

Supporting Guidance

Policy Parameters for Agreement Making in the APS

June 2004

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SUPPORTING GUIDANCE FOR THE POLICY PARAMETERS FOR AGREEMENT MAKING IN THE AUSTRALIAN PUBLIC SERVICE (JUNE 2004)

Introduction

This *Supporting Guidance for the Policy Parameters for Agreement Making in the Australian Public Service (June 2004)* (Supporting Guidance) is intended to assist agencies in applying the Government's policy on agreement making in the Australian Public Service (APS). The Supporting Guidance material will be regularly updated to take account of policy and legislative developments.

The Government expects APS agencies to lead the way in utilising the flexibilities and opportunities for reform available under the *Workplace Relations Act 1996* (WR Act). The WR Act provides that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level.

The *Policy Parameters for Agreement Making in the APS (December 2003)* (Policy Parameters) provide APS agencies with the flexibility to develop innovative agreements tailored to their particular needs and circumstances, that benefit both employees and clients and are exemplars of the Government's workplace relations reforms. The Policy Parameters promote the Government's interests as the ultimate employer of APS employees, while continuing to devolve responsibility for agreement making to agencies. A copy of the Policy Parameters is at [Attachment A](#).

The Government requires its workplace relations policies to be implemented in its own area of employment. Periodically, the Department of Employment and Workplace Relations (DEWR) issues Workplace Relations Advices which outline contemporary Government workplace relations policy. These Advices complement the Supporting Guidance.

Key elements of the Government's workplace relations policies include:

- fostering more direct relations between an agency and employees;
- choice in agreement making – hence the Policy Parameters require Agency Heads to put in place arrangements that enable any employee in their agency to seek to negotiate an AWA; and
- agencies and employees taking primary responsibility for settling/resolving workplace/enterprise issues with the intervention of third parties only at the express invitation of the parties in dispute.

Support and assistance

DEWR provides support and advice to agencies on the Government's workplace relations policies in order to promote effective agreement making across the APS. DEWR's Client Contact Teams can provide up-to-date advice and information in relation to agreement making and other workplace relations issues.

For further details on your Client Contact Team, visit

www.workplace.gov.au/PublicSector

The Australian Public Service Commission (APS Commission) will also provide advice and guidance to agencies on those policy areas for which it is responsible. In relation to the Policy Parameters, the APS Commission has responsibility for the policy on redeployment, reduction and retrenchment arrangements, broadbanding and performance management systems. It also has responsibility for a range of non-Policy Parameter issues such as adherence to the *Public Service Act 1999* (PS Act), the APS Values and APS Code of Conduct, managing underperformance, review processes, workplace diversity, use of frequent flyer points and management of misconduct. While none of these latter issues are required to be in agreements, the APS Commission can provide guidance on the relevant provisions if agencies decide to include them.

Further information is available from the APS Commission's home page at <http://www.apsc.gov.au> or through its Helpline on 02 6272 3609.

The Government expects that, given the level of their duties, Senior Executive Service (SES) employees will be covered by AWAs and excluded from certified agreements.

'Good practice' suggestions regarding agreement making matters are now brought together at Attachment D to the Supporting Guidance. This information is designed to assist agencies in the administration and management of certified agreements.

Consultancy Service

DEWR offers a consultancy service to assist agencies on a cost-recovery basis. This service includes targeted assistance to assist agencies with workplace relations reform, advocacy services, networking across agencies and publication of key resource materials.

Further Information

Further information on DEWR services, publications and updates to the Supporting Guidance can be obtained from www.workplace.gov.au/PublicSector

Other useful resources include DEWR's 'e-Guide', which may be accessed on a subscription basis. The 'Innovative Clauses' resource <http://www.workplace.gov.au> classifies a range of innovative clauses identified by agencies (in their certified agreements) and may assist other agencies in considering ways of achieving greater flexibility.

GENERAL POLICY AND GOVERNMENT APPROVAL REQUIREMENTS FOR CERTIFIED AGREEMENTS

Agreement making for APS agencies is subject to the Policy Parameters at [Attachment A](#).

APS Agency Heads are responsible for managing relations with their employees consistent with the WR Act and for ensuring that their agency agreements, both certified agreements (CAs) and Australian Workplace Agreements (AWAs), are consistent with the Policy Parameters.

Assessment of Certified Agreements

Agencies are encouraged to discuss relevant issues with DEWR Client Contacts during the development of an agreement, particularly in terms of whether emerging issues are consistent with the Policy Parameters. Further, commencing self-assessment against the Policy Parameters when undertaking substantive drafting of an agreement, will assist agencies in identifying potential issues in relation to Government policy at an early stage. An assessment checklist is provided at [Attachment B](#).

Agencies are to:

- provide DEWR with their final draft agreement and self-assessment against the Policy Parameters prior to seeking the Agency Minister's approval and subsequent endorsement of staff; and
- advise the Agency Minister of any unresolved Policy Parameter issues identified by DEWR (or the APS Commission) when seeking the Minister's approval of the agreement.

A copy of an agency's draft agreement will be forwarded to APS Commission for assessment against the Policy Parameter 4 on redeployment, reduction and retrenchment, and advice on any non-Policy Parameter matters, including broadbanding, performance management, and merit and open competition, that may assist the agency in the administration of the agreement. DEWR will coordinate the final reply to the agency in relation to Policy Parameter concerns.

DEWR and the APS Commission will endeavour to complete their assessment of policy issues in five working days of receiving an agency's draft agreement and assessment. DEWR undertakes to discuss any possible Policy Parameter issues with agencies prior to finalising its formal assessment of the agency's draft agreement.

Variation to Certified Agreements

Agencies seeking to vary their agreement formally under the WR Act should provide any proposed variations to DEWR for assessment against the Policy Parameters.

Agencies should also advise their Agency Minister of any policy issues identified by DEWR, prior to seeking their employees' endorsement of the proposed variation (as required under ss.170MD(3) of the WR Act).

1. WORKPLACE RELATIONS POLICY

Agreements are to be consistent with the Government's workplace relations policies.

This includes:

- fostering more direct relations between agencies and their employees;
- protecting freedom of association;
- providing scope for comprehensive AWAs to be made with staff; and
- displacing existing agreements and, wherever possible, awards.

Government Policy Parameter

Direct Relations between Agencies and Employees

A central tenet of the Government's broader workplace relations reforms is the development of more direct employer-employee relationships without the uninvited intervention of third parties, for example tribunals, unions or central agencies.

Consultation with Employees and Facilities for Employee Representatives

The focus of communication and consultation should be between management and employees, with any provision for employee representation to be at the request of employees.

The Government expects that consultative arrangements will encompass all staff, while focussing on the particular circumstances of an agency in delivering their priority outcomes.

Where consultative practices involve employees in decisions affecting them, there may be less need for separate employee representative facilities and processes.

Where the particular circumstances of an agency warrant the provision of separate facilities, they should be accessible by all staff with representative duties, regardless of their membership or otherwise of a union. In other words, it is not appropriate to provide facilities exclusively for the use of one group but not for another group which is legitimately representing the interests of employees.

