

From the desk of Aaron Lane, Legal Fellow

26 October 2016

Mr Stephen Palethorpe
Committee Secretary
Senate Education and Employment
PO Box 6100
Parliament House
Canberra ACT 2600
By email: <eec.sen@aph.gov.au >

Dear Mr Palethorpe

Inquiry into the impact of the Government's Workplace Bargaining Policy and approach to Commonwealth public sector bargaining

I refer to the above inquiry, and provide a submission to the Senate Education and Employment Committee ('Committee') on behalf of the Institute of Public Affairs ('IPA'). The overarching theme of this submission is that workplace bargaining is not a one-way street: there is a weight of evidence of overly generous entitlements in Australian Public Service ('APS') agreements, and there is flexibility in the government's workplace bargaining policy to allow for the offsetting of increased remuneration beyond 2 percent per annum. The IPA's view is that the Committee should find that it is the failure of public sector unions to come to the bargaining table that is causing the failure to conclude workplace bargaining across the APS – not the government's workplace bargaining policy.

About the Institute of Public Affairs

The IPA is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

IPA Research on Commonwealth public sector bargaining

In December 2015, the IPA published a research paper *Driving a soft bargain: examining the Commonwealth Public Sector Enterprise Agreements 2011-2014*, authored by myself and then-IPA Deputy Executive Director James Paterson. This submission is based on this research. I have enclosed a copy of this research paper, and trust that it will be of assistance to the Committee in this inquiry.

The IPA report examined the APS Agreements of the Top 10 Commonwealth government Agencies or Departments, by employee size: Department of Human Services, the Australian Taxation Office, Department of Defence, Department of Immigration and Border Protection, Customs and Border Protection, Department of Industry, Department of Foreign Affairs and Trade, Department of Agriculture, Department of Health, and the Department of Social Services. At the time of the IPA report, these agreements covered 72.4 percent of APS employees.

Since the report was published, the IPA understands that agreements have been reached with 57 Commonwealth agencies, although several major Departments' agreements remain unresolved.

Response to the Committee's terms of reference

Enterprise bargaining requires negotiation from both sides. The government's policy provides the flexibility for this to occur on the employer side. This is in stark contrast to the public sector unions' bargaining policy, which, as the IPA understands, has objected to every single proposed APS agreement – including those agreements which have ultimately resulted in approval from employees.

The IPA's research provides a weight of evidence in support of our submission that the government's workplace bargaining policy is justified.

In particular, our research shows that the previous APS agreements provide that general salary levels for APS-level employees will incrementally increase by a total of 9 per cent over the life of the agreements (April 2012 – June 2014). There is also a presumption of a further salary increase for APS employees each year by advancing through the APS classification steps. Additional lump-sum payments in six APS agreements have the effect of boosting salaries by an average of \$2,420 for those employees. There is clear evidence in the ABS statistics that public sector wages are, on average, higher than the private sector.

The IPA submits that the 2 per cent increase in remuneration outlined in clause 11 of the government's bargaining policy is justified based on previous increases, and the higher starting position.

The IPA considers that it would be economically irresponsible for the government to raise the threshold beyond 2 per cent. First, the Commonwealth's current fiscal position shows the underlying cash deficit is expected to be \$37.1 billion in 2016-17 – with no end in sight to budget deficits, and net debt continuing to increase past the projected \$326 billion in 2016-17. In short, the government cannot afford further salary increases to public sector employees. Second, there is a risk that above-productivity wage increases may flow through to the private sector, which does not have the same capacity to absorb costs through increased taxation – or by running continued budget deficits.

There are several other grounds that the Committee should take into account to support a finding that the government's bargaining policy is justified, including:

- a. All APS agreements contain generous allowances, which have the effect of increasing salary by potentially up to tens of thousands of dollars per year. These allowances are paid to employees with first aid qualifications, to those working in regional and remote locations (even where relocation was not necessary), for professional development costs, gym memberships, for financial advice, child care, and home office costs – amongst many others. Clause 21 of the government's bargaining policy provides the flexibility of restructuring allowances into the base rate of pay. Accordingly, there is scope for negotiation to offset remuneration increases beyond 2 per cent.
- b. All APS agreements have a generous superannuation entitlement. The Commonwealth's agreed employer superannuation contribution is 15.4 per cent – compared to the standard 9.5 per cent Superannuation Guarantee that applies in the private sector. This higher position should be taken into account when considering further remuneration increases. Because the entitlement is expressed as a percentage, every dollar increase in salary will translate to a greater difference in the total compensation package as compared to the private sector.

- c. All APS agreements have leave entitlements that exceed those provided for in the National Employment Standards in the *Fair Work Act* 2009. Some employees have greater than 4 weeks annual leave, and miscellaneous leave entitlements such as volunteer leave or leave for moving house further increase this entitlement. Generous personal leave entitlements also exist, where unused credits accrue annually. Worryingly, all APS agreements entitle union delegates to paid leave to undertake union training and engage in industrial proceedings. Again, there is scope in bargaining policy to offset remuneration increases beyond 2 per cent. Existing generous entitlements should be taken into account when considering whether additional leave conditions are warranted.
- d. In terms of redundancy there is an extensive notice period in place in the APS agreements of up to seven months. APS employees are also entitled to a severance benefit on termination for redundancy which, in some cases, is quadruple that under the National Employment Standards in the *Fair Work Act* 2009. Again, there is scope in bargaining policy to offset remuneration increases beyond 2 per cent.
- e. All APS agreements that provide unions with varying degrees of control over the operation of the agency or department. Management must consult with unions and union representatives on almost every aspect of operations – and union officials and workplace union delegates have mandated positions on consultation committees. These controls go beyond the proper role of union representation, to co-management – and could be curtailed to yield productivity and efficiency dividends. Relevantly, clause 16 of the government's bargaining policy states: "Productivity improvements can be achieved by ensuring that new workplace arrangements do not contain clauses that restrict an agency's ability to operate efficiently and effectively."
- f. Most APS agreements contain highly prescriptive clauses on the performance management system – making it difficult and time-consuming for management to dismiss underperforming employees. In one department, it takes more than 24 weeks for the mandated time-period to elapse – and the decision to terminate can then be internally and externally reviewed. Removing these clauses would achieve productivity improvements envisaged by clause 16, referred to above.
- g. Union-privilege clauses exist in APS agreements which provide direct taxpayer-funded benefits to unions and union members. Under the agreements, union delegates can undertake their roles on taxpayer's time – as well as having access to taxpayer-funded department facilities. These go far beyond the proper role of union representation; this hospitality could be removed as offset for remuneration increases beyond 2 per cent.

In summary, public sector unions cannot continue to seek additional entitlements without considering trade-offs. This submission has provided the Committee with several examples of generous benefits that have not yet been explored in the current round of negotiations. On this basis, the Committee should find that the current policy is justified, particularly taking into account the government's fiscal position.

From the desk of Aaron Lane, Legal Fellow

Conclusion

The IPA trusts that this contribution will be of assistance to the Committee. Of course, the IPA would be pleased to present our submission, and answer any questions, at a public hearing of the Committee.

If you have any questions, please do not hesitate to contact myself: in writing to L2, 410 Collins Street, Melbourne 3000; by telephone on (03) 9600 4744; or by email to

AARON LANE
Legal Fellow, Institute of Public Affairs

Encl.



