

## **1. Introduction**

This submission has been prepared by the Office of the Commissioner for Public Employment (OCPE) for the Productivity Inquiry into the Workplace Relations Framework. It is not intended to be comprehensive, but rather to provide commentary on practical aspects of the current workplace relations framework as it affects the Northern Territory Public Sector (NTPS). For clarity, the submission attempts to follow the structure set out in the five issues papers published by the Productivity Commission.

## **2. Issues Paper 3: The Bargaining Framework**

This section will deal with matters arising from Issues Paper 3. Its first sub-section will deal with bargaining and industrial disputes. The second subsection will examine the types of enterprise bargaining and their key processes covering questions such as restrictions on agreement content; the better off overall test and other aspects of bargaining as they affect the NTPS.

### **2.1. Bargaining and Industrial Disputes**

#### **Context of Enterprise Bargaining in the NTPS**

Apart from a small number of employee classifications<sup>1</sup>, the majority of NTPS employees are covered by enterprise agreements. Pursuant to section 12 of the *Public Sector Employment and Management Act* (NT) (“the PSEM Act”) the Commissioner for Public Employment (“the Commissioner”) is “taken to be the employer of all employees on behalf of the Territory or an

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<sup>1</sup> The terms and conditions of employment for executive contract officers and their equivalents are regulated outside enterprise agreements. In their case, they are employed under common law contracts of employment with terms and conditions set out in a determination issued by the Commissioner for Public Employment made under the PSEM Act.

Agency”. As the employer, the Commissioner is covered by 10 enterprise agreements.<sup>2</sup> All NTPS enterprise agreements are expressed to cover the relevant employee organisations for the covered employees. As required under the *Fair Work Act 2009* (Cth) (“the FW Act”) the relevant employee organisations are the default bargaining representatives for the employees who will be covered by NTPS enterprise agreements.

For decades, employee organisations have participated in the processes associated with the regulation of the terms and conditions of employment for NTPS employees. Despite the occasional disputes that arise between the employer and employee organisations, it is anticipated that their role as a means of articulating employee voice will continue in the NTPS for the foreseeable future.

**The Extent to which Bargaining Arrangements allow employees and employers to genuinely craft arrangements suited to them**

Enterprise Bargaining has been in place in the NTPS in one form or another since its first agreement was certified under section 134C of the then *Industrial Relations Act 1988* (Cth) in 1994<sup>3</sup>. The current workplace relations framework enables the Commissioner to craft terms and conditions of employment that suit employees and their employee organisations. At times the bargaining process can be protracted and extend over many months, especially if there is disagreement about specific terms and conditions, such as the quantum of any proposed salary increase or the content of

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<sup>2</sup> These enterprise agreements cover different groups and occupational categories of employees. For example, there are agreements covering medical officers, nurses and midwives, teachers, prison officers and the general NTPS.

<sup>3</sup> The Northern Territory Public Sector Enterprise Bargaining Agreement 1994 was certified in Brisbane on 21 April 1994 (Print N0251).

enterprise agreements<sup>4</sup>. The next paragraphs will comment on the effect of current workplace relations framework on the content of NTPS enterprise agreements.

From an NTPS perspective, the permitted matters provisions of s. 172 of the FW Act work well because they enable matters pertaining to the relationship between the Commissioner and the relevant employee organisations to be included in the fabric of enterprise agreements.

As mentioned above, relationships with employee organisations are an important aspect of workplace relations in the NTPS. The narrow scope of the matters pertaining provisions of the then *Workplace Relations Act 1996* (Cth) presented considerable difficulties for the Commissioner and employee organisations. It resulted in practices that were artificial, such as employees having to take positive steps to appoint representatives during a dispute, who may be an employee organisation. Similarly the Commissioner would have to resort to the execution of memoranda of understanding or side deeds with employee organisations to set out what had been long-standing consultation mechanisms or training for workplace delegates.

Despite this, some of the matters that could be permitted under s. 172(1)(a) of the FW Act present some difficulty for the Commissioner as an employer, especially logs of claim dealing with matters relating to the engagement of consultants because they can be sometimes delay settlement of the bargaining process.

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<sup>4</sup> For example, negotiations for the Northern Territory Public Sector Teacher and Educator 2014–2017 Enterprise Agreement (Agreement ID: AE412195) commenced at the end of April 2013 and were not finalised until early November 2014. The Fair Work Commission approved the enterprise agreement on 14 January 2015.

