinely bargain, given the importance that CPSU members and delegates place on retaining rights and protections in agreements. The *Fair Work Act* appears to offer little assistance in this situation.

Model Consultation Term

The Act requires all enterprise agreements to include a consultation term, or in the absence of such a term, the model consultation term prescribed in the *Fair Work Regulations*³³.

It is the CPSU position that the model consultation term be amended so that it requires employers to consult with employees over any proposals for change in the workplace *prior* to the decision being made.

The model consultation term (if included in an enterprise agreement) obliges the employer to consult with employees only *after* the employer has made a definite decision to introduce a major change to production, program organisation, structure or technology in relation to its enterprise.

The model consultation term is deficient for two reasons:

- Consultation is only required if the employer has made a decision. Workplace relations and productivity would be improved if consultation began in the lead up to the employer making a decision which could have a significant impact on employees. The decision can be made by the employer after relevant input from the various stakeholders. Consultation after the decision is made is restricted to the effects of the decision and measures that may be taken

³³ *Fair Work Regulations 2009* (Cth), 6.10

to mitigate the adverse effects of the change: rather than consultation as to what change is best suited to the enterprise and employees; and

- A decision to introduce a *major change* is necessary before consultation is required. This requirement that the change be *major* results in disputes as to what a *major* change is. This restriction should be clarified to ensure that the employer is obligated to consult on changes which have a significant impact on employees.

Requirement to consider productivity improvements

In Issues Paper 3, the Productivity Commission seeks feedback on pursuing productivity through bargaining, including whether parties to an agreement should be required to discuss productivity. The *Fair Work Amendment (Bargaining Processes) Bill 2014*³⁴ aims to introduce this requirement, which would prevent the Fair Work Commission from approving an enterprise agreement if the requirement had not been met. The CPSU does not support this approach, and believes this is a matter best left to the parties to the agreement, not mandated by law. In Issues Paper 5, the Productivity Commission also questions whether:

*Reforms might need to take account of the fact that outputs and productivity improvements are less easily measured and consequently less transparent in the public sector*³⁵.

The CPSU is concerned that too often; productivity is redefined by employers to focus on cuts to jobs and employees rights and conditions. A view of productivity that focuses on driving down staffing levels and cutting conditions obscures a lack of investment in genuine sources of productivity. The real drivers of improved productivity include investment in the skills and experience of personnel, improving decision-making in management and improving supervisory skills, strengthening accountability, better systems and focusing on innovation and service improvements.

However, bargaining in the federal public sector is currently approaching productivity in a very restrictive way. The Bargaining Policy limits productivity offsets to productivities found in bargaining³⁶, which is currently being interpreted by the APSC to require conditions reductions and to exclude genuine productivities, as referenced above.

³⁴ *Fair Work Amendment (Bargaining Processes) Bill 2014*, Schedule 1

³⁵ Note 20, p. 9

³⁶ Note 21, p. 16

The typical productivities being identified in Commonwealth bargaining include:

- Staff reductions;
- Removal of allowances;
- Reductions in personal/carers' leave;
- Increased working hours; and
- Slower incremental advancement as employees gain experience at their classification level.

The equation of productivity with cuts to staffing and conditions, driven at the agency level in Commonwealth bargaining, misses an opportunity to drive real change that delivers improvements in program and service delivery in the APS. There are no forums for the Government to centrally discuss and agree changes to workplace practices with employees able to be represented and bargain such matters, and to then drive that change across the sector. If any such changes are formulated at the APS level, the strict interpretation of the Bargaining Policy by the APSC precludes APS employees from receiving any recognition for their contribution to the change.

Regrettably, the APSC is currently interpreting the Bargaining Policy in such a way that restricts agencies from counting various measures excluded from bargaining, including the efficiencies and improvements derived from the agency-level and broader government initiatives that employees contribute to every day.

Measures that agencies are currently not permitted to include as productivity offsets in bargaining include:

- Efficiencies from better workflows, for example, through restructures, use of new IT systems, reform of service delivery;
- Savings made from agencies merging;
- Qualitative improvements to service delivery or policy advice, whether stemming from whole of government reviews or agency-level initiatives; and
- Better outcomes against key performance indicators.

