



Australian Government

Australian Public Service Commission

Department of Finance and Deregulation

# Implementing Machinery of Government Changes

## A good practice guide

*Effective leadership Diverse workforce Capable organisations and workforce Employee conditions APS Values*

Third edition

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# Foreword

As many of us in the Australian Public Service know from experience, undergoing a machinery of government change can be challenging. Agencies are required to consider an enormous number of issues and deal with wide-ranging matters, some of which can be very complex and time-consuming. Affected staff need to be kept informed of what is happening; legislative and government policy requirements must be complied with; and for the process to work as smoothly as possible, actions should be undertaken with a cooperative 'whole-of-government' spirit.

This publication has been designed to provide practical guidance to help agencies implement machinery of government changes. It has been developed jointly by the Australian Public Service Commission and the Department of Finance and Deregulation in consultation with the Department of the Prime Minister and Cabinet, the National Archives of Australia and the Office of the Australian Information Commissioner.

The information contained in this publication was developed in consultation with Departmental Secretaries and draws on their extensive experience of machinery of government changes over the years.

This third edition has been updated to reflect changes to the *Public Service Act 1999* which came into effect on 1 July 2013. In addition, minor revisions have been made to Part 4 (Financial management), new information relating to privacy and freedom of information has been included, and a new case study on winding up an APS agency has been added.

We trust that managers and their staff across the Australian Public Service, particularly those undergoing machinery of government changes, will find this guide useful.

Stephen Sedgwick AO  
Australian Public Service Commissioner

David Tune PSM  
Secretary, Department of Finance and Deregulation

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# Introduction

This document provides a source of practical guidance to help agencies implement machinery of government (MoG) changes. It relates primarily to moves between Australian Public Service (APS) agencies subject to the *Public Service Act 1999* (PS Act) and the *Financial Management and Accountability Act 1997* (FMA Act), but may also provide useful guidance for moves into, or out of, the APS.

While it is not practical to cover in detail every matter that agencies might encounter during MoG changes, this guide provides:

- an overview of the MoG process
- protocols for resolving transfer of resources
- principles and approaches for planning and implementing MoG changes, including a timeframe for key events
- guidance on financial management and people management
- advice on managing physical relocations, information, records, data and taxation
- information on setting up a new APS agency.

The guide has been developed jointly by the Australian Public Service Commission (the Commission) and the Department of Finance and Deregulation (Finance) in consultation with the Department of the Prime Minister and Cabinet (PM&C), the National Archives of Australia (National Archives) and the Office of the Australian Information Commissioner (OAIC).

The principles and approaches contained in the guide were developed in consultation with Departmental Secretaries and draw on their experiences of MoG changes over the years. Those experiences highlighted the need for agencies to look beyond their own immediate interests to the broader needs of the APS as a whole when implementing MoG changes.

The case studies were developed in consultation with four agency heads based on their own experiences of setting up new APS agencies from scratch. The case studies are not intended to be good practice guides but rather personal stories to illustrate some of the challenges faced by the agency heads.

## Legislative and policy framework

The following legislation and guidelines are relevant to MoG changes.

### Legislation

- *Australian Constitution*, section 64 provides that Governor-General may appoint Ministers to administer such Departments as the Governor-General in Council establishes (i.e. by the Administrative Arrangements Order)
- *Public Service Act 1999* (PS Act), particularly sections 72 and 24; and Public Service Regulations 1999, particularly regulations 8.1, 8.2 and 8.3, which provide for movement of staff and their terms and conditions of employment
- *Financial Management and Accountability Act 1997* (FMA Act), particularly section 32, which allows for transfer of annual appropriations; and the *Financial Management and Accountability Orders (Financial Statements for reporting periods ending on or after 1 July 2009)*
- *Fair Work Act 2009* (FW Act) which contains transfer of business provisions and the legislative framework for agreement making in the APS
- *Acts Interpretation Act 1901*, particularly sections 19B to 19C which are relevant to AAO changes
- *Archives Act 1983*, particularly section 24 which relates to the disposal, alteration and transfer of custody or ownership of Commonwealth records
- *Privacy Act 1988*, particularly section 14 which contains the Information Privacy Principles which impose obligations on agencies regarding the handling of personal information
- *Freedom of Information Act 1982*, particularly section 16 which allows for the transfer of FOI requests between agencies.



## Relevant guidance

- *Working Together: Principles and Practices to Guide the Australian Public Service* (Australian Government 2005—available at <http://www.apsc.gov.au/publications-and-media/archive/publications-archive/working-together>)
- *Foundations of Governance in the Australian Public Service* (Australian Government—available at <http://www.apsc.gov.au/publications-and-media/current-publications/foundations-of-governance>).

## Useful contacts and resources

- Australian Government Solicitor: legal briefings at <http://www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/index.htm>
- Australian Public Service Commission, Employment Policy and Participation Group and Workplace Relations Group: contact [staffingpolicy@apsc.gov.au](mailto:staffingpolicy@apsc.gov.au)
- Australian Government legislation (including the Constitution): <http://www.comlaw.gov.au/>
- Department of Finance and Deregulation:
  - Governance Branch at <http://www.finance.gov.au/about-the-department/governance-and-resource-management-group.html>
  - Superannuation Branch at <http://www.finance.gov.au/superannuation/about-the-superannuation-branch.html>
  - outcome statements policy and approval process at <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/outcomes-arrangements.html>
  - allocation of responsibilities for special appropriations at <http://www.finance.gov.au/publications/finance-circulars/2005/13.html>
  - Finance Minister's Orders at <http://www.finance.gov.au/financial-reporting-and-accounting-policy/index.html>
  - list of Australian Government bodies at <http://www.finance.gov.au/financial-framework/governance/list-of-australian-government-bodies.html>, FMA Act agencies at <http://www.finance.gov.au/financial-framework/fma-legislation/fma-agencies.html> and CAC Act bodies at <http://www.finance.gov.au/financial-framework/cac-legislation/cac-bodies.html>
- Department of the Prime Minister and Cabinet: *Requirements for Annual Reports* <http://www.pmc.gov.au/guidelines/index.cfm>; Administrative Arrangements Order <http://www.pmc.gov.au/parliamentary/index.cfm>
- National Archives of Australia: Advice on transferring records following administrative change can be found on the National Archives website at <http://www.naa.gov.au/records-management/agency/keep-destroy-transfer/following-admin-change/index.aspx>. For general advice contact the National Archives Agency Service Centre at [recordkeeping@naa.gov.au](mailto:recordkeeping@naa.gov.au).
- Office of the Australian Information Commissioner: Advice on applying the *Freedom of Information Act 1982* (FOI Act) and the *Privacy Act 1988* at <http://www.oaic.gov.au>
- Declaration of Open Government (Australian Government 2010) at <http://agimo.gov.au/2010/07/16/declaration-of-open-government/>
- Principles on open public sector information (Office of the Australian Information Commissioner 2011) at [http://www.oaic.gov.au/publications/agency\\_resources/principles\\_on\\_psi\\_short.html](http://www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html)
- Australian Government Intellectual Property Manual (Australian Government 2012) at <http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Documents/IntellectualPropertyManual.pdf>
- Web Guide (Australian Government) at <http://webguide.gov.au/>
- FOI Fact Sheet 4 - The information publication scheme for Australian Government agencies (Office of the Australian Information Commissioner) at [http://www.oaic.gov.au/publications/fact\\_sheets/FOI\\_fact\\_sheet4\\_the\\_information\\_publication\\_scheme.html](http://www.oaic.gov.au/publications/fact_sheets/FOI_fact_sheet4_the_information_publication_scheme.html)

Guidance for agency websites: 'Access to information' web page (Office of the Australian Information Commissioner) at <http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-agency-resources/guidance-for-agency-websites-access-to-information-web-page>.

# Part 1 Machinery of government process

The terms ‘machinery of government changes’ (MoG changes) and ‘administrative re-arrangements’ are interchangeable and are used to describe a variety of organisational or functional changes affecting the Commonwealth.

Some common examples of MoG changes are:

- changes to the Administrative Arrangements Order (AAO) (see Part 1.1 below) following a Prime Ministerial decision to abolish or create a department or to move functions/responsibilities between departments/agencies
- creation of a new statutory agency or executive agency, or abolition of such agencies
- movement of functions into, or out of, the APS.

Not all MoG changes involve a change to the AAO. MoG changes within a portfolio, including movements from a department to a statutory agency within the same portfolio, and MoG changes involving the movement of only a small function from one portfolio to the other, would not normally require changes to the AAO. Agencies should consult PM&C on whether a change to the AAO is necessary.

## 1.1 Administrative Arrangements Order

Under section 64 of the Constitution, the Governor-General, on the advice of the Prime Minister, appoints Ministers, establishes departments of state and formally allocates executive responsibility among Ministers through the AAO.

The AAO is published in the Commonwealth Gazette and posted on the PM&C website at <http://www.pmc.gov.au/parliamentary/index.cfm>. It contains an entry for each department of state which describes briefly the principal matters dealt with by that department and then lists all of the legislation administered by the Minister responsible for that department and other agencies in the Minister’s portfolio.

Under the AAO, in some cases two or more departments may be responsible for administering different aspects of the same legislation. Managing joint responsibility for legislation can be complex, and may require the development of protocols or processes relating to consultation, clearance and approval between relevant Ministers and their departments.

## 1.2 General machinery of government changes

MoG changes generally occur in the period immediately after a general election. However, a MoG change may be instigated by the Prime Minister either of his or her own accord or in response to the suggestion of another Minister at any other time. A Minister proposing a MoG change should consult other Ministers where relevant before writing to the Prime Minister. The decision to make a MoG change rests with the Prime Minister. If the Prime Minister wants to make a MoG change that involves an amendment to the AAO, he or she will advise the Governor-General who makes the change.

PM&C is responsible for providing advice to the Prime Minister on a proposed MoG change and, if required, prepares documentation necessary to give effect to that change. If the proposed change has been suggested by another Minister, the advice to the Prime Minister may draw on the views of Ministers affected by the proposed MoG change. Any financial or staffing implications arising from a MoG change will also be raised in the advice to the Prime Minister. PM&C may consult Finance, the Commission, and affected agencies on these matters as part of the briefing process.

## 1.3 Post-election machinery of government changes

While a MoG change may occur at any time, significant MoG changes usually occur immediately following an election. The process for considering MoG changes at such times is, by necessity, different from non-election times.

Following an election, the Secretary of PM&C provides a brief to the Prime Minister on possible MoG changes. This brief is confidential and there may not necessarily be formal consultation with departments on the detail of any changes being considered before the Prime Minister



publicly announces MoG changes. Once the Prime Minister has announced the Ministry and new administrative arrangements, PM&C may contact affected departments to ensure the detail of the MoG changes is accurately reflected in the new AAO that has been prepared. PM&C also advises Finance and the Commission as soon as possible of the changes to departmental arrangements. The AAO may be further revised, and a new consolidation issued, if Secretaries identify that it does not accurately reflect arrangements.

In the event of major changes in portfolio responsibilities, the Secretary of PM&C will inform Secretaries of the nature of the changes to ensure that consistent information can be given to agency staff.

This is a particularly intense period of activity because the time between the announcement and the swearing-in of the new Ministry and making the AAO is normally, on average, three to five days. During this time departments will have an opportunity to seek clarification from PM&C on any matters of detail, such as the programs identified as moving with a particular function.

New Ministerial arrangements take effect on the day that the new Ministry is sworn in. Similarly, any changes to the AAO take effect on the day that the AAO is made by the Governor-General. For example, following the 2010 election, the Ministry was sworn in on 14 September 2010: the new AAO took effect on the same day, reflecting the creation of one new department and the renaming of two departments.

While the transfer of appropriations and the transfer of staff under section 72 of the PS Act are unlikely to be completed by the time the new AAO is made, the Prime Minister expects agency heads to implement AAO changes cooperatively and as soon as possible, if necessary by administrative means such as issuing new delegations.

Implementation of the changes should be predicated on the basis of achieving the best outcome from a whole-of-government perspective, not on the basis of achieving the best outcome for individual agencies. However, if as a result of a post-election MoG change, a department is abolished, transfers of staff and appropriations must take effect on the day the AAO is made.

Following an election, a consolidated AAO is usually issued on the day the new Ministry is sworn in. Shortly after, departments are asked to review the AAO to ensure that any changes that have been made to the AAO are accurate and reflect the Government's intentions. If necessary, a second consolidated AAO would be issued.

## 1.4 Governance arrangements

Following a MoG change, agencies should ensure their structure and governance arrangements are appropriate. The specific structure and governance arrangements that an agency adopts should promote effective implementation of policy. Financial Management Reference Material No.2: *Governance Arrangements for Australian Government Bodies* provides guidance on these aspects—see <http://www.finance.gov.au/financial-framework/governance/governance-arrangements-for-australian-government-bodies.html>. Further queries should be directed to the Governance Branch in Finance at [LRB@finance.gov.au](mailto:LRB@finance.gov.au).

## 1.5 Name or title changes

An Act, or an instrument made under an Act, may contain a reference to a specific Minister, department or Secretary of a department. After an election or ministerial reshuffle, there may be ministerial and departmental changes and a re-allocation of functions, reflected in a new AAO, which make those references incorrect. In some cases, it will be desirable to amend the Act or instrument appropriately. However, it is not necessary to do so in every case, because sections 19B and 19BA of the *Acts Interpretation Act 1901* give the Governor-General the power to make orders which have the same effect.

Such an order may provide that specified references to a Minister, department or Secretary of a department contained in an Act or instrument are to be read as if they referred to the Minister, department or Secretary that is now appropriate because of the AAO changes. Section 19B deals with the case where a ministerial office or a department has been abolished. Section 19BA deals with the case where the Minister, department or Secretary still exists, but the administrative responsibilities have been re-allocated.

The Attorney-General's Department is responsible for preparing section 19B and 19BA orders in consultation with other agencies. This will occur as soon as practicable after an AAO is signed. Section 19B and 19BA orders must be registered on the Federal Register of Legislative Instruments and will generally take effect on the day after the order is registered.

## 1.6 Roles of central agencies

Four agencies are central to the MoG process.

Agency	Role
Department of the Prime Minister and Cabinet	Inform agencies of the Prime Minister's decisions on machinery of government changes.
Australian Public Service Commission	Advise on movement of staff and PS Act coverage. Power to move staff under section 72 of the PS Act. Advise on policy framework for determining remuneration, terms and conditions of employment and workplace arrangements.
Department of Finance and Deregulation	Advise on transfer of appropriations, superannuation issues, accounting, reporting, banking, legal and governance structures issues.
National Archives of Australia	Advise on policy, mechanisms and standards for the transfer of information, records and data between agencies. Permit transfer of custody or ownership of records outside the Commonwealth where appropriate.

## 1.7 Supporting newly created agencies

While there can be issues with the transfer of resources to a newly created agency, and the protocols outlined at Part 2.2 may be relevant, there are additional challenges in establishing a new agency.

It is the responsibility of portfolio Secretaries to provide adequate support to newly created agencies within the portfolio. The setting up of new agencies poses significant challenges which require a high level of judgement and knowledge. Support by portfolio Secretaries could take the form of loaning experienced staff with expertise in corporate functions, or arranging/ supporting secondments where APS employees from other portfolios are needed.

While it will be rare, where a new portfolio Department is established, there will need to be similar assistance provided by the Departments and agencies that are transferring functions to the new Department.

## 1.8 Senior Executive Service cap

A cap on the number of Senior Executive Service (SES) employees was implemented in conjunction with the Review of the SES, completed in early 2011. The Government approved a recommendation of that Review that the SES cap arrangements should continue for five years, to the end of 2016.

