Document 1

Workplace Relations Guidance

APS Bargaining Statement of Common Conditions

Cultural, ceremonial and NAIDOC leave

Purpose

This document's purpose is to assist agencies on how to apply the APS Bargaining Statement of Common Conditions (the Statement) as it relates to **cultural, ceremonial and NAIDOC leave**. It is intended to support the implementation and consistent interpretation of the common condition in agencies, as is appropriate for their circumstances. It may be updated from time to time.

In accordance with the Public Sector Workplace Relations Policy 2023, Australian Public Service (APS) agencies have bargained enterprise agreements that incorporate the common condition on cultural, ceremonial and NAIDOC leave as outlined in the Statement. Non-APS agencies have put in place workplace arrangements that have had regard to the Statement. Some agency enterprise agreements may have retained more beneficial conditions or existing facilitative clauses. It is important to consider this guidance alongside your agency's enterprise agreement.

Date: 19 June 2024

Common condition

The common clause on cultural, ceremonial and NAIDOC leave is outlined on page 107 of the Statement. An extract of the Statement is at **Attachment A**.

Providing access to cultural, ceremonial and/or NAIDOC leave in the APS contributes to supporting and attracting a culturally diverse APS workforce to deliver for all Australians. The common condition supports an inclusive workplace. This is by enabling employees of diverse faiths and cultural backgrounds to fulfil significant cultural or religious obligations that fall outside the scope of public holidays and traditional leave types.

Leave type	Common clause	Guidance
NAIDOC leave	1. First Nations employees may access up to one day of paid leave per calendar year to participate in NAIDOC week activities. 2. NAIDOC leave can be taken in part days.	This clause provides that employees who identify as Aboriginal and/or Torres Strait Islander peoples may access up to one day of paid leave per calendar year, subject to the delegate's approval. This leave is for the purposes of participating in NAIDOC week activities. National NAIDOC Week is an annual celebration across Australia. It is held in the first week of July each year (Sunday to Sunday)

Leave type	Common clause	Guidance
		to celebrate the history, culture and achievements of Aboriginal and Torres Strait Islander peoples. Further information about NAIDOC Week is available at the NAIDOC website. Delegates should make all reasonable efforts to accommodate First Nations Employees' requests for NAIDOC leave. Any unused leave does not accumulate. This means that the entitlement to one day in one calendar year does not "carry over" to the second calendar year to a total of 2 days. Any unused leave is not paid out on termination of employment.NAIDOC leave can be taken in part days. There is no requirement that NAIDOC leave be taken as a single day of leave. Provided that the total leave taken under this leave type does not exceed one day, employees may access this leave to attend NAIDOC activities on different days.
First Nations ceremonial leave	3. First Nations employees may access up to 6 days of paid leave over 2 calendar years to participate in significant activities associated with their culture or to fulfil ceremonial obligations. 4. The <Agency Head> may approve additional leave for cultural or ceremonial purposes as miscellaneous leave, with or without pay. 5. First Nations ceremonial leave can be taken as part days. 6. First Nations ceremonial leave is in addition to compassionate and bereavement leave.	This clause provides that employees who identify as Aboriginal and/or Torres Strait Islander peoples may access up to 6 days of paid leave over 2 calendar years, subject to the delegate's approval. This leave is for the purpose of participating in significant activities associated with the employee's culture and/or to fulfil ceremonial obligations. Delegates should make all reasonable efforts to accommodate First Nation Employees' requests to access ceremonial leave for these purposes. Any unused leave does not accumulate. This means that the entitlement to 6 days of paid leave in 2 calendar years does not "carry over" to the third calendar year. Any unused leave is not paid out on termination of employment. There is no requirement that First Nations ceremonial leave be taken as a single continuous block. Provided that the total leave taken under this leave type does not exceed 6 days in 2 calendar

Leave type	Common clause	Guidance
		years (unless additional leave is granted as miscellaneous leave), employees may access this leave on different days.
Cultural leave	7. The <Agency Head> may grant up to 3 days of paid leave per calendar year for the purpose of attending significant religious and/or cultural obligations associated with the employee's particular faith or culture. 8. The <Agency Head> may approve additional leave for cultural purposes as miscellaneous leave, with or without pay. 9. Cultural leave can be taken as part days. 10. For the avoidance of doubt, this leave does not cover cultural purposes or obligations which are eligible for paid leave under <clause reference to First Nations ceremonial leave>.	This clause provides that employees may access up to 3 days of paid leave per calendar year, subject to the delegate's approval, for the purpose of attending significant religious and/or cultural obligations associated with the employee's particular faith or culture. The purpose of the leave is to support the employee to attend significant obligations connected to their identity and their community, and in turn recognise employees from all cultural and/or religious backgrounds and support them to feel included and safe in the workplace. Delegates should make all reasonable efforts to accommodate employees' requests for leave for these purposes. Any unused leave does not accumulate. This means that the entitlement to 3 days does not carry over to the following year. Any unused leave is not paid out on termination of employment. There is no requirement that cultural leave be taken in a single continuous block. Provided that the total leave taken under this leave type does not exceed 3 days in a calendar year (unless additional leave is granted as miscellaneous leave), employees may access this leave on different days. Shift penalties should not be paid on cultural leave.

Legislative requirements

Agencies have legislative obligations to protect employees from unlawful workplace discrimination, including under section 351 of the *Fair Work Act 2009* (Cth), the *Racial Discrimination Act 1975* (Cth), and anti-discrimination laws applicable in each State and Territory.

As part of fostering safe, supportive workplaces and protecting employees from unlawful discrimination, it is essential that delegates and managers handle requests for cultural, ceremonial and NAIDOC leave in a responsive, consistent, respectful and inclusive manner.

3

Frequently asked questions

1. Who is eligible to access cultural, ceremonial and NAIDOC leave?

Only First Nations employees can access NAIDOC leave and First Nations ceremonial leave under the common condition.

The Statement also provides that agencies are to support employees who are not First Nations peoples to participate in agency NAIDOC week activities on paid time.

Under the common condition, cultural leave is a separate entitlement to First Nations ceremonial leave. Employees who have significant religious and/or cultural obligations associated with their faith and/or culture can apply to access cultural leave.

NAIDOC leave, First Nations ceremonial leave and Cultural Leave are not intended to be interchangeable entitlements. For example, If an employee who is eligible for First Nations ceremonial leave has exhausted that entitlement and wants to access further leave for First Nations ceremonial purposes, they should apply for additional miscellaneous leave in accordance with the First Nations ceremonial leave common clause.

Employees who want to take leave in relation to activities or events associated with the culture and/or faith of their spouse/partner or family member may be eligible to access alternative leave arrangements other than cultural, ceremonial and NAIDOC leave. Whether the employee is eligible to access leave will depend on the circumstances. A respectful discussion between the employee and their manager will need to occur so the delegate can decide whether approving the request would be consistent with the purpose of this leave type (being to support an inclusive workplace by enabling employees to participate in significant obligations and/or activities associated with their particular culture or faith).

Agencies should consider including examples and guidelines around granting cultural, ceremonial and NAIDOC leave in policy, in a way that is representative of their workforce profile.

Case example: First Nations ceremonial obligations and Eid al-Fitr

Nazra is a First Nations employee and practising Muslim. After the passing of a family member, Nazra needs to take time off work for sorry business and to take part in traditional First Nations funeral ceremonies. Nazra is eligible to take First Nations ceremonial leave. On a separate occasion, Nazra is approved to take cultural leave to attend Eid al-Fitr, a Muslim celebration which marks the end of the month-long dawn-to-sunset fasting of Ramadan.

2. How does cultural, ceremonial and NAIDOC leave interact with other leave types and flexibility arrangements?

Employees may be able to access other leave or flexibility arrangements in conjunction with cultural, ceremonial and/or NAIDOC leave. These arrangements include:

- under the cultural, ceremonial or NAIDOC leave common condition, delegates may approve additional paid or unpaid miscellaneous leave where an employee has exhausted their First Nations ceremonial leave or cultural leave entitlement. For example, it may be appropriate to grant an employee additional miscellaneous leave when an employee has a significant cultural obligation spanning over more than three days. Delegates will need to exercise discretion as to when it is appropriate to grant additional leave and whether it is appropriate for this to be paid or unpaid.
- other leave types such as annual leave, purchased leave, compassionate or bereavement leave, still birth or pregnancy loss leave (where applicable)
- flex time arrangements (where applicable)
- under the public holiday common condition, delegates and employees may agree to substitute a prescribed public holiday for a cultural or religious day of significance to the employee (see page 88-90 of the Statement).

It may be appropriate for employees to use a combination of different leave types or arrangements in addition to cultural, ceremonial or NAIDOC leave, for example if an employee requires an extended absence from work to meet their cultural or religious obligations.

In some circumstances, an employee may not be eligible to access cultural, ceremonial or NAIDOC leave but it may be appropriate for the agency to grant the employee access to an alternative leave type or arrangement.

Managers should have respectful discussions with employees to understand the reason for the requested absence. This will help managers to find an arrangement, including the most appropriate type of leave, that meets the employee’s needs while balancing agency operational requirements.

3. When should requests for cultural leave be approved?

The appropriateness of approving or declining a request for cultural leave will depend on the individual circumstances.

The policy intent behind the cultural leave common condition is to enable employees to access leave to attend to significant religious and/or cultural obligations associated with their faith and/or culture.

Delegates and managers should consider this policy intent and assess requests on their individual merits. What constitutes a significant religious or cultural obligation will depend on the circumstances. Where appropriate, this will require managers to have respectful conversations with employees to understand their religious and/or cultural obligations.

It is essential for managers to adopt a respectful, inclusive approach to considering cultural leave requests and avoid making assumptions about an employee’s faith and/or cultural practices and to be aware and take steps to avoid unconscious bias from influencing decision-making. It is important that managers and delegates receive appropriate cultural competency training to equip them to have these conversations and appropriately respond to cultural leave requests.

Managers should support requests for cultural leave where an employee has identified a significant religious or cultural obligation. While managers will need to take into account the business needs of their work area when considering applications for cultural leave, they should make all reasonable efforts to accommodate appropriate requests before refusing a request on operational grounds.

Agencies are encouraged to identify days of cultural significance which may impact a large cohort of their workforce to assist in anticipating where requests for cultural leave may impact service delivery, and how this potential impact can be managed.

Where granting leave would have a detrimental impact on the work area (for example during busy periods) it may be appropriate for the delegate to discuss whether potential alternative arrangements (such as ad-hoc flexible working arrangements) are appropriate and would enable the employee to meet their cultural or religious obligations.

While requests for cultural leave should be assessed on their own circumstances, it is important that delegates and managers do so in a consistent manner. To support this, agencies should educate delegates and managers on appropriate access to cultural leave.

Employees may request cultural leave to attend cultural or religious events or celebrations that fall outside of prescribed public holidays (such as Diwali, Eid al-Fitr and Rosh Hashanah etc). Employees may also apply for cultural leave to participate in bereavement practices specific to their faith and/or culture that compassionate or bereavement leave entitlements do not cover.

An employee may have a significant obligation relating to an event included on a calendar that lists cultural or religious events throughout the year. Delegates may have regard to a calendar of cultural events, but should consider that the purpose of cultural leave is related to a cultural or religious obligation and its significance to an individual employee, not to simply provide employees leave because a day is included on a cultural or religious calendar.

Cultural leave is generally not appropriate for the purposes of attending events/ceremonies that occur outside of normal/usual working hours during the week, or on weekends and prescribed public holidays. However, if an employee requires time to prepare for a specific event, cultural leave may be supported. For example, if an employee needs to prepare food to support catering for an event, and/or travel a significant distance to attend the event in another geographical location.

Case example: Yom Kippur

Jared is an employee who practices Judaism. Jared requests to take cultural leave on Friday, 11 October 2024.

Jared and his manager engage in a respectful conversation regarding why this day is a significant cultural and/or religious obligation for Jared.

Jared explains to his manager that he needs to take the day off work for Yom Kippur, an important day in the Jewish calendar as his faith requires him to fast and attend synagogue services during work hours.

Jared’s manager acknowledges that they recognise the importance of Yom Kippur for Jared, and approves his cultural leave request on that basis.

Case example: Lunar New Year

Over the time they have been colleagues, Zhu Li and her manager, Maya, have discussed their respective cultures, and cultural events throughout the year that are significant to them.

From these discussions, Maya is aware that Zhu Li has a Chinese background and every year she attends family gatherings for Lunar New Year.

Maya knows these gatherings have specific cultural significance for Zhu Li.

Zhu Li asks Maya if she can finish work early on a day in January to make it to a Lunar New Year family gathering on time. Maya considers it appropriate to approve a part day of cultural leave.

Case example: Multicultural Festivals

Multicultural Festivals occur across Australia and provide a platform for diverse local multicultural communities to showcase and celebrate their cultures and customs.

Johannes identifies as having a culturally and linguistically diverse background and asks their manager if they can take cultural leave to attend a local multicultural festival during their rostered work hours.

Johannes’ manager commences a respectful discussion with them to understand their reason for seeking to take cultural leave to attend the local festival. Johannes’ manager asks them if they will be participating in a specific cultural performance or similar. Johannes explains that they want to attend the festival to watch the festival parade and a number of performances showcasing a range of cultural traditions.

Johannes’ manager considers the request and explains to them that it would not be appropriate to grant cultural leave in these circumstances. The manager respectfully explains that while the festival is an important event to celebrate cultural diversity, the purpose of cultural leave is to enable employees to attend to significant obligations personal to them that are associated with their particular faith and/or culture. The manager discusses with Johannes other potential options for them to attend the festival during work hours, such as accessing accrued flex time, or annual leave.

4. How much notice should agencies require employees to give when applying for cultural, ceremonial or NAIDOC leave?

The cultural, ceremonial and NAIDOC leave common condition does not prescribe specific notice requirements.

Agencies should encourage employees to give reasonable notice when requesting leave. However, agencies should acknowledge there may be circumstances where it is not possible for employees to provide advanced notice (for example if a First Nations employee requests to take ceremonial leave after the passing of an Elder).

In such circumstances, employees should advise their manager of their absence as soon as reasonably possible and discuss leave options with them.

5. Are employees required to give evidence when applying for cultural, ceremonial or NAIDOC leave?

The cultural, ceremonial and NAIDOC leave common condition does not prescribe specific evidence requirements. In many cases an employee will be able to request leave by making a written request to their manager (for example by email or via an agency-specific leave application form).

However, in order to approve leave, the delegate should be satisfied that the leave is:

a. for the First Nations employee to participate in NAIDOC week activities
b. for the First Nations employee to participate in significant activities associated with their culture or to fulfil ceremonial obligations, or
c. for the employee to attend significant religious or cultural obligations associated with the employee's particular faith or culture.

To be satisfied that the leave is for the above purposes, it may be appropriate for the delegate to respectfully request information from an employee about their religious, cultural and/or ceremonial obligation and its personal importance to them.

It is not appropriate to request evidence of an employee's faith and/or culture. However, a respectful discussion may occur between the employee and their manager about why they are requesting leave and the significance of the relevant religious or cultural obligation or activity to the employee. Managers must take responsibility to educate themselves appropriately regarding their team, their team members' religious beliefs and/or culture, and the significant religious and/or cultural obligations their employees participate in.

6. What if a manager and employee can't agree?

An employee and their manager should agree on the appropriate use of cultural leave and should try to resolve any disagreements within their immediate work area. Agencies should provide a policy and policy advice on the appropriate use of cultural leave. They may include resolution and escalation points for disagreements that may arise. Agencies should seek to resolve any disagreements on a mutually agreeable basis, prior to the issue becoming a matter for dispute.

7. What resources are available for further guidance on providing cultural, ceremonial and NAIDOC leave?

There are a number of resources available that may assist managers and employees with having respectful, inclusive discussions about cultural, ceremonial and NAIDOC leave. Some of these are listed below.

- APS CALD Employment Strategy and Action Plan
- Diversity Council of Australia conducts research and provides resources on creating inclusive workplaces
- Fair Work Ombudsman provides information and resources on diversity and discrimination
- CALD Networks
- First Nations Networks.

If you have any questions about this guidance, or you experience any accessibility difficulties with this document, please contact WRreform@apsc.gov.au.

Disclaimer

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The content of this document should be considered as general guidance material only.

The Commonwealth does not guarantee, and accepts no legal liability arising from or connected to, the accuracy, reliability, currency or completeness of the content in this document. The content of this document is considered correct as of the date of publication, and may be updated to reflect changes to legislation or government policies.

The information and suggestions contained within this guide are not legal advice. This guide is not a substitute for independent professional advice. Where required, practitioners should obtain appropriate professional advice relevant to their particular circumstances. Agencies should supply any legal advice sought to other agencies as required by legislation.

9

Attachment A – Extract of APS Bargaining Statement of Common Conditions

Cultural, ceremonial and NAIDOC leave in the Statement of Common Conditions – p107

Statement

1. Agencies are to incorporate in their agreements the below clause on cultural, ceremonial and NAIDOC leave.

2. Agencies may make minor drafting updates appropriate for their agency, as indicated in the text in green.

Existing conditions

3. Agencies may retain more beneficial entitlements related to cultural, ceremonial and NAIDOC leave.

4. In the absence of existing enterprise agreement entitlements, employees who do not identify as First Nations employees will be supported to participate, on paid time, in agency NAIDOC week activities.

5. Where there is an existing entitlement to unpaid leave, the new paid leave entitlement is taken to be part of this entitlement. For example, if there is an existing entitlement to 2 weeks unpaid leave, the 3 days paid leave becomes part of this 2 week entitlement, such that 3 days out of 2 weeks is paid.

Agency-level bargaining

6. Any further bargaining would not be consistent with the Policy, unless it is a permitted policy matter as described on page 18.

Common clause to be incorporated into agreements

Cultural, ceremonial and NAIDOC leave

NAIDOC leave

1. First Nations employees may access up to one day of paid leave per calendar year to participate in NAIDOC week activities.
2. NAIDOC leave can be taken in part days.

First Nations ceremonial leave

3. First Nations employees may access up to 6 days of paid leave over 2 calendar years to participate in significant activities associated with their culture or to fulfil ceremonial obligations.
4. The <Agency Head> may approve additional leave for cultural or ceremonial purposes as miscellaneous leave, with or without pay.
5. First Nations ceremonial leave can be taken as part days.
6. First Nations ceremonial leave is in addition to compassionate and bereavement leave.

Cultural leave

7. The <Agency Head> may grant up to 3 days of paid leave per calendar year for the purpose of attending significant religious or cultural obligations associated with the employee's particular faith or culture.
8. The <Agency Head> may approve additional leave for cultural purposes as miscellaneous leave, with or without pay.
9. Cultural leave can be taken as part days.
10. For the avoidance of doubt, this leave does not cover cultural purposes or obligations which are eligible for paid leave under <clause reference to First Nations ceremonial leave>.

Workplace Relations Guidance

APS Bargaining Statement of Common Conditions

Miscellaneous leave

Purpose

This document's purpose is to assist agencies to apply the APS Bargaining Statement of Common Conditions (Statement) as it relates to **miscellaneous leave**. It is intended to support the implementation and consistent interpretation of the bargained outcome in agencies, as is appropriate for their circumstances. It may be updated from time to time.

In accordance with the Public Sector Workplace Relations Policy 2023, Australian Public Service (APS) agencies have bargained enterprise agreements that incorporate the bargained outcome on miscellaneous leave as outlined in the Statement. Non-APS agencies have put in place workplace arrangements that have had regard to the Statement. Some agency enterprise agreements may have retained more beneficial conditions or existing facilitative clauses. It is important to consider this guidance alongside your agency's enterprise agreement.

Date: 19 June 2024

Bargained outcome

Miscellaneous leave was referred to agency-level bargaining without parameters, so there is no common clause incorporated into enterprise agreements. The bargained outcome is outlined on page 106 of the Statement. An extract of the Statement is at **Attachment A**.

The Statement provides that:

- agencies may retain existing conditions related to miscellaneous leave
- agencies are to include the ability to provide miscellaneous leave to casual employees. This is exclusively to provide for paid family and domestic violence leave and otherwise by Government directive, and
- enterprise agreements should refer to the leave as 'miscellaneous leave' and not 'other leave' or 'special leave', as can sometimes be the case.

Legislative requirements

The *Fair Work Act 2009* (Cth) (the FW Act) does not provide employees a specific entitlement to miscellaneous leave.

However, in accordance with the Statement, APS enterprise agreements make paid miscellaneous leave available to employees experiencing family and domestic violence. There is no maximum amount of paid miscellaneous

leave in this circumstance, but to comply with the National Employment Standards (the NES) and the FW Act, agencies must ensure employees affected by FDV can access at least 10 days' paid leave each year.

The NES entitlement is separate to the entitlement provided under enterprise agreements.

From time to time, a government directive may provide a legal entitlement to employees to access leave not provided for by an agency's enterprise agreement or otherwise in legislation (for example, emergency leave provided by government directive during a pandemic). In accordance with the Statement, agencies may provide such leave to employees as miscellaneous leave.

Frequently asked questions

1. What is miscellaneous leave?

Miscellaneous leave, either paid or unpaid, may be provided in a range of circumstances. It gives flexibility to the agency to provide leave to an employee in circumstances not otherwise covered by a separate leave entitlement, or where an employee has exhausted their entitlement to other forms of leave. In short, miscellaneous leave may be requested for any purpose, recognising that some agencies will maintain policies dealing with miscellaneous leave. It will be for the delegate and the employee to discuss the appropriateness of accessing miscellaneous leave, and whether another form of leave is more appropriate.

The granting of miscellaneous leave should be based on both agency and employee needs at the time, which may not always be foreseeable.

2. Does miscellaneous leave count for service?

This will depend on the purpose of the leave, whether it is paid or unpaid, and the provisions in the relevant enterprise agreement. You will need to consider the terms of the enterprise agreement carefully when considering whether miscellaneous leave counts for service.

Generally speaking, miscellaneous leave without pay does not count for service for any purpose except as provided for in an enterprise agreement or relevant legislation (such as the *Long Service Leave (Commonwealth Employees) Act 1976*).

Your agency enterprise agreement, however, may provide for circumstances where miscellaneous leave without pay does count for service. Under the Statement, the period of leave without pay that counts as service was referred to agency-level bargaining without parameters, so this will differ between agencies.

3. Can casuals access paid miscellaneous leave?

Generally, casual employees are not eligible for miscellaneous leave, unless specifically provided for in an enterprise agreement, or as otherwise directed by Government.

However, according to the Statement, agencies are to provide miscellaneous leave to casual employees exclusively to provide for paid family and domestic violence leave, or where casual employees are entitled under a Government directive to leave not otherwise provided for by the agency's enterprise agreement (such as emergency leave during a pandemic).

The Statement provides for paid family and domestic violence leave for casual employees under the Family and Domestic Violence Support clause. Where specific family and domestic violence leave is not otherwise provided in the applicable enterprise agreement, agencies should provide this as miscellaneous leave with pay.

4. Can different uses for miscellaneous leave be detailed in policy?

Agencies may, through policy, provide access to miscellaneous leave for different circumstances. In determining whether to do so, regard might be had for matters including, but not limited to:

- ensuring policy does not operate to reduce or limit any entitlement under an enterprise agreement.
- whether existing leave types sufficiently address the needs of employees.
- whether the policy would be intended to provision leave with or without pay.
- employee welfare at different stages of life.
- existing custom or practice.
- any relevant precedential considerations.

Delegate considerations

In considering an application for miscellaneous leave, delegates should discuss the individual circumstances with the employee, and may have regard to:

- the reason for the leave request
- the business needs of the agency
- whether the employee requesting the leave has an entitlement to access the leave under legislation or the agency's enterprise agreement (for example, if they are requesting access to family and domestic violence leave, they have a paid leave entitlement under the enterprise agreement and the FW Act)
- whether access to an alternate form of leave is available or would be more appropriate in the circumstances.

Purchased leave, flex time, time off in lieu or an ad-hoc flexible work arrangement may also be used to cover an employee's absence from the workplace, depending on the circumstances.

Interaction with other common conditions

Miscellaneous leave interacts with other common terms in the Statement such as:

- Parental Leave
- First Nations ceremonial leave
- Cultural leave
- Leave to attend proceedings (witness leave)
- Family and domestic violence support
- Disaster support
- Pandemic leave (where retained by an agency).

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Attachment A – Extract of APS Bargaining Statement of Common Conditions

Miscellaneous leave in the Statement of Common Conditions – p106

Statement

1. Miscellaneous leave is referred to agency-level bargaining within parameters.

Existing conditions

2. Agencies may retain existing conditions related to miscellaneous leave.

Agency-level bargaining

3. It would not be consistent with the Policy for agencies to include extensive different uses for miscellaneous leave into agreements.

4. Agencies are to include the ability to provide miscellaneous leave to casual employees. This is exclusively to provide for paid family and domestic violence leave and otherwise by Government directive.

5. Agreements are to adopt the name “miscellaneous leave”, and not “other leave” or “special leave”.

6. The APSC may provide further guidance on parameters.

Common clause to be incorporated into agreements
No common clause

Workplace Relations Guidance

APS Bargaining Statement of Common Conditions

Respect at work

Purpose

This document's purpose is to assist agencies on how to apply the APS Bargaining Statement of Common Conditions (the Statement) as it relates to **respect at work**. It is intended to support the implementation and consistent interpretation of the common condition in agencies, as is appropriate for their circumstances. It may be updated from time to time.

In accordance with the Public Sector Workplace Relations Policy 2023, Australian Public Service (APS) agencies have bargained enterprise agreements that incorporate the common condition on respect at work as outlined in the Statement. Non-APS agencies have put in place workplace arrangements that have had regard to the Statement. Some agency enterprise agreements may have retained more beneficial conditions or existing facilitative clauses. It is important to consider this guidance alongside your agency's enterprise agreement.

Date: 19 June 2024

Common condition

The common condition on respect at work is outlined on page 133 of the Statement. An extract of the Statement is at **Attachment A**.

The three clauses in the respect at work common condition are centred on the values of the agency in relation to fostering a safe, respectful and inclusive workplace. The below table provides background on the policy intent for each clause.

Common clause	Guidance
1. The <agency> values a safe, respectful and inclusive workplace free from physical and psychological harm, harassment, discrimination and bullying. The <agency> recognises that preventing sexual harassment, sex discrimination, sex-based harassment and victimisation in the workplace is a priority.	This is a principles-based clause which refers to the agency's values. It is consistent with one of the leadership good practice indicators outlined in the Australian Human Rights Commission (AHRC)'s Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment. This is that organisational leaders and senior staff issue a statement to workers on the organisation's commitment to a safe, respectful, and inclusive workplace free from harassment, discrimination and sexism, and available support.

Common clause	Guidance
2. The <agency> recognises that approaches to prevent sexual harassment, sex discrimination, sex-based harassment and victimisation in the workplace should be holistic and consistent with the Australian Human Rights Commission's guidance, including the *Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment.*	This is a principles-based clause which refers to the AHRC's guidance on fostering respectful workplaces and states that the agency's preventative measures should be holistic and in line with this guidance. Consistent with AHRC guidance, agencies should address each of the Standards within the prevention and response framework adapted to the circumstances of the agency. In doing so agencies should consider whether implementation of particular measures will better ensure the agency meets its positive duty obligations and reflects good practice consistent with expectations of the Commonwealth public sector as a model employer. The reference to "approaches" rather than a policy or processes is to allow for flexibility, in recognition that different approaches are appropriate for different circumstances. Agencies are encouraged to monitor the AHRC's website for other relevant guidance in particular the AHRC Guidelines for Complying with the Positive Duty.
3. The <agency> will consult with employees and their unions in developing, reviewing and evaluating approaches to prevent sexual harassment, sex discrimination, sex-based harassment and victimisation in the workplace.	This clause requires agencies to consult with employees and their unions on developing, reviewing and evaluating an approach. This is consistent with the AHRC's guidance. This includes that the organisation actively seeks to protect workers from sexual harassment and other relevant unlawful conduct, by consulting with workers on its identifications, prevention and response efforts. The clause does not mandate a particular form of consultation to provide flexibility for agencies, employees and unions to engage with each other in a way that suits their circumstances. This could occur through the agency consultative committee or through a separate consultation process between the parties. Consultation should occur in a manner consistent with the common consultation provisions.

Legislative requirements

There is an existing, comprehensive legislative framework that underpins respect at work obligations.

The development and implementation of policies and procedures and other relevant measures that adhere to legislative requirements will vary across each agency depending on:

- the size of the workforce
- the operational nature of the workforce, and
- normative cultural, communication and consultation practices.

Given the inability to prescribe a catch-all approach and capture all existing legislative obligations, the language used in the common condition on respect at work is nonprescriptive. Instead, the common condition codifies the

agency’s commitment to respect at work and the establishment of mitigating approaches in discussion with employees and their union.

