



Australian Government
Australian Public Service Commission

M Poler

By email: foi+request-5231-111329ff@righttoknow.org.au

Our reference: C19/328

Dear M Poler

Freedom of Information request

1. I refer to your email dated 25 January 2019, seeking access to documents held by the Australian Public Service Commission (the Commission) under the *Freedom of Information Act 1982* (FOI Act).
2. You requested access to the following:

I seek a copy of any briefing materials provided by the APSC, to the Minister for the Public Service and/or his office, between the inclusive dates of 2 January 2019 and the date of this FOI application.

My decision

3. I am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests.
4. I have determined that 3 documents fall within the scope of your request.
5. Having considered the documents, I have decided that subject to the redaction of irrelevant material, to grant you access in full. The documents are attached to the correspondence.

Section 22 – Edited documents

6. Section 22 of the FOI Act provides that an agency may edit copies of a requested document to remove matter within the documents that is irrelevant to the scope of a request.

Review rights

7. If you are dissatisfied with this decision, you are entitled to seek a review. Your rights are set out at **Attachment A** to this letter.

Contacts

8. If you require clarification of any of the matters discussed in this decision please contact the Commission's FOI Officer by email at foi@apsc.gov.au.

Yours sincerely



Marco Spaccavento
Group Manager, Workplace Relations
20 February 2019

Enclosures

Attachment A – Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of an FOI decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission, and/or
2. a external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au

Post: The FOI Coordinator
Australian Public Service Commission
B Block, Treasury Building
GPO Box 3176
Parkes Place West
PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: www.oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218

SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072

Website: www.ombudsman.gov.au

PDR Number:
MS19-000003



Australian Government
Australian Public Service Commission

MINISTERIAL SUBMISSION

Copies to:
Commissioner
Deputy
Commissioner

Minister for Finance and the Public Service

January 2019

Fair Work Commission Full Bench decision on the Department of Home Affairs arbitration

Timing: Urgent. 17 January 2019 to brief the Minister on the Fair Work Commission Full Bench decision of 11 January 2019 on the arbitration at the Department of Home Affairs.

Recommendation:

That you:

- i. **note** the contents of this submission; and
NOTED / PLEASE DISCUSS
- ii. **note** the talking points prepared at Attachment A.
NOTED / PLEASE DISCUSS

Key Issues:

The Full Bench of the Fair Work Commission published its decision on the arbitration at the Department of Home Affairs (the Department) on 11 January 2019.

2. The Full Bench provided a draft Workplace Determination with its decision. The draft Determination will provide the terms and conditions of employment for the Department's employees once it commences.
3. A further conference is scheduled for 1 February 2019 with the Department and bargaining representatives to identify any implementation issues with the draft Determination and to resolve a small number of outstanding issues.
4. The Full Bench decision included criticism of the Government's *Workplace Bargaining Policy 2018* (the Policy) and, in one case, of the role of the APSC in the Department's bargaining process. This was reported in the Canberra Times: see Attachment B.

Draft workplace determination

5. The Department has advised the Full Bench adopted many of its positions.
6. Overall, the proposed draft determination is clearer, easier to read and is broadly consistent with the Department's positions, which were consistent with the Government's Policy.
7. The Full Bench released a Statement in June 2018 outlining what its wages decision would be in the final Determination. This included:
 - (a) that the determination would have a 2 year duration;
 - (b) general wage increases would be:

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- i. 4% applying from 8 June 2018 which was applied immediately by the Department; and
 - ii. 3% 12 months from commencement of the Workplace Determination;
 - (c) annual salary advancement (increments) of 3% per annum subject to employees meeting performance expectations;
 - (d) setting working hours at 7 hours 30 minutes a day, which is an increase for employees previously under the *Australian Customs and Border Protection Service Enterprise Agreement 2011-2014*; and
 - (e) establish pay scales set at the higher of the two existing pay scales.
8. In setting the general wage increases, the Full Bench took into consideration the time since the last wage increase in June 2013 and the duration of the draft Determination, productivity, and economic indicators.
9. The headline general wage increase is 7% over almost two and three quarter years when counted from June 2018. At first glance, the general wage increase appears to be in excess of the Government's Bargaining Policy maximum of 2%.
10. However, the last ballot for a new enterprise agreement was held in October 2016. If that had been successful, the agreement would likely to have commenced in February 2017. Over the period from January 2017 to the expected expiry date of the draft Determination in mid-2021, the average wage increase is less than 2% per annum.
11. The decision and draft Determination addresses matters not covered by the Full Bench in its interim June 2018 statement. In particular:
- (a) management of allowances, with a significant number to be discontinued;
 - (b) inclusion of the model consultation, dispute resolution and individual flexibility terms from the *Fair Work Act 2009*; and
 - (c) leave entitlements. In the small number of leave types that were not already aligned, the more generous leave type was awarded.
12. While acknowledging that Machinery of Government (MoG) changes are not uncommon or exceptional in the context of the APS, the Full Bench recommended consideration be given to providing greater flexibility in the Government's Policy for agencies undergoing MoG changes during bargaining.
13. The Full Bench indicated that, overwhelmingly, APSC interactions and communications it had observed in submissions were consistent with its role under the Government's Policy.
14. However, it also indicated that, in at least one interaction with the Department, the APSC exceeded its "gatekeeper" role. This interaction was an email exchange to Commonwealth Chief Negotiators which sought to coordinate the timing of forthcoming agency ballots.
15. The Full Bench also included some criticism of the Department in the process, including failing to act as a model litigant before the Fair Work Commission.

Next steps

16. The APSC continues to work with the Department and to provide advice on the application of the Government's Policy.
17. The Department is preparing for its appearance at the Fair Work Commission conference. It is currently considering implementation issues as well as communicating what this means to its employees. It has identified there are a few inconsistencies between the decision and the draft Determination.

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18. In the event you are requested to provide comment on the Full Bench decision, talking points are provided at Attachment A.

Financial Implications:

19. N/A

Background:

- 20. The Department commenced bargaining in 2014.
- 21. The Australian Customs and Border Protection Service was merged into the Department of Immigration and Border Protection in July 2015.
- 22. The Fair Work Commission terminated industrial action of Community and Public Sector Union members in the Department of Immigration and Border Protection on 5 October 2016. This triggered compulsory arbitration.
- 23. The Department put an enterprise agreement to ballot unsuccessfully in October 2016 before compulsory arbitration commenced. This was the third ballot of employees.
- 24. The Department of Home Affairs was formed from the Department of Immigration and Border Protection in January 2018.
- 25. On 8 June 2018, the Full Bench released a statement outlining its intention to make a two year Workplace Determination and its wage increase decisions.

Consultation:

- 26. The Department of Home Affairs has been consulted.

Attachments:

Attachment A: Talking points regarding the Fair Work Commission Full Bench decision on arbitration at the Department of Home Affairs

Attachment B: The Canberra Times, "Government Policy blamed for stalemate", Sally Whyte, 15 January 2019.



Peter Woolcott
Commissioner
Australian Public Service Commission
02 6202 3501

Contact Officer:	Emma Enzerink
Job Title/Level:	A/g Group Manager
Telephone:	(02) 6202 3989
PDR Number	MS19-000003

Mathias Cormann

Talking Points – Fair Work Commission Full Bench decision of 11 January 2019 regarding arbitration at the Department of Home Affairs

1. The Full Bench of the Fair Work Commission published a decision on 11 January 2019 in relation to the arbitration at the Department of Home Affairs.
2. This decision followed a Statement of the Full Bench on 8 June 2018 that dealt with pay rates and working hours. A draft workplace determination accompanied the latest decision.
3. The Full Bench intends to hold a conference with the Department and other bargaining representatives early February to identify any issues with implementing the draft determination.
4. The Full Bench will decide when the final determination will commence.
5. The Department's position throughout arbitration remained consistent with the Government's bargaining policies.
6. The final arbitrated determination will not affect bargaining in other agencies or the Government's Workplace Bargaining Policy 2018 (the Policy).