The SES cap is administered and monitored by the Commission. The Commission will need to be advised of any SES staff movements occurring as a result of MoG changes. For further information on SES cap matters, see Part 5.

# Part 2 Principles and issue resolution

Consistent with the APS Values and Employment Principles, the principles guiding agency heads in effectively implementing MoG changes are outlined at Part 2.1 below. Part 2.2 provides agreed protocols for resolving issues arising between agencies during negotiations for the transfer of resources following a MoG change.

## 2.1 Principles and approach

Consistent with the APS Values and APS Employment Principles, the principles for implementing MoG changes are:

- Taking a whole-of-government approach across agencies
  - Good faith negotiations
  - Open and honest identification of resource implications
  - Timely and accurate exchange of information
- Constructive and open communication with staff
  - Providing early advice and assistance to staff
  - Consultation—employees have opportunities to contribute to the implementation process within the boundaries of the decision/s taken by Government
  - Acting with integrity
- Accountability and compliance with legislation and policy
  - Following established procedural frameworks, such as the ‘staff follow function’ and ‘finances follow function’ principles
  - Ensuring adequate records management
  - Ensuring appropriate delegations and Chief Executive’s Instructions are in place.

### 2.1.1 Whole-of-government approach

A key to achieving good results in implementing MoG changes is for agencies to take a whole-of-government approach. The need to take a cooperative and collegiate approach underpins the whole-of-government process whereby agencies are encouraged to work together across organisational barriers to achieve Government objectives. In the implementation of MoG changes this means undertaking negotiations with the view to achieving the best outcome from a whole-of-government perspective rather than the best outcome for individual agencies. It is expected that agencies will communicate openly with one another, and with central agencies, to achieve the best outcome for the APS.

#### Good faith negotiations

Negotiations between the gaining agency and the transferring agency should be undertaken in good faith, balancing equity and fairness for each agency against the need to achieve the best outcome for the APS.

Good policy outcomes depend on public servants working effectively across organisational boundaries. Secretaries expect those who work in their portfolios to work constructively and cooperatively with their colleagues in other agencies to achieve whole-of-government outcomes. Public servants should bring to their work behaviour that reflects the APS Values, APS Employment Principles and ethical standards of the APS. In particular, working relationships should be productive and effective. There should be a genuine commitment to working in a collaborative manner.

The publication *Working Together: Principles and Practices to Guide the Australian Public Service*, available at <http://www.apsc.gov.au/publications-and-media/archive/publications-archive/working-together>, provides valuable information to assist agencies in this regard.

#### Open and honest identification of resource implications

The general principle of ‘staff follow function’ applies to MoG changes, as do the principles of ‘finances follow function’ and ‘records follow function’.

While identification of program funding and related staff can be relatively straightforward, mapping of support functions (e.g. corporate services areas) or mapping of functions or

programs that have been split can be more problematic. Agencies should recognise the need for cost sharing (e.g. sharing of fixed costs) and reach an agreement that will meet the test of reasonableness.

As well as identifying staff numbers, pay and conditions and funding, agencies need to comprehensively identify all resources, including details of staff on leave or temporarily reassigned, assets and liabilities, contracts registers, intellectual property (e.g. access to, and licensing arrangements for, relevant databases) and information and communications technology.

### **Timely and accurate exchange of information**

Successful completion of activities is heavily dependent on the quality and timeliness of information—particularly staff numbers and funding information—the transferring agency provides. At the earliest opportunity, transferring agencies need to provide gaining agencies with detailed and current information about:

- structure charts and staffing lists, to aid understanding and estimating staff resource distribution in the transferring agency
- affected programs and policy responsibilities, most critically before negotiations on financial and other resource transfers take place
- all associated activities, such as service delivery arrangements, and their significance
- all information, records and data documenting the functions that are being transferred
- existing audit issues
- existing budget measures.

In line with whole-of-government objectives, information should be shared and discussed as openly as possible.

#### **2.1.2 Constructive and open communication with staff**

To facilitate a smooth transition it is important to establish constructive and open communication with staff by providing early advice and assistance and by acting with integrity.

#### **Providing early advice and assistance to staff**

It is a feature of APS employment that staff can be moved from one APS agency to another (or into or out of the APS) as a result of a MoG change. The Australian Public Service Commissioner (Commissioner) can exercise powers under section 72 of the PS Act to give effect to an administrative re-arrangement. The general principle is that staff follow the function being transferred. Agencies should ensure all staff are aware of this by providing appropriate information prior to engagement and in induction or training programs. Staff should be encouraged to identify both as employees of their own agency and as members of the APS more broadly.

A key issue in the smooth transition of staff from one agency to another is provision of open and timely information and assistance to affected staff to keep them up to date and informed.

#### **Consultation**

APS Employment Principle 10A(1)(e) states that the APS is a career-based public service that provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued. Workplace systems and structures that enable staff to contribute their views and maximise their input to meeting organisational objectives underpin effective workplace relations.

Further, paragraph 205(1)(a) of the *Fair Work Act 2009* (FW Act) mandates the use of a consultation term within enterprise agreements. These clauses require the employer to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect on the employees. Agencies are required to observe the consultation clauses in relevant enterprise agreements.

Workplace systems and structures that enable staff to contribute their views and maximise their input to meeting organisational objectives underpin effective workplace relations.

Agencies should identify areas where there would be value in allowing staff to contribute to the implementation process, for example, in matters affecting their working environment such as accommodation and other transitional issues.

## **Acting with integrity**

APS Value 10(2) requires agencies to act with integrity in all that they do. Communicating and consulting with employees requires good faith in order to build effective workplace relations.

Agencies should ensure all decisions relating to staff, such as staff movements and accommodation, are carefully considered, and that commitments are not made to staff until the agency head is able to ensure they can be upheld.

### **2.1.3 Accountability and compliance with legislation and policy**

It is vital to comply with legislation and policy and to be accountable and transparent by following established procedural frameworks, ensuring adequate records management and appropriate delegations are in place.

#### **Following established procedural frameworks**

The legislative and policy framework with which agency heads must comply is outlined in *Foundations of Governance in the Australian Public Service* at <http://www.apsc.gov.au/publications-and-media/current-publications/foundations-of-governance>.

#### **Ensuring adequate records management**

The need to make adequate records of the implementation of MoG changes is mentioned throughout this guide—Part 6 provides specific information on records management, including related privacy, freedom of information (FOI) and open government considerations.

#### **Ensuring appropriate delegations and Chief Executive's Instructions are in place**

It is essential that each agency review its instruments of delegation and authorisation to ensure they cover all matters and legislation to be administered by that agency.

In the case where responsibility for legislation is transferred from one agency to another, delegations and authorisations of power to people in the transferring agency are likely to cease to have effect on the date the AAO becomes effective. In these circumstances, new and/or interim delegations and statutory authorisations will need to be made in favour of people performing the relevant functions in the gaining agency, recognising that those people performing the functions may still be in the transferring agency for a period of time. New instruments of delegation and authorisation should be made without delay.

Similarly, where an agency is abolished all delegations and statutory authorisations cease to have effect at the time of the agency's abolition. New instruments of delegation and authorisations should be made without delay in favour of persons performing the relevant functions in any agency which takes over the functions of the abolished agency. For newly created agencies these instruments should be finalised without delay.

Part 4.7 'Delegations under the FMA Act' provides advice on financial delegations and Part 5.11 'Delegations and authorisations' provides information on Australian Government Solicitor advice on delegations and authorisations following a general election. See also *Delegations under the Public Service Act 1999 and subordinate legislation* at <http://www.apsc.gov.au/aps-employment-policy-and-advice/employment-framework/delegations>.

Chief Executive's Instructions (CEIs) are issued by the Chief Executive of an FMA Act agency under the authority of section 52 of the FMA Act and regulation 6 of the Financial Management and Accountability Regulations 1997, available at <http://www.comlaw.gov.au>. These instructions form a key part of an agency's internal controls and operational framework, focusing on the agency's particular needs, in order to promote the efficient, effective, economical and ethical use of public money, public property and other Commonwealth resources.

Both transferring and gaining agencies should review their CEIs to ensure that they reflect the MoG changes. For further information refer to Finance Circular 2011/05: *Chief Executive's Instructions* at <http://www.finance.gov.au/publications/finance-circulars/2011/05.html>.

## 2.2 Protocols for resolving the transfer of resources

In the majority of cases, transferring and gaining agencies directly negotiate and agree to the final arrangements for the transfer of resources (financial, people and assets/liabilities) following a MoG change and this is done in a professional and timely way. This will continue to be the case, with the expectation that agency heads and Secretaries of the portfolio Departments will become directly involved if there is a likelihood that there will not be a prompt and equitable finalisation of the transfer of resources.

However, there may be occasions where the affected agencies cannot resolve their differences, even with the intervention of portfolio Secretaries. On these occasions, there needs to be a process which settles the matter quickly, effectively and with the minimum of red-tape.

When complex MoG changes occur, a committee may be set up comprising a Deputy Secretary from Finance and the Deputy Australian Public Service Commissioner, chaired by a Deputy Secretary from PM&C. The committee will play an 'honest broker' role to assist agencies to resolve issues, and to help ensure that MoG changes are implemented in a timely manner.

If significant roadblocks emerge that cannot be quickly resolved, or there are unresolved issues outstanding at the expiration of a reasonable time, the matter will be escalated to a committee comprising the Secretaries of Finance and PM&C and the Commissioner, with the Secretary of PM&C chairing discussions. This committee will arbitrate if necessary and, ultimately, it is open to Finance to transfer funds and the Commissioner to transfer staff, without agreement if necessary.



# Part 3 Planning

The impact on agencies resulting from MoG changes will range from being relatively minor to substantial. Major MoG changes often involve the transfer of functions from one agency to another either because portfolios are being restructured, or because an agency is to be created or abolished.

It is critical that agencies affected by a transfer of functions start planning implementation of the changes as early as possible. As part of the incoming Government brief, in the case of an election, agencies may wish to address the impact on their portfolio of any MoG changes outlined in Government and Opposition policy statements.

Agencies should contact the Commission early to discuss staffing and workplace relations issues that are likely to arise, and should consult the relevant Agency Advice Unit (AAU) in Finance for advice on transfer of appropriations and other financial matters.

## 3.1 Establishing a steering committee

A suitably resourced cross-agency steering committee should be established, with clear lines of accountability to oversee implementation of MoG changes. This will be a useful aid to managing the smooth transition of functions, staff and funding while ensuring business continuity.

While the need and scope for this may vary, depending on the scale of the MoG change, the committee could typically include representation from enabling areas of both the transferring agency and gaining agency (e.g. information technology, legal, finance, people management, property etc.) plus relevant program managers responsible for receiving the functions. The committee could meet regularly during the transition period, provide advice to the executive, and plan for and coordinate implementation activities to assist in a smooth transition and the best possible outcome for all parties involved.

If needed, working groups reporting to the steering committee could be established to progress specific aspects of the change. For example, it may be useful to establish a small working group within the transferring agency immediately after announcement of the MoG change to undertake an initial scoping exercise.

Issues the steering committee and/or subordinate working groups should consider could include:

- clarifying respective roles of gaining and transferring agencies in relation to the process
- ascertaining whether functions will transfer in their current form or in a modified form
- articulating the objectives to be achieved by the change
- determining what the function's new direction, core business, structure and staffing arrangements will be
- ensuring key stakeholders are involved in the process
- conducting due diligence activities associated with transfer of functions (see Part 3.2)
- developing a communication strategy (see Part 3.3) to ensure employees are kept informed of transition arrangements
- developing a people management strategy (see Part 3.4) including developing realistic timeframes and mapping out differences in conditions of employment between the transferring agency and the gaining agency
- developing a project plan for implementation activities, including: transfer of finances (including, but not limited to, assets and liabilities) (see Part 4) and employees (see Part 5); information technology (see Part 3.5); physical relocation to new premises if required (see Parts 4.8 and 5); and transfer of digital and physical records, and other information in all formats (see Part 6)
- conducting risk management
- maintaining the general principles of natural justice (e.g. that decision-makers act fairly and without either perceived or actual bias)
- identifying and quantifying the type and amount of appropriation to be moved from the transferring agency to the gaining agency.

The purpose and respective responsibilities of participants in the steering committee and/or working groups should be clarified from the outset. A detailed checklist of responsibilities for

gaining and transferring agencies working together in special purpose groups is provided in *Working Together: Principles and Practices to Guide the Australian Public Service*, available at <http://www.apsc.gov.au/publications-and-media/archive/publications-archive/working-together>.

### 3.2 Due diligence framework

Due diligence refers to the need to undertake a detailed examination of all aspects of the function being transferred, including its assets and liabilities, and statutory, contractual and other arrangements, with a view to identifying any issues which may need to be addressed. The steering committee should develop a series of questions or a checklist to ensure all necessary information relating to the activities of the transferred functions is gathered. The types of due diligence issues that should be addressed include:

- assets and liabilities
- register of all contractual arrangements and funding agreements, including property or equipment leases and provision of goods and services
- partnerships or joint ventures
- intellectual property issues
- disputes and litigation
- outstanding taxation matters
- identification of existing specific delegated functions and authorisations necessary to ensure smooth transfer of functions
- identification of whether specific programs have a statutory basis or an administrative scheme without specific legislation
- outstanding legal action, FOI requests (including awareness that potential future requests may need to be transferred between agencies) and audit reviews (internal and/ or external)
- the identification and management of agency information, records and data, and records management systems.

### 3.3 Communication strategy

It is important to develop an appropriate communication strategy; and that the gaining agency head communicates details of the changes to all employees early in the process to ensure there is no misunderstanding of the reason for, and objectives and extent of, the change.

A project manager should be appointed from both the gaining agency and the transferring agency to ensure the communication to staff is effective and consistent. The project managers should serve as a central point of communication for their respective agencies, and work together to ensure their advice is consistent. Establishing a central point of communication will ensure staff do not receive conflicting information from the agencies involved. In some cases, the project manager from the gaining agency might take responsibility for the overall communication strategy, while the project manager from the transferring agency will also contribute.

Strategies the project managers should consider for communication include:

- conducting a series of meetings or information sessions for affected staff
- providing regular email updates (from the gaining agency) to staff of both the transferring agency and the gaining agency
- establishing a website dedicated to the transition
- establishing a telephone or email hotline to answer specific enquiries.

### 3.4 People management strategy

The gaining agency should work together with the transferring agency to develop a people management strategy to ensure a smooth transition for all affected staff. Part 5 provides details of the types of issues to be addressed.

### 3.5 Information and communications technology strategy

An information and communications technology strategy needs to be addressed early in the planning process as it may involve significant resources and time to implement.

Consideration should be given to:

- downloading and re-loading databases, electronic mail and personal drives
- diverting electronic mail and phone calls where necessary (generally only necessary if a function has many external stakeholders or where policy guidelines have recently been widely promulgated)
- developing programs to upload personnel data from the transferring agency's human resources system to the gaining agency's human resources system
- arranging for transfer of software (having due regard for any licensing issues) and hardware, including desktop computers, printers and file servers
- whether novation of contracts relating to outsourced computer services is required
- arranging for employees to transfer to the gaining agency's systems and products, including provision of training, as required
- updating gaining and transferring agencies' internet sites to reflect changes, arranging pointers from the transferring agency's site where needed
- updating gaining and transferring agencies' intranet sites
- creating new logons and email addresses
- arranging for information in all formats including records and data to be transferred from the transferring agency to the gaining agency or archived (note that previous website data must be retained not only for archiving purposes but also for FOI purposes)
- installing cabling and outlets in new accommodation
- providing information on disaster recovery/business continuity plans.