The relevant legislation includes the following:

- **The *Sex Discrimination Act 1984* (Cth)** provides a number of protections to employees, including:
    - It prohibits discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities in a number of areas of public life, including employment. The Sex Discrimination Act also provides that a person may be found vicariously liable for the unlawful conduct of an employee if they have not taken all reasonable steps to prevent the conduct.
    - It prohibits sexual and sex-based harassment in the employment context and makes it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.
    - It imposes a **positive duty** on employers to take reasonable and proportionate measures to eliminate, so far as possible, certain discriminatory conduct, such as sexual and sex-based harassment, in the employment context. This means that employers are legally required to take reasonable and proportionate measures to prevent sexual harassment. Further information on the positive duty and employers’ obligations can be found on the Australian Human Rights Commission’s website.
- **The *Fair Work Act 2009* (Cth)** provides a number of workplace protections to employees including,
    - **Section 351 of the Fair Work Act** protects employees from unlawful workplace discrimination. Unlawful workplace discrimination under the Fair Work Act occurs when an employer takes adverse action against an employee because of a protected attribute including sex, sexual orientation, breastfeeding, gender identity, intersex status, marital status, and family or carer’s responsibility.
    - **Part 3-1 Division 3 of the Fair Work Act** prohibits employers from taking unlawful adverse action against an employee, including because the employee has exercised a workplace right such as making a complaint in relation to their employment.
    - **Part 3-5A of the Fair Work Act** prohibits sexual harassment in connection with work and makes employers liable for workplace sexual harassment committed by an employee or agent unless the employer took all reasonable steps to prevent the sexual harassment.
    - **Part 6-4B of the Fair Work Act** provides protections to workers bullied at work by allowing workers to apply to the Fair Work Commission for a stop bullying order.
- **State and Territory anti-discrimination laws** protect employees from unlawful discriminatory conduct in connection with work on protected grounds including sex and gender identity and prohibit sexual harassment in connection with work. The scope of protections vary across jurisdictions and Commonwealth entities may still be subject to state and territory law.
- The ***Work Health and Safety Act 2011* (Cth)** provides for a balanced and nationally consistent framework to secure the health and safety of workers by requiring duty holders to eliminate or minimise health and safety risks, including workplace sexual harassment. The Work Health and Safety Act also imposes obligations on duty holders to consult with workers, health and safety representatives and other duty holders on work health and safety matters, including workplace sexual harassment risks,

  - this Work Health and Safety Act is implemented by relevant Commonwealth, State legislation, and
- The ***Australian Human Rights Commission Act 1986*** **(Cth)** provides a procedure by which the Human Rights Commissioner may investigate and attempt to conciliate in matters involving complaints of unlawful discrimination in the paid workforce, including sex discrimination.
- The APS Code of Conduct in the ***Public Service Act 1999*** **(Cth)** also requires APS employees to treat others with respect and courtesy and without harassment, and provides that the agency head may impose sanctions on an APS employees for breaching the Code. Agencies must report all sexual harassment complaints (de-identified) and high level outcomes to the APS Commission through the APS Agency Survey.
- The APS Commissioner's Directions include a provision requiring agencies to consult with the Commissioner before disputes relating to sexual harassment are settled using agreements that include non-disclosure or confidentiality terms.

Frequently asked questions

1. Is there existing guidance that outlines what employers should/need to do to meet legislative requirements in relation to Respect at Work obligations?

There are a number of resources available online for employers and employees regarding their respect at work obligations. This includes practical measures and mechanisms that employers can implement to meet their legal obligations and prevent unlawful conduct in their organisation. Some of these are listed below.

Australian Human Rights Commission guidance

The Australian Human Rights Commission (AHRC) is an independent third party which investigates complaints about discrimination and human rights breaches.

- Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment
- Complying with positive duty requirements
- Respect at work homepage
- Respect at work guidance for organisations
- Respect at work guidance for individuals
- Respect at work resource hub
- Respect@Work Information Service

Safe Work Australia guidance

Safe Work Australia is an Australian government statutory agency that develops national policy to improve work health and safety (WHS) and workers' compensation arrangements across Australia.

- Preventing workplace sexual harassment
- Sexual and gender-based harassment
- Workplace sexual harassment – advice for workers
- Third-party sexual harassment guidance

Fair Work Ombudsman guidance

The Fair Work Ombudsman enforces compliance with the Fair Work Act 2009, related legislation, awards and registered agreements. They also help employers and employees by providing advice, education and assistance on pay rates and workplace rights and obligations.

- Bullying, sexual harassment and discrimination at work

Comcare guidance

Comcare monitors and enforces compliance with the Work Health and Safety Act 2011 and Work Health and Safety Regulations 2011. They also provide advice and information to duty holders and the community.

- Regulatory guidance for employers
- Harassment including sexual harassment

Australian Public Service Commission guidance

The Commission is a policy agency within the portfolio of the Department of Prime Minister and Cabinet. The Commission publishes guidance and training for the APS workforce to ensure it meets the demands and expectations of the Australian Government and people.

- Positive duty requirements (GovTeams)
  - Request access
- Psychosocial safety
- DRIVE – SES Performance Leadership Framework
- Cross-agency training resources

2. Are there any resources that assist managers and employees in navigating difficult conversations in relation to respect at work?

Managers

- Fair Work Ombudsman: Guide to managing difficult conversations for managers
- AHRC: Supporting employees who have experienced sexual harassment
- AHRC: Reporting workplace sexual harassment

Employees

- Fair Work Ombudsman: Course for navigating difficult conversations for employees
- AHRC: Seeking help for workplace sexual harassment
- AHRC: Responding to workplace sexual harassment

3. Does the consultation referenced in clause 3 need to occur via an agency consultative committee?

No, not necessarily. The common condition does not mandate a particular form of consultation. However, consultation should occur consistent with common consultation provisions. Consultation on respect at work may occur outside of the agency consultative committee if there is a more appropriate forum or mechanism of

doing so as determined by the parties. This may be, but is not limited to, town halls, focus groups, surveys, webinars, information and feedback sessions, etc.

4. Who is responsible for enforcing respect at work principles in an agency?

Work health and safety laws place responsibilities on organisations, senior leaders, workers and others in a workplace to take steps to prevent and address sexual harassment, so everyone has a role in fostering a safe and respectful workplace.

Employers and agency heads have a responsibility to do everything they reasonably can to make sure the workplace is safe and set a cultural example for the rest of the workforce. This includes taking action to prevent, and respond to, workplace sexual harassment.

Key decision makers and managers must exercise due diligence to ensure that the organisation complies with WHS obligations and obligations under the Sex Discrimination Act, and set a strong cultural example.

Workers are responsible for taking reasonable care of their own health and safety while at work, and not negatively impacting the health and safety of others. This includes not sexually harassing others and following reasonable instructions from their employer.

Employees such as **Mental Health First Aid Officers, Harassment Contact Officers and Health and Safety representatives** will often be the first point of contact in the event there is a breach of respect at work principles. The resources below provide some guidance on how to be effective in these roles and respond to respect at work complaints appropriately.

Mental Health First Aid Officer

- Mental Health First Aid Australia: Mental Health First Aid
- Safe Work Australia: Identifying and assessing harmful behaviours

Harassment Contact Officer

- AHRC: Contact officer training
- AHRC: Supporting friends and co-workers who have been sexually harassed

Health and Safety Representative

- Comcare: Health and Safety Representative

If you have any questions about this guidance, or you experience any accessibility difficulties with this document, please contact WRreform@apsc.gov.au.

Disclaimer

This document is intended for internal use by agencies. It is not for further distribution without the prior written consent of the Australian Public Service Commission.

The content of this document should be considered as general guidance material only.

The Commonwealth does not guarantee, and accepts no legal liability arising from or connected to, the accuracy, reliability, currency or completeness of the content in this document. The content of this document is considered correct as of the date of publication, and may be updated to reflect changes to legislation or government policies.

The information and suggestions contained within this guide are not, legal advice. This guide is not a substitute for independent professional advice. Where required, practitioners should obtain appropriate professional advice relevant to their particular circumstances. Agencies should supply any legal advice sought to other agencies as required by legislation.

Attachment A – Extract of APS Bargaining Statement of Common Conditions

Respect at work in the Statement of Common Conditions – p133

Statement

1. Agencies are to incorporate in their agreements the below clause on respect at work.
2. Agencies may make minor drafting updates appropriate for their agency, as indicated in the text in green.
3. Approaches to prevent sexual harassment and sex-based discrimination is included in the list of matters that may be discussed by the APS-wide consultative committee.
4. This is partially related to safe workplaces claims.

Existing conditions

5. Agencies may retain more beneficial entitlements related to respect at work.

Agency-level bargaining

6. Any further bargaining would not be consistent with the Policy, unless it is a permitted policy matter as described on page 18.

Common clause to be incorporated into agreements
Respect at work *Principles* 4. The <agency> values a safe, respectful and inclusive workplace free from physical and psychological harm, harassment, discrimination and bullying. The <agency> recognises that preventing sexual harassment, sex discrimination, sex-based harassment and victimisation in the workplace is a priority. 5. The <agency> recognises that approaches to prevent sexual harassment, sex discrimination, sex-based harassment and victimisation in the workplace should be holistic and consistent with the Australian Human Rights Commission's guidance, including the *Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment.* *Consultation* 6. The <agency> will consult with employees and their unions in developing, reviewing and evaluating approaches to prevent sexual harassment, sex discrimination, sex-based harassment and victimisation in the workplace.

Enterprise Bargaining Guide

Preparing to Bargain

an APSC electronic document

Contents

Disclaimer **3**

A. Overview of the Guide **4**

B. Key players in Commonwealth Bargaining **5**

B1 | Role of the Australian Public Service Commission (APSC) 5

B2 | Role of agency senior leadership 5

B3 | The role of employee bargaining representatives 5

B4 | Role of the Fair Work Commission 6

C. Setting the Stage for Bargaining **7**

C1 | Setting up a bargaining team 7

C2 | Evaluating the agency's context 8

C3 | Consulting senior leadership 14

C4 | Consulting line managers 15

C5 | Consulting corporate functions 17

C6 | Consulting employees 18

C7 | Developing a bargaining position 20

C8 | Evidence supporting a bargaining position 25

C9 | Timeframes for bargaining 26

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Links to external websites

Where external websites are referenced or linked to, they are provided for the reader's convenience and do not constitute the Australian Public Service Commission's (APSC) endorsement of the materials on those sites.

A. Overview of the Guide

This guide covers some of the key areas and questions that Commonwealth agencies should consider during the enterprise bargaining process. Preparing to Bargain represents the first part of the guide. Later sections deal with the bargaining process, post-bargaining considerations and some of the risks associated with bargaining.

Human resource (HR) and workplace relations (WR) practitioners from across the Australian Public Service (APS) were consulted in the development of this guide.

What are enterprise agreements?

Enterprise agreements are collective industrial instruments that set employment conditions for employees to whom they apply. Enterprise agreements are negotiated between the employer and employees and may include employee bargaining representatives. Enterprise agreements are regulated by the national workplace relations system established by the *Fair Work Act 2009* (the FW Act) and other relevant legislation.

Key points

✓ This guide provides only general guidance materials intended to be purely advisory in nature.

✓ This guide is intended to assist WR practitioners refresh their knowledge of bargaining.

B. Key players in Commonwealth Bargaining

This part deals with some of the key stakeholders involved in enterprise bargaining in the Commonwealth public sector.

B1 | Role of the Australian Public Service Commission (APSC)

The APSC provides advice and information to agencies about the application of the Government's workplace relations policies as they apply to Commonwealth employment, including matters related to bargaining.

The APSC monitors the progress of bargaining across the Commonwealth public sector and reports on emerging strategic issues to the Public Service Minister.

B2 | Role of agency senior leadership

In Commonwealth enterprise bargaining, Agency Heads act as the employing authority on behalf of the Commonwealth. The Commonwealth remains the employer for the purposes of the FW Act and other relevant legislation. Agency Heads are responsible for the bargaining process at an agency level and must ensure their agency complies with Government policy where applicable.

The role of the Senior Executive Service (SES), however described, is to provide strategic leadership in Commonwealth agencies. This includes promoting cooperation within and between agencies to deliver outcomes across agencies and portfolios, and providing strategic direction for agencies' bargaining objectives. In some agencies, EL2 employees may share the responsibilities outlined in this section.

Further information:

Are SES employees covered by enterprise agreements?

Previously, some SES employees have been covered by an enterprise agreement. However, SES employees are typically covered by individual contracts or determinations made under relevant legislation. These arrangements are appropriate given the status and complexity of SES roles and the work they perform. SES employees are part of the senior management group within individual agencies and play an important role in explaining and promoting the management position throughout the bargaining process. Having SES employees that are covered by an enterprise agreement negotiate and provide strategic direction on the creation of that enterprise agreement could lead to a perceived conflict of interest.

B3 | The role of employee bargaining representatives

An employee bargaining representative is a person (or organisation) appointed to negotiate an enterprise agreement on behalf of an employee covered by the agreement. Employee bargaining representatives can be union representatives, other employees, professional associations or any other person/s nominated in accordance with the FW Act. Once appointed, the legislation affords specific rights and obligations to bargaining representatives including the requirement to bargain in good faith.

A union will be the default bargaining representative for an employee where that employee is a member of the union and the employee does not otherwise nominate a bargaining representative or revoke the status of the union as their bargaining representative.

B4 | Role of the Fair Work Commission

The Fair Work Commission (the FWC) is Australia's national workplace relations tribunal. The FWC's powers and functions are derived from the FW Act and are carried out by the FWC members and its administrative staff.

Generally, the FWC does not get involved in the preparatory stages of bargaining (i.e. before bargaining commences). The one exception is where an employer refuses to bargain for an enterprise agreement. In this circumstance, the FWC may direct the employer to commence bargaining.

C. Setting the Stage for Bargaining

This part deals with some of the key issues agencies should consider prior to commencing negotiations.

C1 | Setting up a bargaining team

Agency Lead Negotiators (ALNs) should assemble a team of capable individuals who can support them inside and outside of the bargaining room. ALNs should carefully consider the skills and capabilities they need in a bargaining team. Each member of the bargaining team should share the agency's values and its vision for bargaining and be highly engaged, resilient, suitably experienced and actively looking to work in a bargaining team.

The sometimes high profile and protracted nature of bargaining may discourage some from participating in the process. There is no legal requirement or restriction on who can be on an agency's bargaining team.

Negotiation roles

This refers to the individuals present at the bargaining table for agency level bargaining. The negotiation team members bargain for the agency and represent management. Generally, a maximum of four negotiation roles are recommended for most agencies, with fewer individuals for smaller agencies. This group should contain at least one operational manager with front-line experience in applying the current enterprise agreement. These individuals should also have appropriate standing with the senior leadership, who ultimately endorse the negotiation team's proposed agency bargaining position and enterprise agreement.

Support roles

This refers to the individuals who assist the ALN and team members in bargaining. This could include drafting correspondence, performing analysis, collecting feedback and other coordination activities. These individuals generally have a HR and/or industrial relations (IR) background with a sound understanding of the operation of the current enterprise agreement.

Subject matter experts

Subject matter experts are the individuals brought into the bargaining team as required. These individuals come from various fields and may assist with building a communications plan, providing legal advice and developing financial models. Subject matter experts are not involved throughout bargaining, but make themselves available as required. The key skills and capabilities of the negotiation team, support team and subject matter experts may include:

Negotiation Roles	Support Roles	Subject Matter Experts
• Negotiation skills • HR and IR knowledge • Communication skills • Resilience • Organisational knowledge • Necessary seniority	• HR and IR knowledge • Practice implementing the agreement • Analytical skills • Coordination skills	• Communication • Finance • Legal • Data analysis • Mediation • Operational history

C2 | Evaluating the agency's context

The second step in preparing to bargain is to understand the context in which bargaining will occur. Agencies might undertake this in a number of ways, for example using a SWOT analysis (Strengths, Weaknesses, Opportunities and Threats). Whatever approach is taken, the agency's goal is to develop a holistic understanding of its situation. This exercise should account for the stakeholders that are involved, to varying degrees, in bargaining.

Commonwealth agencies operate in challenging circumstances. Their legislative frameworks and obligations to government and taxpayers creates a need to understand their strategic environment. Agencies must appreciate the risks involved in enterprise bargaining and what they need to achieve from the process. Agencies should consider their operational goals (as discussed in corporate/business plans, surveys, and in consultation with senior management) as well as any productivity gains that may be put in place. Regardless of which model is employed in the analysis, the goal is to promote strategic thinking and planning. Achievement of this goal will be dependent on the nature of the agency's business and the outcomes sought. Enterprise agreements should achieve an appropriate balance between the interests of the agency and the interests of employees. An enterprise agreement must support the operations of the agency and provide its workforce with the support and flexibility needed to manage current and future pressures.

Understanding the agency's macro context

Examining the agency's context from the broadest possible perspective allows the bargaining team to understand the agency's macro context and to determine the underlying forces that may be present in bargaining. There are many different ways to undertake this analysis and all are equally valid as long as they assist an agency in thinking strategically.

A useful approach is the PEST model[1] which encourages consideration of the Political, Economic, Social and Technological environments. The illustration below outlines the key issues and considerations an agency might face when bargaining. This example is not an exhaustive list, nor would it apply in every agency's context.

[1] AGUILAR, F. J. (1967). Scanning the business environment. New York, Macmillan.

Understanding the micro context

Following consideration of the macro environment, attention should be given to the internal operations and cultural climate of the agency. This involves thinking about how current operational issues and workplace relations matters may influence bargaining for an enterprise agreement. In this exercise, it is useful to identify the key stakeholders and individuals the agency will need to engage with during bargaining. The example below identifies some of the key stakeholders, and questions agencies should consider.

Some of these stakeholders will not be actively involved in the bargaining process itself, but they might have an impact on how bargaining progresses. The various stakeholders may have divergent interests, expectations and objectives.

Further information:

It is important to recognise the steps identified in this guide are not performed in isolation. This guide does not suggest there is a pre-defined, rigid or consecutive order of activities. The various activities presented in this guide from C3 ‘Consulting with Senior Leaders’ to C9 ‘Timeframes for bargaining’ would likely occur concurrently.

For example, an agency may first consult with various internal stakeholders before presenting their findings to senior leadership. Alternatively, an agency could consult with the various groups concurrently and analyse the feedback once collected. Agencies may even forgo some steps and perform others that are not discussed in this guide. The approach depends on the individual circumstances of each agency and the resources available to each bargaining team.

Pulling it all together and thinking strategically

Strategic thinking affords the agency the opportunity to pull together assumptions and conclusions before progressing to enterprise bargaining. The below table outlines the kinds of questions agencies should consider prior to bargaining. The questions highlight issues that may be present, this includes prior experiences in bargaining, ongoing operational requirements and future priorities. This is not an exhaustive list and will vary between agencies.

Reviewing existing arrangements	• Is the current enterprise agreement working for our agency and employees? • Can any issues with the current agreement actually be resolved in bargaining? • Do changes need to be made to comply with Government policy or legislation?
Determining strategic priorities	• What do our Portfolio Budget Statements and corporate plan outline? • Have we received guidance from our Agency Head or Minister? • What future flexibilities might we need to propose to our employees?
Assessing the last round of negotiations	• Where did we succeed in negotiations? • Where did we fall short in negotiations? • What other lessons from the previous bargaining round will inform our approach?
Reviewing employee engagement, trust and morale	• Are our employees satisfied with the current enterprise agreement? • Are staff engaged with the direction management are promoting?
Anticipating claims/proposals	• What will the bargaining representatives want from bargaining? • What will our employees want from bargaining? • Is there capacity to genuinely reach agreement with bargaining representatives?
Analysing the underlying award and other legislative obligations	• Is there a new or revised underlying award • Has legislation (e.g. the NES) been updated since the last round of bargaining? • Have there been any legal decisions since the last round of bargaining? • Will they impact on the operation of the current agreement or bargaining process?
Analysing current operations and service delivery requirements	• Will our budget and funding requirements change in the near future? • What might our future service delivery requirements look like?

What is the purpose of an enterprise agreement?

Enterprise agreements are not just negotiated as a means to an end. Apart from being industrial instruments that set out the terms and conditions of employment, they can assist or hinder an agency's capacity to meet its business requirements and operational needs. Enterprise agreements must balance the expectations and needs of employees with the agency's capacity to perform its functions.

Do you need to bargain a new enterprise agreement?

Agencies should not put in place a collective determination in lieu of bargaining a new enterprise agreement.

Agencies that use common law contracts instead of enterprise agreements may continue with such arrangements, however APS agencies must consult with employees and the APS Commissioner to explain why the bargaining of an enterprise agreement is not the preferred option.

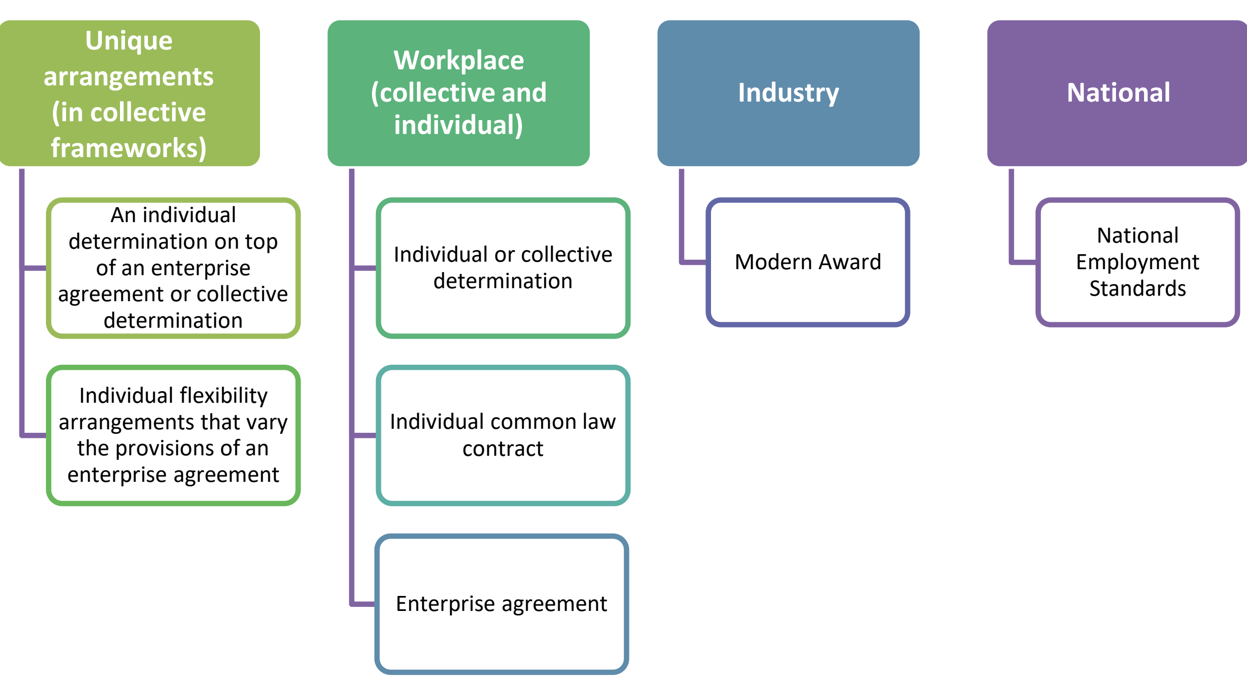
Further information:

What happens when an enterprise agreement nominally expires?

An enterprise agreement continues after its nominal expiry date, unless it is replaced by a new enterprise agreement or terminated by the FWC. When a determination is made on top of an enterprise agreement, the underlying enterprise agreement continues to operate. A new enterprise agreement will have the effect of replacing an expired enterprise agreement, along with any determinations that supplement that agreement.

How do enterprise agreements fit into Australia's workplace relations framework?

The illustration below demonstrates how a combination of workplace arrangements can operate together to determine an employee's terms and conditions of employment. Many Commonwealth agencies already use multiple workplace arrangements. For example, specialist employees may have an individual flexibility arrangement in conjunction with an agency's enterprise agreement, or they may be subject to an individual determination or contract.



National system

At the national level, the National Employment Standards (NES) are enshrined in the FW Act. The NES are a set of minimum entitlements that are applicable to all national system employees. The NES covers matters such as leave, hours of work, public holidays, termination and redundancy. Workplace arrangements cannot reduce the NES.

Industry level arrangements

Industry level arrangements include modern awards as determined by the FWC. Awards are a safety net that supplement the NES and prescribe further minimum conditions that apply to specific industries and workforces. The Awards that apply to Commonwealth employment include the *Australian Public Service Enterprise Award 2015* and the *Australian Government Industry Award 2016*.

The applicable award is only relevant where an employee is not covered by an enterprise agreement. The relevant award is the benchmark for the application by the FWC of the 'Better Off Overall Test' (BOOT) when approving a proposed enterprise agreement. The FWC must be satisfied that every employee covered by a proposed enterprise agreement would be better off under that agreement than they would be if they were covered by the relevant award.

Enterprise level / Workplace arrangements

Workplace arrangements can build on what is contained in a modern award. A determination can only maintain or improve award provisions. Determinations may be made on a collective or individual basis. Common law contracts are individual agreements that can also supplement award conditions. The provisions of the award cannot be

contracted out of via common law contracts (each award term must be met) but there is scope for monetary benefits to be offset in certain circumstances (for example through a ‘rolled’ up salary-rate).

An enterprise agreement is a collective agreement reached between an employer and more than one employee. Enterprise agreements are generally negotiated through employer and employee representatives. Enterprise agreements must be approved by the FWC before they can lawfully commence. The FWC will assess a proposed enterprise agreement against the approval requirements in the FW Act before deciding whether to approve an enterprise agreement. Agencies must meet both procedural requirements (e.g. the conduct of the ballot) and legal requirements (e.g. the better off overall test).

Individual arrangements

Individual arrangements, such as determinations or common law contracts, can also build on entitlements set out in a collective determination or enterprise agreement.

Another individual arrangement is an individual flexibility arrangement (IFA). An IFA is made directly between an employer and an employee and can vary specified terms of an enterprise agreement to suit the unique circumstances of the employee. An IFA must result in the employee being better off overall when compared with the enterprise agreement. An IFA must be genuinely agreed, may be terminated with 28 days’ notice and does not require the approval of the FWC.

Further information:

What is an offset/absorption clause?

Modern awards provide various allowances and monetary entitlements that apply to differing sections of the workforce.

An offset clause is a term in a common law contract specifically stating that remuneration over and above the rates set in the modern award, is directed to offset the employer’s obligation to pay other specified monetary benefits. This allows employers to absorb particular monetary obligations under the award, as part of an employee’s overall remuneration package. Without such a clause, agencies may be required to pay, for example, the various allowances provided for in the relevant award on top of their remuneration package. Agencies should seek legal advice when considering the inclusion of an offset clause in an individual employment arrangement.

What is the Better Off Overall Test (BOOT)?

The BOOT is conducted by the FWC when assessing whether employees would be better off overall under a proposed enterprise agreement in comparison to the relevant modern award. Agencies should seek legal advice and/or consult with FWC to learn more about the BOOT.

C3 | Consulting senior leadership

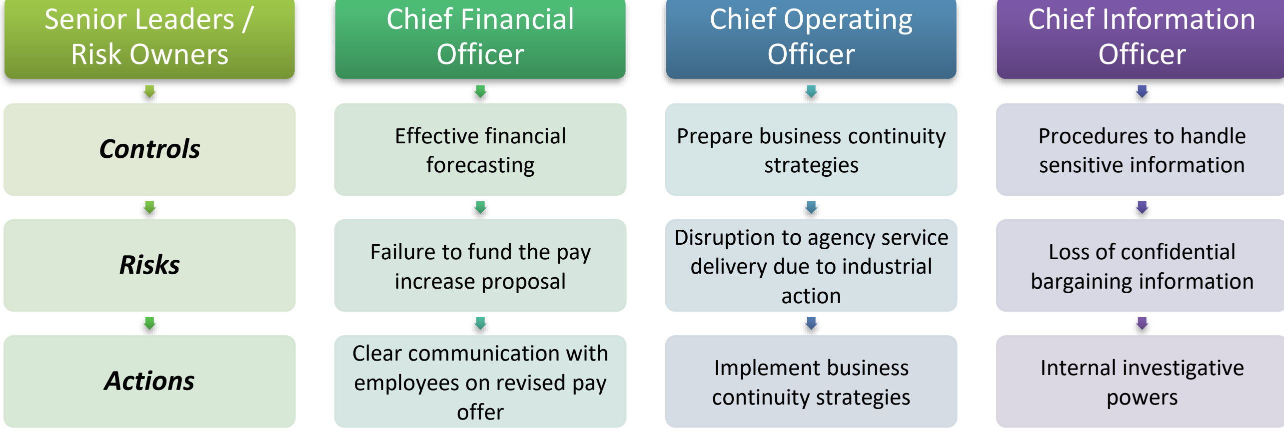
Senior leaders play an essential role in bargaining and should be consulted during the development of the agency's bargaining position. Some agencies establish a steering committee to oversee and guide bargaining. Membership of such a committee could include the agency head or chief operating officer, select senior managers and the HR manager. Committee members should generally represent key areas of the organisation, including finance and HR. The committee generally endorses the agency's bargaining position, holds the negotiation team accountable to that mandate and assists with the making of strategic decisions that guide the bargaining process.

Risk management

Agencies should develop a risk management plan when preparing for bargaining. A risk management plan will identify and assess each risk, determine risk criteria, establish the owners of risk outcomes and settle on appropriate strategies and activities to mitigate risks. Senior leaders need to 'own' these risks as they could have significant reputational, financial or operational impacts for the agency.