That said, however, an employer is not obliged to agree to the inclusion of these matters in an agreement no matter how dearly held by employees or employee organisations. On occasion, the Commissioner has been able to successfully resist pressure in the bargaining process to include some permitted terms in enterprise agreements. At other times, the Commissioner has been less successful at resisting pressure to include terms of this nature<sup>5</sup>.

At the same time, the ability to characterise some claims from employee organisations as claims about matters not pertaining to the employment relationship have also been useful and have helped employees and employee organisations focus on those matters that can be agreed between the parties<sup>6</sup>.

## **2.2. Types of Enterprise Bargaining and their Key Processes**

### **Restrictions on Agreement Content**

On the whole, the restrictions on the content of enterprise agreements assists with the bargaining process because OCPE is able to emphasise that certain claims of trade unions are not permitted matters. For example, in recent negotiations for an enterprise agreement to cover teachers and educators, OCPE was able to successfully resist claims relating to the funding of Northern Territory Government schools. While this did not eliminate the matter as a political and public policy issue, it did manage to remove it from the bargaining agenda, allowing the parties to focus on terms and conditions of employment and some modest productivity improvements.

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<sup>5</sup> For example, clause 20 in the Darwin Port Corporation (Northern Territory Public Sector) 2014–2018 Enterprise Agreement (Agreement ID: AE40960) deals with the use of consultants.

<sup>6</sup> During negotiations for the Northern Territory Public Sector Teacher and Educator 2014–2017 Enterprise Agreement (Agreement ID: AE412195) some of the employee organisation's campaign and claims were around the policy issues of the funding of Northern Territory Government schools or the question of establishing independent government schools,.

## The Better Off Overall Test (BOOT)

Generally, linking the BOOT to the relevant modern award<sup>7</sup> is a workable means of ensuring a safety net for enterprise bargaining; however, in a small number of cases it can present technical difficulties when seeking to have an agreement approved in the Fair Work Commission. Sub-section 53(4) of the *Northern Territory (Self-Government) Act 1978* (Cth) limits the application of the FW Act in respect of tribunals established by an enactment before 1 July 1978. This is a reference to two tribunals: the Police Arbitral Tribunal, which is established under Part III of the *Police Administration Act* (NT)<sup>8</sup> and the Prison Officers' Arbitral Tribunal established under the *Correctional Officers Arbitral Tribunal Act* (NT).<sup>9</sup>

Over the course of the history of enterprise bargaining in the NTPS, prison officers have become covered by enterprise agreements<sup>10</sup>, but the legacy of the determinations issued under *Correctional Officers Arbitral Tribunal Act* poses some challenges for OCPE. In particular, the relevant determinations are not awards for the purpose of the BOOT. In the past, the Office of the Commissioner for Public Employment has overcome this difficulty through references to relevant,

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<sup>7</sup> Currently, the relevant NTPS awards for the BOOT are pre-reform awards. No NTPS employee is currently covered by a modern award. The Commissioner for Public Employment has applied to the Fair Work Commission for a modern enterprise award. This application is yet to be listed in the Fair Work Commission for hearing.

<sup>8</sup> Conditions of service for members of the Northern Territory Police Force are regulated by determinations of the Police Arbitral Tribunal, rather than the FW Act. Although through the Northern Territory *Administrative Arrangements Order*, the Office of the Commissioner for Public Employment administers Part III of the *Police Administration Act*, the Commissioner for Public Employment is not the statutory employer of members of the Northern Territory Police Force.

<sup>9</sup> Formerly known as the *Prisons (Arbitral Tribunal) Act* (NT).

<sup>10</sup> Chief prison officers are covered by the Northern Territory Public Sector 2013–2017 Enterprise Agreement. Prison Officers are covered by their own separate enterprise agreement the Prison Officer (NTPS) 2011–2014 Enterprise Agreement.

NTPS awards of general application, such as Northern Territory Public Sector Redundancy Provisions Award 2001.<sup>11</sup>

Unlike awards, determinations issued by the Correctional Officers Arbitral Tribunal are not modern awards, which means that despite section 57 of the FW Act<sup>12</sup>, these instruments continue to apply and it remains open for relevant employee organisations to pursue matters through the tribunal despite the fact that they may have been settled in the enterprise bargaining process. This technicality can also provide difficulties for no extra claims provisions in enterprise agreements, which will be mentioned below.

