AN OVERVIEW OF THE NATIONAL INDUSTRIAL RELATIONS SYSTEM AND THE ROLE OF THE OFFICE OF THE COMMISSIONER FOR PUBLIC EMPLOYMENT

PREPARED BY THE OFFICE OF THE COMMISSIONER FOR PUBLIC EMPLOYMENT

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Introduction

This paper will provide a brief overview of the Australian industrial relations system, especially as it affects the Northern Territory Public Sector (NTPS). The paper will also explain the legislative basis for the establishment of the NTPS and the role of the Commissioner for Public Employment.

The Australian Industrial Relations System

As part of the overview of the Australian industrial relations system the paper will trace its constitutional basis, the principal legislation—the *Fair Work Act 2009*—other employment-related, Commonwealth legislation, the main parties in the industrial relations system and the main industrial relations processes.

The Constitutional Basis

In order to understand the Australian industrial relations system it is important to recognise the fundamental role played by the Constitution, the *Commonwealth of Australia Constitution Act* (Creighton and Stewart, 2005: 84). As Creighton and Stewart (2005: 84) point out, the Constitution is both the source of power for the Australian industrial relations system and the source of significant, constitutional litigation throughout the 20th Century and the early years of the current century, despite the fact that when it commenced in 1901, apart from one small subsection, it had nothing to say about industrial relations (Stewart, 2009: 20).

Sub-section 51 (xxxv) is the only part of the Constitution that deals explicitly with industrial relations. It empowers the Commonwealth Parliament to make laws in relation to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’.

Creighton and Stewart (2005: 84—85) explain that this wording limits the Commonwealth Parliament’s ability to legislate directly in relation to an industrial dispute or employment generally. Its use of the adjective ‘industrial’ means that the Commonwealth Parliament is also restricted to use this power in relation to matters that are industrial in nature. The question of whether a dispute was industrial in nature was the subject of important High Court cases during the course of the 20th Century.

Another limitation of sub-section 51 (xxxv) of the Constitution is the restriction of the power to interstate disputes. This was the result of a last minute compromise that was a consequence of some bitter, trans-colonial disputes in the 1890s (Bray et al, 2005: 102; Stewart, 2009: 20).

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1 Two cases that dealt with the question of ‘industry’ were *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; and *Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association* (1908) 6 CLR 309 at 333.
Until the last 20 years of the 20th Century, the Australian industrial relations system was dominated by a centralised, arbitral system. The federal industrial tribunal\(^2\) would conciliate and arbitrate disputes between trade unions and employers. These were generally on an industry basis and ensured consistency of wages and conditions within an industry. The federal industrial relations tribunal would hand down its decisions in instruments known as awards.

As well as the federal industrial relations tribunal, each State\(^3\) had its own industrial tribunal that dealt with the broad spectrum of industrial relations matters. As will be discussed below, the Northern Territory did not have its own industrial tribunal, apart from the arbitral tribunals dealing with police and prison officers.

Since 1993, Commonwealth governments have been relying on other heads of power in the Constitution to legislate in relation to industrial relations (Stewart, 2009: 22). These have included the external affairs power of sub-section 51 (xxix) to introduce parental leave provisions and unfair dismissal rights, the corporations power of sub-section 51 (xx) to introduce statutory individual contracts (called Australian workplace agreements or AWAs); and statutory minimal conditions of employment, which are called national employment standards. Through a series of decisions, the High Court has upheld the right of the Commonwealth Parliament to extend its legislative powers through the use of other heads of power in the Constitution. The most recent case confirming this trend was the *Work Choices Case*\(^4\) in 2006.

**The Fair Work Act 2009**

In 2009, the Commonwealth Parliament repealed the existing industrial relations law, the *Workplace Relations Act 1996* and replaced it with a new principal industrial relations statute called the *Fair Work Act 2009* (‘the FW Act’). This section of the paper will summarise the main features of the FW Act.

Like its immediate predecessor, the FW Act establishes statutory minimal conditions of employment. These are called national employment standards and the cover the following provisions:

- maximum weekly hours;

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\(^2\) The federal industrial tribunal had a number of different names. It was originally called the Court of Conciliation and Arbitration, but as consequence of the Boilermaker decision in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529 the judicial and tribunal functions were separated and the tribunal became the Conciliation and Arbitration Commission. With the *Industrial Relations Act 1988*, the tribunal became the Australian Industrial Relations Commission. Under the *Fair Work Act 2009*, the tribunal became Fair Work Australia.

