Public Sector Commission

GOVERNMENT OF WESTERN AUSTRALIA

# Statutory review of redeployment and redundancy

Part 6 of the *Public Sector Management Act 1994*

October 2024
PSC24042060

# Introduction

The review of Part 6 of the *Public Sector Management Act 1994* (PSM Act) deals with the redeployment and redundancy of public sector employees. It is timely to consider this given the unprecedented amount of change that has taken place across the public sector over recent years.[1]

Stakeholder feedback on redeployment and redundancy processes informed this review, as well as consideration of changes introduced by the *Workforce Reform Act 2014* and a previous Ministerial Review.

# Executive Summary

Employers are responsible for managing their surplus employees and the redeployment and redundancy framework should ensure this happens fairly and respectfully, prioritising ongoing employment and bringing employment to an end only when all other avenues to secure alternative work have been exhausted.

Stakeholders raised several issues with the framework, much of which centres around registrable and registered employees, the 2 categories of surplus employees. Stakeholders find the dual categories and the steps and processes involved unnecessarily complex, take too long, have many notification points, and are difficult to navigate.

Without clear timeframes, employees can remain in an agency indefinitely without an ongoing job despite being surplus to its needs. As at 19 January 2024, 232 employees were registrable, and 120 have been waiting to be placed in their agency for more than 24 months, and of these 30 employees have been waiting for 5 years or longer[2]. For employees, this state of uncertainty brings greater risk to employers of more highly stressed and lower motivated staff with a negative impact on productivity and performance.

The review recommends moving from the dual categories to a single definition of surplus employee that has defined timeframes. This will also simplify notification requirements for the surplus employee, reduce complexity and make it easier for employees and employers to navigate through the framework.

Of the 5,970 employees made registrable between 1 May 2015 and 30 June 2023, only 634 registrable and 33 registered employees were successfully redeployed into ongoing jobs. 2,939 received a voluntary severance, and only 38 received an involuntary severance. Agencies have identified the remaining 2,326 surplus employees as ‘inactive’ in the Recruitment Advertising Management System (RAMS) and are no longer registrable employees. Agencies are not required to report the reasons for the change of status to the Public Sector Commission. The list of available reasons in RAMS are:

- retired

[1] Price Waterhouse Coopers, *Workforce Planning the Public Sector: Balancing capability and affordability*, 2018.
[2] RAMS report extracted 19 January 2024

- resigned
- paid leave
- leave without pay
- workers' compensation
- placed
- promoted
- training
- withdrawn
- deceased
- other.

Without rigorous case management surplus employees are not being placed in ongoing jobs and voluntary severance becomes the default. In either situation there is an unnecessary negative impact on staff and a cost to the employer.

The review recommends case management needs to be provided to all employees after they are notified of their surplus status. The review also recommends making the definition around retraining clear to agencies, and that it is an essential component of case management.

## Terms of reference

The Premier (as Minister for Public Sector Management) is required to review the operation and effectiveness of Part 6 of the PSM Act, which deals with the redeployment and redundancy of public sector employees.

The Premier asked the Public Sector Commission to undertake this review in accordance with the following terms of reference:

- Review Part 6 of the PSM Act, the Public Sector Management (Redeployment and Redundancy) Regulations 2014, and Commissioner's Instruction No. 12: Redeployment and Redundancy including:
    - definitions and other matters
    - consultation and notice requirements
    - redeployment (including registrable and registered stages)
    - retraining
    - voluntary severance (including individual exits and voluntary targeted separation schemes).
    - termination of employment (including involuntary severance)
    - transitioning employees due to privatisation and contracting out
    - re-employment restrictions review rights.

- The review is to recommend changes to simplify and improve redeployment and redundancy processes and outcomes with particular consideration given to
    - changes introduced by the *Workforce Reform Act 2014*
    - recommendations of the:

- final report of the Ministerial Review of the State Industrial Relations System (2018, Mark Ritter SC) regarding appeals to the Western Australian Industrial Relations Commission on redeployment and redundancy matters
- Peak Consultative Forum Review of Public Sector Redeployment and Redundancy Processes (December 2020) conducted in accordance with the Public Service and Government Officers CSA General Agreement 2017.

## Advisory Group

The Commission established an advisory group to assist with the review comprising:

- Ms Sharyn O'Neill PSM, Public Sector Commissioner
- Mr Owen Whittle, Secretary UnionsWA
- Ms Rikki Hendon, Branch Secretary Community and Public Sector Union/Civil Service Association of WA
- Ms Rebecca Brown, Director General, Department of Jobs, Tourism, Science and Innovation
- Ms Jodi Cant, Director General, Department of Finance.

The advisory group met on several occasions during the review and provided further information out of session as required. The respective expertise and experience of members was highly valued and assisted in shaping the review's findings and recommendations.

The Commission thanks the advisory group members for their assistance.

## Methodology

On 12 July 2021, the Commission invited all public sector unions and organisations to make submissions to the review. Stakeholders were provided a copy of the Statutory Review of Redeployment and Redundancy: Consultation Paper developed by the Commission. The consultation paper identified 10 issues:

- Complex framework
- Limited mobility for registrable employees
- Surplus employees managed outside framework
- 'Pay' and 'continuous service' for payment calculations unclear
- Part time employees negatively impacted by severance formula
- Severance recipients not restricted from engaging contracts for service
- Few employees redeployed
- Limited appeal rights for involuntary termination
- Retraining opportunities unclear
- Case management not mandatory for registrable employees

Feedback was sought as to whether stakeholders:

- agreed with key issues with the framework
- had other matters they would like to see addressed
- had suggestions for change.

The Commission received 28 written submissions, including 3 from unions, 23 from public sector organisations and 2 from employees. A list of public sector agencies and unions that provided written submissions is provided at Appendix 1.

This report synthesises the 10 issues from the consultation paper into 8 key discussion points. Stakeholder feedback around the topic 'Limited mobility for registrable employees' has been incorporated into the 'Complex framework' discussion as it largely related to the same issues raised in this section. The stakeholder feedback relating to 'Surplus employees managed outside the framework' has not been included in this report. This issue explored situations where agencies proactively choose to resolve situations involving employees who may otherwise become formally surplus. These situations do not meet the conditions for access to the framework and the review makes no recommendations on this section.

