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In reply please quote:

Mr Graeme Head
Commissioner
Public Service Commission
Bligh House
4-6 Bligh Street
Sydney NSW 2000

Dear Mr Head,

Re: Government Sector Employment Act – Rules and Regulation

Thank you for the opportunity to provide comment in relation to the consultation drafts of the *Government Sector Employment Regulation* and the *Government Sector Employment Rules*.

It has been useful to be able to meet with you and officers of the Commission on a number of occasions since the Rules and Regulation were released for consultation.

The comments provided below are in addition to feedback provided at these meetings.

Please find below an outline of our principal concerns in relation to the draft Rules and Regulation.

GSE RULES

Definitions

As indicated in our discussions the Rules and Regulation introduce a number of specific terms that are either new or substantially change the common meaning of terms currently in use in the sector. Providing clear definitions of key terms such as “external advertising”, “sector wide”, “contingent employment”, “secondment” and “development opportunity” would assist in interpreting the document.

Guidance

The Rules provide a new power for the Commissioner to issue “guidance” to replace an existing power to issue “guidelines”. There is no head of power for this rule in the *Government Sector Employment Act (GSEA)*. As a consequence, the status of this “guidance” is not clear. It may be more appropriate for the capacity to issue guidance to be conferred by way of regulation.

Citizenship Requirements

The Association is opposed to the change in relation to the citizenship requirements for engagement as a public service employee. The current provisions in section 54 of the *Public Sector Employment and Management Act (PSEMA)* are adequate and should be retained in the Rules. Public Service involves a special trust and imposes a high duty on those who take it on. These responsibilities should only be placed in the hands of those who have an ongoing commitment to the Australian community.

Temporary Employment

The Association is opposed to the extension to the maximum period for temporary employment from three years to five years. This change runs contrary to the general approach being taken in the remainder of the draft Rules to temporary employment.

The Association is supportive of the proposals to tighten the merit provisions around the engagement of temporary employees. This support is qualified by a number of concerns.

There needs to be appropriate transitional arrangements that prevent existing temporary staff from being displaced from their positions, particularly in circumstances where temporary staff have been engaged in a way that does not conform to the proposed requirements. This change should be phased in over a long lead time to enable an orderly adjustment to the new requirements.

The Association is concerned that the more stringent arrangements in respect of engagement of temporary staff may encourage a growth in contingent labour employed through labour hire arrangements. Measures need to be put in place to prevent agencies from by-passing the merit system in this way.

The Rules do not adequately deal with the question of when temporary and casual staff should be used. The provisions of sections 27 and 38 of the *PSEMA* which specify the circumstances when temporary and casual staff may be used are not reproduced anywhere in the Rules.

The mechanism for converting long term temporary employees to ongoing employment appears more restrictive than current arrangements. The current section 31(3)(a) enables a long term temporary employee to be appointed to a permanent position that is at a similar grade to the original position that the employee had been recruited to. The proposed Rules appear to have less flexibility enabling a temporary employee to be converted to ongoing employment only in their current role.

Merit

The Association has a number of concerns in regards to the proposed merit system. The proposed assessment process does not make adequate arrangements for independence and gender balance in the composition of selection panels.

There is insufficient clarity around the types of assessment methods available to agencies and these methods should be subject to approval by the Commission.

The proposal to remove rank order from the system of eligibility lists which have been re-branded "Talent Pools" may provide an avenue for the merit system to be gamed.

The Association is concerned that the requirement for external advertising as a precondition for engagement in ongoing employment may create inflexibility in regards to restructuring. The proposed arrangements appear to not allow the capacity for internal advertising during restructuring that is currently available under the *PSEMA*. This concern may be allayed by the proposed guidance to be issued by the Commissioner in regards to the process for assignment to roles. At present it is impossible to determine if this will be adequate. The Rules once made will be binding. Guidance from the Commissioner will not be sufficient to overcome a requirement imposed by the Rules.

Promotional Reviews

In discussions with members this proposal has been met with the greatest cynicism. Members are sceptical that the system of review is independent enough to resist pressure being applied to senior executives conducting the review to confirm the original selection.

A senior executive who must conduct a review within their own agency may be reluctant to get off side with colleagues whose decision they have been asked to review. This will be a more acute problem in small agencies with a limited number of senior executives.

An oversight system, in which few people have confidence, will not provide an adequate guarantee for the merit system.

The Association is also concerned that the reviewer cannot consider the question of whether the merit considerations of selection decision have been appropriately balanced. This is a significant change from the current arrangements that apply in promotional appeals. If the guarantee of merit is a primary objective of the merit system then it seems odd to not allow it to be taken into consideration when a merit decision is being reviewed.

The proposed system does allow the reviewer to examine whether the selection process was "irregular or improper". It seems logical that if a reviewer finds evidence of irregular or improper behaviour in a selection process that they should be empowered to make appropriate recommendations to initiate misconduct procedures.

