



Australian Government

Australian Government response to the
Senate Education and Employment References Committee
report:

Siege of attrition: the Government's APS Bargaining Policy

FEBRUARY 2017

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GOVERNMENT RESPONSE TO SENATE COMMITTEE INQUIRY REPORT INTO THE IMPACT OF THE GOVERNMENT'S BARGAINING POLICY AND APPROACH TO COMMONWEALTH PUBLIC SECTOR BARGAINING

Recommendation 1

The committee recommends that the Minister Assisting the Prime Minister for the Public Service take steps to ensure that the APSC issues all agencies with instructions that: the agency must ensure all APS employees may be represented on workplace matters by a person of their choice, including a union representative; and that agencies consult employees on matters that affect them prior to decisions being made.

RESPONSE:

The Government rejects this recommendation. Such instructions are not required.

An employee's right to representation in the workplace is enshrined in the *Fair Work Act 2009*.

The Workplace Bargaining Policy 2015 requires agencies to respect the right for an employee to belong to a union, or not belong to a union.

Many agencies have already included clauses in their enterprise agreements that recognise an employee's right to be represented in the workplace, including by a union delegate. In such circumstances, agencies and employee representatives are expected to deal with each other in good faith.

The bargaining policy strikes an appropriate balance regarding workplace consultation arrangements. The policy requires enterprise agreements to include the model consultation term from the Fair Work Regulations 2009. The model term requires agencies to:

- consult with employees before they can change rosters or hours of work; and
- consult with employees about major workplace changes after a decision has been made.

Employees have a right to nominate a representative to represent them in the consultation process.

It is open to all agencies to establish staff consultative committees to facilitate a forum for discussion about employment and workplace relations matters in the workplace. This is a longstanding practice in the public sector and the bargaining policy encourages this to continue.

In some circumstances it is reasonable and appropriate for consultation to occur before a final management decision is made. The bargaining policy allows agencies to include a clause in an enterprise agreement which requires management to consult employees about proposed changes to HR policies and procedures before a final decision is made. This is sensible business practice.

Nothing in the bargaining policy prevents agencies consulting with employees at any time outside of enterprise agreement requirements. This is good management practice.

Recommendation 2

The committee recommends that the government adjust the annual wage cap contained in the 2015 bargaining policy to a more realistic level, consistent with economy wide outcomes in enterprise bargaining, and facilitate agency access to a portion of the savings accrued through the delays in settlement to allow for improved wage offers that do not come at the expense of cuts to pre-existing rights and conditions.

RESPONSE:

The Government rejects this recommendation.

The recommendation overlooks the fact that the federal budget is in significant deficit.

During this bargaining round, the Government has already lifted the wages offer once. The current remuneration increase available to public servants is an average of 2% per annum. This figure is competitive with the increases to the Consumer Price Index and the Wages Price Index in recent years. The pay rises on offer to public servants are fair and reasonable.

Recommendation 3

The committee recommends that the government urgently amend the prohibition on back pay or provide another mechanism such as a payment upon agreements commencing to allow agencies to provide some limited and appropriate financial recompense to employees who have had their wages frozen for the past three years.

RESPONSE:

The Government rejects this recommendation.

The federal budget is in significant deficit. Public sector agencies are required to fund remuneration increases from within existing budgets. In this economic climate, agencies would not be able to afford even higher remuneration increases, back pay and/or sign-on bonuses without having to cut expenditure elsewhere, which could include redundancies. This is in no one's interests and the Government does not support this.

The Government has made it very clear from the outset that back pay and sign-on bonuses are not available in this bargaining round.

It has been the longstanding practice of successive Governments, including Labor governments, for back pay not to be offered in bargaining, unless exceptional circumstances apply. The act of repeatedly voting no to a fair and reasonable wage increase is not considered an 'exceptional circumstance' by Government.

Recommendation 4

The committee recommends that the Minister Assisting the Prime Minister for the Public Service and relevant portfolio Ministers take immediate steps to ensure that agencies affected by machinery of government changes such as the Department of the Prime Minister and Cabinet, the Department of Immigration and Border Protection, the Federal Courts and the Administrative Appeals Tribunal are encouraged to reach enterprise agreements that align employment pay and employment conditions without loss.

RESPONSE:

The Government rejects the premise of this recommendation.

Machinery of government changes occur intermittently and can occur regardless of whether an agency is bargaining a new agreement or not. The Government is aware of the challenges agencies experiencing machinery of government changes can face when integrating business functions.