### 3.6 Records management strategy

The gaining and transferring agencies should work together to develop a records management strategy—Part 6 of this guide provides further details.

Where records are held in physical format, gaining and transferring agencies need to make arrangements for movement of records and update of systems that control those records, such as databases, spreadsheets or records management systems.

Where records are held in digital formats transferring and gaining agencies need to confer to establish appropriate mechanisms for exporting records from the transferring agency's system and importing them into the gaining agency's systems. Both agencies need to ensure that all required metadata associated with the records being transferred is exported from the transferring agency's systems, linked to the correct record and appropriately imported into the gaining agency's systems.

The information registers of both agencies will be of use here, and should also be updated to reflect the MoG changes. For more information on information registers, see Principle 4 of the *Principles on open public sector information* at [http://www.oaic.gov.au/publications/agency\\_resources/principles\\_on\\_psi\\_short.html](http://www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html), and the guidelines to Part 13 in the OAIC's *Freedom of Information Guidelines*, particularly s 13.20, at <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-13-information-publication-scheme>

Where personnel areas hold forms such as attendance records, medical certificates and leave forms, these need to be transferred to the gaining agency.

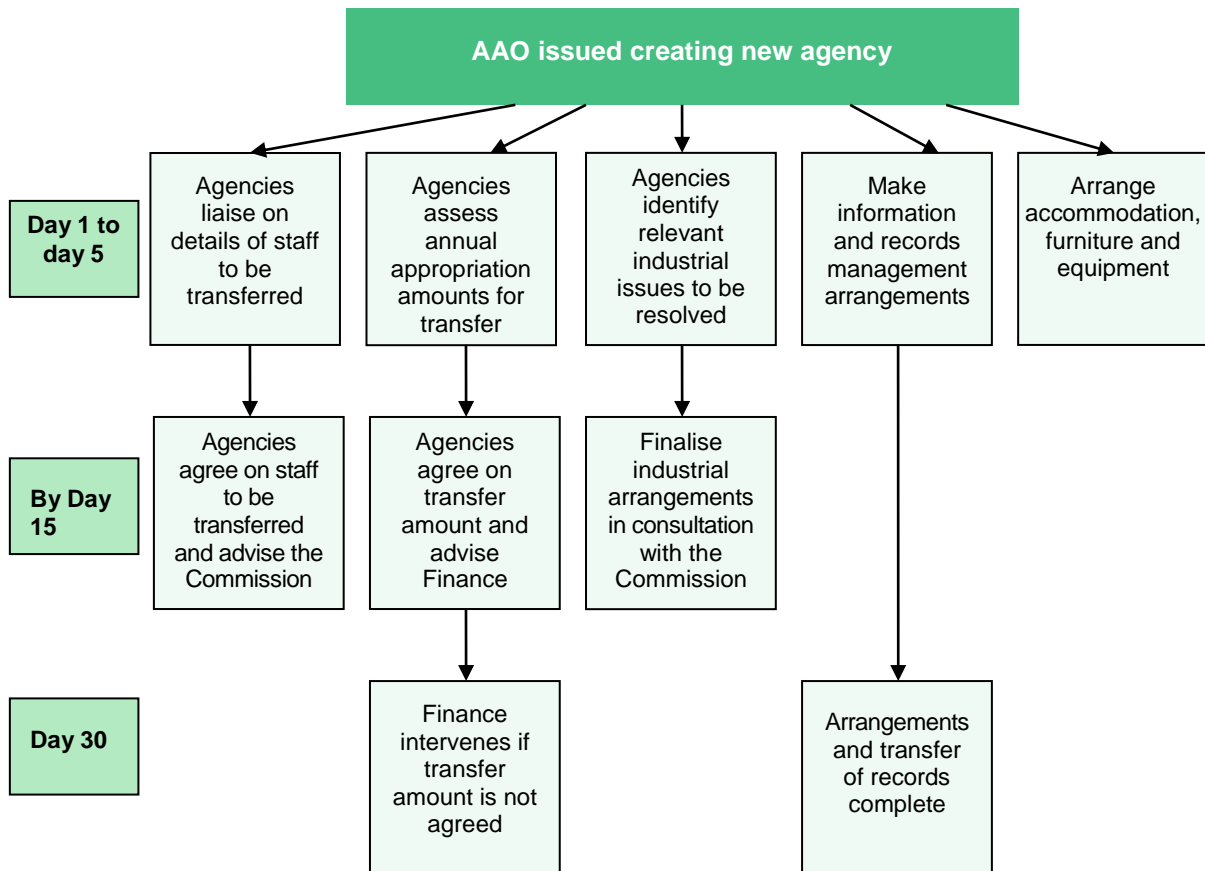
Agencies should be aware of the potential privacy, FOI, and Information Publication Scheme implications (including the proactive publication of public sector information) of transferring records between agencies, which are discussed further in Part 6.

### 3.7 Indicative timeframe

The indicative timeframe below for completing key events when setting up a new APS agency (assuming functions are transferring from an existing APS agency) will also be useful when functions are transferred from one agency to another.

While the transfer of appropriations and the transfer of staff under section 72 of the PS Act are unlikely to be completed by the time the new AAO is made, the Prime Minister expects agency heads to implement AAO changes cooperatively and as soon as possible, if necessary by administrative means such as issuing new delegations.

## Timeframe for setting up a new APS agency



# Part 4 Financial management

MoG changes may require the transfer of: outcomes and programs and associated receipts and appropriations (in accordance with FMA Act sections 31 and 32); superannuation costs; Special Accounts; FMA Act delegations; assets and liabilities; insurance; and reporting requirements for financial statements and annual reports.

## 4.1 Outcomes and program structure

Sometimes MoG changes will impact on outcomes, program structure and corresponding performance reporting. If this occurs, agencies should reassess their outcomes framework to determine its ongoing relevance. If an agency does not have a suitable outcome for a function it has acquired or transferred through a MoG change, it should take steps to update the agency outcome structure. Such a change may also require modifications to reporting structures and performance indicators to better reflect how the agency performs its revised range of functions and achieves its required outcomes.

Generally, changes to outcome and program structures are put in place before the Budget or Additional Estimates rounds to ensure the outcomes are reflected in Appropriation Bills<sup>1</sup>. Changes to outcomes outside the Budget process can only be implemented through Additional Estimates Bills or other Appropriation Bills if there has been a substantive change in agency business since the Budget, or if changes to the AAO require the development of new outcomes.

An AAO is an implementation of an order of the Governor-General and not subject to negotiation.

### 4.1.1 Process for changing outcomes

Outcomes are the results or impacts on the community or the environment of Government decisions. Agencies should review their existing outcomes to ensure they appropriately and adequately capture the outcomes and programs that have been gained as a result of MoG changes, and amend as required. To change an existing outcome, or create a new one, agencies must:

- consult with the relevant Agency Advice Unit (AAU) in Finance, which will in turn liaise with the Resource Management Branch (RMB) in Finance, to ensure the proposed outcome is consistent with Government policy
- obtain legal advice to ensure a new outcome meets the outcome policy
- obtain agreement from the relevant portfolio Minister
- ask their portfolio Minister to obtain approval from the Minister for Finance and Deregulation (Finance Minister).

Agencies should liaise with the relevant Agency Advice Unit (AAU) and RMB in Finance to ensure new outcome structures are reflected in the Central Budget Management System (CBMS) maintained by Finance and as a consequence in subsequent Appropriation Bills.

Where existing outcomes (or part thereof) are transferred, the outcome statement must be retained by the transferring agency until the commencement of the next reporting cycle. The outcome statement from the transferring agency must be retained by the gaining agency until such time as a new outcome has been agreed by the Finance Minister. The exception to this is where the gaining agency has an appropriate existing outcome, in which case the agency may use this outcome.

Refer to the Finance website <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/outcomes-arrangements.html> for more information on the outcome statements policy and approval process.

If you require assistance, contact RMB in Finance by email to [Budget\\_Framework@finance.gov.au](mailto:Budget_Framework@finance.gov.au).

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<sup>1</sup> Programs and other performance information are not reflected in annual appropriation Acts but are incorporated into Portfolio Budget Statements.

## 4.1.2 Continuation of funding for a function pending a new outcome

Where an agency has gained a function, the associated outcome can be transferred to the gaining agency (where a section 32 determination under the FMA Act can transfer appropriations).

The gaining agency must, nonetheless, take steps to have a suitable outcome for the transferred appropriation approved through the next appropriation cycle, usually in either the Additional Estimates or Budget processes. Where an agency has not had a suitable outcome approved prior to seeking a transfer of an amount of appropriation, Finance should be consulted for guidance in relation to this matter.

## 4.2 Transferring annual appropriations

### 4.2.1 Annual appropriations

Annual appropriations are appropriations that appear in one of the annual Appropriation Acts. Three annual Appropriation Bills are prepared at Budget (i.e. Appropriation Bill (No. 1), Appropriation Bill (No. 2) and Appropriation (Parliamentary Departments) Bill (No. 1)) and a further three are prepared, as necessary, at Additional Estimates. The Government may prepare further annual Appropriation Bills, if necessary, at other times during the year.

Where a MoG change results in partial or full transfer of a function to another agency, the transferring agency will need to work with the gaining agency to make arrangements for the transfer of any annual appropriations relating to the function to the gaining agency.

The general principle of ‘finances follow function’ applies to MoG changes, irrespective of any historical budget decisions, etc. Under this principle, annual appropriations devoted to a function at the point of the MoG change are to be transferred to the gaining agency.

### 4.2.2 Determining the amount to be transferred

Following the transfer of a function, an assessment of appropriation amounts relating to the function being transferred should be made by the agencies concerned. In making an initial assessment agencies should consider the appropriation balances showing in the Appropriations and Cash Management (ACM) module of the Central Budget Management System (CBMS), as well as the amount shown in the latest Portfolio Budget Statement and/or Annual Report. Finance is able to provide ACM reports to affected agencies on request—requests should be made to the Annual Appropriations Team by email to [GaRMAAnnualAppropriations@finance.gov.au](mailto:GaRMAAnnualAppropriations@finance.gov.au).

Agencies should also consider available appropriations from past years including unspent appropriations that relate to accrual expenses, such as accrued entitlements for employees who have been transferred. The two agencies should agree on the amounts and details of the transfer of appropriations as soon as possible, following the general principle of ‘finances follow function’. If agreement between agencies on the appropriation transfer amount cannot be reached within the timeframe, Finance may intervene by escalating the issue to the formal resolution process. That process is described at Part 2.2 of this document.

Agencies must consider when the gaining agency will need additional appropriation to make payments for the new function. If the gaining agency has sufficient appropriation to make the payments until the next Appropriation Bill round (e.g. Budget or Additional Estimates), then they should consider transferring the appropriations through the regular estimates update process.

If the gaining agency cannot absorb the payments until the next Appropriation Bill round, then the agencies should contact the Annual Appropriations Team via [GaRMAAnnualAppropriations@finance.gov.au](mailto:GaRMAAnnualAppropriations@finance.gov.au). The Annual Appropriations Team will be able to provide advice, with a view to ensuring the necessary payments can continue.

### 4.2.3 Section 32 of the FMA Act

Where the gaining agency cannot absorb the payments until the next Appropriation Bill round, the Annual Appropriations Team may recommend the transfer of appropriations occur through a determination made under section 32 of the FMA Act. Section 32 determinations enable the Finance Minister, or a delegate, to determine that one or more Schedules to one or more annual appropriation Acts are amended to effect the transfer.



Section 32 determinations are legislative instruments, which must be registered on the Federal Register of Legislative Instruments. These instruments are consolidated into the schedules of the relevant annual Appropriation Acts. The legislative instruments and amended annual appropriation Acts are available on the [ComLaw website](#).

Section 32 determinations will generally require the transferring agency to retain some appropriation to pay outstanding invoices; however, it is expected that gaining agencies would normally pay for invoices received after the date of transfer.

#### **4.2.4 Processing a section 32 request**

Once amounts to be transferred are agreed, and the transfer will be actioned through a section 32 determination, the Chief Financial Officers of each agency will need to complete and return the 'Transfer of Appropriations – Chief Financial Officers Agreement' form to the Annual Appropriation Team at Finance by email to [GaRMAAnnualAppropriations@finance.gov.au](mailto:GaRMAAnnualAppropriations@finance.gov.au). The Annual Appropriations Team will provide the transfer form.

The 'Transfer of Appropriations – Chief Financial Officers Agreement' form is used as a basis to create a section 32 legislative instrument, which enables the Finance Minister or a delegate to make a determination to amend the annual appropriation Acts.

Following approval of the section 32 legislative instrument by the Finance Minister or a delegate, Finance will transfer the amounts relating to the section 32 determination in ACM. Section 32 determinations take effect on the date specified in the determination.

After Finance confirms that section 32 determinations have been finalised, agencies should enter adjustments into the Annual Estimates Module of CBMS, including the estimates baseline for the current and forward years. Section 32 transfers should also be reflected in Monthly Estimates profiles in CBMS, Portfolio Budget Statements and Portfolio Additional Estimates Statements.

### **4.3 Transfer of functions between FMA Act agencies and CAC Act bodies**

Where functions are transferred between FMA Act agencies and CAC Act bodies, agencies should contact the relevant AAU and/or the Governance Branch in Finance to discuss specific circumstances. It is possible that agencies may need to seek legal advice on some issues. Where legal issues are likely to take some time to resolve, Finance will consider what interim measures may be needed to enable continuation of service delivery.

### **4.4 Retaining Prescribed (Relevant Agency) Receipts**

Section 31 of the FMA Act allows agencies to increase their most recent departmental item with amounts prescribed in FMA regulation 15.

FMA regulation 15 applies uniformly to all FMA Act agencies and therefore continues to apply to functions that are affected by MoG changes. The gaining agency is usually entitled to retain any Relevant Agency Receipts associated with a function that it has gained. However, the following two circumstances should be noted:

- If at the time a function is transferred, the transferring agency holds amounts of unspent related receipts, then the calculation of appropriation amounts to be transferred to the gaining agency, under section 32, must include the unspent related receipts.
- If the transferring agency managed any Relevant Agency Receipts associated with the function, in accordance with the operation of a scheme determined in writing by the Finance Minister under FMA sub-regulation 15(3) Item 3, then this should be conveyed by the transferring agency to the gaining agency.

Any receipt collected by an FMA Act agency that is not a Relevant Agency Receipt, as prescribed in FMA regulation 15, and is not otherwise able to be kept by the agency (e.g. under section 30 of the FMA Act) must be transferred to the Official Public Account as an administered receipt. If in doubt, agencies should contact the relevant AAU in Finance to discuss the matter.

### **4.5 Superannuation costs**

Australian Government employers should be providing superannuation for most of their employees and also for contractors who are not common law employees but who are engaged principally for their labour.<sup>2</sup> Where MoG changes occur, the superannuation arrangements for affected employees may change. Further information about these arrangements is detailed in Part 5.13.

Agencies make employer superannuation payments to the Budget (through ComSuper) towards the costs of benefits from the Commonwealth Superannuation Scheme (CSS) and the Public Sector Superannuation Scheme (PSS) for employees who are members of those schemes. The payment for an agency is based on the notional employer contribution rates calculated in the *PSS and CSS Long Term Cost Report*, adjusted to reflect the member and salary experience of the agency. Where employees' membership of the CSS or the PSS is continued after MoG changes the rate of those employer payments may change. Affected agencies should contact Finance to discuss the changes to their payment arrangements.