If pressed about the Fair Work Commission's observation that the Policy made reaching agreement more difficult:

7. Agencies are continuing to bargain successfully with their employees under the Policy and to implement new enterprise agreements.

If asked whether the Government will make the Policy more flexible for agencies undergoing Machinery of Government changes:

8. The Government's Policy is working well and many agencies affected by Machinery of Government changes have successfully bargained new agreements.

If asked about the Fair Work Commission's observation in relation to the role of the APSC in bargaining at the Department:

9. The role of the APSC is to provide support and advice to agencies on the workplace relations matters.
10. The APSC has acted appropriately in administering successive Government bargaining policies.



15 Jan 2019
Canberra Times, Canberra

Author: Sally Whyte • Section: General News • Article Type: News Item
Audience : 17,579 • Page: 8 • Printed size: 381.00cm² • Region: ACT • Market: Australia
ASR: AUD 9,759 • words: 702 • Item ID: 1063584616

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Page 1 of 1

PUBLIC SERVICE

Government policy blamed for stalemate

Reaching pay deal for Home Affairs 'nigh on impossible'

Sally Whyte

The Fair Work Commission has criticised the government's workplace bargaining policy, saying it made it "nigh on impossible" for the government and unions to negotiate the Home Affairs enterprise agreement.

A full bench of the commission handed down a draft determination last Friday, ruling on every clause of the agreement covering employees at the Department of Home Affairs after the government and unions failed to come to an agreement after years of negotiations.

Introduced by former public service commissioner John Lloyd, the controversial workplace bargaining policy restricted agencies from offering more than 2 per cent annual pay increases and blocked conditions from being improved unless traded with other conditions or allowances.

Before the creation of Home Affairs as a mega-department, employees were covered by the agreement for the former department of immigration and citizenship, and others by that which covered former customs and border protection staff with markedly different conditions.

Finding a single set of terms and conditions after the machinery of government change that brought immigration and customs workers together "in a way that balanced the interests of the department and its employees was made nigh on impossible by the absence in the government's workplace bargaining policy of any meaningful scope to recognise the unique circumstances existing in this case," the Fair Work decision said.

The 185-page decision not only

laid out how pay increases should be calculated and the allowances to stay or be scrapped, but also made comments on the conduct of the parties involved and the quality of the evidence given.

The policies and actions of the Australian Public Service Commission also came in for a serve, even though the commission wasn't a party to the case.

"We ... suggest that consideration be given incorporating some flexibility into the government's workplace bargaining policy to deal with the difficulties which frequently arise in bargaining where machinery of government changes are involved," the decision said.

While the interactions between the department and the commission were "overwhelmingly ... consistent with the APSC's role" under the

government bargaining policy, Fair Work did take issue with the conduct of the commission during negotiations.

"We also consider that there was at least one instance where in our view the APSC inappropriately exceeded its 'gatekeeper' role", the decision said.

That instance was a series of emails between the commission and officials at the department, sent in July 2015 that showed the APSC had sought ministerial approval of an agreement to be voted on by employees in order for it to be part of a "co-ordinated ballot timing strategy" with other agencies' agreements.

In an email from the commission to some agencies, a commission staff member said "we think there is value in a co-ordinated approach to

timing, such that a number of EAs are put out to a vote on or near the same day".

Home Affairs staff voted down an agreement for the second time in September of that year.

The Public Service Commission has responded to the assessment made in the decision, saying "The content of the government's workplace bargaining policy is a matter for government to decide.

"Machinery of government changes are not uncommon and agencies affected continue to negotiate new enterprise agreements," a spokeswoman said.

On the instance where the commission was said to have exceeded its role, the commission only said: "The role of the APSC is to provide support and advice to agencies on the government's employment and workplace policies."

The Community and Public Sector Union has long railed against the role played by the Public Service Commission and the government's bargaining policy, labelling it as the reason the negotiations took years.