\(^3\) Under the Kennett Government, Victoria referred its industrial relations powers to the Commonwealth and abolished its state industrial tribunal. Apart from Western Australia, the States have referred their industrial relations powers over the private sector to the Commonwealth. They have retained their state industrial relations commissions for the settlement of disputes involving the public sector and local government.

- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal leave (which covers paid personal leave, unpaid carer’s leave and compassionate leave);
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- the fair work information statement (which is formal advice that employers are required to provide to employees about their industrial rights and other matters).

The national employment standards apply to all national system employees (including high income earners).

As well as the national employment standards, the FW Act provides for modern awards. These are awards that apply across an industry or occupation. From 1 January 2010, these modern awards will displace the older awards that were created by the federal industrial tribunal or its state equivalents\(^5\). Modern awards cover all national system employees except high income earners. There are 122 modern awards. In conjunction with the national employment standards, modern awards form part of the safety net regulating the conditions of employment of most employees in Australia.

In addition to national employment standards and modern awards, the FW Act also provides for a system of collective bargaining at the level of the individual enterprise. Unlike its predecessor the Workplace Relations Act 1996, which privileged AWAs over collective agreements, the FW Act has abolished AWAs and reasserted the primacy of collective agreements.

Under the FW Act collective agreements are called enterprise agreements. The FW Act sets out the rules that must be followed in relation to bargaining for enterprise agreements and the matters that must be included and excluded from them. Although collective bargaining occurs between employers and employees, the FW Act re-establishes an active role for trade unions, after their ability to function in Australian workplaces had been restricted by the Workplace Relations Act 1996. The FW Act also empowers Fair Work Australia—the federal industrial tribunal—to assist the bargaining parties or to arbitrate disputes over the bargaining process, if necessary.

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\(^5\) The awards covering the conditions of employment of NTPS employees have been quarantined from the modern award process. They will continue in operation until 1 January 2014, when they will be either cease or be displaced by a modern enterprise award.
As well as enhancing Fair Work Australia’s ability to assist with the collective bargaining process, the FW Act empowers it to settle other matters such as

- setting minimum wages;
- making workplace determinations (which are made either in relation to low paid employees or in cases in which Fair Work Australia has terminated industrial action associated with collective bargaining);
- equal remuneration;
- transfer of business;
- unfair dismissal;
- industrial action;
- right of entry (which applies to the access of trade union officials to workplaces); and
- dispute settlement.

**Other Commonwealth Employment-Related Legislation**

There are 5 Commonwealth statutes that prohibit discrimination in the employment relationship:

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*;
- *Racial Discrimination Act 1975*; and

The *Age Discrimination Act 2004* protects younger and older workers. It does not apply to matters such as youth wages or superannuation (Australian Human Rights Commission, 2007). This act makes it unlawful for an employer or ‘a person acting or purporting to act on behalf of an employer to discriminate against a person on the grounds of the other person’s age’ (ss 18 (1)). It prevents the subjection of a person to ‘any other detriment’ or ‘denying …or limiting the employee’s access to opportunities for promotion, transfer or training or any other benefits associated with employment’ (ss 18 (2)). Amongst other things the act exempts employers from unlawful discrimination if the discrimination is based on the inherent requirements of the job (ss 18 (4)).

The *Disability Discrimination Act 1992* prohibits discrimination in the workplace on grounds of ‘physical, intellectual, psychiatric, sensory, neurological, learning disabilities, physical disfigurement, illnesses or diseases that affect thought processes, perceptions of reality, emotions or judgement or results in disturbed behaviours’ or the
presence of organisms within the body such as the HIV virus (Australian Human Rights Commission, 2007). This act does not make it unlawful to discriminate in relation to the management of infectious diseases to ‘protect public health’ (s 48) or to pay wages based on an employee’s assessed capacity if this is done under the statutory authority of a fair work instrument (s 47).

The Human Rights and Equal Opportunity Commission Act 1986 empowers the Australian Human Rights Commission (AHRC) to investigate or not to investigate a complaint alleging a breach of a discrimination law, including employment. If as a consequence of that investigation, the AHRC forms the view that there has been a breach of a discrimination law, it is empowered to conciliate a settlement between the parties. If this fails, the AHRC prepares a report for the Attorney-General, which may include recommendations for further action (Australian Human Rights Commission, 2007).

The Racial Discrimination Act 1975 prohibits unlawful discrimination on the grounds of ‘race, colour, descent or national or ethnic origin’ (Australian Human Rights Commission, 2007). This act also contains an express vicarious liability provision, which makes employers liable for any unlawful discrimination committed by employees or agents in connection with their duties, unless employers demonstrate that they took all reasonable steps to prevent the discriminatory act (s 18E).