Protecting Freedom of Association

Consistent with the provisions of the WR Act, employees are free to choose:

- whether or not to join a union;
- whether to remain a member of a union;
- which union to join, if they do decide to join a union (which is eligible to represent their industrial interests); and
- whether or not to participate in any union activities.

Staff must not be subject to any victimisation or discrimination on the grounds that they are, or are not, a member of a union.

Agreements should:

- neither encourage nor discourage union membership or representation
 - the use of agency facilities to promote union membership, for example to distribute union recruitment material or to give union representatives time to address induction programs is not appropriate as it may be seen as encouraging or endorsing union membership;
- ensure consultative arrangements encompass all employees, including representatives of staff who are not union members
 - the use of the inclusive term 'employee representative' rather than 'union representative' will provide scope for the involvement of non-union employees,
 - where the use of the term 'union' is considered appropriate, it is important to ensure that there is also scope for non-union employees to be consulted and choose who they wish to represent them – by the use of provisions such as 'employees, and where they choose, their representatives' or 'employees, and where they choose, their representatives, including unions' enshrine choice as to representation;
- not provide scope for the automatic and/or uninvited involvement of third parties, for example unions that are party to, or become bound by, the agreement, or the Australian Industrial Relations Commission (AIRC),
 - the use of the term 'party' may provide scope for uninvited third party involvement – the term 'the parties to the dispute' is preferable,
 - terms such as 'person of their choice' or 'person of their choice such as an employee representative or union representative' also protect against uninvited involvement by a third party; and
 - ensure dispute prevention and settlement procedures (DPSPs) provide all employees (union members and non-union employees) with common access to processes and focus on the parties to the dispute resolving issues at the level closest to where the dispute is occurring (further 'good practice' suggestions regarding DPSPs are provided at [Attachment D](#)).

The *Australian Public Service Award 1998* (APS Award) contains provisions which are inconsistent with the Government's workplace relations policy. To ensure consistency with the Government's freedom of association policy, where agreements will operate in conjunction with the APS Award, agencies should displace subclauses 26.1.7 (averaged shift penalties) and 26.3 (twelve hour shifts) of the APS Award as these provide for union notification and representation as a matter of course, rather than choice by affected employees. If needed, provisions on these matters may be incorporated into agreements, appropriately reworded to meet the Government's policy on choice of representation.

Compulsory Union Levy Clauses

Agencies should neither encourage nor discourage union membership or representation through their agreements. Compulsory union levy clauses (or bargaining agent fee clauses), which impose a levy on non-unionists for the provision of unrequested industrial services, represent an indirect means of promoting union membership. Accordingly, agencies should not include such clauses in their agreements.

Payroll Deduction of Union Dues

The Government's policy on the payroll deduction (PRD) of union dues requires individual employees in Australian Government employment who use this facility to annually confirm their wish to have union dues deducted from their pay. In practical terms, agencies will need to invite relevant employees to elect each year whether they wish to continue with the PRD of union dues.

DEWR will annually remind agencies of the need to seek employee confirmation as to whether or not they wish to continue to utilise the PRD facility.

Managing Industrial Action

Agencies should advise the Agency Minister, copied to the Minister for Employment and Workplace Relations (and Minister Assisting the Prime Minister for the Public Service) of any industrial disputes which could significantly affect the delivery of services and their proposed response. Further, agencies should not apply to suspend or terminate a bargaining period unless they have obtained the approval of the Agency Minister, in consultation with the Minister Assisting the Prime Minister for the Public Service.

Where a workplace issue or dispute arises, agencies and employees are required to follow DPSPs under agreements or awards which apply to them. Section 170MN of the WR Act provides for employees and employers to take protected industrial action, where legislative requirements are met. Industrial action taken during a bargaining period is not necessarily protected, for example if there has not been a genuine attempt to reach agreement by either party, or if employees have failed to notify the agency of the type and timing of action. Industrial action undertaken during the period of an agreement

would generally be unprotected. The WR Act provides remedies to deal with illegitimate industrial action such as s.127 orders to prevent or stop industrial action.

Section 187AA of the WR Act prohibits the payment of wages to employees for any period they are engaged in industrial action. Agencies must take appropriate action to ensure they meet the 'no strike pay' provisions for any industrial action – whether protected or unprotected. Industrial action, as defined in s.4 of the WR Act, includes unauthorised absence from the workplace, bans and limitations, and work to rule.

Before initiating an employer lockout, agencies should first consult with the Agency Minister, copied to the Minister Assisting the Prime Minister for the Public Service.

The WR Act allows employers to institute industrial action during a bargaining period. An employer lockout involves the employer preventing employees from working, and not paying them, without dismissing them, in order to persuade employees to agree to certain terms and conditions of employment in an agreement.

Right of Entry for Union Representatives

The WR Act provides for a representative of a union eligible to represent employees in an agency to enter the agency's premises without the permission of the employer to investigate during working hours suspected breaches of the WR Act or obligations under the WR Act, or for discussions with employees in their own time (see s.285A – s.285G of the WR Act). The WR Act makes entry conditional on union representatives holding a permit issued by the Industrial Registrar and providing at least 24 hours notice to the employer (verbal notice is sufficient under the WR Act).

It is important that agencies ensure that union representatives observe the provisions of the WR Act. Given the provisions of the WR Act, there is no need for agencies to include right of entry provisions in their agreements, nor would it be appropriate for enhanced right of entry arrangements to be established through agreements.

Future Agreement Making Options

Agencies should not make commitments in agreements on consultations to develop replacement agreements which may limit their future agreement making options, for example, including provisions detailing how an issue will be addressed in future agreements.

In particular, agencies should ensure that any provisions allow future agreements to be made directly with their employees. Being silent in an agreement about who will be involved in consultations when making a replacement agreement, or using the term 'parties', may imply the automatic involvement of all persons who become bound by the agreement.

Accordingly, if any provision is made for future agreements, it should ensure that consultations are between the agency, its employees and their representatives.

Facilitating Access to AWAs

The Policy Parameters require Agency Heads to put into place arrangements that enable any employee in their Agency to seek to negotiate an AWA.

Agencies are required to provide for access to all agreement making options under the WR Act and retain the capacity to offer AWAs to all employees.

The Government expects that, given the level of their duties, Senior Executive Service employees will be covered by AWAs and excluded from certified agreements.

All APS certified agreements should incorporate explicit provision enabling Agency Heads to subsequently enter into AWAs with employees at all levels.

Comprehensive Agreements

Agencies are required to make agreements comprehensive by displacing existing agreements and, wherever possible, awards.

Certified Agreements

As a minimum, agencies must, through their CA, displace the *Continuous Improvement in the APS Enterprise Agreement 1995-96* (the Continuous Improvement Agreement) and existing agency CAs. Agencies should note that an application to terminate the Continuous Improvement Agreement is currently before the AIRC. Where agencies wish to retain access to particular provisions from existing agreements, these provisions should be incorporated in the new agreement.