None of the conditions reductions that are permitted by the APSC to be included as productivity offsets actually drive increased productivity. Instead, the approach agencies must take in bargaining drives further job cuts on top of the Government's planned 16,500 job cuts over two years³⁷, puts pressure on service standards, and forces agencies to seek to cut employee conditions. This approach undermines morale and stands to threaten the ability of the APS to attract and retain quality staff and to continue to meet the needs of the Australian community into the future.

Any analysis of public sector productivity should start with an acknowledgement that our public services are efficient and that as a country we have a high standard of public services. In comparison to other OECD countries, Australia not only has low rates of taxation, but highly effective provision

³⁷ Australian Government, '2014-15 Budget Paper 4 – Part 2: Staffing of Agencies', May 2014, http://budget.gov.au/2014-15/content/bp4/html/bp4_part_2.htm, (accessed 15 August 2014)

of government services³⁸. In 2012, Australia was ranked in the 94th percentile for government effectiveness and the 97th percentile for regulatory quality by the World Bank³⁹.

Not only is Australia a low-taxing, low-spending country, a relatively small percentage of spending goes towards its public sector. Employment in the general government sector (across all tiers of government) is at 15.7%, on par with the OECD average of 15.5%⁴⁰. Australia also spends less than average on its public services. The OECD average is 13.6% of government expenditure on general public services while Australia spends 12.5%⁴¹. Of this, the Commonwealth public sector workforce constitutes only 5.8% of total Commonwealth Government expenditure⁴².

The CPSU agrees that productivity in the public sector can be harder to measure than in some other industries. There is a strong commitment among public sector workers, however, to delivering quality services to the community. The APS should and does change over time to meet the needs of the community and APS employees have a good track record of meeting these needs and serving the government of the day. These contributions and genuine productivities should be recognised in bargaining.

The role of government as a model employer

Issues Paper 5 identifies a number of areas in which public sector bargaining is said to differ from the private sector. It is the CPSU position that there is a role for the Commonwealth government to set an example in the broader economy as a model employer.

This includes:

- Exemplary conduct in bargaining;
- Adherence to the terms of the *Fair Work Act*;
- Genuine bargaining, in which the Commonwealth seeks to genuinely reach agreement with employees;
- Maintaining the living standards of the workforce;

³⁸ C. Stone, *False Economies: Unpacking public service efficiency*, Sydney, Centre for Policy Development, June 2014, pp.28-29

³⁹ World Bank, *Worldwide Governance Indicators, Country Data Report for Australia, 1996-2013*, Washington D.C., USA, 11 September 2014, p.4-5

⁴⁰ 'Figure 5.1 Employment in general government as a percentage of the labour force (2001 and 2011)' in OECD, *Government at a Glance 2013*, Paris, France, OECD Publishing, 14 November 2013

⁴¹ 'Table 3.25, Structure of general government expenditures by function (2011)', in OECD, *Government at a Glance 2013*, Paris, France, OECD Publishing, 14 November 2013

⁴² Australian Government, '2014-15 Budget Paper 1: Budget Strategy and Outlook', 13 May 2014, http://budget.gov.au/2014-15/content/bp1/html/bp1_bst9.htm, (accessed 15 January 2015)

- Setting a high community standard on employee rights, conditions, and protections at work; and
- Promoting measures that support workforce diversity and workforce participation.

Promoting workplace diversity through collective bargaining

Collective bargaining can and should promote measures that support workforce participation and diversity. As recognised in the *State of the Service Report* ⁴³, diversity in the workforce is an important goal, as it allows the APS to better serve and support the community and the Government. It is also relevant that the Government has now increased its target for Aboriginal and Torres Strait Islander employment in the APS to 3% over the next three years.

Unfortunately, the requirement that agencies meet the streamlining requirements of the Government's Bargaining Policy is seeing agencies seek to remove clauses supporting workplace diversity from enterprise agreements. To date, at least 16 agencies have sought to remove workplace diversity clauses from enterprise agreements. These clauses represent little or no cost to an agency, but play an important role in changing workplace culture and supporting diversity. The CPSU sees the removal of diversity clause as a backwards step, and argues that the Federal Government should be setting an example as a very large employer within the Australian community.

Work life balance and workforce participation

Enterprise agreements should provide a range of measures to allow employees to balance their work, family and personal life. The ability to use a range of flexible working arrangements is important to employees, and necessary to support women's workforce participation. The CPSU's 2013/2014 *What Women Want* ⁴⁴ survey found that an overwhelming majority of women rank having the right to request flexible working arrangements as an important or very important aspect of their employment ⁴⁵. More specifically, two thirds of women in the APS indicated that being able to negotiate part-time work was important or very important ⁴⁶. These findings are consistent with previous *What Women Want* surveys conducted by the CPSU.