The Sex Discrimination Act 1984 prohibits unlawful discrimination on the grounds of sex, marital status, pregnancy or dismissal on the grounds of family responsibility (Australian Human Rights Commission, 2007). The act also prohibits sexual harassment (s 28A—s 28L). It also has an express vicarious liability provision (s 106).

The Industrial Relations Parties

The principal parties in industrial relations are employers and employees. Industrial relations as a field of study examines the regulation of the employment relationship. At times the employment relationship can be conflictive, when the needs or interests of one party are opposed to those of the other party. At other times the employment relationship can be collaborative in that both parties work together for their mutual interests (Bray et al, 2005).

Most scholars (Bray et al 2005) accept that as well as employers and employees, there are also three other parties in the industrial relations system: the state, employee organisations, and employer organisations.

The State

The state has a three-fold role in the industrial relations system. Firstly, it is the legislator with responsibility for introducing laws to establish the system such as the FW Act, anti-discrimination legislation and workers’ compensation and health and safety legislation. Secondly, it is also the regulator. In Australia, it regulates the industrial
relations system through the courts, tribunals and inspectorates (such as the Fair Work Ombudsman or NT WorkSafe). Thirdly, the state is also a major employer⁶.

**Employee Organisations**

Most employee organisations are called unions, but some call themselves associations or federations. Employee organisations must be registered in accordance with the *Fair Work (Registered Organisations) Act 2009*. Under the FW Act, trade unions have certain rights in relation to safeguarding their members’ industrial interests. These include rights to enter premises to investigate suspected breaches of the FW Act; awards or enterprise agreements that relate to or affect a worker on the premises, whose interests the organisation is entitled to represent. The main trade unions recognised in the Northern Territory Public Sector are the:

- Community and Public Sector Union (CPSU);
- United Voice (UV);
- Australian Manufacturing Workers Union (AMWU);
- Australian Nursing Federation (ANF);
- Australian Education Union (AEU);
- Association of Professional Scientists and Managers of Australia (APESMA);
- Communications, Electrical and Plumbing Union (CEPU);
- Australian Salaried Medical Officers Federation (ASMOF);
- Transport Workers Union (TWU);
- Maritime Union of Australia (MUA);
- Australian Maritime Officers Union (AMOU); and
- Northern Territory Police Association (NTPA).

Many, but not all, of these employee organisations belong to two peak organisations: the Northern Territory Trades and Labour Council, which is known as UnionsNT and through their national bodies, the Australian Council of Trade Unions (‘the ACTU’).

The ACTU plays a critical role in relation to major test cases, national wage cases and recently, the award modernisation process. As well, it plays a role when unions disagree with each other about their representational rights in relation to particular groups of employees. In the past, these disputes used to be called demarcation disputes.

**Employer Organisations**

Employer organisations represent the interests of major groups of employers. In the past, under the centralised arbitral system, employer organisations were active partici-

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⁶ In May 2012, there were 704,800 people employed in public administration and safety (Australian Bureau of Statistics 2012).
pants in industrial processes. Although they can still represent employer groups in Fair Work Australia, their role has increasingly become one of lobbying government and advocating for the interests of employers. Two employer organisations operating in the Northern Territory are the:

- Chamber of Commerce NT; and
- Territory Construction Association.

Although the Northern Territory Government and the Office of the Commissioner for Public Employment are not members of any employer organisations, it is a signatory to an inter-governmental agreement that ensures that it is part of a consultation process with the Commonwealth and other jurisdictions about any proposed changes to the national industrial relations system.

**The Main Industrial Relations Processes**

There are two broad industrial relations processes. The first process involves the regulation of the employment relationship, in which the basic rules such as salary and conditions are set down. Bray and Waring (2006: p. 1) suggest that there are four sub-processes regulating the employment relationship in Australia:

- state regulation (either through legislation or modern awards);
- collective bargaining;
- individual, common law contracts; or
- the direct exercise of managerial prerogative.

A number of these principal means could apply to a particular employment relationship at any one time. For example, an executive contract officer has employment conditions that are both the product of state regulation (the *Fair Work Act 2009* and Determination 13 of 2011) and a common law contract of employment. The employment relationship of a professional officer working in the Department of Health is covered by state regulation (the *Fair Work Act 2009*, the *Public Sector Employment and Management Act* and its subordinate and delegated legislation) and the current collective agreement. For many workers outside the public sector or industries that are well unionised, the main means of regulating the employment relationship would be through state regulation and managerial prerogative (especially in relation to wages and conditions above the statutory minima).