# Overview of the framework

## Public Sector Management Act 1994 (Part 6)

Part 6 of the PSM Act establishes the statutory basis for dealing with redeployment and redundancy and enables related regulations to be made. Part 6 also establishes rights for some matters to be referred to the Western Australian Industrial Relations Commission.

Following amendments passed in the *Workforce Reform Act 2014*, the PSM Act provides the capacity to implement redeployment arrangements that may ultimately end with the involuntary termination of employees who are surplus to an agency's requirements or whose office, post or position has been abolished.

## Public Sector Management (Redeployment and Redundancy) Regulations 2014

The regulations came into effect on 1 May 2015 replacing the Public Sector Management (Redeployment and Redundancy) Regulations 1994.

The regulations apply to all public sector employees although parts 2 to 6 do not apply to:

- executive officers, including those to which compensation arrangements apply under section 59 of the PSM Act
- ministerial officers
- casual and seasonal employees
- employees retired on the grounds of ill health, or whose employment is terminated due to substandard performance or disciplinary reasons.

The main aspects of the regulations are outlined below.

| Subject | What the regulations do |
|---|---|
| Registrable employees | • Enable an employer, in accordance with Commissioner's Instruction 12, to determine an employee is registrable.<br>• Set consultation and notification requirements for employees who are or may become registrable.<br>• Enable a registrable employee to be transferred to another position at the same level in their department or organisation.<br>• Enable a registrable employee to be offered a voluntary severance where they cannot be transferred within their agency. |
| Voluntary severance | • Detail the process and payments, benefits and entitlements due when offering voluntary severances.<br>• Enable the Minister for Public Sector Management to approve targeted voluntary separation schemes for which specified employees can apply. |
| Registered employees | • Enable employers to register an employee in accordance with Commissioner's Instruction 12.<br>• Enable registered employees to access special leave, retraining and redeployment to suitable positions in the public sector where the maximum pay is between 80% and 110% of their normal pay.<br>• Empower the Public Sector Commissioner to direct a registered employee to accept an offer of suitable employment or direct an employer to offer employment to a registered employee. |
| Involuntary severance | • Provide for involuntary severance when a registered employee has not been redeployed to another job within 6 months.<br>• Detail the process and payments, benefits and entitlements due. |
| Privatisation and contracting out | • Establish the procedure and entitlements for employees leaving the public sector following privatisation and contracting out of functions. |
| Restrictions on re-employment | • Restrict subsequent employment in the WA public sector for certain time periods for people who have received severance payments. |

The regulations provide for a dual stage registration process to differentiate between a registrable and a registered employee.

The key differences between the 2 categories of surplus employees are summarised in Appendix 2.

## Commissioner's Instruction 12: Redeployment and Redundancy

This instruction sets out further procedural requirements which support the operation of Part 6 of the PSM Act and the regulations, including:

- transfer of registrable employees
- voluntary severances
- management and support of registered employees
- suspension and revocation of registration periods
- directions to accept or offer employment
- provision of information to the Commissioner
- priority access to vacancies for registered employees.

Redeployment and Redundancy Guidelines were developed by the Public Sector Commission in 2015 to assist employers apply the redeployment and redundancy provisions. The guidelines also set out the following underlying principles:

1. Involuntary termination of employment is a measure of last resort – internal placement, retraining, voluntary severance and redeployment remain preferred approaches where practicable.
2. A shared and ongoing responsibility exists between the employing authority and employee to assist employees in managing change activities and effect work transition outcomes.
3. Priority should be given to registrable and registered employees for placements where appropriate.

Industrial instruments also place obligations on employers and provide rights and entitlements to surplus employees. These interact significantly with the legislative framework for redeployment and redundancy. While outside the scope of this review, there is a risk that the benefits of any proposed statutory changes will be impacted if industrial provisions are not reviewed to ensure consistency.

# Operation and effectiveness of the PSM Act

## Purpose of Part 6

Part 6 of the PSM Act was introduced to provide a legislative basis for redeployment and redundancy. At the time, redeployment and redundancy entitlements were contained in industrial and administrative arrangements. These were seen as generally effective; however, the legislation was intended to eliminate inconsistencies in their application.[3]

Part 6 replaced the General Order made by the Industrial Relations Commission in 1989 dealing with redeployment and redundancy in the public sector.[4] That Order was criticised for impeding continuing employment where public services or agencies were privatised and for reinforcing the concept that public sector employment was permanent whether or not there was employment available.[5]

Commissioner Fielding, who reviewed the PSM Act in 1996, considered that the purpose of Part 6 was to provide redeployment and retraining as an alternative to voluntary or involuntary severance.[6] Involuntary severance was not included as an option in the original framework. Commissioner Fielding recommended that the scheme be re-examined with a view to including involuntary severance as an option of last resort. This was following submissions that the regulations were inconsistent with the obligation imposed by the PSM Act on chief executive officers to manage

[3] Second Reading Speech, Public Sector Management Bill 1993, Hon Richard Court MLA, Premier and Member for Nedlands, Hansard p 5026.
[4] Western Australian Government Employees Redeployment, Retraining and Redundancy General Order (1989) 69 WAIG 517.
[5] Report of the Independent Commission to Review Public Sector Finances (Vol 1) pages 201-203, (Vol 2) p 39.
[6] Review of the Public Sector Management Act 1994, Commissioner G L Fielding, 1996, p 166.

the deployment of personnel within their departments or organisations, that there were too many redeployees and that the scheme did not encourage promotion on merit.[7]

Involuntary severance was finally introduced through the *Workforce Reform Act 2014* amendments which came into effect on 1 July 2014. This was introduced to enable a more 'balanced' framework which,

> "on the one hand… respect(s) the interests of all employees concerned and treat(s) their situation with fairness and due process and, on the other, meet its responsibility to the broader community to manage the public sector workforce in the most efficient and cost-effective manner".[8]

The aim was to provide more flexible redeployment arrangements that may ultimately end with the involuntary severance of employees that are surplus to an agency's requirements or whose office, post or position has been abolished and cannot effectively be redeployed.[9] It was anticipated that the changes would only affect a very small number of public sector employees. The amendments were put forward to allow the application of involuntary severance as a means of last resort.[10] Western Australia was the last jurisdiction to introduce this mechanism.