The risk management plan should be endorsed by the agency's senior leadership. Below is a rough outline of a simplistic risk plan that identifies a number of senior leaders who act as owners of specific risks. It is important to remember that this example is purely illustrative and agencies should create risk plans according to their own internal procedures and requirements. In this example, '**Controls**' refers to actions taken by the agency prior to the risk eventuating. '**Risks**' refers to the potential issues in question. '**Actions**' refers to the strategies implemented if the risk eventuates. Depending on the risk calculations made, risk ownership may sit with senior leaders at varying levels of seniority.

Senior leaders may have their own perspectives on the grading of a specific risk in a risk matrix or on who should be the owner of a specific risk, which is why consultation is necessary. The consultative process does not guarantee the agency has the capacity to deal with all the possible risks effectively, but it does ensure the necessary discussions occur beforehand.



C4 | Consulting line managers

What do managers want from an enterprise agreement?

Managers are an invaluable resource for enterprise bargaining teams. Consulting with line managers and identifying their recommended changes to support agency operations is a critical step in the preparatory phase. Line managers understand the operational needs of the agency and apply the provisions of an enterprise agreement on a daily basis. They may also interpret clauses, understand what conditions are provided and they will know how the operation of specific clauses might impact their operations. Enterprise agreements should support the agency's operations. The views of the line managers who rely on the enterprise agreement should be sought when preparing to bargain.

Managers' roles in bargaining

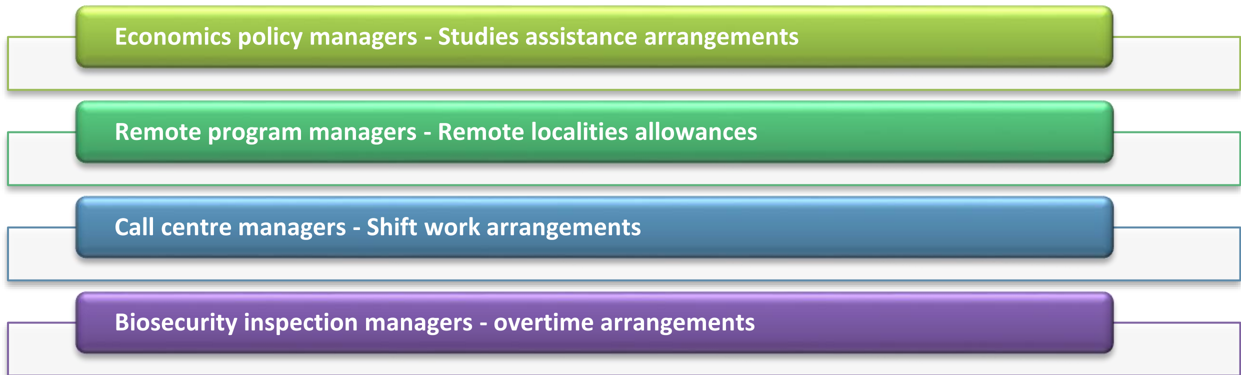
Bargaining for an enterprise agreement can often be a change management process. When agencies seek to commence enterprise bargaining, employees will generally understand that some degree of change will be proposed by management. Even if the changes proposed by an employer in bargaining are not substantial, the immediate signal to employees will typically remain the same.

An important element of any change management process is determining the identity of the change agents for the agency. For most agencies, the change agent will be the line managers who assist in facilitating the delivery of messages from senior leaders to employees.

Consulting with managers before bargaining commences gives an agency the opportunity to seek their feedback on the current enterprise agreement. This could be achieved, for example, through a survey of line managers. The consultative process helps develop a bargaining position that accounts for the views of people who actively use the enterprise agreement every day. Feedback from managers should be collated and broadly summarised, to identify key topics of interest and to accurately capture the relevant proposed changes.

Managers also have a stake in bargaining because the enterprise agreement can both reflect and codify their managerial prerogative. Beyond offering feedback, managers are instrumental in assisting employees with understanding bargaining proposals and the progress of bargaining generally. Managers act as a conduit, collecting feedback from employees and communicating the moods and attitudes of affected staff to the bargaining team and senior leaders.

Below are some examples of the kinds of bargaining issues that may be of interest to different line managers.



Explaining change to managers

Agencies must recognise that various groups of employees, including managers, view change differently and may be legitimately concerned about their own circumstances. An agency should explain the rationale for any proposed change and achieve management support for that change. This is critical as managers will also need to explain to employees why change is necessary. This approach can be illustrated through the two-step process set out below.[2]

1. Primary conditioning

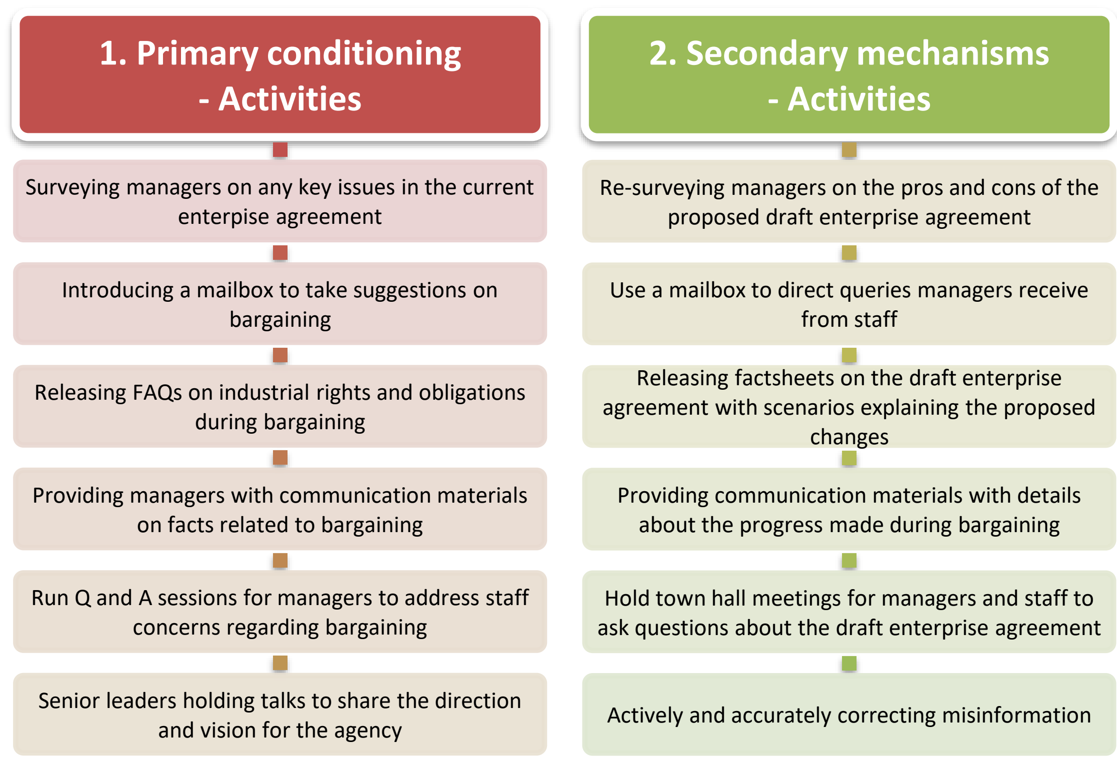
- Establish the need for change
- Build capacity for action
- Supply vision, values and direction

2. Secondary mechanisms

- Break strategy into actionable pieces
- Monitor and adjust activities
- Rethink communications

The first step is 'primary conditioning', which reflects the need to prepare an agency's managers for the bargaining process. It requires senior leaders to champion a clear vision and explain the agency's context. This is essentially a 'scene setting' exercise to prepare managers for bargaining.

The second step is 'secondary mechanisms', and refers to the need to reinforce and refine the original communication efforts. This would occur throughout each stage of bargaining. Some examples of activities that can be undertaken when consulting with managers are outlined below.



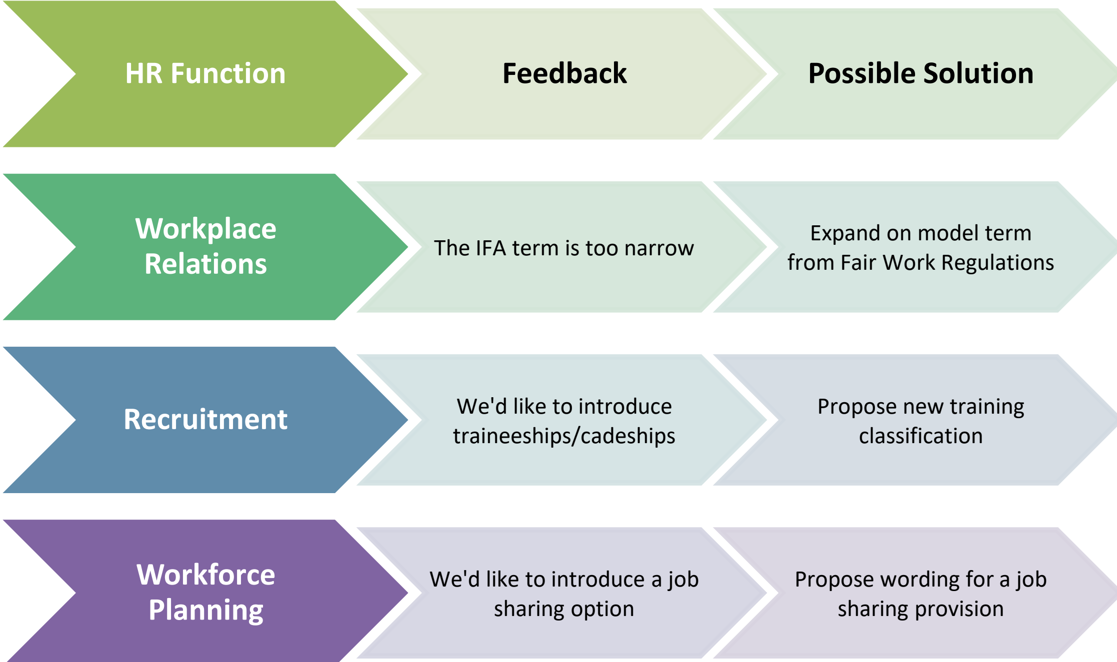
[2] PETTIGREW, A. & WHIPP, R. (1991). *Managing Change for Competitive Success*. Oxford, Blackwell.

C5 | Consulting corporate functions

HR Personnel

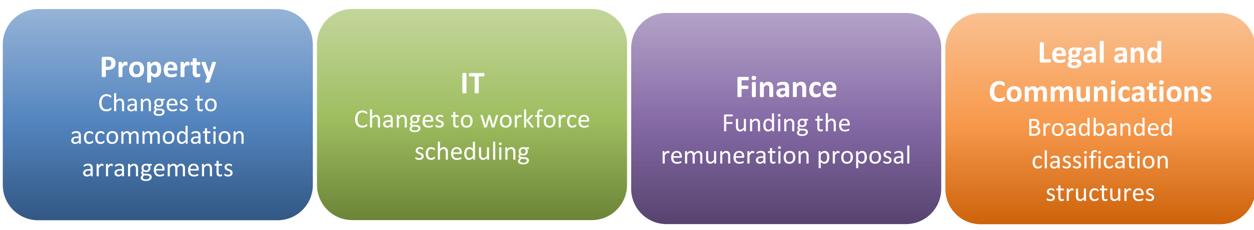
HR personnel must be consulted prior to bargaining as, like managers, they apply and interpret the enterprise agreement on a daily basis. Each specific area of HR can offer important perspectives on the operation and implementation of the enterprise agreement. The HR team are most likely to know which aspects of an enterprise agreement are not operating as intended, are causing inefficient administration within the agency, or do not adequately cater for the needs of sections of the agency's workforce.

Agencies should seek feedback from their HR personnel on how the current enterprise agreement is operating in practice and how it is currently administered. Directly engaging with HR teams through workshops can be an effective way for HR personnel to discuss challenges and consider options for improving the enterprise agreement. The example below outlines the feedback received from several HR areas which identifies a proposed change to existing arrangements and the relevant solution.



Other agency functions

Whilst preparing for bargaining, agencies should consult with all functional areas within their organisation. Other areas may be involved in bargaining, potentially offering subject matter experts. Bargaining teams should not make assumptions about the 'value' other areas could offer to the bargaining process, because they will each have their own perspective on the terms of the proposed enterprise agreement. Below are some examples of the kinds of bargaining issues some functional areas may be interested in.



C6 | Consulting employees

Communication with employees is an ongoing process, and does not start and stop at the commencement and conclusion of bargaining. Communication should continue throughout the bargaining journey, including the periods between bargaining rounds. A key to achieving successful bargaining outcomes, is for employees to regard management as a trusted and reliable source of information.

Communicating directly with employees

To establish a supportive and informed environment agencies should communicate with their employees prior to bargaining. This will ensure employees are fully engaged on the bargaining journey. An agency can gauge the mood and attitudes of its employees by talking directly to them (e.g. at forums or branch/team meetings), or via other means which may provide anonymity and/or draw out more frank feedback (e.g. surveys or a designated email or mailbox).

Consulting with employees does not necessarily mean the agency will agree with the suggestions or feedback received. However, the process will highlight key areas of concern and interest for employees. Agencies should respond to the feedback they receive from employees in a timely manner. Responding can be just as important as consulting. The agency should reiterate what may or may not be achievable and explain why. Employees are more likely to remain engaged with the process where they believe the agency has considered their views and been upfront and open with them.

Establishing your communications methods

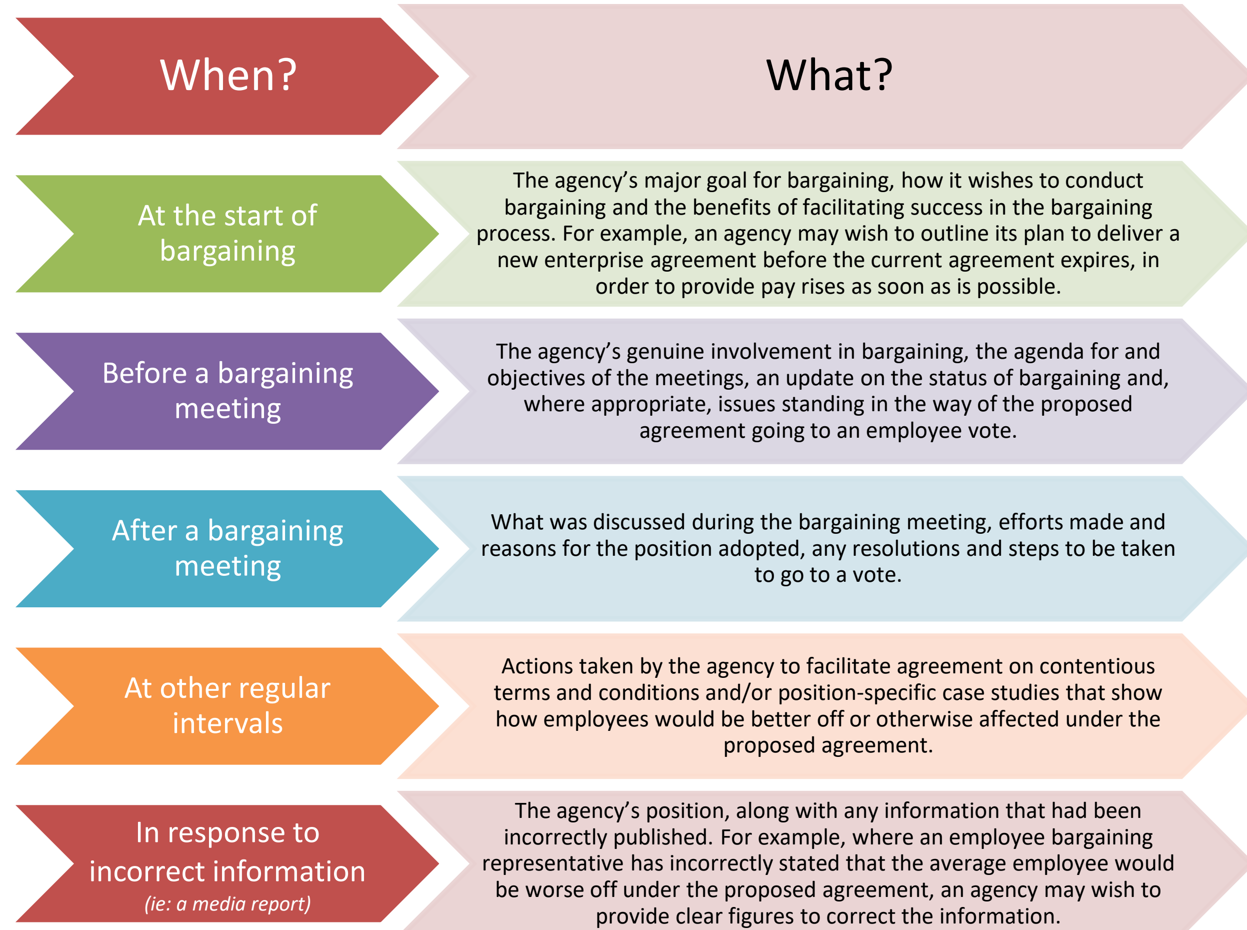
Agencies will need to communicate different messages/information to employees before, during and after bargaining. Multiple communication channels and strategies will likely be needed. The examples below illustrate how different communication approaches can be tailored to a particular message. For example, legislative and procedural information that simply outlines employee rights and obligations during bargaining could be best placed in factsheets on the agency's intranet. Such information can then be accessed at any time, updated as required and employees can be directed to the information when related questions arise.

It is important to establish a simple, authoritative source of information (which may be delivered through multiple channels) early. This will minimise the risk of misinformation. Depending on the agency, the source of information may be the agency head, head of corporate/HR, chief negotiator, or another nominated credible spokesperson.

What messages to communicate?			
Legislative and procedural information	Key issues for the agency	The steps involved in bargaining	Possible timeframes and important news

How to communicate the messages?			
Factsheets	Q&A videos	Blog posts	All staff emails

Agencies should communicate and consult with their employees throughout bargaining. Employees want to know how proposed changes to the enterprise agreement will affect them. A failure to provide employees with accurate and timely updates on bargaining may result in the spread of misinformation and rumours. Employees could form an unbalanced view about the proposed agreement if the agency does not provide employees with regular and appropriate updates and does not correct misinformation. Agencies may wish to communicate specific messages over the course of bargaining, for example:



Communicating with employees through managers

Helping managers communicate with their employees about the bargaining process is important. Whilst it is essential for agencies to have a single source of information, employees often prefer to receive information face-to-face. When face-to-face communications come from someone they know and trust, such as their immediate manager/supervisor, it is more likely to be understood. This will provide a platform for an open and healthy discussion about bargaining. Effective communication comes from providing managers with the tools and information necessary to communicate messages directly with their staff.

It is imperative that agencies assist their line managers by providing them with constant, timely and accurate bargaining information. Feedback received from employees through these exchanges will also enable managers to capture any issues/concerns, and work with the bargaining team and/or senior management to ensure matters are appropriately addressed.

C7 | Developing a bargaining position

An informed bargaining position

An agency's bargaining position should not be developed in isolation. It should be informed by analysing the agency's objectives, context, consulting with senior leaders, managers and employees. In practice, an agency would perform all these activities, while concurrently developing its bargaining position. Any feedback received will also help to support and inform the bargaining position that is ultimately taken.

Legislative obligations

In developing a bargaining position, agencies need to consider their legislative obligations. Changes to legislation that occur during the term of the current enterprise agreement may need to be reflected in the proposed enterprise agreement. Changes to legislation should be identified and reflected in an agency's bargaining position.

Agencies must ensure the proposed enterprise agreement will comply with the NES, pass the 'BOOT' and meet the approval requirements. Agencies should consider seeking legal advice where they are unsure about any compliance related obligations.

> **Further information:**
>
> Enterprise agreements, and other workplace arrangements, cannot contradict or provide a lesser entitlement than the NES. The NES are a guaranteed set of minimum employment entitlements provided to all employees in the national workplace relations system.

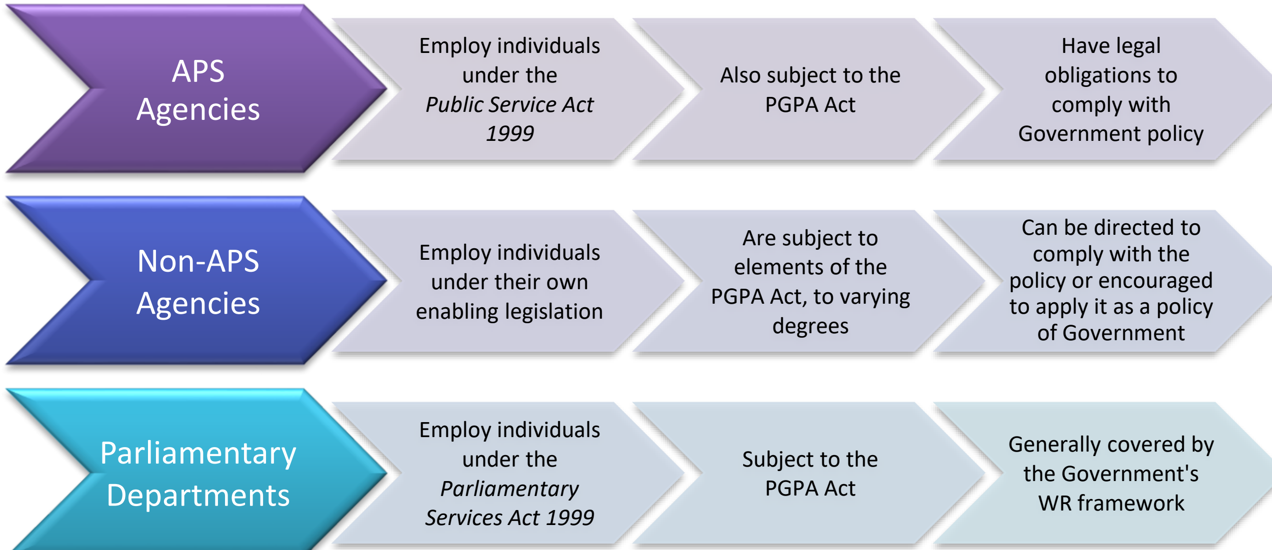
Workplace Relations Policy Framework

The APSC periodically publish the Australian Government policy framework which sets the parameters for Commonwealth entities in the development of workplace arrangements (such as enterprise agreements). This is a longstanding approach undertaken by consecutive Governments, with similar approaches also being taken by State and Territory Governments.

The policy framework generally covers remuneration, terms and conditions of employment and related workplace relations practices. The policy framework may also include terms and conditions which must be included in Commonwealth agency workplace instruments. The policy may also include rules about approval of instruments.

Approvals generally apply to collective arrangements, including enterprise agreements, determinations and common law contracts. The approval requirements vary, depending on the type of workplace arrangement and the nature of the agency.

APS and non-APS agencies operate under different enabling legislation, and are subject to the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) to varying degrees. It should also be noted that some agencies have dual staffing powers under both the PS Act and other enabling legislation. The illustration below shows how the arrangements generally apply to Commonwealth entities.



Making comparisons with other employers

Agencies should frame their own enterprise agreement within a wider context, taking into account their own circumstances. It is not uncommon for Commonwealth agencies to compare themselves with each other, as they share similar classification structures or job roles. Commonwealth agencies may also operate under the same bargaining policy.

Only undertaking a comparison against other Commonwealth agencies has the effect of developing a 'false' internal labour market. Agencies are encouraged to consider the broad trends occurring across the Australian economy, including those in State and Territory government agencies and the private sector, rather than taking a narrow focus on Commonwealth agencies.

For these reasons, Commonwealth agencies should develop their bargaining position based on their own unique circumstances, taking into account external information and trends, where they are relevant to their operational challenges, government policies and operational goals, rather than simply adopting the practices of other agencies.

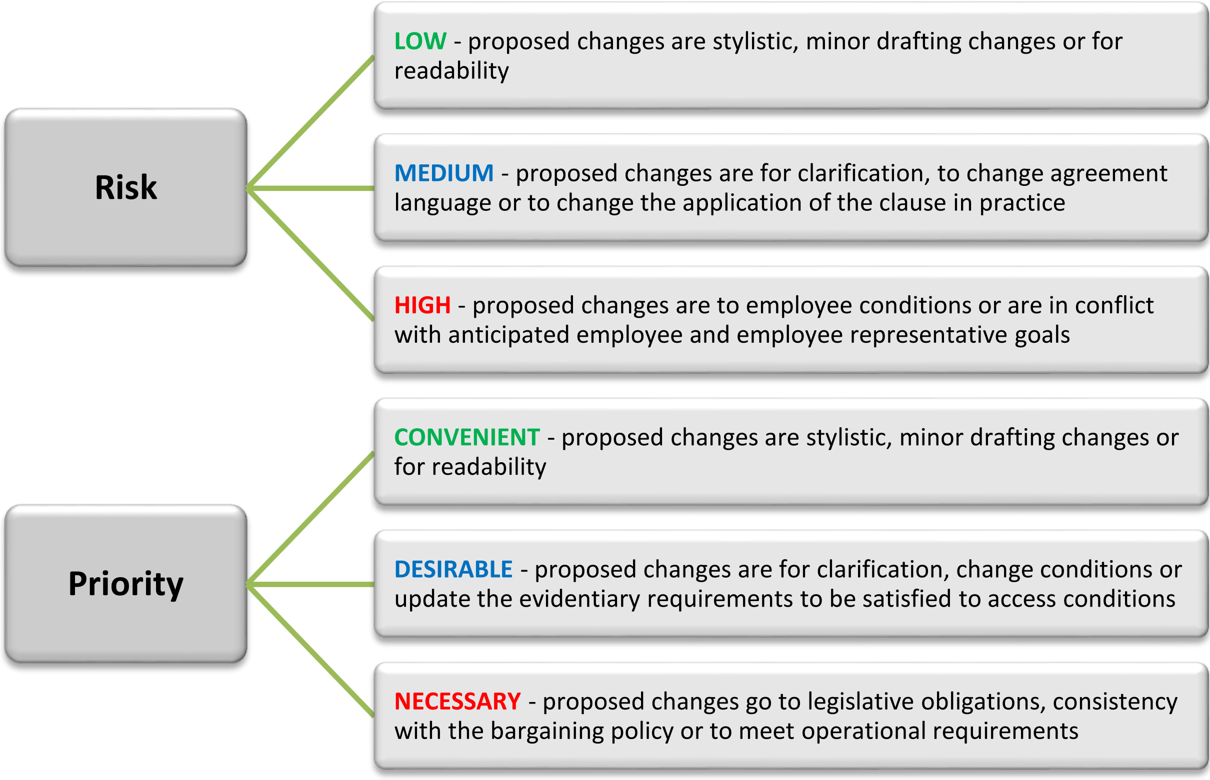
Assessing the risk and priority of bargaining positions

Agencies should take into account and prioritise any risks associated with proposed changes to be pursued in bargaining. Some proposals will be more contentious than others, and could be categorised as more risky and likely to face more opposition from bargaining representatives and employees.

Some risks may not eventuate, but it is better to be prepared in advance. This is an exercise agencies should complete before bargaining commences. This exercise gives agencies an opportunity to prepare arguments and counter-arguments. It will also ensure the bargaining team is able to effectively articulate the case for change.

Agencies should prioritise their bargaining proposals based on importance, identifying which proposals must happen, as opposed to those that are *desirable*.

The example below outlines an approach to identifying risk and prioritising bargaining positions. The three levels in each category offer a spectrum of an expected level of risk and necessity.



Outlining a bargaining position

There are many different ways an agency could outline its bargaining position, with two approaches detailed in this section of the guide.

The first approach involves identifying only the terms and conditions where changes are proposed. The second approach involves undertaking a comprehensive clause-by-clause analysis of the enterprise agreement, outlining the agency's bargaining position(s). Outlining a bargaining position is useful, because it summarises the decisions made and positions taken. A bargaining position also forms a record for the agency endorsed position leading into bargaining.

Identifying terms and conditions

Specific conditions could be identified, as illustrated in the example below. A justification or rationale should be provided to explain the necessity for the proposed change. The agency could identify what their current enterprise agreement provides for and what position they intend to adopt. An alternative position could also be identified.

Where the agency faces resistance to a proposed change, the alternative position could be considered as a 'fall back' option at an appropriate time in the negotiation (having regard to the overall context and status of bargaining more generally). In some cases, there may not be an alternative position, such as where a change is required based on legislative changes, or the requirements of Government policy.

Comprehensive comparison of the agreement

Agencies using this approach systematically analyse their current enterprise agreement clause by clause, outlining their positions in a comprehensive manner. This can be an exhaustive list or may simply outline the clauses the agency intends to change. In some cases, it may be an effective exercise to outline the reasons for maintaining the status quo, especially where it is anticipated that bargaining representatives will bring forward claims to change particular clauses.

To some extent, this approach assumes that agencies intend to use their current enterprise agreement as a basis for bargaining. For some agencies, their current enterprise agreement may no longer work for them and they may wish to re-write it completely. Agencies already operating under streamlined and succinct enterprise agreements would not necessarily need to take this approach. The table below shows an example of a bargaining position.