Several agencies in the current bargaining round that have experienced machinery of government changes have been able to reach new agreements sensibly within budget constraints. These include:

- Department of Education and Training
- Department of Employment
- Department of Environment and Energy
- Department of Health
- Department of Industry, Innovation and Science
- Department of Infrastructure and Regional Development
- Department of Social Services.

All of these bargains involved significant complexity but were successfully negotiated. In the case of the Department of Social Services, that department brought together arrangements from seven previous enterprise agreements and this involved variable pay rise outcomes for staff.

Such complexities in bargaining can be worked through sensibly when bargaining parties adopt a positive and constructive approach and work through the issues together.

Recommendation 5

The committee recommends that the bargaining policy should be amended to specifically allow for the maintenance of existing negotiated agreement provisions, including in the case of agencies affected by machinery of government changes.

RESPONSE:

The Government rejects the premise of this recommendation.

The Workplace Bargaining Policy 2015 does not require agencies to reduce existing conditions of employment. Some bargaining representatives have confused content in agreements that is procedural and administrative in nature with conditions of employment.

The quantum of conditions like annual leave, personal/carer's leave, compassionate leave, maternity leave, supporting partner leave, overtime rates, penalty rates, remote localities allowances, redundancy payments etc may be retained under the policy. Some of the administrative detail about how such entitlements are administered is detail that is more appropriately contained in HR policies or guidelines.

Over successive bargaining rounds, a range of superfluous content that does not provide employees with any specific entitlements has crept into agreements. In some cases, large swathes of HR manuals and procedures have been included in agreements. Such content complicates the use of enterprise agreements and makes them highly inflexible. In the case of agencies experiencing machinery of government changes, the option of grandfathering some employment conditions is available under the bargaining policy. Such arrangements have already been agreed to for some agencies.

Recommendation 6

The committee recommends that the bargaining policy should be amended to allow agencies and employee bargaining representatives to agree on improvements and encourage provisions in enterprise agreements that support victims of domestic violence including access to leave.

RESPONSE:

The Government rejects this recommendation.

The bargaining policy does not require agencies to remove existing provisions which provide domestic or family violence leave. However, only a small number of agencies reference domestic or family violence in their enterprise agreement.

Where references do not exist, agencies have the ability to support employees using existing provisions. This approach ensures an employee's privacy is maintained.

Commonwealth agencies are committed to supporting employees experiencing domestic or family violence. Agencies already provide a wide range of measures to assist employees, including:

- Access to personal/carer's leave and miscellaneous leave, as required
- Access to counselling and support services
- Personal safety assistance at workplaces

- Flexible working arrangements
- One-on-one advice through designated contact officers.

These are useful, practical support initiatives for employees.

The independent Fair Work Commission is currently considering the matter of whether to include an entitlement to ten days' paid domestic violence leave in all modern awards.

In December 2016, the Council of Australian Governments noted the importance of encouraging employers to provide appropriate workplace support to employees experiencing family violence, and agreed to consider the matter further following the Fair Work Commission's decision, expected in early 2017.

Recommendation 7

The committee recommends that the Minister Assisting the Prime Minister for the Public Service and the Minister for Immigration and Border Protection take immediate steps to ensure the Department of Immigration and Border Protection fairly address disparities arising from the integration of Customs and Immigration and the creation of the Australian Border Force and ensures officers of the Department can receive current pay and conditions.

RESPONSE:

The Government rejects this recommendation.

Employees at the Department of Immigration and Border Protection have been provided with three opportunities to accept a new enterprise agreement. The department's employees have not accepted these offers. These offers included proposals to address the disparities.

The Fair Work Commission terminated protected industrial action in the department in October 2016. A Full Bench of the Commission will now arbitrate a Workplace Determination for the department's employees which will be binding on all parties.

It would be highly inappropriate for the department to make wholesale changes to the terms and conditions of employees within the department while arbitration is ongoing. On this basis, it would also be inappropriate for the Government to intervene in the proceedings.

Recommendation 8

The committee recommends that the Minister Assisting the Prime Minister for the Public Service and the Minister for Immigration and Border Protection take immediate steps sufficient to ensure the Department of Immigration and Border Protection can and will seek to genuinely reach early agreement with employee representatives and put an agreed position to the Fair Work Commission arbitration of a workplace determination.

RESPONSE:

The Government rejects the premise of this recommendation.