### **Productivity Improvements**

The commissioner negotiates enterprise agreements in accordance with the Northern Territory Public Sector Wages Policy 2013–2016. Although the wages policy does not specifically mention productivity, there are two main provisions that establish a link to productivity and wages outcomes. Firstly, agreement outcomes are required to be kept within the Northern Territory Government's fiscal parameters. In the current policy, this means that agreement outcomes are to have a total overall cost of up to three per cent per annum. Secondly, the quantum of the actual salary increases depends on the efficiency measures achieved through the bargaining process. These efficiency measures are assessed against the degree to which concessions have been made around working arrangements for employees; opportunities for immediate or future reform or both and other quantitative and qualitative measures. In some cases, the efficiency measures are modest, but over time they provide for administrative efficiencies and some labour cost reduction.

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<sup>11</sup> AP806389

<sup>12</sup> Section 57 deals with the interaction between modern awards and enterprise agreements. It provides for modern awards not applying to employees, employers and employee organisations.

While enterprise bargaining should be linked to improved productivity outcomes, it is OCPE's view that determining these productivity improvements should be left to the bargaining parties. The commissioner would see little benefit in moving beyond the proposal that the Fair Work Commission being satisfied that "improvements to productivity at the workplace were discussed" during the bargaining process.<sup>13</sup>

Because OCPE believes that the emphasis on enterprise bargaining should be on the common interests of the bargaining parties (which would include employees and employee organisations), there is not a large measure of enthusiasm for the proposition that would prevent the Fair Work Commission from issuing a protected action ballot order if it were satisfied that applicants for these orders were advancing claims that were manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates; or claims that were likely to have a significant adverse impact on productivity at the workplace.<sup>14</sup> This would require the Fair Work Commission to hear arguments and make a decision about whether claims were excessive or reasonable. Ultimately, running these arguments would require employers to devote resources to them, whereas as experience in the NTPS would indicate there are effective counter-measures available to an employer who is faced with the prospect of protected industrial action. These will be discussed below in the section that deals with employer response action.

### **Individual Flexibility Arrangements**

Although it is a statutory requirement to include a provision for individual flexibility arrangements in an enterprise agreement, OCPE has found that the capacity to enable employees to enter into

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<sup>13</sup> See Item 1 of Schedule 1 of the Fair Work Amendment (Bargaining Processes) Bill 2014.

<sup>14</sup> See Item 4 of Schedule 1 of the Fair Work Amendment (Bargaining Processes) Bill 2014.

individual flexibility arrangements useful. In NTPS enterprise agreements these are negotiated at the agency level, but approved by OCPE who will give effect to the arrangements through issuance of a special determination<sup>15</sup> or other appropriate instrument. These are powers that have been used by OCPE well before there was a requirement to include a provision for individual flexibility arrangements in enterprise agreements.

### **Variations to Working Arrangements for Groups of Employees**

In addition to individual flexibility arrangements, NTPS enterprise agreements provide options for flexible arrangements for groups of employees. These are generally used to accommodate situations in which the practical issues associated with delivery of particular services do not fit easily within the normal enterprise agreement provisions. For example, one variation to working arrangements under a previous enterprise agreement covered youth outreach workers. It provided these employees with a composite allowance and a paid meal break. In effect it rolled up their shift penalties and provided for them to be paid through their normal fortnightly pay (including periods of annual leave). As with individual flexibility arrangements, variations to working arrangements for groups of employees require OCPE's approval as well as having mechanisms to review and terminate them.

### **Good Faith Bargaining**

The NTPS has not been subject to a bargaining order, but, on three recent occasions a union has sought to use either section 229 or section 240 of the FW Act in bargaining.<sup>16</sup> Despite the

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<sup>15</sup> Sections 13(a) and 14(2) empower the commissioner to determine conditions of employment, including remuneration of employees.

<sup>16</sup> United Voice sought to use section 240 of the FW Act in B2014/1358 (10 September 2014) and B2014/1393 (22 September 2014); and section 229 of the FW Act in B2014/1536 (29 October 2014). All three matters



inconvenience and the interruption to bargaining posed by these applications, OCPE holds the view that they do not pose an impediment to effective bargaining. Most enterprise agreement negotiations are conducted without the threat of bargaining orders or disputes. Although the current bargaining regime under the FW Act can lead to lengthy, protracted negotiations<sup>17</sup>, OCPE holds the view that the good faith bargaining regime remains effective.

### **No Extra Claims**

The FW Act provides a mechanism that the parties to an enterprise agreement can either seek to vary it or ask the FWC to issue orders to remove an ambiguity or uncertainty. The need to use these provisions has not arisen in the NTPS. In the context of the decision of the Full Court of the Federal Court of Australia in *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84, existing no extra claims provisions in NTPS enterprise agreements are unlikely to be an impediment to their mutually agreed variation. The existing no extra claims provisions act as a bar to a party to an NTPS agreement making unilateral claims during the operation of these agreements.

