



Australian Public Service Bargaining Framework

Supporting Guidance

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Australian Government

Australian Public Service
Commission

Contents

- Introduction iii**
- APSC Assessments ix**
- Part 1 - Workplace Relations Framework..... 1**
 - 1.1 Senior Executive Service (SES) terms and conditions..... 2
 - 1.2 Non-SES employees’ terms and conditions 4
 - 1.3 Compliance with all relevant legislative requirements 5
 - 1.4 Facilitate productive workplace relations and collective bargaining in good faith..... 11
 - 1.5 Respecting employees’ right to representation 12
 - 1.6 Application of the right of entry and freedom of association provisions of the Fair Work Act in a fair and reasonable manner 14
 - 1.7 Ensuring clear, easy to read, streamlined instruments 14
 - 1.8 Seek the inclusion of relevant model clauses in terms and conditions instruments 15
 - 1.9 Submit proposed bargaining positions, enterprise agreements and collective determinations to the APSC for assessment..... 15
 - 1.10 Comply with any instruction issued by the APS Commissioner in relation to administering the APS Bargaining Framework..... 16
 - 1.11 Obtain Ministerial approval in relation to enterprise agreements and collective determinations 16
- Part 2 - Remuneration Policy 19**
 - 2.1 Improvements in remuneration are to be offset by genuine, quantifiable, productivity initiatives 19
 - 2.2 Salary advancement for individuals within classifications and broadbands is subject to at least satisfactory performance 21
 - 2.3 Remuneration increases are to apply prospectively, other than in exceptional circumstances 22
- Part 3 - Funding Policy 23**
 - 3.1 Funding from within agency budgets..... 23
- Part 4 - Staffing Policy 25**
 - 4.1 Maintain structures that are consistent with the APS Classification Rules and work level standards..... 25
 - 4.2 Include compulsory redeployment, reduction and retrenchment provisions, without enhancing existing redundancy arrangements other than where required by legislation or in exceptional circumstances..... 27

4.3	Ensuring the portability of accrued paid leave entitlements and enhanced mobility of employees.....	31
4.4	Leave policies and employment practices that support the release of community service volunteers for emergency services and Defence Reservists for peacetime training and deployment.....	32
4.5	Flexible attraction and retention initiatives, including terms and conditions which assist employees in maintaining a healthy work-life balance and improve diversity	34
Legal Advice		37
Further Advice and Information.....		38
Definitions.....		39
Attachment A.	Notice of Employee Representational Rights	41
Attachment B.	Facilities for bargaining representatives.....	43
Attachment C.	Principles relating to workplace delegates	45
Attachment D.	Funding declaration.....	47
Index.....		48

Introduction

Australian Public Service (APS) Bargaining Framework

The APS Bargaining Framework ('Bargaining Framework') sets out Australian Government policy as it applies to workplace relations arrangements in APS agencies in respect of their APS employees. It provides a framework for the management of workplace relations in the APS consistent with both the broader principles of Australian Government workplace relations policy, and legislative requirements. To this end, the Bargaining Framework operates within the legislative framework of the *Fair Work Act 2009*, *Public Service Act 1999*, and other Commonwealth laws.

The Bargaining Framework balances the workplace interests of the Australian Government with those of APS employees.

The aim of the Bargaining Framework is to implement the Government's workplace relations policy with respect to APS employment, namely to:

- support the concept of 'one APS' and facilitate mobility across the APS by achieving greater commonality of terms and conditions;
- ensure fairness and flexibility;
- promote productivity;
- provide for sustainable and affordable remuneration arrangements;
- provide for enterprise agreements, negotiated at the individual agency level, as the principal means of setting terms and conditions of employment for non-Senior Executive Service level employees;
- enshrine accountability for compliance with the APS Bargaining Framework with individual agencies; and
- respect and facilitate the role of unions in the workplace.

From time to time, the Australian Public Service Commission (APSC) will issue APSC Circulars to provide information regarding relevant aspects of workplace relations policy and legislation. These circulars, and the former Workplace Relations Advice series, will be made available on www.apsc.gov.au.

This document provides guidance for agencies on the implementation of the Bargaining Framework when making workplace agreements and other workplace arrangements with their employees. It is not a definitive guide to all aspects of the Government's workplace relations policy or federal workplace relations legislation.

This January 2011 edition of the Supporting Guidance replaces the September 2009 edition of the Supporting Guidance to the Australian Government Employment Bargaining Framework in relation to APS employees.

Application of the Bargaining Framework

APS agencies are to apply the Bargaining Framework in regard to employees engaged under the *Public Service Act 1999* (Public Service Act).

Australian Government policy is for the Bargaining Framework to apply to enterprise agreements, determinations made under section 24(1) of the Public Service Act and common law agreements. APS agencies are to also ensure that workplace policies and practices are consistent with the APS Bargaining Framework.

APS Agencies

The Australian Government requires all APS agencies to comply with the relevant sections of the Bargaining Framework in respect of APS employees.

Non-APS Commonwealth Authorities and other Government employers

The Australian Government's workplace relations policy for non-APS Commonwealth Authorities and other Australian Government employers, including Members of Parliament Staff, can be found in the Australian Government Employment (Non-APS) Bargaining Framework and its Supporting Guidance. Where an APS agency has dual staffing powers (that is, they employ employees under legislation other than the Public Service Act), the Non-APS Bargaining Framework will apply to the non-APS employees employed at those agencies.

To avoid any doubt, the APS Bargaining Framework and the Non-APS Bargaining Framework do not apply to the Australian Defence Force or Government Business Enterprises (GBEs), although GBEs are encouraged to apply the policy set out in the Non-APS Bargaining Framework where it is appropriate to do so.

Types of workplace arrangements

Enterprise agreement

An enterprise agreement is as defined in the *Fair Work Act 2009* (Fair Work Act).

Determination

A determination is a legislative instrument made by an authorised person under section 24(1) of the Public Service Act which sets out terms and conditions. A determination may apply to an individual employee or a group of employees.

Common law arrangement

For the purposes of the Bargaining Framework, a common law arrangement should be a written agreement made between an APS agency and another party, generally, an employee of that agency.

Definitions of key terms are provided at page 39.

Key links in the Bargaining Framework

Agency Heads

Agency heads are responsible for the application of the Bargaining Framework within their respective APS agencies.

Each Agency Head is to:

- apply the Bargaining Framework in their agencies, consistent with the legislative framework;
- ensure that all workplace arrangements are consistent with the Bargaining Framework and Australian Government policy, unless specifically agreed by the Special Minister of State for the Public Service and Integrity;
- engage in good faith with employees and their representatives in negotiating enterprise agreements and making other workplace arrangements;
- advise the agency Minister of any significant proposed workplace relations initiatives prior to implementation;
- advise the agency Minister and the Special Minister of State for Public Service and Integrity or the APSC of any workplace matters (potential or actual) which could significantly affect delivery of services and any proposed response

With respect to enterprise agreements, each Agency Head is to:

- seek the approval of a proposed bargaining position prior to issuing a notice of employee representational rights to employees under the Fair Work Act, in accordance with the processes outlined under Part 1.11;
- once approval for the proposed bargaining position is obtained from the APSC or the Special Minister of State for the Public Service and Integrity, issue a Notice of Employee Representational Rights to their employees at the commencement of bargaining, consistent with the Fair Work Act;
- negotiate an enterprise agreement with their non-SES employees (and SES employees where applicable) consistent with the APS Bargaining Framework and the requirements of the Fair Work Act;
- provide regular updates on bargaining to the APSC;
- seek the APSC's views on potential disputes prior to initiating Fair Work Australia proceedings or seeking legal advice;
- ensure the terms of a proposed enterprise agreement are provided to the APSC for an assessment for consistency with the Bargaining Framework, and seek the approval of that proposed enterprise agreement in accordance with the processes outlined under Part 1.11;
- ensure any inconsistencies between the terms of a proposed enterprise agreement and Bargaining Framework are either:
 - (i) rectified prior to seeking the approval of agreement from the Special Minister of State for the Public Service and Integrity; or
 - (ii) drawn to the attention of the Special Minister of State for the Public Service and Integrity when requesting the approval of the Minister to proceed;

- provide the APSC with a copy of the enterprise agreement following final approval from employees.
- With respect to a determination which applies to a group of employees, Agency Heads are to follow their obligations with respect to enterprise agreements.
- An exception to this requirement is where a determination is necessary solely to preserve pre-existing terms and conditions immediately following a Machinery of Government change, in conjunction with the machinery of government protections and regulations under the Public Service Act and *Public Service Regulations 1999*.

Agency Heads are to ensure that any individual arrangements, including determinations or common law arrangements, are consistent with the Bargaining Framework and Australian Government policy.

Agency Heads are also to ensure that relevant data and other information on the application of the APS Bargaining Framework within their agency is provided to the APSC in a timely fashion both regularly and from time to time as requested. Such information may include, but is not limited to:

- provision of information on the number and terms of individual flexibility arrangements and employment instruments;
- provision of information about workplace delegates rights protocols and practices;
- orders made by Fair Work Australia in respect of the agency;
- documents required under the Fair Work Act, such as the notice of employee representation rights issued by the agency; and
- data on remuneration, terms and conditions of employment.

Australian Public Service Commission

The APSC is responsible for the development, application and interpretation of the Bargaining Framework.

The APSC is to:

- publish and maintain the Bargaining Framework in accordance with Government policy;
- provide APS agencies with information and advice on employment and workplace relations policy, legislation, and the application and interpretation of the APS Bargaining Framework through various means, including the issuing of APSC Circulars from time to time;
- assess an agency's proposed bargaining position;
- brief the Special Minister of State for the Public Service and Integrity, as required;
- assess an agency's proposed enterprise agreement or collective determination and seek approval from the Special Minister of State for the Public Service and Integrity where the agreement is inconsistent with the Bargaining Framework;
- as part of the briefing process for the Special Minister of State for the Public Service and Integrity, provide APS agencies with written advice on whether a proposed enterprise agreement or determination is consistent with the Bargaining Framework;

- provide advice on whether any other workplace arrangement complies with the Bargaining Framework;
- provide information, advice and recommendations on workplace arrangements which represent current best practice across Australian Government employment and are designed to improve the operation and administration of workplace arrangements in the APS, including through the provision, from time to time, of suggested model clauses for inclusion in workplace arrangements;
- provide information and advice to agencies on specific workplace relations matters, including consistency of workplace arrangements with the Bargaining Framework, where the agency requests;
- report to the Special Minister of State for the Public Service and Integrity, both regularly and upon request from time to time, on the application of the APS Bargaining Framework, compliance with other Australian Government workplace relations policies such as the provision of facilities to bargaining representatives, and on other workplace arrangements applying in Australian Government employment; and
- monitor decisions made by Fair Work Australia on matters of interest such as good faith bargaining and seek advice from DEEWR where necessary to enable the provision of advice to agencies on any relevant implications.

Department of Finance and Deregulation (Finance)

The role of Finance is to assess the affordability of APS agreements where proposed wage outcomes are in excess of the Average Annualised Wage Increase (AAWI) parameters outlined under Parts 2 and 3 of this Supporting Guidance.

Finance will:

- examine proposed increases to remuneration and an agency's financial position to determine whether affordability parameters are met, as required; and
- provide advice to the APSC and the agency on the affordability of a proposed enterprise agreement as required as part of the assessment process.