Condition or entitlement	Current condition or entitlement	Proposed bargaining position	Rationale for the proposed changes	Alternative position
Christmas closedown	No Christmas closedown	Introduce a maximum of two days of Christmas closedown	Improving employee entitlements in this area will assist with attraction and retention of staff. There is limited need for staff to work over this period.	Introduce Christmas closedown for the period between Christmas Day and New Year's Day inclusive.
Annual Leave	20 days per annum which accrues monthly	Annual leave must be accrued progressively	To meet BOOT requirements - per recent undertakings made by agencies, and legal advice received	Nil, the current agreement is inconsistent with the NES
Purchased Leave	No requirement for taking leave in blocks	Purchased leave must be taken in blocks of 5 working days	As per consultation with managers, who believe employees are using purchased leave to work de facto part-time arrangements	Purchased leave is not taken in a pattern that, in effect, changes employment status
Healthy Lifestyle Allowance	Healthy Lifestyle Allowance	Remove the Healthy Lifestyle Allowance	To simplify allowances and remove allowances that do not address a specific operational requirement	Nil, the agency has a strong desire to remove this allowance

The example below identifies a personal/carer’s leave clause and offers a specific bargaining position for each subclause. The rationale for the change is identified and an alternative position is included.

Current clause wording	Proposed bargaining position clause wording	Rationale for the proposed change	Fall-back position in bargaining
F1.1 – Ongoing employees will be entitled to 18 days personal/carer’s leave for each year of service	Ongoing employees will be granted 18 paid personal/carer’s leave on commencement and then, from the first anniversary of their commencement, will be entitled to 18 days personal/carer’s leave for each year of service thereafter.	Consistency with APS standard	Nil, this is a benefit to employees
F1.2 - Personal/carer’s leave accrues and is credited monthly	Personal/carer’s leave accrues daily and is credited monthly.	To meet FWA requirements and APS standard	Nil, the current agreement is inconsistent with the NES
F1.3 - Unused personal/carer’s leave will accrue from year to year, but will not be paid out on separation.	Nil	Legislative obligations are already met	Nil, the current arrangements are sufficient.

C8 | Evidence supporting a bargaining position

Having supporting evidence that justifies a bargaining proposal allows an agency to explain its rationale to employees, and their representatives. It may also allow the agency to refute the claims of other bargaining representatives. It may not be possible to share the evidence in all situations, as some evidence may be subjective or open to interpretation.

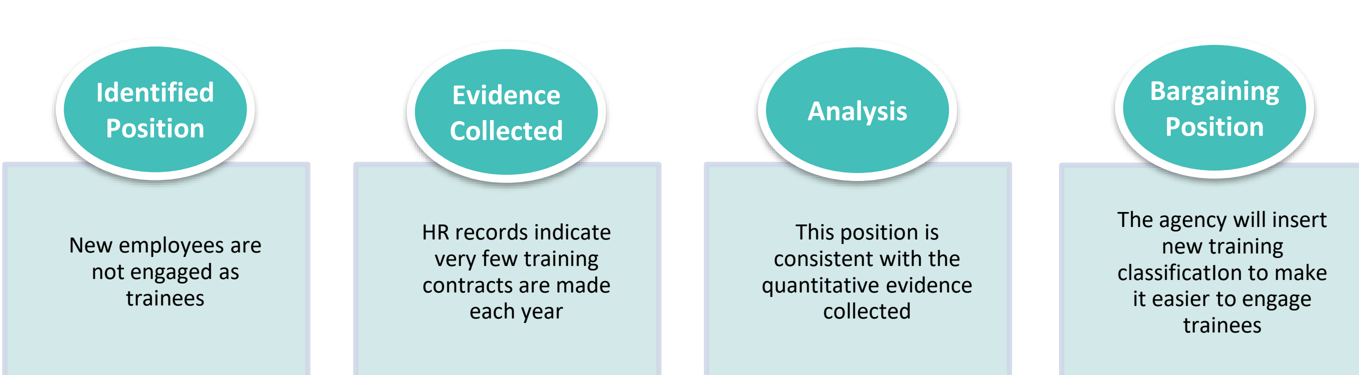
Qualitative and quantitative evidence

Qualitative evidence takes many forms, including feedback from senior leaders, managers, HR personnel, employees, and legal advice.

Quantitative evidence could refer to data that the agency collects through HR systems, surveys or other databases. For example, system reports can demonstrate usage patterns of specific entitlements and allowances over the life of the enterprise agreement. Other reports may show patterns of work and how specific provisions of the current enterprise agreement are applied in practice.

Evaluating the evidence

Agencies should evaluate their bargaining positions against the evidence they collect. Below are a few examples that demonstrate situations where evidence can inform an agency's bargaining position.



C9 | Timeframes for bargaining

Agencies should develop indicative timeframes when preparing to commence bargaining. The timeframes should identify the activities expected to progress bargaining in a timely manner. Developing timeframes allows the agency to plan ahead and indicate to senior leaders their proposed strategic approach to bargaining. Timeframes relating to specific activities may need to be revised throughout the bargaining process due to changes in circumstances or unexpected events.

When does bargaining commence?

Bargaining commences when the employer notifies employees, and their representatives, that they have commenced negotiations for a new enterprise agreement. In some circumstances, a bargaining representative can give an employer a request in writing to bargain and compel the commencement of bargaining.

Note: The FW Act stipulates certain process requirements that must be complied with at the initiation of bargaining. For example, as they relate to time periods in which Notices of Employee Representational Rights must be issued.

Further information:

Agencies looking for further information on their legislative obligations should consider:

- The FWC enterprise agreement benchbook:
  https://www.fwc.gov.au/resources/benchbooks/enterprise-agreements-benchbook
- The Fair Work Ombudsman's fact sheets on enterprise bargaining:
  https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/enterprise-bargaining

Approval requirements

When developing timeframes to commence bargaining, agencies should account for the various approval processes that will be required. This includes seeking approval from the Agency Head, other senior leaders and, in some cases, the Minister/s. Agencies should also account for the time it takes to escalate briefs and decisions internally. In addition, the draft timeframes should provide sufficient time for senior leaders to consider the proposals.

Some agencies will need to keep their Minister/s and portfolio department informed about significant events in bargaining. In particular, agencies where industrial action has the potential to affect the delivery of services to the community, especially need to keep their Minister/s informed.

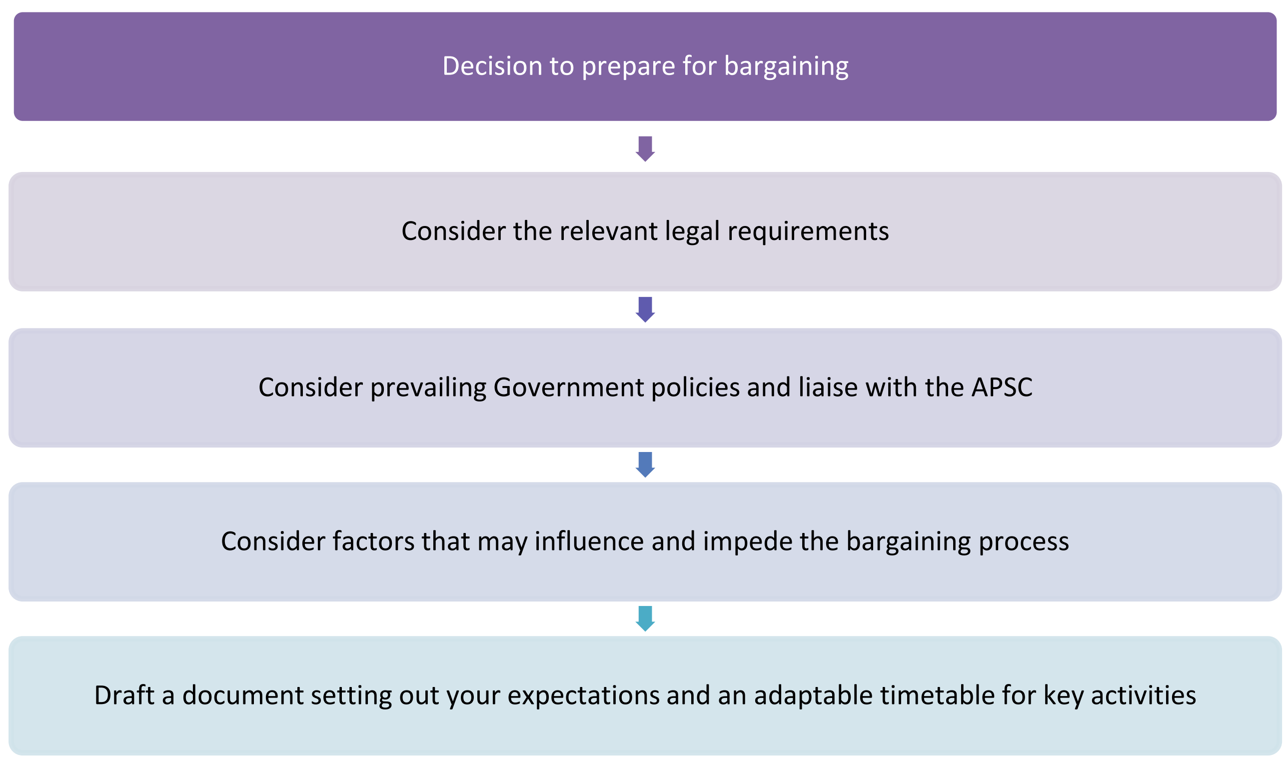
External factors

Agencies should also factor in external influences when developing timeframes. This can include seeking decisions from their Minister, the APSC, or other relevant parties. Agencies should engage early with the APSC to seek an indication of how long the approval process might take.

Federal budgets, or changes of government, can signal funding or Machinery of Government changes. These changes may have a substantial impact on an agency's funding and costs. It is therefore important to consider that a new government or budget may lead to delays in bargaining while the agency re-evaluates its financial position.

Preparing a timeframe document

The diagram below outlines the steps involved for agencies when drafting expected timeframes to commence bargaining. The steps are not exhaustive and only identify some of the key considerations in the period prior to bargaining commencing.



For questions related to this Guide, please contact the APSC Workplace Relations Group at workplacerelations@apsc.gov.au.

Enterprise Bargaining Guide

Enterprise bargaining

Contents

Disclaimer 3

Links to external websites 3

D. Overview of the Guide 4

E. Enterprise Bargaining 5

E1 | Public sector bargaining 5

E2 | Commencing bargaining 8

E3 | Driving bargaining as the employer 10

E4 | Good faith bargaining 11

E5 | Developing bargaining protocols 15

E6 | Employee representative's log of claims 16

E7 | Communicating with employees 17

E8 | Records management 20

E9 | Drafting clauses and changing your bargaining position 22

E10 | Progressing to an employee ballot 25

E11 | Explaining and promoting the enterprise agreement 28

E12 | Holding a successful vote 31

E13 | After an unsuccessful vote 33

F. Fair Work Commission 35

F1 | Matters in the Fair Work Commission 35

F2 | Terminating the enterprise agreement 37

G. Industrial action 39

G1 | Industrial action and industrial action ballots 39

G2 | Preparing for industrial action and business continuity 41

G3 | Communicating with stakeholders about industrial action 43

G4 | Responding to industrial action 44

Disclaimer

The contents of this document is general guidance material only. The Commonwealth does not guarantee, and accepts no legal liability arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this guide. The information provided, including commentary, is considered correct as of the date of publication. This guide may be updated from time to time to reflect changes to legislation or government policies.

The advice and information contained within this guide is not, in any way, legal advice. This guide is not a substitute for independent professional advice. Where required, practitioners should obtain appropriate professional advice relevant to their particular circumstances. Agencies should supply any legal advice sought to other agencies as required by legislation.

Links to external websites

Where external websites are referenced or linked to, they are provided for the reader's convenience and do not constitute endorsement of the materials on those sites.

D. Overview of the Guide

This guide covers some of the key areas and questions that Commonwealth agencies should consider during the enterprise bargaining process. *Enterprise Bargaining* represents the second part of the guide and follows *Preparing to Bargain*. The next and final part, *Post-bargaining* will deal with the activities following a successful employee ballot.

Human resources and workplace relations practitioners from a number of Australian Public Service (APS) have been consulted in the development of this guide.

What is enterprise bargaining?

Enterprise bargaining is the formal negotiation between an employer, employees and their representatives for an enterprise agreement. The aim of the bargaining process is to reach agreement on employees' terms and conditions of employment, including remuneration, and matters relevant to the manner in which work is to be performed. Enterprise agreements, being the result of enterprise bargaining, are collective industrial instruments and are made between an employer and their employees under the national workplace relations system.

Key points

- ✓ This guide provides only general guidance materials that are purely advisory in nature.
- ✓ This guide seeks to help workplace relations practitioners refresh their knowledge on bargaining.

E. Enterprise Bargaining

This part deals with some of the key issues Agency Heads should consider during bargaining.

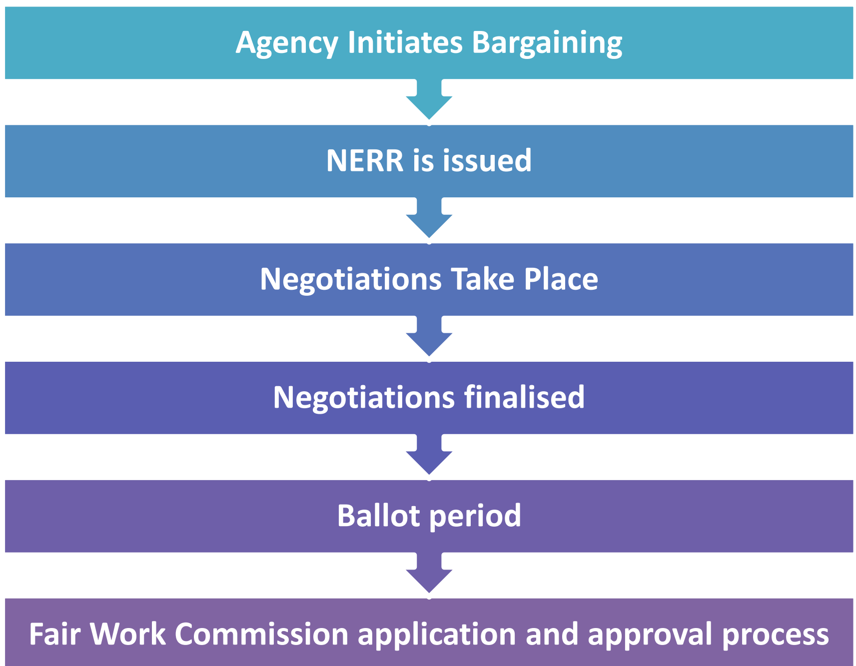
E1 | Public sector bargaining

Enterprise bargaining in the Commonwealth public sector operates in the same national workplace relations system established by the *Fair Work Act 2009* (Cth) as other national system employers.

Characteristics unique to Commonwealth public sector bargaining	Characteristics common with other national system employers
• Consulting with Minister(s) • Application of Government Policy, including core common terms • Public expectations	• Good faith bargaining requirements • Negotiating with bargaining representatives • Application of Fair Work Act 2009 (Cth) • Fair Work Commission enterprise agreements approval process

Outline of the bargaining process in the Commonwealth

Below is an outline of the enterprise bargaining process for Commonwealth public sector entities. Agencies should note that some of the below steps are subject to strict deadlines under the *Fair Work Act 2009*:



Comparison to private sector employers

Agencies in bargaining are subject to similar obligations and processes as private sector corporations and entities. For example, private corporations have boards of directors and other governance structures similar to Government Ministers. These directors may set parameters for bargaining, similar to the Government's bargaining policy.

Ministers

Agencies should keep their Minister informed of significant and key developments in the enterprise bargaining process. Enterprise bargaining can directly affect the operations of an agency, especially when industrial action is likely to occur. Many agencies have obligations to provide services to the public and businesses. Some agencies may experience significant public scrutiny and media coverage during enterprise bargaining. This is especially the case when industrial action affects the provision of services to the community.

Agencies covered by the *Public Service Act 1999* bargain on behalf of the Commonwealth as the employer. The Government, as the employer, publically decides what outcomes it seeks or takes certain positions in bargaining, this is done through Government Policy. The role of agency bargaining teams is to deliver on these decisions and directions.

Australian Government Policy

The Australian Government may periodically publish a policy framework (the Policy) that sets the parameters for Commonwealth entities in developing workplace arrangements like enterprise agreements. This was outlined in section C6 'Developing a bargaining position' in Part 1 of this Guide. Commonwealth agencies are expected to comply with the Policy or, in some cases, to apply it to the extent practicable based on commercial and operational circumstances.

The Policy reflects the Government's key objectives for bargaining and workplace relations in the public service. The existence of the Policy is a long-standing approach undertaken by consecutive Governments. State and Territory Governments also adopt similar approaches. The Policy will usually also set out approval requirements, these are independent of the fair work approval process and the agency's own internal operations. These requirements must be met prior to a proposed enterprise agreement progressing to a ballot.

Australian Public Service Commission (APSC)

The APSC is responsible for providing advice on the application of the Policy to agencies bargaining in the Commonwealth. The APSC is also responsible for the administration and bargaining of service wide common conditions for APS agencies. These common conditions are incorporated into the Policy.

The APSC also monitors the progress of bargaining across the Australian Government and supports the APS Commissioner in administering the Policy. Agencies should remain in contact with the APSC prior to and during enterprise bargaining. The APSC will assist agencies in complying with the Policy.

Agencies should note that the APSC review process can be iterative in nature. . Agencies should account for this when developing a bargaining timeframe.

Non-APS agencies are required to seek approval from the APS Commissioner prior to commencing bargaining. This involves the agency submitting their bargaining position to the APSC for review. The bargaining position should explain the specific changes proposed and the reasoning for those proposed changes. This position is assessed to ensure consistency with Government Policy. Non-APS agencies are also

required to provide a remuneration and funding declaration prior to making a wage offer to employees.

Agencies should seek more information directly from the APSC about the application of the Policy in their circumstances.

Employee bargaining representatives and unions

Some agencies have very small workforces and may have no union involvement or nominations by employee bargaining representatives. In these cases, an agency may have the ability to hold bargaining meetings with their entire workforce.

For larger agencies, employee bargaining representatives are nominated after the NERR is issued. Specific unions will have coverage of specific groups of employees and will be default bargaining representatives for their members. Employees may appoint themselves or another person as a bargaining representative in writing. For further information regarding the NERR refer to section E2 'Commencing bargaining'.

Medium to larger sized agencies will likely have employee bargaining representatives and unions as part of their bargaining process. While there are public sector specific unions in the Commonwealth, agencies with technical and specialist staff may also have broader union coverage. Most agencies will be required to bargain with employee bargaining representatives that are self-nominated, along with representatives that act on behalf of groups of employees.

Employee and union bargaining representatives have a legitimate role to play in bargaining. Recognising and meeting with these representatives is a good faith bargaining requirement. For further information refer to section E4 'Good faith bargaining'.

E2 | Commencing bargaining

Pre-bargaining survey

Many agencies choose to undertake a survey of employees prior to commencing enterprise bargaining. This survey helps to inform and in some cases may support elements of the agency's bargaining position. When drafting this survey, agencies should take care not to trigger the notification time. Agencies cannot withdraw from enterprise bargaining once the notification time has occurred. If bargaining is triggered, there is no other option but to undertake enterprise bargaining and issue a notice of employee representational rights (NERR) as soon as practicable (and within 14 days). To avoid any confusion, some agencies choose to undertake the survey a few days prior to issuing the NERR.

Notification time

Section 173 of the *Fair Work Act 2009* (Cth) details the process to commence bargaining. The notification time begins when:

1. an agency agrees to bargain or initiates bargaining for an agreement;
2. the employer's enterprise agreement has reached its nominal expiry date in the past 5 years and the employer receives a request to bargain by a bargaining representative; or
3. a majority support determination, scope order, supported bargaining authorisation or single interest employer authorisation comes into operation.

Usually, the Chief Negotiator who bargains on behalf of the Agency Head (the 'employing authority') triggers the notification time by agreeing to bargain or initiating bargaining.

Ideally, employers will not start bargaining until they are ready to do so. Agencies should therefore take care to ensure they only agree to or initiate bargaining deliberately. An agency may accidently trigger bargaining through conversations with employee representatives or communications with employees more generally. Where an agency is required to issue its Notice of Employee Representational Rights following a request made by a bargaining representative under 173(2A) of the Fair Work Act, the agency should expedite its bargaining preparations.

Notice of Employee Representational Rights

Section 173 of the *Fair Work Act 2009* (Cth) requires that, after the notification time, the agency must take all reasonable steps to notify employees, who will be covered by the proposed agreement and are currently employed, of their right to be represented. This must happen as soon as practicable and cannot happen more than 14 days after the notification time. This notice is known as the notice of employee representation rights or 'NERR'.

Many agencies will issue the NERR when (or immediately after) they formally commence bargaining (also known as the notification time). A NERR template is available on the Fair Work Commission's website. Agencies must strictly refrain from changing the contents of the NERR template.

The Fair Work Commission (the FWC) may not approve an enterprise agreement where the NERR was issued incorrectly. Agencies should ensure that the NERR is not issued later than required, contains only the standard

wording and is not attached to additional information that may alter the message or character of the notice.

Where an agency issues a defective NERR, the agency must stop bargaining and initiate bargaining again (including the issue of a new NERR). Simply issuing a new NERR during a continuing period of bargaining will not resolve the defect.

Further Information

An enterprise agreement is made by the employer and their employees. In the APS, the employer is the Commonwealth of Australia acting through the relevant 'employing authority'.

An employing authority is defined as a person described in Schedule 6.3 of the *Fair Work Regulations 2009* (Cth). Under the *Fair Work Regulations 2009* (Cth), for the purposes of enterprise bargaining, the employing authority is the Agency Head.

An employing authority may also be an officer authorised by the principal executive officer of a Commonwealth Authority employing a person in public sector employment.

Commonwealth bargaining

Outside the application of *Fair Work Act 2009* (Cth), there are a number of factors particular to Commonwealth enterprise bargaining that makes it different and similar to private sector bargaining. These will be detailed in the sections to follow.

E3 | Driving bargaining as the employer

This section of the guide outlines some of the key considerations for employers in enterprise bargaining. This section does not deal with bargaining strategies or the nuances of negotiations.

Reaching in-principle agreement

Enterprise agreements are collective arrangements made directly with employees (although often 'negotiated' through their representatives). Therefore, reaching in-principle agreement with the bargaining representatives (while ideal) is not always possible and should not be the primary measure of success in bargaining. Negotiators must ensure they do not become fixated on simply achieving an in-principle agreement with bargaining representatives at the expense of their own objectives as an employer. Agencies will often face different (sometimes contradictory) forces in bargaining. Bargaining teams have the job of drafting and negotiating agreements that balance employee claims, meet business/operational requirements and comply with Government expectations (including any relevant policy), while trying to reach a successful ballot.

Negotiation is a process where parties attempt to resolve their differences and try to reach agreement. This can be done through exploring options and exchanging offers. This is not the objective of enterprise bargaining and this may not be achievable in every circumstance. The primary objective is getting an enterprise agreement that clearly sets out the terms and conditions of employment for its duration. These terms and conditions must support the operations of the agency and which employees will vote for.

The role of the employer

Just like any other employer, agencies are responsible for initiating and concluding bargaining. Agencies therefore need to drive the bargaining process.

Agencies cannot sit passively and just respond to events in bargaining, doing this may result in the agency losing control of the bargaining process. Agencies (through their chief negotiator) must understand their objectives in bargaining. Agencies need to drive bargaining to develop solutions. Ways an employer could drive bargaining can include (for illustrative purposes only):

Proposing a schedule of bargaining meetings

Setting the agenda for bargaining meetings

Taking action items from bargaining meetings and following up on action items

Setting timeframes for discussion of particular bargaining topics

Telling bargaining representatives when it's appropriate to address particular issues in writing

NOT simply run through the employee representative's logs of claims

E4 | Good faith bargaining

Representatives engaged in an enterprise agreement bargaining process are required to abide by the good faith bargaining provisions under section 228 the *Fair Work Act 2009* (Cth). Good faith bargaining obligations apply to all bargaining representatives, not just the employer.

The legislated good faith bargaining obligations are:

1. attending, and participating in, meetings at reasonable times;
2. disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
3. responding to proposals made by other bargaining representatives for the agreement in a timely manner [**Note:** employers and employee bargaining representatives do not have to agree or make concessions];
4. giving genuine consideration to the proposals of other bargaining representatives for the agreement and giving reasons for the bargaining representative's response to those proposals;
5. refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
6. recognising and bargaining with other bargaining representatives for the agreement.

In addition to the legal good faith bargaining obligations, APS employees possess additional obligations under the *Public Service Act 1999* (Cth) and the APS Values which include the requirement to be respectful and act ethically.

Further Information

For more detailed information regarding good faith bargaining obligations and applications for good faith bargaining orders, the FWC's Enterprise Agreement Benchbook should be consulted.

Good faith bargaining obligations in practice

Below is a non-exhaustive breakdown of good faith obligations agencies may consider during enterprise bargaining. This list outlines some of the most common issues concerning good faith bargaining obligations.

1. Attending, and participating in, meetings at reasonable times:

- ✓ Agencies should ensure they attend and participate in bargaining meetings;
- ✓ Agencies should meet and explain their positions in person (as opposed to only in writing). The purpose of these meetings is to demonstrate to the bargaining representative 'whether the proposal or modified form of it might be acceptable' *[APESMA v Peabody Energy Australia Coal Pty Ltd [2015] FWCFB 1451]*; and
- ✓ Even if the agency is not in a position to bargain on a matter (e.g. non-APS agencies awaiting the finalisation of the APS position), the agency should nevertheless meet with the bargaining representatives to allow the representative to submit and explain their proposal.

2. **Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner:**

   ✓ Representatives do not need to disclose confidential or commercially sensitive information:

   - Agencies hold commercially sensitive information, for example, commercial products or paid services provided to the community;
   - Agencies hold significant confidential information, for example, information related to the Federal Budget or Cabinet decisions;
   - Information may be confidential if it reveals the personal information of employees or is related to internal bargaining position deliberations; and
   - Agencies should be able to justify their decisions to withhold documents (for example, on relevance grounds, or if they are considered to be confidential or commercially sensitive).

3. **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:**

   ✓ Agencies cannot adopt the role of a 'disinterested suitor' and must actually participate in bargaining;

   ✓ 'Consideration' does not mean that agencies must agree with a proposal or make concessions;

   ✓ Agencies should listen to the views of bargaining representatives, seek more information where required and offer alternatives;

   ✓ Agencies should provide their reasons for disagreeing with a proposal with as much specificity as possible; and

   ✓ In this context, agencies should take responsibility for driving bargaining and therefore take control of the negotiation process. Further information is contained section E3 'Bargaining mindset'.

4. **Responding to proposals made by other bargaining representatives for the agreement in a timely manner**

   ✓ Agencies should respond to other bargaining representatives' claims in writing at an appropriate time, even if it only to refute or disagree with these claims; and

   ✓ Agencies should inform bargaining representatives if they are unable to respond in time and advise when they may be able to do so.

5. **Recognising and bargaining with the other bargaining representatives for the agreement:**

   ✓ Employers must recognise, and bargain with, other representatives; and

   ✓ The *Fair Work Act 2009* (Cth) identifies those persons who are bargaining representatives at section 176.

6. **Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining:**

   ✓ Capricious or unfair conduct can take the form of a range of actions.

Capricious or unfair conduct

Capricious or unfair conduct is a good faith bargaining term provided for in legislation. Below are a few examples of activities that are capricious or unfair and examples that are not. In most cases, behaviour can only be determined to be capricious after examining the context of the particular case.

Examples of unfair or capricious conduct include:	Examples that are **NOT** unfair or capricious conduct include:
• Barring bargaining representatives from attending meetings. • Engaging in detrimental conduct towards an employee because they are a bargaining representative. • Preventing employees from appointing a representative in bargaining.* • Making statements that do not accurately portray the position of another bargaining representative. • Making statements that mischaracterise other bargaining representatives' actions or intent. • Scheduling meetings in a way to purposefully limit participation.	• Communicating directly with employees for the purpose of engaging in bargaining matters (so long as the employer is not bypassing the representatives and this communication is consistent with information provided to representatives). • Putting a proposed EA to vote without the agreement of bargaining representatives where there has been an impasse in bargaining. • Engaging in employer response action as a response to protected industrial action. • Restructuring rosters for a legitimate operational reason (with appropriate consultation as required).

Note: a union can only act as a bargaining representative if they are eligible to represent the industrial interests of the employee.

Making concessions

Agency Heads and other parties in bargaining do not have to make concessions or reach agreement on a proposed draft enterprise agreement. They can do this while still meeting their good faith bargaining obligations. This is because good faith bargaining obligations are procedural in nature.

For this reason, it is important agencies understand their organisational objectives, context and cost implications for changes to the enterprise agreement. This allows an agency the ability to (where necessary) refute and argue against claims and positions of other bargaining representatives. Examples of situations where an Agency Head can say 'no' to a position taken by another bargaining representative, can include (for illustrative purposes only):

Employee bargaining representative position	Agency response	Agency explanation
Increase annual leave credits	No, an increase to annual leave credits for employees adversely impacts on productivity and costs	Costings of the bargaining position demonstrates this.

