

## Chapter 8

### 'The most divisive and least productive bargaining round in 30 years'

8.1 Mr Michael Tull, Assistant National Secretary of the Community and Public Sector Union (CPSU), told the committee that the current Australian Public Service (APS) bargaining round was the most divisive and unproductive that he had ever experienced:

I am a CPSU official and I have been involved in public sector bargaining for nearly 30 years. I have made hundreds of agreements under every form of industrial legislation and under all the policy variations since 1990. I have made agreements in large agencies and small ones, for public sector, private sector, individual contracts, AWAs, common law agreements—I have dealt with every form on industrial setup in the public sector. I can say, based on that experience, that this round of bargaining is the most divisive and least productive round in those 30 years.<sup>1</sup>

8.2 Mr Tull was very clear that the reason the dispute had remained unresolved for so long was due to the government's bargaining policy:

As you have heard from bargaining reps—the people who are at the table who are in the workplace and who deal with this every single day—it should be abundantly clear that there are some serious problems with this round of bargaining. There is the substantial human cost and there are also clearly problems for the agencies. It should be abundantly clear that these are problems caused by the workplace bargaining framework, the approach taken and the implementation of that framework. It is also clear, as we have heard from the people preceding me, that this is a very different round of bargaining with a different approach and a different mindset. It is that approach that is fundamental to causing the problems and it is the change of that approach that would be fundamental to getting a resolution. CPSU has been trying to resolve this for more than three years and there is clearly no end in sight.<sup>2</sup>

8.3 Mr Esmond Smith who is an employee bargaining representative for over 90 Australian Competition and Consumer Commission (ACCC) staff pointed out that 'the ACCC bargaining process, driven by the government's hard line bargaining framework, has been extremely slow and difficult', and that the current bargaining framework 'is unfair and unreasonable'.<sup>3</sup>

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1 Mr Michael Tull, Assistant National Secretary, CPSU, *Committee Hansard*, 11 November 2016, p. 25.

2 Mr Michael Tull, Assistant National Secretary, CPSU, *Committee Hansard*, 11 November 2016, p. 25.

3 Mr Esmond Smith, *Submission 192*, p. 1.

8.4 Mrs Kelly Miller, a member of the Department of Agriculture and Water Resources Bargaining Team pointed out that employees in the department had worked cooperatively with management to manage the transition in the wake of the 2013 budget cuts. However, that cooperation had now disappeared as a result of the government's bargaining policy:

In 2013 huge budget cuts meant a massive round of redundancies. We formed what we called the transition committee and we worked with management. We had equal management representation, staff representation and CPSU delegates like me. That transition committee lasted nearly 12 months, I think, and we worked together to transition from a large workforce to a smaller workforce and manage that workload. We did have to cooperate, we did have to work together and we helped that change go through because we worked together. Three years later, I do not see that. I do not feel that same cooperation in the workplace.<sup>4</sup>

#### ***APS Commissioner's rejection of good faith proposals***

8.5 The CPSU advised the committee that this was the first time a bargaining policy had required the minister's delegate, namely the APS Commissioner, to approve a pay offer before it can be put to employees. The CPSU further submitted that numerous agencies had told the respective CPSU bargaining teams and their staff that agency management was negotiating with the APS Commissioner about what could be included in the enterprise agreement offered to staff. For example, the CPSU stated that the Australian Research Council (ARC) had to submit a proposed enterprise agreement to the APS Commissioner 17 times before securing approval to put the offer to a vote.<sup>5</sup>

8.6 According to the CPSU Delegate on the Enterprise Bargaining Committee at the ARC this was the 'primary contributor to the delay at the ARC, other than the untimely release of the Government bargaining policy only three months prior to the nominal expiry date of agreements'. As a consequence this 'meant that negotiations did not start until February 2016 when the draft ARC Enterprise Agreement was finally tabled as the ARC's position at a bargaining committee meeting.'<sup>6</sup>

8.7 The committee heard several examples of reasonable and fair offers being rejected by agency management and/or the APS Commissioner. For example, Mr Smith told the committee that that he had proposed to ACCC management an increase in salary levels on commencement of a new agreement equivalent to the average wage increase across the Australian economy since the last salary increase staff received on 1 July 2013, and increases over the next two years based on forecast

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4 Mrs Kelly Miller, Department of Agriculture and Water Resources Bargaining Team, *Committee Hansard*, 11 November 2016, p. 26.