At the same time, the PSM Act established rights of appeal to the Western Australian Industrial Relations Commission, rather than its constituent authorities, such as the Public Service Arbitrator or the Railways Classification Board to ensure all appeals were placed on a common footing. As was previously the case, any decision made under the regulations, up to the point of a decision to make a public sector employee involuntarily redundant, was subject to review by the Commission to the extent of determining whether or not the regulations had been fairly and properly applied. The Commission was not given the jurisdiction to reinstate or otherwise compensate the employee.[11]

With the exceptions stated above, the redeployment and redundancy framework applies to entire public sector, which comprises approximately 165,000 employees[12]. Between 1 May 2015 and 30 June 2023, 5,970 employees were made registrable for redeployment under the framework.[13] Over those 8 years, only 38 were made involuntarily redundant and 2,939 voluntary severances were accepted. A total of 634 registrable and 33 registered employees have been redeployed across the public sector during the period 1 May 2015 to 30 June 2023.[14]

A breakdown of the number of voluntary and involuntary severances is provided in the table below:

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[7] Ibid, p 167.
[8] Second Reading Speech, Workforce Reform Bill 2013, Hon Colin Barnet MLA, Premier and Member for Cottesloe, Hansard p 5369c.
[9] *Workforce Reform Bill 2013*, Explanatory Memorandum 2013, p 1.
[10] Hon Helen Morton MLC, Minister for Mental Health, Hansard, 28 November 2013, p 6854.
[11] Ibid, p 5370b.
[12] Figure as at June 2023, Quarterly Workforce Report
[13] RAMS data extracted 19 January 24
[14] RAMS report extracted 19 January 2024

| Number of employees exited by severance type | 2015 /16 | 2016 /17 | 2017 /18 | 2018 /19 | 2019 /20 | 2020 /21 | 2021 /22 | 2022 /23 | Total |
|---|---|---|---|---|---|---|---|---|---|
| Voluntary severance[15] | 1,241 | 748 | 56 | 233 | 200 | 303 | 79 | 79 | 2,939 |
| Involuntary severance | 10 | 9 | 6 | nil | 1 | nil | 3 | 9 | 38 |

Based on the very small numbers of employees that left with an involuntary severance since the *Workforce Reform Act 2014* amendments became operational, it appears that it has been used only as a last resort as intended.

## Targeted separation schemes

In addition to the voluntary severance payments outlined above, the Minister for Public Sector Management may approve targeted separation schemes (TSS) under which employees are invited to apply for severance packages. Regulation 16 provides the Minister with the discretion to set the terms of each TSS, including the class of employees to which it applies, the period under which applications can be made, and the amount of the severance. This may exceed the 52 weeks' payment applied under normal voluntary severance arrangements.

The following targeted schemes have been approved since 2009:

| Scheme title | Operating period | Target severances/ funding | Actual severances | Total expenditure $million |
|---|---|---|---|---|
| 2009 Targeted Employment Separation Offer | 16 – 26 March 2009 | 500 | 469 | $47.75m |
| 2010 Targeted Employment Separation Offer | 2 Mar – 14 May 2010 | 300 | 333 | $32.75m |
| 2011 Targeted Employment Separation Offer | 24 Mar – 16 June 2011 | 400 | 336 | $33.87m |
| 2013 Enhanced Voluntary Separation Program | 13 Jun 2013 – 29 Nov 2013 | 1,200 | 1,112 | $149m |
| 2014 Targeted Voluntary Separation Scheme | 9 Oct – 30 Jan 2015 | 1,500 | 1,362 | $129.47m |

[15] Excluding voluntary severances via targeted separation schemes.

| Scheme title | Operating period | Target severances/ funding | Actual severances | Total expenditure $million |
|---|---|---|---|---|
| 2017 Voluntary Targeted Separation Scheme | 7 Sep 2017 – 30 June 2018 | 3,000 | 2,923[16] | $355.56m |
| Department of Justice VTSS 2021/22 | 11 Nov 2021 – 30 June 2022 | Corporate functions | 47 | $4.2m |
| 2022 Animal Resources Authority | 1 Jul 2022 – 30 June 2023 | $3.7m funding | 25 | $3.54m |
| **Total** | | | 6,607 | $756.12m |

# Issues identified with the framework

Below is an overview of stakeholder feedback on each of the 8 key issues, along with recommendations to improve the redeployment and redundancy framework.

## 1. Complex Framework

The current 3-stage model to manage surplus employees has notification and consultation requirements at each stage.

A diagram of the current process is provided at Appendix 3.

Feedback received during the Peak Consultative Forum Review indicated the notification processes under regulations 8 (that an employee may become a registrable employee) and 9 (that an employee is registrable) are cumbersome and impractical.[17] A survey of Community and Public Sector Union/Civil Service Association members who had experienced being made surplus found that 46% of recipients did not understand the process of becoming surplus.[18]

The current framework enables registered employees to be redeployed to suitable positions across the sector using the following options:

- referral and consideration of suitability to fill vacancies before they are advertised (under Commissioner's Instruction 12)
- placement into positions with different rates of pay to their substantive salary (between 80 – 110%), with salary maintenance for 6 months, if the new position is at a lower rate of pay.

Amendments to the Public Sector CSA General Agreement means that registrable employees must also be considered for a vacancy. In practice, agencies are required

[16] This figure includes actual severances approved under extensions to the scheme. This includes sworn Police officers (163), Department of Education (82) and Department of Communities as at 6 December 2021 (367).
[17] Peak Consultative Forum Review of Public Sector Redeployment and Redundancy Processes (2020), p 7
[18] Ibid, p 6

to post details of job vacancies (for positions of 6 months and more) on the Recruitment Advertising Management System (RAMS) and consider both registered and registrable employees referred to them before receiving 'clearance' from the Public Sector Commission to advertise. However, a key difference remains in that only registered employees can move to positions attracting different rates of pay and access to salary maintenance provisions.

