

# Chapter 6

## The no 'enhancements' rule

6.1 This chapter considers the application of the no 'enhancements' rule in the bargaining policy and its impact on public servants including those subject to machinery of government changes. It also considers the prohibition on 'enhancements' in relation to various proposals to include domestic violence leave in enterprise agreements.

6.2 The 2015 bargaining policy prohibits any so-called 'enhancements' to conditions. Clause 45 of the policy reads:

APS and Commonwealth employment conditions generally meet or exceed community standards. An enhancement of existing conditions would only be contemplated in exceptional circumstances. Ministerial approval of any enhancement would be required.<sup>1</sup>

6.3 This clause closely mirrors the related provision in the March 2014 bargaining policy:

Core APS terms and conditions of employment should not be enhanced unless otherwise approved by the Ministers.<sup>2</sup>

6.4 Aside from a restriction specific to existing redundancy arrangements, there is no equivalent provision in the 2011 bargaining policy.<sup>3</sup> As such the no 'enhancements' rule is a new restriction introduced by the government into the Australian Public Service (APS) bargaining framework.

6.5 The Australian Public Service Commission's (APSC) justification for the no-enhancements prohibition relies on a generalised and unsubstantiated claim of generous conditions:

Public service employment conditions are generous. In the current fiscal environment, enhancing conditions would place further pressure on agency budgets. This would not be defensible to the Australian taxpayer. For this reason, the Workplace Bargaining Policy 2015 does not allow existing employment conditions to be enhanced.<sup>4</sup>

6.6 Ms Nadine Flood told the committee that this bargaining round was highly unusual in that enhancements to conditions had been redefined under the bargaining policy to mean that agencies had been told by the APS Commissioner that they would

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1 Australian Public Service Commission, *Workplace Bargaining Policy 2015*, November 2015, Clause 45, p. 4.

2 Australian Public Service Commission, *Australian Government Public Sector Workplace Bargaining Policy*, March 2014, Clause 4.1, p. 7.

3 Australian Public Service Commission, *Australian Public Service Bargaining Framework*, January 2011, Part 4.2, pp. 27–31.

4 Australian Public Service Commission, *Submission 202*, p. 7.

be unable to maintain previously agreed and existing enterprise agreement conditions.<sup>5</sup>

6.7 Mr Tom Carrigg, a member of the Community and Public Sector Union (CPSU) Australian Competition and Consumer Commission (ACCC) Bargaining Team, explained how the head of his agency had been 'overruled by the APSC' regarding 'modest' enhancements:

...the chair of the ACCC, Rod Sims, supported modest improvements for his workforce but was overruled by the APSC. Bargaining representatives were advised on 4 August 2016 that Rod Sims was seeking APSC approval for relatively modest improvements to the ACCC offer. On 14 October 2016, ACCC bargaining representatives informed the CPSU that discussions with the APSC had not been productive.<sup>6</sup>

### ***Machinery of government changes***

6.8 The impact of the no enhancements rule has had particularly acute ramifications for staff that are transferred between agencies during machinery of government changes.

6.9 For example, machinery of government changes in 2013 saw staff from nine other agencies moved into the Department of the Prime Minister and Cabinet (PM&C). As a result, there were 10 different enterprise agreements in PM&C.<sup>7</sup>

6.10 Ms Joanne Kerr, a member of the CPSU bargaining team works in the Indigenous Affairs Group at PM&C in the Sydney regional office. She told the committee that the employee bargaining team was advised that the PM&C agreement was the baseline agreement and that the bargaining policy prohibited the inclusion of rights and conditions contained in the other nine agreements, even though some staff may have had those conditions for over 20 years.<sup>8</sup>

6.11 Ms Kerr also informed the committee that PM&C would not seek an exception to the bargaining policy from the minister, thereby undermining the ability to conduct genuine negotiations between employer and employees over rights and conditions.<sup>9</sup>

6.12 Similar concerns were expressed by Mr Andrew Greenan from the CPSU Administrative Appeals Tribunal (AAT) bargaining team. Mr Greenan previously

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5 Ms Nadine Flood, National Secretary, CPSU, *Committee Hansard*, 11 November 2016, p. 50.

6 Mr Tom Carrigg, CPSU, Australian Competition and Consumer Commission Bargaining Team, *Committee Hansard*, 11 November 2016, p. 33.