Department of Education, Employment and Workplace Relations (DEEWR)

The APSC has a Memorandum of Understanding with the Workplace Relations Legal Group of the Department of Education, Employment and Workplace Relations (DEEWR) and works in partnership with DEEWR on workplace relations legal matters affecting Australian Government employment. In particular, it is important that DEEWR be kept fully informed of legal advice that impacts on the interpretation of the Fair Work Act. Agencies are therefore reminded that, under clause 10 of the Legal Services Directions, copies of such legal advice should be provided to DEEWR in addition to being provided to the APSC.

Fair Work Australia and the Fair Work Ombudsman

Fair Work Australia and the Fair Work Ombudsman do not have a direct role in the application of the Bargaining Framework. However, under the Fair Work Act, Fair Work Australia performs a number of functions relevant to agreement making. These functions include

approving enterprise agreements, overseeing right of entry and industrial action, dealing with disputes, and providing assistance and advice about its functions and activities.

Similarly, the Fair Work Ombudsman is responsible for monitoring compliance and investigating breaches of the Fair Work Act and fair work instruments, and providing education, assistance and advice to employees, employers and organisations on the application of legislation and other general workplace relations enquiries.

APSC Assessments

Introduction

As set out above, the APSC is responsible for providing advice on Australian Government employment and workplace relations policy, the application of the Bargaining Framework and assessing enterprise agreements and collective determinations for consistency with the APS Bargaining Framework. Agencies are encouraged to seek information and advice from the APSC on these matters when required.

Assessments relating to bargaining positions and enterprise agreements or collective determinations

Agencies are required to submit an agency's proposed bargaining position and proposed final enterprise agreements and collective determinations (other than a determination that preserves terms and conditions following a Machinery of Government change) to the APSC for assessment against the Bargaining Framework, ahead of final approval. To this end, the APSC will:

- conduct assessments of proposed bargaining positions, including briefing the Special Minister of State for the Public Service and Integrity as required, and provide advice to agencies on the consistency of their bargaining positions with Australian Government policy; and
- conduct assessments of enterprise agreements and other collective arrangements, including briefing Special Minister of State for the Public Service and Integrity as required, and provide advice to agencies on the consistency of their proposed enterprise agreement or other arrangement ahead of finalisation and approval by employees and by Fair Work Australia.

These requirements apply to both new enterprise agreements and collective determinations, and any proposed variations to existing collective instruments.

Agencies are strongly encouraged to contact the APSC to discuss the development of any enterprise agreement or collective determination and the Bargaining Framework before bargaining commences and before an agreement is finalised.

The APSC can provide advice on proposed collective workplace arrangements to assist agencies to identify any potential inconsistencies with the Bargaining Framework at an early stage.

Where an enterprise agreement or collective determination has been provided to the APSC for assessment, the APSC will discuss all identified inconsistencies with the agency's nominee prior to finalising the written assessment.

Where an enterprise agreement or collective determination is significantly amended or altered following the APSC's written assessment (other than to amend any inconsistencies raised in the assessment), including amendments to the total remuneration provided in the agreement, the agreement must be resubmitted to the APSC for assessment.

Assessment of individual arrangements

Agency Heads are responsible for ensuring that individual arrangements, including individual flexibility agreements, common law agreements and determinations, are consistent with the APS Bargaining Framework and the Government's workplace relations policy.

Agency Heads may request the APSC to assess individual arrangements for consistency with the APS Bargaining Framework; however, formal assessment is not required under the APS Bargaining Framework.

The APSC is available to provide advice to agencies about individual arrangements which relate to the Bargaining Framework or the Government's workplace relations policy where an agency requests.

Assessment of policies and practices

Agency Heads are responsible for ensuring that their workplace policies and practices are consistent with the Bargaining Framework, relevant legislation, and the Government's workplace relations policy.

Agency Heads may request that the APSC assess workplace policies and practices for consistency with the Bargaining Framework; however formal assessment of policies and practices is not required under the Bargaining Framework.

The APSC is also available to provide advice to agencies about policies and practices which relate to the Bargaining Framework or the Government's workplace relations policy where an agency requests.

Part 1 - Workplace Relations Framework

Part 1 - Workplace Relations Framework

APS Agencies are to:

- 1.1 Set out Senior Executive Service (SES) employees' terms and conditions in either:
 - (a) determinations made under the *Public Service Act 1999* or individual common law arrangements; or
 - (b) where a majority of SES officers choose, in an SES enterprise agreement separate to that agency's non-SES enterprise agreement;
- 1.2 Set out non-SES employees' terms and conditions in one enterprise agreement per agency, other than in exceptional circumstances as approved by the Prime Minister and the Special Minister of State for the Public Service and Integrity, with coverage excluding SES employees except for the following limited cases:
 - (a) small agencies where the nature of the work and benefits does not differ considerably between SES and non-SES; or
 - (b) defined specialist SES in non-managerial positions;
- 1.3 Comply with all relevant legislative requirements;
- 1.4 Facilitate productive workplace relations and collective bargaining in good faith with employees and their representatives;
- 1.5 Ensure an employee's right to representation in the workplace is respected;
- 1.6 Apply the right of entry and freedom of association provisions contained in the Fair Work Act 2009 in a fair and reasonable manner;
- 1.7 Ensure all enterprise agreements, determinations made under the *Public Service Act 1999*, common law arrangements, and workplace policies and practices are clear, easy to read, and streamlined;
- 1.8 Seek the inclusion of relevant model clauses, as advised by the Australian Public Service Commission (APSC), in terms and conditions instruments;
- 1.9 Submit proposed bargaining positions, enterprise agreements and collective determinations to the APSC for assessment prior to seeking Ministerial approval;
- 1.10 Comply with any instruction issued by the Public Service Commissioner in relation to administering the Bargaining Framework; and
- 1.11 Obtain Ministerial approval in relation to enterprise agreements and collective determinations.

1.1 Senior Executive Service (SES) terms and conditions

1.1.1 It is Australian Government policy that agencies are to set out the terms and conditions for SES employees and their equivalents in either:

- determinations made under the Public Service Act;
- individual common law arrangements; or
- where a majority of SES officers in an agency choose, in an SES enterprise agreement separate to that agency's non-SES enterprise agreement.

SES enterprise agreement options

- 1.1.2 Given the different nature of the duties of SES and non SES employees, where a majority of affected SES level employees choose to negotiate an enterprise agreement, it is Government policy that a separate enterprise agreement for SES level employees be negotiated.
- 1.1.3 A 'majority of SES officers' means either 50 per cent plus one affected SES employees in the agency (or relevant business function where the agency chooses to implement separate enterprise agreements) or, if a vote is conducted, a majority of affected SES employees in the agency who vote.
- 1.1.4 An 'affected SES employee' means an SES employee who may be covered by the enterprise agreement during its nominal duration.
- 1.1.5 It is Government policy that a separate enterprise agreement will be made between an agency and SES employees under this option in all cases other than the following:
- (a) small agencies where SES and non-SES level employees have uniform or highly similar functions and conditions; or
 - (b) defined specialist SES employees in non-managerial positions.
- 1.1.6 Agencies considering a single enterprise agreement applicable to both SES and non-SES employees are encouraged to consult with the APSC about the application of these exceptions.
- 1.1.7 Agencies considering including SES-equivalent classifications (i.e. other classifications described in Groups 9-11 of the *Public Service Classification Rules 2000*) in an otherwise non-SES enterprise agreement should seek the agreement of the APSC to do so before proceeding.

SES individual arrangement options

- 1.1.8 Where no applicable enterprise agreement is in place in an agency, SES employees' terms and conditions of employment will remain subject to all applicable minimum standards contained in a relevant award (such as the APS Award 1998) and relevant legislation.
- 1.1.9 Agencies should be conscious that determinations and common law arrangements may be more limited in their operation than enterprise agreements (for instance, they must comply in every respect with the conditions of an applicable award other than where an exemption for high income earners applies, whereas a enterprise agreement can, subject to the Better Off Overall Test, alter those conditions).
- 1.1.10 When using common law arrangements, APS agencies must include provisions which:
- allow the common law arrangement to be overridden by any subsequent s 24(3) determination; and
 - include dispute resolution arrangements.
- 1.1.11 Agencies should note that Fair Work Australia has no capacity to hear and determine disputes in relation to common law arrangements (other than in relation to a safety net contractual entitlement outlined in ss 541 & 542 of the Fair Work Act). Agencies should seek advice from the APSC about options for dispute resolution arrangements.
- 1.1.12 APS agencies should note that a determination cannot be used to set salary for superannuation purposes in the Commonwealth Superannuation Scheme (CSS), the Public Sector Superannuation Scheme (PSS) and the Public Sector Superannuation Accumulation Plan (PSSAP) as a determination is not considered to be an 'agreement' for the purposes of those schemes. Accordingly, a determination cannot provide that an employee's salary for superannuation purposes is anything other than the default treatment of salary for superannuation purposes under the relevant scheme's rules and legislative requirements. Should an agency and the relevant employee wish to alter the employee's salary for superannuation purposes; a separate common law arrangement will be required for this purpose.
- 1.1.13 Further information on the use of determinations and common law arrangements is available for agencies from their APSC client contact team
- 1.1.14 As the issues associated with determinations and common law arrangements will vary on a case by case basis, agencies are invited to contact the APSC for further advice.

Existing SES employees' Australian Workplace Agreements (AWAs)

- 1.1.15 In accordance with the Government's workplace relations policy all existing workplace agreements, including Australian Workplace Agreements, will continue to operate until they are terminated or replaced in accordance with the provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

- 1.1.16 Further information on the termination or replacement of existing workplace agreements is available for agencies from the APSC.

1.2 Non-SES employees' terms and conditions

- 1.2.1 It is Australian Government policy that terms and conditions for non-SES employees be negotiated separately by each agency in an enterprise agreement made under the Fair Work Act.

One non-SES enterprise agreement per agency

- 1.2.2 It is Australian Government policy that agencies should seek to cover all of their non-SES employees in one enterprise agreement per agency, other than in exceptional circumstances with the agreement of the Prime Minister and the Special Minister of State for the Public Service and Integrity.
- 1.2.3 Agencies considering multiple enterprise agreements to accommodate distinct groups within the agency should therefore consult with the APSC in the first instance to determine whether the proposed arrangements are consistent with the APS Bargaining Framework.
- 1.2.4 While there are some distinct operational groups where it is appropriate to apply separate terms and conditions (for example, groups with specialist skills differentiated from the broader agency to which they are attached), these cases would be the exception rather than the norm. Agencies are not to enter into multiple collective agreements where doing so would lead to a harsh or oppressive result for the employees concerned, or for the purposes of providing inferior terms and conditions to any group of employees.

Determinations and common law agreements

- 1.2.5 For non-SES employees, a determination or a common law agreement is not a satisfactory alternative to an enterprise agreement to set terms and conditions in the medium to long term. However, it may be necessary for short-term, interim periods (such as following the establishment of a new agency) to use a determination or common law agreements to set terms and conditions of employment while an enterprise agreement is negotiated. Agencies who consider that they would not be able to conclude negotiations for an enterprise agreement within twelve months should contact the APSC to discuss their options.
- 1.2.6 Agencies who wish to provide for terms and conditions for employees in addition to those available under an enterprise agreement should utilise a flexibility term, as described under Part 1.3, rather than a determination or common law agreement.
- 1.2.7 Further information on the use of determinations and common law agreements is available for agencies from the APSC.

Existing non-SES employees' AWAs

- 1.2.8 In accordance with the Government's workplace relations policy, all existing workplace agreements, including Australian Workplace Agreements, continue to operate until they are terminated or replaced in accordance with the Fair Work Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* as appropriate.
- 1.2.9 Further information on the termination or replacement of existing workplace agreements is available for agencies from the APSC.