Transfer Reviews

The Association has made a number of observations in relation to the proposed Rules around transfers in the attached clause by clause comments particularly in relation to the creation of enforceable rights for employees who are the subject of a transfer agreement between agency heads. The existing arrangements in relation to mobility are governed by comprehensive guidelines. At present there is no indication that similar guidance will be issued by the Commissioner prior to the commencement of the *GSEA*. The Association recommends that more detailed guidance be provided around the criteria to be applied in relation to the review process for transfer decisions.

Unsatisfactory Performance & Misconduct

A similar point must be made in respect to the Rules around unsatisfactory performance and misconduct. Current arrangements are underpinned by detailed enforceable procedural guidelines which will disappear with the commencement of the *GSEA*. There is no indication that these guidelines will be reissued as guidance by the Commissioner.

The Association is also concerned that the reliance on the performance development system that operates in each agency for the management of unsatisfactory performance may lead to significant disparities between agencies in how employees are treated.

Senior Executive Arrangements

The Senior Executive arrangements fail to address the concern of the Association in relation to the practical operation of section 41(1) of the *GSEA*. It is not clear how the requirement to provide a report on the reasons for termination can be satisfied where the provisions of section 41(1) are being relied on for the termination.

The Association is also concerned about the proposals in relation to hours of work and the negative impact this will have on efforts to address the gender imbalance in the Senior Executive cohort. The Association is supportive of the moves to formally recognise part time work arrangements for Senior Executives but more can be done. The Association believes there is capacity to enable a flexible approach to working hours by enabling local agreements on hours to be reached and incorporated as side agreements to executive contracts.

GSE REGULATION

Hours of Work

The Association is concerned that the existing clause 9 of the *PSEM* Regulation has been omitted from the new Regulation without explanation.

Power to create and grade roles

Similarly the power conferred by sections 9(2) and 9(3) for the agency head to create and grade positions (now roles) has been removed and finds no comparable provision in the Act, Regulation or Rules. In the absence of this provision, on what basis are roles created and graded?

TECA for Senior Executives

Clause 21 of the existing *PSEM* Regulation has been omitted, effectively removing the entitlement of senior executives to the benefits of the *Transferred Employees Compensation Award (TECA)*. The Association recommends that this provision be retained.

Excess Employees

The Association maintains that the policy approach of the employer on the issue of excess employees is wrong. The policy emphasis should be on redeployment and not on encouraging exit from the sector. The current approach also conflicts with the objectives of the Commission to foster mobility and remove the notion that employees own positions.

Unlike the existing provisions at Section 56 of the *PSEMA*, the proposed rule has no test for determining if an employee is excess. The Association is concerned that a person can simply be made excess and that this process is arbitrary and subverts the other elements of the Rules around termination.

Clause 8(2) stipulates that a decision is to be made in accordance with any guidance provided by the Commissioner. The Association is concerned that there will be no guidance available prior to the commencement of the Act. This guidance should be the subject of consultation with the Association.

Clause 8(3) represents a diminution of the requirements for agencies to engage in an active process of trying to redeploy excess staff. The proposed change is from the previous requirement to have 'taken all practicable steps' to 'taken reasonable steps'.

Consistent with previous representations made by the Association around this issue, we support a more flexible approach that allows for a longer retention period and the capacity to redeploy excess employees to temporary roles.

Higher Duties Allowance

The Association is concerned that changes to wording in the proposed clause will adversely impact on the capacity of part-time workers to access higher duties allowance. Also of concern is the removal of the existing Clause 19 which guarantees that staff acting in another role will not as a result suffer a reduction in remuneration.

Repayment of Redundancy

The Association opposes in its entirety the requirement to repay a severance payment where an employee is re-engaged in the sector. The provision may have had validity where the policy only provided for voluntary redundancy. In the context of a policy of forced retrenchment the justification is removed.

Retrenchment payments are designed to compensate in part for lost leave credits – particularly sick leave. Where an employee is retrenched against their will the severance payment will have compensated for a loss of entitlements that cannot be restored in the event that the employee gains re-employment in the sector. In this circumstance the repayment requirement imposes an

unfair and unreasonable restriction on the capacity of an employee to be re-employed in the sector.

The proposed clause also changes, to the detriment of any affected employee, the existing arrangements in relation to the method of determining the amount to be re-paid.

Extended Leave

The Association is opposed to any changes to the wording of the existing clause 3(2) of Schedule 3A of the *PSEMA*. The proposed wording will have the effect of excluding temporary employees from the benefit of this clause. The proposed wording represents a diminution of the entitlement and is as a consequence, contrary to the explicit undertakings provided by the Government that the extended leave entitlement would remain unchanged.

DETAILED COMMENTARY

Please find attached a detailed clause-by-clause commentary in relation to the proposed drafts for your consideration.

It would be appreciated if you could provide confirmation of the proposed timeframe for the release of additional guidance, policies and transitional regulations so that the Association is able to prepare appropriate feedback in relation to these further documents.

Yours faithfully

A handwritten signature in black ink that reads "A Gardiner". The signature is written in a cursive, flowing style.

Anne Gardiner
General Secretary

14 January 2014

Attach.