7 Ms Joanne Kerr, CPSU, Department of Prime Minister and Cabinet, *Committee Hansard*, 11 November 2016, p. 25; CPSU, answers to questions on notice, 11 November 2016 (received 18 November 2016).

8 Ms Joanne Kerr, CPSU, Department of Prime Minister and Cabinet, *Committee Hansard*, 11 November 2016, p. 25.

9 Ms Joanne Kerr, CPSU, Department of Prime Minister and Cabinet, *Committee Hansard*, 11 November 2016, p. 25.

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worked for the Social Security Appeals Tribunal (SSAT). When the SSAT was moved into the AAT under machinery of government changes, the former SSAT employees lost the conditions that they had at the SSAT. Furthermore, the pay scales at the AAT were lower than at the SSAT. This means that it will be years before former SSAT employees get a pay rise because they have to wait for AAT employees to reach the same pay rate through years of incremental increases.<sup>10</sup>

6.13 Mr Greenan explained that the bargaining policy prohibited him from retaining the conditions he formerly had at the SSAT and he told the committee that the low morale at the AAT was exacerbated by negative commentary in the media and some in the parliament that described public servants as 'having it too good and needing conditions cut'.<sup>11</sup>

6.14 The recent merger of Customs into the Department of Immigration and Border Protection was another prominent example of a machinery of government changes which resulted in employees losing significant pay and conditions. Miss Susan Jones, who is the CPSU's Section Secretary at the Department of Immigration and Border Protection, told the committee:

Many of my colleagues have already lost money from their fortnightly wages due to the government decision to amalgamate the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service without providing an appropriate framework to mesh these two workforces together in a fair and decent manner. This policy seeks to penalise people trying to provide a critical service to this country, by not allowing people who do the same work at the same location with the same skills and qualifications to be paid the same pay and have the same conditions. My understanding is that this is because trying to get equality in pay and conditions is, under this policy, deemed to be an enhancement—which is banned, rather than them being seen as sensible terms of employment to support our workforce.

The enforcement of this policy has created a deep mistrust between the workforce and senior management, who are required to implement it. My colleagues and I, through our union, have always worked collaboratively with the department to achieve the objectives of government, such as the implementation of the integrity framework and during the integration process. We do this to ensure the highest standards and to meet community expectations. We have had our points of difference at times but we have always managed to find common ground—but not this time, due to the rigid and unacceptable demands of this bargaining policy...<sup>12</sup>

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10 Mr Andrew Greenan, CPSU, Administrative Appeals Tribunal Bargaining Team, *Committee Hansard*, 11 November 2016, p. 32.

11 Mr Andrew Greenan, CPSU, Administrative Appeals Tribunal Bargaining Team, *Committee Hansard*, 11 November 2016, p. 32.

12 Miss Susan Jones, Community and Public Sector Union Section Secretary, Department of Immigration and Border Protection, *Committee Hansard*, 15 November 2016, p. 31.

6.15 A DIBP bargaining representative colleague of Miss Jones, explained that the 'enhancements' prohibition was one of the key problems with the bargaining framework that had led to thousands of dollars of lost wages:

Prohibition on enhancements—ex-Customs allowances cannot be allowed in new agreements. So after the merger, there were some allowances that were preserved through determinations and other ones that were not preserved at all. They are things that we had just over a year ago, and things that we can no longer have or can have going forward because they are deemed to be enhancements moving into a new agreement. Examples of this are a reduction in night shift penalties. This has already cost me and other Perth Airport workers up to \$2,500, which is what we are out of pocket now. Another example are the proposed changes to remote locations conditions, costing these employees thousands of dollars...<sup>13</sup>

6.16 The loss of wages was particularly acute in situations where employees were deployed to remote locations:

And that [loss of wages due to the DIBP merger] is mirrored exactly the same all through remote WA as well—the same situation. I have had members come up and approach me and say, 'What will my conditions be if I move post 1 July?' And either I cannot tell them, because we do not have an EA signed up, or I can let them know that it will be significantly worse than the person they will be sitting next to, to the tune of \$15,000 difference in their pay packets for doing exactly the same job, sitting side by side.<sup>14</sup>

### ***The rejection of domestic violence leave proposals***

6.17 Another key area where the no 'enhancements' rule was seen to have a major impact was with respect to proposals to include new arrangements for domestic violence leave. Employment law academics from the University of New South Wales outlined their analysis of approved agreements in this regard:

As our submission details, preliminary analysis of APS agreements that have been certified in the current round confirm some important employment conditions have been removed or reduced in some agreements.