AUSTRALIAN TAXATION OFFICE

Driving a soft bargain

Examining the Commonwealth Public Sector Enterprise Agreements
2011-2014

Aaron Lane
PhD Candidate & Lawyer

James Paterson
Deputy Executive Director

December 2015

 **Institute of
Public Affairs**
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The IPA is funded by individual memberships and subscriptions, as well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy.

Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

About the authors

Aaron Lane is a PhD candidate in economics at RMIT University. He is a lawyer, and was admitted to the Supreme Court of Victoria in 2012. Aaron has a particular research interest in industrial relations, and has appeared before the Fair Work Commission and the Productivity Commission on these issues. His research and opinion pieces have been featured in major daily newspapers including *The Australian*, *The Age*, *The Guardian*, and the *Herald Sun*.

James Paterson is the Deputy Executive Director at the Institute of Public Affairs. He has previously served as Editor of the *IPA Review* and Director of Development and Communications.

James has appeared on ABC's Q&A, Sky News, ABCNews24, 774 Melbourne and 3AW. James' research and analysis has been featured in *The Wall Street Journal*, *The Australian*, *The Australian Financial Review*, *The Sydney Morning Herald*, *The Age*, *The Herald Sun*, *The Courier Mail*, *The Spectator* and *Quadrant*.

James holds degrees in Arts and Commerce from the University of Melbourne.

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Executive Summary

All current Australian Public Service Enterprise Agreements have a nominal expiry date of 30 June 2014, and are currently in the bargaining stage for the next suite of agreements. This report examines the APS Agreements of the Top 10 Commonwealth government Agencies or Departments by employee size.

The APS Agreements provide that general salary levels for APS-level employees will incrementally increase by a total of 9 per cent over the life of the agreement (April 2012 – June 2014). There is a presumption of a further salary increase for APS employees each year by advancing through the APS classification steps. Additional lump-sum payments in six APS agreements have the effect of boosting salaries by an average of \$2,420 for those employees.

Public sector wages are higher than those in the private sector, on average. There is a risk that above-productivity wage increases may flow through to the private sector, which does not have the same capacity to absorb costs through increased taxation.

All APS agreements contain generous allowances, which have the effect of increasing salary by potentially up to tens of thousands of dollars per year. These allowances are paid to employees with first aid qualifications, to those working in regional and remote locations, for professional development costs, gym memberships, for financial advice, child care, and home office costs – amongst many others.

APS agreements have a generous superannuation entitlement. The Commonwealth's agreed employer superannuation contribution is 15.4 per cent – compared to the standard 9.5 per cent Superannuation Guarantee.

Leave entitlements under all APS agreements exceed those provided for in the National Employment Standard. Some employees have greater than 4 weeks annual leave, and miscellaneous leave entitlements such as volunteer leave or leave for moving house further increase this entitlement. Generous personal leave entitlements also exist, where unused credits accrue annually. Worryingly, all APS agreements entitle union delegates to paid leave to undertake union training and engage in industrial proceedings.

In terms of redundancy there is an extensive notice period in place in the APS agreements of up to seven months. APS employees are also entitled to a severance benefit on termination for redundancy which, in some cases, is quadruple that under the National Employment Standards.

Most APS agreements contain highly prescriptive clauses on the performance management system – making it difficult and time-consuming for management to dismiss underperforming employees. In one department, it takes more than 24 weeks for the mandated time-period to elapse – and the decision to terminate can then be internally and externally reviewed.

Union-privilege clauses exist in APS agreements which provide direct taxpayer-funded benefits to unions and union members. Under the agreements, union delegates can undertake their roles on taxpayer's time – as well as having access to taxpayer-funded department facilities.

Guised as 'consultation' provisions, all APS agreements that provide unions with varying degrees of control over the operation of the agency or department. Management must consult with unions and union representatives on almost every aspect of operations – and union officials and workplace union delegates have mandated positions on consultation committees.

This report provides a weight of evidence supporting arguments that the public sector union's ambit-claims in the current negotiations are unjustified.

Introduction and Context

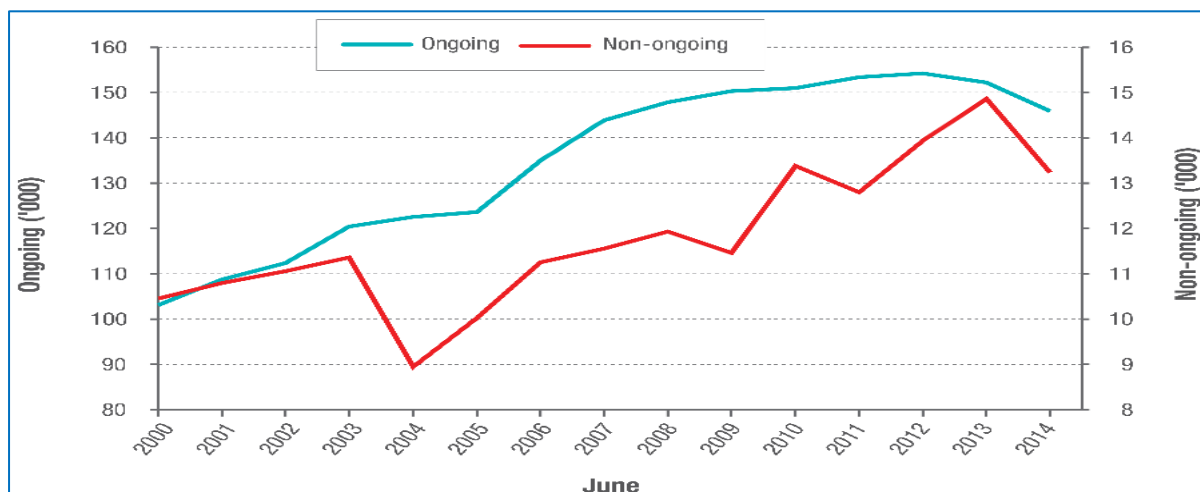
There are currently 115 public-sector enterprise agreements that govern the pay and conditions of Australian Public Service employees. Made between 2011 and 2012, all current APS Enterprise Agreements have a nominal expiry date of 30 June 2014 and are currently in the bargaining stage for the next suite of agreements.

The task of this report is to offer a broad-brush review and analysis of APS Enterprise Bargaining Agreements. The report aims to highlight provisions in the relevant agreements that provide employees with overly generous conditions, compared to the standard and legislated conditions of employees employed in the private sector. The report will also examine barriers to flexibility in the public service.

The analysis draws a number of main themes: hidden allowances which have the effect of substantially increasing an APS employee's salary above the pay-rate schedules; access to a Commonwealth funded superannuation contributions above the private sector's Superannuation Guarantee; overly generous leave entitlements; and union control provisions. These themes have become the main sections of this report.

At 31 December 2014 there were 152,606 employees in the Australian Public Service, a decrease of 10,915 or 6.7% from the December 2013 figure of 163,521.¹ Despite this current downward trend, there has been significant growth in the public sector since 2000, particularly in the amount of on-going positions. This growth is illustrated in Figure 1.

Figure 1 - Size of the Australian Public Service by employment category, June 2000 – June 2014



Source: Australian Public Service Commission.