Increase detail in performance management process	No, the increased detail is prescriptive and risks further disputation	A very small minority of employees are impacted.
Introduce pet bereavement leave	No, including a new leave type is unnecessary	Existing leave entitlements and management discretion is available and sufficient
Guarantee shiftworker rosters	No, doing so limits flexibility for employees and management	Doing so would greatly impact operations and the agency's ability to serve the public
Introduce a glasses allowance	No, the glasses allowance is already in HR policy documents	Having the glasses allowance in policy provides flexibility to employees and management

Agencies can take a robust or hard stance in bargaining as a negotiation strategy. However, agencies must always meet their procedural obligations under the *Fair Work Act 2009* (Cth) and behave in accordance with the APS Code of Conduct and APS values set out in the *Public Service Act 1999* (Cth).

Bargaining orders

If any bargaining representative has concerns that one or more of the bargaining representatives for the proposed agreement have not met or are not meeting the good faith bargaining requirements, they may apply to the FWC for good faith bargaining orders. Notice of the relevant concerns must first be given to the bargaining representative thought to be in breach of their good faith bargaining obligations. Depending on the facts, evidence and arguments presented, the FWC may grant a good faith bargaining order.

Bargaining orders may require a particular course of action be taken to progress bargaining and/or stop the parties from acting in a certain way. Most often, it is employee bargaining representatives that apply for bargaining orders. In certain circumstances however, it may be appropriate for employers to do so.

Commonwealth agencies must consider all legal, practical and reputational implications and the APSC's views before a good faith bargaining application is made.

E5 | Developing bargaining protocols

Bargaining protocols are arrangements made for the enterprise agreement negotiation process. In some cases, an agency and bargaining representatives may reach agreement on a set of protocols. However, agencies can introduce bargaining protocols unilaterally and provide arrangements that the agency considers to be appropriate and reasonable.

Protocols can be a formal document or an informal verbal agreement that outlines arrangements for the negotiation process. These arrangements guide the conduct of the parties during bargaining meetings. Protocols help create a pattern of normative behaviour that governs the negotiation. Protocols can reduce administrative burden and allow representatives to focus on the substantive issues at hand.

Bargaining protocols in practice

The content of the protocols will vary between each bargaining round. Regardless of the specific content of the protocol, it is advisable that they be principles-based, uncontroversial and flexible, in order to effectively conduct meetings. If the agency and bargaining representatives cannot reach agreement on protocols, the agency may proceed as it sees fit. Below are some examples of the kinds of protocols terms that agencies can apply.

Membership of bargaining teams

- Form of invitations to attend bargaining meeting.
- Procedures for inviting guests to bargaining meetings.
- Outlining contact details for representatives.

Deadlines on requests

- Establishing deadlines and procedures around requests made to bargaining representatives to assist in the management of requests.

Facilitation

- Establishing rules for facilitating bargaining meetings, including scheduling.
- Notification method for changes to bargaining meeting schedule and procedures.

Establishing procedures for responding to tabled claims

- Establishing rules for the tabling of claims.
- Establishing procedures for the tabling of responses to claims.

Treating documents without prejudice

- Establishing rules on the treatment of documents and information produced during bargaining.
- Treating all documents and discussions without prejudice unless otherwise indicated.

Good faith obligations

- Establishing that all bargaining representatives are subject to good faith requirements under the FWA.

Administration

- Establishing administrative procedures.
- For example: meetings venues, dates for meetings, length of meetings, the provision of materials/agendas before meetings and post meeting summaries or minutes.

E6 | Employee representative's log of claims

Using an employer logs of claims

Agencies may wish to prepare a log of claims, reflecting the changes required to support the agency's operational goals. Such documents should clearly state the agency's requirements from bargaining, priorities and bargaining positions. Agencies should have a clear understanding of what they want to achieve, informed by the expectations of Government and the agency's executive. Further information on developing bargaining positions for an employer log of claims is in Part 1 of the Enterprise Bargaining Guide 'Preparing to bargain'.

Agencies are able to use their own log of claims to drive bargaining as discussed in section E2 'Bargaining mindset'. The agency can then discuss the employees' log of claims in the context of the agency's log of claims. This allows the agency to set the pace of and drive bargaining forward.

What is an employee representative's log of claims?

An employee representative's log of claims (or draft enterprise agreement) is the official record of the position of the employees they represent. The log usually takes the form of correspondence provided by a union on behalf of their members. Agencies will often receive a log of claims from employee bargaining representatives. Employee bargaining representatives will usually use this log of claims to anchor themselves in bargaining and negotiate the agreement.

Agencies may choose to discuss the components of the employee representative's log of claims within the context of discussing the agency's own log of claims. It is important that agencies have evidence of their responses, as any alleged lack of response could form part of a good faith bargaining dispute. Written evidence ensures agencies are meeting their good faith bargaining obligations and shows the agency is genuinely trying to reach a consensus. Agencies can also provide a formal response to new claims made in bargaining periodically.

In some cases, a log of claims may seek to address issues outside the parameters of what is achievable in enterprise bargaining. The claim may not be possible or realistic within the legislative and policy framework. The claim may also seek to restrict how the agency operates. In these circumstances agencies should simply respond to these claims and explain why the agency cannot agree to them.

Employee expectations

Agencies that proactively engage with their employees, inside and outside of bargaining, will develop a strong understanding of their employees' expectations and priorities. In this way, agencies can verify claims made by employee bargaining representatives. Agencies may also undertake periodic employee surveys about the enterprise agreement issues that matter most to them. This approach is also helpful to dispel misinformation about employee concerns, particularly during an employee ballot.

E7 | Communicating with employees

An essential element of successful enterprise bargaining is effective communication with employees. The agency's employees are the ones who vote in the ballot on the proposed enterprise agreement. Employees are likely to receive the proposed agreement more positively when they are informed and consulted.

As discussed in *Part 1 - Preparing to Bargain,* Agencies are encouraged to develop a communication plan before bargaining commences. The bargaining team should work in conjunction with their communications team to develop the plan. The plan should be regularly reviewed and adjusted throughout the bargaining process.

Each agency will have different circumstances to consider when designing the communication plan. There is no one size fits all approach when it comes to communicating effectively with employees in a variety of locations and roles. Communication resources must be accurate, respectful and accessible to all employees. All communication activities must be underpinned by good faith bargaining obligations.

Communicating in bargaining

Upon commencing bargaining, agencies should set the scene for their employees and appropriately manage expectations. Most employees are unlikely to know the fundamentals of industrial relations or the nuances of enterprise bargaining. Agencies should seek to explain to their employees the context of their operations, what they hope to achieve through bargaining and their requirements within the bargaining policy and legislation.

Agencies need to be proactive when it comes to communicating with employees and engaging them in the bargaining process. Other bargaining representatives will fill information vacuums left by the bargaining team. Communication must be factual, clear and timely. It should also focus on the bargaining team's key messages.

To build and maintain this trust, employees expect factual and timely information. It is the role of the employer to respond to or refute any inaccurate information quickly.

Agencies must consider other events or contentious issues occurring during bargaining. These issues may detract from an agency's messaging during the ballot period. Employees themselves may not distinguish between bargaining and other employer actions or activities outside of bargaining. For example, the introduction of a controversial policy may derail efforts to build support for an enterprise agreement that provides the agency with discretion over certain conditions.

Communicating through line managers

Agencies should seek to communicate to their employees in bargaining through their line managers. Many employees would naturally prefer to receive information about bargaining through their immediate manager/supervisor, whom they trust. It is therefore important that messages from line managers are consistent with the messages communicated by the agency's senior leadership.

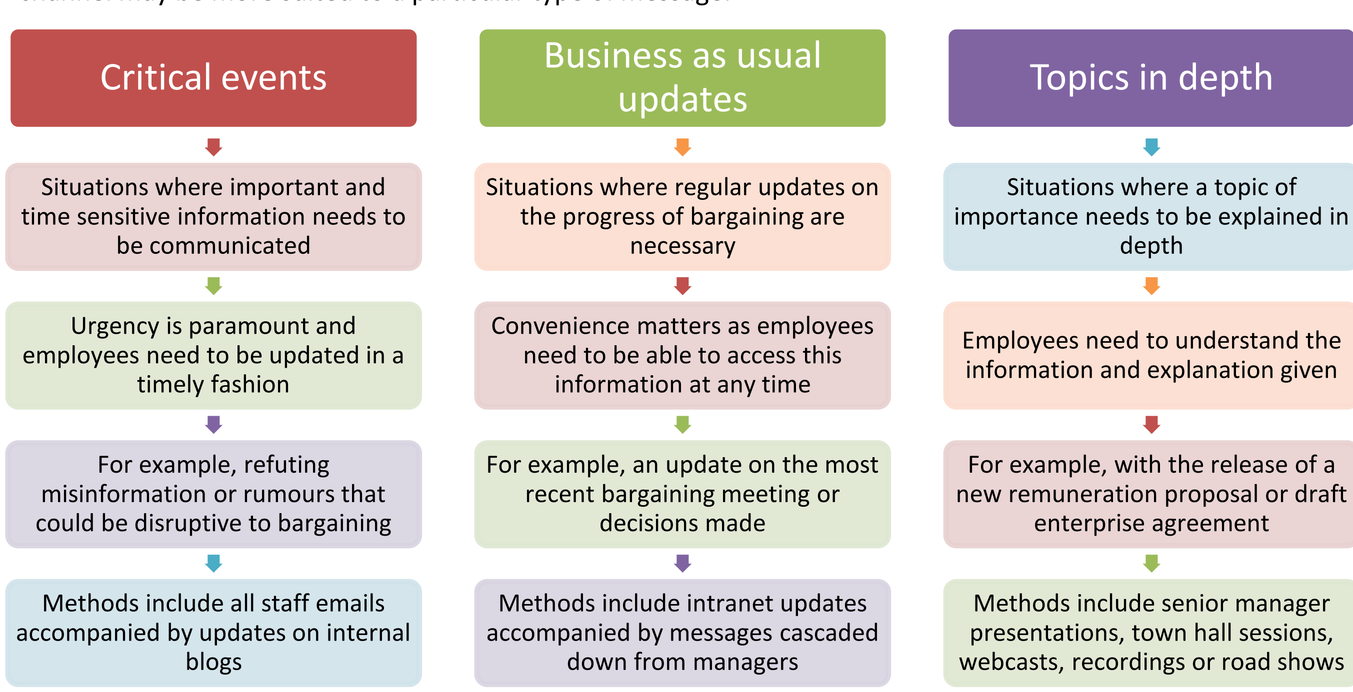
Face-to-face communication should come from someone that employees know and trust. Line managers can be effective conduits passing common queries and issues raised within their teams/branches back to the

bargaining team. As such, bargaining teams should assist their agency's line managers by providing them with regular updates on the progress made in bargaining or official responses to misinformation.

Agencies should educate and encourage line managers to see their role as a manager and not simply as an employee. For this reason, some agencies hold separate meetings for line managers and employees to address the separate issues that each face.

Choosing a communication method

There is no one size fits all approach to choosing a communication method for your agency. Employee preferences may change over the course of bargaining, agencies should choose the communication approach that best suits their needs. The graphic below describes three situations in which a different communication channel may be more suited to a particular type of message.



Communication channels

There are many different channels for communicating effectively with employees during the bargaining process. Most agencies choose a mix of channels to suit their needs, resourcing and employee circumstances. The examples below describe the most common communication channels employed during the bargaining process.

All staff emails

- Direct messages to all employees
- Advise employees of major events in bargaining

Letters and memos

- Formal agency letters to employees

Intranet portals

- Updates on a bargaining specific moderated intranet page
- Post Q&A factsheets or key facts

Managers communicating the information

- Using line managers to cascade information
- Disseminate key messages and respond to employee queries

Senior management presentations

- Senior managers travelling around to agency sites
- Provide major updates, like a remuneration proposal

Webcasts/video recordings

- Online recordings of senior managers providing updates on bargaining
- Q&A sessions and general updates on bargaining

E8 | Records management

Maintaining accurate records is an essential element of enterprise bargaining. Commonwealth agencies have policies and procedures for recordkeeping. Agencies should contact the National Archives of Australia if they are unclear on their obligations. Effective recordkeeping ensures that the; information collected, analysis undertaken, rationale given, decisions made and actions taken in bargaining, are documented for the future.

Record keeping allows agencies to learn from multiple rounds of bargaining by retaining and transferring knowledge. These records form part of the agency's organisational memory. Future bargaining teams may enquire as to why certain decisions were taken previously in bargaining and would naturally look for accurate and comprehensive records for answers.

Record keeping in bargaining

Below are a few examples of the kinds of records that a bargaining team may keep. They illustrate that there are many documents inside and outside the bargaining room that agencies should account for when recordkeeping.

- Draft enterprise agreements from bargaining
- Email exchanges with employee bargaining representatives
- Official correspondence with employee bargaining representatives
- Minutes from bargaining meetings
- Internal briefs seeking approval of a draft enterprise agreement
- Ministerial briefs on the progress of bargaining

Effective recordkeeping extends to a bargaining team's internal documents. For example, bargaining teams should maintain version control of the various drafts of their proposed enterprise agreement, highlighting changes made over time. This ensures the team can reflect on what progress has been made and can easily refer to these changes. Recordkeeping can also assist an agency in meeting its good faith bargaining obligations. These documents can be used to demonstrate where the agency has engaged with bargaining representatives.

Effective record keeping is also very helpful when it comes time to completing forms required by the FWC. Following a successful employee ballot, agencies must seek FWC approval of the proposed agreement. The prescribed forms to support the approval application require the provision of detailed information. Effective records allow an agency to compile the relevant information with greater ease, whether the NERR, key dates in bargaining or evidence of explaining the effects of the agreement to staff.

There are situations where an agency may be compelled or strongly encouraged to disclose information. Below are a few examples where effective recordkeeping could play an important role in evidencing an agency's actions. These include; dealings with bargaining representatives or members of the public, parliamentary hearings and FWC proceedings.

- Referring to actions taken or decisions made by parties at the bargaining table
- Requests for an earlier draft of a proposed enterprise agreement in bargaining
- Freedom of information requests
- Public Interest Disclosure requests
- Evidencing the agency's position in a Senate Estimates hearing
- Formal hearings at the FWC

Further Information

For the purposes of the *Archives Act 1983* (Cth) a 'Commonwealth record' is essentially a record that is the property of the Commonwealth or of a Commonwealth institution. This includes records that are created or received in the course of bargaining.

Therefore, it may not be appropriate to release certain information if it would jeopardise the employer's position, or if the records are not relevant to bargaining.

Agencies could contact the APSC for further information regarding the disclosure of bargaining related information.

Commonwealth considerations

Agencies looking for further information on Commonwealth record keeping requirements and legislative obligations should consider:

- Information on the National Archives of Australia website: http://www.naa.gov.au/information-management/index.aspx

E9 | Drafting clauses and changing your bargaining position

While one goal of enterprise bargaining might be to clarify intentions of bargaining representatives, the ultimate goal of an enterprise agreement is that the provisions are clear to employees and managers. Both employees and managers have to apply the enterprise agreement on a daily basis. That is why it is important to draft clear and unambiguous clauses in the agreement.

Legislative requirements

There are content requirements in the *Fair Work Act 2009* (Cth) which agencies must consider when drafting enterprise agreements. The illustration below sets out the content requirements for enterprise agreements made under the *Fair Work Act 2009* (Cth). This is a non-exhaustive list.

Permitted Matters	Mandatory Terms	Unlawful Terms
• Matters pertaining to the employer-employee relationship • Terms about deductions from wages • Terms about how the enterprise agreement will operate • Matters pertaining to employer-union relationships	• Coverage term • Nominal expiry date • Individual flexibility term • Consultation term • Dispute resolution term	• Discriminatory terms • Objectionable terms • Right of entry terms • Opt-out clauses that allow the employer or employees to alter the coverage of an enterprise agreement*

***Note:** There are also limitations on terms in section 194 of the *Fair Work Act 2009* (Cth).

Further Information

For more detailed information regarding permitted matters, mandatory terms and unlawful terms, the FWC's Enterprise Agreement Benchbook should be consulted.

Interpreting enterprise agreement clauses

Interpretation of enterprise agreements can be a complex process, but must begin with consideration of the ordinary meaning of the words having regard to the context and purpose of the provisions. Therefore, it is paramount to ensure that enterprise agreements are drafted as clearly as possible.

It may be appropriate to have someone with legal drafting experience review the enterprise agreement, this may avoid any unintended consequences. Minor drafting issues may impact in the interpretation of a clause. Long sentences, ambiguous wording and incorrect clause references should be avoided. Additionally, broad aspirational statements that suggest (or imply) that the agency will do something may result in disputes.

In the past, many agreements in the Commonwealth contained pages of HR policies that did not necessarily provide employees with any entitlement, but provided a guide for supervisors in carrying out their duties. Such content should not be included in an enterprise agreement.

Evaluating a draft enterprise agreement

Below is a set of questions agencies should ideally ask themselves as they draft their enterprise agreement.

- ✓ *Do all clauses support the operation of the agreement and the organisation?*
  - Are there any clauses that are restrictive and overly procedural that risk making enterprise agreement unworkable?
  - Are there any clauses that were previously problematic to human resource functions that should be amended?
- ✓ *Does it meet content and approval requirements under the Fair Work Act 2009* (Cth) *and other legislation?*
  - Enterprise agreements that fail to comply with legislative requirements may not be approved by the FWC, this may occur where legislation has changed during the life of the current enterprise agreement.
- ✓ *Does the document, as a whole, read clearly and coherently?*
  - The document should be easy to understand for employees, line managers, human resources managers and workplace relations practitioners.
  - Bargaining teams could ask persons not involved in bargaining and who are unfamiliar with the draft enterprise agreement to read it. Having someone external read the proposed draft agreement can be effective as the draft may assume knowledge, or use unnecessary acronyms or confusing language.
  - Having individuals in human resources read the proposed draft agreement can be particularly effective. These individuals will likely use the enterprise agreement on a daily basis.
- ✓ *Are there any issues with syntax – tense, tone and voice is consistent throughout the document?*
  - Clauses which are long, ambiguous and subjective may lead to differing interpretations and disagreement.
- ✓ *Does the enterprise agreement define necessary terms?*
  - Some terminology can be defined through legislation, however agencies must ensure subjectivity is kept to a minimum when it comes to entitlements and conditions.
- ✓ *Are clause references throughout the document accurate?*
  - Accurate clause referencing is essential to drafting an enterprise agreement.
  - Where referencing is incorrect or inconsistently applied in the agreement agencies risk employees being misinformed or claiming subjectivity.
- ✓ *Does the clause have any unexpected flow on effects?*
  - Clauses that are not consciously and correctly drafted may have unexpected flow on effects

for other aspects of the agency's operations.

✓ *Is it consistent with the Australian Government's Policy?*

- Agencies must comply with relevant Government policies.
- While bargaining policies are revised intermittently, it is common practice for the Commonwealth Government to establish a policy which determines the scope for wage outcomes and changes to employment conditions in the public sector. This policy must be adhered to where it applies to the agency.

E10 | Progressing to an employee ballot

Deciding when to progress to an employee ballot

Agencies should progress to an employee ballot for a proposed enterprise agreement when a number of conditions have been met:

- ✓ The agency is satisfied that bargaining has concluded or has reached an impasse.
- ✓ The draft agreement has been negotiated with bargaining representatives, noting that all parties do not need to reach a consensus to progress to a ballot (however, an agency must fulfil their good faith bargaining obligations or risk bargaining representatives seeking good faith orders from the FWC to stop the ballot).
- ✓ The agency has consulted with the APSC and, where required, received approval from the APS Commissioner for their draft enterprise agreement.
- ✓ The agency considers there is a strong likelihood of the majority of eligible voters voting to approve proposed enterprise agreement.
- ✓ The proposed draft enterprise agreement requires no further edits and the agency is satisfied with its contents.
- ✓ At least 21 days have passed since the NERR was issued.

Note: As outlined in section E1 'Public sector bargaining', the APSC review process can be iterative. Agencies must account for the time taken for the APSC review process and the APS Commissioner's consideration of any proposed draft enterprise agreement and proposed remuneration package. Agencies should engage with the APSC early on to avoid any issues.

Continuing to consult with senior management

Agency bargaining teams should consult with senior management throughout the bargaining process. It is important to update management on challenges, successes, trends and major events during bargaining. Senior management especially may be able to provide the bargaining team with the high-level context and strategic direction of the agency.

Senior management may also have insights on broader issues within the agency. For example, senior managers may be aware of major events within the agency that could affect the agency's ability to hold a ballot on a certain date. These events could affect employee voting turnout, attitude and sentiment within the agency more broadly.

Preparing for the employee ballot

Section 181 of the *Fair Work Act 2009* (Cth) outlines that employers may request employees approve a proposed enterprise agreement by voting on it via a ballot or electronic method. Electronic methods could include an email exchange (where undertaken by the agency), telephone or SMS voting or an online system. A secret ballot is not required. Where only a small number of employees are involved, a ballot could be a simple show of hands.

Different ballot providers will offer different kinds of services. Agencies should engage a ballot provider well before the ballot is expected to take place. This is because ballot providers may have limited availability at certain times of year.

Agencies need to account for a number of different administrative issues when preparing to progress to a ballot, including:

- ✓ Preparing documents and communication materials for employees to promote the proposed enterprise agreement. These documents should include an explanation of the terms and the effect of the terms of the agreement.
- ✓ Preparing senior leaders and managers to promote staff voting the agreement up.
- ✓ Choosing to use a ballot provider to administer the ballot. However, very small agencies with a very small number of eligible employees may decide not to use a ballot provider and conduct the ballot internally.
- ✓ Determining how many staff are on leave or seconded and will not be in the office in the period leading up to the ballot. Employers must take all reasonable steps to ensure these staff are given a reasonable opportunity to consider the agreement and the ability to participate in the ballot.
- ✓ Determining which employees are eligible to participate in the ballot. For example, which casual employees can vote in the ballot?
- ✓ Choosing a period of time to hold a ballot that provides the greatest opportunity for eligible employees to vote.
- ✓ Choosing a period of time to hold a ballot that takes into account any external events that may impact on the vote (e.g. school holidays, busy periods for the agency).
- ✓ Considering whether terms of the agreement are adequately explained, taking account of demographic, cultural or linguistic backgrounds of employees.

Fair Work Commission approval process

Within 14 days of an enterprise agreement being voted up by employees, an agency must apply to have the agreement approved by the FWC. This application includes the submission of a number of forms available on the FWC's website, such as Forms F16, F17 and F18.

Agencies are urged to consider the requirements of these forms in advance. As these forms are complex and detailed, agencies should consider preparing these forms (to the extent practicable) in advance of the vote. The provision of comprehensive, precise information at lodgement can reduce delays in the approval process.

If an agency does not meet the 14-day deadline, the FWC will dismiss an application to approve a proposed enterprise agreement (unless it is satisfied that it is fair to extend the deadline).[1] Agencies should ensure each form is completed correctly (including signature requirements) or risk a delay or even dismissal of the application for approval.

[1] Note however that there is no discretion to extend the deadline for lodgement of a greenfields agreement.

Requirements for a vote

The *Fair Work Act 2009* (Cth) and Statement of Principles on Genuine Agreement provides certain obligations for an enterprise agreement vote to be valid. Agencies must comply with these obligations.

The vote cannot occur until 21 days have passed since the last notice of employee representational rights (NERR) was issued.

The employer should provide employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it. The employer must provide employees with a full copy of the agreement and a full copy of any other material incorporated into the agreement. This must occur within a reasonable time period before the start of voting on the proposed agreement and cannot be provided less than 7 full calendar days before the day on which voting starts (unless otherwise agreed with one or more employee representatives or a significant proportion of employees to be covered by the proposed agreement).

Employees must also be given a reasonable opportunity to vote on a proposed agreement. Agencies must ensure employees are given a fair and reasonable opportunity to vote. The employer must also ensure that the vote of each employee is not disclosed or ascertainable to the employer.

Notification of the time, place and/or method of the vote must be provided at least 7 full calendar days prior to the date voting starts (for example, if the voting is to start on 9 May, employees should be informed on or before 1 May). A shorter period may be agreed upon by the agency with one or more employee bargaining representatives or a significant proportion of employees to be covered by the agreement, this period must still be reasonable however.

The agency and the relevant union(s) must disclose certain financial benefits (if any) that they or parties closely connected to them must derive under the terms of the proposed agreement. Employees must be provided with any disclosure documents before they vote on the proposed agreement.

There is no minimum specified length of a ballot period. Agencies are required to ensure the method and period of voting provides all employees entitled to vote with a fair and reasonable opportunity to cast a vote. Agencies should decide on a method and period of ballot based on the size of their workforce and their operating context.

An enterprise agreement is made when the majority (50% plus one vote) of the valid votes are for the proposed enterprise agreement.

Further Information

For more detailed information the FWC’s Enterprise Agreement Benchbook should be consulted.

E11 | Explaining and promoting the enterprise agreement

Legislative obligations – Explaining the enterprise agreement

Under section 180 of the *Fair Work Act 2009* (Cth) and the Statement of Principles on Genuine Agreement agencies have specific legislative obligations around communicating with staff about a proposed enterprise agreement. Agencies are required to:

1. Provide relevant employees (i.e. those employees employed during the ballot period and are covered by the agreement) with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing the employees of the time, place and method for the vote. This must occur at least 7 full calendar days before the day on which voting starts.

2. Provide employees with a reasonable opportunity to consider a proposed enterprise agreement. This requires agencies to provide a copy of the enterprise agreement and any materials incorporated by reference into the enterprise agreement at least 7 full calendar days before voting commences. A shorter time period may be agreed with one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement, however the time period must still be reasonable.

3. Prepare a disclosure document (if required) and provide employees with access to that document and any disclosure document provided by the relevant union, before employees vote on the proposed agreement.

4. Take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, are explained to relevant employees. This should include explaining how the proposed agreement will alter existing terms and conditions of employment. Any explanation must be performed in an appropriate manner taking in account the particular circumstances and needs of the relevant employees. Particular employee circumstances could include employees from a culturally and linguistic diverse background, young employees and employees who did not appoint a bargaining representative.

    - In practice, agencies have held voluntary meetings with employees or information sessions on the proposed enterprise agreement and remuneration proposal. The chief negotiator or human resource practitioners would undertake these sessions and explain the terms of the enterprise agreement along with answering questions from attendees.

    - Agencies have also posted additional documents explaining the terms and conditions that have changed. Agencies may even explain the purpose of each clause in the proposed enterprise agreement. Many agencies provide information for line managers to talk through in branch or group meetings.

    - It is essential that agencies keep records of these activities to demonstrate that the agency actively sought to inform employees of the enterprise agreement.

    - Agencies should take extra steps for those employees with particular and unique circumstances. For example, some agencies have staff working overseas or in remote parts of Australia.

Overall, agencies should seek legal advice where unsure of their obligations under the *Fair Work Act 2009* (Cth). Where the employer fails to meet the legislative requirements (or is unable to demonstrate compliance), the FWC will not approve the enterprise agreement, irrespective of whether the agreement was voted up by employees.

Promoting the enterprise agreement

Communication strategy

Agencies should comprehensively plan their communication strategies in the lead up to an employee ballot. Bargaining teams and managers are not neutral parties.

Agencies are still subject to good faith bargaining obligations during this period. Agencies need to be accurate and clear in their communication about the proposed agreement.

Examples of communication materials used to promote a proposed agreement, include:

- ✓ Q&A factsheets addressing common questions about the proposed enterprise agreement;
- ✓ comparison documents showing the difference between the current and proposed agreements;
- ✓ documents containing scenarios that demonstrate the application of the proposed agreement in practice;
- ✓ workplace briefings/town hall meetings to explain the proposed agreement in depth;
- ✓ cascading messages through line managers promoting the proposed agreement; and
- ✓ posters promoting the benefits of the proposed agreement.

Enterprise agreement package

Agencies should actively promote their proposed enterprise agreement package when progressing to a vote. This package must include the draft enterprise agreement, remuneration proposal and possibly any accompanying human resource policy documents.

The package is a campaign for votes, but undertaken within the context of employees being fully informed on the terms of the proposed agreement (and the campaign must not involve any misrepresentations or misleading statements). If a package contains misrepresentations or misleading statements, it may result in the FWC not approving the enterprise agreement as it was not genuinely agreed by employees.

Messaging technique

Agencies should consider their tone, style and attitude when promoting a proposed enterprise agreement. This is just as critical as the content of the message as it provides cues that frame how the agreement will be considered.

Messaging should always be tailored to meet the agency's underlying objectives, context and bargaining history. For example, the messaging of a proposed agreement must change between an agency's first and third ballot. Likewise, the messaging should be tailored based on any union campaign in relation to the ballot. Is the agency looking to minimise uncertainty, espouse a vision, clarify misinformation or obtain individual buy-in? Agencies may find it useful to seek input from communications experts.

Agencies should consider employee circumstances when developing a message. This includes the demographics of the workforce, seniority, geographic dispersion and technological sophistication. These and other factors should inform the messages the agency develops and how to communicate messaging. These decisions should be supported by feedback received from employees including their concerns, expectations and aspirations from bargaining.