APS Award

Agencies are encouraged to make stand alone CAs which provide for all of the pay and conditions entitlements of employees. Accordingly, wherever possible, agencies are encouraged to displace the APS Award, as varied from time to time, through their CAs. Where agencies decide their CA will operate in conjunction with the APS Award (or incorporate the provisions of the APS Award applying as at the date of certification), there are two clauses of the APS Award concerning averaged shift penalties and twelve hour shifts that should be displaced (refer to Freedom of Association section – p.10).

Australian Workplace Agreements

As AWAs operate to the exclusion of any award that would otherwise apply to the employee, AWAs should be fully comprehensive and clearly provide for all the terms and conditions of employment.

Commonwealth Legislation

Commonwealth legislation regulates various conditions of employment, for example long service leave, maternity leave, superannuation, workers' compensation, and occupational health and safety. The PS Act and subordinate legislation such as the PS Regulations, the Prime Minister's Public Service Directions, the Public Service Commissioner's Directions and the Classification Rules also create certain rights and entitlements for APS employees.

CAs and AWAs cannot override or displace provisions under Commonwealth legislation, including regulations or other subordinate legislation, unless specifically authorised by regulations made under the WR Act.

CAs and AWAs can only override Commonwealth legislation which has been prescribed under ss.170LZ(4) and ss.170VR(4). The only provisions that have been prescribed under WR Regulations 30ZE (CAs) and 30ZJ (AWAs) are ss.24(1) of the PS Act, ss.24(1) of the *Parliamentary Service Act 1999* and various provisions of the *Australian Federal Police Act 1979*.

A summary table outlining the interaction of CAs and AWAs with other authorities is provided at [Attachment C](#).

Public Service Act 1999 (PS Act) and Agency Head Determinations

Subsection 24(1) of the PS Act gives Agency Heads the power to determine terms and conditions of employment for employees in their agencies. It is the Government's policy that terms and conditions of employment be established through agreements made under the WR Act. Accordingly, this determination making power should be used sparingly, primarily to remedy genuinely unforeseen issues that arise during the life of an agreement, without the need to vary the agreement.

Note, however, that:

- ss. 24(1) cannot be used to reduce benefits contained in an award or an agreement;
- ss. 24(1) should not be used as a substitute for agreement making or for varying existing agreements in due course; and
- as far as possible, agreements should be drafted to encompass situations that can be foreseen as arising during the life of an agreement, such as predictable variations in remuneration or conditions.

Employee Entitlements

Agency agreements should not provide guarantees in respect of future employee entitlements in circumstances where current agency activities are being or will be market tested or contracted out.

The Government has established the General Employee Entitlements and Redundancy Scheme (GEERS) as a safety-net scheme designed to protect employees who have lost their job and employee entitlements due to their employer becoming insolvent or bankrupt. Agencies should therefore not include any undertakings to provide or explore the provision of guarantees regarding employee entitlements. For further information on this issue, refer to DEWR's Workplace Relations Advice No. 2002/3.

Agencies should note that in assessing agreements against the Government's workplace relations policy objectives, DEWR also seeks to coordinate advice to agencies about provisions that may not be consistent with the broader Government policies and/or decisions. Accordingly, where agreements provide for market testing and outsourcing, DEWR will discuss the proposed provision with the Department of Finance and Administration which is responsible for the Government's competitive tendering and contracting policy.

Termination of Employment

Agencies should not provide in agreements for avenues of appeal against termination of employment other than through the WR Act. APS employees have the same rights as the rest of the workforce to apply to the AIRC for relief in relation to termination of employment.

Section 33 – Review of actions of the PS Act specifically provides that:

... an APS employee is not entitled to review under this section of APS action that consists of the termination of the employee's employment.

Agencies should ensure that termination of employment or a decision to terminate employment cannot be reviewed under dispute prevention and settlement procedures or review of actions provisions in an agreement.

[Attachment D](#) provides further 'good practice' suggestions on termination of employment issues.

2. APS REMUNERATION POLICY

Improvements in pay and conditions are to be linked to improvements in organisational productivity and performance

- **other than in exceptional circumstances, pay increases are to apply prospectively.**

Government Policy Parameter

Remuneration outcomes through agreements should be linked to higher productivity and performance. No provision in an agreement should create any expectation or prospect that improvements will flow simply due to changes in the external environment, for example changes in general taxation arrangements.

Improvements in pay and conditions under agreements should be underpinned by productivity gains and should not result in either increased prices or a reduced quality of services. To reinforce the linkage between improvements in pay and conditions and organisational productivity and performance, agencies may wish to consider making general or individual pay increases, either in part or full, contingent on the achievement of key corporate goals or targets.

There is no cap on the quantum of salary increases that may be agreed by agencies - this is a matter to be settled at agency level. However, agencies should be mindful that above average pay increases in one agency lead to pay pressures in other agencies and that general pay increases reward all employees to the same extent as high performing employees.

Where an agency offers pay increases which are significantly above average, DEWR will generally seek further advice from the agency regarding the factors influencing the proposed pay increase. In this regard, one strategy agencies could consider is to offer modest across the board pay increases and link access to additional increases to individual performance outcomes, thus attracting, retaining and rewarding high performing employees. AWAs could also be used more widely and flexibly to attract, retain and reward high performing employees.

In addition, agencies should also explore changes to non-monetary employment conditions and working arrangements. For instance, many employees are attracted to flexible working arrangements that assist them in balancing their work and personal responsibilities and this may require specific provision in an agreement.

The Policy Parameters explicitly state that pay increases should apply prospectively ie from the date of certification of the agreement or the date that an AWA is agreed with the staff member, subject to the approval of the AWA by the Office of Employment Advocate, with any retrospectivity applying only in exceptional circumstances.

Longstanding industrial practice has been to avoid retrospective pay increases, as it involves additional pay and significant administrative and processing costs. It also creates pressure for other agencies.

It is important that agencies and employees properly manage the timing of negotiations for a replacement CA to avoid delays between the nominal expiry date (NED) of the current CA and date of certification of the replacement agreement. Agencies should have in place a strategy to facilitate the process to certification having regard to:

- informing employees about the content of proposed agreements prior to voting;
- conducting the ballot; and
- preparing the mandatory documentation and arranging certification by the AIRC; as these requirements can prolong the period between the dates of in-principle agreement and certification of the agreement.

While DEWR will carefully consider any agency proposal citing exceptional circumstances in support of proposed backdating, it envisages very few, if any, circumstances as likely to warrant retrospectivity. Agencies are encouraged to contact DEWR at an early stage to discuss their circumstances.

No-Disadvantage Test

The No-Disadvantage Test (NDT) established under the WR Act requires that agreements must not result in a reduction in employees' overall terms and conditions of employment when compared with the relevant award and any relevant laws. [Attachment C](#) outlines which authorities form part of the NDT under the WR Act, while [Attachment D](#) also provides further guidance on the NDT.