Caring responsibilities for dependent children and, increasingly, elderly parents, as well as other friends and family members are an important part of many employees' lives. These latter caring arrangements are becoming more common. The 2013/14 *What Women Want* survey found that

⁴³ Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2013-14, p. 13

⁴⁴ The What Women Survey is conducted by the CPSU and now in its 8th year. It is the largest survey of working women in Australia and gives a detailed picture into the working lives of women, particularly in the APS.

⁴⁵ Community and Public Sector Union, *What Women Want 2013/14 Survey Report*, March 2013, p.28

⁴⁶ *Ibid*, p.29

nearly one in four women in the APS have caring responsibilities for those other than dependent children, primarily their parents or parents-in-law⁴⁷. Nearly half of these women also have dependent children and work full-time⁴⁸.

Even where there are clear entitlements to flexible working provisions within enterprise agreements, employees often identify problems in accessing these provisions. It is important, therefore, that enterprise agreements contain specific entitlements to flexible working arrangements and give employees a clear right to access those entitlements.

However, in order to meet the “streamlining” requirements of the Bargaining Policy, agencies are seeking to remove flexible working arrangements and part time work protections from enterprise agreements. At least ten agencies have sought to do this.

The types of clauses that agencies are seeking to remove from enterprise agreements in this round of Commonwealth bargaining include:

- Clauses that detail when an employee may seek a part time work arrangement, how those agreements are negotiated, and their duration;
- Flexible working arrangements for parents and carers; and
- Flex time provisions, and the circumstances in which flex time may be accessed.

Agencies have also sought increases in standard working hours and to reduce personal and carer’s leave entitlements in enterprise agreements. At this stage twenty six agencies have signaled an intention to increase working hours and twenty have signaled an intention to reduce personal and carer’s leave entitlements.

These actions represent a backwards step. Instead, the Commonwealth, as a major national system employer, should set an example within the community and advance flexible working arrangements in order to encourage the workforce participation of workers with family, caring, and other commitments.

Taking protected industrial action

In Issues Paper 3 the Productivity Commission asks a series of detailed questions about the adequacy of provisions relating to industrial action under the Act⁴⁹.

⁴⁷ Ibid, p.17

⁴⁸ Ibid, p.18

⁴⁹ Note 2, p. 14

Employers have a range of options to exert pressure to influence employees to accept outcomes in bargaining. Many of these levers do not involve industrial action, but include tactics such as threatening job losses and avoiding or delaying negotiations. In contrast, employees have few options to bring bargaining to a resolution where the employer has no interest in reaching an agreed outcome. Protected industrial action is one of those avenues, although it is by no means easily accessible. The CPSU opposes any further restrictions on employees taking industrial action. It is already an onerous and lengthy process, with multiple opportunities for an employer to obstruct the taking of action on various procedural grounds.

The CPSU does note, however, that industrial disputes could be avoided if the bargaining system was geared towards requiring the parties to genuinely negotiate, and if there was a stronger role for the Fair Work Commission to resolve bargaining disputes. Currently, employees have few options for concluding bargaining where an employer has no desire to conclude bargaining fairly, other than looking to industrial action.

In Issues Paper 3, the Productivity Commission asks whether employers should have access to a broader range of options for taking industrial action against their employees ⁵⁰. The CPSU is opposed to any further opportunities for employers to take response action against their workforce. Employers already exercise significant control in bargaining, including making the decision about when to commence negotiations, when to submit a proposal for employees to consider, and a range of actions in the context of industrial action, including lock outs ⁵¹ and the option of deducting pay and refusing to accept any work from employees when partial work bans are imposed ⁵².

Individual Flexibility Arrangements

In Issues Paper 3 the Productivity Commission examines Individual Flexibility Arrangements (IFAs) and asks a series of detailed questions about the benefits and costs of IFAs and the protections that are needed ⁵³.

The CPSU is opposed to any changes that may water down protections that ensure IFAs are not used to undermine working conditions and basic protections for employees. Such changes are currently before Parliament in the *Fair Work Amendment Bill 2014* ⁵⁴.