E12 | Holding a successful vote

There is no requirement for agencies to hold a vote for the proposed agreement in a particular fashion. Section 181 of the *Fair Work Act 2009* (Cth) provides that the vote could occur by a ballot, an electronic method or some other method. This could include for example; postal voting, telephone voting or online voting. Attendance voting through placing a completed ballot paper in a designated box or by a show of hands is also possible.

An enterprise agreement is 'made', a term defined under the *Fair Work Act 2009* (Cth), where the majority of those employees who cast a valid vote, vote to approve a proposed enterprise agreement. This would be at least 50% of all valid votes, plus one additional vote.

Further information on agency activities following a successful ballot can be found in the next part of the guide.

Key timeframes in legislation

There are a number of key timeframes to consider under the *Fair Work Act 2009* (Cth). Where your bargaining process is not consistent with these timeframes, regardless of the ballot outcome, the FWC cannot approve the enterprise agreement.

Employers must check that they have met these timeframes prior to commencing the ballot. The timeframes include:

Time Limit - A NERR must be provided to employees covered by the proposed enterprise agreement within 14 days of the notification time

Minimum time period - a valid vote cannot commence until at least 21 days has passed since the last NERR was issued (this period does not include the day on which the NERR was issued).

An employee must be given a reasonable time to consider the agreement and other materials incorporated by reference into the agreement. A reasonable time is at least 7 full calendar days (unless otherwise agreed) ending immediately before the start of the vote.

Time Limit - An application to approve an agreement with the FWC must be made within 14 days of successful vote ending

***Note:** For further information on NERRs see E2 'Commencing Bargaining'.

Further information:

As employers, agencies have legislative obligations under the *Fair Work Act 2009* (Cth) to take all reasonable steps to ensure that the terms and effects of the proposed enterprise agreement are explained to relevant employees.

For this reason, agencies should take active steps to explain the proposed agreement's terms and effects. This can be done through information sessions and/or publishing informative supporting documents.

Agencies should also keep evidence of the actions taken, to explain the terms and effects of the proposed enterprise agreement. Agencies can use this evidence to demonstrate to the Fair Work Commission that they took all reasonable steps to explain the agreement to relevant employees.

Relevant cases that demonstrate this obligation include, *CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266 and *Health Services Union v Clinpath Laboratories Pty Ltd; Strath, Jenny and Others* [2018] FWCFB 5694.

Other resources:

Agencies looking for further information on their legislative obligations should consider:

The FWC's enterprise agreement benchbook:
https://www.fwc.gov.au/resources/benchbooks/enterprise-agreements-benchbook

The Fair Work Ombudsman's fact sheets on enterprise bargaining:

https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/enterprise-bargaining

E13 | After an unsuccessful vote

While an unsuccessful ballot is disheartening for the enterprise bargaining team, it provides a chance for an agency to consider the entire process. The period after an unsuccessful ballot provides time for a break from the bargaining process and an opportunity to review the agency's negotiation and communication strategies. This period also provides an opportunity to reflect and think critically. Employers may need to conduct more than one vote in order to obtain employee approval of their proposed agreement. The critical challenge is to maintain alignment between the Agency's objectives and engagement with employees.

Following an unsuccessful vote, agencies should acknowledge the contribution of all parties and the amount of work involved to get to a ballot by the bargaining team and lessons learnt from this experience.

A negotiation audit

Following the unsuccessful ballot, an agency should undertake a negotiation and bargaining strategy audit. Agencies should also consider undertaking an audit at the end of the year as this is when negotiations often temporarily pause (i.e. around Christmas). Conducting an audit at these times allows the agency to reflect on progress made and begin to plan for the next period of negotiations. Key steps in a negotiation audit can include:[2]

Step 1: Outline the Negotiation Structure

- Pull together the Chief Negotiator, the bargaining team and other key figures
- Describe the structure of negotiations and key parties involved
- Outline the objectives and priorities of parties

Step 2: Map out the negotiation process

- Map the actual sequence of events in the negotiations
- Identify critical and important events
- Determine where are the problems and challenges during bargaining

Step 3: Reflect on your actions

- Individuals should consider their own role and contribution in negotiations
- Reflect on the actions taken in bargaining and potential areas for improvement
- Jointly discuss how each individual's actions contribute to the bargaining team

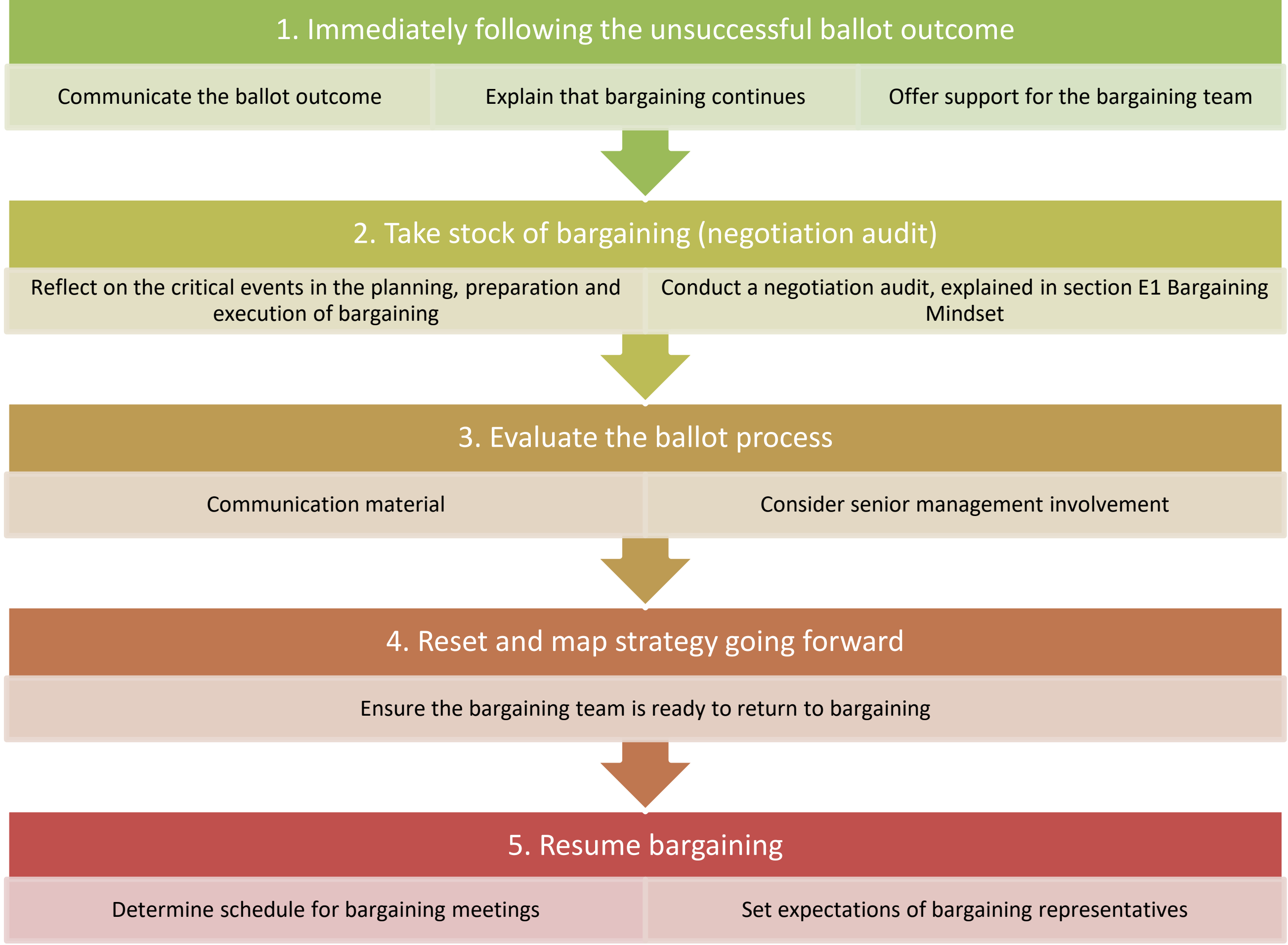
Step 4: Review the negotiation outcome

- Consider the perspective of the other parties
- Reflect on the progress made in bargaining over the negotiation period

[2] FELLS, R. E. (2012). *Effective Negotiation: From research to results* 2nd edition. Port Melbourne, Cambridge University Press.

Next steps following an unsuccessful ballot

Below is an outline of the activities agencies can undertake following an unsuccessful ballot.



Agencies should examine critical events in the bargaining process, including planning (prior to bargaining phase), preparation (the bargaining phase) and execution (the ballot). Taking stock provides an opportunity to evaluate; the bargaining strategy, the allocation of resources and expectations going forward. In most situations, there is no advantage in rushing back to bargaining without learning what led to the unsuccessful ballot outcome.

Consulting with senior leaders, managers, corporate areas, employees and their representatives should help the agency pinpoint the unresolved issues and assess the mood of the workforce. Once this has taken place, a new strategy must be developed to find an acceptable proposal (consistent with the agency's objectives and mandate, particularly around remuneration).

It might also be useful to refresh bargaining team members if they are experiencing fatigue. This may also help to reset the relationship with bargaining representatives.

F. Fair Work Commission

Enterprise bargaining may not always proceed smoothly. In some circumstances, agencies and other bargaining representatives may find themselves at the FWC, which is the industrial relations tribunal for the Commonwealth sector. This part of the guide deals with some of the key issues agencies should consider regarding the role of the FWC.

F1 | Matters in the Fair Work Commission

Agencies should look to the *Fair Work Act 2009* (Cth) and their enterprise agreement to determine; what powers the FWC has, what method of dispute resolution applies and whether an application can be made to the FWC to deal with the dispute in question.

When faced with a dispute or potential matter in the FWC, agencies should seek legal advice, consult with the APSC and consider the risks of engaging in a particular method of dispute resolution (e.g. more formal dispute resolution processes, such as arbitration, may produce a binding outcome).

Mediation, conciliation and arbitration

Mediation, conciliation and arbitration are methods of dispute resolution facilitated by the FWC to deal with the various types of disputes between enterprise bargaining representatives or other parties that arise in relation to the *Fair Work Act 2009* (Cth) or an agency enterprise agreement.

Disputes can relate to termination of employment, general protection of workplace rights, workplace bullying, right of entry, interpreting an award or agreement, engaging in industrial action and other matters that may arise from creating an enterprise agreement.

The methods of the FWC's dispute resolution process are as follows:

Concilation or mediation	Arbitration
• Conciliation and mediation are informal methods of dispute resolution involving the facilitation of dialogue between parties by the FWC with the aim of finding an agreeable solution for everyone. • The parties do not have to come to an agreement. • The Fair Work Act does not distinguish between mediation and conciliation, but given their ordinary meanings the key difference is that a conciliator may offer his or her opinion as to the merits of each party's position, while a mediator does not.	• Arbitration is a formal method of dispute resolution involving the provision of evidence and arguments to the FWC before a decision is made by the FWC • Parties are bound by the arbitrator's decision. • Arbitration generally only involves the parties involved in the bargaining related dispute

Representation in the FWC

Bargaining representatives or any other parties engaged in a dispute at the FWC may only be represented by an external lawyer or paid agent if granted permission by the FWC. This contrasts the procedure in other courts which allow parties to be legally represented as a matter of course.

However, agencies may use in-house expertise at the FWC without obtaining permission to be represented. APS agencies can also be represented by the Australian Government Solicitor (AGS) because the agency is part of the Commonwealth, so its use is not considered representation. This means that agencies proposing or planning to use the services of the AGS in proceedings are not required to seek permission before they can be represented.

Agencies should make sure to consider the FWC's position on representation prior to seeking legal representation for a FWC dispute. The FWC can give permission for a person to be represented by a lawyer or paid agent in a matter before the FWC if:

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter;
- it would be unfair not to allow the agency to be represented because the agency is unable to represent itself effectively (effectiveness); or
- it would be unfair not to allow the agency to be represented taking into account fairness between the agency and other parties in the same matter (fairness).

Further Information

In *Stephen Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 the FWC interpreted the phrase 'represented in a matter before the FWC' to include certain out-of-court activities that occur after a matter comes before the FWC. These are likely to include preparing submissions, negotiating a resolution and other prehearing steps, but is unlikely to include legal advice (a subsequent FWC decision confirmed that permission is not required to obtain legal advice from a paid agent: see *Stringfellow v Commonwealth Scientific and Industrial Research Organisation* [2018] FWC 1136). The practical implications of this case are that a party should apply to the FWC for permission to be represented as soon as a matter comes before the FWC, if they intend to engage a lawyer or paid agent to assist with preparing documents and other pre-hearing steps.

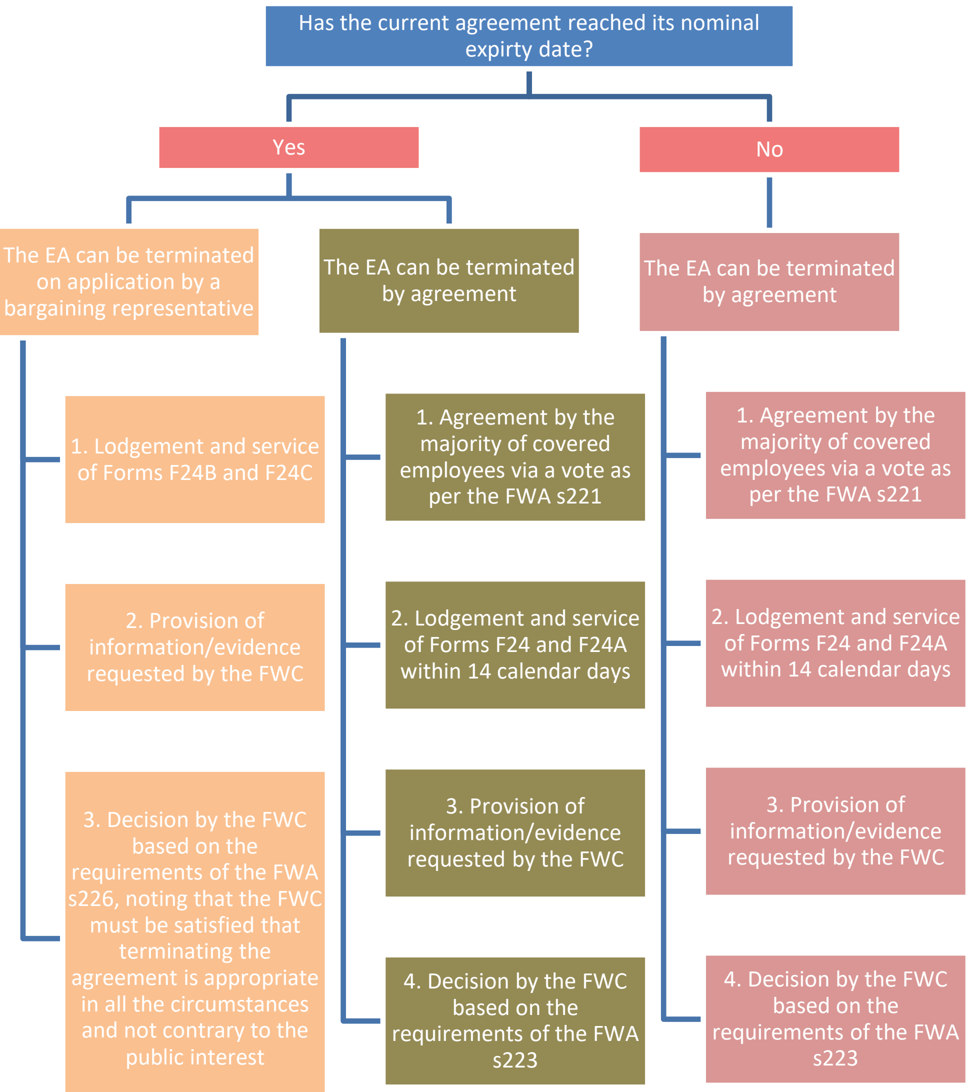
F2 | Terminating the enterprise agreement

Enterprise agreements are not automatically terminated as a result of passing beyond their nominal expiry date. An enterprise agreement will continue to operate in perpetuity unless replaced by a new enterprise agreement or officially terminated.

It should be noted that it is exceedingly rare for enterprise agreements to be terminated in the public sector and this should only be considered when absolutely necessary. Public sector enterprise agreements will generally only be terminated where there is a strong justification for its termination, for example, where the agreement restricts the work of an agency. Termination applications are likely to have significant implications for an agency's workforce, including a likely return to Award coverage. Agencies should seek legal advice and contact the APSC before applying to termination of an enterprise agreement.

The way in which termination can be brought about depends on whether the agency's current enterprise agreement's nominal expiry date has been passed or not.

This flowchart explains the basic means of terminating an agreement under the *Fair Work Act 2009* (Cth):



The FWC must terminate an agreement if:

In the case of a termination **application by a bargaining representative**, under section 225 of the *Fair Work Act 2009*

- The FWC is satisfied that it is not contrary to the public interest to do so; and
- The FWC considers that it is appropriate to terminate the agreement taking into account all of the circumstances including:
  - The views of employees, each employer; and
  - The circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them

In the case of a termination **application by agreement,** under s222 of the Fair Work Act 2009 (Cth)

- The FWC is satisfied that each employer covered by the agreement give employees a reasonable opportunity to decide whether to terminate the agreement; and
- The FWC is satisfied that the termination was agreed to in accordance with whichever of subsection 221(1) or 221(2) applies (those subsections deal with agreement to the termination of different kinds of enterprise agreements by employee vote); and
- The FWC is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and
- The FWC considers that it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations (if any) covered by the agreement.

Further Information

Example of Commonwealth agency terminating an enterprise agreement:

The matter of Australian Rail Track Corporation's (**ARTC**'s) application for termination of the *Australian Rail Track Corporation Enterprise Agreement 2014* (2014 EA) [2018] FWCA 641 is an example of a Commonwealth entity terminating their enterprise agreement under section 225 of the *Fair Work Act 2009* (Cth).

The Corporation had recently voted up a new enterprise agreement (**New Agreement**) which superseded the 2014 EA. The New Agreement covered most of the 55 employees covered by the 2014 EA and measures were put in place to protect the terms and conditions of the small number of employees not covered by the New Agreement.

It should be noted that the Corporation's application was supported by all 55 employees in writing and not opposed by any unions representing the employees. The FWC terminated the 2014 EA, noting that it considered the termination to be appropriate and not against the public interest.

G. Industrial action

This part covers how to plan for industrial action and how to communicate with stakeholders during industrial action. This part also outlines the different types of industrial action available to employees and the options available to employers facing industrial action.

G1 | Industrial action and industrial action ballots

What is protected industrial action?

Protected industrial action refers to actions taken, which are authorised by the FWC through a protected action ballot process.

Employees engaging in protected industrial action will have immunity from legal action in relation to the industrial action, except for a list of exceptions set out in section 415 of the *Fair Work Act 2009* (Cth) (for example, in relation to action for defamation).

Protected industrial action under the *Fair Work Act 2009* (Cth) can only occur when:

- ✓ the parties are bargaining for a new single-enterprise agreement (that is not a greenfields agreement);
- ✓ the nominal expiry date of an existing agreement has passed;
- ✓ the FWC has approved a protected action ballot;
- ✓ at least 50% of eligible members vote in the ballot;
- ✓ a majority of those that participate in the ballot (50% plus one) vote in favour of the industrial action;
- ✓ the bargaining representatives are genuinely trying to reach agreement;
- ✓ the action is for permitted matters and not for unlawful terms, part of pattern bargaining or part of a demarcation dispute;
- ✓ the bargaining representatives have complied with all relevant notice requirements; and
- ✓ the employees and bargaining representatives have complied with all FWC orders, including any order to participate in a conference pursuant to Section 448A of the FW Act.

What is unprotected industrial action?

Unprotected industrial action is any industrial action that is not protected under the *Fair Work Act 2009* (Cth). This may include, for example, actions taken despite an unsuccessful application to initiate protected industrial action or actions, which occur in addition to protected industrial actions approved by the FWC. If the action is also unlawful (e.g. taken when the enterprise agreement is in place and has not passed its nominal expiry date) there may be penalties for those involved in the action.

Activities not considered industrial action

There are exceptions to the definition of industrial action (whether protected or unprotected), being action that is authorised or agreed to by the employer, or action taken by an employee based on the employee’s reasonable concern about an imminent risk to his or her health or safety.

Industrial action ballots

What is a protected action ballot?

A protected action ballot is a secret ballot that asks eligible employees covered by the ballot to authorise the taking of lawful protected industrial action. Employees cannot engage in lawful protected industrial action until the proposed industrial action is approved by a vote in a protected action ballot. This ballot is organised by employees or their representatives who provide an employer with notice of their intention to hold a ballot.

Considering the protected action ballot application

Once an agency has received a copy of a protected action ballot application, they should note the range of actions listed and the amount of notification to be given before taking protected action. The agency should also communicate the details of the ballot with their senior leadership, their Minister's Office and the APSC.

Potential employer responses to protected action ballot

Agencies may also wish to seek their own legal advice about whether or not the application for a protected industrial action ballot could be challenged (e.g. the 'genuine agreement' criteria is not met). The agency may then ask the FWC not to approve the ballot or to vary the content of the proposed ballot actions.

An agency may consider the notice period for protected industrial action as insufficient given the potential for serious disruption to its business and customers. An agency could also seek clarification where the wording of proposed ballot question is ambiguous. In these situations agencies should seek legal advice before deciding on a particular course of action. Agencies are entitled to prepare for industrial action and seek to moderate a ballot which is unclear or incorrect, provided it is appropriate and there is scope to do so.

Mandatory Conference

If the FWC has made a protected action ballot order in relation to a proposed enterprise agreement, the FWC must make an order directing the bargaining representatives for the agreement to attend a conference. This conference is mandatory for bargaining representatives. A failure to attend this conference will result in any industrial action taken by a bargaining representative in relation to the protected action ballot order being unprotected. This includes employer response action where an employer bargaining representative does not participate in the conference. The conference will take the form of a mediation or conciliation conference and is designed to reduce the number of matters in dispute. Conferences are conducted prior to the date the protected action ballot closes, with the details of the conference included in the protected action ballot order.

Further Information

For more detailed information regarding industrial action and employer responses consult the FWC's Industrial Action Benchbook.

Agencies should consult with the APSC and seek legal advice when decided on a specific response to employees taking industrial action.

G2 | Preparing for industrial action and business continuity

Preparing for industrial action

Agency Heads need to be prepared for the possibility of protected industrial action. Where Agency Heads consider protected industrial action likely, Agency Heads should develop a management plan. This plan should be informed by the risk management plan outlined in Section C3 'Consulting Senior Leadership'. An industrial action management plan should set out the processes and actions the agency would undertake to mitigate these risks and provide business continuity.

A management plan for dealing with industrial action should account for four main activities:

Implement systems to monitor industrial action

- Agencies need systems in place to capture which staff undertake industrial action.
- This includes working with managers to quickly assess which activities are protected and which are not.
- Payroll and other human resource functions need to be aware of the agency's legislative obligations and management decisions.

Gain access to legal and policy advice

- Agencies need to have contacts in place to quickly request and receive legal and policy advice.
- Advice regarding the bargaining policy should come from the APSC as they are responsible for administering the policy.

Develop communication strategies

- Agency communication needs to be clear, accurate consistent and timely.
- Agencies not only have to communicate with employees, but managers and supervisors (internally) as well as their Minister's Office, APSC and the public (externally).
- Some agencies may have external customers who would be affected by industrial action that limits their operations and business continuity

Consider employer responses to industrial action

- Agencies have a range of legal options that can be taken in response to protected and unprotected industrial action.
- Some actions are required by legislation, but agencies have discretion with regard to others.
- Agencies should also develop comprehensive legal and operational contingency plans in advance of industrial action.

Managing industrial action and business continuity

After the protected action ballot has been completed and the result declared, the agency should expect the successfully voted on actions to commence within 30 days. The 30 day period is a legislative requirement that can be extended another 30 days by the FWC.

The agency must be prepared to implement their management plan. This plan should be tailored to meet the requirements of different groups and stakeholders. Below is an outline of these different groups and what the management plan may set out for them.

Employees

- Communicate the industrial rights, responsibilities and obligations of employees eligible to choose to participate in protected industrial action.
- Delineate between protected and unprotected action.

Managers and Supervisors

- Move resources and employees to facilitate business continuity in line with management plan.
- Communicate obligations to monitor and report on industrial action being taken.
- Provide tools to differentiate between types of industrial action.
- Express the need to be vigilant around the use of TOIL, flextime and other leave during period of industrial action like work bans.

External stakeholders

- Advise the Minister's Office on the impact of industrial action on service delivery.
- Inform customers and/or clients of business continuity.
- Advise the APSC of the impact of industrial action.

Human Resource Functions

- Payroll actions deductions and amends leave accrual for employees taking industrial action.
- Workforce planning plans the movement of resources and employees to maintain business continuity.
- Workplace relations drafts FAQs and other resources for employees and managers, and communicates with the union and other employee bargaining representatives.

G3 | Communicating with stakeholders about industrial action

Effectively communicating with stakeholders is critical to managing industrial action successfully. This starts with assessing the likely impact of industrial action and preparing a management plan to address business continuity concerns.

This plan should include a communications element with the various stakeholders including employees, managers, customers, the Minister's office and the APSC. Agencies need to notify internal and external stakeholders about the potential impacts of industrial action and provide a realistic assessment of business continuity.

Below is an outline of the stakeholders, communication channels and methods that should be identified in a communications plan regarding industrial action.

Unions

- Protected industrial action.
- Maintain a working relationship to ensure members are aware of industrial rights and obligations.
- Work with the union to disseminate factual information.

Employees

- Ensure all employees are aware of the implications and impact of industrial action.
- Ensure all employees know if they are eligible to take industrial action (each notice may apply to specific groups of employees) and their right to choose (if eligible) to participate.

Customers, clients and the public

- Identify which services will be impacted and communicate it directly with customers and clients.
- Outline alternative arrangements and service availability.
- Reassure the public with factual information.

Partner Agencies

- Identify projects and activities impacted by industrial action.
- Advise on impacts to business continuity and staffing.

Minister

- Outline the impact on service delivery.
- Outline potential media coverage resulting from action.

G4 | Responding to industrial action

Employer actions

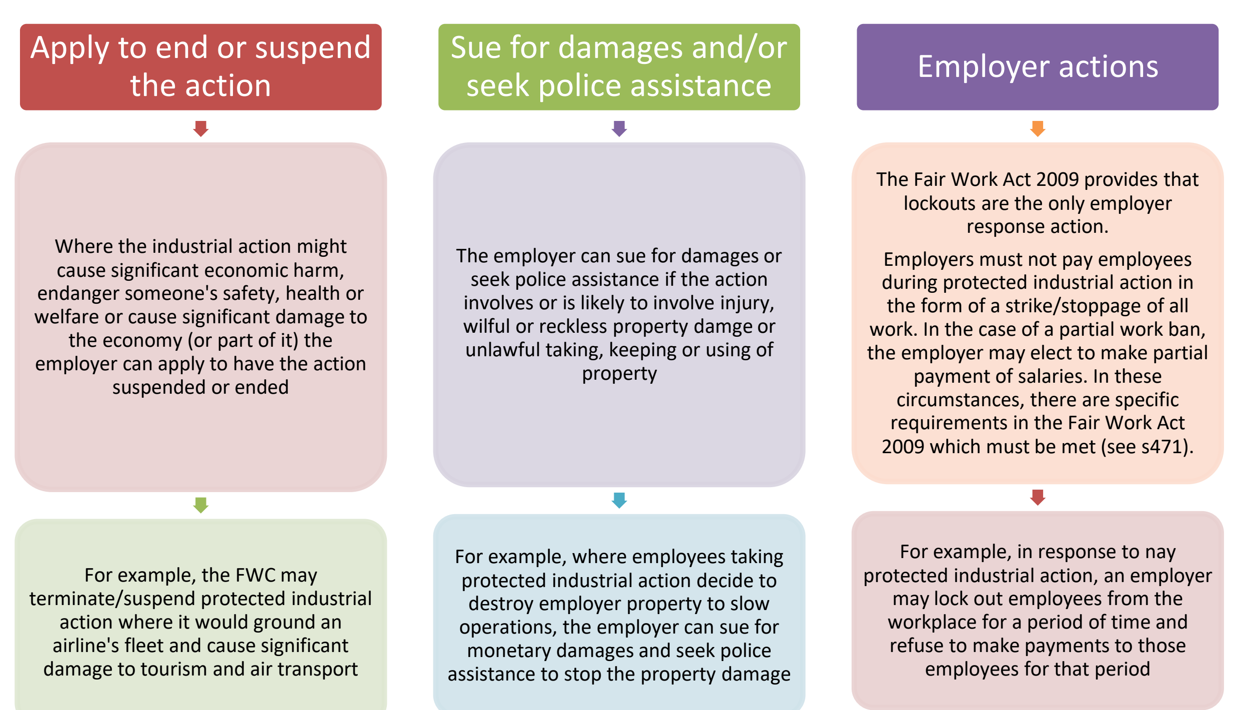
Where employees have engaged in industrial action, agencies may consider engaging in employer response action. Employer response action is action that is:

1. organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and
2. taken by an employer in response to industrial action undertaken by a bargaining representative and/or employee covered by the proposed enterprise agreement (and which actually occurs, rather than being merely threatened or imminent).