New Superannuation Arrangements for Australian Government Employees

Agencies should not make commitments in their agreements which pre-empt any legislation, but should note that the proposed arrangements will allow flexibility to adjust the mix between salary and superannuation contributions.

Junior Rates and New Apprenticeships including Traineeships

The Government's view is that, where appropriate to their needs, employers should be encouraged to employ juniors. Junior rates are an integral part of the base level classifications and should be included in agreements which incorporate these classifications.

The WR Act makes available workplace relations arrangements for apprenticeships and traineeships. The arrangements provide agencies with flexibility to implement entry level training strategies, including above base entry levels, specifically tailored to meet their needs. Wage arrangements provide for wages to be adjusted to reflect the reduction in productive time due to time spent in training under the traineeship or apprenticeship, as determined by an approving authority.

Further information may be obtained by accessing the Department of Education, Science and Training website: www.newapprenticeships.gov.au.

3. FUNDING

Improvements in pay and conditions are to be funded from within agency budgets.
Government Policy Parameter

Agreements are to be funded, including any increased employer superannuation liabilities, from within agency appropriations as generally determined in the Budget context, including efficiency dividend and specific Budget decisions.

A budget funded agency's price of outputs reflect a combination of measures, including movements in community wage increases based on the outcome of the most recent AIRC Living Wage Case decision converted to a percentage of Average Weekly Ordinary Time Earnings through application of a composite index to its output appropriation.

Within this framework, agencies are required to provide for improved remuneration and conditions under their own funding arrangements including any 'outside budget' funding as appropriate.

As improvements in pay and conditions are to be underpinned by higher productivity outcomes, there should be no increase in prices or reduction in the quality of services resulting from agreements.

4. REDEPLOYMENT, REDUCTION AND RETRENCHMENT

Agreements are to include compulsory redeployment, reduction and retrenchment provisions, with any changes not to enhance existing redundancy arrangements

- an Agency Minister may, in consultation with the Minister Assisting the Prime Minister for the Public Service, approve separate financial incentives to resolve major organisational change. Such incentives are to be cost neutral to the agency in the context of the major organisational change.

Government Policy Parameter

Compulsory Redeployment, Reduction and Retrenchment

All CAs and AWAs must provide for access to compulsory redeployment, reduction and retrenchment for excess APS staff. This will ensure that agencies maintain the capacity to resolve excess staff situations by either:

- moving the employee to a suitable job at or below their substantive classification level (with or without the employee's agreement); or
- terminating employment if the employee does not wish to accept voluntary retrenchment and there is no useful work for the employee to perform.

No Enhancement of Existing Obligations

While agencies are able to adapt their redundancy provisions to meet their specific needs, any revision must not be an enhancement of existing obligations in terms of the arrangements already in place in the agency. For example:

- the redundancy benefit of two weeks' salary for each completed year of continuous service to a maximum of 48 weeks' salary available to staff under the APS Award must not be exceeded even if retention periods are removed or reduced; but
- an agency may wish to provide payment in lieu of part or all of the one month consultation period, the one month consideration period and/or the four or five weeks' notice period set out in the former *APS General Employment Conditions Award 1995*.

Under the APS Award, a redundancy benefit is payable to an excess employee whose employment is terminated, regardless of whether the termination is with or without the employee's consent.

Where an agency's agreement allows for access to an extended period of retention under the redundancy provisions, the agency will need to ensure that a redundancy benefit is

not made available to an employee who has rejected voluntary retrenchment and has elected to access the extended period of retention in employment.

Conversely, an agency may seek to modify their redundancy provisions to suit their particular circumstances, for example, by excluding the retention arrangements for employees who do not accept voluntary retrenchment.

Major Organisational Change

Where an agency wishes to make a separate financial payment to a particular group of employees to facilitate the early resolution of a major one-off restructuring or change, then it must obtain the approval of the Agency Minister, in consultation with the Minister Assisting the Prime Minister for the Public Service.

In seeking approval an agency will need to:

- demonstrate that special circumstances exist;
- ensure that the making of this separate financial payment represents no additional cost to the agency in that it does not exceed what would otherwise have been the overall cost of implementing the change
 - for example, where a particular function is to cease, or an office in a specific location is to close, and there are savings in terms of accommodation and other overheads if all staff leave by a specific date; and
- identify any savings to be achieved by making the special payment.

Such a payment must not create a precedent for other agencies and there must be a clear benefit to the Commonwealth. No such payment has been approved under the Policy Parameters, and it is likely that this provision will be used only in very exceptional circumstances.

[Attachment D](#) provides further advice on this aspect of redeployment, reduction and retrenchment provisions.

Statutory Obligations and Termination of Employment

Agencies need to be aware that a CA or an AWA cannot override statutory obligations relating to:

- termination of employment under the WR Act, particularly in relation to minimum periods and payment in lieu of notice, see s.170CM of the WR Act;
- provisions relating to consultations with unions on significant redundancy exercises, that is affecting 15 or more employees, see s.170GA of the WR Act; and
- payments authorised under s.37 of the PS Act to SES employees as an incentive to retire.

Further information on redeployment, reduction and retrenchment may also be obtained by contacting the APS Commission's home page <http://www.apsc.gov.au> or the APS Commission's Policy and Employment Group on (02) 6272 3609.

5. FACILITATING MOBILITY AND MAINTAINING A COHESIVE APS

Agreements are to facilitate mobility across the APS by:

- maintaining structures that are consistent with the Classification Rules, with salary advancement to be guided by performance; and
- retaining portability of accrued paid leave entitlements.

Government Policy Parameter

Classification Structures

Section 23 of the PS Act provides for the Public Service Minister (the Prime Minister) to make rules about classifications of APS employees. The Public Service Classification Rules allow employees and duties to be classified on the basis of work value and enable the grouping of classifications at comparable levels.

The Public Service Classification Rules 2000 are available at <http://www.workplace.gov.au/PublicSector>

The Policy Parameters require that the classification structures contained in agency agreements are consistent with the Classification Rules.

Salary Advancement

The Public Service Commissioner's Directions (Chapter 2.12) require agencies to put in place a fair and open performance management system that covers all employees, guides salary movement, is linked to organisational and business goals and the maintenance of the Values, and provides employees with a clear statement of performance expectations and an opportunity to comment on those expectations. The Policy Parameters require salary advancement to be guided by performance, i.e. salary advancement should only occur where an employee's performance has been assessed as effective or better. Within this broad framework, Agency Heads have the flexibility to develop performance management systems that meet the particular needs of their organisation and employees.

Portability of Accrued Leave Entitlements

Agreements are to retain portability of accrued annual leave and personal/carers leave entitlements (however described) within the APS, with future entitlements being those prevailing at the receiving agency. Subsequent leave will accrue at the rate applying in the receiving agency.

Further, the provisions of the *Parliamentary Service Act 1999* and the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* require agencies to recognise certain leave accrued in these services. Accordingly, agreements should provide for the portability of annual and personal/carers leave (however described) between the Parliamentary Service and the APS, and accrued annual leave between the ACT Public Service and the APS. Also agreements should provide for the portability of personal/carers leave between the ACT Public Service and the APS as this is the basis of ongoing inter-government agreement.

