

**Senate Standing Committee on Environment and Communications**

**Answers to Senate Estimates Questions on Notice**

**Budget Estimates May 2017**

**Communications Portfolio**

**Australia Post**

**Question No: 71**

**Australia Post**

**Hansard Ref: Page 102-104, 24/05/2017**

**Topic: Section 49**

**Senator Dastyari, Sam asked:**

**Senator DASTYARI:** Not at all. Minister, if you were to provide a direction as the shareholding minister, is it a disallowable instrument? That is a very technical question.

**Senator Fifield:** I would have to seek advice. I hazard a guess that it is not, but I stand to be corrected.

**Senator DASTYARI:** Minister, I do not know whether the department has left because of the arrangement—

**Senator Fifield:** We will take that on notice.

**Senator DASTYARI:** You may be correct. But I am not sure you are correct—which is fair enough because that is a very technical question about whether or not—

**Senator Fifield:** As I said, I am not making a definitive statement.

**Senator DASTYARI:** You were making reference to section 49.

**Mr Blake:** That is our advice.

**Senator DASTYARI:** Explain to me your advice. Section 49 says:

**Minister may give directions to the Board**

*(1) Subject to subsection (2), the Minister may, after consultation with the Board, give to the Board such written directions in relation to the performance of Australia Post's functions as appear to the Minister to be necessary in the public interest.*

*(2) The Minister shall not give a direction under subsection (1) in relation to:*

*(a) rates of postage; or*

*(b) amounts to be charged for work done, or services, goods or information supplied, by Australia Post.*

*fair enough—*

*(3) Where the Minister gives a direction under subsection (1), the Minister shall cause a copy of the direction to be laid before each House of the Parliament within 15 sitting days of that House after giving the direction.*

*That is common language for a 'disallowable instrument'. I am not playing gotcha; you are not expected to know the technical details of a direction.*

**Senator Fifield:** No, you are being helpful.

**Senator DASTYARI:** My understanding of that is that it is a disallowable instrument. So if you were to give a direction the Senate could reject it. Is that the advice that you have? Were you aware of that, Mr Blake?

**Mr Blake:** The advice we have is that there are two mechanisms by which it could occur and, therefore, practically it applies.

**Senator DASTYARI:** No, it is quite the opposite of 'practically it applies'. The act itself says that, if you are given a direction, then it becomes a matter for the Houses of Parliament as to

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whether or not they should choose to disallow that. Where are you getting your advice? Is this external advice, or is this from the government?

**Mr Blake:** We did seek external advice, yes. I do not have that advice with me, but I would be happy to provide it on notice.

...

**Senator DASTYARI:** Which piece of legislation do you think that applies to you—

**Mr Blake:** The Public Governance, Performance and Accountability Act 2013.

**Senator DASTYARI:** Where in the act?

**Mr Blake:** I believe it is section 22, but I am happy to confirm that on notice.

**Senator DASTYARI:** I am going to look that up. We can go to other senators questions so that I can have a chance to look at that and then we will come back to it. Chair—

**Ms Corbett:** We have spoken to our staff. We have spoken to the unions. We have explained to our staff that there is a government workplace bargaining policy and that we have received a letter from the Australian Public Service Commission—and we have shared that letter with the unions—that shows that it is the intention that a Australia Post would be bound by that policy. We have been very open and transparent with our staff, saying that our offer to our staff is two per cent. In addition—and this is what is really important to our staff—we have said that all the benefits they receive under the current EBA will be confirmed and will stay. That is really important for Australia Post and the people who work for us, from a job stability perspective.

**Senator DASTYARI:** Chair, in terms of fairness, I want to have an opportunity to have a look at this now. It might be a better use of the committee's time if we perhaps went to other senators and then come back to this.

**Answer:**

A direction given to the board by the Minister under section 49 of the *Australian Postal Corporation Act 1989* is not subject to disallowance (see Regulation 9 of the *Legislation (Exemptions and Other Matters) Regulations 2015*).

Australia Post's external legal advice is attached.

## Advice for Australia Post

Prepared for: Nick Macdonald, General Counsel and GM Assurance (Corporate Centre)

Geraldine Rivers, Group Head of Workplace Relations & Policy

Prepared by: John Tuck, Partner

**CORRS  
CHAMBERS  
WESTGARTH**  
lawyers

6 April 2017

*Privileged and confidential*

# Obligations under the Workplace Bargaining Policy 2015

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## Question

- 1 Is Australia Post required to comply with the *Workplace Bargaining Policy 2015* (**Bargaining Policy**) and what are the legal bases for such compliance?
- 2 What are the consequences of non-compliance with the Bargaining Policy by Australia Post?

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## Answer

- 1 Yes.  
Australia Post is required to comply with the Bargaining Policy. The Government can mandate compliance with the Bargaining Policy through provisions in the *Australian Postal Corporation Act 1989* (**APC Act**) and the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**).
- 2 If Australia Post does not comply with the Bargaining Policy there is a high risk of adverse consequences including significant delays. In our view insisting on the strict application of the provisions of the APC Act would not ultimately alter the position of Australia Post or its employees. What it will do is lead to delays. It may also lead to a less favourable outcome than that which has so far been achieved through the co-operative discussions. There is a serious risk that under this scenario a significant re-write of the enterprise agreement would be required.

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## Next steps

Consider our advice.