The range of actions an agency can and should take will depend on whether the industrial action is protected or unprotected and what type of industrial action it is.

Protected industrial action

Where protected industrial action has been initiated, a number of options for recourse may exist for the employer, including:



When faced with notification of protected industrial action agencies should:

1. check that all of the FWC's requirements for the taking of the protected industrial action have been met; and

2. check that the proposed action matches the actions authorised by the ballot.

If any discrepancies or contraventions are found, the bargaining representative should be advised of the issue and FWC proceedings may be brought to stop the action.

Payments to employees engaging in protected industrial action

Work stoppages

Agency Heads are prohibited from making payments to employees for the duration of the protected industrial action, with some exceptions for partial work bans. Therefore, an employee taking a work stoppage for an hour must have their salary deducted by that period of one hour. This can include periods less than an hour, for example deducting one minute of pay for a one minute work stoppages.

Partial work bans

Special provisions (in section 471 of the *Fair Work Act* 2009 (Cth)) apply in relation to paying employees during partial work bans. In response to partial work bans, employers can either:

- **refuse any work** from employees engaged in partial work bans;
- or **deduct partial payment** in proportion to the work that is not being performed as a result of the bans.
- Paying employees undertaking the partial work ban their full salary; or
- Providing ***written notice*** to employees undertaking the partial work ban advising that the Agency Head will reduce payment of salary by a specified portion for the period of the partial work ban;[3] or
- Providing ***written notice*** to employees undertaking the partial work ban that the Agency Head will refuse to accept any work from the relevant employees until they are prepared to perform their normal duties, and will therefore not pay employees at all for the period of the ban.

Overtime bans

There are specific rules on protected overtime bans. Agencies can only withhold payment where the employee refuses a request or requirement to work overtime. The refusal to work overtime must in be in contravention of the employee’s obligations under a contract of employment, enterprise agreement or other industrial instrument.

[3] Partial payments must comply with the requirements in section 471 of the *Fair Work Act 2009* (Cth) and any applicable regulations.

Unprotected industrial action

Where unprotected industrial action has been initiated as part of the bargaining process, a number of options for recourse may exist for the employer, including:

Payments to employees engaging in unprotected industrial action

Where an agency considers employees are taking industrial action which is not protected under the *Fair Work Act 2009* (Cth), the agency should contact the APSC and seek legal advice. Employees and unions are not entitled to take unprotected industrial action. The *Fair Work Act 2009* (Cth) provides that agencies can seek FWC orders (and in some instances court orders) for such actions to cease. There are significant penalties for non-compliance of these orders.

In the event of unprotected industrial action, employers must withhold pay from those employees involved in the action under section 474 of the *Fair Work Act 2009* (Cth). Failure to do so may result in a civil penalty to the employer. Employees and unions on behalf of their members must not ask for, or accept, payment from an employer where payment would contravene the above requirement.

The arrangement for deducting payments for employees engaged in unprotected industrial action is different to that for employees taking protected industrial action. Agencies are required to withhold a minimum of 4 hours pay per day of industrial action, as explained below:

It should be noted that additional rules/exceptions apply to payment of wages during an overtime ban and for actions taken where the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety.

Seeking FWC intervention

In specific circumstances outlined in the *Fair Work Act 2009* (Cth) an employer may seek to suspend or terminate protected industrial action, as determined by the FWC. Agencies should consult with the APSC and their Minister's Office and seek legal advice when considering an application of this nature.

This has occasionally occurred in the Commonwealth public sector in situations where the industrial action could cause; significant economic harm, danger to the employees and/or a threat to the welfare of the public.

Significant and compelling evidence is required before the FWC would agree to suspend or terminate industrial action on these grounds. Alternatively, an agency could seek suspension of industrial action to provide a cooling off period where the FWC believes it would assist in reaching a resolution between bargaining representatives.

Employer response action

Employer response action refers to protected industrial action taken by the employer against employees. Section 19 of the *Fair Work Act 2009* (Cth) only provides for one form of employer response action which is a lockout of employees. It should be noted that:

- the response need not be proportional to the industrial action; and
- continuity of employment (e.g. for leave purposes) will not be affected by lockouts.

Other responses such as standing down employees for periods during which the employees cannot usefully be employed[4] (noting this is a high threshold) or declining to pay employees for partial work bans (as per section 471 of the *Fair Work Act 2009* (Cth)) are not 'employer response actions' as defined by the *Fair Work Act 2009* (Cth).

The use of lockouts in the Commonwealth public sector is very uncommon and unusual. Agencies considering such actions should seek legal advice, consult with the APSC and their Minister. Agencies should also consider whether imposing a lockout assists its overall bargaining strategy and improves the likelihood of reaching an agreement with employees. Lockouts risk further escalation and could impact the agency's service delivery obligations.

[4] See Part 3-5 of the *Fair Work Act 2009* (Cth).

Enterprise Bargaining Guide Post Bargaining

Contents

Disclaimer **3**

H. Overview of the Guide **4**

I. Post-bargaining **5**

I1 | Fair Work Commission approvals process 5

I2 | Communication and educating employees 7

I3 | Developing documents to support the new agreement 8

I4 | Knowledge transfer and succession planning 9

I5 | Identifying practical issues 11

I6 | Communicating with stakeholders 12

J. Self-assessment **13**

J1 | Questions bargaining teams should ask themselves 13

Disclaimer

The content of this guide is general guidance material only. The Commonwealth does not guarantee, and accepts no legal liability arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this guide. The information provided, including commentary, is considered correct as of the date of publication. This guide may be updated from time to time to reflect changes to legislation or government policies.

The information and suggestions contained within this guide are not, in any way, legal advice. This guide is not a substitute for independent professional advice. Where required, practitioners should obtain appropriate professional advice relevant to their particular circumstances. Agencies should supply any legal advice sought to other agencies as required by legislation.

Links to external websites

Where external websites are referenced or linked to, they are provided for the reader's convenience and do not constitute the Australian Public Service Commission's (APSC) endorsement of the materials on those sites.

H. Overview of the Guide

This guide covers some of the key areas and questions that Commonwealth agencies should consider during the enterprise bargaining process. *Post Bargaining* represents the third and final part of the Guide. It deals with the issues agencies should consider after bargaining and a successful ballot.

Human resources (HR) and workplace relations (WR) practitioners from a number of Australian Public Service (APS) agencies have been consulted in the development of this guide.

Key points

- ✓ This guide provides only general guidance materials that are meant to be purely advisory in nature.
- ✓ This guide seeks to help workplace relations practitioners refresh their knowledge on bargaining.

I. Post-bargaining

This part deals with the key activities agencies undertake after an enterprise agreement has been successfully voted up by employees.

I1 | Fair Work Commission approvals process

Before a proposed enterprise agreement commences it must be approved by the Fair Work Commission (FWC). The FWC will ensure the proposed enterprise agreement meets the various legislative requirements set out in the Fair Work Act 2009 (Cth) (the FW Act), including that employees are better off overall under the proposed enterprise agreement when compared with the relevant underpinning Award (see section 186(2)(d) of the FW Act).

The BOOT is a global assessment about whether any reasonably foreseeable employee is better off under the enterprise agreement than if the modern award applied. In the Commonwealth, the relevant award is likely to be the Australian Public Service Enterprise Award 2015 or the Australian Government Industry Award 2016. Under the BOOT, the FWC may amend an agreement after it is lodged, if the FWC of the view that it doesn't pass the BOOT. The FWC may also reconsider an agreement after it has been approved, if relevant circumstances were not properly considered or if circumstances have changed.

Agencies must apply to the FWC for approval of their enterprise agreement within 14 days of the agreement being made (i.e. voted up). Agencies should not wait until the 14th day to lodge their application. Agencies should also be proactive in seeking guidance from the FWC should any questions arise during the application process.

Agencies must account for the FWC's approval process. This includes preparing the application and attached documentation prior to a ballot (as far as possible). These documents should be filled out with as much relevant information as possible, to give the agency the best possible chance of having the enterprise agreement approved by the FWC.

Applications can be submitted through the FWC's website, and must include:

- A completed *'Application to approve a new enterprise agreement'* - **Form F16**
- A signed copy of the enterprise agreement, which must meet the requirements of regulation 2.06A of the *Fair Work Regulations 2009*
- Any required declarations*, including a completed *'Employer declaration for an enterprise agreement'* - **Form F17**

* See also optional **Form F18** - *'Union declaration for an enterprise agreement'*. If a union is a bargaining representative, arrange for completion of this form in support of the application.

Further Information

For more detailed information regarding the FWC's enterprise agreement approval process, the BOOT and any forms, consult the FWC's Enterprise Agreement Benchbook.

On receipt of an agency's enterprise agreement approval application (Form F16), the FWC has a number of steps to follow. An enterprise agreement will only be approved where the FWC is satisfied that (but not limited to):[1]

- Bargaining has been finalised;
- The FWC application forms have been completed and submitted on time;
- The agreement has been genuinely agreed to by the relevant employees (considering the Statement of Principles on Genuine Agreement);
- The agreement passes the better off overall test;
- The group of employees covered by the agreement is fairly chosen;
- The agreement does not contain terms which exclude or have the effect of excluding the National Employment Standards (NES) or a provision of the NES;
- The agreement does not include any unlawful terms or designated outworker terms;
- The group of employees covered by the agreement was fairly chosen;
- The agreement specifies a date as its nominal expiry date (not more than 4 years after the date of Commission approval); and
- The agreement provides a dispute settlement procedure.

Note: if the agreement does not include a flexibility clause or a consultation clause, or includes clauses that are not consistent with the terms of the *Fair Work Act 2009* (Cth) (the FW Act) then the applicable model clause is taken to be a term of the agreement.

Undertakings

In certain circumstances, the FWC may seek further information or amendments to the operation of the proposed enterprise agreement where it does not meet certain requirements of the FW Act. These amendments are called 'undertakings'.

If a FWC Member is concerned about an aspect of the agreement, they would seek the views of employee bargaining representatives about making undertakings. The FWC may require the employer to provide a written undertaking to address the concerns. The undertaking is read in conjunction with the proposed enterprise agreement and prevails over the terms within the agreement.

For example, if an enterprise agreement does not meet a condition set out in the NES, the FWC may accept a written undertaking describing how the NES will be met. Where the request for an undertaking is made and the FWC's rationale is not clear, an agency may seek further information from the FWC. Agencies should seek legal advice where they disagree with the proposed undertaking or believe it is broader than required to address the FWC's concerns.

Once the FWC approves the proposed enterprise agreement, the agency and other bargaining representatives will be notified. The agreement will be published on the FWC's website and the agreement will come into effect on the date specified by the published decision (seven days after its approval, or a later date specified in the proposed agreement).

Further Information

For more detailed information regarding the FWC's enterprise agreement approval process, the BOOT and any forms, consult the FWC's Enterprise Agreement Benchbook.

[1] The Fair Work Commission, 'Approval Process' (updated 31 July 2017) - https://www.fwc.gov.au/awards-and-agreements/agreements/approval-process

I2 | Communication and educating employees

A newly 'voted up' enterprise agreement is an opportunity for an agency to promote a good news story to its employees, and to thank everyone involved in bargaining. Agencies should communicate the confirmed outcome of the enterprise agreement ballot to their employees as soon as practicable. As a courtesy, agencies could also inform the bargaining representatives just prior to informing all employees.

The following diagram identifies the key stakeholders agencies need to communicate with following a successful enterprise agreement ballot, including:

Fair Work Commission approval process

The bargaining team's duties do not end once the enterprise agreement ballot is successfully voted up. An agency should communicate the FWC's approval process to their employees. It is vital to manage expectations, specifically noting there is no specified time frame for the FWC to review and approve an enterprise agreement. Once the enterprise agreement has been lodged, an agency could periodically update their employees on its progress.

Agencies should note that the approval process may be extended based on the complexity of the agreement, whether undertakings have been sought and the number of other agreements before the FWC for consideration at that time.

Implementation of the new agreement

An agency should inform its employees of the steps needed to implement the enterprise agreement. There may be a range of activities needed, including payroll actioning the remuneration proposal and any associated increases to allowances, uploading the approved enterprise agreement to the agency's intranet, amending HR guides and factsheets to reflect any changes to the enterprise agreement and issuing a new HR delegations instrument.

Other interested groups

The bargaining team should maintain communication with their agency's senior leadership and their Minister's Office. For some agencies, a successful enterprise agreement ballot also means the automatic cessation of a protected action ballot order, which ceases to be effective where an agreement is made with employees.

The agency should communicate the ballot outcome and participation statistics with the APSC as soon as practicable. The agency should also inform the APSC when the agreement has received the FWC's approval, so the APSC can update its records on the progress of bargaining across the Commonwealth public sector.

I3 | Developing documents to support the new agreement

Agencies should develop new policy documents and/or update existing documents to reflect the changes proposed in the new enterprise agreement. The updates could include instructions to managers about administering entitlements and delegations for decision making.

Workplace policies codify the principles of the new enterprise agreement and set out any new practices required for implementation. Policies may also specify who is responsible for undertaking specific tasks and activities inherent in the new agreement. The steps below outline some of the key stages in developing and introducing new policy documents.

Step 1: Plan and consult

- Involve relevant staff in the development and implementation of any new workplace policies.
- Determine responsibility for promoting awareness and ownership of policies.
- Ensure all consultation obligations are included in the plan.

Step 2: Undertake research

- Research the characteristics of effective policy documents - what is best practice?
- Determine what the policy documents should contain and how they should be presented.

Step 3: Draft new policy documents

- Determine the format for the new policy documents.
- Clearly define who the policy documents apply to.
- Policy documents should be written in a simple, clear and easy to read manner.
- Determine a process to regularly review and revise policy documents.

Step 4: Implement the new policy documents

- Prepare the workplace for new policy documents
- Make new policy documents easily available and accessible to all employees.
- Assist managers in disseminating information regarding the new policy documents.

Step 5: monitor and evaluate

- Seek feedback from employees on the readability and usefulness of the new policy documents.
- Review policies to ensure they remain current and factual.

I4 | Knowledge transfer and succession planning

Following an enterprise bargaining round, the most underrated but important activities are those that assist agencies to retain knowledge of the bargaining process. The long timeframe between enterprise bargaining rounds (usually three years) can lead to a loss of bargaining knowledge and skills.

Organisational (corporate) knowledge

Accurate and comprehensive bargaining records form part of an agency's organisational knowledge. The bargaining team should take steps to ensure the organisational knowledge contained in official records is collected and stored. HR practitioners within the agency should know where these records are stored and have access to them.

Future bargaining teams can refer to records to identify why a particular decision was made or an action was taken. More than offering a rationale, these records are resources to help agencies during future bargaining rounds.

Communications materials or tools developed in one bargaining round can also be retooled, tailored and amended for use in future bargaining rounds, where appropriate.

This is partially addressed in Section E8 'Records management' which deals with maintaining accurate records during bargaining to illustrate that an agency was meeting its good faith bargaining obligations.

Succession planning

Bargaining succession planning is about ensuring that HR and WR practitioners are developed and retained between bargaining rounds. The skills developed during bargaining, and lessons learned throughout the process, can be effectively employed in the next bargaining round.

At the agency level this involves training and developing practitioners between bargaining rounds, ensuring they have a sound understanding of the Australian industrial relations system and the enterprise bargaining process. It may also involve mentoring and coaching of new practitioners by more developed practitioners. Some bargaining representatives may have been involved in or observed bargaining across multiple rounds. They often have robust and intimate knowledge of the organisation's history and decisions taken in previous bargaining rounds. Agencies should prepare for this by utilising the services of practitioners and representatives who were involved in previous bargaining rounds, or at least have a working knowledge of what occurred.

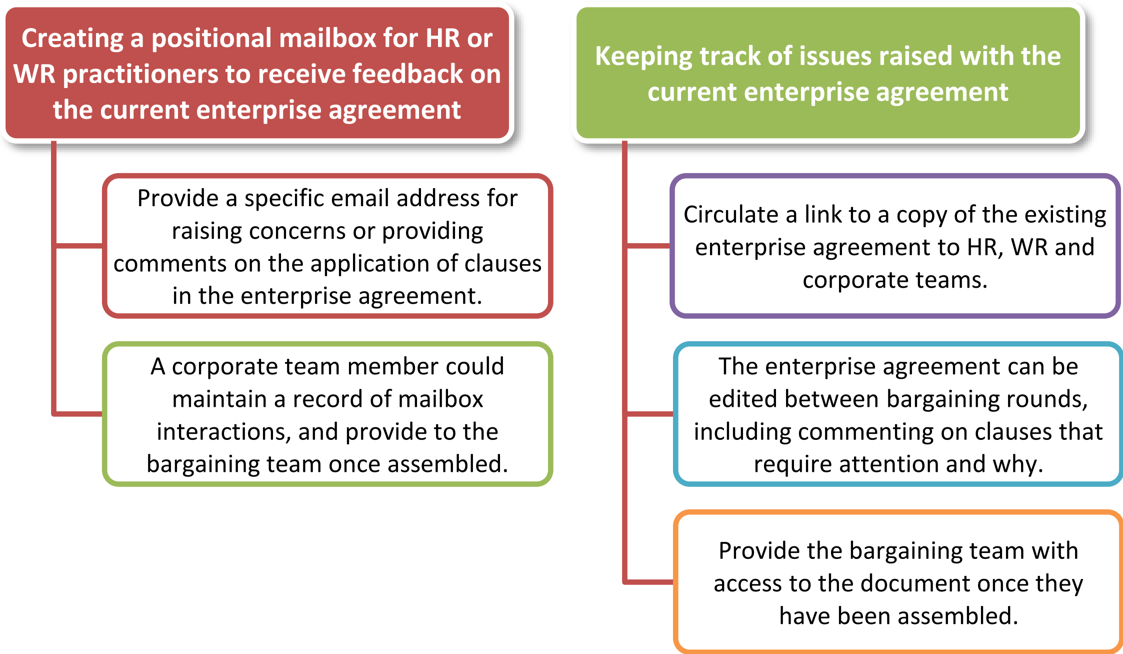
It is important for agencies to keep in touch with what is happening within the Australian industrial relations system and the Commonwealth context.

I5 | Identifying practical issues

Between bargaining rounds, agencies should look at their enterprise agreements critically. If issues are not recorded in a timely fashion, it is likely some may be forgotten or overlooked by the time the bargaining team undertakes its pre-bargaining consultation and evaluation.

Critical evaluation will ensure any practical deficiencies are recorded, and can be addressed when preparing for the following bargaining round. This might include clauses that unduly restrict agency operations or have unintended consequences.

Changes to legislation, particularly in relation to the NES, will need to be recorded and implemented. Agencies should consider monitoring the FWC's annual wage review and any amendments to the applicable modern award, so as to ensure their pay scales are equivalent to or higher than the award rate. There are a number of ways to monitor practical issues, which may include:



The incoming bargaining team can review any comments or feedback provided by the corporate areas, and determine which matters can be addressed through the drafting and/or bargaining processes.

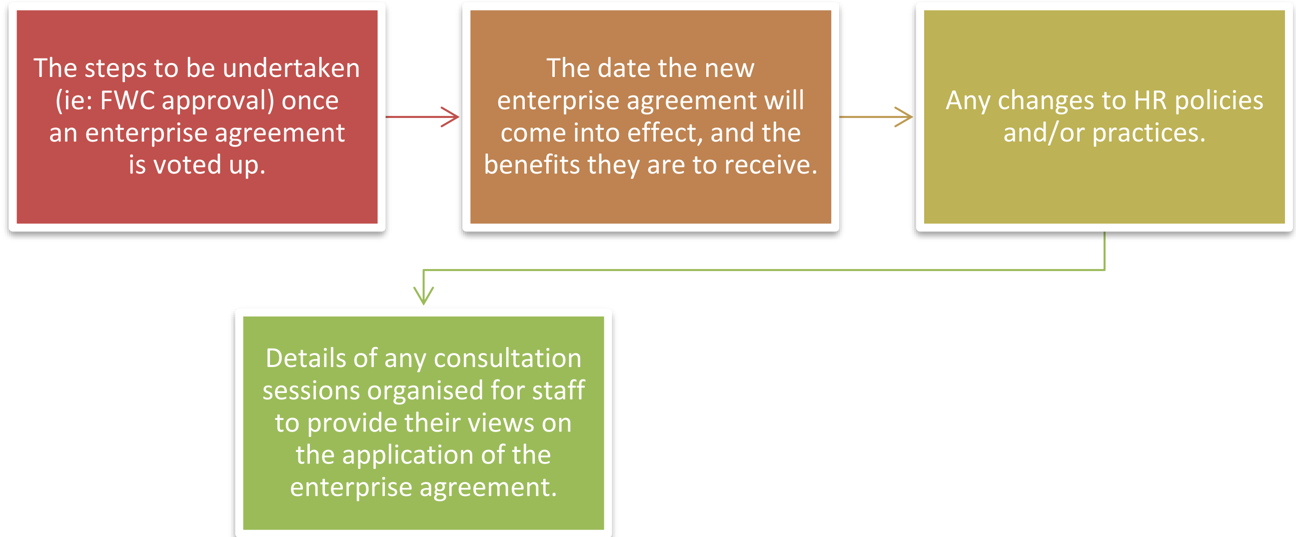
Some issues that are raised may not relate to drafting or bargaining, but point to broader capability issues within the agency's corporate functions, or a lack of proper communication with staff. Where such concerns are identified, the bargaining team may wish to provide the feedback to the relevant business area to address.

I6 | Communicating with stakeholders

In addition to giving corporate functions a means of providing enterprise agreement feedback, agencies should also explore active communication with senior management and staff, even when not actively engaged in bargaining.

Communicating with staff

Communication with staff does not end when an enterprise agreement is voted up or comes into effect. Effective post-agreement communication assists in increasing engagement, morale and productivity, and may also increase an agency's chances of success when it proposes a new agreement. Agencies may wish to communicate the following to staff:



Communicating with senior management

Communication with senior management is crucial because they are responsible for providing strategic direction.

Expectations about the agency's next enterprise agreement and likely timeframes should be decided early. This will allow the new bargaining team time to conduct their pre-bargaining investigations prior to the nominal expiry date of the existing arrangement.

Agencies also need to ensure senior management are kept up-to-date with important issues arising from the application of the agreement, and any significant changes in the agency's broader operational environment. Such matters may include machinery of government changes, elections or funding changes.

J. Self-assessment

Once bargaining is complete, the bargaining team should take some time to reflect on the process and to assess their performance throughout. Identifying strengths and weakness, what they did well, or where they might develop, is an effective way of ensuring the next bargaining round commences in a more informed manner.

J1 | Questions bargaining teams should ask themselves

Where possible, agencies should conduct an analysis of the bargaining process. Questions might include:

1. Preparation prior to bargaining
- How did the bargaining team evaluate the agency's context ahead of bargaining?
- To what extent were bargaining positions developed with sufficient evidence?

2. The bargaining team
- What subject matter expertise was particularly useful or effective during bargaining?
- Did the bargaining team experience high turnover during the bargaining round?

3. Consulting and communicating with stakeholders
- In setting bargaining expectations, how effectively did the bargaining team consult with stakeholders, including senior leadership and corporate functions areas?
- How effectively and how regularly did the bargaining team consult with employees?
- What were the most effective communication methods for updating staff and promoting the employer's positions?

4. The bargaining process
- During the course of bargaining, how did participants act in good faith?
- What issues/topics/positions did bargaining representatives reach agreement on?
- How effective were any established bargaining protocols?
- How realistic were proposed bargaining timeframes?
- How effective was the bargaining team's record keeping and documentation?

5. The employee ballot
- In promoting the enterprise agreement to employees, how effectively did the bargaining team engage with managers and supervisors?
- Was the agency successful in getting the enterprise agreement voted up on the first employee ballot? If not, what were some of the sticking points?
- How effective was the service of the ballot provider?

6. Other enterprise bargaining factors
- How effectively did the bargaining team respond to any legal action taken during bargaining?
- How well did the agency manage any industrial action taken during bargaining?
- How effectively did the agency manage any FWC mediation or conciliation?
- Where there any unforeseen or unexpected issues during bargaining? How effective was the bargaining team response? What lessons can be taken from this experience?

7. Fair Work Commission approval
- How prepared was the agency for the completion of the FWC application forms?
- What undertakings, if any, did the agency have to make with the FWC?

8. The new enterprise agreement
- Did the bargaining team identify any drafting issues in the new enterprise agreement?
- In applying the new enterprise agreement, have any practical issues been identified?

9. The next bargaining round
- How might the agency manage or avoid any issues identified in the next bargaining round?
- How should the agency seek stakeholder feedback on the new enterprise agreement? This includes from managers, employees, HR and WR practitioners.

Bargaining teams should use these questions and self-reflections when drafting a handover document with lessons learnt for future bargaining teams. Agencies should recognise that engaging with their staff is part of a continual industrial relations process. The new enterprise agreement, employee consultation and ongoing activities will inform future bargaining rounds.

Non-APS Bargaining

FAQs - One-Off Payments

Eligible non-APS agencies may make a one-off payment, equivalent to 0.92 per cent of base salary, using administrative arrangements on the date of a successful vote

Key points

1. What are the eligibility requirements for the one-off payment?

To be eligible for the one-off payment, an agency must commence an access or consideration period that results in a successful **yes vote**, by the later of:

a. 14 March 2024; **or**

b. the nominal expiry date of the current instrument or the 12-month anniversary date of the final increase provided under a determination.

The access or consideration period is the formal period during which employees are given time to read and consider the proposed agreement immediately before a ballot.

If a non-APS agency **does not** conclude agency-level bargaining and commence an access or consideration period in the required timeframe, employees would receive only the 4 per cent pay increase on commencement of their agreement and **would not** be eligible for the one-off payment.

2. How will the one-off payment be made?

Consistent with APS bargaining, the one-off payment will be paid by a determination made under an agency's enabling legislation. Determinations used to facilitate the one-off payment will not need APS Commissioner approval.

The APSC will provide an example determination for agencies to amend as required. Agencies should ensure the determination is appropriate having regard to their enabling legislation. Agencies should provide a draft determination to their APSC Relationship Manager for review before it is signed by the Agency Head. It will not be necessary to make any reference to the one-off payment in the drafting of the enterprise agreement.

3. What type of payment is it?

The payment is a one-off payment, not a base salary increase. Because the payment is non-cumulative it will attract different tax and superannuation treatments.

4. **When will the one-off payment be made?**

   An agency will be able to make a one-off payment after its enterprise agreement is voted up and while it is awaiting approval from the Fair Work Commission (FWC). For instance, an agency may have their agreement voted up on 8 February 2024, the one-off payment could be paid on payday 15 February 2024, with the enterprise agreement commencing after FWC approval. This may vary depending on timing of a ballot and payroll processing capacity.

5. **Are non-APS agencies required to make the one-off payment?**

   No. Non-APS agencies may make the one-off payment but are not required to do so. The cost of the one-off payment should be included in an agency's Funding and Remuneration Declaration and must be affordable. Where an agency already has approval of its Funding and Remuneration Declaration we ask that the agency provides separate advice (via email, to their APSC Relationship Manager) to confirm affordability of the one-off payment. Please ensure this advice is provided by, or cleared by, a person with relevant authority to confirm affordability.

Calculating the payment

6. **How is the payment calculated?**

   The one-off payment is calculated as 0.92 per cent of the employee's base salary on the reference date, pro-rated for part-time and casual employees.

7. **What is the reference date?**

   The *reference date* is the date the enterprise agreement is voted up – this is the date that will be used for determining eligibility for the payment and calculating entitlements. On the *reference date*, a snapshot of the payroll should be taken to determine each employee's working hours and base salary for the purposes of calculating the payment.

8. **How is 'base salary' defined?**

   For the purposes of the payment, base salary includes any applicable higher duties allowance and casual loading. No other allowances or loadings are included for the purposes of calculation. The applicable base salary is the employee's base salary on the *reference date*, to which the pay increase would otherwise be applied, not the base salary the employee will receive upon commencement of the new agreement.

9. **Is the base salary calculated inclusive of the Year 1 pay increase?**

   No. The one-off payment is calculated on employee's current pre-adjusted salaries on the *reference date*.

10. **Why is the payment 0.92 per cent?**

    The 0.92 percent figure is consistent with the APS pay offer. It is the equivalent to the Year 1 increase having been brought forward twelve weeks or 84 days. The workings of the formula are as follows: **(84/365) * 4% = 0.92%**

11. **When should the payment be made?**

    The one-off payment should be made on the first practicable payday after the agency's enterprise agreement is voted up. Agencies should draft their determination and provide it to their APSC Relationship Manager before they commence their access or consideration period.

12. **Can Non-APS agencies who have already delivered the Government's previous wage offer provide the one-off payment?**

    Yes. Consistent with the intent of the payment, it will be calculated on base salaries before they had been adjusted by 4 per cent.

Tax and superannuation

13. **How will the one-off payment be treated for tax purposes?**

    The payment is likely to be treated as a bonus or similar payment for taxation purposes. The payment should therefore be subject to appropriate tax withholdings as advised by your pay team or payroll provider.