[Attachment D](#) provides further advice on the portability of leave entitlements.

6. SUPPORT FOR DEFENCE RESERVISTS

Agreements are to include leave policies and employment practices that support the release of Defence Reservists for peacetime training and deployment.

Government Policy Parameter

The Government's 2000 Defence White Paper, *Defence 2000 Our Future Defence Force*, noted that the Government will show the way as a major employer of Reservists by having leave policies and employment practices that support the release of Defence Reservists for peacetime training and deployment. Consistent with this commitment, agreements are to provide Reservists with access to leave to undertake peacetime training and deployment.

The Defence Reserves Support Council (DRSC), an advisory body established by the Government, has developed a public sector leave policy which it strongly commends to all APS agencies. Specifically, the DRSC recommends agencies:

- provide 4 weeks (20 working days or 28 calendar days) leave on full pay each year for Reservists undertaking Defence service;
- provide an additional 2 weeks paid leave to allow for a Reservists' attendance at recruit/initial employment training;
- provide scope for additional leave for Defence service, either on a paid, unpaid or top-up pay basis;
- not require Reservists to pay their tax-free Reserve salary to their agency in any circumstances;
- allow Defence leave entitlements to accumulate and be taken over a 2 year period;
- treat leave for Defence service, whether with or without pay or on top-up pay, as service for all purposes – the exception being that a period or periods of leave without pay in excess of six months not count as service for annual leave purposes; and
- provide Reservists with continued access to other components of their remuneration package, eg. Superannuation (subject to the rules of the CSS, PSS and Military Superannuation and Benefits Scheme), studies assistance, salary reviews, cars, during periods of Defence service.

In addition, the DRSC considers it important that agencies keep Reservists employed by an agency and who are undertaking peacetime training or deployment informed of developments in the workplace. For instance, Reservists absent from the workplace on Reserve service should be kept abreast of developments regarding their agency's agreement making negotiations and afforded the opportunity to participate in any ballot

on a proposed certified agreement where their employment is or will be subject to the agreement. This is not only good practice, but is also common in respect of other employees on extended leave.

Such arrangements would be entirely consistent with the Government's commitment to show the way in establishing employment arrangements which support Reserve service. The Government therefore supports DRSC calls for agencies to implement arrangements along these lines through their agreements. Agencies are encouraged to retain their existing agency arrangements where those arrangements are already in advance of those advocated by the DRSC.

APS agencies are now also eligible to receive the Employer Support Payment (ESP). The ESP scheme provides a financial benefit to those employers who provide leave, other than normal paid leave entitlements (eg. annual leave), to Reservists to undertake peacetime training and deployment. Under the Scheme an employer is eligible to receive the ESP once a Reservist has completed 14 days continuous Reserve service in any financial year. The qualifying period can be undertaken as a single period or as multiple periods of continuous Defence Service, as long as each period of continuous Defence service is a minimum of five consecutive days. Further information on the ESP can be obtained by contacting the DRSC on 1800 803 485.

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

More broadly, the Government strongly encourages APS agencies to actively promote the benefits of Reserve service to their employees. The DRSC can assist agencies with promotional material. As mentioned above, the DRSC can be contacted on 1800 803 485.

ATTACHMENT A - POLICY PARAMETERS FOR AGREEMENT MAKING IN THE APS (DECEMBER 2003)

The Government expects that APS agencies will lead the way in utilising the flexibilities and opportunities for reform available under the *Workplace Relations Act 1996* (WR Act). The Policy Parameters allow APS agencies the flexibility to develop agreements that are tailored to their particular needs and circumstances and are exemplars of the Government's workplace reforms.

The WR Act provides choice regarding the form of agreement available to employers and employees. Consistent with the WR Act, Agency Heads are to put in place arrangements that enable any employee in their agency to seek to negotiate an AWA.

APS Agency Heads are responsible for managing relations with their employees consistent with the WR Act and for ensuring that their agency agreements, both certified agreements and AWAs, are consistent with the following policy requirements.

Government policy requirements for agreement making

1. Agreements are to be consistent with the Government's workplace relations policies. This includes:
 - fostering more direct relations between agencies and their employees;
 - protecting freedom of association;
 - providing scope for comprehensive AWAs to be made with staff; and
 - displacing existing agreements and, wherever possible, awards.
2. Improvements in pay and conditions are to be linked to improvements in organisational productivity and performance
 - other than in exceptional circumstances, pay increases are to apply prospectively.
3. Improvements in pay and conditions are to be funded from within agency budgets.
4. Agreements are to include compulsory redeployment, reduction and retrenchment provisions, with any changes not to enhance existing redundancy arrangements
 - an Agency Minister may, in consultation with the Minister Assisting the Prime Minister for the Public Service, approve separate financial incentives to resolve major organisational change. Such incentives are to be cost neutral to the agency in the context of the major organisational change.
5. Agreements are to facilitate mobility across the APS by:
 - maintaining structures that are consistent with the Classification Rules, with salary advancement to be guided by performance; and
 - retaining portability of accrued paid leave entitlements.

6. Agreements are to include leave policies and employment practices that support the release of Defence Reservists for peacetime training and deployment.

Government approval requirements for certified agreements

Agencies are to provide their draft agreement to the Department of Employment and Workplace Relations (DEWR) for assessment against the Policy Parameters. In seeking Ministerial approval of their agreement, agencies should advise the Agency Minister of any Policy Parameter issues raised in DEWR's assessment.

Further assistance

The *Supporting Guidance to the Policy Parameters for Agreement Making in the APS* provides further guidance on the Government's workplace relations policies. Agencies are encouraged to contact DEWR (or the APS Commission on redundancy issues) during agreement negotiations to discuss issues prior to submitting their draft agreement for assessment against the Policy Parameters.

ATTACHMENT B - AGENCY ASSESSMENT CHECKLIST – POLICY PARAMETERS FOR AGREEMENT MAKING IN THE APS

Agencies may use this checklist to assess their draft agreements against the Policy Parameters prior to DEWR's consideration. This checklist should be read in conjunction with the contemporary Supporting Guidance which is periodically updated and made available at www.workplace.gov.au/PublicSector

KEY ISSUES TO CHECK	RELEVANT CLAUSES	AGENCY COMMENTS
<p>Agency has in place arrangements that enable any employee to be able to seek to negotiate an AWA (please provide details in column 'Agency Comments').</p> <p>Policy Parameter 1: Workplace relations policy:</p> <ul style="list-style-type: none"> <input type="checkbox"/> foster more direct relations between the agency and employees at the workplace; <input type="checkbox"/> consultative arrangements cover all employees and neither encourage nor discourage union membership; <input type="checkbox"/> consistent with freedom of association policy e.g. DPSPs do not provide for uninvited involvement of third parties, right of entry provisions (if included) do not go beyond the WR Act, no provision for compulsory union levies (bargaining agents fees); <input type="checkbox"/> any provision for the negotiation of future agreements does not enable the uninvited involvement of third parties; <input type="checkbox"/> provision for comprehensive AWAs to be made with employees; <input type="checkbox"/> SES excluded from certified agreement; <input type="checkbox"/> displaces existing agreements and, wherever possible, awards; and <input type="checkbox"/> consistent with legislative provisions e.g. maternity leave and long service leave. 		