The top ten Agencies /Departments by number of employees and proportion of the APS are provided in Table 1. This report will examine the Enterprise Agreements of these agencies. Combined, these Agencies /Departments account for 72.4 per cent of the entire APS – providing a more than credible sample size. The Enterprise Agreements to be examined are also listed in Table 1.

¹ Australian Public Service Commission, Snapshots: December 2014, <<http://www.apsc.gov.au/about-the-apsc/parliamentary/aps-statistical-bulletin/snapshots-december-2014>>, accessed June 2015.

Table 1 - Top Ten Agencies/Departments by number of employees

Agency / Department	No. of employees December 2014	% of total APS	Name of Agreement	Nominal Expiry
Human Services	34342	22.5	Department of Human Services Agreement 2011-2014	30-Jun-2014
Australian Taxation Office	20717	13.6	ATO Enterprise Agreement 2011	30-Jun-2014
Defence	20524	13.4	Defence Enterprise Agreement 2012-2014	30-Jun-2014
Immigration and Border Protection	8433	5.5	Department of Immigration and Citizenship Enterprise Agreement 2011-2014	30-Jun-2014
Customs and Border Protection	5356	3.5	Australian Customs and Border Protection Service Enterprise Agreement 2011-2014	30-Jun-2014
Industry	4926	3.2	One Innovation Enterprise Agreement 2011	30-Jun-2014
Foreign Affairs and Trade	4799	3.1	Department of Foreign Affairs and Trade Enterprise Agreement 2011-2014	30-Jun-2014
Agriculture	4550	3.0	Department of Agriculture, Fisheries and Forestry Enterprise Agreement 2011-2014	30-Jun-2014
Health	3502	2.3	Department of Health and Ageing Enterprise Agreement 2011-2014	30-Jun-2014
Social Services	3366	2.2	Department of Families, Housing Community Services and Indigenous Affairs Enterprise Agreement 2012 -2014	30-Jun-2014
Total	110515	72.4		

Source: Australian Public Service Commission; Fair Work Commission.

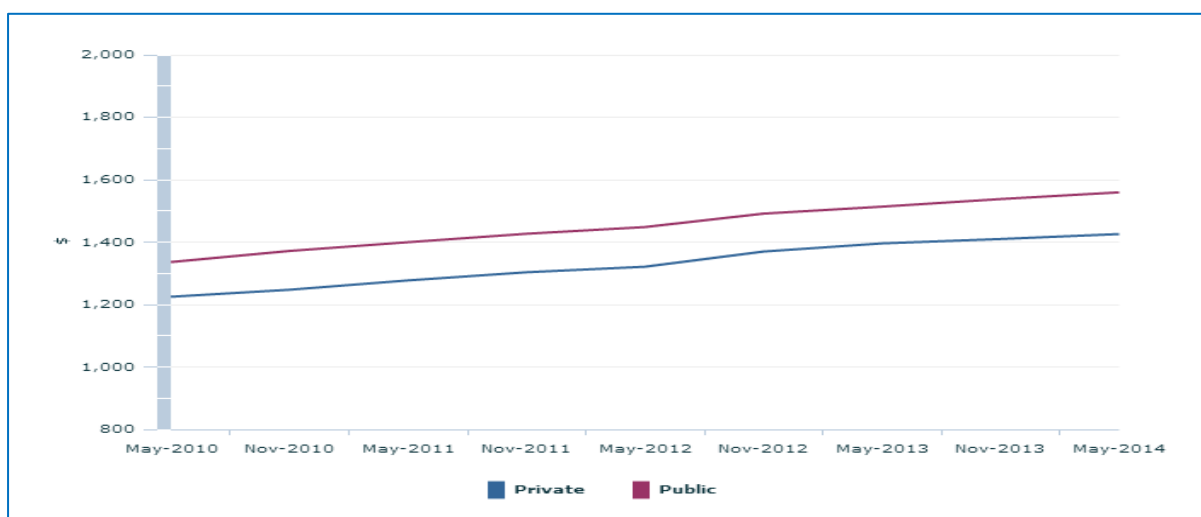
Section 1: Salary matters

General wage growth

The APS agreements surveyed all provide that salaries for APS-level employees will incrementally increase by a total of 9 per cent over the life of the agreement (April 2012 – June 2014). There is some variation as to the breakdown of the increments. For example, the Department of Defence agreement provides for an increase of 6.5% at the commencement of the agreement, and a further increase of 2.5% in July 2013²; whereas the ATO agreement provides for a 4% increase on commencement, 2% in June 2012, 1% in January 2013, and 2% in June 2013³.

Those employed in the public sector have higher average weekly earnings compared to their private sector counterparts. In May 2014, the public sector full-time adult average weekly ordinary earnings was \$1,559.90 (\$81,114.80 per annum), which is \$133.90 per week higher than the private sector average of \$1,426.00 (\$74,152 per annum). This gap is illustrated in Figure 2 for the period between May 2010 and May 2014.

Figure 2 – Average Weekly Ordinary Time Earnings, Full Time Adults



Source: Australian Bureau of Statistics.

Classification structure

All salaries within the APS are based on a classification structure – which are prescribed in the *Public Service Classification Rules 2000*.

The most common classifications covered in the agreements are:

- APS 1 and 2 – entry-level roles; cadetships; traineeships.
- APS 3 and 4 – graduates; administrative, technical and project services roles.
- APS 5 and 6 – senior administrative, technical and project services roles.

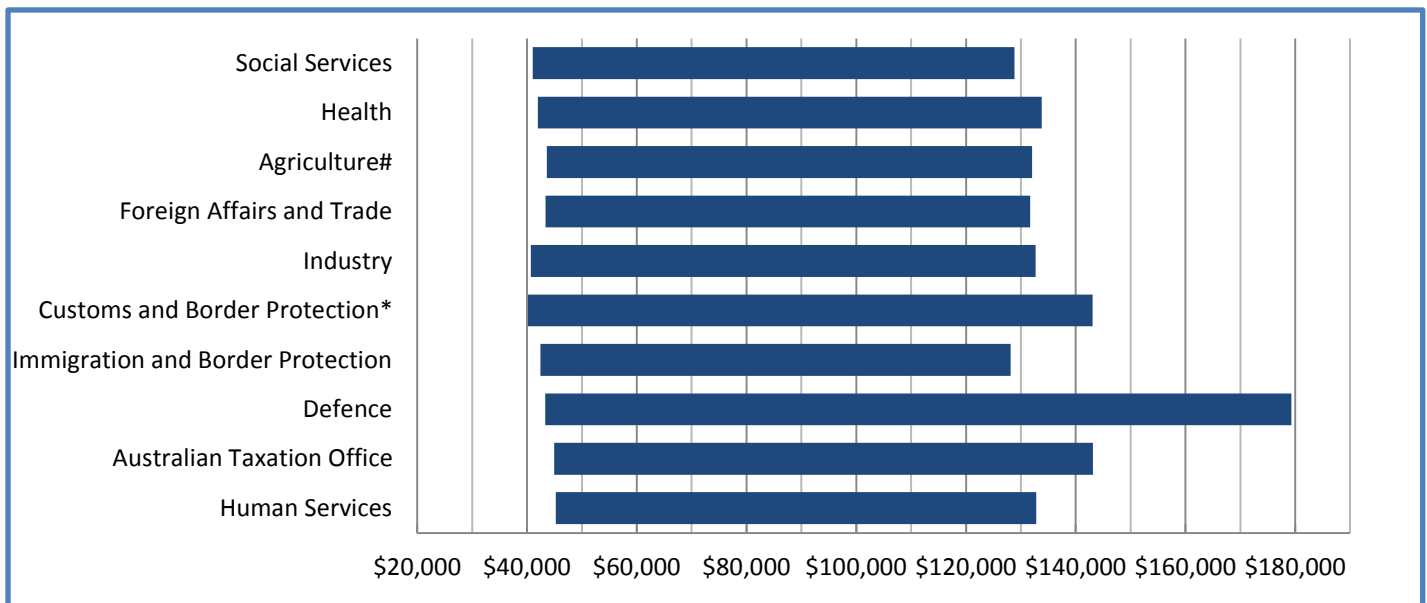
² Annex D, Defence Enterprise Collective Agreement 2012-2014.