Clauses modelled on the changes to the Public Sector CSA General Agreement outlined above continue to be included in all public sector industrial agreements as they fall due for renegotiation, and 36 of the existing 58 agreements now contain these requirements. This has led to different approaches across agencies and inequities between surplus employees across the public sector. This is understandable given the complexities of the redeployment and redundancy framework that involves the Act, Regulations, commissioner's instructions, industrial provisions and guidance material.

The Peak Consultative Forum Review suggested that employers may be less inclined to register employees as a result of the change to the General Agreement.[19] The Peak Consultative Forum Review recommended simplifying the redeployment phases and associated processes to increase the likelihood of employers using the framework and improve the experience of surplus employees.[20]

Stakeholder feedback to the Peak Consultative Forum Review indicated the main areas of complexity were:

- the 2 step notification process under regulations 8 and 9
- the distinction between registered and registrable and the interaction between the framework and industrial instruments.

Other comments included:

- the process is too lengthy, with too many notification points
- education and guidance material to assist agencies and employees requires improvement.

### Recommendations

The following recommendations address stakeholder's key concerns about the complexity of the current framework.

1.1 Replace 'registered' and 'registrable' categories with a single definition of surplus employee.

1.2 Simplify notification requirements to reduce complexity while ensuring individuals are consulted and informed.

1.3 The redeployment and redundancy framework to step out agency expectations for upfront workforce planning, employee consultation and retraining before involuntary severance.

1.4 Set a defined timeframe (of no more than 12 months) to promote a consistent and timely progression through the framework for all employees across the sector.

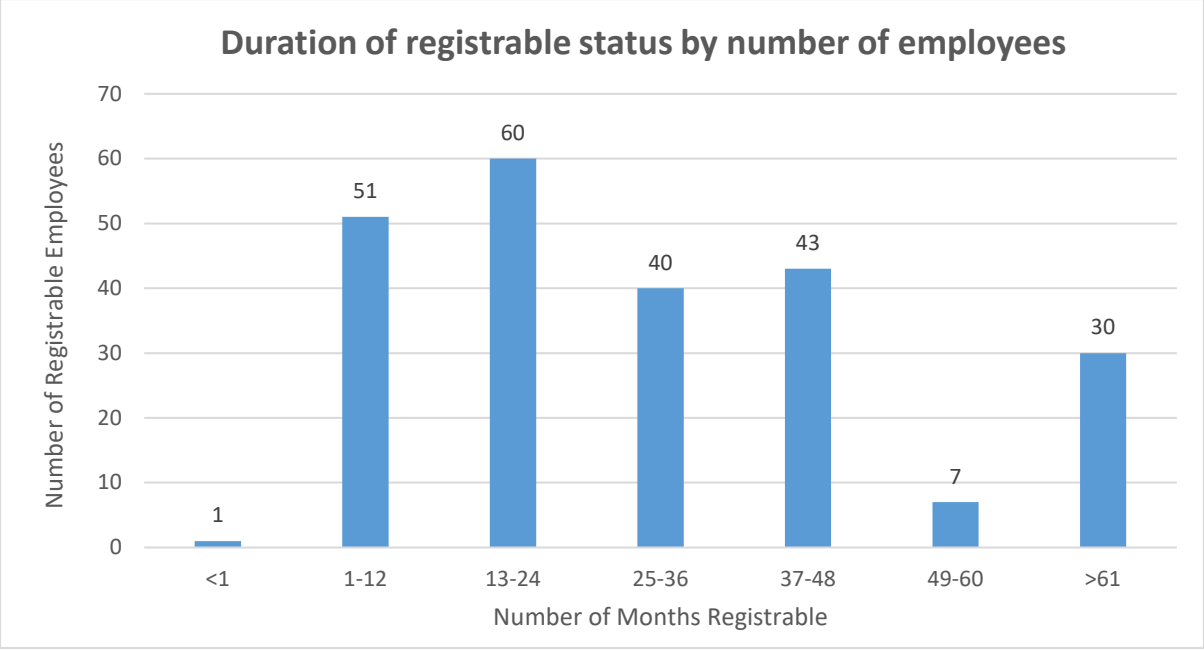
[19] Ibid, p 7
[20] Ibid, p 14

## 2 Few surplus employees redeployed

While not explicitly stated, the framework aims to promote redeployment of employees either internally or elsewhere in the sector. Despite this, only 11% of surplus employees have been permanently redeployed across the sector since the legislative changes took effect. Of the 5,970 surplus employees, 634 registrable and 33 registered employees have been redeployed across the public sector during the period 1 May 2015 to 30 June 2023.[21]

As at 19 January 2024, there were 232 registrable employees listed on RAMS.

The following graph summarises the length of time these 232 employees have been registrable (in months). Of note, 120 registrable employees have been waiting to be redeployed for more than 24 months.




Successful redeployment from one agency to another relies on the prospective employer assessing an employee's suitability for a job. This involves assessing things such as qualifications, skills, behaviours and where this may not match, their ability to retrain.

The capacity exists for the Public Sector Commissioner to direct:

- agencies to employ surplus employees
- surplus employees into a job.

This power to direct has been rarely used as it is not in the best interest of employees and prospective employers where it results in an unsuitable outcome.

During times of significant machinery of government change, the Commissioner has other powers that can be used to move staff from one agency to another without the need for them to be made surplus.

[21] RAMS report extracted 19 January 2024

The Peak Consultative Forum Review reported that employers prefer to use voluntary severance and targeted schemes rather than redeployment and involuntary severance and recommended the framework be refined to promote the redeployment of surplus employees wherever possible.[22]

### Consultation

While not explicitly stated, the framework aims to promote redeployment of employees either internally or elsewhere in the sector. Sixty eight percent of respondents in the consultation undertaken for the Peak Consultative Forum Review agreed that low redeployment numbers are a concern, suggesting that the framework is not placing redeployees in jobs across the sector.

Respondents to the consultation paper suggested some possible factors that may contribute to low redeployment numbers:

- registrable employees opt for voluntary severance over redeployment, either because of a personal preference or a lack of faith that there are genuine redeployment opportunities
- the perception that staff are made surplus due to performance issues
- hiring managers looking for an 'exact match'
- difficulty redeploying regionally based surplus employees.

Several agencies also said that considering the low likelihood of redeployment and the lengthy, cumbersome, and costly processes, redeployment was not currently a cost-effective option.