<p>Policy Parameter 2: APS remuneration policy:</p> <ul style="list-style-type: none"> ❑ improvements to pay and conditions are linked to productivity including an outline of the rationale for any bonus payment provided for at the commencement of the agreement; ❑ pay increases apply prospectively; ❑ where appropriate, defines salary for purposes such as superannuation, leave, severance and termination payments; and ❑ relevant training classifications and junior pay rates are included. 		
<p>Policy Parameter 3: Agreements are funded from within agency appropriations.</p>		
<p>Policy Parameter 4: Redeployment, reduction and retrenchment (RRR):</p> <ul style="list-style-type: none"> ❑ access to compulsory RRR; ❑ no enhancement to existing redundancy obligations applying to an agency; and ❑ any separate financial incentives in certified agreements or AWAs to resolve major organisational change involve no additional cost to the agency in the context of that change and subject to Government approval – facilitative clause may be included in the agreement. 		
<p>Policy Parameter 5: Facilitate mobility and maintain a cohesive APS:</p> <ul style="list-style-type: none"> ❑ classification structures are consistent with the Public Service Classification Rules; ❑ salary advancement is guided by performance; and ❑ portability of accrued paid leave entitlements is retained. 		
<p>Policy Parameter 6: Agreements are to include leave policies and employment practices that support the release of Defence Reservists for peacetime training and deployment.</p>		

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Administrative Re-arrangements

It is not necessary for agencies to provide in agreements for the effect of administrative re-arrangements on pay and other conditions of employment. Section 72 of the PS Act and Public Service Regulation 8.1 provide a detailed framework governing the entitlements of employees who are moved as part of an administrative re-arrangement, either within the APS or to a non-APS Commonwealth authority.

Given that administrative re-arrangements can potentially give rise to complex policy and legal issues, including transmission of business issues, it is important that agencies contact DEWR and the APS Commission, where such a movement of functions into or out of the APS is anticipated. Agencies should also consider seeking legal advice on more complex movements.

For further information on administrative re-arrangements within the APS, refer to APS Commission Circular 2001/7 at <http://www.apsc.gov.au/circulars/circular0007.htm>

AWAs and Certified Agreements

The Policy Parameters require that CAs include provision for the making of comprehensive AWAs, so agencies can make subsequent AWAs with their employees. Such a provision should enable a subsequent AWA to operate to the exclusion of the CA. Agencies should not make commitments in their CA which raise the threshold of future AWA terms and conditions above the no-disadvantage test in the WR Act, for example by stating that the CA will provide the basis for terms and conditions in AWAs.

A suggested clause allowing AWAs to be made follows:

The Agency Head may enter into Australian Workplace Agreements (AWAs) with employees covered by this agreement. Those AWAs may either operate to the exclusion of this certified agreement or prevail over those terms to the extent of any inconsistency, as specified in each AWA.

If agencies and employees agree that some of the employee's conditions be the same as a CA, it is preferable to insert the actual provisions in the AWA rather than cross-referencing to the CA provisions. A stand-alone AWA will avoid unnecessary complexity in subsequent administration and interpretation of the AWA.

Agency Heads have the authority to make AWAs on behalf of the Commonwealth as the employer. The power to make AWAs cannot be delegated, however an Agency Head can authorise other employees (through the execution of a formal instrument) to enter AWAs on his or her behalf.

Only persons whose employment will be subject to a proposed CA may vote on that agreement. Whether or not the employment of a person covered by an AWA would be subject to a proposed CA depends on a range of factors. In particular, much will depend on the terms of the agreements themselves (for example, if the CA specifically excludes persons covered by an AWA, as in the clause outlined above, then anyone on an AWA will not be subject to the agreement and cannot vote). It is not necessary that the CA set all of the terms and conditions of a person's employment; even if they are only partially subject to the CA they would still be entitled to a vote.

Agencies should seek advice if there is any doubt over whether a person on an AWA is entitled to vote on a CA, as a potential consequence of wrongfully including or excluding persons from the vote is that the AIRC may refuse to certify the agreement.

An example of a clause that would clarify who is eligible to vote on the CA is:

This Agreement applies to all non SES employees within the agency employed under the Public Service Act 1999, but does not apply to APS employees in the agency who are parties to an AWA made before, on or after the date of this Agreement.

Closed Agreement

It is important that provision is made in agreements that there be no further claims which would increase labour costs except where consistent with the terms of the agreement. Agreements without such a clause run the risk of being logged by an organisation of employees for further conditions of employment. A suggested clause to prevent this occurring follows:

This Agreement constitutes a closed agreement in the settlement of all matters for its duration. The parties agreed that for the life of this Agreement, there will be no further claims, except where consistent with the terms of this Agreement.

Classification Structures

APS Classification Structure

The Public Service Classification Rules provide for APS Levels 1 to 6 and Executive Levels 1 and 2, Senior Executive Bands 1, 2 and 3 and approved agency specific classification structures. Also, the Classification Rules provide for associated training classifications comprising APS Trainees and Agency Trainees including trainees, cadets, graduates and apprentices. Remuneration arrangements for these classifications should be included in agreements for those agencies considering employing staff in these classifications during the life of the agreement. SES employees are excluded from CAs consistent with the Government's expectation that they should be covered by AWAs.

Broadbanding of the APS Classification Structure

If agencies are considering broadbanding the APS Classification Structure, they should be mindful of the Public Service Commissioner's view that it would be difficult to meet the APS Values relating to merit and reasonable access (Values (b) and (m)) without incorporating at least two breaks that would require open competitive selection, that is a minimum of three broadbands. The extent of the broadbanded structure and the location of the breaks requiring open competitive selection will depend upon the particular organisational structure of the agency. It is important for agencies to look carefully at the homogeneity or commonality of functions, including supervisory needs, when developing broadbands, and to place barriers appropriately.

It is suggested that agencies consult DEWR and the APS Commission during the early stages of development of any proposed broadbanding to ensure consistency with the APS Classification Rules and the APS Values.

Agency Specific Classification Structures

Some agencies have an agency specific classification structure under their CA as the APS classification structure could not be adapted to the needs of the agency. Where an agency is contemplating moving to an agency specific classification structure, this should first be discussed with DEWR. The APS classification structure, with the facility to broadband, is generally expected to be capable of meeting the differing needs of agencies. DEWR would, therefore, be hesitant to create a new agency structure in the absence of sound reasons for not utilising the APS classification structure.