³ Schedule 1, ATO Enterprise Agreement 2011.

- Executive Level 1 and 2 – management roles; senior professional roles.

In the agreements, there are between three and five salary steps per classification level. Some agreements have combined several classification levels into what is known as 'broadbanding', which provides a level of flexibility. Figure 3 illustrates salary ranges for 10 surveyed APS agreements.

Figure 3 - APS1 to EL2 salary range, by Agency/Department, as at 30 June 2014



Notes: #Policy, Technical and Science roles *Work Value 1 to Customs Level 5.

Source: APS Enterprise Agreements

Advancement

There is a presumption of a salary increase for APS employees each year. This is because all of the agreements provide for annual performance reviews, leading to a competency rating. The competency rating then dictates whether an employee will advance a salary step within the classification band. As such, while competency criteria applies and is required to be maintained, progression through the steps is really based on the number of years served in the role.

The consequences of receiving a poor performance rating are discussed in section 4.

A good aspect of the agreements is that they maintain the discretion of a Department Secretary to approve a salary at a higher pay point.⁴ However, there is no mechanism to ensure that this is necessarily tied to performance. The Department of Defence agreement allows the most flexibility as the Secretary can pay premiums,⁵ retention bonuses for critical occupational disciplines⁶ and strategic 'Building Defence Capability' payments.⁷

⁴ See, for example: clause 11.1, Agriculture.

⁵ B3.8, Defence Enterprise Collective Agreement 2012-2014.

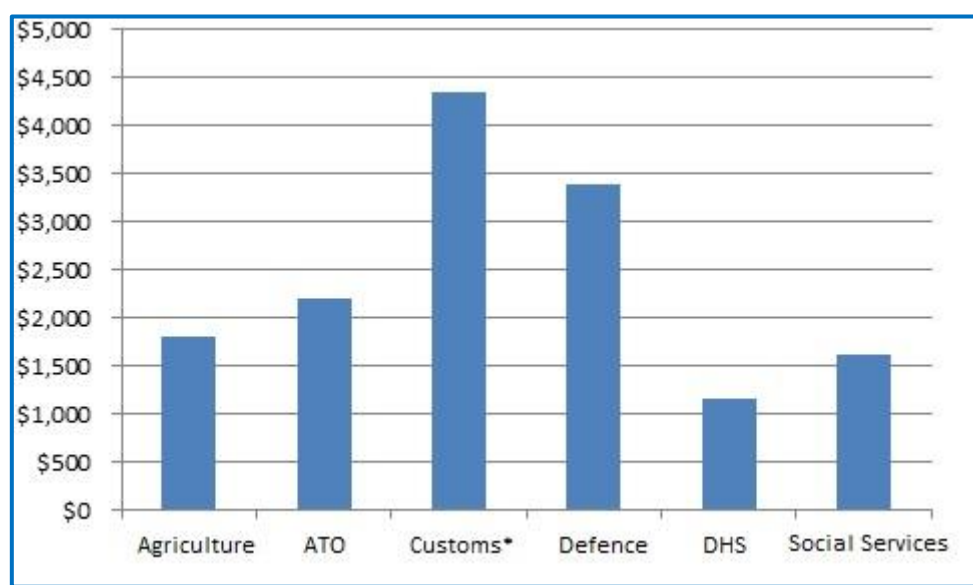
⁶ B3.12, Defence Enterprise Collective Agreement 2012-2014.

⁷ G5, Defence Enterprise Collective Agreement 2012-2014.

Lump-sum productivity payments

Six of the agreements provide for productivity payments in addition to general wage increases, in recognition of productivity improvements achieved during the life of the agreement and those supposedly already achieved prior to the commencement of the agreement. These are lump-sum payments of an average of \$2,420. Figure 4 illustrates the amount these payments over the life of the relevant agreements.

Figure 4 - Productivity payments by Agency/Department



Note: *Based on 5% bonus for a Customs Level 3 classification employee.

Source: APS Enterprise Agreements.

Salary sacrificing

All APS employees can choose to sacrifice part of their salary, which reduces the amount of income tax payable. Indeed, the Department of Human Services allow employees to sacrifice up to 100 per cent of their salary.⁸ While the majority of agreements are silent on specifics, the DFAT agreement expressly provides that employees can salary sacrifice childcare fees.⁹

Allowances

All APS agreements provide for a variety of generous allowances to be paid to employees. These hidden allowances have the effect of increasing salary – by potentially tens of thousands of dollars per year. Table 2 provides a non-exhaustive list of examples of these allowances.

⁸ Department of Human Services Agreement, clause 25.

⁹ Department of Foreign Affairs and Trade, clause 3.11.

Table 2 – Various Allowances

Allowance	Maximum payment
Position-based allowances	
Airport Allowance ¹⁰	\$7 per day
First Aid Officer ¹¹	\$908* per year
Fire/Emergency Warden ¹²	\$926* per year
Health and Safety Representative ¹³	\$613* per year
Wellbeing Site Representative ¹⁴	\$613* per year
Harassment Officer ¹⁵	\$601* per year
Second language ¹⁶	\$9,717* per year
Wharf allowance ¹⁷	\$1,000 per year
Remote locations ¹⁸	\$19,162** per year
Hazardous Material, Confined Spaces, Artificial Environments, Heights, Dirty Work, Protective Clothing allowance ¹⁹	\$36.17 per week
Tool Allowance, Electrical License Allowance, Storage and Plant allowance ²⁰	\$16.10 per week
Professional allowances	
Membership of professional bodies ²¹	\$1000 per year
Professional development ²²	\$4,500 per year
Professional registration fees ²³	At cost [#]
Study assistance ²⁴	\$793 per year
Health and fitness allowances	
Eyewear ²⁵	\$165 per prescription
Flu Vaccination ²⁶	At cost
Gym/Fitness activities ²⁷	\$300 per year
Travel allowances	
Airport Lounge Membership ²⁸	At cost
At Sea or Camping Allowance ²⁹	\$104.30 per night

¹⁰ Department of Immigration Agreement, clause 9.14

¹¹ ATO Agreement, clause 35.

¹² ATO Agreement, clause 38.

¹³ ATO Agreement, clause 37.

¹⁴ ATO Agreement, clause 40.

¹⁵ ATO Agreement, clause 39.

¹⁶ Department of Defence Agreement, Annex E.

¹⁷ Department of Agriculture Agreement, clause 58.

¹⁸ Department of Immigration Agreement, clause 6.47.

¹⁹ Department of Defence Agreement, Annex E.