1.3 Compliance with all relevant legislative requirements

- 1.3.1 All workplace arrangements must comply with all relevant legislative requirements, including but not limited to provisions relating to employee representation and good faith bargaining. Key employment-related legislation affecting APS agencies includes the:
- *Public Service Act 1999*;
 - *Fair Work Act 2009*;
 - *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*;
 - *Long Service Leave (Commonwealth Employees) Act 1976*;
 - *Maternity Leave (Commonwealth Employees) Act 1973*;
 - *Paid Parental Leave Act 2010*; and
 - *Privacy Act 1988*.
- 1.3.2 In addition to the above, agencies may also be subject to other agency-specific legislation containing employment-related provisions.
- 1.3.3 In particular, agencies should be aware of the following requirements:

Notice of employee representational rights

- 1.3.4 At the commencement of bargaining, employees must be provided with a notice of employee representational rights as detailed at s 174 of the Fair Work Act. This notice must be provided as soon as practicable, and not later than 14 days, after the notification time for the agreement. In the context of APS employment, the notification time will generally be the time where the agency agrees to bargain, or initiates bargaining, for the agreement.

- 1.3.5 The prescribed notice can be found at [Attachment A](#). Agencies should note that the prescribed notice cannot be amended other than as provided for in the notice.
- 1.3.6 This notice specifies that the employee may appoint a bargaining representative to represent the employee:
- (a) in bargaining for the agreement; and
 - (b) in a matter before Fair Work Australia that relates to bargaining for the agreement.
- 1.3.7 The notice also explains that:
- (a) if the employee is a member of an employee organisation that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement; and
 - (b) the employee does not appoint another person as his or her bargaining representative for the agreement;
 - (c) the organisation will be the bargaining representative of the employee.
- 1.3.8 The notice must also explain the effect of s 178(2)(a) of the Fair Work Act (which deals with giving a copy of an instrument of appointment of a bargaining representative to an employee's employer).
- 1.3.9 Agencies should provide the APSC with a copy of the notice of employee representational rights given to employees at the time it is distributed, and advise the APSC of the composition of bargaining units as soon as practicable.

Bargaining representatives

- 1.3.10 Under the Fair Work Act, an employee can appoint a bargaining representative for a proposed enterprise agreement. Where an employee is a member of a union, that union will be taken to be their bargaining representative unless the employee appoints another person or revokes the status of the union as their representative. Where an employee appoints another person or revokes the status of the union as their representative, the Fair Work Act requires that this be done in writing.
- 1.3.11 As with other employers under the Fair Work Act, agencies are not permitted to seek control of, or influence over, the appointment of bargaining representatives. Agencies should also note that under the Fair Work Regulations, a bargaining representative of an employee must be free from control by the employee's employer or another bargaining representative and free from improper influence from the employee's employer or another bargaining representative.
- 1.3.12 There is no limit to the number of bargaining representatives who may take part in negotiations for a new enterprise agreement. However, in cases where the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining

representatives (s 229(4)(a)(ii) of the Fair Work Act), Fair Work Australia may make a bargaining order. Agencies considering applications for such an order must consult with the APSC in the first instance.

- 1.3.13 In addition to the obligation to provide the APSC with a copy of the notice of employee representational rights at the time it is distributed, and advise the APSC of the composition of bargaining units as soon as practicable, agencies must also advise the APSC that they have commenced bargaining and provide periodic updates as to the status of the bargaining process.

Good faith bargaining

- 1.3.14 The Fair Work Act outlines legal requirements which must be met by all bargaining representatives in relation to good faith bargaining.
- 1.3.15 It is also a matter of longstanding Australian Government policy that agencies will bargain with their employees in good faith.
- 1.3.16 These requirements are further discussed under Part 1.4 below.

Employee representation

- 1.3.17 The Fair Work Act enshrines the right of employees to be represented and provides that every employee is free to decide whether or not to join and be represented by a union in the workplace, including in bargaining.
- 1.3.18 It is unlawful for anyone to try to stop an employee exercising this choice by threats, pressure, discrimination or victimisation.
- 1.3.19 Employees have the right to seek advice, assistance and representation from their union in the workplace. Workplace delegates will be able to represent their colleagues in the workplace.

Unlawful terms

- 1.3.20 Under the Fair Work Act, agreements must not contain unlawful terms. A term of an enterprise agreement will be an unlawful term if it:
- is a discriminatory term;
 - is an objectionable term;
 - would be inconsistent with the unfair dismissal provisions of the Fair Work Act;
 - would be inconsistent with the industrial action provisions of the Fair Work Act;
 - would be inconsistent with the right of entry provisions of the Fair Work Act; or

- would result in an exercise of State or Territory occupational health and safety rights in a way that is inconsistent with the right of entry provisions.

Matters not pertaining to the employment relationship

- 1.3.21 Matters which do not pertain to the employer-employee relationship or employer-union relationship cannot be enforced in an agreement, and protected industrial action during bargaining cannot be taken in relation to such a matter.

Clauses required by legislation

Nominal expiry date

- 1.3.22 An enterprise agreement must specify a nominal expiry date of not more than four years after the day on which Fair Work Australia approves the agreement (s 186(5) of the Fair Work Act).
- 1.3.23 The Australian Government recommends that, subject to meeting the good faith bargaining requirements of the Fair Work Act, APS agencies seek to include a common NED of 30 June 2014 in enterprise agreements.

Consultation clause

- 1.3.24 The Fair Work Act requires all enterprise agreements to include a consultation term relating to major workplace change where the change is likely to have a significant effect on employees, and that allows for the representation of those employees for the purposes of consultation. Where a consultation term is not included in an enterprise agreement, the term provided in regulation 2.09 of the *Fair Work Regulations 1999* is taken to be part of the enterprise agreement (s.205(3)) of the Fair Work Act).
- 1.3.25 In addition to meeting these minimum requirements, agencies may wish to also incorporate in their consultation term the other routine consultation arrangements or processes within their agency. This may include arrangements regarding the establishment and operation of the agency's consultative committees and consultation on matters affecting employees or the workplace. .
- 1.3.26 In developing a consultation term, APS agencies may, subject to negotiations with bargaining representatives, incorporate the term provided at Fair Work Regulation 2.09, adopt a recommended model term circulated by the APSC, or otherwise include their own consultation term, subject to that term meeting the requirements of the Fair Work Act.

Individual flexibility arrangements

- 1.3.27 The Fair Work Act requires all enterprise agreements to include a flexibility term which enables the effect of an enterprise agreement to be varied to meet the genuine needs of an individual employee and their employer. Where a flexibility term is not

included in an enterprise agreement, the term provided in regulation 2.08 of the *Fair Work Regulations 2009* is taken to be part of the enterprise agreement (s.202(4) of the Fair Work Act).

- 1.3.28 In keeping with the Fair Work Act, flexibility arrangements must meet the following requirements:
- An individual arrangement is to only include things that would be permitted in an enterprise agreement, and not include things that would be unlawful in an enterprise agreement;
 - The arrangement must be genuinely agreed by the employee and must result in the employee being better off against their enterprise agreement than if they had not entered into an individual flexibility arrangement;
 - The arrangement is to be agreed to by the employee and employer and not required to be approved, or consented to, by another person (except where the employee is under 18 where a parent is to sign);
 - The arrangement is to include the provisions by which either party (or both) can terminate the arrangement; and
 - A copy of the individual arrangement is to be given to employee within 14 days of being agreed to.
- 1.3.29 Consistent with the requirements of the Fair Work Act, an employee and employer may agree in an individual flexibility arrangement to trade off certain terms and conditions of employment as specified in the agency's flexibility term, providing the employee is better off against their enterprise agreement than if they had not entered into an individual flexibility arrangement. However, the terms and conditions in a flexibility arrangement are not to undercut legislated minima, such the National Employment Standards. For example, an arrangement is not to provide less than the minimum entitlement to annual leave in exchange for additional remuneration. Similarly, as a matter of Government policy, personal/carer's leave entitlements are not to be traded away.
- 1.3.30 In developing a flexibility term, APS agencies may, subject to negotiations with bargaining representatives, incorporate the term provided at Fair Work Regulation 2.08, adopt a recommended model term circulated by the APSC, or otherwise include their own flexibility term, subject to that term meeting the requirements of the Fair Work Act.
- 1.3.31 An agency's flexibility term is expected to be the sole mechanism for providing additional or different terms and conditions to those otherwise available through an enterprise agreement for individual non-SES employees. Individual determinations made under the Public Service Act or supplementary common law arrangements for non-SES employees are not to be used other than in exceptional circumstances, and only after consultation with the APSC.

1.3.32 Agencies are required to provide the APSC with details regarding the number and terms of individual flexibility arrangements entered into, as requested from time to time.

Dispute resolution clause

1.3.33 All enterprise agreements must contain a procedure that allows Fair Work Australia, or another person who is independent of the employers, employees, or employee organisations covered by the Agreement, to settle disputes (s 186(6) of the Fair Work Act).

1.3.34 Other collective arrangements in the APS, such as collective determinations made under the Public Service Act, should include a dispute resolution clause on the same basis as those required in enterprise agreements under the Fair Work Act.

1.3.35 It is Australian Government policy that all workplace arrangements in the APS must include procedures which facilitate the resolution of disputes at the workplace level in the first instance. Only in cases where a dispute cannot be resolved through workplace-based processes should it be referred to an external party for assistance with resolution.

1.3.36 Where a dispute cannot be resolved at the workplace level and requires external assistance, dispute resolution arrangements should provide for initial external assistance to take the form of mediation or conciliation. Should that be unsuccessful, dispute resolution arrangements should provide for access to arbitration by Fair Work Australia as the final avenue for resolution following exhaustion of all other options.

1.3.37 It is Government policy that the resolution of disputes in the APS should occur in good faith and therefore follow the same principles as the good faith bargaining requirements detailed at s 228 of the Fair Work Act.

1.3.38 The Fair Work Regulations contain a model clause for dispute resolution which meets the requirements outlined above. When developing an enterprise agreement or collective determination, agencies may, subject to negotiations with bargaining representatives, incorporate this model dispute resolution clause, adopt a recommended model clause circulated by the APSC, or otherwise include their own dispute resolution clause subject to that term meeting the requirements of the Fair Work Act and the policy settings outlined above.

1.3.39 Agencies may also wish to consider the following issues if drafting their own clause:

- To be cautious in considering any proposal to broaden the scope of the clause beyond matters that arise under the enterprise agreement or the NES; and
- To be clear about the role of Fair Work Australia. The options available to Fair Work Australia in the model term in FW Regulation 6.01 are an appropriate guide to use. Where Fair Work Australia is expected to deal with a dispute by arbitration, this must be expressly stated in the dispute resolution term to give them the authority to do so.

1.4 Facilitate productive workplace relations and collective bargaining in good faith

1.4.1 Agencies will facilitate productive workplace relations with employees and their representatives. Agencies will work with employees and their representatives to ensure that APS agencies have workplace relations which value communication, consultation, cooperation and input from employees.

Good faith bargaining

1.4.2 It is a requirement of the Fair Work Act that agencies will bargain with their employees in good faith.

1.4.3 Agencies will observe the right of employees to appoint their own bargaining representatives to represent them in bargaining for a proposed enterprise agreement. If employees are union members and the union is entitled to represent the industrial interests of the employees in relation to their work, then agencies will recognise the unions as the bargaining representatives for those employees.

1.4.4 Chapter 2, Part 2-4, Divisions 3 and 8 of the Fair Work Act provide the legislative framework for appointing bargaining representatives and negotiating with bargaining representatives, including defining good faith bargaining.