"The government's harsh and unreasonable public sector bargaining policy drove much of the agenda that's behind this ugly dispute, as Fair Work itself has recognised in criticising the conduct of the Australian Public Service Commission," national secretary Nadine Flood said.

"It took more than four years to settle bargaining for the vast majority of Commonwealth workers and yet Home Affairs was the only department that was even able to access arbitration through Fair Work after the Commonwealth applied to terminate industrial action at international airports."

Department of Home Affairs Arbitration – Interim Talking Points

- The Full Bench of the Fair Work Commission published a decision on 11 January 2019 in relation to the arbitration at the Department of Home Affairs.
- The decision included a draft workplace determination that follows on from a Statement on 8 June 2018 that dealt with pay rates and working hours.
- The Full Bench intends to hold a conference with the Department and other bargaining representatives in the coming weeks to identify any issues with implementing the draft determination.
- The Full bench will determine when the final determination will commence.
- The Department's position throughout arbitration remained consistent with the Government's bargaining policies. The Department successfully argued for a more streamlined determination benefiting employees and the agency.
- The final arbitrated determination will not affect bargaining in other agencies or the Government's *Workplace Bargaining Policy 2018* (the Policy).

If asked about the Fair Work Commission's observation that the Policy made reaching agreement more difficult:

- Agencies are continuing to bargain successfully with their employees under the Policy and to implement new enterprise agreements.

If asked whether the Government will make the Policy more flexible for agencies undergoing Machinery of Government changes:

- The Government's Policy is working well and many agencies affected by Machinery of Government changes have successfully bargained new agreements.

If asked about the Fair Work Commission's observation in relation to the role of the APSC in bargaining at the Department:

- The role of the APSC is to provide support and advice to agencies on the workplace relations matters.
- The APSC has acted appropriately in administering successive Government bargaining policies.

From: ENZERINK,Emma
Sent: Wednesday, 16 January 2019 5:43 PM
To: Clode, Daniel
Cc: WILEY-SMITH,Mary; WOOLCOTT,Peter
Subject: RE: Department of Home Affairs Fair Work Commission Arbitration - Decision [SEC=UNCLASSIFIED]
Attachments: FWC Full Benach decision Dept of Home Affairs Ministerial Submission.pdf

Hi Daniel

Attached is the brief and talking points. It is in PWS but won't get to you through the system until tomorrow.

Kind regards

Emma

From: Clode, Daniel <Daniel.Clode@finance.gov.au>
Sent: Wednesday, 16 January 2019 8:10 AM
To: ENZERINK,Emma <Emma.Enzerink@apsc.gov.au>
Cc: WILEY-SMITH,Mary <Mary.Wiley-Smith@apsc.gov.au>; WOOLCOTT,Peter <Peter.Woolcott@apsc.gov.au>
Subject: RE: Department of Home Affairs Fair Work Commission Arbitration - Decision [SEC=UNCLASSIFIED]

Thanks Emma

That's fine as the Minister has the earlier info as background to hold him over and no one is on our doorstep for comment

From: ENZERINK,Emma <Emma.Enzerink@apsc.gov.au>
Date: 15 January 2019 at 6:11:24 pm AEDT
To: Clode, Daniel <Daniel.Clode@finance.gov.au>
Cc: WILEY-SMITH,Mary <Mary.Wiley-Smith@apsc.gov.au>, WOOLCOTT,Peter <Peter.Woolcott@apsc.gov.au>
Subject: RE: Department of Home Affairs Fair Work Commission Arbitration - Decision [SEC=UNCLASSIFIED]

Hi Daniel

Apologies for not yet getting the brief up to you. I am still awaiting material from the Department of Home Affairs so that I am confident that there is consistency in what is being provided to both ministers.

It will get to you tomorrow.