The Bill seeks to ⁵⁵:

⁵⁰ Ibid, p. 14

⁵¹ Note 2, s 411

⁵² Ibid, section 471

⁵³ Note 22, p. 9

⁵⁴ *Fair Work Amendment Bill 2014* (Cth)

⁵⁵ Ibid, Part 4

- Extend the notice period for terminating an IFA from 4 weeks to 13 weeks;
- Create a defence for employers that have contravened a flexibility term of an enterprise agreement on the grounds that the employer was of a reasonable belief that the employee was better off;
- Remove employee and employer discretion about the terms that an individual flexibility term of an enterprise agreement will cover; and
- Allow a benefit other than a monetary benefit to be included the better off overall test (BOOT) for the purpose of assessing the IFA.

Scope of individual flexibility arrangements

Currently the Act allows parties to bargaining to negotiate the terms of the IFA clause that will be inserted into the enterprise agreement. This allows parties to consider what individual flexibilities may be appropriate to employees and the employer, and craft the individual flexibility clause of the enterprise agreement to suit those purposes.

The CPSU would oppose any changes that would require the flexibility term of an enterprise agreement to mandate that an IFA cover a minimum range of matters. Mandating the minimum scope of IFA terms in enterprise agreements would undermine genuine bargaining processes between employers, employees and unions. The terms of flexibility clauses should properly be a matter for negotiation between bargaining representatives.

Notice period

The CPSU opposes extensions to the notice period for unilateral termination by the employee or the employer of individual flexibility arrangements (IFAs) entered into under the terms of enterprise agreements.

An employee's ability to opt out of an IFA through the current provision of four weeks notice is one of the safeguards that was built into the Act when IFAs were introduced. Any increase to the notice period would undermine this safeguard, making it more difficult for employees who enter IFAs and then decide this is not in their best interests to revert to the terms of the applicable enterprise agreement.

Defence provision

The CPSU opposes any defence provision which would protect employers from a finding that they contravened the flexibility term of an enterprise agreement, even where the IFA fails the better off overall test (BOOT).

The *Fair Work Amendment Bill*, if passed, would amend the Act to allow an employer to rely on a defence against a finding that the IFA contravened the flexibility term of an enterprise agreement, where the employer acted on a reasonable belief that the employee was better off, which seems to largely rely on a signed statement from the employee. There is no requirement that the employee be reasonably or accurately informed as to their entitlements before signing such a statement. There is also no requirement that the employer take appropriate steps to inform itself about the employee's entitlements and ensure that the employee is actually better off overall.

IFAs are already subject to limited scrutiny and oversight. By creating a defence for employers who have been found to have acted contrary to the terms of the enterprise agreement, the Bill will put employees at greater risk of exploitation.

Inclusion of non-monetary benefits

In respect of IFAs, the CPSU would also oppose any legislative notes to establish that non-monetary benefits provided for under an IFA may be taken into account for the purposes of the BOOT.

Under the *Workplace Relations Act 1996*, many CPSU members in the federal public sector and other areas, such as Telstra, were employed on the basis of individual contracts which removed their rights and entitlements, without commensurate compensation. The Bill seeks to provide for greater use of IFAs, while at the same time restricting scrutiny and oversight. This is of significant concern to the CPSU.

The right to representation in the workplace

The principles of the right to organise, freely associate, and collectively bargain have long been recognised in international conventions to which Australia is a signatory⁵⁶. These principles rely in practice on employees' access to representation and the ability of union delegates to perform their role unencumbered by obstruction from the employer. However, Australian workers are regularly prevented from freely accessing such representation.

For example, employers are able to unreasonably limit the time that union representatives have to represent employees on matters that affect them. Even where delegates' rights are enshrined in enterprise agreements, delegates can be limited to providing support and representation to members on meal breaks and in their own time after work.

⁵⁶ International Labor Organisation, *Freedom of Association and Protection of the Right to Organise Convention 1948*, No 87, International Labor Organisation, *Right to Organise and Collective Bargaining Convention, 1949* (No. 98)

The general protections contained in the Act have as one of their objects the protection of freedom of association ⁵⁷. Employers are prohibited from taking adverse action against an employee for exercising a workplace right ⁵⁸, which includes the right to be represented by a union delegate ⁵⁹. However, the requirement to show there has been adverse action, for example dismissal of the employee or injuring their employment ⁶⁰, is too high a bar to cover day to day situations in which employees are blocked from accessing their union delegate. The general protections therefore provide insufficient protection for employees to access representation in the workplace on a day to day level.