1.4.5 The principles of good faith bargaining apply to all bargaining representatives (defined in the Fair Work Act as employers, employee organisations – provided an employee is a member and union can represent their industrial interests, and any other person appointed as a bargaining representative by an employee or employer).

1.4.6 If a bargaining representative considers that negotiations are not proceeding in good faith, a bargaining representative may refer the matter to Fair Work Australia. In determining matters related to good faith bargaining, Fair Work Australia may, on application by a bargaining representative, make a bargaining order or a serious breach declaration directing the parties to undertake certain courses of action as it sees fit.

1.4.7 Agencies considering referring a good faith bargaining matter to Fair Work Australia are to consult with the APSC before any referral or request is made.

1.4.8 Good faith bargaining includes:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- (f) recognising and bargaining with other bargaining representatives for the agreement.

1.4.9 Good faith bargaining requirements do not require:

- (a) a bargaining representative to make concessions during bargaining for the agreement; or
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

Consultation on other workplace arrangements

1.4.10 Agency Heads will genuinely consult with employees and their representatives in good faith in relation to other workplace arrangements, such as determinations.

1.5 Respecting employees' right to representation

1.5.1 Agencies should ensure an employee's right to representation is respected. The role of workplace representatives, including union delegates and employee representatives, is to be respected and facilitated.

1.5.2 An individual employee's choice to be represented must be respected by all parties in the workplace. Where an employee elects to be a member of a union, their agency must respect the employee's right to deal on workplace matters through their representative.

1.5.3 It is the Government's expectation that agencies and employee representatives, including unions, will work together collaboratively and professionally.

1.5.4 In accordance with longstanding practice, agencies are to provide the facility for an employee to have their union membership fees deducted from their pay upon the request of the employee.

Facilities for bargaining representatives

1.5.5 In order to facilitate a collaborative and professional relationship between agencies, unions and bargaining representatives across the APS, Attachment B sets out the facilities which agencies are to provide to unions and other bargaining representatives in the context of negotiating enterprise agreements.

- 1.5.6 Agencies are advised that the specific facilities outlined at Attachment B are to be considered the minimum standard. It is not intended that any existing facilities provided be reduced where they exceed the minima. Where Agencies consider that the provision of facilities further to those provided under existing protocols, or custom or practice, is likely to enhance or expedite the bargaining process, they are encouraged to consult with employees and their representatives on any such provision.

Ongoing facilities for union delegates

- 1.5.7 Agencies are encouraged to enter into discussions with employees and their representatives in order to facilitate arrangements for workplace representatives that take into account the agency and the employee representatives' specific needs.
- 1.5.8 To best facilitate this, agencies should develop a framework, similar to that provided at Attachment C, in consultation with all relevant unions with coverage of that agency's employees which outlines responsibilities and obligations in relation to delegates' rights within the workplace.
- 1.5.9 It is recommended that each agency develops, in consultation with unions, a timely process to resolve issues arising from these arrangements.
- 1.5.10 Agencies should review their existing frameworks, developed under the 1 September 2009 edition of the Bargaining Framework, to ensure consistency with the updated requirements.

Facilities for union communication with employees

- 1.5.11 Agencies will seek to facilitate official union communication with employees by means including:
- (a) The use of email as a means of communicating with all employees. Delegates have the right to email employees in their workplace as set out in the Principles for Workplace Delegates at Attachment C, subject to the reasonable use of this right. Agencies which currently provide superior arrangements should continue to do so. Agencies should consider requests from unions for all-staff emails and seek to facilitate these requests where possible, subject to operational requirements;
 - (b) The provision of notice boards or other designated areas for the display of union information outside of public contact areas. These notice boards may be physical, or provided via an agency Intranet site or similar means if it is more practicable to do so;
 - (c) Other means of information sharing, including written materials, electronic billboards, and access to websites;
 - (d) Providing facilities for paid or unpaid group or individual meetings between employees and their representatives.

- 1.5.12 The provisions described above represent minimum standards. It is in no way intended to reduce rights under existing protocols, or custom and practice. In this context, agencies should note that there is no expectation that any existing arrangements should be reduced where those arrangements exceed the minima. Where Agencies consider that the provision of facilities further to those provided under existing protocols, or custom or practice, is likely to enhance or expedite the bargaining process, they are encouraged to consult with employees and their representatives on any such provision.
- 1.5.13 The APSC will periodically ask agencies to report on the implementation of delegates' rights frameworks.

1.6 Application of the right of entry and freedom of association provisions of the Fair Work Act in a fair and reasonable manner

- 1.6.1 Agencies should apply the right of entry and freedom of association provisions of the Fair Work Act in a fair and reasonable manner.
- 1.6.2 The Government recognises the legitimate role played by unions in the workplace, including the rights and obligations provided for under legislation. The Government recognises the legitimate role of unions to act on behalf of their members and for the benefit of workers and to organise and bargain collectively.
- 1.6.3 It is Australian Government policy that agencies should facilitate employee access to their unions, or other representatives, in the workplace in a fair and reasonable way. This includes the provision of information to employees by their representatives.
- 1.6.4 The Government expects that all arrangements will take into account the specific circumstances of an agency and will not prejudice the efficient operation of, or service provision by the agency.

1.7 Ensuring clear, easy to read, streamlined instruments

- 1.7.1 Enterprise agreements may include as much or as little detail as agreed between agencies and bargaining representatives, subject to satisfying the requirements of the Fair Work Act.
- 1.7.2 However, as a general principle, it is Australian Government policy that APS enterprise agreements, determinations, common law agreements, and workplace policies and practices be clear, easy to read, and streamlined in order to maximise their accessibility for all APS employees.

- 1.7.3 The terms of enterprise agreements should facilitate ongoing productivity initiatives and the capacity to meet changing and evolving business needs in a fair and reasonable manner.

1.8 Seek the inclusion of relevant model clauses in terms and conditions instruments

- 1.8.1 When developing enterprise agreements and other workplace arrangements, agencies should actively consider how those instruments can better support the concept of ‘one APS’, as outlined in *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*.
- 1.8.2 To assist agencies in doing so, from time to time the APSC will circulate recommended terms and conditions (which may include specific entitlements, or ranges of entitlements) which agencies may seek to include in enterprise agreements and other instruments through good faith bargaining
- 1.8.3 Model clauses and other advice on specific entitlements issued by the APSC will serve as guidelines only. They are not intended to prevent agencies from bargaining employment terms and conditions in good faith or to limit agencies’ capacity to do so. To this end, a failure to achieve all of the recommended terms and conditions, or incorporate suggested model clauses, through a good faith bargaining process shall not be cause to determine that a proposed agreement cannot proceed or is inconsistent with the Bargaining Framework.

1.9 Submit proposed bargaining positions, enterprise agreements and collective determinations to the APSC for assessment

- 1.9.1 Agencies are to provide proposed enterprise agreements and collective determinations to the APSC to be assessed against the APS Bargaining Framework and the recommended terms and conditions. The APSC in assessing agreements aims to promote consistency with Australian Government workplace relations policy.
- 1.9.2 This requirement also applies to an agency’s proposed bargaining position, which must be assessed by the APSC before the agency issues of a notice of employee representational rights.
- 1.9.3 The APSC will endeavour to identify potential non compliance with legislative requirements during formal assessments of enterprise agreements and where an agency has requested assessment of other workplace arrangements.

1.10 Comply with any instruction issued by the APS Commissioner in relation to administering the APS Bargaining Framework

- 1.10.1 Consistent with the responsibility for the APS Bargaining Framework and broader APS employment and workplace relations matters, the Commissioner may issue circulars or other instructions to agencies regarding the administration, interpretation, implementation, or application of the APS Bargaining Framework from time to time. These circulars or other instructions may be communicated broadly, or provided to a particular agency in the context of that agency's own circumstances.
- 1.10.2 These instructions may include requests to provide data or other information to assist the APSC in discharging its responsibilities. As has previously been the case, information to be collected from agencies will include salary, performance pay, characteristics of individual arrangements, and other key terms and conditions at the discretion of the APSC.

Industrial disputes and related matters

- 1.10.3 Agencies should inform their Minister and the APSC at the earliest possible time where industrial action, either protected or unprotected, is being engaged in, threatened, impending, or probable.
- 1.10.4 Agencies should also inform their Minister, the Special Minister of State for the Public Service and Integrity, and the APSC at the earliest possible time where they become involved in matters before Fair Work Australia or in any court matter that is of a workplace relations nature.

APSC assistance in dispute mediation

- 1.10.5 The APSC may be able to assist in the mediation of disputes at the request of an agency where circumstances warrant external assistance. Agencies wishing to utilise this option are encouraged to contact the APSC to discuss options for assistance.

1.11 Obtain Ministerial approval in relation to enterprise agreements and collective determinations

Approval of proposed bargaining positions

- 1.11.1 Agencies are to seek the approval of a proposed bargaining position prior to issuing a notice of employee representational rights to employees under the Fair Work Act.
- 1.11.2 To better support the concept of 'one APS', agencies should seek to include recommended terms and conditions in enterprise agreements and other instruments as outlined under Part 1.8 above. Accordingly, where an agency's proposed bargaining

position is in line with recommended terms and conditions, the APSC will certify on behalf of the Special Minister of State for the Public Service and Integrity that the proposed bargaining position is consistent with the Bargaining Framework and recommended terms and conditions.

- 1.11.3 Where an agency's proposed bargaining position is not in line with the Bargaining Framework and/or the recommended terms and conditions, approval from the Special Minister of State for the Public Service and Integrity is required.
- 1.11.4 Agencies will be required to outline their business case as to how they intend to move towards the recommended terms and conditions, or otherwise why they cannot do so.
- 1.11.5 The involvement of the agency's Minister in this process is a matter for the agency to discuss with its Minister. However, it is the Government's expectation that, as a minimum, the Agency Head would clear a proposed bargaining position before it is provided to the APSC.

Approval of proposed enterprise agreements

- 1.11.6 Agencies are to seek the approval of the Special Minister of State for the Public Service and Integrity of a proposed enterprise agreement ahead of putting any such agreement to staff vote.
- 1.11.7 Where the content of a proposed enterprise agreement has not deviated from the approved bargaining position as outlined above, and the proposed agreement is otherwise consistent with the Bargaining Framework, the APSC will certify on behalf of the Special Minister of State for the Public Service and Integrity that the proposed enterprise agreement is consistent with the Bargaining Framework and recommended terms and conditions.
- 1.11.8 Where the content of a proposed enterprise agreement has deviated from the approved bargaining position as outlined above, and/or the proposed agreement is otherwise inconsistent with the Bargaining Framework, direct approval from the Special Minister of State for the Public Service and Integrity is required. In these cases, agencies will be required to provide an explanation as to why deviations have occurred or provisions inconsistent with the Bargaining Framework and/or recommended terms and conditions are proposed.
- 1.11.9 The involvement of the agency's Minister in this process is a matter for the agency to discuss with its Minister. However, it is the Government's expectation that, as a minimum, the Agency Head would clear a proposed enterprise agreement before it is provided to the APSC.

Approval for exceptional circumstances

- 1.11.10 There are a number of situations outlined in this Supporting Guidance where approval is required to deviate from the Bargaining Framework on the basis of exceptional circumstances. Where approval for any exceptional circumstances matters is required outside of the above bargaining position and agreement approval processes (for example, because a matter has arisen during the course of bargaining), agencies should brief their Minister to write to the Special Minister of State for the Public Service and Integrity seeking approval of the relevant matters.

Issues arising in the course of negotiations

- 1.11.11 In addition, agencies should inform the APSC where significant issues arise during the course of negotiations which could substantially alter the outcome of the bargaining process. Where necessary, agencies may seek approval from the Special Minister of State for the Public Service and Integrity should they wish to alter their bargaining position during the course of negotiations.