Queries concerning employer superannuation costs should be directed to the Superannuation Branch in Finance, in the first instance, by email to [superbranch@finance.gov.au](mailto:superbranch@finance.gov.au).

## 4.6 Special appropriations

A special appropriation is an authority provided in an Act (other than the annual appropriation Acts) to spend public money specified in that Act or a related Act. When a MoG change occurs, portfolio departments should review the relevant AAO instrument regarding the allocation of responsibilities for administering legislation that contains special appropriations. At the time when responsibility for administering a special appropriation is transferred, the gaining portfolio department should ensure the gaining agency is able to comply with its statutory responsibilities.

Further guidance can be found in Finance Circular 2005/13: *Allocation of responsibilities for special appropriations*, available on the Finance website at <http://www.finance.gov.au/publications/finance-circulars/2005/13.html>.

### 4.6.1 Special Accounts

A Special Account may be established either by a Finance Minister's determination under section 20 of the FMA Act (section 20 Special Account), or by other enabling legislation as recognised under section 21 of the FMA Act (section 21 Special Account).

The Finance Minister may establish or vary a section 20 Special Account by tabling a written determination in each House of the Parliament. Either House may pass a resolution disallowing the determination within five sitting days after the determination has been tabled. If neither House passes such a resolution, the determination takes effect on the day immediately after the last day upon which such a resolution could have been passed. A determination to abolish a section 20 Special Account is not subject to disallowance by Parliament and typically takes effect the day after registration on the Federal Register of Legislative Instruments (FRLI).

In the event of MoG changes, agencies should consider whether any Special Accounts they manage will be affected.

Where responsibility for administering legislation is transferred between Ministers through the AAO process, responsibility for administering any section 21 Special Accounts established by the related legislation is also automatically transferred. No action is required by agencies to effect such a transfer. However, if there was a subsequent need to vary or abolish a section 21 Special Account, the establishing legislation would need to be amended.

Where responsibility for a function that involves a section 20 Special Account is transferred between agencies, generally the responsibility for administering the section 20 Special Account should be effected as soon as possible after the AAO instrument is made. Written correspondence between the relevant Chief Executives or their delegates should agree the transfer date upon which the gaining agency becomes responsible for managing the Special Account. In some instances the transfer of a function may require a new Special Account determination to be made by the Finance Minister. In such instances, the gaining agency should

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<sup>2</sup> Further information on when these people may be regarded as employees for superannuation purposes is available from the Australian Taxation Office website at <http://www.ato.gov.au/super>.

liaise with Finance as soon as possible to consider whether a new Special Account needs to be established or whether a variation is required for the existing Special Account. Such arrangements may require a written request to the Finance Minister from the relevant agency's Minister.

Where it is not possible to immediately establish or vary a section 20 Special Account (e.g. where the Parliament has risen), temporary arrangements may be put in place to enable the gaining agency to have access to the appropriation provided by an existing section 20 Special Account. For example, the gaining agency could be issued with drawing rights by the transferring agency to the existing section 20 Special Account.

Agencies should consult the relevant AAU in Finance about any proposals to transfer, establish, abolish or vary Special Accounts. If changes to legislation are required for a section 21 Special Account, agencies should also contact the Governance Branch by email to [LRB@finance.gov.au](mailto:LRB@finance.gov.au) and Appropriations and Cash Management Branch by email to [special.appropriations@finance.gov.au](mailto:special.appropriations@finance.gov.au) in Finance.

## 4.7 Delegations under the FMA Act

Section 62 of the FMA Act and regulation 24 of the Financial Management and Accountability Regulations 1997 enable the Finance Minister to delegate his or her powers or functions under the FMA Act and FMA Regulations to Chief Executives of FMA Act agencies. Some of the powers that the Finance Minister has currently delegated include the authority to enter into agreements with banks to open and maintain bank accounts, issue drawing rights, commit future appropriations and enter into agreements for the receipt and custody of public money by outsiders. Chief Executives are responsible for promoting proper use of Commonwealth resources under section 44 of the FMA Act. Proper use means efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth.

Section 53 of the FMA Act and regulation 26 of the FMA Regulations enable a Chief Executive to delegate his or her powers under the FMA Act and Regulations to officials, including powers that have been delegated by the Finance Minister. Where a function has been transferred or abolished, an agency's internal delegations for this function may cease to have effect. The Chief Executive of this agency will generally need to issue new internal delegations, including the power to issue drawing rights. Agencies should therefore review their internal delegations as soon as possible after a MoG change.

Apart from the need to review the FMA Act, FMA Regulations, and delegations (and any other delegations arising under other legislation) where there has been a change of office-holder such as a Chief Executive or Minister, it is important to review any previous authorisations and approvals. Agencies should contact Finance through the relevant AAU for further advice. See also the *Financial Management and Accountability (Finance Minister to Chief Executive) Delegation 2010*, as amended from time to time, at <http://www.finance.gov.au/financial-framework/fma-legislation/fma-delegations.html>.

## 4.8 Assets and liabilities

The process for determining the amount of appropriation that is to be transferred is separate and distinct from the process of transferring assets and liabilities. Agencies should identify those assets and liabilities that are to be transferred, preferably under a Memorandum of Understanding (MoU). This identification needs to consider those assets (including cash) and liabilities that belong to the function that is to be transferred. Cash to be transferred may include amounts of cash that have been accumulated to meet future commitments. Accounting for the transfer should be in accordance with relevant accounting standards and the Finance Minister's Orders for Financial Reporting (FMOs)—see <http://www.finance.gov.au/financial-reporting-and-accounting-policy/index.html>.

The FMOs require Commonwealth entities to record the transfer at the amount recognised in the books of the transferring agency as at the transfer date (see Part H of the FMOs). The net book values of assets and liabilities transferred as a result of a MoG change must be treated as contributions by (gaining agency), or distributions to (transferring agency), owners. A transfer of an administered asset or liability should therefore be reflected in the reconciliation of the opening and closing balances of administered assets less administered liabilities at existing book value.

The time at which asset and liability transfers are recorded in the financial statements depends on the date at which agreement to transfer them is effective.

This reflects that certain assets and liabilities may remain under the control of the transferring agency until sometime after the MoG change. See 4.8.5 *Timing of transfers of assets and liabilities* below for more information.

#### **4.8.1 Transfer of physical assets**

Transferring and gaining agencies will need to reach agreement about the transfer of physical assets (including, but not limited to, property, plant, equipment, and fitout) and contracts for the use of physical assets (e.g. accommodation leases). The decision to transfer assets depends on the particular circumstances of each case. Some agencies lease assets and it will be a matter between the gaining and transferring agencies to decide who will take responsibility for these leasing arrangements.

Where assets have been purchased from an appropriation for the function that is being transferred, it would generally be appropriate to transfer these items unless, for example, a gaining agency indicates it has no requirement for them. Assets purchased from some other appropriation but used for the performance of the function being transferred should be subject to an agreement between the agencies.

#### **4.8.2 Commenced but not finalised procurements**

At the time of a MoG change, there may be procurements that are underway, but not yet finalised. In line with the Commonwealth Procurement Guidelines, the procurement should go ahead unless the gaining agency determines that it is no longer in the public interest to award a contract. Public interest grounds generally arise in response to unforeseen events or new information which materially affects the objectives or reasons underlying the original procurement requirement. The Guidance on the Mandatory Procurement Procedures cites a number of examples where it may not be in the public interest to award a contract including 'machinery of government changes affecting responsibilities between agencies for programs to which the procurement relates'.

However, after making the above considerations, it is a matter for the gaining agency to determine whether to proceed with the procurement, cease any further procurement action or start the procurement process anew.

Refer to the Finance website <http://www.finance.gov.au/procurement/> for more information on the Commonwealth Procurement Guidelines and the Guidance on the Mandatory Procurement Procedures.

#### **4.8.3 Cost issues**

There are no established rules about who pays for transition costs. Agencies should come to agreement on how costs, including overhead costs, that are incurred during the transition will be funded. The general principle to be applied is that agencies should bear their own re-location costs. For example, it is reasonable to expect that a transferring agency would pay for physical movement of employees, furniture, equipment and files; downloading information and other information technology activities relating to the move; including FOI and Information Publication Scheme obligations (including the proactive publication of public sector information); and updating internal records. Conversely, gaining agencies would be expected to pay for the costs of establishing the transferred employees in their new premises, including re-loading information, setting up access to the network, security arrangements, and updating internal records. Agencies are urged to enter into the transition arrangements in a spirit of cooperation and to be reasonable and fair in their expectations.

To help prevent misunderstandings and disputes later, it is very important that cost issues, particularly regarding costs for services provided after the transfer, be agreed upon and documented in an MoU. Examples include where salary is paid by the transferring agency to the end of a fortnight for administrative ease, or where services are provided for a certain period.

#### **4.8.4 Transfer of employee leave entitlements**

The Financial Management and Accountability Regulations 1997 (FMA Regulations), in particular Part 11, require a payment for leave entitlements to be made from the transferring agency to the gaining agency when an ongoing employee in an agency moves to another agency, to a Commonwealth authority or to the High Court of Australia.

FMA Regulation Part 11 does not apply if the employee movement is a direct consequence of a transfer of a Government function, including AAO changes, as the funding arrangements in

these situations would be considered as part of the annual appropriations transfer process. Further information regarding the transfer of annual appropriations is provided at Part 4.2 of this document.

For more information on the legal application of FMA Regulation Part 11, contact the Governance Branch in Finance by email to [LRB@finance.gov.au](mailto:LRB@finance.gov.au).

#### **4.8.5 Timing of transfers of assets and liabilities**

Assets and liabilities transfer between agencies when control passes from one agency to another, or when effective administrative responsibility transfers for administered items. The timing of control is a factual matter:

- In some cases control transfers when specified legal events occur e.g. appropriation balances transfer when the section 32 determination is effective (annual appropriations) or the AAO date (special appropriations).
- In other cases control transfers at times agreed between the two agencies e.g. transfer of property, plant and equipment.

The Government intends that policy responsibility for the function should transfer as of the AAO date. Accordingly, agencies should endeavour to arrange the transfer of assets and liabilities as soon as practical after the date of the AAO change. See *Finance Brief 37: Timing of changes in assets and liabilities arising from Machinery of Government Changes* for more information, including when timing of control passes depending on what is being transferred, at <http://www.finance.gov.au/publications/financebriefs/index.html>.

### **4.9 Certificate of Compliance**

The Chief Executives of all agencies under the FMA Act are required to provide a completed Certificate of Compliance (Certificate) to their portfolio Minister each year. The Certificate process is designed to improve compliance with the Australian Government's financial management framework and to ensure that Ministers are kept informed of compliance issues within their portfolios. The Certificate is a comprehensive report on each agency's compliance with the financial management framework. A key focus of the Certificate is the activities undertaken to address non-compliance.

When there is a MoG change, leading to a change in agency functions, the general approach is that a Chief Executive should only report for the Certificate on the affected functions for the period those functions were actually under his or her control. Where a new agency is created, as a result of a MoG change, the Chief Executive must report from the date the agency was created.

Where an agency is abolished as a result of the MoG change, the Chief Executive of the successor agency is required to report for the entire reporting period, including the functions of the abolished agency until the date of abolition.

If a new FMA Act agency is created, the Chief Financial Officer of that agency should contact the Resource Framework & Reporting Branch at [finframework@finance.gov.au](mailto:finframework@finance.gov.au) to discuss the Certificate process.

Further guidance on the Certificate of Compliance is available in Finance Circular 2013/03: *Certificate of Compliance – FMA Act Agencies*, available on the Finance website at <http://www.finance.gov.au/publications/finance-circulars/2013/03.html>.

### **4.10 Reporting requirements for financial statements**

Chief Executives of FMA Act agencies are required, under section 49 of the FMA Act, to provide annual financial statements to the Auditor-General.

FMA Act agencies are required to prepare financial statements in accordance with the FMOs, which are issued by the Finance Minister under section 63(1) of the FMA Act. Division 14 of the FMOs require that the Chief Executive sign a certificate. See <http://www.finance.gov.au/financial-reporting-and-accounting-policy/index.html>.

Section 51 of the FMA Act provides that, where an agency ceases to exist, the financial statements that the Chief Executive of that agency would have been required to prepare under section 49 of the FMA Act must be prepared by another Chief Executive as nominated by the Finance Minister. Unless otherwise advised by the Finance Minister, ceasing agencies must prepare closure accounts. These accounts are to be audited/audit reviewed as soon as



practicable following preparation and management clearances and accordingly, respective agencies should consult with the Australian National Audit Office.

Section 51 of the FMA Act also provides that if a function is transferred to one or more agencies the financial statements prepared under section 49 of the FMA Act will be prepared by the Chief Executive or Chief Executives as nominated by the Finance Minister.

In respect of the period for which agencies should prepare financial statements for a function/activity/program that has been transferred to another agency:

- the transferring agency should report on that function/activity/program up to the date of transfer;
- the gaining agency should report on the function/activity/program from the date of transfer; and
- both the transferring and the gaining agency should include a note to its financial statements as per the Restructuring Note in PRIMA (see <http://www.finance.gov.au/financial-reporting-and-accounting-policy/index.html>). The information required for the gaining agency (e.g. assets, liabilities, income and expenses) will need to be sourced from the transferring agency, and the transferring agency should co-operate with the gaining agency to provide it.

All affected agencies should review *FinanceBrief 37: Timing of changes in Agency assets and liabilities arising from Machinery of Government Changes* for timing of and practices relating to transfers of assets and liabilities as per 4.8.5 *Timing of transfers of assets and liabilities* above. The Australian National Audit Office has been consulted in the development of *FinanceBrief 37*. See <http://www.finance.gov.au/publications/financebriefs/index.html>.

Agencies should include a note to the financial statements explaining the reason for the partial reporting of a function (e.g. transfer of a function as a result of restructuring) and the impact of the restructuring on the agency as per PRIMA. Changes to appropriations will also need to be reflected in the Portfolio Budget Statements/ Portfolio Additional Estimates Statements.

## 4.11 Reporting requirements for annual reports

The practice for reporting program information in annual reports is different from that required for financial statements.

Departments of State, pursuant to section 63(2) of the PS Act, and executive agencies, pursuant to section 70(2) of the PS Act, are subject to the *Requirements for Annual Reports* (the Requirements), approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit (JCPAA). As a matter of policy, the Requirements also apply to prescribed agencies under section 5 of the FMA Act.

The Requirements state that, in cases of a MoG change during the reporting period, where functions or offices are gained or lost, the established practice is that the gaining agency must report on that function or office for the entirety of the reporting period, whether or not the transferring department continues to exist.

Further details can be found in PM&C's *Requirements for Annual Reports* at <http://www.pmc.gov.au/guidelines/index.cfm>. Alternatively, agencies should contact PM&C's Parliamentary and Government Branch.

## 4.12 Insurance

When a function is created, abolished, or transferred between agencies, there may be a corresponding change in the risk profile of the affected agencies. With any MoG change, Comcover should be contacted by both the gaining agency and the transferring agency in order to reassess the risk profiles of the affected agencies and adjust the insurance premiums and coverage as appropriate. Comcover can be contacted by telephone 1800 651 540 or by email to [comcover@comcover.com.au](mailto:comcover@comcover.com.au).



# Part 5 People management

MoG changes can cause a large degree of disruption to employees. If human resource issues are not managed appropriately, staff morale may suffer, leading to staff attrition and loss of productivity. As described in Part 3, it is good practice for the gaining agency to establish a steering committee or working group to manage and oversee staff changes and develop a people management strategy.