Regards

Emma

Emma Enzerink | A/g Group Manager
Workplace Relations Group

Australian Public Service Commission
Level 5, B Block, Treasury Building, Parkes Place West, Parkes ACT 2600
GPO Box 3176, Canberra ACT 2601

From: ENZERINK,Emma

Sent: Monday, 14 January 2019 5:18 PM

To: 'Daniel.Clode@finance.gov.au' <Daniel.Clode@finance.gov.au>

Cc: WILEY-SMITH,Mary <Mary.Wiley-Smith@apsc.gov.au>; WOOLCOTT,Peter <Peter.Woolcott@apsc.gov.au>

Subject: Department of Home Affairs Fair Work Commission Arbitration - Decision [SEC=UNCLASSIFIED]

Good afternoon Daniel

As discussed, the below is an update on the Department of Home Affairs Fair Work Commission Arbitration, and attached are some interim talking points. The talking points are interim until we know what the Department of Home Affairs is intending to say. I will confirm, or update, after I meet with the Department tomorrow.

1. The Full Bench of the Fair Work Commission (FWC) published a decision and a draft Workplace Determination late Friday 11 January 2019 on the Department of Home Affairs (the Department) arbitration. This follows on from an earlier Statement in June 2018 which dealt with wages and working hours.
2. Our overarching assessment is that the outcome is good. The Department will have clear, easy to read determination and much of what has been decided is consistent with the Department's position (which was consistent with the bargaining policy).
3. The FWC will call a conference with the parties in the coming weeks to identify any implementation issues. This conference is not to challenge the matters determined or present new or additional evidence. The FWC wants this to occur expeditiously so the workplace determination can commence as soon as possible.
4. The FWC decision comments on the Policy and the APSCs' role:
 - it stated the Governments' Workplace Bargaining Policy (the Policy) imposed very significant constraints on negotiations and recommended that flexibility be provided in future policies to enable agencies undergoing significant Machinery of Government changes to more easily resolve difficulties in bargaining;
 - acknowledged that Machinery of Government changes are not exceptional in the context of the APS so the Department was unlikely to have been successful had it sought to request an exemption from the Policy;
 - found the interactions between the Department and the APSC were overwhelming consistent with the APSC's role under the Policy; and
 - identified one instance where it considered the APSC inappropriately exceeded its "gatekeeper" role. This was in the content of an email to agency Chief Negotiators in 2016 in which the APSC sought to coordinate agencies going to ballot.
5. We have received a media request on this matter from Sally Whyte. We don't think this will generate interest outside Canberra.
6. I will keep you updated as this matter progresses. Further background is below.

Happy to discuss

Emma

Links:

Decision: <https://www.fwc.gov.au/documents/decisionsigned/html/2019fwcfb143.htm>.

Draft Determination:

https://www.fwc.gov.au/documents/awards/tracee/agreements/pdf/draft_determination__dpt_home_affairs.pdf.

Background

In brief, the draft Workplace Determination provides, :

As per the Interim Statement 8 June 2018

- two year duration;
- 4% wage increase from 8 June 2018 (already applied) and 3% 12 months from the commencement date of the Determination;
- an increase to working hours for some employees to 37.5 hours per week;
- salary ranges expanded to include the higher maximums and lower minimum of the former Immigration and Customs agreements;
- salary advancement of 3% per annum;

and the outstanding matters now decided:

- the model consultation: without the pre-decision consultation sought by the union,
- the model dispute resolution: limited to the National Employment Standards the content of the Determination, not all workplace matters as sought by the union;
- the individual flexibility term: which does not include remuneration which was sought by the Department;
- retention of some allowances, cessation of others - the Department's proposed a composite allowance to remove a number of allowances was not awarded;
- removal of unnecessary content for example aspirational content as well as matters that the FWC considers better placed in policies; and
- the removal of some specific special entitlements for ex-Customs executive level staff such as 4 days per year additional time off (noting this class of employee has time off in lieu provisions which the Determination will continue).

We are yet to do an analysis of the leave entitlements, for example annual leave and personal leave.

Emma Enzerink | A/g Group Manager

Workplace Relations Group

Australian Public Service Commission

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