Part 2 - Remuneration Policy

Part 2 - Remuneration Policy

APS agencies are to observe the following remuneration policies:

- 2.1 Improvements in remuneration are to be offset by genuine, quantifiable productivity improvements;
- 2.2 Salary advancement for individuals within classifications and broadbands is subject to at least satisfactory performance;
- 2.3 Remuneration increases are to apply prospectively, other than in exceptional circumstances

2.1 Improvements in remuneration are to be offset by genuine, quantifiable, productivity initiatives

- 2.1.1 The Australian Government requires improved remuneration and conditions for APS employees to be underpinned by improved productivity and performance.
- 2.1.2 The government encourages the introduction of new methods of increasing productivity in APS agencies. Examples of initiatives that agencies may introduce include (but are not limited to):
 - (a) improved training processes to increase the skills base of the workforce for improved efficiency,
 - (b) development of new technological processes to streamline agency processes and as a consequence increase output.
- 2.1.3 In this context, APS agencies are able to negotiate productivity-based salary increases that meet their business needs, subject to affordability parameters as described under Part 3. However, as APS salaries are publicly funded it is important to ensure that APS salary increases are consistent with community standards and principles of fiscal responsibility.
- 2.1.4 To this end, and without seeking to limit the capacity of agencies to bargain in good faith, the APSC recommends that salary increases in APS workplace arrangements not exceed 3 per cent on a NED to NED basis. Table 1 (below) provides some examples of NED to NED AAWI calculations. On request, the APSC will also provide accompanying material to assist agencies in calculating the NED to NED AAWI of their workplace arrangements.
- 2.1.5 The NED-NED-AAWI is calculated by dividing the total pay increases provided under the agreement, by the agreement duration (based on the time elapsed between the NED of the previous agreement to the NED of the proposed new agreement).

NED-NED AAWI - examples

Example 1

Total Pay Increases over length of agreement = 9.0%

Previous Nominal Expiry Date 30 June 2011

Commencement date of new agreement 28 July 2011

Current Nominal Expiry Date 30 June 2014

AAWI

No of Days from 28 July 2011 – 30 June 2014 = 1068

AAWI= 9.0 /1068 x 365 = 3.07% (rounded) 3.1%

NED-NED AAWI

No of days from 30 June 2011 – 30 June 2014 = 1096

9.0 /1096 x 365 =2.99% (rounded) 3.0%

Example 2

Total Pay Increases over length of agreement= 9.75%

Previous Nominal Expiry Date: 11 November 2011

Commencement date of new agreement 13 January 2012

Current Nominal Expiry Date: 30 June 2014

AAWI

No of Days from 13 January 2012 – 30 June 2014 = 899 days

AAWI= 9.75 /899 x 365 = 3.95 % (rounded) 4.0%

NED-NED AAWI

No of Days from 11 November 2011 – 30 June 2014 = 962 days

9.75 /962 x 365 = 3.69% (rounded) 3.7%

Salary threshold

- 2.1.6 Subject to affordability and in order to facilitate a reduction in remuneration dispersion across the APS, where agencies have employees who would be paid below the 5th percentile of APS salaries for their classification upon commencement of a new enterprise agreement or other workplace arrangement, those agencies may bring forward a higher wage increase for those employees. Any such measures taken to increase the remuneration of employees below the salary threshold will not be counted towards that agency's NED to NED AAWI.
- 2.1.7 The APSC will publish and advise agencies of the salary threshold for each APS and EL classification, expressed as an annual salary rate. The salary threshold of APS

salaries for each classification will be based on salary data collected from agencies by the APSC, and will be updated from time to time.

- 2.1.8 For the avoidance of doubt, this salary threshold applies at the point of commencement of a workplace arrangement. Should certain employees subsequently fall below the salary threshold during the life of the agreement, agencies will not be expected to provide further additional ‘top ups’ of salaries beyond that provided in the workplace arrangement, however they may choose to subject to affordability.

Demonstration of productivity improvements

- 2.1.9 Agencies will need to ensure that they are able to demonstrate that proposed improvements to the terms and conditions of employment for agency employees are underpinned by quantifiable productivity initiatives.
- 2.1.10 For the purposes of the APSC assessment, agencies will satisfy this requirement by completion of the template declaration at [Attachment D](#).

2.2 Salary advancement for individuals within classifications and broadbands is subject to at least satisfactory performance

- 2.2.1 Salary advancement through a classification and/or broadband is only to occur where an employee’s performance has been assessed at least at the satisfactory level in accordance with;
- the work level standards for their classification;
 - the terms of their individual performance agreement; and
 - other applicable employment instruments under the Public Service Act.
- 2.2.2 Agencies are entitled to set additional performance management requirements at their discretion.
- 2.2.3 Agencies have the flexibility to develop performance management systems that meet the particular needs of their organisation and employees, noting that the Public Service Commissioner’s Directions 1999 (Chapter 2.12) require agencies to put in place a fair and open performance management system that:
- covers all employees; and
 - guides salary movement and
 - is linked to agency organisational and business goals and the maintenance of the APS Values; and

- provides employees with a clear statement of performance expectations; and
 - provides employees to comment on those expectations.
- 2.2.4 Advancement within a broadband should also be guided by work availability and application of the merit principle.

2.3 Remuneration increases are to apply prospectively, other than in exceptional circumstances

- 2.3.1 Should an agency consider exceptional circumstances exist such that it is necessary to include a remuneration clause in an enterprise agreement or collective arrangement which applies retrospectively, the agency should consult with the APSC.
- 2.3.2 The inability of the negotiating parties to reach agreement through good faith bargaining would not be considered an exceptional circumstance.
- 2.3.3 Salary increases should not be scheduled to take effect after the proposed NED of an enterprise agreement.
- 2.3.4 Bonus payments, including where a bonus is payable on commencement of an agreement, are increases in remuneration and, in accordance with Government policy, must be linked to improvements in productivity and performance. Individual bonus payments must be linked to individual productivity and performance; while collective or group bonuses must be linked to collective productivity and performance improvements.

Part 3 - Funding Policy

Part 3 - Funding Policy

- 3.1 Improvements in pay and conditions are to be funded from within existing budgets, without the redirection of program funding.

3.1 Funding from within agency budgets

- 3.1.1 It is Australian Government policy that agencies may not enter into arrangements which cannot be met from within existing agency budgets.
- 3.1.2 Therefore improvements in pay and conditions will be funded from within existing agency budget allocations for the life of an enterprise agreement or other Workplace Arrangement.
- 3.1.3 In determining appropriate remuneration levels in their workplace arrangements, agencies should take into account any approved funding increases, including annual indexation, the application of all efficiency dividends, and the flow on costs to accrued leave entitlements. As noted under Part 2.1, agencies are required to provide a signed declaration covering remuneration and funding policy which can be located at Attachment D.
- 3.1.4 To ensure an accurate assessment of the cost impact of workplace arrangements agencies should seek to assess any potential increases in costs from the flexibility clause and from the implementation of any incomplete reviews of terms and conditions contained within the agreement.

No redirection of program funding

- 3.1.5 Agencies are required to complete the funding declaration (Attachment D) certifying that improvements in wages, terms and conditions have not been met by the redirection of program funding. Agencies are not to assign funding from agency programs and initiatives to fund improvements in employee terms and conditions.

Affordability of proposed remuneration improvements

- 3.1.6 APS agencies proposing new or varied enterprise agreements or collective determinations which have a NED to NED AAWI in excess of 3.0 per cent will be subject to enhanced scrutiny by Finance in relation to affordability.
- 3.1.7 The APSC will advise Finance when it receives a proposed enterprise agreement or collective determination which exceeds the NED to NED AAWI parameters. Finance

will assess proposed agreements for consistency with these requirements and will advise agencies as to the information it requires on a case by case basis.

Affordability and approval by the Special Minister of State for the Public Service and Integrity

- 3.1.8 Any new or varied enterprise agreements or new collective determinations proposing a NED-NED AAWI in excess of 3.0 per cent which have not met Finance scrutiny cannot be approved by the Special Minister of State for the Public Service and Integrity.

Part 4 - Staffing Policy

Part 4 - Staffing Policy

All APS workplace arrangements (including enterprise agreements, common law arrangements, determinations made under the Public Service Act, and workplace policies and practices) are to:

- 4.1 maintain structures that are consistent with the APS Classification Rules and work level standards;
- 4.2 include compulsory redeployment, reduction and retrenchment provisions, without enhancing existing redundancy arrangements other than where required by legislation, or in exceptional circumstances with the approval of the Special Minister of State for the Public Service and Integrity;
- 4.3 contain provisions which ensure the portability of accrued paid leave entitlements and enhance mobility of employees;
- 4.4 incorporate leave policies and employment practices that support the release of community service volunteers for emergency services duties and Defence Reservists for peacetime training and deployment; and
- 4.5 incorporate flexible attraction and retention initiatives, including incorporating terms and conditions which assist employees in maintaining a healthy work-life balance and improve diversity.

4.1 Maintain structures that are consistent with the APS Classification Rules and work level standards

- 4.1.1 Section 23 of the Public Service Act provides for the Public Service Minister to make rules about classifications of APS employees. The *Public Service Classification Rules 2000* (the Classification Rules) allow employees and duties to be classified on the basis of work value and enable the grouping of classifications at comparable levels.
- 4.1.2 The Classification Rules are available on the [APSC's website](#).
- 4.1.3 The APS Bargaining Framework requires that the classification structures contained in agency agreements be consistent with the Classification Rules.

APS classification structure

- 4.1.4 The Classification Rules provide for APS Levels 1 to 6, Executive Levels 1 and 2, Senior Executive Bands 1, 2 and 3 and a limited number of approved specific classification structures. In addition, the Classification Rules provide for associated training classifications including for trainees, cadets, graduates and apprentices.

- 4.1.5 Rule 6 of the Classification Rules requires an Agency Head to allocate an approved classification to each APS employee in the agency. Approved classifications are only those that appear in Schedules 1 and 2 of the Classification Rules.

Broadbanding of the APS classification structure

- 4.1.6 Rule 9 of the Classification Rules allows an Agency Head to allocate more than one classification to a group of duties. This is the process of combining several classification levels into a broadband. The broadband encompasses the full range of work values and work level standards of the group of classifications from the base of the lowest to the top of the highest.
- 4.1.7 It should be noted that the broadband is allocated to the group of duties and not the individual employee. An employee can only hold one classification at any given time and each employee must hold a classification. As such, any title given to a broadband by an agency should be regarded as a local designation and not an approved classification. Agreements should be drafted in a way that allows the agency and employees to clearly identify, at any point in time, what approved classification each employee holds.
- 4.1.8 Agencies should ensure that as each employee moves through a particular broadband, the employee's APS classification is adjusted to remain consistent with the relevant classification for the substantive duties that the employee is performing and the employee's position in the broadband.
- 4.1.9 The three band classification framework for the SES can not be broadbanded.
- 4.1.10 If agencies are considering broadbanding the non-SES APS classification structure, it is important for agencies to look carefully at the homogeneity or commonality of functions, including supervisory needs, when developing broadbands, and to place barriers appropriately. Agencies should be mindful that it would be difficult to meet the APS Values without incorporating at least two breaks that would require open competitive selection, that is, a minimum of three broadbands.
- 4.1.11 The extent of a broadbanded structure and the location of the breaks requiring open competitive selection will depend upon the particular organisational structure of the agency. Whilst Agency Heads have the flexibility to agree on broadbanding arrangements which best suit the needs of their agency, they must take into account the APS Values relating to merit, community access to employment and leadership when establishing such arrangements.
- 4.1.12 Agencies with new or revised broadbanding proposals will be required to demonstrate to the APSC that such proposals meet the APS Values and legislative requirements in relation to merit and leadership, as part of the APS Bargaining Framework assessment process.