The Community and Public Sector Union have adopted an inflexible position throughout the Department's bargaining. Three proposed agreements have been rejected. The union's intransigence continued after the termination of bargaining, and during conciliation with the assistance of the Fair Work Commission.

Prior to arbitration of this matter commencing, the parties were provided with a 21 day conciliation period in which they could identify matters that could be agreed and the matters remaining in dispute.

Given the significant number of issues that the Community and Public Sector Union claimed to still be in dispute, conciliation failed to resolve all of the outstanding issues.

The Government notes that it has always been open to the CPSU to engage in this process in a more constructive and conciliatory manner in the interests of its members. The union elected not to.

The arbitration of a Workplace Determination for the department is now being conducted by the independent Fair Work Commission.

Recommendation 9

The committee recommends that the government amend its bargaining policy to allow for the retention of existing rights and conditions in full, including but not limited to removing the prohibition on enhancements and defining previously agreed agreement provisions as enhancements in circumstances such as machinery of government changes.

RESPONSE:

The Government rejects this recommendation.

This recommendation appears to cover similar grounds to recommendations 4, 5 and 7 which the Government has also rejected.

The Government response to recommendation 5 also applies to this recommendation 9.

Recommendation 10

The committee recommends that the government amend its bargaining policy to allow and encourage the retention of access to family friendly conditions, including hours of work protections, to facilitate and support the employment of those with caring responsibilities.

RESPONSE:

The Government rejects the premise of this recommendation.

The bargaining policy does not require agencies to remove flexible working arrangements that assist employees manage their personal commitments while ensuring agency operational requirements are met. The policy encourages greater workplace flexibility.

Some clauses in current agreements place restrictions around how flexible working arrangements operate. The policy requires restrictive practices to be removed from agreements. This ensures that agencies and their employee can operate efficiently with maximum flexibility.

The *Fair Work Act 2009* requires all enterprise agreements to include an individual flexibility term. This allows terms and conditions in an agreement to be varied for an individual employee where the employer and the employee agree to this. These arrangements cannot be entered unless the employee will be better off overall on the individual arrangement.

The bargaining policy requires agencies to include the model individual flexibility term from the Fair Work Regulations 2009 plus allow remuneration to be varied by mutual agreement. Agencies are encouraged to provide for a broader range of matters that may be varied to increase workplace flexibility.

Recommendation 11

The committee recommends that the Minister Assisting the Prime Minister for the Public Service and the Minister for Human Services take immediate steps to ensure that the Department of Human Services can and will seek to maintain enterprise agreement provisions that preserve existing family friendly conditions, provide employee protections for rostering and hours of work, maintain current consultation provisions and provide that ongoing employment remains the preferred type of employment in the Department.

RESPONSE:

The Government rejects the premise of this recommendation.

Bargaining in the Department of Human Services is a matter for the department's employer representatives and employee representatives.

The recent enterprise agreement proposal put to a vote in the Department of Human Services offered the following arrangements to employees:

- For rostered staff, a three phased rostering process, meaning rostered employees can:
 - o give their preferences or have their agreed hours accounted for
 - o receive a draft roster so they can discuss any changes with their manager, and
 - o receive a final roster after which they can seek to make ad hoc changes,
- Guarantees that employees, and where they choose their representatives, will be consulted about the implementation of significant changes in the workplace after management decisions have been made,
- The guaranteed continuation of a staff consultative forum where management and employee representatives can meet to discuss and consider matters in accordance with an agreed terms of reference,
- A guarantee that, where the Department proposes to change workplace policies, the proposals will be available to employees for comment and feedback for at least two weeks prior to any decisions being made about the final policy,
- A right to be consulted about proposed changes to working hours before final decisions are made,
- Guaranteed timeframes and protections for the duration of part-time work agreements,
- Guaranteed timeframes and protections for the duration of regular hours agreements for non-rostered employees and guaranteed timeframes and protections for the duration fixed pattern of hours for rostered employees,
- A right to request formal planned day off as part of a regular hours agreement or fixed pattern of hours,

- A right for an employee to return to their previous role upon returning from parental leave, or if the position no longer exists, a suitable position aligned with the employee's experience and skills,
- A right for an employee to return to a part time position upon returning from parental leave which is guaranteed until the child turns three years of age,
- The maintenance of guaranteed lactation breaks for employees who are breastfeeding.

There is no need for any commitment about ongoing employment to be included in the enterprise agreement. This is required by law under the *Public Service Act 1999*. The department's workforce overwhelmingly continues to see most employees engaged on an ongoing basis.

All of these arrangements are sensible, fair and generous by any standards.