For effective change management, agency heads should advise staff on the rationale for, and the nature and extent of, the changes and should provide regular updates to staff. Agencies also need to consider relevant human resources legislation, principles and policies, particularly in relation to staffing and equity issues.

Agencies affected by a transfer of functions will need to establish early contact and work together in a cooperative manner to ensure continuity of Government business and a minimum of disruption to employees. As noted in Part 3, documentation of the process is essential; it is highly desirable to develop MoUs detailing all decisions agreed between agencies, particularly relating to payment of transition costs and recovery of costs at a later stage. This is important where a transferring agency agrees to continue providing some services for a period, such as allowing employees to remain in its accommodation and maintaining communications and information technology services. It will be necessary to record these expenses and to recover the cost from the gaining agency at a later date.

Agencies need to address the following as a matter of priority:

- identification of affected employees including whether physical relocation is needed
- connection to agency information and communications technology systems, including email
- calculation of employee entitlements
- transfer of physical and digital personnel records of affected employees including personnel files and leave records (see Part 6 for information on transfer of records).

Transferring agencies may choose to finalise performance appraisals and, where relevant, make arrangements for calculation and payment of pro rata performance bonuses to staff leaving the organisation.

Transferring agencies also need to identify (and advise the Commission of) any relevant outstanding employee-related actions, such as investigations into suspected breaches of the Code of Conduct, harassment complaints, management disputes, non-performance, etc. (see Part 5.4 of this guide for further information).

Affected employees should be consulted throughout these processes, kept informed of developments, and given the opportunity to speak to managers regarding any concerns they may have. Gaining agencies should provide induction sessions and information packages to help staff settle into the new organisation.

Before leaving an agency, employees must return agency items in their possession, such as vehicles, laptops, mobile phones, credit cards, and security passes (although there may be occasions where agreement is reached for an employee to continue to access the premises for a defined period for a particular purpose, for example, to finalise a project). In some cases, staff transferring to the gaining agency may be permitted to take certain items (such as phones and vehicles) from the transferring agency, as part of an agreed transfer arrangement.

Employees should also ensure that all agency records for which they are responsible (including physical or digital format records) are either captured into agency records management systems and, in the case of physical format records, returned to agency records management areas according to agency procedures.

Employees should consider the implications of the transfer on delegations or authorisations required to perform their duties, governance documents, contractual arrangements, and any outstanding procurement or legal action, and advise the gaining agency of requirements or issues.

## 5.1 Induction of transferred employees

The gaining agency should ensure transferred employees are given an appropriate induction to the agency as soon as possible to provide them with information including:

- the organisational structure
- management systems, including performance management
- the agency's systems and arrangements for how its work is prepared, including information communications and technology issues and formats required for written material, records management policies and practices
- workplace arrangements, remuneration and classification structure
- procedures for raising issues such as complaints and conduct matters
- work health and safety management and procedures.

## 5.2 Legal framework

Section 72 of the PS Act provides a head of power for movement of staff whose duties are affected by MoG changes. The Commissioner may, if satisfied that it is necessary or desirable in order to give effect to an administrative re-arrangement:

- move APS employees to another agency—paragraph 72(1)(a)
- determine that a person ceases to be an APS employee and becomes an employee of a specified Commonwealth authority—paragraph 72(1)(b)
- determine that a person ceases to be employed as a non-APS (Commonwealth) employee and becomes engaged as an APS employee in a specified agency—paragraph 72(1)(c)
- engage any person as an APS employee in a specified agency—paragraph 72(1)(d).

The Public Service Regulations 1999 (PS Regulations) provide that any action taken, or not taken, under section 72 of the PS Act is not a 'reviewable action' for the purposes of section 33 of the PS Act. In other words, an employee is not entitled to a review of any action taken under section 72—see regulation 5.23 and Item 5 of Schedule 1 of the PS Regulations.

There is no power under the PS Act to move State or Territory employees compulsorily into the APS, or to move APS employees to State or Territory jurisdictions, in order to give effect to a transfer of functions between jurisdictions.

In relation to the Commonwealth assuming responsibility for State or Territory functions, the PS Act includes a facilitative provision (paragraph 72(1)(d)) which allows the Commissioner to engage a person as an APS employee if satisfied that such action is necessary or desirable to give effect to an administrative re-arrangement.

This provision is not a compulsory transfer provision. Rather, it allows persons who accept an offer of employment in the APS to be engaged as APS employees without having to satisfy the usual merit selection processes for engagement in the APS.

In practice, where there is a transfer of functions from State or Territory jurisdictions to the Commonwealth, relevant State or Territory employees may be offered APS employment in a specified APS agency. Those who accept the APS offer may be engaged by the Commissioner under paragraph 72(1)(d) of the Act; those who reject the APS offer remain the responsibility of the relevant State or Territory.

The following information is concerned with movement of employees between APS agencies under paragraph 72(1)(a) as a result of MoG changes. If, as a result of the changes, there is a need to move staff into or out of the APS, the Commission should be consulted.

## 5.3 Staff follow function

The general principle of 'staff follow function' applies to MoG changes. Under this principle, affected employees are moved with their function, and their employment status (i.e. ongoing or non-ongoing) and classification remain the same.

The transferring agency will need to identify the ongoing and non-ongoing employees who are to be moved and provide the Commission with the name, AGS number and substantive APS classification of those employees. The Commissioner will make a determination under paragraph 72(1)(a) of the PS Act to move the affected staff to the gaining agency. The names and other relevant details of staff to be moved will be set out in schedules to the determination.

In most cases, identification of the employees to be moved will be a straightforward exercise. Complexities can arise, however, where a functional or program area is to be split or where there is to be a division of an agency's support functions (e.g. corporate services areas). There may need to be detailed negotiations between the transferring and gaining agencies to identify

the staff to be moved. As a general rule, unless exceptional circumstances apply, the number of corporate services staff who are transferred will generally be in proportion to the number of program staff leaving the transferring agency.

### **5.3.1 Non-ongoing employees**

A determination made under paragraph 72(1)(a) of the PS Act will move identified non-ongoing employees to the gaining agency for a period equal to the unexpired part of their existing term of engagement, or for the remainder of the duration of the task for which they were originally engaged, or on the same irregular or intermittent basis as that on which they were originally engaged.

### **5.3.2 Employees on leave, secondment or temporary assignment**

In identifying employees who are to be moved, the transferring agency will need to provide details of any employees who normally perform work associated with the function that is to be moved but who are on paid or unpaid leave (including employees granted leave without pay to take up statutory appointments, or employment under the *Members of Parliament (Staff) Act 1984* or the *Governor-General Act 1974*), those on long term sick leave including where compensation payments are involved, and any employees who are 'seconded' or on temporary movement to another employer. All these employees will be moved to the gaining agency with effect from the date specified in the section 72 determination but will not normally commence working there until their period of leave or secondment has expired.

The transferring agency will also need to identify and provide details of any employees who normally perform work associated with the function that is to be moved but who, at the time of the MoG change, are temporarily performing duties in another part of the transferring agency that is not affected. Employees in this situation are also moved to the gaining agency with effect from the date specified in the section 72 determination and will commence work in the gaining agency on that date. In these circumstances, however, it is possible for the employee and the two agencies concerned to enter into a temporary movement agreement under section 26 of the PS Act, which would allow the employee to continue performing duties in the area in which they were working before the MoG change came into effect.

An arrangement to assign duties temporarily to an employee at a higher level within the employee's agency under section 25 of the PS Act is not automatically preserved when the employee is moved to the gaining agency—the section 72 determination will move employees at their substantive APS classification.

Where there is an operational need, the gaining agency can continue any such arrangements by reassigning the higher duties under section 25 of the PS Act to an affected employee on or after the date of the move, although there is no obligation to do so.

### **5.3.3 Impediments to transfer**

There may be occasions when there are impediments to transferring staff with functions, for example where the gaining agency has certain requirements such as high level security clearances which some transferring staff cannot meet or where there will be geographic relocation (i.e. to another city). In these situations, the gaining and transferring agencies should make all efforts to accommodate these individuals. Where agencies are unable to resolve the situation, the Commission should be contacted by email to [staffingpolicy@apsc.gov.au](mailto:staffingpolicy@apsc.gov.au) for advice.

### **5.3.4 Transfers of statutory office holders**

There is no power under the PS Act to compulsorily move a statutory office holder from one agency to another.

Paragraph 72(1)(d) allows the Commissioner to engage a person as an APS employee if satisfied that such action is necessary or desirable to give effect to an administrative re-arrangement, and could be used to offer a statutory office holder employment in the APS if that is the desired outcome.

This provision is not a compulsory transfer provision. Rather, it allows persons who accept an offer of employment in the APS to be engaged as APS employees without having to satisfy the usual merit selection processes for engagement in the APS.

### 5.3.5 Senior Executive Service cap

In June 2010, the Government introduced a cap on net SES growth in each APS agency, in response to the *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*. The SES cap is administered and monitored by the Commission.

The subsequent Review of the SES, completed in early 2011, recommended that the SES cap arrangements should continue for five years, to the end of 2016, with a review of the cap's operation to be completed after three years. This has been endorsed by Government.

Where a MoG change will result in the movement of SES staff from one agency to another, the SES caps applying to each agency will need to be adjusted accordingly, subject to the role(s) having been evaluated appropriately against the SES work level standards. It is important therefore that agencies liaise with the Commission when SES movements resulting from MoG changes are being considered so that adjustments to the SES caps can be made. Queries in relation to SES cap aspects of MoG changes should be emailed to [sescap@apsc.gov.au](mailto:sescap@apsc.gov.au).

Where a MoG change will result in the creation of a new agency and it is intended to employ SES staff, steps will need to be taken to establish the agency's SES cap (refer to section 5.16.5).

## 5.4 Outstanding employment matters

Subsection 72(5A) of the PS Act provides the Commissioner with the discretion to determine how a range of employment-related matters that relate to APS employees moving to another APS agency under paragraph 72(1)(a) of the PS Act as a result of a MoG change will be handled.

It is possible that at the time of a MoG change there might be a range of employment-related actions underway applying to individual employees or groups of employees who are to be moved to the gaining agency. This could include action under either the PS Act or subordinate legislation, procedures under an agency's enterprise agreement or other industrial instrument, or an agency's internal operating arrangements.

These employment-related matters have been prescribed in Regulation 8.3 as follows:

- conditions of engagement imposed by the transferring agency under subsection 22(6) of the Act (see also 5.4.1 below),
- enduring conditions of employment imposed by the transferring agency under section 20 of the Act,
- investigations into an alleged breach of the APS Code of Conduct, and any resultant imposition of sanctions (including sanctions that have already been imposed but which might have ongoing effect such as a reduction in classification which has not yet taken effect, or periodic deductions from salary),
- a suspension imposed by the transferring agency in the context of a suspected breach of the Code of Conduct, and
- processes (however described) relating to performance management (including those involving non-performance of duties); management of excess staff; assessments of physical or mental fitness for duty; or the loss, or lack, of an essential qualification.

In making a determination under paragraph 72(1)(a) of the Act, the Commissioner may include a provision determining how such matters will be handled (e.g. that where any employee is serving a period of probation in the transferring agency at the time of the MoG change, then the probation may be continued in the gaining agency for the unexpired period and may be extended by the gaining agency if that possibility had been advised to the employee in their letter of engagement). However, the Commissioner may also need to determine other matters on a case by case basis, having regard to the individual circumstances of a particular case (e.g. a Code of Conduct investigation that is underway in the transferring agency at the time of the MoG change).

While the principle of 'staff-follow-function' generally continues to apply, there may also be circumstances where it is in the interests of the efficient administration of the APS, or in an employee's interests, that an employee not be moved immediately so that the action can be completed in the transferring agency.

When identifying employees to be moved as a result of a MoG change, the transferring agency must advise the Commission of any relevant employment matters covered by Regulation 8.3.

### 5.4.1 Conditions of engagement

While it will be up to the Commissioner to make a determination in accordance with subsection 72(5A) of the PS Act, generally it would be expected that where an employee who is to be moved to a gaining APS agency is still subject to a condition of engagement that was imposed under subsection 22(6) of the PS Act at the time of their original engagement in the APS, that condition would continue to apply to the employee's employment in the gaining agency.

It will be up to the gaining agency head to be satisfied as to whether the condition has been met. A gaining agency head can decide that an employee has met a condition within the period specified in the original condition of engagement (e.g. end a probationary period before the date specified) or that the condition no longer needs to be met. The gaining agency head may not, however, vary a subsection 22(6) condition that was originally imposed in the transferring agency or impose a new condition of engagement under subsection 22(6) of the PS Act, on an employee moved to the agency under paragraph 72(1)(a) of the PS Act.

## 5.5 Incomplete recruitment action

At the time of a MoG change, agencies may have Senior Executive Service (SES) and non-SES recruitment processes underway which have not been completed. The arrangements for handling such processes will depend on the stage reached in the process and the nature of the administrative re-arrangement.

### 5.5.1 Before decision to exercise employment powers

The Commissioner's Directions (see Clause 2.5 for the meaning of *similar vacancy*) provide that:

- where a vacancy has been notified in the Public Service *Gazette*, and
- the agency head has not yet taken the decision to engage or to assign duties to the preferred applicant (including promotion), and
- the relevant function has been moved to another agency after the notification by a MoG change

the gaining agency head can decide either to discontinue the process or proceed with the recruitment action.

Where the gaining agency head decides to proceed with the recruitment action, he or she may decide either to continue with the current process, on the basis of the action already taken in the agency in which the opportunity was notified, or to re-notify the vacancy in the Public Service *Gazette* and restart the recruitment process.

Where the gaining agency head decides to continue with the current process, the vacancy notified in the transferring agency may be regarded as a 'similar vacancy' in the gaining agency for the purpose of clause 2.9 of the Commissioner's Directions (notification of vacancy in the Public Service *Gazette*).

Any decision the gaining agency head ultimately takes to promote or engage a person will need to satisfy the requirements of APS Employment Principle 10A(1)(c) that decisions relating to engagement and promotion are based on merit, and subsection 10A(2) of the PS Act defining the requirements of a merit-based decision. To do this, the gaining agency head will have to be satisfied that the action taken in the transferring agency before the MoG change, and any subsequent action taken in the gaining agency, meets the minimum requirements of Chapter 2 of the Commissioner's Directions.

### 5.5.2 After decision to exercise employment powers and before taking effect

Except in situations involving abolition of an APS agency (see Part 5.5.3), where the transferring agency head has taken the decision to either engage, or assign duties to, the preferred applicant (including promotion), but:

- at the time of the MoG change, the decision had not come into effect, and
- as a result of the MoG change, the function associated with the employment opportunity now exists in the gaining agency

the recruitment process continues to finality, including any reviews of promotion decisions undertaken in accordance with Division 5.2 of the PS Regulations.



Until the process is complete, the vacancy remains in the transferring agency. Once the relevant decision to engage, assign duties (including promotion), or move a person comes into effect, the person will, in accordance with the section 72 determination, be immediately moved to the gaining agency (if necessary). For example, if a decision to promote a person has been made and has not come into effect when the part of the agency in which the person will perform the duties is moved to the gaining agency, the promotion will take effect in the transferring agency. Once the promotion takes effect, the determination made under paragraph 72(1)(a) will move the employee to the gaining agency (if necessary).

A clause is able to be included in the relevant determination to address this issue.

If, for any reason, a gaining agency head does not wish the recruitment action to come into effect, he or she will need to ask the transferring agency head to cancel the recruitment action before it takes effect.