- 4.1.13 It is therefore strongly recommended that agencies consult the APSC for clarification on classification, merit and leadership issues during the early stages of development of any proposed broadbanding to ensure consistency with the Classification Rules and the APS Values.

Agency specific classification structures

- 4.1.14 Agencies contemplating moving to an agency specific classification structure should discuss their needs with the APSC.

Local designations

- 4.1.15 Agency specific classification structures should not be confused with local designations. The confusion usually occurs when agencies develop a broadbanded structure and give their broadbands a locally designated classification. For example, a broadband of APS 1 to APS 3 may be locally designated as ‘Agency X Level 1’.
- 4.1.16 Agencies utilising local designations must ensure that the equivalent APS classifications are included next to references to the local designation in their enterprise agreement.

Work Level Standards

- 4.1.17 The Classification Rules require agencies to determine Work Level Standards (WLS) for each classification being utilised in the agency through genuine consultation with employees and their representatives. WLS specify the distinctive features of work at each level, characterising the type of duties undertaken and assessing the relative worth of jobs in terms of work value.

4.2 Include compulsory redeployment, reduction and retrenchment provisions, without enhancing existing redundancy arrangements other than where required by legislation or in exceptional circumstances

- 4.2.1 All enterprise agreements, determinations where relevant and common law agreements must provide for access to compulsory redeployment, reduction and retrenchment (RRR) for excess APS employees. This will ensure that agencies maintain the capacity to resolve excess employee situations by either:
- moving the employee to a suitable job at or below their substantive classification level (with or without the employee’s agreement); or
 - terminating the employee’s employment under section 29 of the Public Service Act if the employee does not wish to accept voluntary retrenchment and there is no useful work for the employee to perform.

SES employees

- 4.2.2 Section 37 of the PS Act provides that an Agency Head may give notice in writing to an SES employee stating that the employee will become entitled to a payment of a specified amount if the employee retires within a period specified in the notice – i.e. an incentive to retire.
- 4.2.3 The purpose of this provision is to instigate change and effectively manage an agency's SES workforce particularly in downsizing situations. It is likely that most situations involving excess SES employees will be managed under section 37 of the Public Service Act.
- 4.2.4 Chapter 6 of the Public Service Commissioner's Directions (the Commissioner's Directions) sets out the minimum requirements that must be met in relation to an Agency Head giving notice to an SES employee under section 37 of the Public Service Act. The Directions provide that the Commissioner must have agreed to the amount to be paid to the employee in these circumstances. A determination, common law contract or SES enterprise agreement should not bind the Commissioner to a certain level of payment for redundancy or retrenchment and as such should be silent on the quantum of the payment. The Directions also provide that an employee must be given access to independent financial advice and career counselling.
- 4.2.5 As this incentive to retire provision requires the agreement of the individual SES employee, enterprise agreements, determinations or common law agreements applying to SES employees should continue to include provisions that make it clear that the employee may be redeployed to other duties, including at a lower level, or have their employment terminated without their agreement on the grounds that they are excess to an agency's requirements.
- 4.2.6 However, it is inappropriate for SES enterprise agreements, determinations or common law agreements to include provisions which provide a redundancy benefit or similar type of payment to persons whose employment is terminated involuntarily under section 29 of the Public Service Act. Similarly SES enterprise agreements, determinations or common law agreements should not include retention arrangements for excess SES employees.
- 4.2.7 Agencies should however note that Chapter 6 of the Commissioner's Directions establishes minimum requirements that Agency Heads must satisfy in relation to SES employment decisions including where it is proposed to redeploy an SES employee (either at level or to a lower classification level) or where termination of employment is proposed.
- 4.2.8 In addition, section 38 of the Public Service Act provides that before an Agency Head can terminate the employment of an SES employee under section 29 of the Public Service Act, the Commissioner must have issued a certificate stating that all the relevant requirements of the Commissioner's Directions have been satisfied in relation

to the proposed termination and the Commissioner is of the opinion that the termination is in the public interest.

- 4.2.9 Where an SES employee's employment is terminated under section 29(3)(a) of the Public Service Act (i.e. on the ground that he/she is excess to the requirements of the agency), the employee may be entitled to an NES redundancy payment in accordance with the Fair Work Act.
- 4.2.10 In addition, there may be some cases where an SES employee who is retired with a special benefit under section 37 of the Public Service Act may also have an entitlement to redundancy benefit as set out in the NES. In these cases, the specified amount that is agreed by the Commissioner under section 37 that is to be paid to the employee will be regarded as including any entitlement the employee would have under the NES. Agency Heads should make it clear in advice to an SES employee that the incentive includes entitlements under the NES (if any).

No enhancement of existing obligations other than where required by legislation or in exceptional circumstances

- 4.2.11 In relation to non-SES employees, enterprise agreements and determinations, where applicable, must include compulsory redeployment, reduction and retrenchment provisions for excess APS employees. These provisions or other arrangements (i.e. an individual flexibility arrangement or a determination) which are used to supplement enterprise agreements should not enhance the agency's existing redundancy obligations other than where it is necessary to do so in order to comply with the minimum redundancy entitlements contained within the NES.
- 4.2.12 The Special Minister of State for the Public Service and Integrity may approve the enhancement of existing obligations in exceptional circumstances. If agencies believe they have exceptional circumstances they must seek advice from the APSC before proceeding.

Minimum entitlement under the NES

- 4.2.13 The typical APS redundancy benefit (as set out in the APS Award 1998 and replicated in most agency agreements) is two weeks' pay per year of continuous Commonwealth service (with a pro-rata amount for completed months of service). The amount of pay varies from four to 48 weeks.
- 4.2.14 While generally more favourable than the NES, the typical APS provisions are less favourable than the NES for some employees with between two and three years' service, and three and four years' service. This means that for some employees made redundant during these periods, the NES will apply instead of the APS scale. Agencies should therefore ensure that redundancy payment provisions contained within new enterprise agreements and other workplace arrangements are consistent with (but do not exceed) the NES entitlements for employees with two to three, and three to four, years' service. An increase to redundancy entitlements in order to meet NES obligations would not be considered an enhancement of existing provisions.

4.2.15 The following table outlines the key differences between the NES entitlement and the typical APS provisions as described above:

Table 1: Key differences between the NES and APS Redundancy entitlements

Length of service	NES Redundancy	Typical APS Redundancy
Less than 1 year	Nil	4 weeks
At least 1 year but less than 2 years	4 weeks	4 weeks
At least 2 years but less than 3 years	6 weeks	4 weeks + pro rata for completed months of service
At least 3 years but less than 4 years	7 weeks	6 weeks + pro rata
At least 4 years but less than 5 years	8 weeks	8 weeks + pro rata
At least 5 years but less than 6 years	10 weeks	10 weeks + pro rata
At least 6 years but less than 7 years	11 weeks	12 weeks + pro rata
At least 7 years but less than 8 years	13 weeks	14 weeks + pro rata
At least 8 years but less than 9 years	14 weeks	16 weeks + pro rata
At least 9 years but less than 10 years	16 weeks	18 weeks + pro rata
At least 10 years but less than 11 years	12 weeks	20 weeks + pro rata
11 years or more	12 weeks	22 weeks up to a max of 48 wks

4.2.16 The term ‘existing redundancy arrangements’ for the purposes of the no enhancement requirement should be interpreted as follows:

- for existing APS Agencies that have an enterprise agreement in place, (or are covered by a determination made under s.24 (1) or s.24(3) of the Public Service Act as a result of a machinery of government change which sets out the RRR arrangements for the agency or preserves RRR arrangements that applied before the machinery of government change), the assessment of a new enterprise agreement should be made against the provisions set out in the existing enterprise agreement, s.24(1) determination or those preserved by the s24(3) determination;
- Where new agencies are established that do not have an EA in place (nor covered by a Public Service Act determination under s.24), the assessment will be against the RRR model clause, including the retention period provisions should the agency wish to include that option. This will also apply where non-APS agencies are moved into the APS, provided that the benefits are not greater than the benefits

that already apply in the agency (or part of the agency) as set out in the agency's current EA.

Flexibilities for Redeployment, Reduction and Retrenchment arrangements

- 4.2.17 Agencies are able to adapt their redundancy provisions to meet their specific needs, subject to the test of no enhancement of existing arrangements and the requirements described above.
- 4.2.18 The APSC is able to provide further advice to agencies on these issues.

Statutory obligations and termination of employment

- 4.2.19 Agencies need to be aware that an enterprise agreement, determination or common law agreement cannot override statutory obligations or remedies relating to termination of employment under the Fair Work Act or the Public Service Act.

4.3 Ensuring the portability of accrued paid leave entitlements and enhanced mobility of employees

- 4.3.1 Agreements and other workplace arrangements are to retain portability of accrued annual leave and personal/carer's leave entitlements (however described) within the APS, with future entitlements being those prevailing at the receiving agency. Entitlements to leave will subsequently accrue at the rate applying in the receiving agency.
- 4.3.2 The provisions of the *Parliamentary Service Act 1999* and the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* require agencies to recognise certain leave accrued in these services. Accordingly, workplace arrangements should provide for the portability of annual and personal/carer's leave (however described) between the Parliamentary Service and the APS, and accrued annual leave between the ACT Public Service and the APS. Workplace arrangements should also provide for the portability of personal/carer's leave between the ACT Public Service and the APS as this is the basis of ongoing inter-government agreement.
- 4.3.3 The portability of leave within the APS requires receiving agencies to act on the advice of an employee's former employing agency in determining their accrued leave entitlement. For example, agencies have previously used a range of terms to describe personal/carer's leave in their existing workplace arrangements and have done so for varying reasons. A receiving agency is required to recognise leave accrued in an employee's former agency, even if the purpose for which it was provided is not recognised in the receiving agency's agreement. However, leave accrued from commencement with the receiving agency, will generally accrue in accordance with that agency's arrangements, unless specified otherwise.

- 4.3.4 Certain other terms and conditions of employment set out in Commonwealth legislation and applying to the APS will continue to apply and cannot be overridden by workplace arrangements. In particular, these include long service leave, maternity leave, workers' compensation and occupational health and safety.
- 4.3.5 Agencies considering whether to recognise prior service with, or seek to transfer leave balances from other bodies such as non-APS authorities or State Government agencies (other than for long service leave purposes consistent with the *Long Service Leave (Commonwealth Employees) Act 1976*) must consult with the APSC and Finance before proceeding.
- 4.3.6 Further information on payments related to the portability of accrued annual and long service leave entitlements is set out in Part 11 of the *Financial Management and Accountability Regulations 1997*.
- 4.3.7 In order to facilitate enhanced levels of mobility across the APS, agencies should consider including clauses in enterprise agreements which provide for salary maintenance where a transferring employee currently enjoys a higher salary rate than that which is provided by the gaining agency's enterprise agreement.

4.4 Leave policies and employment practices that support the release of community service volunteers for emergency services and Defence Reservists for peacetime training and deployment

- 4.4.1 The Government supports employees participating in emergency services duties and Defence Force Reserve activities.
- 4.4.2 The Australian Government therefore expects that agencies will lead the way in employment policies and practices which support the release of community service personnel for emergency services duties and Defence Reservists for peacetime training and deployment.
- 4.4.3 Agencies may determine their own approach to these employment practices provided they remain consistent with the broader Government policy of support for these functions.
- 4.4.4 In acknowledgement of the Government's objectives in this area, agencies are encouraged to promote the benefits of community service and Defence Reserve service to their employees.
- 4.4.5 Agencies should note their obligations to provide community service leave in accordance with the requirements of the National Employment Standards. Agencies should also cater for unpaid leave to community service personnel for emergency

services duties encompassing leave for regular training, all emergency services responses, reasonable recovery time and ceremonial duties.