²⁰ Department of Defence Agreement, Annex E.

²¹ Department of Human Services Agreement, clause H17.

²² Department of Immigration Agreement, clause 11.40.

²³ Department of Foreign Affairs and Trade

²⁴ Department of Immigration Agreement, clause 11.50.

²⁵ Department of Health Agreement, clause 68.

²⁶ Department of Agriculture Agreement, clause 74.

²⁷ Department of Agriculture Agreement, clause 72.2

²⁸ Department of Immigration Agreement, clause 9.24.

²⁹ Department of Agriculture Agreement, clause 55.3.

Allowance	Maximum payment
Overnight stay (where accommodation is not required) ³⁰	\$102 per night night
Overseas trip allowance ³¹	\$511 per trip plus \$192/day (on top of travel expenses)
Part Day Travel ³²	\$51 per day
Tropical and Temperate Climate Allowance (for the purpose of purchasing clothing) ³³	\$100
Miscellaneous allowances	
Establishment costs for working from home arrangement ³⁴	\$3435
Financial advice (for employees approaching retirement) ³⁵	\$500
Safe Driver Training ³⁶	At cost
School Holiday subsidy ³⁷	\$26 per day per child

Notes: All references to APS Agreements are provided for purposes of example only, as some allowances available across multiple agencies/departments – check relevant agreements. *Amount depending on level of qualification and responsibility held. **Amount depending on location classification

³⁰ Department of Immigration Agreement, clause 9.14.

³¹ Department of Immigration Agreement, clause 6.12.

³² Department of Immigration Agreement, clause 9.9.

³³ Department of Social Services Agreement, clause 13.17.

³⁴ ATO Agreement, clause 88.6.

³⁵ Department of Defence Agreement, clause B5.7.

³⁶ Department of Social Services Agreement, clause 8.4.

³⁷ Department of Industry Agreement, clause 211.

Section 2: Superannuation

APS employees are entitled to generous superannuation contributions compared to what employees would ordinarily receive in the private sector.

Employers are required by law to pay "Superannuation Guarantee" contributions to a designated superannuation fund for their employees and some independent contractors that the employers engage.³⁸ From 1 July 2014, the Superannuation Guarantee is 9.5 per cent.

Under all of the APS agreements surveyed, the Commonwealth's agreed employer superannuation contribution is 15.4 per cent.

Table 3 illustrates that an APS employee on an annual salary of \$80,000 (excluding super) can expect to gain at least an additional \$62,680 over a 10 year period – compared with the base contribution rate of the Superannuation Guarantee.

Table 3 – Superannuation contributions by annual salary

Annual salary	\$60,000	\$80,000	\$90,000	\$100,000
9.5% contribution rate	\$5,700	\$7,600	\$8,550	\$9,500
15.4% contribution rate	\$9,240	\$12,320	\$13,860	\$15,400
Additional annual benefit	\$3,540	\$4,720	\$5,310	\$5,900
Additionally 10-year benefit*	\$47,010	\$62,680	\$70,515	\$78,350

Notes: *The additional 10 year benefit calculation is the additional employer superannuation contribution to retirement capital over a 10 year period, based on a 10-year annualised net return of 6.15 per cent per annum[#] excluding fees, insurance and other charges. # Rate obtained from the default product option of the Public Sector Superannuation Accumulation Plan from the Commonwealth Superannuation Corporation: <<http://pssap.gov.au/>> as at June 30, 2014.

³⁸ *Superannuation Guarantee (Administration) Act 1992* (Cth).

Section 3: Leave entitlements

Annual Leave

Under the National Employment Standards, a full-time employee is entitled to 4 weeks (i.e. 20 days) paid annual leave.³⁹ The basic annual leave entitlement of APS employees is generally in line with this standard, however the Department of Human Services Agreement provides for 23 days of annual leave while the Department of Foreign Affairs employees receive 22 days. Shift workers under relevant agreements are entitled to a further 5 days annual leave, which corresponds to the National Employment Standards.⁴⁰ Seven out of ten agencies/departments allow employees to take annual leave at half pay, and a different combination of seven out of ten also allow employees to cash out annual leave balances above certain levels. All of the agreements allow employees to purchase additional leave via salary sacrificing. However, all agreements cap the amount of leave that can be purchased – with the Department of Industry providing a maximum of an additional 50 days. Table 4 summarises the annual leave entitlements for each Agency/Department surveyed.

A number of agreements provide remote employees with additional annual leave. For example, a Department of Human Services employee based in Katherine, NT, will receive an addition 9 days of annual leave – plus annual leave fares.⁴¹

Table 4 – Annual Leave entitlements by Agency/Department

Agency / Department	Basic annual leave entitlement	Purchase additional leave (Max)	Ability to take leave at half pay	Ability to cash out leave
Human Services ⁴²	23 days	20 days	☑	☑
Australian Taxation Office ⁴³	20 days	40 days	☒	☑
Defence ⁴⁴	20 days	20 days	☑	☒
Immigration & Border Protection ⁴⁵	20 days	40 days	☑	☑
Customs & Border Protection ⁴⁶	20 days	20 days	☒	☒*
Industry ⁴⁷	20 days	50 days	☑	☑
Foreign Affairs & Trade ⁴⁸	22 days	20 days	☒	☑
Agriculture ⁴⁹	20 days	20 days	☑	☑
Health ⁵⁰	20 days	30 days	☑	☒
Social Services ⁵¹	20 days	40 days	☑	☑

³⁹ Section 87, *Fair Work Act 2009*.

⁴⁰ Ibid.

⁴¹ Department of Human Services Agreement, Schedule 5.

⁴² DHS Agreement, clauses G2-G6.

⁴³ ATO Agreement, clauses 92-93.

⁴⁴ Defence Agreement, clause F15.

⁴⁵ Immigration and Border Protection Agreement, Part 7.

⁴⁶ Customs Agreement, clauses 17.1, 17.11.

⁴⁷ Industry Agreement, clauses 162-169 and 177.

⁴⁸ DFAT Agreement, clauses 4.9, 4.19-4.22, and 4.66.

⁴⁹ Agriculture Agreement, clause 28.

⁵⁰ Health Agreement, clauses 56 and 63.

⁵¹ Social Services Agreement, Part 7.

Notes: *grandfathering provision for employees that have accrued leave prior to 27 March 2006.

Flex-time

All APS agreements provide for a flex-time scheme where employees accrue leave by working more than their normal hours of work. This has the effect of increasing leave available. Some departments allow cashing out of flex time, with the effect of increasing salary. In the private sector, it is standard for full-time employees to work a reasonable amount of overtime as part of their salary package.

Christmas and Easter closedown leave

The majority of the APS agreements provide extra leave for employees between Christmas Day and New Year's Day, without needing to take annual leave.⁵² Effectively, this provides employees with up to an additional three days of annual leave. The Department of Social Services agreement also provides that employees can leave work up to two hours early on the Thursday prior to Good Friday, without taking leave, and still be paid.⁵³

Personal/Carer's leave

The National Employment Standards guarantees employees 10 days paid personal/carer's leave per year. Unused personal leave not used is accrued and carried over to the following year. By comparison, the bulk of APS employees receive 15 to 20 paid days per year – i.e. up to double the NES – and unused leave is accrued. The personal leave entitlements are illustrated in Table 5.