### **5.5.3 Abolition of agency**

Where all the functions of an agency are moved to one or more gaining APS agencies and the transferring agency is being abolished, any decision the transferring agency head took to engage or assign duties to a preferred applicant (including promotion) that has not yet taken effect at the time of the MoG change will lapse. For example, where a decision to promote an employee has been notified in the *Public Service Gazette* but the decision has not yet taken effect, the promotion will lapse.

If, however, a gaining agency head wants to proceed with the recruitment action, he or she can decide to continue with the current process on the basis of the action taken in the agency in which the vacancy was notified. A gaining agency head may exercise powers under the relevant sections of the PS Act to promote or engage a person but will need to be satisfied that any action taken in the transferring and gaining agencies meets the minimum requirements of Chapter 2 of the Commissioner's Directions.

Where an engagement or promotion decision has lapsed as a result of the abolition, and the gaining agency head decides to continue with the process and engage or promote the preferred applicant on the basis of the selection process undertaken in the transferring agency, the engagement or promotion should be notified again in the *Public Service Gazette*. This will be a new engagement or promotion with a new date of effect and may be subject to different remuneration and other terms and conditions of employment, depending on the arrangements that apply in the gaining agency.

There should be consultation with the employee on remuneration and other conditions applying to the job.

In other cases, the applicant should be notified that the engagement or promotion has lapsed.

### **5.5.4 Subsequent and recurring vacancies**

The Commissioner's Directions (clause 2.5) provide gaining agency heads with a mechanism to use an order of merit that was finalised in the transferring agency to fill a subsequent or recurring employment opportunity in the gaining agency, provided it is within 12 months from the date of the *Public Service Gazette* notification.

Consideration needs to be given as to the appropriateness of this action. If, for example, the vacancy was advertised with a note to the effect that the duties would be moving to a new agency, or in circumstances where an entire division or agency was moved into or merged with another agency, it may be appropriate to use an existing order of merit. It is a matter of judgment for the gaining agency head to decide whether there has been a reasonable opportunity to apply for the vacancy or 'similar vacancy' (defined in Clause 2.5 of the Commissioner's Directions) and the vacancy has been adequately notified. Agencies could contact the Commission by email to [staffingpolicy@apsc.gov.au](mailto:staffingpolicy@apsc.gov.au) for advice if needed.

### **5.5.5 Non-ongoing employment**

A gaining agency should generally not use a register or panel arrangement created by a transferring agency to select non-ongoing employees for employment in the gaining agency. The gaining agency may, however, wish to encourage people on the transferring agency's register or panel to apply for non-ongoing employment opportunities in line with the procedures or arrangements that apply in the gaining agency.



## 5.5.6 Independent Selection Advisory Committees

Where there has been a request for an Independent Selection Advisory Committee (ISAC) in relation to employment opportunities in an agency that is subject to a MoG change, but the ISAC has not been established, the Merit Protection Commissioner will consider the request in consultation with the relevant agency heads.

Where an ISAC has been established to make recommendations to an agency head about the suitability of candidates for engagement, promotion, or assignment to duties in connection with employment in the agency, and:

- that ISAC has not yet made a recommendation to the agency head as to which candidate(s) is considered to be most suitable for the relevant employment, and
- as a result of a MoG change, some or all of the employment opportunities for which the ISAC was established to recommend candidates now exist in the gaining agency

the ISAC may continue its function in relation to the employment opportunities that still exist in the transferring agency. If the gaining agency head wishes to take any further action to fill particular employment opportunities that now exist in the gaining agency, he or she will need to restart the selection process, and may ask the Merit Protection Commissioner to establish a new ISAC.

Where:

- an ISAC has made recommendations to an agency head about the suitability of candidates for engagement, promotion, or assignment to duties in connection with employment in the agency, and
- as a result of a MoG change, some or all of the employment opportunities about which the ISAC has made its recommendations now exist in a gaining agency

the transferring agency head may choose to use the recommendation of the ISAC in deciding the most suitable candidates for the employment opportunities that still exist in the transferring agency. The gaining agency head is unable to use the original ISAC for employment opportunities that now exist in the gaining agency.

In circumstances where all functions of an agency are moved to one or more gaining APS agencies and the transferring agency is abolished, an ISAC established to make recommendations to the transferring agency head would lapse.

## 5.6 Temporary movements

A determination made under paragraph 72(1)(a) of the PS Act by the Commissioner will deal, among other things, with the situation of people who are on temporary movement from their home agency (the pre-temporary move agency) to another APS agency (the post-temporary move agency) at the time of a MoG change.

### 5.6.1 Changes in the post-temporary move agency

The following arrangement applies where an APS employee has temporarily moved to an agency under section 26 of the PS Act and the part of the agency in which the employee is working temporarily is moved to another APS agency (the gaining agency) as a result of a MoG change.

The section 72 determination will provide that the employee will move with the function to the gaining agency for the remainder of the temporary movement agreement. The temporary movement agreement will continue in accordance with its original terms as if it had been made with the agency head of the gaining agency. At the expiration of the temporary movement agreement, the employee will return to their pre-temporary move agency, except in the circumstances outlined below, or unless alternative arrangements are agreed between the parties (e.g. early termination of the arrangement, a further extension of the temporary movement, or an ongoing move).

In some cases, the employee's pre-temporary move agency may also be affected by the MoG change. If the part of that agency where the employee worked prior to the temporary movement is moved to another APS agency (the gaining agency), the Commissioner's section 72 determination will move the employee to the gaining agency with effect from the next working day after the temporary movement agreement expires.

If, however, the function the APS employee is performing in the post-temporary move agency is moved to the employee's pre-temporary move agency, the temporary movement agreement lapses.

A transferring agency will need to establish if there are any employees who are on temporary movement from another APS agency and are working in parts of the transferring agency affected by the MoG change. If so, the section 72 determination will move these employees in accordance with the arrangements outlined above. The Commission will liaise with the transferring agency on appropriate words to include in the determination to cover these employees.

### **5.6.2 Changes in the pre-temporary move agency**

The following arrangement applies where an APS employee has temporarily moved from his or her agency to another agency under section 26 of the PS Act and the part of the pre-temporary move agency that the person was working in before entering into the temporary movement agreement is affected by a MoG change which involves the functions being moved to a gaining agency.

In these circumstances, the temporary movement is not affected by the MoG change. The Commissioner's section 72 determination will provide that the person will become employed in the gaining agency, with effect from the next working day after the temporary movement agreement expires, unless the parties agree on alternative arrangements (e.g. early termination of the arrangement, a further extension of the temporary movement, or an ongoing move).

Where the part of the pre-temporary movement agency in which a person was working before entering into the temporary movement agreement is moved to the same agency in which the employee is working as a result of the temporary movement agreement, the temporary movement agreement will lapse.

The transferring agency will need to establish if there are any employees who are on temporary movement to another APS agency but who, before entering into the temporary movement agreement, were performing duties in the part of the transferring agency affected by the MoG change. If so, the determination the Commissioner will make will move these employees with effect from the end of the temporary movement agreement. The Commission will liaise with the transferring agency on the wording to include in the determination to cover these employees.

## **5.7 Review of actions**

The PS Regulations do not provide for transfer between agencies of applications for reviews of actions made under Division 5.3 of those Regulations. Where such an issue arises concerning an APS employee, agencies are encouraged to contact the Commission to seek further advice about whether the review may be continued, or whether the employee should be advised to lodge a new application with the gaining agency.

## **5.8 Classification, duties and the place duties are to be performed**

Under rule 6(1) of the *Public Service Classification Rules 2000* (the Classification Rules), an agency head must allocate an approved classification (as set out in schedule 1 to the Classification Rules) to each employee in the agency. Under section 25 of the PS Act, an agency head may, from time to time, determine the duties of an APS employee and the place at which those duties are to be performed.

A gaining agency head will need to take action under the Classification Rules to allocate an approved classification and to assign duties under section 25 of the PS Act to any employee who is moved to the agency under paragraph 72(1)(a) of the PS Act.

It will be sufficient for a gaining agency head to execute a global instrument allocating to all employees who are moved under paragraph 72(1)(a) of the PS Act the same approved classification that was applied to them in their previous agency or a corresponding approved classification in the same group. Pending any action by the gaining agency head, the previous classification and duties should be regarded as continuing.

Where an employee's approved classification is part of a broadband in a transferring agency, the employee should be allocated the same approved classification in the gaining agency. A transferring agency should ensure that, before any movements to a gaining agency occur, the

approved classifications required under Classification Rule 6 have been identified for all employees, including those within broadbands.

Subsection 23(4) of the PS Act does not allow an agency head to reduce the classification of an APS employee without their consent, except in specified circumstances. An employee cannot be assigned duties at a higher classification except in accordance with clause 4.6 of the Commissioner's Directions.

## 5.9 Engagement of non-ongoing employees

Where non-ongoing employees are moved between APS agencies as a result of a MoG change, the circumstances relating to engagement of a person as a non-ongoing SES employee (as set out in PS Regulation 3.4), or as a non-ongoing non-SES employee (as set out in PS Regulation 3.5) are taken to be the circumstances under which the person is employed in the gaining agency.

The gaining agency head may extend the engagement of a non-ongoing employee who is moving as part of a MoG change provided the extension is made in accordance with the provisions of PS Regulation 3.4 (for non-ongoing SES employees) or PS Regulation 3.5 (for specified term non-SES employees) and Chapter 2 of the Commissioner's Directions. However, any provision of the PS Regulations relating to extending the engagement of a SES or non-SES non-ongoing employee applies to any extension of the engagement by the gaining agency head as if the total period of engagement was in the gaining agency.

## 5.10 Transferring employees entitled to rehabilitation compensation

### 5.10.1 Existing employees

The *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) provides powers and obligations to 'rehabilitation authorities' (defined in the SRC Act as the principal officer of the entity or the Commonwealth authority in which an employee is employed).

For ongoing employees whose existing entity or authority is abolished, the MoG process allocates each employee to a successor entity or authority, hence these employees are provided with a new 'rehabilitation authority' that continues to provide their rehabilitation rights in accordance with subsection 36(1) of the SRC Act.

### 5.10.2 Ex-employees

The SRC Act also defines an ex-employee of an entity or Commonwealth authority to be an 'employee' for the purposes of the SRC Act. Ex-employees of existing entities or authorities continue to receive rehabilitation entitlements from that agency or authority in accordance with subsection 36(1) of the SRC Act.

An ex-employee of an abolished entity or Commonwealth authority has the same rights under the SRC Act as a current employee or an ex-employee of an existing entity or authority. In the circumstances where an ex-employee's former employing entity or authority is abolished, the affected agencies are to advise Comcare of the agency responsible for future administration of an ex-employee's entitlements. Where there are unresolved cases the matter is to be dealt with under the process set out in Part 2.2 of this guide.

Similar principles used to identify employees who 'transfer with function' may be applied in this circumstance to determine the most appropriate agency to transfer rehabilitation obligations to.

## 5.11 Delegations and authorisations

The Australian Government Solicitor provides a helpful overview of issues surrounding delegations and authorisations after a general election in its Legal Briefing No. 85 updated August 2010 entitled 'After the election—what happens?' The Legal Briefing is available at <http://www.ag.gov.au/publications/agspubs/legalpubs/legalbriefings/index.htm>.

The Briefing advises that the changes in Ministers, departments and agency heads which occur following an election make it essential that each agency review its instruments of delegation and authorisation.

The Briefing notes that an instrument of delegation or a statutory authorisation made by a Minister or agency head will continue to have effect following a general election if the only

substantive administrative change is the person who holds the office of Minister or agency head. Similarly, a delegation or statutory authorisation continues in effect where there has simply been a change in the designation of a Minister, agency head or department. In both cases, however, it is clearly good administrative practice to provide new office-holders with the opportunity to reconsider these arrangements and issue new instruments of delegation or statutory authorisation.

Where functions and staff are moved between agencies, however, any delegations or statutory authorisations of power attached to staff within the transferring agency will cease to have effect at the time the functions and staff are moved to the gaining agency—delegations or statutory authorisations will have to be remade. Delegations or statutory authorisations will also cease to have effect where an agency is abolished.

The Briefing also indicates that the position is different where instruments of authorisation provide for specified people to exercise relevant powers 'for and on behalf of' an office-holder under the Carltona Principle (refer to glossary). All authorisations of that kind may cease to have effect when the person holding the relevant office changes and all such instruments of authorisation should be re-made without delay.

## 5.12 Remuneration and other conditions of employment

The PS Act and PS Regulations describe the arrangements that apply to the terms and conditions of employment of staff moved within the APS as a result of a MoG change (subsection 72(5) and Regulation 8.1). These provisions apply where APS employees are moved to an existing APS agency as well as where employees are moved to a newly established APS agency.

Where an APS employee is moved to either an existing or newly created APS agency, the steps to be taken include:

- identifying what industrial instrument(s) apply to the employee in the new situation
- applying subregulation 8.1(2) to determine the employee's annual salary upon the date of the move (see Parts 5.15.2 and 5.16.2 of this guide for further details).

As well, the gaining agency head should consider whether it is necessary or appropriate to preserve particular conditions of employment from the transferring agency, pending the making of a new enterprise agreement under the FW Act.

All agencies should liaise with the Commission early in this process, particularly when considering whether to preserve certain conditions of employment after a MoG change has taken effect. Agencies should liaise with the Commission where approval has been granted under the APS Executive Remuneration Management Policy to pay any APS employee remuneration above the notional amount.

Some agencies may provide their employees with access to certain facilities (e.g. vehicles and childcare) available under salary packaging which may not be available in the gaining agency. Agencies may also have different approved providers or financiers for salary packaging. These situations should be dealt with flexibly by the gaining agency where possible.

The advice that follows on remuneration and conditions of employment provides broad guidance only and, where there is any uncertainty, it is recommended agencies obtain their own legal advice.

## 5.13 Employee superannuation arrangements

The superannuation arrangements for Commonwealth employees are included in, or operate in accordance with, legislation, including the *Superannuation Industry (Supervision) Act 1993*, *Superannuation Guarantee (Administration) Act 1992* (SG Act), the *Superannuation Act 1976*, *Superannuation Act 1990* and *Superannuation Act 2005*, the *Superannuation (Productivity Benefit) Act 1988* and the *Superannuation Benefits (Supervisory Mechanisms) Act 1990* and delegated legislation made under those Acts.

In many cases, employees affected by a MoG change will be members of the CSS, the PSS or the Public Sector Superannuation Accumulation Plan (PSSAP). However, some agencies may have, or have had, their own superannuation scheme or arrangements. Also, many new employees will have a choice of superannuation fund in accordance with the SG Act.

Superannuation arrangements that may be affected by MoG changes include those superannuation arrangements that are in workplace agreements. Examples of arrangements that may be in workplace agreements include the level of employer superannuation contribution to be paid for employees, agency-specific choice of superannuation fund arrangements and the superannuation salary for employees who are CSS, PSS or PSSAP members. Both the transferring and gaining agencies should address these matters early in the planning process.

In addition, employees may automatically become members of a Commonwealth superannuation scheme or may lose membership of one of those schemes if they move into or out of the APS. Agencies that had authority to have their own superannuation arrangements may no longer have that authority.

Queries concerning superannuation arrangements for Commonwealth employees should be directed to the Superannuation Branches in Finance in the first instance—see <http://www.finance.gov.au/superannuation/about-the-superannuation-branch.html> or email [superbranch@finance.gov.au](mailto:superbranch@finance.gov.au).

## **5.14 Movement of APS employees to an existing APS agency**

MoG changes can have an effect on APS employees' industrial instruments. The relationship between these instruments can be complex, and agencies may need to seek specific legal advice in this area.

### **5.14.1 Industrial instruments**

Agencies should identify what industrial instrument will apply to the employee after the MoG change.