Defence Reserves Support Council

4.4.6 The Defence Reserves Support Council (DRSC) has developed a public sector leave policy which it recommends to Australian Government employers. Specifically, the DRSC recommends that agencies:

- Provide four weeks (20 working days or 28 calendar days) leave on full pay each year for Reservists undertaking Defence service;
- Provide an additional two weeks paid leave to allow for a Reservists' attendance at recruit/initial employment training;
- Provide scope for additional leave for Defence service, either on a paid, unpaid or top-up pay basis;
- Not require Reservists to pay their tax-free Reserve salary to their agency in any circumstances;
- Allow Defence leave entitlements to accumulate and be taken over a two year period;
- Treat leave for Defence service, whether with or without pay or on top-up pay, as service for all purposes – the exception being that a period or periods of leave without pay in excess of six months not count as service for annual leave purposes;
- Provide Reservists with continued access to other components of their remuneration package during periods of Defence service, for example: superannuation (subject to the rules of the CSS, PSS and Military Superannuation and Benefits Scheme), studies assistance, salary reviews and cars;
- Keep Reservists informed of developments in the workplace while the Reservists are undertaking training or are on deployment.

More broadly, the Australian Government strongly encourages APS agencies to actively promote the benefits of Reserve service to their employees. Defence Reserves Support communication employees can assist agencies with promotional material.

4.4.7 These arrangements are consistent with the Government's commitment to supporting Reserve service. The Government therefore supports agencies implementing arrangements along these lines through their workplace arrangements.

4.4.8 In recognition of the potential impact of Defence service on employers, the Australian Defence Force has undertaken to provide agencies, whenever possible, with at least three months notice of a requirement for a Reservist to undertake Defence service. A number of agencies also require Reservists to provide written evidence of their attendance for Defence service.

- 4.4.9 APS agencies are eligible to receive the Employer Support Payment (ESP). The ESP Scheme provides a financial benefit to those employers who provide leave, other than normal paid leave entitlements (e.g. annual leave), to Reservists to undertake peacetime training and deployment. Under the ESP Scheme an employer is eligible to receive the ESP once a Reservist has completed 14 days continuous Reserve service in any financial year. The qualifying period can be undertaken as a single period or as multiple periods of continuous Defence Service, as long as each period of continuous Defence Service is a minimum of five consecutive days.
- 4.4.10 Further information on the ESP, including assistance in developing Reserve service promotional material, can be obtained by contacting the DRSC:
www.defencereserves.com.

4.5 Flexible attraction and retention initiatives, including terms and conditions which assist employees in maintaining a healthy work-life balance and improve diversity

- 4.5.1 The Government acknowledges the wide range of flexible working arrangements which exist throughout Australian Government employment to support the needs of employees and assist agencies in attracting and retaining valuable employees.
- 4.5.2 Such arrangements include but are not limited to:
- training support and study leave;
 - parental leave above minimum legislative entitlements;
 - flexible working hours and employee initiated part-time work;
 - ceremonial or cultural leave (including NAIDOC leave);
 - purchased leave and annual leave at half pay; and
 - career break schemes.
- 4.5.3 Nevertheless, each agency should continue to work proactively with employees and their representatives to consider how their workplace arrangements might be used to support the needs of employees, to retain and upskill existing employees, and to assist the attraction of new employees to the APS.
- 4.5.4 It is Government policy that agencies' enterprise agreements and other workplace arrangements should allow flexible work arrangements to be agreed between the agency head and employees.
- 4.5.5 The Government is committed to assisting employees to maintain a healthy work-life balance. It is expected that agencies will take into account the work-life issues facing

employees in the development of their enterprise agreements and other workplace arrangements. The cost and productivity benefits of any proposed initiatives must be taken into account when determining the overall affordability of the proposed arrangements.

Improving diversity

- 4.5.6 Consistent with the Government commitment to increase Aboriginal and Torres Strait Islander employment to 2.7% by 2015, agencies are encouraged to include specific provisions in enterprise agreements to improve the attraction and retention of Aboriginal and Torres Strait Islander employees.
- 4.5.7 Agencies are also encouraged to implement workplace policies and strategies to improve representation of employees with a disability and from culturally and linguistically diverse backgrounds. Where appropriate such measures should be negotiated and included in enterprise agreements.

Paid Parental Leave (PPL)

- 4.5.8 The *Maternity Leave (Commonwealth Employees) Act 1973* (ML Act) sets out the minimum legislative entitlement to paid parental leave applicable to Australian Government employees. Agencies are able to negotiate paid parental leave above these legislative entitlements as part of the agreement making process.
- 4.5.9 The ML Act does not provide for any more than 12 weeks paid maternity leave (at full pay). However this period of paid leave may be supplemented by a period of unpaid maternity leave (which would not count as service), and the payment for the paid leave component may be spread over the combined periods of paid and unpaid leave.
- 4.5.10 Australian Government employers are required to administer parental leave pay under the *Paid Parental Leave Act 2010* to employees from 1 January 2011. Entitlements under this scheme operate in addition to existing legislative entitlements under the ML Act and entitlements negotiated through agency agreement making. The PPL scheme provides 18 weeks of payments for eligible employees at the federal minimum wage level to new parents who are the primary carers of a child born or adopted on or after 1 January 2011. To be eligible, the primary carer must be in paid work and have worked continuously for 10 of the 13 months before the expected date of birth or adoption and have completed at least 330 hours of work (the equivalent of around one full day of work each week). The scheme covers employees, including casual employees, contractors and the self employed.

Cashing out of personal/carer's leave

- 4.5.11 It is Australian Government policy not to provide for the cashing out of any personal/carer's leave. Agencies should not enter into any such arrangements in their

enterprise agreements, individual flexibility agreements, determinations, common law agreements, or workplace policies and practices.

Cashing out of annual leave

4.5.12 Enterprise agreements may include provisions which enable annual leave to be cashed out. Any such provision must comply with section 93 of the Fair Work Act which provides:

Section 93 - Terms about cashing out [paid annual leave](#)

- (1) A [modern award](#) or [enterprise agreement](#) may include terms providing for the cashing out of [paid annual leave](#) by an [employee](#).
- (2) *The terms must require that:*
 - (a) [paid annual leave](#) must not be cashed out if the cashing out would result in the [employee's](#) remaining accrued entitlement to [paid annual leave](#) being less than 4 weeks; and
 - (b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and
 - (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone

Legal Advice

At various stages during the agreement making process, agencies may wish to seek legal advice on various aspects of related legislation.

The Attorney-General has directed that agencies consult with the agency responsible for the relevant legislation by providing a reasonable opportunity to provide advice on the relevant matter prior to seeking formal legal advice. Agencies should also provide a copy of the request for advice and the advice to the administering agency.

Accordingly, agencies requiring legal advice on the interpretation of provisions in the Fair Work Act or the Public Service Act should contact their APSC Client Contact Officer in the first instance.

The APSC has a Memorandum of Understanding with the Workplace Relations Legal Group of the Department of Education, Employment and Workplace Relations (DEEWR) and works in partnership with DEEWR on workplace relations legal matters affecting Australian Government employment. In this context, agencies should note that while the APSC has responsibility for APS workplace relations matters, DEEWR is the administering agency for the Fair Work Act. Agencies are therefore reminded that, under clause 10 of the Legal Services Directions, DEEWR should be given the opportunity to be consulted on any request for legal advice on the interpretation of the FW Act, as well as being given requests for and copies of such legal advice.

For any legal advice related to the operation of the FW Act, Agencies should consult with DEEWR and provide copies of any legal advice to:

Chief Counsel
Workplace Relations Legal Group
Department of Education, Employment and Workplace Relations
GPO Box 9880
CANBERRA ACT 2601

Given the APSC's role in APS workplace relations, agencies are requested to provide copies of any legal advice sought on the FW Act to the APSC in addition to DEEWR.

Similarly, for any legal advice related to the operation of the PS Act, Agencies should consult with the APSC and provide copies of any legal advice to:

Legal Adviser
Australian Public Service Commission
16 Furzer St
WODEN ACT 2606

For further information consult the Attorney-General's Department's Legal Services Directions.

Further Advice and Information

The Australian Public Service Commission

The APSC provides support and advice to Agencies on the Government's employment and workplace relations policies in order to promote effective agreement making across the APS.

The APSC's Client Contact Teams have been established for all Portfolios.

Your client contact officer can provide up-to-date advice and information in relation to agreement making and other workplace relations issues.

Further information about the APSC's role, services it provides, and publications, along with updates to this policy document can be obtained from www.apsc.gov.au.

You may also contact the APSC's Adviceline on 02 6202 3859 or email employmentadvice@apsc.gov.au. It would be appreciated if complex or sensitive queries are submitted by e-mail.

Fair Work Australia and the Fair Work Ombudsman

Under the Fair Work Act, Fair Work Australia performs a number of functions relevant to agreement making. These functions include approving enterprise agreements, ensuring that bargaining is conducted in good faith, overseeing right of entry and industrial action, dealing with disputes, and providing assistance and advice about its functions and activities. Further assistance is available from Fair Work Australia via its website (www.fwa.gov.au) or by calling 1300 799 675.

The Fair Work Ombudsman is responsible for monitoring compliance and investigating breaches of the FW Act and fair work instruments, and providing education, assistance and advice to employees, employers and organisations on the application of legislation and other general workplace relations enquiries. Further assistance is available from the Fair Work Ombudsman via its website (www.fwo.gov.au) or by calling 13 13 94.

Definitions

‘Agency Head’

The Secretary or head of an APS agency as defined under the *Public Service Act 1999*.

‘APS’

Australian Public Service.

‘APS agency’

An agency that employs employees under the *Public Service Act 1999*.

‘APSC’

The Australian Public Service Commission.

‘AAWI’

Average Annualised Wage Increase.

‘AWA’

Australian Workplace Agreement.

‘Broadband’

A grouping of duties across numerous classifications.

‘Classification/s’

An approved classification level as set out in the *Australian Public Service Classification Rules 2000*.

‘Collective arrangement’

An enterprise agreement or a determination under the employing legislation applying to more than one employee.

‘Commissioner’

The Australian Public Service Commissioner as defined under the *Public Service Act 1999*.

‘Common law arrangement’

A written contract between an APS agency and an employee/s of that agency.

‘DEEWR’

The Department of Education, Employment and Workplace Relations.

‘Determination’

A determination made under relevant employing legislation.

‘Enterprise agreement’

An enterprise agreement made under the Fair Work Act.

‘Fair Work Act’

The *Fair Work Act 2009*.

‘Fair Work Regulations’

The *Fair Work Regulations 2009*.

‘Finance’

The Department of Finance and Deregulation.

‘NED’

Nominal Expiry Date.

‘Public Service Act’

The *Public Service Act 1999*.

‘RRR’

Redeployment, reduction and retrenchment.

‘SES’

Senior Executive Service.

‘Workplace arrangement’

Enterprise agreements, other workplace agreements, common law arrangements, determinations issued under the employing legislation and workplace policies and practices.

Attachment A. Notice of Employee Representational Rights

(Fair Work Regulations 2009, regulation 2.05 – current as at 1 July 2009)
Fair Work Act 2009, subsection 174 (6)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement (*[name of the proposed enterprise agreement]*) which is proposed to cover employees that *[proposed coverage]*.