Table 5 – Personal leave by Agency/Department

Agency / Department	Personal leave entitlement
Human Services ⁵⁴	18 days
Australian Taxation Office ⁵⁵	18.5 days
Defence ⁵⁶	15 days
Immigration & Border Protection ⁵⁷	18 days
Customs & Border Protection ⁵⁸	18 days
Industry ⁵⁹	18 days
Foreign Affairs & Trade ⁶⁰	20 days
Agriculture ⁶¹	20 days
Health ⁶²	18 days
Social Services ⁶³	20 days

⁵² See, for example: Department of Agriculture Agreement, clause 22.

⁵³ Department of Social Services Agreement, clauses 6.84-6.87.

⁵⁴ DHS Agreement, clauses G7.

⁵⁵ ATO Agreement, clauses 92-93.

⁵⁶ Defence Agreement, clause F22.5.

⁵⁷ Immigration and Border Protection Agreement, Part 7.

⁵⁸ Customs Agreement, clauses 17.2.

⁵⁹ Industry Agreement, clauses 151.

⁶⁰ DFAT Agreement, clauses 4.27.

⁶¹ Agriculture Agreement, clause 29.2.

⁶² Health Agreement, clauses 57.

On top of these amounts, some APS agreements provide discretion to grant additional leave when leave credits have expired.⁶⁴

Notably, one agreement provides that personal leave can be used for childcare purposes.⁶⁵

Paid Parental Leave

Under the APS agreements all employees are entitled to access the Commonwealth employee's paid parental leave scheme governed by the *Maternity Leave (Commonwealth Employees) Act 1973*. This Act provides for 12 weeks leave at full pay, with the possibility to take this leave at half pay over 24 weeks. This is more generous to the otherwise applicable Federal Paid Parental Leave entitlement which provides for 18 weeks' pay at the minimum wage.⁶⁶

Miscellaneous paid leave

There are numerous other forms of paid leave provided in the various APS agreements where employees are not required to utilise their annual, personal or flex time leave.

A non-exhaustive list of examples of paid miscellaneous leave is as follows:

- **Blood donation, body tissue donation, and vaccination leave** – reasonable leave as required;⁶⁷
- **Ceremonial leave** – up to 10 days over a two year period granted to an Aboriginal or Torres Strait Islander employee for ceremonial purposes⁶⁸ and up to 2 days per year for all employees for other religious purposes;⁶⁹
- **Community service volunteer leave** – up to four day's paid leave per year to conduct volunteer work with a community organisation;⁷⁰
- **Custodial hearing** – one day's paid leave;⁷¹
- **Defence Day** – The Department of Defence agreement provides one day's paid leave paid without requiring a reason;⁷²
- **Industrial proceedings** – reasonable paid leave for employees preparing for and/or attending industrial proceedings;⁷³
- **Moving house** – several agencies provide one day of paid leave per year;⁷⁴

⁶³ Social Services Agreement, clause 7.25

⁶⁴ See, for example: Department of Social Services Agreement, clause 7.34.

⁶⁵ Department of Agriculture Agreement, clause 29.3.

⁶⁶ Centrelink website: <<http://www.humanservices.gov.au/customer/services/centrelink/parental-leave-pay>> accessed June 2015.

⁶⁷ See, for example: Department of Foreign Affairs and Trade Agreement, clause 4.57.

⁶⁸ ATO Agreement, clause 101.

⁶⁹ See, for example: Department of Defence Agreement, Annex C.

⁷⁰ See, for example: Department of Social Services Agreement, clause 7.70.

⁷¹ See, for example: Department of Agriculture Agreement, clause 40.2.

⁷² See, for example: Department of Defence Agreement, Annex C.

⁷³ See, for example: Department of Foreign Affairs and Trade Agreement, clause 4.57.

⁷⁴ See, for example: Department of Agriculture Agreement, clause 40.2.

- **NAIDOC week** – several agencies provide Aboriginal and Torres Strait Islander employees with up to two days leave per year to participate in NAIDOC week, and some agencies provide this for all employees;⁷⁵
- **Participation in major sporting events** – paid leave available for the duration of the competition where employees are participating as an accredited official/competitor at an international sporting event;⁷⁶
- **Study** – paid leave on approval to undertake education and training;⁷⁷
- **Union activities** – reasonable paid leave for workplace delegates representing members at formal union forums and for attending union training;⁷⁸
- **Workplace relations training** – up to three days' paid leave for union delegates;⁷⁹

The various miscellaneous leave entitlements reinforce the proposition that the APS agreements provide generous annual and personal leave entitlements. For example, most private sector employees would be expected to utilise personal leave credits to attend the doctors to receive vaccinations – or attend family court hearings. Likewise, 'Defence Day' and paid leave for moving house are not commonly found in private sector agreements and effectively increase an APS employee's annual leave entitlement.

The public subsidisation of trade unions is a concerning theme in the APS agreements. Under the above provisions the Commonwealth is providing paid leave for union representatives to undertake union activities – it is difficult to ascertain the benefit to the employer in this regard. This is especially so where employees would be entitled to paid leave to take part in industrial proceedings against the employer. Further union provisions are examined in section 5 of this report.

⁷⁵ See, for example: Department of Immigration Agreement, clause 7.54.

⁷⁶ See, for example: Department of Foreign Affairs and Trade Agreement, clause 4.57.

⁷⁷

⁷⁸ See, for example: Department of Foreign Affairs and Trade Agreement, clause 4.57.

⁷⁹ ATO Agreement, clause 104.

Section 4: Other soft provisions

In addition to generous salary, superannuation, and leave entitlements, an analysis of the APS agreements provides us with two further privileges that exist in the public sector that are not ordinarily apparent in the private sector. These are redundancy benefits and anti-dismissal provisions for underperformance.

Redundancy

All agreements' redundancy provisions are essentially the same – and they are far more generous than the *Fair Work Act* 2009 entitlements in two key respects.

First, there is an extensive notice period for involuntary retrenchment in place in the APS agreements. This is in addition to the extensive consultation requirements that must be adhered to before redundancies can occur (see section 5 for further detail). In total, an Agency or Department must wait at least seven months before an employee identified as being in excess can be involuntarily retrenched – this increases to 13 months where an employee has 20 or more years of service, or is older than 45 years of age. No such redundancy notice period applies under the *Fair Work Act* 2009, other than ordinary notice provisions. For an APS employee on a salary of \$80,000 per year, a seven month notice period amounts to a benefit of over \$46,000.

Second, after the retrenchment waiting period has expired, APS employees are then entitled to a severance benefit on termination. The longer an employee's period of continuous service with the employer – the greater the severance payout. There is a maximum of 12 weeks' severance pay under the *Fair Work Act* 2009.⁸⁰ The severance benefit for APS employees accrues at two weeks' salary for each completed year of continuous service, up to a maximum of 48 weeks' salary. Table 6 illustrates that under this arrangement, the Fair Work Act and the APS provisions are at parity at 4 years' service – thereafter, the APS benefit outstrips the Fair Work benefit. The gap is most significant as service increases past ten years of service – where an APS employee receives an additional 8 weeks of pay. For an APS employee on a salary of \$80,000 per year, this amounts to an additional benefit of over \$12,000.