Recommendation 12

The committee recommends that the government amend its bargaining policy so that it no longer requires the removal of existing agreement content in various areas above the legislated National Employment Standards and the minimum provisions required by the *Fair Work Act 2009*.

RESPONSE:

The Government rejects the premise of this recommendation.

The bargaining policy does not require agencies to reduce any existing employment conditions that are more generous than those provided in the National Employment Standards.

The *Fair Work Act 2009* requires all enterprise agreements to contain a dispute resolution term, consultation term and individual flexibility term. The bargaining policy requires the model dispute resolution term and model consultation term from the Fair Work Regulations 2009 to be included in public sector enterprise agreements.

Recommendation 13

The committee recommends that the government amend its bargaining policy to allow for the retention of existing and long-standing consultation and dispute resolution rights.

RESPONSE:

The Government rejects the premise of this recommendation.

The Government's response to recommendation 12 addresses these matters.

Recommendation 14

The committee recommends that the Minister Assisting the Prime Minister for the Public Service take immediate steps to ensure that where decisions with respect to bargaining outcomes rest with the Minister or with the APS Commissioner, the decision maker engages in bargaining and acts in accordance with the good faith bargaining requirements of the *Fair Work Act 2009*.

RESPONSE:

The Government rejects this recommendation.

Enterprise bargaining has occurred in a similar fashion in accordance with successive policies over successive governments for well over 15 years. It has not been the practice for the relevant Minister, or delegates with responsibility for administering government policy, to engage directly in bargaining.

Bargaining has occurred at the agency level for many years. The current bargaining round is unremarkable in this respect.

The bargaining framework places responsibility for negotiating an enterprise agreement with the agency head. This is appropriate, as the best and most effective deals are those owned by the parties, the employer and the employees.

The Commonwealth notes that in August 2016, the CPSU sought bargaining orders against the Minister Assisting the Prime Minister for the Public Service. On 17 August 2016, the CPSU issued a bulletin and a social media update publicly accusing the Minister of breaching the *Fair Work Act 2009*.

The CPSU failed to demonstrate that the Minister is a bargaining representative. Consequently, the union substantially revised its position and dropped its claim for bargaining orders against the Minister.

Recommendation 15

The committee recommends that the Minister Assisting the Prime Minister for the Public Service takes immediate steps to ensure that the APS Commissioner acts to remove the existing impediments and works with employee representatives and agencies to enable a reasonable conclusion to be reached to the current protracted Commonwealth public sector bargaining.

RESPONSE:

The Government rejects the premise of this recommendation.

As at 8 February 2017, 83 agreements have been made in accordance with the bargaining policy. This demonstrates that agreements can be made if the relevant bargaining representatives sit down and genuinely attempt to resolve outstanding issues in a positive, conciliatory and constructive way.

Recommendation 16

The committee recommends that the Minister Assisting the Prime Minister for the Public Service take immediate steps to facilitate a discussion with the CPSU about a possible resolution of this extended dispute, with due consideration for the other recommendations in this report.

RESPONSE:

The Government notes this recommendation.

The Commonwealth notes that throughout this bargaining round, the CPSU has pursued a range of actions that do not suggest the union is genuinely willing to reach an agreement in agency-level bargaining.

Shortly after the Turnbull Government took office, the Government changed the bargaining policy. This provided for higher remuneration increases and relaxed a range of other requirements. The CPSU responded to this by declaring that it would not support any agreements made in accordance with the policy.

The Government is aware that the CPSU's bargaining campaign strategy has included strong encouragement for public servants to vote no to agreements. This has usually been coupled with vague or illusive rhetoric suggesting that a better offer will be made, or the Government's policy will change. Since November 2015, it does not appear that any of the CPSU's assurances to its members and non-members have proven true.

The CPSU has on occasion misrepresented agency positions and the bargaining policy. This has led to confusion amongst members and staff, and has caused negotiations to be protracted.

The best approach for the CPSU is to encourage members to support proposed agreements.

Recommendation 17

The committee recommends that the APSC and the CPSU consider a range of approaches for future enterprise bargaining and settle on the best and most productive approach for the APS and other Commonwealth agencies well in advance of the nominal expiry of this round of enterprise agreements.

RESPONSE:

The Government notes this recommendation.

The APSC always undertakes consultation with a variety of stakeholders in the development of Government policies. This includes consultation with unions where appropriate.

The wide views of a range of stakeholders are considered when developing the Government's approach to bargaining.