What is an enterprise agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Australia.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Australia about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a low-paid authorisation applies — include:]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union's status as your representative.

[If a low-paid authorisation applies to the agreement — include:]

Fair Work Australia has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union's status as your representative, or you are a member of another union that also applied for the authorisation.

[if the employee is covered by an individual agreement-based transitional instrument — include:]

If you are an employee covered by an individual agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or
- a conditional termination of your existing agreement has been made

(this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to either your employer, bargaining representative, go to www.fairwork.gov.au, or contact the Fair Work Australia Infoline on 1300 799 675.

Attachment B. Facilities for bargaining representatives

Principles

1. In considering its approach to facilities and protocols for bargaining representatives, the following principles should guide agencies' positions:
 - Agencies acknowledge that bargaining representatives (who may include workplace delegates and elected union officials who are also APS employees) have a legitimate role to play in bargaining for enterprise agreements and should take reasonable steps to facilitate their participation in the bargaining process.
 - Freedom of association must be respected. This includes not only the right to join, or not join a union, but also the right to choose whether or not to become involved in union activity in any way, including whether or not to receive communications from unions.
 - Agency resources are not to be used for promoting or facilitating industrial action of any kind.
 - Participation in the bargaining process should not unduly interfere with an APS employee's paid employment.
 - It may be appropriate to provide greater support for a bargaining representative who is representing a large number or a large proportion of agency employees, than for a bargaining representative who is representing a small number or a small proportion of agency employees, or only themselves.
 - Right of entry provisions of the Fair Work Act apply at all times during the bargaining period. It is expected that union officials will be invited to attend enterprise bargaining meetings with employer bargaining representatives and so will not need to use right of entry processes for that purpose.

2. The following specific facilities are outlined as a minimum. Agencies are advised that it is not intended that any existing facilities provided be reduced where they exceed the minima.

Minimum facilities for bargaining representatives

Employee Meetings	Agencies to allow bargaining representatives to conduct a round of paid time meetings with employees they represent at the commencement of bargaining and another round of paid time meetings when in-principle agreement has been reached. All other meetings to be conducted during unpaid work breaks.
Meeting Facilities	Bargaining representatives will have access to agency meeting facilities subject to agency needs and without undue interference with normal business.
Costs	Unless agreed otherwise by the relevant Agency Head, bargaining representatives will meet their own costs (including travel, accommodation and meals).

Use of emails	Bargaining representatives may access agency email addresses to communicate with the employees they represent.
Attendance at Bargaining Meetings	Bargaining representatives will be provided with reasonable paid time to prepare for and participate in bargaining meetings, subject to operational requirements.
Office equipment	Reasonable facilities will made available such as meeting rooms, communication facilities and other office equipment, subject to operational requirements.
Release of Employees from duty	<p>Agency Heads will facilitate the release of employees to participate in bargaining having regard to the agency's practices and operational needs. In doing so, agencies should consult with relevant unions around the scope of the release and their union delegates involved.</p> <p>Where an employee is released from duty to participate in bargaining, agencies should do so in such a way that it does not affect their existing and/or ongoing entitlements as an employee.</p>

Attachment C. Principles relating to workplace delegates

Note: This attachment outlines the principles for workplace delegates which agencies are to follow and should be read in conjunction with Part 1.4 of the Supporting Guidance. Information on the provision of facilities by agencies during bargaining is provided at Attachment B.

The role of union workplace delegates and other elected union representatives is to be respected and facilitated.

Agencies and union workplace delegates must deal with each other in good faith.

In discharging their representative roles at the workplace level, the rights of union workplace delegates include but are not limited to:

- the right to be treated fairly and to perform their role as workplace delegates without any discrimination in their employment;
- recognition by the agency that endorsed workplace delegates speak on behalf of their members in the workplace;
- the right to participate in collective bargaining on behalf of those whom they represent, as per the Fair Work Act
- the right to reasonable paid time to provide information to and seek feedback from employees in the workplace on workplace relations matters at the agency during normal working hours;
- the right to email employees in their workplace to provide information and seek feedback, subject to individual employees exercising a right to 'opt out';
- undertaking their role and having union representation on an agency's workplace relations consultative committee;
- reasonable access to agency facilities (including telephone, facsimile, photocopying, internet and email facilities, meeting rooms, lunch rooms, tea rooms and other areas where employees meet) for the purpose of carrying out work as a delegate and consulting with members and other interested employees and the union, subject to agency policies and protocols;
- the right to address new employees about union membership at the time they enter employment;
- the right to consultation, and access to relevant information about the workplace and the agency; and
- the right to reasonable paid time to represent the interests of members to the employer and industrial tribunals.

In discharging any roles that may involve undertaking union business, the rights of union workplace delegates include but are not limited to:

- reasonable paid time during normal working hours to consult with other delegates and union officials in the workplace, and receive advice and assistance from union staff and officials in the workplace;
- reasonable access to appropriate training in workplace relations matters including training provided by a union;
- reasonable paid time off to represent union members in the agency at relevant union forums.

In exercising their rights, workplace delegates and unions will consider operational issues, departmental policies and guidelines and the likely affect on the efficient operation of the agency and the provision of services by the Commonwealth.

For the avoidance of doubt, elected union representatives include APS employees elected to represent union members in representative forums, including, for example, CPSU Section Secretaries, Governing Councillors and Section Councillors, and APESMA Government Division Committee members.

Attachment D. Funding declaration

I <insert Agency Head name> certify that having taken account of:

1. our existing financial position, including out-year appropriations and known efficiency dividends;
2. known operational requirements for the foreseeable future; and
3. expected increases in pay and conditions to be provided to <insert Agency name> employees employed under the proposed arrangement, including consequential effects such as increases to outstanding leave liabilities and superannuation entitlements; and
4. the potential cost of individual flexibility agreements, including consequential effects such as increases to outstanding leave liabilities and superannuation entitlements;

that all additional costs arising from the <insert name of Agency collective Workplace Arrangement> can be funded from within the <insert Agency name> budget and revenue streams.

Further, I certify that the improvements in terms and conditions contained within the proposed arrangement will be offset by genuine and quantifiable productivity initiatives.

[Where additional requirements under Part 3.1 apply – include:

I certify that the improvements in terms and conditions contained within the proposed arrangement are not, and will not be, funded through the use of <insert Agency name> program funding].

Signature: _____
Name: _____
Position: _____
Date: _____



- A**
- Agency Heads 48
 APS Classification Structure 28
 Consultation 13
 Responsibilities under the Bargaining Framework vi, vii, xi, 18, 19, 28
 SES employees 31
 Agency Minister vi, 17, 19
Ahead of the Game
Blueprint for the Reform of Australian Government
Administration 16
 Annual leave 10, 34, 36, 37, 39
 APS classification structure 27, 28
 Attraction and retention initiatives 37
Australian Capital Territory Government Service
(Consequential Provisions) Act 1994 34
 Australian Public Service Commission vii, 42
 Advice and information 3, 4, 5, 33, 40, 41
 Assessments x, xi, 17, 23
 Circulars iii, viii
 Mediation 18
 Responsibility vii, 17, 19, 23
 Average Annualised Wage Increase. viii, 21, 22, 23, 25, 26, 42
- B**
- Bargaining representatives ii, viii, 7, 8, 9, 10, 11, 12, 13, 14, 16, 46, 48
 Better Off Overall Test 3
 Broadbanding 28, 29
- C**
- Classifications See APS classification structure
 Common law arrangements iv, xi, 5, 16, 30, 31, 39, 42
 Commonwealth Superannuation Scheme 3
 Consultation clause See *Fair Work Act 2009*
- D**
- Defence Reserves Support Council 35, 36
 Department of Education, Employment and Workplace
 Relations viii, ix, 40, 42
 Department of Finance and Deregulation viii, 25, 26, 35, 43
 Determination See *Public Service Act 1999*
 Dispute resolution See *Fair Work Act 2009*
 Dispute resolution clause See Model clauses
- F**
- Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* 4, 5, 6
Fair Work Act 2009 iii, iv, 6, 43, 44
 Appointment of bargaining representative 7
 Consultation clause 9
 Dispute resolution 11
- Employee representation 8
 Flexibility term 5, 9, 10
 Good faith bargaining viii, 5, 8, 9, 11, 12, 13, 16, 21, 24, 41, 49
 Nominal expiry date 9, 43, 44
 Notice of employee representational rights ...vi, 6, 7, 17, 18, 44
 Unlawful terms 8
 Fair Work Australia ..vi, vii, viii, ix, x, 3, 6, 7, 9, 11, 12, 13, 18, 41, 44, 45
 Fair Work Ombudsman ix, 41
 Flexibility agreements xi, 39, 51
 Flexibility terms See *Fair Work Act 2009*
 Flexible working arrangements 37
 Freedom of association 13, 15, 46
- G**
- Good faith bargaining See *Fair Work Act 2009*
 Government Business Enterprises iv
- I**
- Individual flexibility arrangements vii, 9, 11, *Also see*
 Flexibility agreements
 Industrial action ix, 8, 9, 17, 41, 46
 Industrial disputes vi, 17
- L**
- Long service leave 34, 35
Long Service Leave (Commonwealth Employees) Act 1976
 6, 35
- M**
- Machinery of Government change vii, x, 33
Maternity Leave (Commonwealth Employees) Act 1973 ...6, 38
 Model clauses viii, 11, 16
 Dispute resolution 11
 RRR model clause 33
- N**
- National Employment Standards 10, 11, 31, 32, 35
 Nominal expiry date See *Fair Work Act 2009*
 Non-APS Commonwealth Authorities iv
 Notice of employee representational rights... See *Fair Work Act 2009*
- P**
- Paid Parental Leave Act 2010* 6, 38
 Parental leave 37, 38
 Maternity leave 34, 38
 Paid Parental Leave 6, 38
Parliamentary Service Act 1999 34

<i>Privacy Act 1988</i>	6
Productivity	iii, 16, 21, 23, 24, 37, 51
Public Sector Superannuation Accumulation Plan	3
Public Sector Superannuation Scheme	3
<i>Public Service Act 1999</i> .. iii, iv, vii, 2, 5, 10, 11, 23, 27, 30, 31, 33, 34, 40, 42, 43	
Determination iv, vii, viii, x, xi, 2, 3, 4, 5, 10, 11, 13, 16, 17, 18, 25, 26, 30, 31, 33, 34, 39, 42, 43	
<i>Public Service Classification Rules 2000</i> ...	2, 27, 28, 29, 42
<i>Public Service Commissioner's Directions 1999</i> .	24, 30, 31
<i>Public Service Regulations 1999</i>	vii

R

Recommended terms and conditions	16, 17, 18, 19
Redundancy.....	29, 30, 31, 32, 33

S

Salary increases	21, 24
Salary threshold.....	22
Senior Executive Service.....	iii, 2, 43
SES enterprise agreements.....	2, 3, 4, 30, 31
SES individual arrangement.....	3

Special Minister of State for Public Service and Integrity vi, vii, viii, x, 4, 18, 19, 20, 26, 32	
Superannuation	<i>See</i> Public Sector Superannuation Accumulation Plan, <i>and</i> Public Sector Superannuation Scheme

T

Termination of employment	31, 34
Transfer of leave.....	34

U

Union	
Representation in the workplace.....	8
Union members	12, 14, 49, 50
Union delegate	<i>See</i> Bargaining representatives
Unlawful terms	<i>See Fair Work Act 2009</i>

W

Work Level Standards	23, 27, 28, 29
----------------------------	----------------