Merit review of employment matters

In Issues Paper 5, the Productivity Commission refers to certain employment matters that are subject to merit review in the public sector. Federal public sector employees are engaged under the *Public Service Act 1999* if they are APS employees or under their agency's enabling legislation if they are not APS employees ⁶¹. The *Public Service Act* places obligations on employees to adhere to the APS Code of Conduct ⁶² and to adhere to APS values ⁶³.

One of the objects of the Act is:

To establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public ⁶⁴.

The apolitical nature of the APS rests in part on a clear legislative framework supporting promotion based on merit and impartial decision-making in relation to employees' employment. These principles are upheld through the availability of promotion appeals ⁶⁵ and independent oversight over allegations of any breach of the APS Code of Conduct ⁶⁶. These functions are performed through the independent, statutory office of the Merit Protection Commissioner.

However, the National Commission of Audit recommended that the role of the Merit Protection Commissioner be abolished.

⁵⁷ Note 2, section 336

⁵⁸ Ibid, section 340

⁵⁹ Ibid, section 347

⁶⁰ Ibid, section 342

⁶¹ *Public Service Act 1999* (Cth), s6(1)

⁶² Ibid, section 13

⁶³ Ibid, section 10

⁶⁴ Ibid, section 3(a)

⁶⁵ *Public Service Regulations 1999* (Cth), Division 5.2

⁶⁶ Ibid, Division 5.3

The National Commission of Audit recommended:

- a. *the role of the Merit Protection Commissioner be abolished, with the Department of Employment to undertake responsibilities on Code of Conduct matters; and*
- b. *removing provisions for appeal processes in relation to promotion decisions for lower level positions in the Australian Public Service*⁶⁷.

The CPSU does not support these proposals. The availability of promotion appeals and independent oversight of Code of Conduct investigations guards against favouritism and unfair decision-making. This is necessary to maintain public confidence in the APS.

It would not be appropriate for any APS agency, including the Department of Employment as recommended by the National Commission of Audit, to oversee Code of Conduct reviews. This presents a conflict of interest as APS agencies are responsible for initiating and pursuing investigations of suspected breaches. The use of that power should be checked by an independent body to protect against abuse of process.

The availability of promotions appeals supports an APS where employment decisions are based on merit, not patronage or favour. The CPSU does not support any removal of promotion appeal rights, and notes that such a move would be at odds with recent developments in public sector governance, that have seen the clarification and strengthening of accountability measures through the introduction of the *Public Governance, Performance and Accountability Act 2013* and the *Public Interest Disclosure Act 2013*.

⁶⁷ National Commission of Audit, *Towards Responsible Government, The Report of the National Commission of Audit –Phase Two*, Canberra, Commonwealth of Australia, March 2014, p.xxi

Conclusion

A fair, balanced and robust workplace relations system is a cornerstone of any democratic society. Strong and fair workplace laws underpin economic security and social cohesion. The CPSU supports a workplace relations system that genuinely protects employees' interests. This should include the facilitation of sensible and cooperative approaches to bargaining that recognise employees' contributions to improving the welfare of the Australian community.

The workplace relations framework requires substantial improvement. This includes measures that:

- Gear the system towards genuine collective bargaining, not mere compliance with procedure;
- Recognise that restricting bargaining to the enterprise level can, at times, undermine genuine collective bargaining;
- Allow bargaining disputes to be arbitrated by the Fair Work Commission at an early stage, so that bargaining can be settled and protracted disputes can be avoided;
- Assist employees to commence bargaining and overcome unnecessary delays by employers where this occurs; and
- See outcomes negotiated that genuinely reflect employees' contributions and which support employees in the public sector to meet the needs of the community. This requires a broader understanding of productivity than mere cost cutting and the reduction of employees' conditions.

The public sector plays a special role in the economy and in civil society, providing the services, support and infrastructure for all Australians to participate fully in community life. The federal government also has a responsibility to set an example as a model employer, to promote workforce participation and to support workforce diversity. The decisions made in the public sector in relation to public sector employment should be of the highest standard, and subject to scrutiny. The CPSU therefore strongly recommends the maintenance of independent merit review in relation to employment decisions in the APS.

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