## **2.3. When Enterprise Bargaining Disputes lead to Industrial Action**

Most NTPS enterprise agreements are negotiated without protected industrial action; however in a small number of instances unions will seek orders for a protected industrial action ballot; while a

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related to bargaining for a replacement enterprise agreement for NTPS firefighters. The context of these disputes were attempts by the employer to (a) conduct an audit of secondary employment of firefighters; (b) amendment of a general order relating to shift changes. In these applications United Voice argued that the employer had sought to undermine the good faith bargaining provisions of the FW Act; had engaged in coercive conduct; and had breached the consultation provisions of the existing enterprise agreement. Although the employer argued the contrary and that the changes were administrative and necessary, the employer agreed to extend its consultation with employees about the proposed changes.

<sup>17</sup> The negotiations for the replacement enterprise agreement for NTPS fire fighters started in August 2013 and have not been finalised. The negotiations for the NTPS teachers and educators' enterprise agreement started in April 2013 and were not finalised until November 2014.

smaller number will engage in protected industrial action.<sup>18</sup> In some ways the processes associated with seeking approval for a protected industrial action ballot order enable OCPE to gain useful information about the levels of union density amongst particular elements of the workforce.

Partial work bans pose a problem for the employer mainly in determining the appropriate level of deduction from pay in response to the action. In one case, the Commissioner proposed to deduct \$124 per shift for partial work bans by fire fighters. The union disputed this and argued for a much lower amount. The matter went to the FWC with an order that there be a 15 per cent deduction in shift payments for the partial work bans. This amounted to approximately \$93 per shift.

In other cases, the Commissioner has used employer response action to counter short stop work meetings by teachers. In this case, when teachers engaged in stop work meetings they were effectively locked out for the whole day. Although it might be disputed by the Australian Education Union, OCPE holds the view that the economic pain that followed the Commissioner's employer response action, helped bring the negotiations to a conclusion.

### **Limited Conciliation and Arbitration**

In the context of NTPS enterprise bargaining, OCPE considers the current limitations on arbitration in bargaining disputes to be reasonable. When combined with good faith bargaining, they provide an incentive on the parties to reach a settlement. OCPE would not be in favour of the FWC being able to intervene to conciliate a bargaining dispute on its own motion.

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<sup>18</sup> In the last round of bargaining, firefighters and teachers engaged in protected industrial action, while nurses and midwives sought an order for a protected industrial action ballot.

## **2.4. Individual Arrangements outside Enterprise Agreements**

In the NTPS there are no individual arrangements outside enterprise agreements. Although executive contract officers<sup>19</sup> sit outside enterprise agreements, their conditions of employment are subject to the FW Act; the PSEM Act and a determination issued by the Commissioner. There are six levels of executive contract and within each level there is capacity for variation of the remuneration above the base level subject to certain approval processes.

## **2.5. Resolving Disputes over Terms and Conditions**

OCPE considers the existing dispute resolution mechanisms available in the workplace relations framework to be effective and efficient. Only a small number of disputes have arisen in the NTPS<sup>20</sup>. Often these disputes do not proceed to the FWC. Those disputes that have proceeded to the FWC have been resolved at the conciliation stage. No disputes have proceeded to arbitration.

## **3. Issues Paper 4: Employee Protections**

This section will deal with matters arising from Issues Paper 4: unfair dismissal; anti-bullying laws; and general protections as they affect the NTPS.

### **3.1. Unfair Dismissal**

The NTPS has an average of four unfair dismissal applications per annum. Most of these are resolved at conciliation. A small number proceed to arbitration, which in some cases is discontinued mid-proceedings.

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<sup>19</sup> As at 25 March 2015, there were 578.27 full-time equivalent executive contract officers in the NTPS.

<sup>20</sup> Most of these have been related to disputes about the application of the consultation mechanisms relating to the introduction of change in NTPS workplaces. A very small number have related to actual conditions of employment, such as leave or pay.

Generally the unfair dismissal laws achieve their purpose. There is a considerable body of jurisprudence relating to unfair dismissal, which makes it is easy to analyse the merits of particular applications. The NTPS adheres to the principles of being a model employer and a model litigant and will seek resolution of an application, especially if the view is formed that the employee had been dealt with unfairly.

The caps and discounting processes associated with determining compensation in lieu of reinstatement are fair and reasonable and largely predictable.