This involves looking both at any industrial instrument(s) that applied to the employee in the transferring agency, to see if they continue to apply, and at the terms of those instruments of the gaining agency to see if they would apply. In interpreting such instruments, it is important to note that where, as part of the administrative re-arrangement there is merely a change to the name of the agency, references in a workplace agreement to the old agency are to be read as references to the renamed body.

#### **General approach**

In general, provisions of the FW Act relating to a transfer of business do not apply in the case of movements between APS agencies, nor when an agency is renamed. This is because the employer remains the Commonwealth at all times where employment is under the PS Act.

Where APS staff are transferred to a newly created APS agency or functions are transferred from one APS agency to another, in most cases, the existing enterprise agreement of the transferring agency would cease to apply to the transferred employees. There may, however, be some instances where the wording of the transferring agency's existing instrument specifically provides for it to continue to apply to transferred workers after a MoG change.

Where the employer does change as a result of a MoG change (for example where functions or staff are transferred into or out of the APS) the provisions of the FW Act relating to transfer of business may apply. Under the transfer of business provisions in the FW Act the industrial instruments that apply to the old employer will transfer to the new employer in relation to any 'transferring employees' and will continue to operate until they are terminated or replaced by a new enterprise agreement. Generally, a transferring employee is an employee employed by the old employer who becomes employed by the new employer in the business being transferred.

Note that a new employer may have notification obligations in respect of any transferring employees, including those in relation to preserved redundancy entitlements.

Whether or not industrial instruments that cover employees of the old employer (or transferring agency) will bind a new employer (or gaining agency) in a MoG change must be determined on a case-by-case basis. As such, agencies involved in a MoG change should consult with the Commission to discuss the possible implications with respect to the agencies and employees involved.

Common law contracts, while not industrial instruments, may apply to some staff in agencies (particularly SES employees). Whether or not such contracts can continue to apply to those staff if they are moved to another agency as part of a MoG process will depend primarily on the terms of the contract. In these circumstances, agencies are advised to seek legal advice.



## Australian Workplace Agreements

There are few Australian Workplace Agreements (AWAs) remaining in place within APS employment. Depending on the circumstances, an AWA may continue to apply to an employee where an employee is moved under paragraph 72(1)(a) of the PS Act to another APS agency as part of a MoG change. Whether the AWA applies will depend on a variety of factors—principally the wording of the AWA—and agencies should seek their own legal advice when in doubt. Where an AWA continues, PS Regulation 8.1 will not need to be applied, as the salary and conditions under the AWA continue to apply.

### Certified/ Collective/ Enterprise agreements

As a general rule, an agency's existing enterprise agreement will not apply to a transferred employee, unless there is a transfer of business or a term in the enterprise agreement providing that it will apply. Even if an agency's existing enterprise agreement may apply to an employee, it will not apply if the employee is covered by an AWA that relates to the same employment as the enterprise agreement which is capable of transferring to the gaining agency as outlined above.

### Awards

All transferring employees are protected by the National Employment Standards (NES). Some elements of particular awards will continue to apply, unless excluded by a continuing certified, collective or enterprise agreement that applies to the transferring employees. The Australian Public Service Award 1998 (APS Award), for example, binds all Ministers of the Crown for the Commonwealth in respect of APS employees employed under the PS Act. The APS Award, apart from various agency-specific provisions, applies to all APS employees. Movement of APS employees from one agency to another will not affect the application of an award or the NES, however agencies will need to be aware of specific provisions in an award that may apply to an employee.

Agencies should consult the Commission by email to [employmentadvice@apsc.gov.au](mailto:employmentadvice@apsc.gov.au) with any enquiries.

### Determinations under section 24(1) of the PS Act

The majority of SES employees' terms and conditions are subject to subsection 24(1) determinations or common law contracts. The gaining agency head will need to ascertain whether or not a new subsection 24(1) determination will be required to 'carry over' the SES employee's remuneration and conditions.

In rare cases, the terms and conditions of non-SES employees in the transferring agency or the gaining agency may be governed by subsection 24(1) determinations (e.g. where a newly created agency has not yet negotiated an enterprise agreement). Agencies should seek legal advice and consult the Commission if such a situation arises. The use of such a determination must be consistent with the Australian Public Service Bargaining Framework (APSBF) which is available at <http://www.apsc.gov.au/publications-and-media/current-publications/aps-public-service-bargaining-framework>.

Additionally, such determinations should only remain in force for a maximum of twelve months as a purely interim arrangement until an enterprise agreement is formalised. It should be noted that, where subsection 24(1) determinations are not underpinned by an enterprise agreement, provisions of the APS Award 1998 may be invoked, including leave loading entitlements. If agencies believe they may be affected by this, they should consult the Commission for advice.

### 5.14.2 Annual salary

PS Subregulation 8.1(2) provides that, where an APS employee is moved between APS agencies, the annual salary that applies to the employee on the day when the move occurs will be the greater of:

- the salary the person was entitled to before the move, and
- the annual salary that would, apart from that regulation, apply to the APS employee after the move.

The general policy approach that underpins subregulation 8.1(2) is that, while employees should not suffer a loss in salary as the result of a move, they should move as quickly as possible to the salary regime of the gaining agency. In many cases, this simply means translating affected employees to the equivalent salary or the nearest salary point specified in the gaining agency's workplace agreement as applying to their classification. However, if on the



day of the move, the industrial instruments that now apply would result in the employee receiving a lower annual salary, subregulation 8.1(2) preserves the previous salary.

The term 'annual salary' as used in subregulation 8.1(2) is the employee's salary set out in an enterprise agreement (including where salary is set through an individual flexibility agreement) or other instrument, and does not include such things as higher duties allowance or other allowances that the employee might be entitled to, travel and other expenses, or bonuses.

PS Subregulation 8.1(2A) provides that any salary protection an employee is entitled to under subregulation 8.1(2) continues until such time as the salary of the employee is increased by an employment arrangement (defined in the dictionary to the Regulations as meaning a fair work instrument, determination under section 24 of the Act or a written contract of employment) in the gaining agency.

At that point, subregulation 8.1(2) ceases to apply.

Agencies should have a common understanding of how transferring employees' current annual salaries are constructed, for example if performance bonus or Executive Vehicle Scheme cash-in-lieu has been rolled in.

It should be noted that operation of subregulation 8.1(2) does not create an entitlement to any further increases that would have become available under a transferring agency's workplace agreement that has ceased to apply to the employee. The gaining agency's enterprise agreement (if any) will, in so far as it applies to the employee, govern any future salary increases.

### **5.14.3 Subsection 24(1) determination**

Subsection 24(1) of the PS Act gives the gaining agency head the power to make a determination to carry across some or all of the 'other conditions of employment' that applied to the APS employee immediately before the move (see subregulation 8.1(3)). This is particularly relevant where the gaining agency's workplace agreement does not include conditions of employment essential for the operational requirements associated with the transferred functions (e.g. shift work or remote locality provisions).

Agencies must consult the Commission before undertaking a determination of this nature. In some instances, the Minister for the Public Service and Integrity may be required to consider a subsection 24(1) determination before an agency head may implement it. A number of other conditions also apply to making a subsection 24(1) determination pursuant to PS Subregulation 8.1(3), namely:

- a subsection 24(1) determination cannot be used to reduce benefits contained in an award or an agreement that would otherwise apply
- agency heads must consult with affected employees
- a subsection 24(1) determination is not to be used as a substitute for agreement making; nor should subsection 24(1) be used to enhance terms and conditions that would otherwise be determined through workplace agreements, or to vary existing agreements in due course
- in making a subsection 24(1) determination, agency heads are to be mindful of the APSBF requirements that improvements in pay and conditions are to be linked to improvements in organisational productivity and performance
- the subsection 24(1) determination cannot take effect any sooner than the date the employee(s) are moved to the new agency.

The gaining agency head is not obliged to carry across any or all of the terms and conditions that previously applied where they are not considered appropriate to the needs of the gaining agency. In some cases, it may not be practicable to preserve particular conditions, for example, access to work-based childcare may not be available in the gaining agency.

PS Subregulation 8.1(4) provides that such a determination ceases to apply when a new workplace agreement comes into effect after the move that applies to the relevant employee(s).

Existing policy is that the terms and conditions of non-SES employees should be established through enterprise agreements made under the FW Act. However, it may be necessary for interim periods of up to twelve months to use a determination or common law agreement to set terms and conditions of employment while an enterprise agreement is negotiated. In line with this policy, gaining agencies should replace subsection 24(1) determinations and/or common law agreements as soon as practicable within this timeframe. Entering into a new enterprise

agreement will, for example, help the gaining agency integrate all employees into a common human resources framework.

## 5.15 Creation of a new APS agency

Special issues arise where a new APS agency is created, whether it is a new department, an executive agency or a statutory agency staffed under the PS Act. The Governance Branch in Finance has policy responsibility for the creation of new Australian government bodies, and should be contacted as soon as practicable for advice on governance structures matters by email to [LRB@finance.gov.au](mailto:LRB@finance.gov.au).

The process for determining the terms and conditions of APS employees who are moved to the new agency is similar to that which applies where APS employees are moved to an existing APS agency.

See also Appendix B: Checklist – Setting up a new APS agency and Appendix C: Case studies – Setting up a new APS agency.

### 5.15.1 Industrial instruments

The process for identifying which industrial instruments apply is as set out in Part 5.14.1, except in relation to certified, collective or enterprise agreements.

In some cases, where a separate business unit (within an agency) with its own certified, collective or enterprise agreement has been given agency status, the existing agreement continues to apply.

However, the most usual situation is that the newly created agency will not have an agreement. In that case, unless a transferred employee is covered by an agreement that carried across from the transferring agency, the agency may need to seek legal advice on what arrangements may apply. Agencies should contact the Commission in such a situation.

### 5.15.2 Annual salary

In most cases, there will not be a workplace agreement that applies to the new agency, nor will a previous workplace agreement continue to apply. The effect of subregulation 8.1(2) will, therefore, almost always be to preserve the annual salary to which the transferred employee was entitled before the move.

The term ‘annual salary’ as used in that Regulation is the employee's salary set out in an enterprise agreement (including where salary is set through an individual flexibility agreement) or other instrument, and does not include such things as higher duties allowance or other allowances that the employee might be entitled to, travel and other expenses, or bonuses.

Subregulation 8.1(2A) provides that any salary protection an employee is entitled to under subregulation 8.1(2) continues until such time as the salary of the employee is increased by an employment arrangement (defined in the dictionary to the Regulations as meaning a fair work instrument, determination under section 24 of the Act or a written contract of employment) in the gaining agency.

### 5.15.3 Subsection 24(1) determination

The same principles as set out in Part 5.14.3 generally apply. The main difference is that it is likely that an agency may wish to preserve nearly all the conditions of employment that previously applied.

However, as any subsection 24(1) determination made in accordance with PS Regulation 8.1 only applies to existing APS employees moved to the new agency, it may also be necessary to make a separate subsection 24(1) determination creating interim terms and conditions for other employees who may be engaged by, or move to, the new agency at a later date (see Part 5.15.4).

The use of a subsection 24(1) determination will be subject to assessment against the APSBF available at <http://www.apsc.gov.au/publications-and-media/current-publications/aps-public-service-bargaining-framework>.

Additionally, such a determination should only remain in force for a maximum of twelve months as a purely interim arrangement until a workplace agreement is formalised.

A gaining agency head may wish to draft a determination providing that the transferred employees' conditions of employment are the same as they enjoyed under the certified, collective or enterprise agreement of the transferring agency, subject to specified qualifications. Such qualifications might include definitional changes so that particular references (e.g. as to the agency, agency head, Minister and agreement) continue to work in the new context, or to exclude certain clauses that are not relevant to the new agency.

There may also be terms and conditions in the transferring agency's agreement that the gaining agency head does not wish to continue to apply.

There is a provision in subsection 24(1) of the PS Act that a subsection 24(1) determination is of no effect to the extent that it would reduce the benefit to an employee of any individual term or condition applicable to the employee under an award or an agreement.

Subsection 24(1) determinations made in accordance with PS Subregulation 8.1(3) can only preserve some or all of an employee's pre-existing terms and conditions—they cannot be used to introduce a new regime. Thus, where employees have been moved to the new agency from several different APS agencies, the new agency will generally be required to preserve separate terms and conditions for the employees from each transferring agency. It may only be at the point that the new agency negotiates a new enterprise agreement with the transferred employees that it will be in a position to harmonise the terms and conditions of all its employees into a single conditions framework. It should be noted that, where subsection 24(1) determinations are not underpinned by a workplace agreement, provisions of the APS Award 1998 may be invoked, including leave loading entitlements. If agencies believe they may be affected by this, they should consult the Commission for advice.

#### **5.15.4 Employees who are engaged by, or move to, the agency at a later date**

Where no enterprise agreement applies to the newly created agency, it may also be necessary to determine interim terms and conditions of employment under subsection 24(1) of the PS Act for people who are engaged by, or who move voluntarily to, that agency at a later date.

In this circumstance, it is desirable:

- not to compromise the ability to negotiate future agreements under the FW Act that comply with the APSBF, by including inconsistent provisions in a subsection 24(1) determination
- to include a recital that the base salary includes a benefit in lieu of any conditions in previous industrial instruments that have been rolled into base pay.

Further, there are some minor technical differences that apply to making such a determination under subsection 24(1) of the PS Act, due to the fact that it is not made in accordance with the process requirements of PS Subregulation 8.1(3). In this situation:

- it is necessary to determine the employee's remuneration as well as other conditions of employment
- it is not necessary to consult the employee/s before making such a determination
- as PS Subregulation 8.1(4) does not apply, it will generally be desirable to state that the determination will cease once it is displaced by a workplace agreement.

Where staff have been moved to a new APS agency from several different APS agencies, the new agency head will face a more difficult practical choice as to what is the most appropriate interim conditions framework for employees who are later engaged by the new agency, pending negotiation of a new workplace agreement.

While the PS Act provides a mechanism for making interim arrangements, it is important to move as quickly as possible to enter into agreements under the FW Act as well as to develop new human resource policies and procedures. This may also help address any unforeseen difficulties in interpreting interim subsection 24(1) determinations that were drafted by reference to the workplace agreement of a different agency, and in harmonising the terms and conditions of employees who came to the new agency from different agencies.

Once all employees of a new agency are covered by an enterprise agreement it is desirable to formally revoke any subsection 24(1) determinations made.

### **5.15.5 Senior Executive Service cap**

Where a new agency is created, an SES cap must be determined if the agency intends to employ SES staff. This will require the approval of the Minister for the Public Service and Integrity, via submission to the Commission.

Requests to establish an SES cap should be submitted before the establishment date of the new agency.

In negotiating an SES cap for a new APS agency, the Commission will:

- consider the impact of the new agency on existing roles in related agencies
- critically examine any executive roles in non-APS agencies transferring into the APS.

It cannot be assumed that 'SES-equivalent' roles established under non-APS provisions will become SES on the basis of the remuneration of the existing incumbent, and/or the role's title, and/or responsibilities—all roles must meet the SES work value test.

Queries in relation to establishing an SES cap should be emailed to [sescap@apsc.gov.au](mailto:sescap@apsc.gov.au).