Our analysis shows a range of gender equitable provisions have been reduced or removed. These include a clause for domestic violence leave, which has been removed from one agreement [the Department of Social Services]. A study conducted by the Australian Domestic and Family Violence Clearinghouse found that domestic violence leave is good for employee morale, with 65 per cent of employees surveyed believing that workplace entitlements could reduce the impact of domestic violence in their organisation. We understand that the government position is that domestic violence leave should be available through existing leave provisions and contained in HR policy. Enshrining [domestic violence]

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13 Mr Mike Suijdendorp, CPSU Bargaining Team, Department of Immigration and Border Protection, *Committee Hansard*, 15 November 2016, p. 33.

14 Mr Mike Suijdendorp, CPSU Bargaining Team, Department of Immigration and Border Protection, *Committee Hansard*, 15 November 2016, p. 32.

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leave provisions in an agreement rather than in a policy which is subject to change without consultation gives employees security in their entitlements...

We also recommend including domestic and family violence leave in agreements, as this would be of minimal cost to agencies but would send a clear signal to employees that the Australia government is committed to assisting those affected by domestic violence.<sup>15</sup>

6.18 While the Department of Social Services has removed the provision of domestic violence leave from its current agreement, there are several other agencies that have provisions retained from earlier agreements. These agencies are the Workplace Gender Equality Agency, the Department of Employment, the Department of Education, and parts of PM&C.<sup>16</sup>

6.19 Senior APSC representatives reminded the committee that the no 'enhancements' rule precludes the introduction of domestic violence leave into new employment agreements:

The bargaining policy, as you know, says no enhancements. So if the leave type does not exist already, you cannot insert it. The policy around how to support staff who are experiencing domestic violence points to all of the different sorts of leaves that agencies will have and encourage people to use it.<sup>17</sup>

6.20 Notwithstanding the outright ban imposed by the government's bargaining framework, several employee bargaining team representatives raised it with their departments due to the importance of the issue for members. For example, the bargaining representative from the ACCC told the committee:

With regard to domestic violence, we have put that up a number of times to the bargaining committee, but, because of the bargaining framework, they just will not consider it.<sup>18</sup>

6.21 Similarly the ATO's bargaining team representative told the committee:

Yes, domestic violence leave was certainly one of our claims. In a period of time where there is such a focus on dealing with domestic violence, that was a core claim for us. It was completely ignored by the tax office. There were some changes to the miscellaneous leave guidelines to allow for it, but that is not the same thing as having it in the agreement, where it is

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15 Dr Sue Williamson, Senior Lecturer, Human Resource Management, University of New South Wales, *Committee Hansard*, 11 November 2016, p. 7.

16 Mr Marco Spaccavento, Group Manager, Australian Public Service Commission, *Committee Hansard*, 11 November 2016, p. 45.

17 Ms Stephanie Foster, Deputy Australian Public Service Commissioner, Australian Public Service Commission, *Committee Hansard*, 11 November 2016, p. 47.

18 Mr Tom Carrigg, Community and Public Sector Union, Australian Competition and Consumer Commission Bargaining Team, *Committee Hansard*, 11 November 2016, p. 37.

something that we could actually enforce in the Fair Work Commission if we needed to.<sup>19</sup>

6.22 Ms Beth Vincent-Pietsch, a Deputy Secretary at the CPSU explained that these rejections were widespread across the public sector:

...virtually no APS agency has been able to negotiate domestic violence leave into an agreement, because they did not have it in the previous agreement. Even where managers at the table were very sympathetic and were keen to add it in, under the bargaining policy it is deemed to be an enhancement; therefore it is not able to be discussed. It has been a cause of genuine frustration, and obviously, with the focus on domestic violence as a significant issue that we all recognise needs to be addressed, I think it is a real cause of frustration not only for our members but for the secretaries of departments and agency heads, who would really like to be able to move meaningfully into that space.<sup>20</sup>

6.23 By contrast the CPSU bargaining representative for the ABC explained that the ABC had successfully concluded its enterprise bargaining negotiations which included a new provision for domestic violence leave:

In return for workplace change ABC management were able to offer employees a fair-pay outcome and enhanced conditions, including domestic violence leave. Employees were able to genuinely negotiate with their employer and, just as importantly, the employer was able to genuinely listen to the feedback of staff and to amend their claims accordingly.<sup>21</sup>

6.24 It is clear from Ms Sinddy Ealy's evidence that the inclusion of domestic violence leave under the ABC's new enterprise agreement, an inclusion that has been rejected in other negotiations as an 'enhancement', was only possible because the ABC refused to be bound by the APS bargaining framework:

...it is my view that a successful agreement [including domestic violence leave] was able to be made in the ABC because the ABC was not subjected to the government's workplace bargaining policy. The ABC agreement maintained existing workplace rights, such as pre-decision consultation. Those things are important to employees and contribute to the efficient operation of the workplace.<sup>22</sup>

### **Committee view**

6.25 The APSC's rigid application of the no 'enhancements' rule during the current bargaining round has caused enormous frustration to thousands of public servants,

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19 Mr Erik Rasmussen, Community and Public Sector Union, Australian Taxation Office Bargaining Team, *Committee Hansard*, 11 November 2016, p. 38.

20 Ms Beth Vincent-Pietsch, Deputy Secretary, Community and Public Sector Union, Bargaining Team, *Committee Hansard*, 11 November 2016, p. 39.

21 Ms Sinddy Ealy, ABC Section Secretary, Community and Public Sector Union, ABC Bargaining Team, *Committee Hansard*, 11 November 2016, p. 32.

22 Ms Sinddy Ealy, ABC Section Secretary, Community and Public Sector Union, ABC Bargaining Team, *Committee Hansard*, 11 November 2016, p. 32.

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particularly those that have been subject to machinery of government changes. The resulting damage to staff morale (see Chapter 6) across the APS is incalculable.

6.26 The solution to this problem is straightforward. The CPSU has already outlined a common sense approach in its response to a question on notice.<sup>23</sup> In essence, the CPSU stated that agencies affected by machinery of government changes such as PM&C, DIBP, the Federal Courts and the AAT must be allowed to reach enterprise agreements that align employment pay and employment conditions.

6.27 This would require flexibility in pay outcomes and the abandonment of the absurd situation where decades old already-agreed working conditions are now suddenly deemed to be an 'enhancement'.

6.28 Agencies should be allowed to consolidate disparate pay rates and conditions to provide an integrated set of salaries and conditions without loss.

6.29 Furthermore, the bargaining policy should be amended to allow the retention of existing rights and conditions. This change alone would remove a major barrier to making agreements, and make a significant contribution towards repairing workplace morale and good workplace relations.

6.30 The committee strongly agrees with this eminently sensible point of view.

#### **Recommendation 4**

**6.31 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.**

#### **Recommendation 5**

**6.32 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.**

6.33 The committee notes that the high incidence of domestic violence in Australia has rightly been the focus of increased public and government attention. However, the committee heard evidence from numerous employee bargaining representatives that agencies had rejected the inclusion of domestic violence leave proposals in enterprise agreements because they were seen as 'enhancements'. The Deputy APS Commissioner confirmed that the bargaining policy prohibited the inclusion of domestic violence leave in an agreement if that leave type did not already exist in the agreement.

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23 CPSU, answer to questions on notice, 11 November 2016 (received 18 November 2016).

6.34 The committee notes the successful conclusion of an enterprise agreement at the ABC occurred because management were not constrained by the bargaining policy. As a result ABC management and staff were able to reach a fair-pay outcome and enhanced conditions, including domestic violence leave in exchange for workplace change. It is notable that these genuine negotiations could only occur because the ABC refused to be bound by the government's bargaining policy.

6.35 The committee is firmly of the view that the bargaining policy should be amended to allow agencies and employee bargaining representatives to agree on improvements including domestic violence leave.

### **Recommendation 6**

**6.36 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.**

6.37 In addition to the above over-arching recommendations, the committee is of the view that specific issues affecting the Department of Immigration and Border Protection and the Australian Border Force warrant urgent attention.

6.38 In particular, the committee is of the view that the government should:

- fairly address disparities arising from the integration of Customs and Immigration and the creation of the Australian Border Force; and
- no longer seek to cut the pay or conditions of officers.

### **Recommendation 7**

**6.39 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.**

### **Recommendation 8**

**6.40 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.**