The second major process in industrial relations relates to dispute resolution. Disputes in one form or another are an inherent aspect of the employment relationship (Bray et al, 2005). The *Fair Work Act 2009*, modern awards and enterprise agree-
ments\textsuperscript{7} set out the mechanisms for settling disputes. Fair Work Australia\textsuperscript{8} or others\textsuperscript{9} can be involved in assisting the parties to resolve their dispute.

Apart from those associated with collective bargaining, most disputes in the Northern Territory Public Sector relate to the application of agreements or other instruments regulating employees’ terms and conditions of employment. Occasionally these disputes are resolved with the assistance of Fair Work Australia, but the preferred method of resolving disputes is through direct negotiation between the parties. Often, the Office of the Commissioner for Public Employment becomes involved in settlement of disputes, especially if they cannot be settled between the agency, the employee or employees or their union or unions.

The Northern Territory

This part of the paper will explain the interaction of the national, industrial relations system and the Northern Territory. Firstly it will deal with the constitutional aspects of the industrial relations system in the Northern Territory through a brief discussion of the Northern Territory (Self-Government) Act 1978. Then it will outline the remaining private sector employment-related legislation in the Northern Territory. This will be followed an outline of public sector legislation in the Northern Territory and a description of the role of the Office of the Commissioner for Public Employment.

The Northern Territory (Self-Government) Act 1978

The Northern Territory (Self-Government) Act 1978 establishes the NT as ‘a body politic under the Crown’ (s. 5) because the Commonwealth Parliament considered ‘it desirable … to confer self-government on the Territory, and for that purpose to provide … for the establishment of separate political, representative and administrative institutions in the Territory and to give the Territory control over its own Treasury’ (preamble). There were limits, however, to the sovereign power of the Northern Territory, specifically in relation to industrial relations powers.

Section 53 of the Northern Territory (Self-Government) Act 1978 sets out the industrial relations powers of the NT. It does this by limiting the application of the Fair Work Act 2009 in the NT. Firstly, it says that the Fair Work Act 2009 will not apply in relation to tribunals that had been established in the NT before 1978. This results in the retention of arbitral tribunals that regulate the employment conditions of police and prison officers. Secondly, it provides the power to make laws establishing a Northern Territory Public Sector and providing for the Commissioner for Public Employment to make determinations that fix the terms and conditions of employment of public sector employees, but not to the extent that these laws seek to confer on any

\textsuperscript{7} The Fair Work Act 2009 requires enterprise agreements to have dispute resolution clauses. If an agreement does not have a clause then the legislation applies a model dispute resolution clause that can be found in the Fair Work Regulations 2009.

\textsuperscript{8} Section 739 Fair Work Act 2009

\textsuperscript{9} Section 740 Fair Work Act 2009
court, tribunal, board, body, person or other authority any power in relation to the hearing and determining of disputes, claims or matters relating to terms and conditions of employment.’ Essentially this means that the NT cannot establish its own industrial relations system such as those that exist federally through the *Fair Work Act 2009*. This power is used to enact laws such as the *Long Service Leave Act*.

**Private Sector Employment-Related Northern Territory Legislation**

The *Fair Work Act 2009*\(^\text{10}\) has limited the Northern Territory’s power to legislate over private sector employment matters. Current and enforceable private sector employment related legislation in the Northern Territory is listed in table 1 below.

**Table 1 Current and Enforceable NT Private Sector Employment –Related Legislation**

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Administering Agency</th>
<th>Main Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Long Service Leave Act</em></td>
<td>Office of the Commissioner for Public Employment</td>
<td>Provides for long service leave after 10 years of continuous service with a Northern Territory employer in those circumstances in which an employee does not have an entitlement to long service leave in other industrial instruments.</td>
</tr>
<tr>
<td><em>Public Holidays Act</em></td>
<td>Office of the Commissioner for Public Employment</td>
<td>Establishes public holidays to be observed in the Northern Territory and empowers the Minister for Public Employment to gazette additional public holidays.</td>
</tr>
<tr>
<td><em>Construction Industry Long Service Leave and Benefits Act</em></td>
<td>Department of Lands and Planning</td>
<td>Establishes a portable long service leave scheme for employees working in the construction industry in the Northern Territory.</td>
</tr>
</tbody>
</table>

\(^\text{10}\) See section 26 of the *Fair Work Act 2009*
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Administering Agency</th>
<th>Main Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work Health and Safety (National Uniform Legislation) Act 2011</td>
<td>Department of Justice</td>
<td>Regulates occupational health and safety in all Northern Territory workplaces</td>
</tr>
<tr>
<td>Workers’ Rehabilitation and Compensation Act</td>
<td>Department of Justice</td>
<td>Regulates the rehabilitation and compensation of workers who are injured in the course of their employment.</td>
</tr>
<tr>
<td>Anti-Discrimination Act</td>
<td>Department of Justice</td>
<td>Amongst other matters this act has the object of eliminating discrimination in the area of work.</td>
</tr>
</tbody>
</table>

The Work Health and Safety (National Uniform Legislation) Act (2011) and the Workers’ Rehabilitation and Compensation Act apply to all employees in the Northern Territory including those in the Northern Territory Public Sector.