Work Level Standards

The Classification Rules require agencies to determine Work Level Standards (WLS) for each classification being utilised in the agency. WLS specify the distinctive features of work at each level, characterising the type of duties undertaken and assessing the

relative worth of jobs in terms of work value. These need not be referred to in agreements.

SES Classification and Remuneration Arrangements

The three Band classification framework for the SES cannot be broadbanded.

As previously mentioned, the Government expects APS agencies to have entered into AWAs with their SES staff.

Commonwealth Legislation

Long Service Leave (Commonwealth Employees) Act 1976

There is minimal scope for flexibility on long service leave provided under the *Long Service Leave (Commonwealth Employees) Act 1976*. In particular, agencies cannot modify the rate or basis of calculation of entitlements or provide for cashing out through their agreement.

However, agencies can modify the minimum period of long service leave that can be granted through their agreements or through administrative arrangements, as this is not stipulated in the legislation. For example, agencies might choose to stipulate that long service leave should not be granted for less than 15 calendar days on the basis that long service leave is intended to provide employees with a substantial break from work after a period of continuous long service. In any case, the minimum period of leave granted should not be less than seven calendar days. This is because long service leave currently accrues on a calendar month basis and a shorter minimum grant of long service leave could provide an enhanced entitlement.

Maternity Leave (Commonwealth Employees) Act 1973

Some agencies have included in their agreement, an option for an employee to request that payments in relation to the 12 weeks required absence in relation to childbirth be spread over a period of 24 weeks, that is, to request half pay maternity leave. The legal basis for such an option is simply an administrative arrangement with the employee that the payments to which she has become legally entitled be made over a longer period of time. Agreements should make it explicit that under such arrangements, the initial 12 week period counts as full time service. As the second 12 weeks is not strictly paid leave under s.7B of the *Maternity Leave (Commonwealth Employees) Act 1973* it does not count as service. This should also be made explicit in the agency's agreement.

Contingency Clauses

In considering whether to include a contingency provision, agencies should take account of the following:

- an important outcome of agreement making is to provide certainty over labour costs for the duration of the agreement (and this may influence its duration);
- for budget funded agencies, the cost of workplace agreements are to be funded from within the agency's budget;
- where a contingency provision is included, it should
 - be limited to unforeseen and exceptional circumstances
 - be limited to changes that the Government (as ultimate employer of APS employees) has some control over; and
 - provide for the particular circumstances to be discussed at the time, with any changes subject to the agreement of the Agency Head, that is the agency has the capacity to consider the costs and other implications of any change, and
- any outcome of such a clause, whether achieved by a formal variation of the agreement or by actions authorised by the provision, must be fully consistent with the Policy Parameters.

It remains open to an agency to include an appropriate facilitative provision in an agreement to provide scope for reassessing cost reimbursement arrangements such as travelling allowance. This may cover the quantum paid (given that it is meant to cover actual costs) or the administration of the arrangements, for example an appropriately based allowance versus reimbursement of actual costs.

Determinations

Subsection 24(1) of the PS Act

The WR Regulations allow certified agreements and AWAs to change or displace conditions of employment determined by Agency Heads under ss.24(1) of the PS Act, except in relation to administrative re-arrangements under s.72 of the PS Act. Therefore, Agency Heads will not be able to make agreements which prevent them from using ss.24(1) determinations to vary the remuneration or other conditions of employees moved into the agency as a result of administrative re-arrangements under s.72 of the PS Act.

Given that Agency Heads may determine remuneration and other conditions under ss.24(1), it is suggested that agencies leave open the capacity to make future determinations under ss.24(1) of the PS Act to deal with unforeseen issues which may

arise during the life of an agreement. Therefore, agencies are encouraged to exclude the operation of awards under their agreements but not to displace the use of ss.24(1) determinations (which will occur if agreements displace all prescribed conditions under WR Regulations 30ZE and 30ZJ).

DEWR's Workplace Relations Advice No. 2000/9 provides more information on the use of ss.24(1). See also p.13 of the Supporting Guidance.

Dispute Prevention and Settlement Procedures

In developing DPSPs to meet their particular needs, agencies may provide for the involvement of a third party such as a mediator, conciliator or arbitrator in circumstances where the parties to the dispute are unable to resolve the matter. There is no requirement that disputes arising from an agreement must only be settled by the AIRC.

In light of the High Court decision in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 75 ALJR 670, agreements should clearly specify the powers being given to a third party regarding the settlement of matters in dispute and acceptance of such decisions.

How matters are referred to a third party should be consistent with freedom of association principles. Agencies should be cautious about using the term 'parties' in DPSPs as it may provide scope for the automatic involvement of persons and bodies who become bound by an agreement – refer to p.9 of the Supporting Guidance.

Agencies may wish to note that an employee is also entitled to seek a review of any APS action that relates the employee's APS employment under s.33 of the PS Act.

Executive Vehicle Scheme

Agency Heads are responsible for the operation of the Executive Vehicle Scheme (EVS) Guidelines within their Agencies (refer to DEWR Workplace Relations Advice Nos.2004/3 and 2004/3A).

Expired Agreements

For reasons of good housekeeping, agencies are encouraged to terminate expired certified agreements under s.170MH of the WR Act, immediately following certification of a replacement agreement.

No-Disadvantage Test

The No-Disadvantage Test (NDT) established under the WR Act requires that agreements must not result in a reduction in employees' overall terms and conditions of employment when compared with the relevant award and any relevant laws. This comprehends not only the APS Award, but various legislated provisions including determinations and terms and conditions created under enabling legislation and subordinate authorities. The NDT is a 'global' test of the overall outcome, not a 'line-by-line' comparison with previous provisions.

Following the award simplification process, agencies have more flexibility to revise their terms and conditions of employment consistent with the NDT. For example, redeployment, retirement and redundancy retention periods under the former *APS General Employment Conditions Award 1985* have not been included in the APS Award.

To maximise the potential advantages which agreement making arrangements offer to agencies, it is important to understand how agreements reached under the WR Act can affect, or be affected by, such authorities as:

- the APS Award;
- agreements certified under the previous *Industrial Relations Act 1988* and the WR Act;
- the PS Act and Agency Head Determinations made under ss.24(1) of the PS Act; and
- other Commonwealth legislation covering employment conditions.

Attachment C also outlines which legal authorities may form part of the NDT under the WR Act.

Portability of Accrued Leave Entitlements

The portability of leave within the APS requires receiving agencies to act on the advice of an employee's former agency in determining what constitutes accrued leave. For example, agencies have used a range of terms to describe personal/carers leave in their existing agreements and have provided it for varying reasons. A receiving agency is required to recognise leave accrued in an employee's former agency, even if the purpose for which it was provided is not recognised in the receiving agency's agreement.

As previously noted (see pp.13-14 of the Supporting Guidance), certain conditions of employment – as set out in various Commonwealth legislation – will continue to apply and are not able to be overridden by agreements, in particular long service leave, maternity leave, workers' compensation and occupational health and safety.