14. **Will the payment attract superannuation?**

    The treatment of the payment for superannuation purposes will depend upon the method for calculating an employee's super salary. The one-off payment is considered *Ordinary Time Earnings* (OTE), and will attract a superannuation contribution for employees whose contributions are calculated using that method.

    As the one-off payment does not go to base salary, however, it will not impact an employee's *Fortnightly Contribution Salary* (FCS) where FCS is used for calculating superannuation payment.

    For employees in defined benefit superannuation funds, the treatment will depend upon the provisions of the relevant trust deed.

Part-time, casual, and non-ongoing employees

15. **How are part-time employees treated?**

    Part-time employees will receive a pro-rated payment based on their agreed part-time hours as at the *reference date*. For instance, an employee working 3 full days per week would receive the payment calculated on 60% of their base salary.

16. **How are casuals treated?**

    Casual employees will receive the one-off payment, pro-rated for their average hours, as a proportion of full-time hours, over the preceding 12 months. Where a casual has less than 12 month's employment, a shorter period can be used for determining the appropriate fraction. The equivalent base salary for casual employees should be calculated inclusive of casual loading.

17. **Should the payment be paid to non-ongoing employees whose term ends before the agreement comes into effect?**

    Yes. Any employee employed on the *reference date* is eligible for the one-off payment according to their base salary and hours on that date.

Changes in employee circumstances

18. **What if an employee commences with the agency after the agreement is voted up?**

    Eligibility for the payment is determined by an employee's status on the *reference date,* i.e. the date the agreement is voted up. The payment is not paid to employees who commence after the *reference date*. Employees who commence after the agreement has been voted up will benefit from the Year 1 increase from the date the Agreement commences.

19. If an employee leaves the agency prior to the date the agreement commences will they be required to repay the payment?

No. There is no recovery or clawback provision for employees who separate after the agreement is voted up.

20. What if someone gets a promotion or changes their hours after the agreement is voted up?

Calculation of the payment is determined by an employee's salary on the *reference date*. Any changes to the employee's salary after the *reference date* will not impact the one-off payment. Agency Heads may make individual arrangements for specific employees where it is considered necessary to ensure equitable application.

21. What happens if the agency considers an employee is unfairly disadvantaged because of their particular circumstances?

The example determination includes Agency Head discretion to vary the basis on which the one-off payment is pro-rated. For example, if a full-time employee has a need to take a single day of unpaid leave on the reference date, an Agency Head may wish to exercise their discretion to pay them the full one-off payment.

Employees on leave

22. Will employees on Leave Without Pay (LWOP) receive the one-off payment?

No. While employees on LWOP are able to participate in the enterprise agreement ballot, their base salary on the applicable reference date will be zero. Employees on LWOP will benefit from the base salary increase when their leave ends. Agency Heads may make individual arrangements for specific employees where this is considered necessary to ensure equitable application.

23. Will employees on leave at half pay receive the one-off payment?

Yes. Similar to part-time employees, those on leave at half pay will receive a pro-rated payment based on their agreed payment rate on the *reference date*. Agency Heads may make individual arrangements for specific employees where this is considered necessary to ensure equitable application.

24. Will employees on approved workers compensation or invalidity payments receive the one-off payment?

No. Where an employee is covered on compensatory payout they are not eligible to receive the payment.

Common law arrangements, IFAs, and maintained salaries

25. Do employees with common law arrangements in place receive the payment?

Yes. The one-off payment is payable from the anniversary of the employee's last wage increase. If employees on common law arrangements have received a 4 per cent increase since 31 August 2023, a 0.92 per cent payment calculated on pre-adjusted salary can be made as soon as practicable.

26. Will employees acting in SES equivalent level roles receive the payment?

Acting SES equivalent employees typically, due to their substantive classification level, remain covered by the enterprise agreement during their acting period. In most instances acting SES employees will therefore satisfy the eligibility criteria.

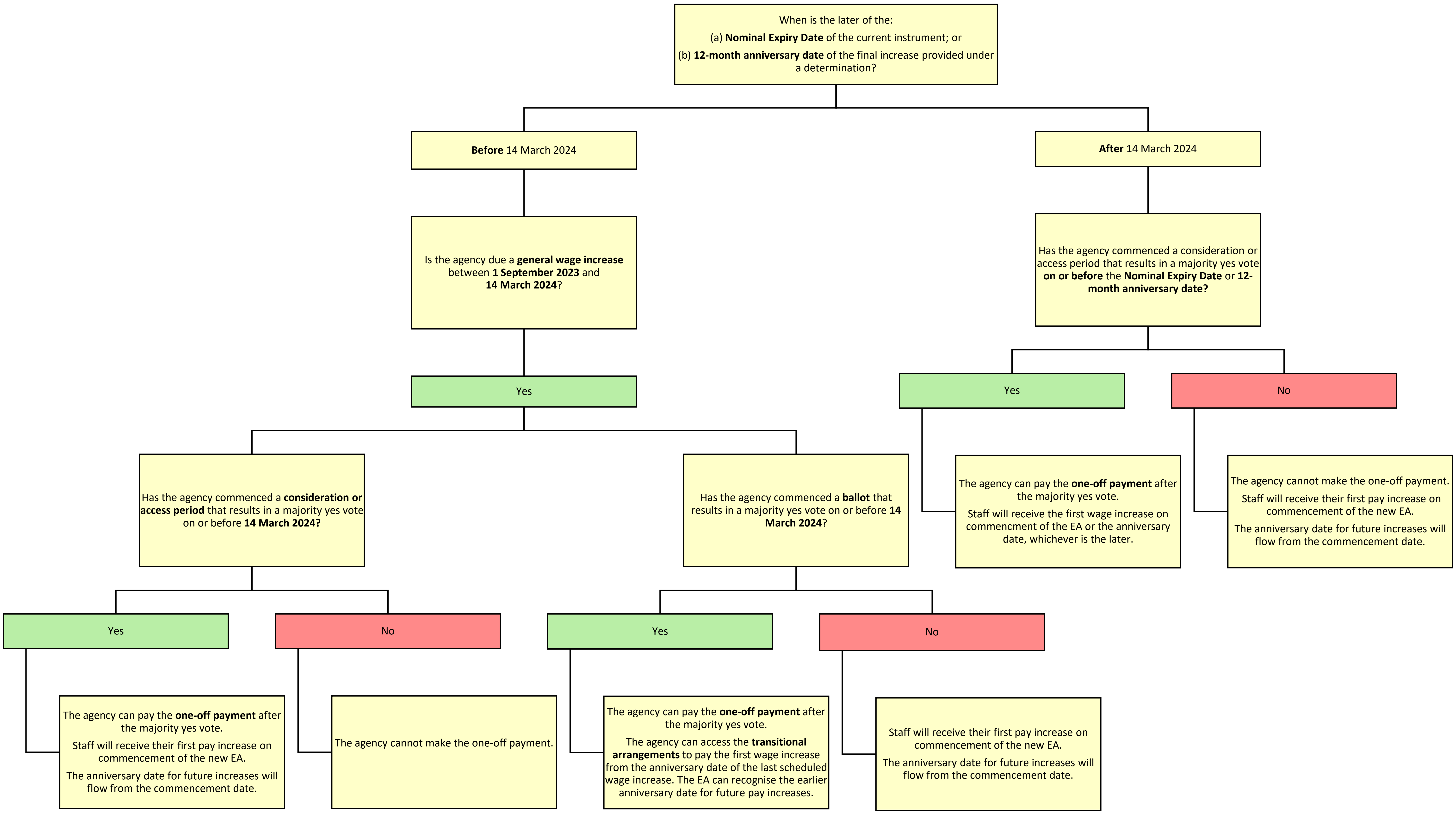
27. Is the payment paid on an employee's IFA salary?

This will depend on the construct of the IFA. If the IFA provides an additional non-salary allowance it is excluded from the payment. If the IFA modifies an employee's base salary it will be included in the calculation. Agency Heads may make individual arrangements for specific employees where it is considered necessary to ensure equitable application.

28. What if an employee is on a maintained salary?

An employee on a maintained salary, above the Agency's applicable salary range, should have the one-off payment calculated on their individual maintained base salary.

Non-APS Bargaining – Decision Tree



APS bargaining

Allowances

Guidance for Agency Lead Negotiators

Purpose

This document is intended to assist agencies in understanding the applicable parameters when bargaining for the introduction or amendment of allowances in accordance with the *Public Sector Workplace Relations Policy 2023* (the Policy).

Key takeaways

- Existing salary-related allowances may be increased in line with salary increases.
- Existing expense-related allowances may be increased in line with a relevant economic indicator.
- Agencies may not introduce new allowances which are a remuneration increase by another name (e.g. Healthy Lifestyle Allowance, Working in the Office Allowance).
- These parameters extend to all payments provided via policy and 'reimbursements', however described.
- Existing agency allowances may be retained.

Introduction

1. The Australian Government is committed to providing APS employees with fair and reasonable base salaries which appropriately remunerate them for their work and move in step with broader economic conditions.

2. While base salary is appropriately the primary component of most employee's remuneration, in some circumstances it will be appropriate to provide employees with additional remuneration in the form of an allowance.

3. Allowances can be broadly categorised as either salary-related or expense-related.

   a. **Salary-related allowances** are provided to an employee in the ordinary course of their work as compensation for certain conditions of a role. If an allowance is reported on an annual income statement for tax purposes then it is a salary-related allowance.
   Example: Higher Duties Allowance

   b. **Expense-related allowances** are provided to an employee to defray an estimated additional cost required for the role which would otherwise be met by the employee. If an allowance is not reported on an annual income statement, it's likely an expense-related allowance.
   Example: Travel Allowance

4. The Policy provides parameters for agencies seeking to introduce new allowances or vary existing allowances. This document specifically clarifies two particular matters:

   a. the distinction between permissible and impermissible new allowances (clause 44 and 45), and

   b. the parameters for increasing the rates of existing allowances (clause 49).

Permissible and impermissible new allowances

5. The Policy recognises that it may be appropriate for agencies to introduce new allowances to support their specific operational requirements (clause 44), yet this precludes agencies from agreeing to new allowances which are effectively a pay increase by another name.

6. The intent of this provision is to support agencies in meeting their critical business needs in delivering services to Government and the Australian community, without exceeding the Government's approved pay offer or otherwise diminishing the Government's policy actions to address pay fragmentation between agencies.

7. The distinction between these permissible allowances (clause 44) and impermissible allowances (clause 45) is a matter of Policy interpretation, noting all arrangements ultimately require the approval of the APS Commissioner. The below guidance, however, is intended to be instructive in how a proposed allowance is likely to be assessed under the requirements of the Policy.

Impermissible allowances

8. Any proposed new allowance which is a pay increase by another name is impermissible under the Policy. Such allowances may include, but are not limited to, *Healthy Lifestyle Allowances*, *Attending the Office Allowances*, *Specialist Skills Allowances, Security Clearance Allowances,* and *Device Allowances*.

9. Impermissible allowances typically propose a broad application, have only a tangential link to the core outputs of the agency, purport to compensate employees for elements of their role already compensated by base salary, or propose to meet costs which would ordinarily be borne by the employee without a business reason.

10. Any allowance which is primarily offered to increase an employee's total remuneration package or increase relative salary competiveness is not permitted under the Policy.

Permissible allowances

11. In contrast to impermissible allowances, permissible allowances have a clear justification, are carefully targeted and are supported by evidence of critical business needs. They should only be considered when alternative non-monetary solutions have not been successful.

12. Agencies may propose, or support claims for, new allowances where they can be shown to be necessary to meet specific operational requirements. The below is an indicative, but not exhaustive, list of considerations agencies should scrutinize when contemplating new allowances.

Relevant considerations for new allowances

Consideration	Detail
Justification	▪ Does the proposed new allowance have a clear purpose? ▪ Is the proposed allowance recognising a legitimate hardship? ▪ Is the justification beyond what is already reasonably compensated by salary? ▪ Is it clear how it will be known if the intended allowance is having its intended effect?
Evidence	▪ Is the proposed allowance supported by evidence for its need? ▪ Is there a clear link between the proposed allowance and a critical business output? ▪ Is there evidence of why other non-monetary solutions are not appropriate or viable?
Scope	▪ Is the proposed allowance appropriately targeted to specific roles? ▪ Is it clearly explained when employees will become eligible and cease to be eligible?
Amount	▪ Is there appropriate evidence for the rate of the proposed allowance? ▪ Has it been demonstrated that a lesser rate would be insufficient to achieve the objective?
Affordability	▪ Has the allowance been appropriately costed with reference to eligibility and usage? ▪ Is the cost of the proposed allowance able to be met from within existing agency budgets?

13. Agencies must engage with the APSC prior to tabling any proposal for new allowances.

Parameters for increasing existing allowances

14. The following explanation is offered to assist agencies in understanding the Policy's intent when establishing parameters for increasing existing allowances.

15. The principle clause providing parameters for increasing allowances is Clause 49, which states:

> For the avoidance of doubt, existing salary-related allowances covered by clause 47 may be increased in line with general remuneration increases, including any applicable adjustment. Existing expense-related allowances covered by clause 47 may be increased in line with a relevant economic indicator or statistical measure.

16. This clause reflects the long established principle that salary-related allowances can increase in line with wages, and expense-related allowances can increase proportionate to the expense for which they are offered. However the clause also references clause 47 which states:

> Agencies may have clauses which have not been covered by the Common Conditions, but do not fit the 'Agency Level bargaining' matters at clauses 44 and 45.

17. Clause 47 has become less applicable overtime with Part A negotiations being extended to cover more matters than originally anticipated. This expansion of matters was necessary to ensure the Commonwealth complied with its Good Faith Bargaining responsibilities under the *Fair Work Act 2009*.

18. Consequently, clause 49 may effectively be read without reference to clause 47 as follows:

> For the avoidance of doubt, existing salary-related allowances ~~covered by clause 47~~ may be increased in line with general remuneration increases, including any applicable adjustment. Existing expense-related allowances ~~covered by clause 47~~ may be increased in line with a relevant economic indicator or statistical measure.

19. This interpretation of the Policy is consistent with longstanding practice for increasing allowance, is consistent with decisions made in Part A bargaining, and is consistent with advice previously provided to agencies.

20. Agencies should apply this clause consistent with this clarified policy intent, which will be reflected in the Statement of Common Conditions as issued under the authority of the Policy.

Cumulative increase rates for expense-related allowances

21. Where time has passed since an expense-related allowance was increased, agencies may increase that allowance by the cumulative percentage change in the relevant economic indicator (most often CPI).

22. The cumulative increase may be calculated from the latter of when the allowance was last increased or the commencement of the last enterprise agreement. This cumulative percentage change is the maximum increase, but agencies may increase a rate by less.

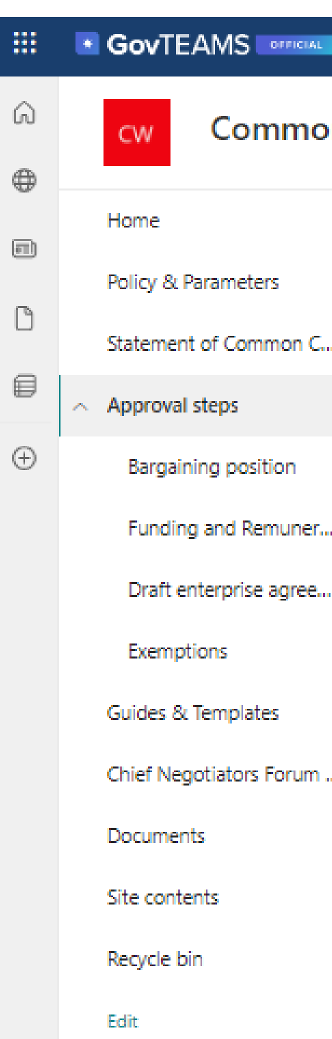
23. It will be necessary for agencies to demonstrate their working when proposing to increase such allowances.

> **Example:** An agency has an expense-related allowance of $100 which was last increased in their 2011 Enterprise Agreement. The agency's last enterprise agreement commenced in December 2019 and expired in December 2022.
>
> The agency may increase the allowance by the cumulative percentage change in CPI since December 2019, which is 15.1%. The allowance can therefore be increased to $115.

24. Allowances which can be bargained 'without parameters' may be increased without regard to these considerations.

25. For further questions, please contact the Workplace Relations Bargaining Taskforce via WRreform@apsc.gov.au.

Commonwealth Workplace Relations - Non-APS



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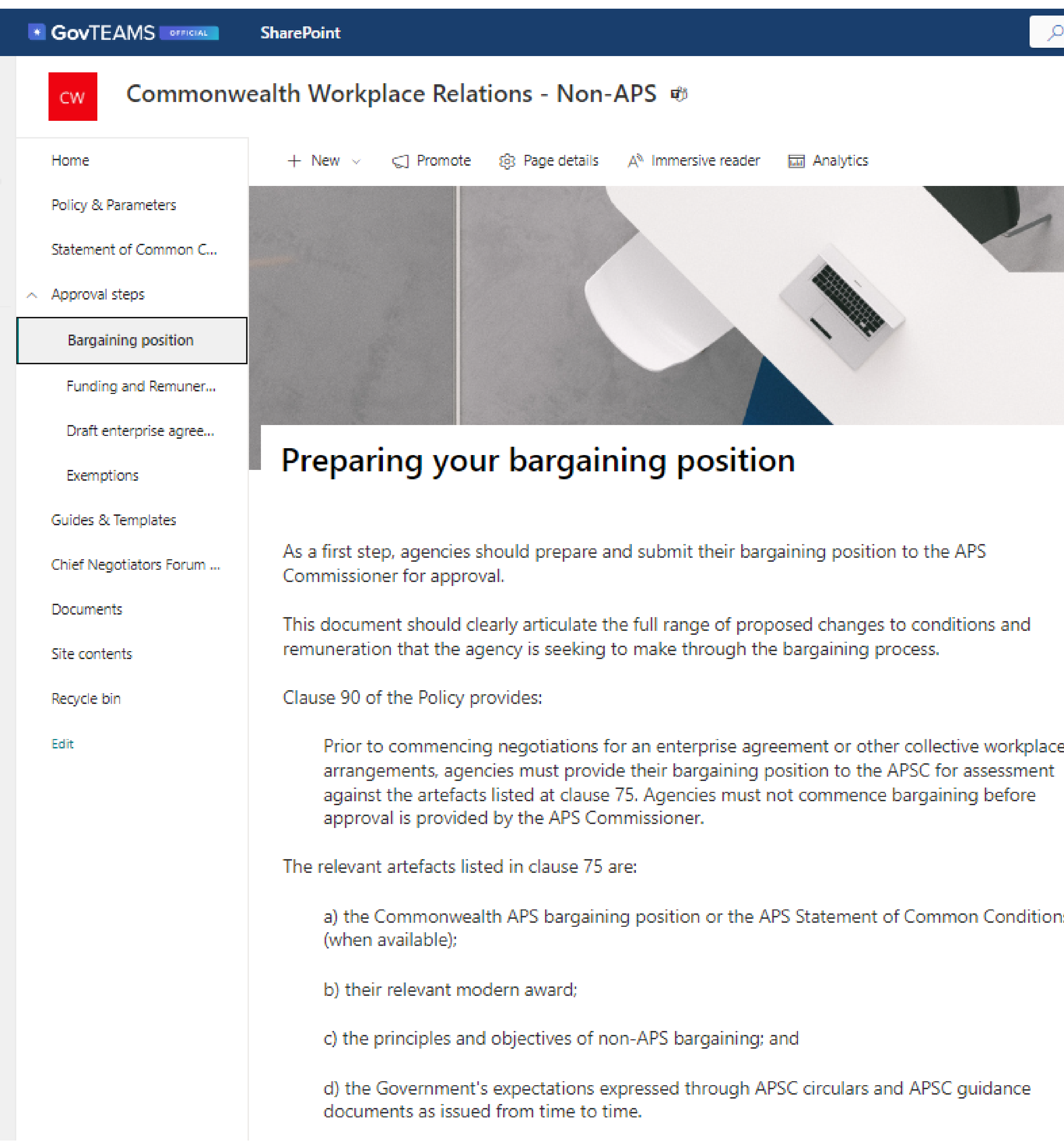
Approval steps

This table outlines key steps and approval points in the bargaining process for non-APS agencies (excluding the agencies listed at clause 87 of the Policy).

Phase	Step
Pre-bargaining	Agencies are encouraged to touch base with their APSC Relationship Manager for advice prior to starting the bargaining process.
Develop your bargaining position	Agencies must provide their bargaining position to the APSC for assessment, ideally prior to commencing bargaining.
Bargaining	Agencies can commence bargaining, either after the bargaining position is approved or earlier if required under the Fair Work Act.
Prepare your Funding and Remuneration Declaration	Agencies must prepare a Funding and Remuneration Declaration using the APSC template.
Seeking an exemption from the Policy	The Policy provides that an exemption to the Policy will only be considered in exceptional circumstances.
Submitting a draft collective instrument for approval	The Policy provides that a draft collective instrument (e.g. an enterprise agreement) is to be provided to the APS Commissioner for approval before an agency tables its final position with employees and their representatives.
Amendments to draft collective instruments	Agencies may request changes to a previously approved collective instrument.
Vote	Once an agency has an approved draft collective instrument, the agency can hold a vote with employees. If the vote is successful, the agency can seek approval from the Fair Work Commission. If the vote is unsuccessful, the agency may review their negotiation and communication strategies and resume bargaining. Depending on the scope of the renewed bargaining, the agency may require updates to their Funding and Remuneration Declaration and the draft collective instrument.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Home
Policy & Parameters
Statement of Common C...
Approval steps
Bargaining position
Funding and Remuner...
Draft enterprise agree...
Exemptions
Guides & Templates
Chief Negotiators Forum ...
Documents
Site contents
Recycle bin
Edit

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Preparing your bargaining position

As a first step, agencies should prepare and submit their bargaining position to the APS Commissioner for approval.

This document should clearly articulate the full range of proposed changes to conditions and remuneration that the agency is seeking to make through the bargaining process.

Clause 90 of the Policy provides:

> Prior to commencing negotiations for an enterprise agreement or other collective workplace arrangements, agencies must provide their bargaining position to the APSC for assessment against the artefacts listed at clause 75. Agencies must not commence bargaining before approval is provided by the APS Commissioner.

The relevant artefacts listed in clause 75 are:

> a) the Commonwealth APS bargaining position or the APS Statement of Common Conditions (when available);
>
> b) their relevant modern award;
>
> c) the principles and objectives of non-APS bargaining; and
>
> d) the Government's expectations expressed through APSC circulars and APSC guidance documents as issued from time to time.

How should a bargaining position be drafted?

You are not required to use a specific template to prepare your bargaining position.

There are many different ways an agency could outline its bargaining position. Agencies should choose a format that most clearly reflects their intended changes. The intention is for the APSC to provide the earliest possible advice on policy application to inform your agency's planning.

One option is that the agency identifies only the terms and conditions where changes are proposed and provides information on these proposed changes. Another option is that the agency undertakes a comprehensive clause by clause analysis of the existing enterprise agreement outlining the proposed changes.

Further information on potential approach, including examples, are included in the APSC Bargaining Guides.

^ Tips for preparing your bargaining position

Your bargaining position should not be developed in isolation. It should be informed by analysing the agency's objectives, context, consultation and legislative obligations. Some key considerations include:

Consultation with employees: communication with employees is an ongoing process and should continue through the bargaining journey. Agencies should seek feedback and suggestions from employees to inform their bargaining position. This will highlight areas of concern and interest for employees.

Consultation with senior leaders: senior leaders plan an essential role in bargaining and should be consulted during the development of the agency's bargaining position. Some agencies establish a steering committee to oversee and guide bargaining. Membership of such a committee could include the agency head or chief operating officer, select senior managers and the HR manager. Committee members should generally represent key areas of the organisation, including finance and HR. The Committee generally endorses the agency's bargaining position, holds the negotiation team accountable to that mandate and assists with the making of strategic decisions that guide the bargaining process.

Consultation with managers: consulting with managers before bargaining commences gives an agency the opportunity to seek their feedback on the current enterprise agreement. This could be achieved, for example, through a survey of line managers. The consultative process helps develop a bargaining position that accounts for the views of people who actively use the enterprise agreement every day. Feedback from managers should be collated and broadly summarised, to identify key topics of interest and to accurately capture the relevant proposed changes.

Legislative obligations: Agencies must consider their legislative obligations. Changes to legislation that occur during the term of the current enterprise agreement may need to be reflected in the proposed enterprise agreement. Changes to legislation should be identified and reflected in the bargaining position.

See Part 1 of the APSC Bargaining Guide for further guidance.

Preparing your Funding and Remuneration Declaration

After its bargaining position is approved, an agency should prepare a signed Funding and Remuneration Declaration to submit to the APS Commissioner for approval.

Clause 91 of the Policy states that:

> Approval from the APS Commissioner must be obtained prior to any proposed increases in remuneration or changes to conditions with a financial impact being discussed with employees and/or their representatives. Agency Heads are to provide the APS Commissioner with a signed Funding and Remuneration Declaration, using the template provided by the APSC.

Policy requirements relating to changes to remuneration and conditions

Agencies may make remuneration and conditions adjustments within Government parameters, as advised by the APSC.

Clause 99 to 101 of the Policy provides requirements in relation to changes to remuneration and conditions, including:

- changes to remuneration and conditions are to be affordable from within existing agency budgets, without the redirection of programme funding
- remuneration and conditions adjustments are not to be funded through reductions in output or services, or increases in fees, charges, levies or similar income sources beyond ordinary indexing practices
- remuneration increases are to apply prospectively

Links:

Funding and Remuneration Declaration Template--Nov-...

Preparing your draft enterprise agreement

Following successful negotiations, an agency should submit a draft enterprise agreement to the APS Commissioner for approval.

Clause 92 of the Policy states:

> A draft enterprise agreement, or other collective workplace arrangement, is to be provided to the APS Commissioner for approval prior to the agency tabling its final position with employees and/or their representatives.

To support the approval process, agencies must provide the following documents to the APSC:

- a version of their current enterprise agreement with the proposed changes recorded in track*
- a completed checklist that records the Common Conditions incorporated into the draft agreement

*If this is not practical due to the complexity or number of proposed changes in the draft enterprise agreement, the agency should use another format, such as a table, that would clearly articulate the proposed changes between the current enterprise agreement and the draft enterprise agreement.

Further updates to an approved enterprise agreement

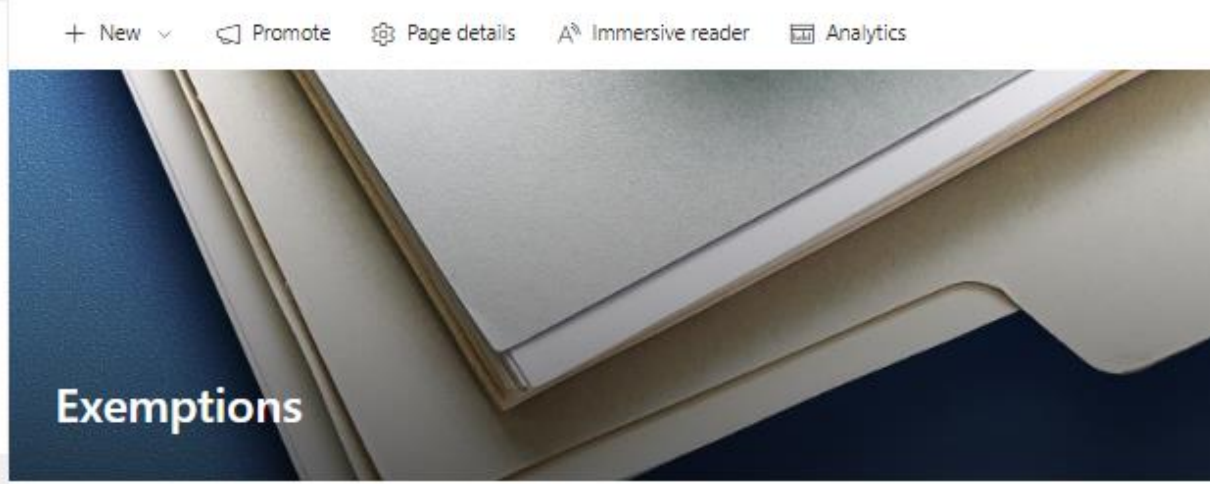
An agency may need to update a draft enterprise agreement that has already been approved by the APS Commissioner or their delegate before proceeding to an employee vote. For example, an agency may identify an error in the draft agreement or substantial changes may be required as a result of further bargaining.

In this situation, the agency must submit the updated enterprise agreement for further approval.

To support the approval process, agencies must provide the following documents to the APSC:

- a version of the draft enterprise agreement with the proposed changes (since the last approval stage) recorded in track
- an updated checklist that records the Common Conditions incorporated into the draft agreement, if required.

Commonwealth Workplace Relations - Non-APS



Exemptions

An agency may seek an exemption from the Policy in exceptional circumstances.

Clause 93 of the Policy provides:

> Exemptions to the non-APS Policy will only be considered in exceptional circumstances. An application for an exemption must be assessed by the APSC and is subject to endorsement from the portfolio Minister and approval from the Minister for the Public Service.

Agencies should consult with the APSC early if they are considering an exemption request.