**Public Sector Employment-Related Northern Territory Legislation**

As discussed above, the Northern Territory Legislative Assembly has the power to enact legislation that deals with public sector employment. Table 2 sets out the main laws relating to public sector employment and to employment in entities relating to the Northern Territory of Australia.\(^\text{11}\)

**Table 2 Northern Territory Public Sector Employment-Related Legislation**

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Administering Agency</th>
<th>Main Provisions</th>
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</thead>
</table>
| Public Sector Employment and Management Act      | Office of the Commissioner for Public Employment | Establishes the Northern Territory Public Sector and creates the position of Commissioner for Public Employment. The Act also provides for subordi-

\(^{11}\) Not all persons employed by the Northern Territory of Australia are employed in the Northern Territory Public Sector, which is a body established under the Public Sector Employment and Management Act.
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Administering Agency</th>
<th>Main Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>nate and delegated legislation that regulate the administration of the Northern Territory Public Sector and by-laws and determinations affecting the terms and conditions of employment of persons employed in it.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Police Administration Act (Part III)</td>
<td>Office of the Commissioner for Public Employment</td>
<td>Part III of the act regulates the terms and conditions of employment for persons working in the NT Police through the establishment of the Police Arbitral Tribunal with its power to issue determinations. It also provides for the making of consent agreements covering terms and conditions of employment for police officers.</td>
</tr>
<tr>
<td>Prisons (Arbitral Tribunal) Act</td>
<td>Office of the Commissioner for Public Employment</td>
<td>This act establishes the Prisons’ Arbitral Tribunal, which has the power to hear and determine the conditions of service of prison officers.</td>
</tr>
<tr>
<td>Public Employment Mobility Act</td>
<td>Office of the Commissioner for Public Employment</td>
<td>This act provides for mobility between certain areas of public employment within the Territory, without loss of accrued conditions of employment.</td>
</tr>
<tr>
<td>Public Sector Employment and Management Act (Transition and Savings) Act</td>
<td>Office of the Commissioner for Public Employment</td>
<td>This is a transition act that provides for the continuation of certain offices and agencies following the enactment of the Public Sector Employment and Man-</td>
</tr>
<tr>
<td>Legislation</td>
<td>Administering Agency</td>
<td>Main Provisions</td>
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</tr>
<tr>
<td><em>Public Sector Employment (Interim Arrangements) Act</em></td>
<td>Office of the Commissioner for Public Employment</td>
<td>This act provides for the establishment of executive contracts of employment.</td>
</tr>
<tr>
<td><em>Superannuation Act</em></td>
<td>Northern Territory Treasury</td>
<td>This act provides for the administration of the NTG superannuation scheme, which has been closed. It also provides for the administration of the NTG death and disability scheme.</td>
</tr>
</tbody>
</table>

**The Role of the Office of the Commissioner for Public Employment**

Apart from the Commissioner’s principal function as the statutory employer of the Northern Territory Public Sector, the Office of the Commissioner for Public Employment exercises a number of other functions, including:

- acting as the labour inspectorate in relation to compliance with the *Long Service Leave Act*;
- administering the *Public Holidays Act*;
- providing secretariat support for the police and prisons arbitral tribunals;
- acting as the Northern Territory respondent to the Commonwealth in relation to Australia’s compliance with its obligations to the International Labour Organization; and
- providing Northern Territory Public Sector labour force data (including statistics about industrial disputes) to the Australian Bureau of Statistics.

**Conclusion**

This reference paper has provided a brief overview of the Australian industrial relations system, especially as it affects the Northern Territory Public Sector (NTPS). It has also explained the legislative basis for the establishment of the NTPS and the role of the Commissioner for Public Employment.

Additional information about the Australian industrial relations system or the role of the Office of the Commissioner for Public Employment can be obtained from the Em-
ployee Relations Division which can be contacted on 08 89994282 or via email at enquiries.ocpe@nt.gov.au.

References