### Recommendations

2.1 Remove requirements on external agencies to place surplus staff on another agency, with this to be the responsibility of the initiating agency.

2.2 The Public Sector Commissioner only consider issuing directions where needed to facilitate significant structural change.

## 3 Retraining opportunities unclear

Regulation 20(1) enables an employer to arrange for a registered employee to be employed for retraining purposes inside or outside the public sector in a different position. This is 'on-the-job' training, distinct from attending a course or training, and is only available to registered employees.

Retraining conditions include:

[22] Peak Consultative Forum Review of Public Sector Redeployment and Redundancy Processes (2020), pp 15, 23

- all parties must agree to the retraining arrangement and the terms and conditions[23], which must be in writing and include provision for its termination[24]
- a registered employee cannot be employed for retraining purposes for a period that exceeds the employee's redeployment period[25]
- the original employer is required to bear all costs of the retraining arrangement, unless otherwise agreed by the parties.[26]

Despite the regulations contemplating employees being employed for retraining purposes, the Peak Consultative Forum Review identified a lack of clarity amongst stakeholders on what this entails. The report noted that:

> "Agency responses regarding what constitutes 'retraining' under the Framework varied considerably. Some referred to it as 'formal' training, assisting the redirection of an employee's career rather than job placement as defined in the Framework. Others observed that the retraining provisions cause confusion and set unrealistic expectations for surplus employees[27].

The Peak Consultative Forum Review recommended further education and guidance be provided to agencies on what constitutes retraining for the purposes of Regulation 20. The Peak Consultative Forum Review also commented that the framework may benefit from clarification of retraining arrangements.

Data is not currently collected regarding the level of retraining that occurs amongst registered employees across the sector. Given the relatively small number of registered employees, it is likely to be a low number. However, registrable employees do undertake 'placements' or 'secondments' from time to time which while not falling within 'retraining' for the purposes of Regulation 20, are similar.

### Consultation

Respondents to the consultation paper strongly supported the findings of the Peak Consultative Forum Review outlined above with 89% of respondents agreeing that there was a general lack of clarity concerning the retraining obligations.

The CPSU/CSA also observed confusion amongst agencies and employees differentiating between general "training" opportunities as distinct from formal "retraining" under the framework.

For the most part, agencies appear open to providing retraining opportunities where it is likely to lead to the permanent placement of surplus employees.

However, one agency commented that it did not see any formal need for retraining under the regulations to be necessary, noting that it was difficult to distinguish between these and temporary placements or secondments that were already available to train surplus employees.

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[23] Regulation 20(2)
[24] Commissioner's Instruction No. 12
[25] Regulation 20(3)
[26] Regulation 20(4).
[27] Peak Consultative Forum Review of Public Sector Redeployment and Redundancy Processes (2020). p 11

Another agency advised that redeployees should be given a greater understanding of the realistic expectations that placements could provide so that they were aware of the likelihood of ongoing employment or whether the placement was for the acquisition of skills only.

Other feedback indicated that financial constraints frequently limited the ability to provide adequate retraining options. Their experience also suggested that those referred for consideration for advertised vacancies had been provided very little retraining with the expectation being that formal retraining would occur when they secured a placement. Another agency commented that training was not consistent and depended on each agency's capacity and funding to support it.

Unions echoed the impact of financial considerations, noting that members frequently reported that disputes arose over who was responsible for the cost of training and placing employees into positions on a trial basis needs to be articulated. They noted that trial placements have been blocked based on agencies not wanting to carry the cost of training and wages while the trial occurred.

Guidance material

Many respondents were of the view that better definitions in guidance material would assist all stakeholders deliver more effective retraining outcomes.

### Recommendation

3.1 Make explicit that retraining is an integral case management activity.
3.2 Improve guidance material to confirm the retraining effort expected from agencies.

## 4 Case management not mandatory for registrable employees

Regulation 21 and Commissioner's Instruction 12 place a specific case management obligation on employing authorities to support registered employees throughout the period of redeployment. The Case Management Guidelines developed by the Public Sector Commission state that case management is expected to begin as soon as an employee is identified as a registrable employee. This reflects requirements in some industrial instruments.[28] Nevertheless it appears that case management for registrable employees is ad hoc and is detrimental to a person's employment prospects.

### Consultation

Most agencies and unions who responded to the review agreed that mandatory case management should be extended to registrable employees.

Comments included that:

- without case management employees may feel that they are left to their own devices when made registrable and the de-prioritisation of case management has led to ineffective processes

[28] For example, Public Sector CSA General Agreement 2019, clause 51.5

- early case management is a cost-effective solution that will result in a higher chance of a successful placement, reduce complaints and lodgement of appeals
- numerous agencies reported that they already case manage registrable employees, with some describing success with this approach.

In relation to whether this should be mandatory some agencies commented that:

- consideration needs to be given to the workload this may place on agencies with large numbers of registrable employees
- not enshrining mandatory case management for registrable employees enables flexibility in how the process is conducted.

The CPSU/CSA suggested that a case manager be assigned to every surplus employee at the point of becoming surplus.[29]

It is also acknowledged that the quality of case management needs to be addressed at the same time[30], along with greater clarity around related expectations, limitations, and processes. Separate to this review, the Commission is undertaking work to improve guidance material and training for case managers.

### Recommendation

4 Case management is provided to all surplus employees immediately upon notification of surplus status.

## 5 'Pay' and 'continuous service' for payment calculations unclear

The definition of pay in the regulations[31] is unclear. The definition determines the severance amount and other entitlements to incentive payments. For example, there is no explanation of how shift allowances are to be taken into account, which can lead to inconsistent application across agencies.