Table 6 – Redundancy Severance Benefit under Fair Work Act and APS Agreements

Continuous service with the employer on termination	Fair Work Act Benefit	APS Agreements Benefit
At least 1 year but less than 2 years	4 weeks	4 weeks
At least 2 years but less than 3 years	6 weeks	4 weeks
At least 3 years but less than 4 years	7 weeks	6 weeks
At least 4 years but less than 5 years	8 weeks	8 weeks
At least 5 years but less than 6 years	10 weeks	10 weeks
At least 6 years but less than 7 years	11 weeks	12 weeks
At least 7 years but less than 8 years	13 weeks	14 weeks
At least 8 years but less than 9 years	14 weeks	16 weeks
At least 9 years but less than 10 years	16 weeks	18 weeks
At least 10 years	12 weeks	20 weeks
...		
At least 24 years	12 weeks	48 weeks

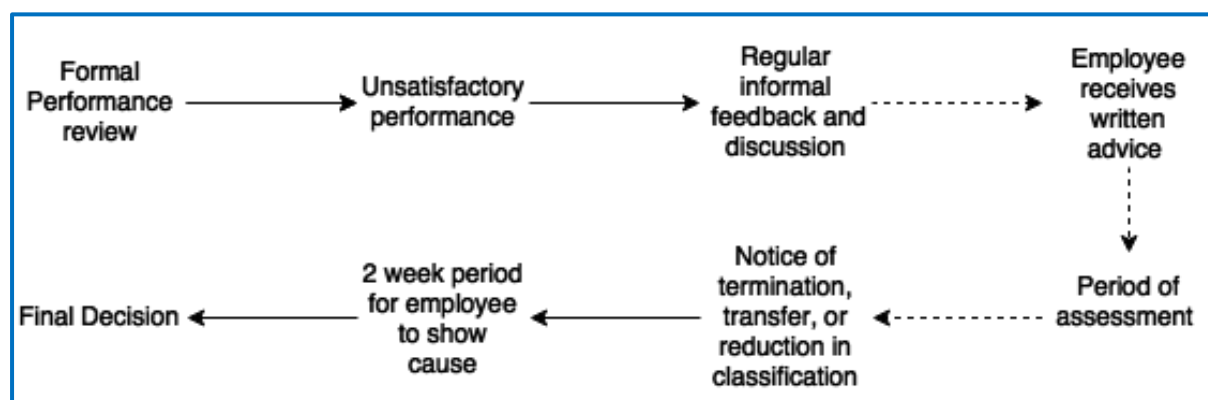
⁸⁰ Section 119, *Fair Work Act* 2009 (Cth).

Underperformance

Most APS agreements analysed contain highly prescriptive clauses on the performance management system. In relation to underperformance, these clauses are effectively anti-dismissal codes which make it incredibly difficult for management to dismiss underperforming public servants.

The majority of the APS agreements mandate the general process illustrated in Chart 1. Three agreements provide that performance management is subject to guidelines⁸¹ – which may allow for greater flexibility, although they would be subject to union control provisions (see: section 5).

Chart 1 – General APS Performance Management Process



Different time periods apply for different Agencies/Departments – represented by the hashed lines in Chart 1. For example, the Department of Industry has the shortest period of assessment, being at least one month.⁸² The Department of Agriculture requires that the employee be given a ‘reasonable time’ to improve performance after informal feedback and written advice, followed by a two-month period of assessment.⁸³ This is similar to the Departments of Immigration and Citizenship, and Defence.⁸⁴ The Department of Human Services agreement provides for a 12 week informal performance improvement process, followed by a further 12 week period of assessment.⁸⁵ The Department of Foreign Affairs and Trade requires a three-month assessment period.⁸⁶

In the case of repeat underperformers, it appears that so long as the employee maintains a satisfactory level of performance for 10 months following a period of assessment, further action cannot be taken against without the need for undertaking the entire process again – even if the reasons for the unsatisfactory performance are the same.⁸⁷

It should be noted that the Secretary or Agency Head’s final decision can be subject to review, in addition to ordinary avenues of external review by the Fair Work Commission or the courts – further drawing out the process.

⁸¹ See: Customs and Border Protection Agreement, clause 16; Department of Social Services Agreement, clause 4.20; Department of Health, clause 78.

⁸² Department of Industry Agreement, clause 141.

⁸³ Department of Agriculture Agreement, clause 78.

⁸⁴ Department of Immigration and Citizenship, clauses 5.10-5.19; Department of Defence Agreement, clause D7.

⁸⁵ Department of Human Services Agreement, clauses I5-I6.

⁸⁶ Department of Foreign Affairs and Trade Agreement, Annex 2.

⁸⁷ See, for example, Department of Agriculture Agreement, clause 78.12.

Section 5: Union control

The public sector has one of the most highly unionised workforces in Australia. In June 2014, 42% of those employed in the public sector were members of a trade union – compared with 12% of all Australian employees in the private sector.⁸⁸

There are unions recognised as parties to all Commonwealth public sector enterprise agreements, as indicated in Tables 7. The Community & Public Sector Union (CPSU) is the dominant public sector union, boasting 55,000 members around the country,⁸⁹ and is a party to every agreement analysed. The Media Entertainment and Arts Alliance (MEAA) is a party to nine out of ten agreements, and had 15,580 members as at 30 June 2014.⁹⁰

Other unions include:

- Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (known as the Australian Manufacturers' Workers Union (AMWU))
- Australian Municipal, Administrative, Clerical and Services Union (known as the Australian Services Union (ASU))
- Australian Nursing and Midwifery Federation (formerly Australian Nursing Federation (ANF))
- Australian Salaried Medical Officers Federation (ASMOF)
- Civil Air Operations Officers' Association of Australia (CAOOAA)
- Construction, Forestry, Mining and Energy Union (CFMEU)
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (known as the Communications Electrical Plumbing Union (CEPU))
- National Union of Workers (NUW)
- Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers, Australia (APESMA))

Table 7 – Unions party to Agency / Department's Enterprise Agreement

Agency / Department	Unions party to respective Enterprise Agreement
Human Services	CPSU, MEAA
Australian Taxation Office	CPSU, MEAA, ASU
Defence	AMWU, APESMA, CAOAA, CEPU, CFMEU, CPSU, MEAA, NUW
Immigration and Border Protection	CPSU, MEAA
Customs & Border Protection	CPSU, MEAA
Industry	CPSU, APESMA
Foreign Affairs and Trade	CPSU, AMWU, MEAA, ASMOF
Agriculture	CPSU, MEAA
Health	CPSU, ASMOF, ANF, MEAA, AMWU
Social Services	CPSU, MEAA

⁸⁸ Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership: 6310.0, 4 June 2014.

⁸⁹ Community & Public Sector Union Website, <<http://www.cpsu.org.au>> accessed June 2015.

⁹⁰ Media Entertainment and Arts Alliance, Annual Report 2013-2014, p. 27.

Two common themes emerge from an analysis of the agreements. First, there are union-privileged clauses that provide benefits to the union itself, and other clauses providing individual benefits to union members – the costs of which are borne by the taxpayer. Second, agreements have union-control clauses that provide the union, through its delegates, with a measure of control of the operation of a department.

Soft union perks

All agreements contain prescriptive arrangements which guarantee union delegates access to use workplace facilities, infrastructure, technology and resources – and paid time – for the purposes of carrying out their role with their union. This means all union delegates in the public sector receive taxpayer funding to carry out their union role and receive access to taxpayer funded resources.