## What this advice covers

This advice focuses on the following issues:

Is Australia Post required to comply with the Bargaining Policy? What are the legal bases for such compliance? .....	2
What are the consequences of non-compliance with the Bargaining Policy by Australia Post? .....	3

## Is Australia Post required to comply with the Bargaining Policy? What are the legal bases for such compliance?

**The Government can mandate compliance with the Bargaining Policy through relevant provisions in the *Australian Postal Corporation Act 1989* and the *Public Governance, Performance and Accountability Act 2013*.**

### Background and context

- 1 It is important to appreciate the broader legislative context to understand why the Bargaining Policy applies to Australia Post. Australia Post is a corporate Commonwealth entity which is established by and operates under the *Australian Postal Corporation Act 1989* (Cth) (**APC Act**). The Australian Government is the sole shareholder in the Corporation, and the Minister for Communications (**Minister**) and Minister for Finance have responsibility for Australia Post.
- 2 Governance of Australia Post is principally determined by the APC Act and the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**). The APC Act expressly recognises the role of the Minister in the governance of Australia Post.
- 3 Australia Post is a Government Business Enterprise (**GBE**) within the meaning of sections 8 and 10(1)(e) of the PGPA Act.<sup>1</sup> This is important as paragraph 2 of the Bargaining Policy provides that it applies to GBEs.
- 4 The Bargaining Policy was released in November 2015 by the Australian Public Service Commission (**APSC**) which has specific statutory responsibilities detailed in the *Public Service Act 1999* (Cth) (**PS Act**), including developing, promoting, reviewing and evaluating employment practices and policies. The Minister Assisting the Prime Minister for the Public Service has oversight of the Bargaining Policy in conjunction with the APSC.
- 5 The Bargaining Policy itself follows the common practice for the Commonwealth Government of setting parameters and policies that establish the scope for wage outcomes and changes to employment conditions for Commonwealth public sector bargaining. State governments adopt a similar approach.
- 6 It is clear that the Commonwealth has the capacity to mandate compliance by Australia Post with the Bargaining Policy. It could do this by either or two routes. First, following consultation with the Board of Australia Post, it could, in reliance upon section 49(1) of the APC Act, give to the Board

<sup>1</sup> See also *Public Governance, Performance and Accountability Rule 2014*, s 5(1).

‘such written directions in relation to the performance of Australia Post’s functions as appear to the minister to be necessary in the public interest’. This could clearly include a direction to adhere to the Bargaining Policy.

- 7 The alternative route would be for the Finance Minister to make a ‘government policy order’ under section 22(1) of the PGPA Act that applies ‘to one or more Commonwealth entities’. Before making any such order the Finance Minister must be satisfied that the relevant portfolio Minister ‘has consulted the entity on the application of the policy’.
- 8 No direction or order has yet been issued under either the APC Act or the PGPA Act. However, the Australian Public Service Commission (**APSC**) has indicated to Australia Post that the Government expects enterprise agreement negotiations and any resulting agreement to conform to the Bargaining Policy. We are of the clear view that it would be both unnecessary and an error of judgment to view the implementation of the Bargaining Policy by Australia Post solely through the prism of the APC Act and/or the PGPA Act.
- 9 The Commonwealth’s relationship to GBEs can appropriately be seen as analogous to that between a holding company and its subsidiaries: the Commonwealth has a strong interest in the performance and financial returns of the GBE as well as reporting and accountability arrangements that facilitate active oversight by the shareholder. This also means the Commonwealth can take action in relation to the strategic direction of its GBEs where it prefers a different direction from the one proposed by the GBE concerned.
- 10 Put differently, we consider that it would be unnecessarily and inappropriately legalistic to take the position that there is no obligation on Australia Post to comply with the Bargaining Policy unless the Minister either issues as direction or order under section 49 of the APC Act or section 22 of the PGPA Act.
- 11 The management autonomy of Australia Post which is clearly set out in section 23 of the APC Act needs to be balanced against this broader context, and in particular the requirement in section 28 of that Act that Australia Post perform its functions in a way consistent with (amongst other things) with orders under section 22 of the PGPA Act and directions under section 49 of the APC Act. In our view it is an unremarkable conclusion that the Commonwealth can both expect and require Australia Post to observe the Bargaining Policy.

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**What are the consequences of non-compliance with the Bargaining Policy by Australia Post?**

**Non-compliance with the Bargaining Policy could result in adverse consequences including significant delays and a less favourable outcome than that which has so far been achieved through co-operative discussions with the APSC.**

- 12 Australia Post has had productive and cooperative discussions with the APSC with respect to the application of the Bargaining Policy to its next enterprise agreement. Discussions with the APSC have set out a course for

Australia Post to make a new enterprise agreement with its employees. This process is nearing in principle agreement that can be voted on by employees.

- 13 If Australia Post were to adopt a different course and to defy the application of the Bargaining Policy to its negotiations there is a high risk of adverse consequences including significant delays. In our view, for the reasons set out above, insisting on the strict application of the provisions of the APC Act would not ultimately alter the position of Australia Post or its employees. What it will do is lead to delays. It may also lead to a less favourable outcome than that which has so far been achieved through the co-operative discussions. There is a serious risk that under this scenario a significant re-write of the enterprise agreement would be required.

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**Reliance**

This advice is for the benefit of the addressee.

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**Please call to discuss any aspects of this advice**

**John Tuck**  
Partner