### Current definition

'Pay' is currently defined as the sum of the following:

a) the award rate of pay, excluding allowances, applicable to the substantive classification of the recipient of the pay or, if the recipient does not have a substantive classification, the rate of pay, excluding allowances, under his or her contact of employment
b) an allowance listed in subregulation (2)
c) a tally or piece rate.[32]

The following allowances are included in the definition through subregulation (2):

a) an allowance –
    i. that is always paid with the award rate of pay applicable to the substantive classification of the recipient of the pay or, where the recipient does not have a substantive classification, with the rate of pay under his or her contract of employment; and

[29] CSA Redeployment and Redundancy – Draft Model Process, 8.12.21
[30] Submission from Government Sector Labour Relations.
[31] Regulations 3, 13, 40.
[32] Regulation 3(1)

ii. the payment of which is not subject to any condition relating to the time, place or circumstances at or in which the recipient of the pay is employed or to any other condition;

b) an enterprise bargaining allowance;
c) an allowance for an employee being in charge of other employees;
d) any other allowance that the Commissioner has approved for the purposes of this subregulation.

### Need for amendment

The CPSU/CSA advised that members frequently report errors in their severance payments because of agencies incorrectly applying the formula and/or excluding allowances that are included under subregulation (2) above.

Agencies also identified the following issues with the current definition:

- confusion around interpreting pay and continuous service for payment calculations
- provisions for long-term acting arrangements are ambiguous and open to interpretation
- lack of clarity around how higher duty allowances are considered under the definition of pay.

Stakeholders had mixed views about whether shift allowances should be included in the definition for determining pay. For some workers the allowance recognises work done during unsociable hours and can constitute a regular part of an employee's role. As this allowance is currently not included to determine pay, some agencies believed shift employees were disadvantaged.

In contrast, another agency noted that shift work can vary due to the nature of rosters and is therefore not easily calculated. They also noted the potential for misuse through judicious shift selection. On this basis, the agency suggested excluding shift allowances from the definition of pay. Another agency noted that the base wage for waged employees does not reflect the employee's pay and suggested an average of penalties to accommodate this.

### Recommendation

5.1 Clarify the definition of pay to ensure agencies calculate the correct voluntary severance payment.

### Definition of 'continuous service'

The meaning of continuous service for redundancy payment calculation purposes is also unclear. Payments are calculated based on years of continuous service in the public sector. The meaning of continuous service is currently defined by reference to the *Wages Employees Long Service Leave General Order*.[33]

Applying this complex and outdated order, which was not established for this purpose, has led to interpretation difficulties. For example, a case tested in the Industrial Appeal Court[34] found that continuous service includes time served in the employment of the Commonwealth or other state public sector. This is contrary to

[33] WA Industrial Relations Commission (1986)
[34] [2020] WASCA 16

the long-standing interpretation accepted by central agencies that only service in the WA public sector is recognised.

### Recognising service from other jurisdictions

Comments from public sector unions and agencies regarding the definition of 'continuous service' included:

- there are practical issues relating to recognising prior service in another jurisdiction, for example, such service may not be accurately recorded by the employee or in the payroll system and it would be difficult to ensure employees don't get severance payments from 2 jurisdictions for the same period of service
- there are now different industrial definitions of 'continuous service' that apply in various scenarios for casuals with long service leave entitlements, further complicating the issue
- there is uncertainty as to how higher duties allowances impact the severance, leave and incentive components of payment.

Some stakeholders supported the recognition of service in other jurisdictions, for example, the CPSU/CSA's view is that continuous service should recognise public service in equivalent public jurisdictions. They contend that the portability of service in other jurisdictions in WA is likely to have a 'minimal detrimental impact on the cost base of redundancy as its application will be contained to a very small number of redundant employees' and that prospective employees from other jurisdictions should not be 'penalised' for seeking to continue to serve the community in WA.

It is difficult to quantify the number of staff that this may impact. However, the case in the Industrial Appeal Court illustrates that recognition of such service can involve significant sums. The case involved alternative potential payouts of $179 000 (recognising service external to the WA public sector) compared with $65 500 (WA public service only). The WA Government receives no compensation from other jurisdictions on the transition of their staff, the payment is more a recognition of prior service to the community wherever that may be or possibly a tool of attraction.

The following Australian jurisdictions enable years of prior service in other jurisdictions to be included as 'years of continuous service' when making redundancy payments to public sector staff:

| CTH | VIC | NSW | QLD | SA | TAS | NT | ACT |
|---|---|---|---|---|---|---|---|
| No | No | Yes | Yes – provided there is no break in service in excess of 12 months during which time the person did not work. | No | No | No | Yes |

### Additional feedback on the definition of 'continuous service'

Other suggestions from stakeholders included:

- align the definition with industrial relations frameworks
- remove the reference to the Long Service Leave General Order
- enable breaks in service to be considered on a case-by-case basis to allow incorporation of employment periods outside the public sector where work is still related to public sector, for example 12 months at a not-for-profit organisation whose work clearly aligns with the public sector. This may assist not-for-profit organisations to attract staff to deliver services in areas that are a priority for government.

The definition of 'continuous service' is used elsewhere in industrial instruments for some occupational groups in the public sector for the purposes of calculating long service leave entitlements. For example, School Education Act Employees' (Teachers and Administrators) General Agreement 2019, clause 7 defines 'continuous service' as service under an unbroken contract of employment subject to some exceptions. Similarly, the *Minimum Conditions of Employment Act 1993* (WA) defines 'continuous service' as:

> service under an unbroken contract of employment and includes any period of leave or absence authorised by the employer or by an employer-employee agreement, an award, a contract of employment or this Act.[35]

### Recommendation

5.2 Amend the definition of 'continuous service' in Regulation 3 to:
- only recognise service within the Western Australian Public Sector, as defined within the PSM Act, section 3.
- remove reference to Wages Employees Long Service Leave General Order ('the General Order') and insert a clear, standalone definition that aligns with other definitions of 'continuous service'.

## 6 Part time employees negatively impacted by severance formula

Regulation 13 currently provides for a standard[36] voluntary severance payment of 3 weeks' pay for each complete year of continuous service, up to a maximum of 52 weeks' pay (18 years' service).

To determine the weekly pay of an employee who works on a part time basis, the following formula is used:

A = B x C
Where: A = employee's weekly pay
B = employee's full time weekly pay
C = employee's average weekly hours expressed as a percentage of employee's potential full time weekly hours.

The following example demonstrates the intended and practical impact this formula has on the severance payment received by 2 employees on varying workload arrangements:

[35] Section 3
[36] Does not include targeted schemes approved by the Minister under Regulation 16.