5 CPSU (PSU Group), *Submission 196*, p. 23.

6 Ms Amy Phillips, CPSU Delegate, Enterprise Bargaining Committee, Australian Research Council, *Submission 197*, p.1.

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average economy-wide wage growth. Yet, ACCC management had rejected these proposals on the basis that they did not meet the tenets of the bargaining policy.<sup>7</sup>

8.8 Furthermore, offers to end the ACCC's dispute through arbitration by the Fair Work Commission were also rejected on the basis that the bargaining policy does not permit arbitration.<sup>8</sup>

8.9 However, Mr Smith held the government rather than agency management responsible for the lack of good faith bargaining:

I have offered constantly to change my proposals, to try to reach agreement, but there has been no flexibility by management in terms of their application of the bargaining policy. I do not hold that against management. I believe they are precluded from doing so by the position of the government. It is an enormous frustration for me, that people in government who are openly claiming not to be bargaining representatives under the Fair Work Act, and therefore not obliged to give genuine consideration to my claims under the law, are making decisions on my proposals.<sup>9</sup>

8.10 Mr Tom Carrigg, a member of the CPSU ACCC Bargaining Team, is an economic analyst at the ACCC involved in monitoring and regulating Australia's largest airports. He told the committee that ACCC employees did not feel that bargaining had been conducted in good faith because the APS Commissioner overruled clauses where employees and ACCC management had already reached agreement:

The first point is that employees feel that bargaining at the ACCC has not been conducted in good faith. Employer and employee representatives were able to reach agreement on a number of clauses that were subsequently overruled by the Australian Public Service Commission. To us, this means that employee representatives were given no opportunity to put their case to the decision-maker, the Australian Public Service Commission; nor has the APSC genuinely considered the merits of the employee representatives' proposals. With no access to influence the decision-maker, the employee reps, including I myself, feel that we are denied a fair process.<sup>10</sup>

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7 Mr Esmond Smith, Employee Bargaining Representative for Australian Competition and Consumer Commission (ACCC) staff at the ACCC and the Australian Energy Regulator, *Committee Hansard*, 11 November 2016, p. 19.

8 Mr Esmond Smith, Employee Bargaining Representative for Australian Competition and Consumer Commission (ACCC) staff at the ACCC and the Australian Energy Regulator, *Committee Hansard*, 11 November 2016, p. 19.

9 Mr Esmond Smith, Employee Bargaining Representative for Australian Competition and Consumer Commission (ACCC) staff at the ACCC and the Australian Energy Regulator, *Committee Hansard*, 11 November 2016, p. 19.

10 Mr Tom Carrigg, CPSU, Australian Competition and Consumer Commission Bargaining Team, *Committee Hansard*, 11 November 2016, p. 33.

8.11 Furthermore, Mr Carrigg advised the committee that the chair of the ACCC was hamstrung by the bargaining policy because the APS Commissioner had dismissed recommendations that the chair of the ACCC had put to him.<sup>11</sup>

8.12 Likewise, Mr Smith drew the committee's attention to the enormous frustrations felt by staff because there was no genuine consideration of their concerns merely because the concerns did not fit within the strict confines of the bargaining policy.<sup>12</sup>

### ***Agency proposals have not met the BOOT test***

8.13 Another indication of the extraordinary nature of the current negotiations is the fact that a number of agencies have not met the 'better off overall test' (BOOT). The BOOT is a legislative requirement under the Fair Work Act. It requires the Fair Work Commission, prior to approving an enterprise agreement, to ensure that each of the employees to be covered by the agreement are better off overall than under the relevant modern award.<sup>13</sup>

8.14 The CPSU gave evidence that six agencies were required by the Commission to give undertakings because their agreements did not satisfy the BOOT:

[Six Commonwealth agencies] have not met the Fair Work better off overall test because of the matters that have been removed or reduced from agreements. It is highly unusual. We have had Commonwealth agencies, such as the Department of Finance, having to give undertakings in Fair Work because of these agreements that remove a number of existing provisions and not meeting the BOOT.<sup>14</sup>

### ***Government and APSC intransigence***

8.15 It became clear to the committee that once the government had established the highly lopsided bargaining framework, there was no genuine desire or good will on the government's part to progress any meaningful negotiations. This has been an enormous source of frustration, not only for the CPSU and thousands upon thousands of Commonwealth employees, but also to many government agencies which have all been forced to negotiate under the government's flawed framework.

8.16 The Secretary of the CPSU, Ms Nadine Flood, effectively summed up the prevailing mood regarding the government's failed bargaining framework and process:

[Appearing before a Senate Committee] is, frankly, the last place that both employees or our union wanted to be sitting at the end of 2016—still in the

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11 Mr Tom Carrigg, CPSU, Australian Competition and Consumer Commission Bargaining Team, *Committee Hansard*, 11 November 2016, p. 33.

12 Mr Esmond Smith, Employee Bargaining Representative for Australian Competition and Consumer Commission (ACCC) staff at the ACCC and the Australian Energy Regulator, *Committee Hansard*, 11 November 2016, p. 18.

13 Section 193, *Fair Work Act 2009*.

14 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard*, 11 November 2016, p. 53.

largest and most protracted industrial dispute in 30 years of enterprise bargaining in the Commonwealth. As you have seen from hundreds of submissions, this bargaining round is profoundly different, with a very significant human cost. I take no pride or joy whatsoever in still being bargaining in the Commonwealth after more than 1,000 days. We have workers on average wages—many of whom I have met with as recently as this week—who face their third Christmas without a pay rise. They and their families are doing it very tough where they have had to go through a three-year industrial dispute because they cannot give up the family-friendly and hours provisions they signed up to in these jobs that they previously negotiated in enterprise agreements and that they rely on to pick up their kids and juggle their work and family. There are also groups of workers who face additional challenges, such as at Immigration and Border Protection where we still have thousands of officers who face an actual cash pay cut to what they have earned since 2013...