The Department of Health agreement⁹¹ provides a typical example. This agreement provides that in discharging their representative roles at the workplace level, the rights of union workplace delegates expressly include (but are not limited to):

- reasonable paid time to provide information to and seek feedback from staff in the workplace on workplace relations matters at the department during normal working hours;
- the right to email staff in their workplace to provide information and seek feedback;
- reasonable access to department facilities (including telephone, facsimile, photocopying, internet and email facilities, meeting rooms, lunch rooms, tea rooms and other areas where staff meet) for the purpose of carrying out work as a delegate and consulting with members, other interested staff and the union;
- the right to address new staff about union membership at the time they enter employment;
- the right to consultation, and access to relevant information about the workplace and the department;
- the right to reasonable paid time to represent the interests of members to the employer and industrial tribunals;
- reasonable paid time during normal working hours to consult with other delegates and union officials in the workplace, and receive advice and assistance from union staff and officials in the workplace;
- reasonable access to appropriate training in workplace relations matters including training provided by a union; and
- reasonable paid time off to represent union members in the department at relevant union forums.

Hard union control

All of the agreements contain union-controlling provisions. Guised as 'consultation', these clauses provide the union with varying degrees of control over different aspects of the operation of the agency or department. These clauses make it difficult for agencies and departments to respond to changing government and community priorities over the life of the agreement – and over time become entrenched.

⁹¹ Department of Health Agreement, Schedule C.

The matters that Secretaries or Agency Heads are required to consult about are essentially the same in all agreements – although there are differences in the wording of provisions. These matters are those where “a decision is made to introduce major changes in program, organisation, structure or technology that are likely to have a significant effect on employees”⁹². In this case, the Secretary must notify the employees who are likely to be affected by the proposed changes and their representatives.

The agreements provide that significant effects include a wide range of matters that include (but are not limited to):

- termination of employment;
- major changes in composition, operation or size of the department's workforce or in the skills required;
- the elimination or diminution of job opportunities, promotion opportunities or job tenure;
- alteration in hours of work;
- the need to retrain employees;
- the need to relocate employees to another workplace; and
- the restructuring of jobs.⁹³

Some agreements have further detailed provisions in addition to those above. For example:

- The Australian Taxation Office agreement limits the ability of the ATO even to move its employees to a new office within the same city.⁹⁴ This is included in the agreement even though section 25 of the *Public Service Act 1999* (Cth) allows Agency Heads the unilateral power to determine the location at which an APS employee will perform their duties.
- The Department of Human Services agreement provides extraordinarily lengthy provisions on negotiation of working hours and rosters.⁹⁵ The provisions also detail how the consultation will occur in respect of changing working hours and other conditions.
- The Department of Agriculture agreement dictates that the outsourcing proposals (e.g. the use of contractors or labour hire) for ongoing work are subject to consultation with a national committee consisting, in part, of union delegates and officials.⁹⁶ Unions will have a vested interest in ensuring limited contracting takes place. The committee also has jurisdiction over ‘environmental initiatives’.⁹⁷

There is a prescribed consultation process that the Secretaries or Agency Head must undertake in these cases.⁹⁸ This consultation process includes formal consultation committees – with mandated union representatives. The content of the provisions varies from one agreement to another. For example, consultation committees have differing ratios of union representatives to other employee

⁹² Department of Human Services Agreement, clause A7.4.

⁹³ Ibid, clause A7.5.

⁹⁴ ATO agreement, clause 112.

⁹⁵ Department of Human Services Agreement, clauses F7 and F8.

⁹⁶ Department of Agriculture agreement, clause 82.8.

⁹⁷ Department of Agriculture agreement, clause 82.8.

⁹⁸ See, for example: Department of Human Services Agreement, clause A7.9.

and management representatives,⁹⁹ and different ways of appointing or electing representatives to the committee¹⁰⁰. The balance of union-heavy committees is made worse in some agreements which provide committee membership for external union officials.¹⁰¹

Fundamentally, all of the agreements provide for two levels of consultation: one committee which relates to individual workplaces or particular zones, and another committee which operates at a national level and oversees Department-wide issues. Usually, the smaller zone committees are able to escalate issues to the national committee. Chart 2 illustrates the Department of Human Services consultation structure – which is typical of the other agreements.

Table 8 – Department of Human Services consultation committees

Service Zone Committees	National Consultative Committee
<ul style="list-style-type: none"> • Membership of committees consists of 3 management and 3 union representatives • Meets at least 3 times per year • May escalate issues to the NCC 	<ul style="list-style-type: none"> • Membership consists of 4 management and 4 union representatives • Meets at least 4 times per year

⁹⁹ For example, half the employee representatives on the Department of Social Services committee are not union appointed compared to the Department of Human Services where there is no representation for non-union employees.

¹⁰⁰ For example, some agreements allow for directly union appointments, whereas the Department of Immigration breaks up employees into geographical electorates.

¹⁰¹ For example, the Department of Agriculture Committee has 1 CPSU official; the Department of Social Services committee has 1 CPSU official and 1 MEAA official.

Conclusion

Bargaining negotiations have commenced in line with the Commonwealth government's bargaining policy *Workplace Bargaining Policy 2015*. Among other things, this policy document stipulates that pay rises must be offset with productivity savings and capped at 2 per cent a year. This position has softened mildly from the government's previous policy of average pay increases of 1.5 per cent per annum, which applied prior to 21 October 2015.

Over the past decade, Australian Public Service employees have enjoyed wage increases substantially above CPI. During this time, APS remuneration increases totalled 50.7 per cent, compared to CPI increases of 31.8 per cent. That is more than most other industries. One of the reasons for this is because the public sector does not face the budget constraint of the private sector. Governments are able to pay higher wage bills out of consolidated revenue – typically by raising taxes or incurring larger deficits (which, it should be noted, will have to be paid through taxation eventually). A government's capacity to pay is also much higher than the average private sector business.

A further risk is that over time unrealistic above-productivity wage increases in the public sector may place undue pressure on the private sector to match. This is true, for example, in the private and independent education sector where unions have successfully sought conditions where wage increases are tied to those in the public sector. Unlike government, the private sector cannot compulsorily levy increased revenue to meet these costs, and the higher cost base, all things equal, will reduce the amount a business is able to produce.

In addition to these generous wages, this report has highlighted that APS agreements have accumulated other generous terms and conditions, including provisions favouring the unions. These entitlements go beyond those provided by minimum safety nets, and often well above standards in the private sector.

The CPSU is seeking a 12.5 per cent wage increase with no productivity offsets. This report evidences that the union's ambit-claim is unjustified. There are numerous examples of overly-generous entitlements that could be traded away for an increase in salary.

The unions are continuing to block the Commonwealth government's pay offers. Despite this, as at the beginning of December 2015, enterprise agreements consistent with the government's bargaining policy have been voted up by employees at five Commonwealth agencies. These include the NBN Co., ComSuper, the Australian Office of Financial Management, the Department of Treasury and the Australian Public Service Commission.

These agreements were voted up in the face of strident opposition from the public sector unions. Unfortunately this is part of an increasing trend across the country where union leaders are using the enterprise bargaining process and the industrial relations system to further their own political purposes – i.e. putting pressure on conservative governments – rather than acting in the best interest of their union's members.

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