1. Two employees have both worked a total of 7 years in positions classified at the same level, employee A full time and employee B part time at 0.6 FTE for the first 5 years with the last 2 worked at full time. Both receive a severance payment equal to 21 weeks, however employee A is paid at the full time rate while employee B receives only 71% of the full time amount.

### Consultation

Most of the respondents agreed that part time employees were negatively impacted by the current severance formula.

The Commissioner for Equal Opportunity (EO Commissioner) provided detailed commentary in this regard, noting that his agency had received complaints arguing the formula is discriminatory on the grounds of gender and/or family responsibility. He advised that, while the regulations do not meet the criteria for a successful complaint of direct or indirect discrimination under the *Equal Opportunity Act 1984*, he regards them as “arguably unfair”. The EO Commissioner recommended the calculation formula be changed to address this.

The EO Commissioner provided a hypothetical comparison of 2 employees considering severances, both of whom had worked full time in identical roles for the past 18 years (the length of service qualifying for the maximum 52 week payout). Employee A commenced service 18 years ago while employee B commenced service 40 years ago, working 2 days a week until 18 years ago after which the employee worked full time. The current formula provides employee A with the maximum 52 weeks at the full time rate. Employee B, while working for a combined total of almost 27 years, also received 52 weeks of severance pay, but is only paid at 56% of their full time rate.

The EO Commissioner’s comments were echoed in some other submissions. The CPSU/CSA noted that part time employees, particularly those who have worked part time for only a portion of their overall years of service, are negatively impacted by an inequitable severance payment formula. They noted that the formula has a disproportionate adverse impact on women who are overwhelmingly engaged in part time employment. One agency agreed, noting that the current calculation formula unfairly and disproportionately affected women and people with family responsibilities.

Another agency also considered the formula to be a significant contributor to the uptake of voluntary severance offers. They noted that despite women comprising 91% of their part time workforce, the agency's 2017/18 voluntary severance program only resulted in 11% of this demographic accepting a severance offer. They attributed this underrepresentation to the offer being of lower value to this cohort.

It is noted that the formula is consistent with how industrial entitlements (such as long-service leave, workers compensation and annual leave) are ordinarily calculated. One agency also recognised this point but noted that ideally, the formula would consider the average that an employee works over the period of their employment.

On a related matter, the EO Commissioner commented on the fairness of the re-employment restriction period following a severance payment for part time

employees. The Commissioner noted that while it was not raised as an issue in the consultation paper, it should also be addressed as a component of any amendments.

Complaints about the exclusion period are much rarer than complaints about the calculation method, but the fairness of the exclusion period is relevant for employees who worked part time irrespective of whether their total years of service is less or more than 17 years 4 months. The EO Commissioner proposed that the exclusion period should also be calculated on a pro-rata basis for part time employees.

### Consultation

Agencies suggested several alternatives to the current calculation, ranging from a flat payout calculated at current full time salary rates for all employees, to models suggesting that service include the last 18 years only. While these models are straightforward to administer, they do not recognise the circumstances of employees as they move from full time to part time arrangements and vice versa throughout their careers.

### Recommendation

6 Amend the severance payment calculation in Regulation 13 to reflect an employee's full time equivalent years of service with the following model:

- Full time equivalent years of service is actual total years of continuous service multiplied by the average weekly hours for the service of the employee, expressed as a fraction of the employee's potential full time weekly hours (e.g. an employee who has worked 18 years of full time and 2 days per week for 22 years, the full time equivalent service is 26.8 years).

While marginally higher cost than the current payment calculation, it provides the most accurate reflection of an employee's overall length of service and aligns with the calculation methods used by most Australian jurisdictions in calculating severance arrangements.

## 7 Severance recipients not restricted from engaging in contracts for service

The regulations currently prevent re-employment for a restriction period of former employees who receive voluntary severance payments.[37] This period is equal to the number of weeks the person received a severance payment unless they refund the payment. It does not include any periods associated with the person's leave component or incentive payment. The Public Sector Commissioner may also exempt a person from this requirement.

The Redeployment and Redundancy Guidelines advise agencies that this restriction period should also extend to former employees who wish to enter into contracts for service with public sector agencies where direct consultancy arrangements apply.

Most respondents to the consultation paper agreed that it was an issue that severance recipients are not restricted from immediately being engaged by agencies

[37] Regulations 17 and 36

under contracts for service, with no obligation to repay the severance amount or a proportion.

Several agencies commented that this occurs now, with one noting that severance recipients often reappear within a short period of time under temporary personnel (labour hire) arrangements, due to their knowledge of public sector requirements.

One agency has some concerns with making this part of the statutory framework, as it restricts an individual's ability to use their skills to find suitable employment during the exclusion period.

The CPSU/CSA commented that it is a "critical issue that both voluntary severance recipients and employees subject to involuntary redundancy are currently not restricted from engaging in contracts for service in the sector". They also noted that it acts as a disincentive to proper workforce planning prior to abolishing positions and creates a perverse incentive to outsource public sector work.

New South Wales, Victoria, Queensland, and South Australia all restrict former employees who have received severance or redundancy payments from subsequent engagement as both an employee and a consultant or contractor for a defined period. In some states extends to re-engagement via labour hire arrangement or through a company or partnership that provides the services of the former employee to the public sector entity.

**Restrictions on re-engagement of redundancy recipients**

| | WA | NT | CTH | QLD | VIC | NSW | SA | ACT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| **Employee** | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| **Contractor /Consultant** | | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| **Labour Hire** | | | | | ✓ | ✓ | ✓ | ✓ | ✓ |
| **Employee services through company/partnership** | | | | | | ✓ | ✓ | | ✓ |

Some jurisdictions enable exemptions. For example, in Victoria an agency head may approve earlier re-employment in extraordinary circumstances.[38]

### Recommendation

7.1 Ensure employees who receive a voluntary severance cannot be re-employed through contracting arrangements during the exclusion period, either directly or through a third party.

[38] Public Sector Industrial Relations Policies 2015, Government of Victoria, p 14.

## 8 Limited appeal rights for involuntary termination

Employees dealt with under the framework can appeal any decision made by their employer, up to the point of involuntary termination, to the WA Industrial Relations Commission (WAIRC). The WAIRC is confined to considering whether the employer fairly and properly applied the regulations. For example, a decision to register an employee for redeployment may be challenged on the grounds that the employee was not genuinely surplus to requirements.