Subject to the multiple actions of both the FW Act and the PSEM Act,<sup>21</sup> NTPS employees whose employment is terminated have rights of redress under both laws.<sup>22</sup> While this can pose some confusion, especially for applicants, practical experience over time has meant that OCPE has been to navigate these overlapping statutory provisions.

### **3.2. Anti-Bullying Laws—a New Addition to the Workplace Relations Framework**

It was initially the view of OCPE that the NTPS should be excluded from the anti-bullying laws based on the premise that under the PSEM Act and the NTPS Code of Conduct that there was already an enforceable system of protections against bullying and other inappropriate behaviours. This is still the view of OCPE and it would be preferable if these provisions were amended to exclude the public sector.

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<sup>21</sup> See section 59D(1)(b) of the PSEM Act and Part 6–1 of the FW Act

<sup>22</sup> This right of redress or review would also apply to general protections applications under section 365 of the FW Act, which are discussed below.

That said, there have only been three anti-bullying matters raised in the NTPS, since the commencement of the jurisdiction. All of these were resolved at conciliation, with outcomes that would have been achievable under the PSEM Act provisions.

### **3.3. General Protections and Adverse Action**

The NTPS has an average of three general protections applications per annum. The majority of these are made under section 372 (i.e. an application to deal with a non-dismissal dispute). Most of these are resolved at conciliation. Two general protections applications are currently before the Federal Circuit Court. Both of these relate to section 365 applications (i.e. applications dealing with dismissal).

From an employer perspective the current general protections provisions afford adequate protection and certainty, especially since the decision of the High Court of Australia in *Bendigo Regional Institute of Technical and Further Education, Board of v Barclay* (2012) 248 CLR 500, which has provided greater clarity around the reverse onus of proof attached to general protections applications.

## **4. Issues Paper 5: Other Workplace Relations Issues**

This section will deal with two matters arising from Issues Paper 5: public sector workplace relations and transfer of business.

### **4.1. Public Sector Workplace Relations**

The FW Act applies to NTPS employees. The Commissioner is a national system employer for the purposes of the FW Act and all NTPS employees are national system employees. Although other

statutes also affect their employment relationships<sup>23</sup>, NTPS employees have always been subject to Commonwealth industrial law.

## **4.2. Transfer of Business**

Transfer of business has occurred in a number of contexts in the NTPS including outsourcing and insourcing. In some cases, difficulties can occur when transferring employees from the NTPS to another entity such as a non-government organisation or a private business. In some cases, the superior public sector terms and conditions of employment can mean that it is difficult to transfer an employee to another employer on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than the employee's NTPS terms and conditions of employment. This can be especially the case when the transferring employees are members of a defined benefit superannuation scheme.

Cases involving transfers of business into the NTPS also pose their own unique set of challenges. On a number of occasions non-government organisations that have been providing an essential service such as the delivery of primary health care have opted to return the function to the Northern Territory Government. At these times, employees will often accompany the transfer of functions. In some cases, these employees are covered by enterprise agreements. Despite their often lower salary levels, some of the terms and conditions of their employment may be better than those available in the NTPS.<sup>24</sup> OCPE has dealt with these situations in a number of different ways. Sometimes, the employees have come across to the NTPS on their existing terms and conditions of

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<sup>23</sup> See section 53 of the *Northern Territory (Self-Government) Act*; the PSEM Act; Part III of the *Police Administration Act* (NT); and the *Correctional Officers (Arbitral Tribunal) Act* (NT).

<sup>24</sup> For example, they may be able to provide access to more generous salary packaging options due to their status as public benevolent institutions.

employment that have been adopted in a determination issued by the Commissioner. On one occasion, which involved the transfer of a single employee who was covered by an enterprise agreement, the Commissioner successfully applied for an order under section 318 of the FW Act that the transferring employee be covered by the relevant NTPS enterprise agreement.

## **5. Discussion and Conclusion**

Generally, the current workplace relations framework works well in the NTPS. OCPE and the NTPS have embraced enterprise bargaining since its inception in the 1990s. The bargaining framework generally works. The industrial action provisions although cumbersome, provide OCPE with a number of options during bargaining, including some additional benefits such as the ability to gain information about levels of union density in the workforce.

While OCPE considers that there is scope to exclude the NTPS from the anti-bullying jurisdiction of the FWC because of existing protections under the PSEM Act, the small number of applications for orders to stop bullying that have affected the NTPS make this a low order issue.

OCPE and the Commissioner remain happy to assist the Productivity Commission in its inquiry, if required.