I have told the story of this dispute to business leaders, industry groups, senior public servants from other government and, rarely, when I have had the opportunity, to members of this government. Many have reflected that a bargaining policy that requires removal and reduction of existing previously negotiated rights, bans any improvements and provides no pay rise for, effectively, three of six years that these agreements will cover is unrealistic and highly unusual in any sector of the economy. They are more surprised when I say that the government, in fact, will not talk to us at all about bargaining...

And, as we have seen again today, there is a refusal to admit that there is a problem, including from the Public Service Commissioner. It may surprise the committee, but the CPSU remains committed and willing to sit and talk at any point, including in sensitive, confidential discussions not played out in the media, or, indeed, in the parliament, to actually resolve this situation. That is what employees need and it is what agency needs, and I would be delighted to have that opportunity.<sup>15</sup>

8.17 Ms Flood then explained the CPSU's multiple attempts to engage the government on the bargaining process:

[In late 2013] we were discussing this matter with [the then Employment] Minister Abetz and discussing what the government's bargaining policy would be. So in the first few months of the Abbott government we were actually having a dialogue. In fact, I think we may be the only union in the country that invited the Prime Minister to address our national council—much to the shock of some of my colleagues! And Minister Abetz came. It was only a matter of months later when the government decided to stop talking, and then some time after that this policy [the March 2014 version] was released.<sup>16</sup>

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15 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard*, 11 November 2016, p. 49.

16 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard*, 11 November 2016, p. 52.

8.18 Over time, as the negotiations became protracted, the CPSU was forced to take an unprecedented approach and release its bargaining position:

I flagged that [the CPSU's intention to publicly release its revised bargaining position] with Commissioner Lloyd in March 2015, one of the only times we sat in a room together. Then we went through a process to actually put that out explicitly in public. I sat down with Minister Cash in the only meeting we have had after she took the portfolio on in October [2015]. We sent to government, in writing, our full outcomes position—again, something that you do not normally do: exactly what the CPSU would accept on everything, in writing.

I went through it with the minister...<sup>17</sup>

8.19 Ms Flood explained that the CPSU's position was 'ignored by the government':

...a revised bargaining policy was put out shortly afterwards that did not address what our outcomes position had said: 'The key issue for workers is not money; it is maintaining existing rights and conditions, particularly family-friendly conditions. That is the issue you need to address. People accept this is not a round of bargaining that is going to produce higher wage outcomes.' That was entirely ignored in that the revised bargaining policy [of November 2015] did not address that issue, and as recently as today we still have agreements going to votes that remove existing rights and conditions because the policy has not dealt with that matter.<sup>18</sup>

8.20 Finally, Ms Flood outlined her more recent contact with the APSC in August 2016, which demonstrates the disregard shown by the APS Commissioner regarding good faith bargaining and reaching a negotiated outcome:

It has been a very long time since the commissioner and I spoke. He did ring me on day 1,000 of this dispute to tell me that there was no interest whatsoever from the minister or him in meeting and discussing this matter at all back in August [2016]. That was the most recent contact. I thought it was an interesting day to pick.<sup>19</sup>

### **Committee view**

8.21 The committee is extremely disappointed that the government and its representatives at the APSC have presided over a public sector bargaining round described as 'the most divisive and least productive round in 30 years'. Given the evidence presented in over 500 public submissions, the committee reluctantly endorses this description.

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17 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard*, 11 November 2016, p. 52.

18 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard*, 11 November 2016, p. 53.

19 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard*, 11 November 2016, p. 55.

8.22 The committee is of the view that essentially the government has conducted a phoney bargaining process. The utter contempt displayed by successive Ministers for Employment and the Public Service, and the APS Commissioner towards more than one hundred and fifty thousand dedicated public servants is breathtaking.

8.23 The committee notes that several agencies have sought to negotiate with their employees in good faith but these efforts have been stymied by the government's rigid bargaining framework and its implementation by the APSC. The recent successful agreement reached between ABC management and staff, which was negotiated outside the confines of the bargaining framework, is a clear illustration of what could be achieved if the government and the APSC were not so ideologically driven.

8.24 Finally, the committee urges the government to reconsider its approach to APS bargaining with a view to ending the three year-long disputation which has caused incalculable harm to the public sector's reputation, its service delivery and its workers.

#### **Recommendation 14**

**8.25 The committee recommends that the Minister Assisting the Prime Minister for the Public Service take immediate steps to ensure that where decisions with respect to bargaining outcomes rest with the Minister or with the APS Commissioner, the decision maker engages in bargaining and acts in accordance with the good faith bargaining requirements of the *Fair Work Act 2009*.**