Where an employee is the subject of an involuntary severance decision, a right of review to the WAIRC exists but is confined to whether the employee was paid the benefits they were entitled to.[39] The WAIRC has no jurisdiction to reinstate or otherwise compensate the employee.[40]

The Ritter Review recommended relevant sections of the PSM Act be repealed so an employee may refer to the WAIRC, as an industrial matter, a decision to terminate their employment under the regulations.[41] The Ritter Review also recommended that re-employment be included as a potential remedy as it would not be possible to reinstate a person to a position that has been abolished. Ritter envisaged a system where agencies continue structural change despite an unfair dismissal application being made.

### Consultation

57% of respondents supported the extension of appeal rights to the WAIRC for employees who are involuntarily terminated under the redeployment and redundancy framework. Comments included the following:

- The review of involuntary severance decisions should be more than an assessment of the accuracy of the severance amount paid. This would encourage evidence-based decision-making across the sector. This may promote agencies to make reasonable efforts to place registered employees and may encourage employees to be fully engaged in the entire process.
- Involuntary termination should be afforded the same appeal rights as other forms of termination.

Concerns raised by agencies on possible expanded appeal rights include:

- Providing merits review of involuntary termination may undermine the intention of the regulations by unduly prolonging processes and removing finality. Merits review is available for all other steps leading up to the point of termination, which should provide sufficient protection to employees from unfair decision-making.
- The practicalities of challenge, burden of proof and reasonableness could be difficult to address. Putting in place a remedy such as re-employment seems impractical and would be difficult to implement.
- This would make the redundancy process cumbersome, further increase risks to agencies and may discourage agencies from exercising all options available through the framework.

[39] Section 96A, *Public Sector Management Act 1994*

[40] Second Reading Speech, Legislative Assembly, Hon C Barnett, 23 October 2013, *Redeployment and Redundancy: A Guide for Agencies,* p 5

[41] Ministerial Review of the Industrial Relations System – Final report, 2018, Recommendation 35, p 194

### Other jurisdictions

Except for New South Wales and Tasmania, surplus public sector employees can appeal decisions about redundancy to their respective industrial commissions.

**Appeal rights for involuntary redundancy**

| State | Appeal right | Remedies available |
|---|---|---|
| **VIC** | Yes (excluding executives, ministerial officers or persons employed at higher managerial levels)[42] | Reinstatement (to same or similar position with the employer or an associated entity) or payment of compensation (limits apply) if reinstatement not appropriate.[43] |
| **QLD** | Yes (excluding executives)[44] | Reinstatement (same position), re-employment (similar position) or compensation (only if the former options are impractical)[45] |
| **SA** | Yes | Re-employment (preferred) to same or another position or compensation (limits apply) [46] |
| **CTH** | Yes | Reinstatement (to same or similar position with the employer or an associated entity) or payment of compensation (limits apply) if reinstatement not appropriate[47] |
| **NT** | Yes | Same as Commonwealth |
| **ACT** | Yes | Same as Commonwealth |
| **NSW** | No | N/A |
| **TAS** | No | N/A |

### WA context

Considering the small number of officers who are involuntarily terminated on the grounds of redundancy, expansion of appeal rights is not likely to create a large caseload for the WAIRC or agencies. Given the gravity of the matter to individuals, expansion will arguably improve the fairness of the system.

Ritter addressed the criticism that a new right of appeal may delay agency restructuring processes, however, it is considered that if a claim was made, this should not prevent the dismissal taking effect, except where the WAIRC orders this to occur.[48] This would enable the workings of agencies to continue.

[42] *Fair Work (Commonwealth Powers) Act 2009* (Vic) s. 5(1).
[43] *Fair Work Act* (Cth) 2009, ss 390 - 393.
[44] *Public Service Act 2008 (Qld)*, s 195(1)(g).
[45] *Industrial Relations Act* (Qld) *2016*, s 321, 322.
[46] *Fair Work Act* (SA) 1994, s 109.
[47] ibid
[48] Ritter Review, p 178 para 405.

## Recommendations

8.1 Amend the PSM Act so rights of review to the WA Industrial Relations Commission are extended to people receiving a redundancy.

8.2 Provide the WA Industrial Relations Commission with the capacity to make orders, such as reinstatement (to the same position), re-employment (to a similar position) or compensation.

# Appendix 1

## Public sector organisations written submissions

Commissioner for Equal Opportunity

Landgate

Dept of Primary Industries and Regional Development

South West Development Commission

North Metropolitan TAFE

Public Sector Commission

VenuesWest

Department of Mines, Industry Regulation and Safety

Department of Biodiversity, Conservation and Attractions

Department of Planning, Lands and Heritage

LotteryWest

Department of Training and Workforce Development

Department of Health

Department of Premier and Cabinet

Office of Director of Public Prosecutions

Health and Disability Services Complaints Office

Department of Local Government, Sport and Cultural Industries

Department of Finance

Mental Health Commission

Department of Justice

Transport portfolio

Government Sector Labour Relations

Department of Water and Environmental Regulation

## Unions written submissions

Australian Rail, Tram and Bus Union
Health Services Union

Civil Service Association/ Community and Public Sector Union

# Appendix 2

Differences between registrable and registered employees

| | Registrable employees | Registered employees |
|---|---|---|
| **Redeployment** | Can be transferred to suitable positions within their own agency or seek opportunities in the broader public sector | Agency has been unable to place individual within organisation so are registered on the Recruitment Advertising Management System |
| **Timeframes** | No set timeframes | Subject to a 6 month redeployment period from the point of registration after which they become involuntarily redundant |
| **Priority access to vacancies in sector** | Subject to agreement provisions may have priority access to vacancies in sector but no access to 80-110% of maximum pay applicable to classification | Priority access to whole of sector vacancies which can be accessed within a range of 80-110% of the maximum pay applicable to their classification |
| **Case Management** | Not mandatory | Mandatory |
| **Access to retraining** | Not mandatory | Can be employed in a position internal or external to the public sector for retraining purposes |

# Appendix 3

## Current 3-stage model to manage surplus employees