A suggested clause providing for portability of accrued leave between the Parliamentary Service and the APS and ACT Public Service and the APS follows:

Where an employee joins the Agency on or after the certification date from an employer staffed under the Public Service Act 1999, the Parliamentary Service Act 1999 or from the ACT Government Service, accrued annual leave and personal/carers leave (however described) will be transferred, provided there is no break in continuity of service.

Further information on payments related to the portability of accrued annual and long service leave entitlements is set out in the Financial Management and Accountability Orders 1997.

Redeployment, Reduction and Retrenchment

To enable a separate payment to a particular group of employees to facilitate the early resolution of a major one-off restructuring, agencies will need to either vary their existing agreement in accordance with the WR Act (but this could overly delay the organisational change) or include a facilitative clause in their next agreement along the following lines:

Where a separate payment would facilitate the speedy resolution of major organisational change and it can be demonstrated that special circumstances exist, the Agency Head may, with the agreement of the Agency Minister, in consultation with the Minister Assisting the Prime Minister for the Public Service, make a separate financial payment in addition to and separate from the entitlements prescribed in the Redeployment, Reduction and Retrenchment (or however described) provisions in this agreement for excess employees.

Superannuation

Superannuation Act 1976, Superannuation Act 1990, Superannuation (Productivity Benefit) Act 1988 and the Superannuation Benefits (Supervisory Mechanisms) Act 1990

Most Australian Government employees are members of either the Commonwealth Superannuation Scheme (CSS) or the Public Sector Superannuation Scheme (PSS). The CSS and PSS are established under the *Superannuation Act 1976* and in the Trust Deed and Rules under the *Superannuation Act 1990*, respectively. Agencies with employees who are not CSS or PSS members, for example, because they are ineligible to join, are required to make superannuation contributions for those employees in accordance with the *Superannuation (Productivity Benefit) Act 1988*.

The *Superannuation Benefits (Supervisory Mechanisms) Act 1990* establishes the framework within which all agencies must provide superannuation for employees who do not have

superannuation provided for them under other legislation. Currently, this framework does not generally permit agencies to provide alternative superannuation arrangements for their employees. Agencies are permitted to provide additional superannuation through salary sacrifice subject to meeting certain conditions. Further information is available on Department of Finance and Administration's home page at <http://www.dofa.gov.au/super>

Salary and Superannuation

Employees who are CSS or PSS members and Agency Heads can reach agreement on superannuation salary or the method for determining that salary, and these outcomes can be included in a CA or AWA.

Where a superannuation salary is not set in an agreement, the normal CSS and PSS salary rules continue to apply. These rules provide that, normally, superannuation salary cannot decrease for an employee because the current superannuation regulatory legislation does not generally permit reduction in accrued benefits. Where a decrease in actual salary occurs – even by agreement – the rules usually provide for the automatic maintenance of the superannuation salary that applied before the decrease, updated by movements in Average Weekly Ordinary Time Earnings.

Agencies can also arrange top-up superannuation cover on a salary sacrifice basis. Top-up arrangements, which must satisfy certain conditions, are only permitted if a CA or an AWA incorporates flexible remuneration arrangements that include provision for salary sacrifice. The top-up arrangements enable all employees to have additional superannuation cover and will not affect CSS or PSS membership.

The employer superannuation payments paid through Comsuper are adjusted, over time, to reflect the superannuation costs of the particular agency. Agencies need to assess the superannuation costs of proposed remuneration changes, including from cashing out of other benefits, to ensure that any increases in superannuation costs are fully taken into account in decisions on CAs and AWAs.

Agencies are required to meet the full resultant superannuation cost increases for past service of the employees affected. For example, cost increases could be substantial in respect of long serving employees granted large salary increases close to retirement, including cashing out of non-wage benefits into salary.

New Superannuation Arrangements for Australian Government Employees

The Government has indicated its intention to pursue new arrangements providing Commonwealth civilian employees with greater choice and control over their superannuation savings and to improve the flexibility of their superannuation arrangements, including providing more portable arrangements. Further, the

Government remains committed to the closure of the PSS and to giving Australian Government employees greater choice of superannuation fund.

Supported Salary Payments

Agencies may wish to include in their agreements provision for the Supported Salary Payments for Employees with a Disability should, during the life of the agreement, the agency employ an eligible employee with a disability or an existing employee acquires a disability.

Transmission of business provisions of the WR Act

DEWR has produced a series of information papers in connection with Court decisions about the transmission of business provisions of the WR Act. The information papers focus on the implications for contracting out of services and activities and information technology outsourcing by APS agencies. Recent papers are available on the DEWR home page: <http://www.workplace.gov.au>

In brief, the various Court decisions regarding transmission of business and outsourcing highlight the need for agencies, in market testing, to focus on achieving value for money by identifying the most efficient and effective way of providing services, not a reduction in terms and conditions of employment. Further, the transmission of business issue is not an impediment in itself to market testing, contracting out or information technology outsourcing by agencies. It is one of a number of issues that agencies need to manage in any contracting out process. Tenderers should be made aware of the provisions of the WR Act in order that they may develop a commercial risk assessment and management strategy.

There are some courses of action available to agencies and/or new employers in circumstances where a transmission of business may be an issue – though the appropriateness of those courses of action depends on the circumstances of each case.

In relation to awards, the agency and/or the new employer may apply to the AIRC for an order under ss.149(1) of the WR Act providing that any applicable public sector awards, or parts of the awards, do not transmit. However, the transmission of awards may be of limited practical impact, given that CAs and/or AWAs now cover the key terms and conditions of employment for most APS employees.

When contemplating an anticipated sale or privatisation, there may be merit in including a specific provision in CAs and AWAs that expresses the intention of the parties to confine the operation of a particular agreement to employment on a specified basis or in specified circumstances. However, such a clause may not prevent the transmission of an APS CA or AWA to a new employer. Nevertheless, it may direct a Court's attention to

the clear purpose of the parties to the agreement, including a valid majority of affected employees, concerning the operation of the agreement.

Termination of Employment

Agreements cannot avert common law and administrative law remedies. Also note that legal advice is that there are strong arguments that State and Territory unfair dismissal and unfair contract laws have no application in any case to APS employees, for reasons including the construction and scope of State Acts, the effect of s.109 of Australia's Constitution and Commonwealth immunity. The following clause seeks to ensure that this is the case:

The sole and exhaustive rights and remedies of an employee in relation to termination of employment are those that the employee enjoys under:

- *Division 3 of Part VIA of the Workplace Relations Act 1996;*
- *other Commonwealth laws (including the Constitution); and*
- *at common law.*

Termination of, or a decision to terminate employment, cannot be reviewed under the dispute prevention and settlement procedures/review of action procedures addressed in clauses X and Y of this Agreement.

Nothing in this agreement prevents the Agency Head from terminating the employment of an employee for serious misconduct, without further notice or payment in lieu, in accordance with subsection 170CM(1)(c) of the Workplace Relations Act 1996, subject to compliance with the procedures established by the Agency Head for determining whether an employee has breached the Code of Conduct under section 15 of the Public Service Act 1999.