## Part 6 Records management

The National Archives provides a range of services to Government agencies to help them create and manage complete and accurate records and to ensure that records of archival value are preserved. These services include:

- providing guidance on managing systems that maintain records to ensure the ongoing business of agencies is documented adequately
- maintaining a comprehensive history of the administrative structure of the Commonwealth and the records it has created. This is achieved through the Commonwealth Record Series system which can be accessed through the RecordSearch database on the National Archives' website
- promoting the development and publication of records authorities that meet agency business needs and National Archives objectives
- negotiating with agencies to identify records of enduring national significance and ensure their appropriate maintenance
- authorising destruction of records that do not have enduring national significance
- permitting transfer of custody or ownership of records outside the Commonwealth where appropriate
- providing storage and access facilities for records assessed as being of archival value in accordance with a current records authority issued under section 24 of the *Archives Act 1983*
- providing advice on the management of records including websites and other publicly available information.

AGIMO is also a useful resource regarding archiving issues. Visit <http://webguide.gov.au/recordkeeping/archiving-a-website> for information on the mandatory requirement to archive websites, and <http://webguide.gov.au/recordkeeping/retaining-access-to-outdated-content> for information on retaining access to outdated content.

With MoG changes, the general principle is that records follow functions. An exception is where a function is moving out of the APS, when some of the associated records may need to be retained by the Commonwealth.

Once re-allocation of functions has been determined the agencies involved should:

- determine how the records of transferring agencies should be re-allocated to new or restructured agencies according to the new distribution of functions
- seek guidance from the National Archives in cases where the physical, intellectual or digital structures of the records may complicate the re-allocation. Often, several functions are documented in one series of records. However where these functions are split between agencies, the National Archives can advise on best practice for splitting records from the series between agencies
- provide the National Archives with details of how functions have been re-allocated so:
  - administrative histories can be updated
  - 'controlling agency' responsibility for records already in Archives' custody can be re-attributed to the gaining agency, where appropriate
  - records authorities can be re-attributed to gaining agencies as necessary.

Some classes of records, such as those containing personal information or legal or other confidential information, may present particular problems. When functions transfer between agencies, there would not normally be any change to any obligation to hold, maintain and use personal information in accordance with the *Privacy Act 1988*. In the same manner, confidentiality obligations that may be inherent in records documenting legal opinions or other protected matters will also be expected to persist. However, meeting these obligations should not place any impediment on the transfer of records that document the functions in question between Commonwealth agencies when responsibility for the function changes.

Where functions have been reassigned between agencies in the AAO, the consequential transfers of records containing personal information between them are disclosures consistent with the Privacy Act because they are 'authorised by law'. For more information about acting in accordance with the Privacy Act when transferring records, visit the OAIC's website at [www.oaic.gov.au](http://www.oaic.gov.au).

Another records management consideration to be aware of following MoG changes involves FOI requests. Agencies may find that, as a result of a MoG change and the associated movement of records from one agency to another, they receive FOI requests that must be transferred between agencies. This is covered by section 16 of the FOI Act and further explained in the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act. Further information is available on the OAIC website at <http://www.oaic.gov.au/>. To provide continuity and accountability, decisions about the arrangements for transfer of records and records management responsibilities must be appropriately recorded at the time they are made in the records management systems of both the transferring and the gaining agencies. Materials which are not published on agency websites and which may be required for FOI and open public sector information purposes must be retained and appropriately stored.

Agency websites are also considered as records that document the interaction between the agency and the Australian public. Transferring and gaining agencies should ensure that old and new websites are captured – including for FOI and Information Publication Scheme purposes (including the proactive publication of public sector information) – before websites are redeveloped as part of MoG changes. New or updated websites are particularly likely to be affected by FOI and Information Publication Scheme obligations. MoG changes also provide the opportunity to consider publishing agency information assets beyond the mandatory requirements of the Information Publication Scheme. This is also an opportunity to ensure that the information registers of both agencies are up to date. For more information on information registers, see Principle 4 of the *Principles on open public sector information* at [http://www.oaic.gov.au/publications/agency\\_resources/principles\\_on\\_psi\\_short.html](http://www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html), and the guidelines to Part 13 in the OAIC's *Freedom of Information Guidelines*, particularly s 13.20, at <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-13-information-publication-scheme>.

To provide continuity and accountability, decisions about the arrangements for transfer of records and records management responsibilities must be appropriately recorded at the time they are made in the records management systems of both the transferring and the gaining agencies. Agency websites are also considered as records that document the interaction between the agency and the Australian public. Transferring and gaining agencies should ensure that old and new websites are captured before websites are redeveloped as part of MoG changes.

Where MoG changes give rise to the creation of a new agency, it is particularly important that the responsible officer take immediate steps to establish a means to record important initial decisions about the legal warrant for the agency, its functions, policy scope and structure. The National Archives can provide specific advice and assistance with systems required for these steps.

Information held by agencies is a valuable national resource and should be managed as a core strategic asset. Further information on the matters contained in this Part is available on the OAIC's website at <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-13-information-publication-scheme>, and [www.oaic.gov.au/publications/agency\\_resources/principles\\_on\\_psi\\_short.html](http://www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html).

## 6.1 National Archives contact points

The Records Management section of the National Archives' website at <http://www.naa.gov.au> provides guidance on managing Government records. Advice on transferring records following an administrative change can be found at <http://www.naa.gov.au/records-management/agency/keep-destroy-transfer/following-admin-change/index.aspx>.

Policy enquiries on MoG change issues should be directed to the Assistant Director-General, Government Information Management Branch, at the National Archives on (02) 6212 3681.

General enquiries on records management issues resulting from a MoG change should be directed to [recordkeeping@naa.gov.au](mailto:recordkeeping@naa.gov.au).



# Part 7 Taxation issues

Taxation issues for both transferring and gaining agencies include registration for Australian Business Numbers and the ability to claim input tax credits. For detailed information see the Australian Taxation Office (ATO) guide *GST and machinery of government changes* available at <http://www.ato.gov.au/Business/Bus/GST-and-machinery-of-government-changes/>.

## 7.1 Australian Business Numbers

In 1999, portfolio Ministers agreed to a registration policy for Australian Government agencies. The policy requires each department of state, parliamentary department, prescribed agency under the FMA Act, and authority and company subject to the *Commonwealth Authorities and Companies Act 1997*, to have an Australian Business Number (ABN) and be registered for the goods and services tax (GST).

Two exceptions to this general rule are that:

- a unit within an agency subject to the FMA Act whose operations are materially independent of other operations of the agency can register as a separate entity
- a number of related Australian Government agencies that keep accounts on the same basis for the same tax periods can group together to help facilitate GST administration.

In regard to these exceptions, the relevant portfolio Minister must approve the registration before an application can be lodged with the ATO.

MoG changes may have consequences for ABN registration. For example, the following may apply:

- a newly created agency will be required to be registered under an ABN
- the ABN of an agency that has been abolished will need to be cancelled
- an agency that has been affected only by a change in title requires no change to its ABN (although the ATO should be advised of the title change)
- the ABNs for agencies affected by transfer of policies and programs do not require any change.

Agencies that have been merged should contact the ATO for advice. The ATO's website is <http://www.ato.gov.au>.

## 7.2 Input tax credits

The ATO has issued a determination to the effect that, as a result of a transfer of functions arising from MoG changes, it will treat a document issued by a supplier as a valid tax invoice for the purposes of the gaining agency claiming input tax credits in respect of that document, where the document is in the name of the transferring agency. The ATO has advised that it will extend these transitional arrangements and accept these tax invoices for up to three months after the date of the MoG change.

# Appendix A: Checklist – Implementing MoG changes

The following list provides some suggestions for implementation and issues for consideration. Not all of these issues will be relevant in every situation. Particular complexities may arise when non-FMA and/or non-APS agencies and entities are involved in a transfer of functions, which are not covered in this good practice guide or in the list below. Issues arising as a result may require legal advice or advice from agencies with policy responsibility for the particular matters.

## Planning

- Gaining agency to establish a steering committee or change management team to coordinate implementation of the MoG change, and consider whether the transferring agency should be represented on the team.
- Gaining agency to consult transferring agency to consider whether a small working group should be established in the transferring agency to undertake scoping exercise and answer due diligence questions.
- Gaining agency to establish a due diligence framework and develop a comprehensive list of questions relevant to the transferring functions and programs including assets and liabilities, contracts register, intellectual property, disputes and litigation, lapsing programs, staff numbers, pay and conditions and Information Publication Scheme obligations, including the obligation to consider publishing public sector information beyond that required.

## Communication

- Gaining agency/project managers to develop communication strategy informing employees of the impact of proposed changes, with regular updates as needed. There is a key role to be played by agency heads (and their senior executives) in driving the integration of new areas and staff into their agencies.
- Gaining agency/project managers to consider setting up a website page and/or hotline for affected employees, providing advice on what the changes mean for them.
- Gaining agency/project managers to consult extensively with affected employees throughout the process and provide opportunities for them to raise any concerns they may have.

## Financial management (including taxation issues)

- Memorandums of understanding to be developed covering implementation issues, including decisions regarding costs, payment of invoices, recovery of moneys and transfer of assets, liabilities, revenues and expenses.
- Recovery of moneys expended on transition costs to be effected as soon as possible.
- Chief Financial Officers of transferring and gaining agencies to agree on the amount of appropriation balances relating to the transferred function to be transferred within the indicative timeframe agreed during the planning phase. The agreement is to cover any unspent section 31 receipts due to the transferred function.
- Arrange for bank accounts to be renamed and for signatories to be changed.
- Gaining agency to develop financial management and payroll systems or arrange to remain on transferring agency's system for interim period.
- Gaining agency to liaise with Finance to arrange access to the Central Budget Management System and ensure new responsibilities are reflected in outcomes and outputs framework.
- Transferring agency to transfer administration of section 21 Special Accounts effective as of date of AAO instrument. Gaining agency to agree in writing with transferring agency the date of effect for the transfer. Agreed date of transfer to be advised to Finance. Liaise with Finance re required amendments to legislation involving Special Accounts.
- Gaining agency to consider whether outcomes are still appropriate and, if not, seek changes through Additional Estimates or Budget process.

- Gaining and transferring agencies to arrange to report on functions in financial statements for relevant period and include notes to financial statements about the restructure and partial reporting of a function.
- The section 49 financial statements of an abolished agency must be prepared and signed by a Chief Executive nominated by the Finance Minister.
- Take appropriate action to cancel or obtain an Australian Business Number, if relevant.
- Review Chief Executive's Instructions and issue new internal delegations as required.
- The PS Act requirements for annual reports require that gaining agencies must report on the transferring function for the entire reporting period.
- Gaining agency and transferring agency to contact Comcover to discuss whether a review of the risk profile and adjustment of premiums needs to be considered.
- Gaining agency and transferring agency to contact Finance to discuss whether adjustment of the agencies' employer contribution rate to the CSS and PSS is required.

## People management

- Transferring and gaining agencies to consult on identification of employees to be moved— seek advice from the Commission where necessary.
- Transferring agency to advise the Commission of details of ongoing and non-ongoing employees to be moved (names, AGS numbers and classification levels) to allow for preparation of determination under section 72 of the PS Act.
- Transferring and gaining agencies to consult on SES cap to be moved (where applicable)
- Transferring agency to advise the Commission of any employees on leave without pay or on temporary assignment within the agency, or to other agencies.
- Gaining agency to negotiate with transferring agency and individual employees to establish temporary movement agreements (in accordance with section 26 of the PS Act) where necessary.
- Transferring agency to identify any outstanding recruitment action relating to jobs that are located in the function being moved and advise the gaining agency of status.
- Transferring agency to advise gaining agency of any outstanding action relating to employees (breaches of Code of Conduct, disputes, harassment claims, reviews of action, occupational health and safety issues, non-performance assessments, etc.) that are in train at the time of the move. Discuss handling of these cases with the Commission if necessary.
- Gaining agency to assign duties to transferred employees in accordance with section 25 of the PS Act.
- Gaining agency to establish whether any additional clearances (e.g. security) are needed for transferring employees.
- Gaining agency to conduct induction sessions and provide information packages to transferred employees.
- Gaining agency to liaise with Finance about superannuation issues where relevant.
- Gaining agency to liaise with Comcare about managing compensation cases for employees moved as a result of a MoG change.
- Transferring agency to finalise performance appraisals and pro rata performance bonus payments, where relevant.
- Transferring agency to ensure that employees capture any outstanding agency records for which they are responsible into appropriate agency records management systems and return any records in physical format to agency records management area.

## Remuneration and other conditions of employment

- Gaining agency to consult the Commission about any workplace relations implications of the change and, if necessary, seek legal advice.
- Gaining agency to brief affected employees on the likely workplace relations implications of the proposed move and to consider whether it is necessary or appropriate to make a subsection 24(1) determination for transferred employees.
- Gaining agency to prepare determinations under section 24 of the PS Act (relating to conditions of employment) for signature on, or as soon as possible after, the day of the move. Agency head must consult employees on section 24 determinations made pursuant to subregulation 8.1(3) before signing.

## Delegations

- Gaining agency to ascertain whether any interim delegations (under PS Act, FMA Act etc.) are needed in circumstances where there is a delay between the AAO coming into effect and the date employees and other resources are transferred.
- Gaining agency to obtain approval for required delegations and authorisations, including drawing rights, particularly for delegations required to take effect on the day of the move.

## General

- Legislative area of each agency to examine AAO to ensure all entries are correct.
- Transferring agency to identify outstanding legal action, freedom of information requests, Australian National Audit Office reviews, and advise gaining agency of details.
- Identify governance documents requiring review as a result of MoG changes, for example, MoUs, Heads of Agreement, Ministerial Determinations, etc.
- Gaining agency and transferring agency to agree on reporting issues (e.g. annual reports, taxation and GST reporting).
- Conduct a post-MoG change review to ensure all matters have been satisfactorily resolved.

## Accommodation, furniture and equipment

- Gaining and transferring agencies to determine whether employees will move immediately to a new location or remain in the transferring agency's accommodation for a period.
- If remaining in transferring agency's accommodation and gaining agency is taking over leasing arrangements, gaining agency should notify the landlord of the premises of the change of client.
- If remaining in transferring agency's accommodation for a period and transferring agency is continuing to pay for the lease, a MoU should be developed to include the intention to recover these costs.
- Gaining agency to consult transferring agency about any furniture and equipment to be moved, if relevant.
- Gaining agency to arrange removal of furniture and equipment, provide packing boxes to employees etc.
- Identify staff requiring temporary access to transferring agency's premises and desktop facilities and arrange for this to continue.
- Transferring agency to arrange for employees to return agency items in their possession (laptops, mobile phones, gym keys, security passes, credit cards, vehicles, library books, etc.) consistent with normal 'exit' procedures. In some cases, staff from the transferring agency may be able to take certain items with them, as part of agreed transfer arrangements.

## Information and communications technology

- Both agencies to arrange for websites to be updated, including links with other agency's website, if necessary. Gaining agency to publish information under the Information Publication Scheme, with consideration given to including public sector information beyond that required the Scheme.
- Both agencies to ensure that old and new websites are captured for lodging with the National Archives before any further website redevelopment takes place.
- Transferring agency to arrange for telephone calls and emails to be diverted to gaining agency, if necessary.
- Transferring agency to arrange for databases, emails and personal files to be downloaded (gaining agency will need to re-load information) – see also Information and records management below.
- Gaining agency to arrange for link to its information technology network for employees remaining in transferring agency's accommodation.
- Both agencies to update internal distribution lists, contact lists and intranet sites.

## Information and records management

- Gaining and transferring agency to discuss arrangements and develop a strategy for transferring records in all formats including records in databases.
- Transferring agency to identify and list records (both physical and digital) required for the ongoing management of the transferred business.
- Transferring agency to make arrangements with the gaining agency for transport of physical records relating to the transferred business.
- Transferring agency to make arrangements with the gaining agency to hand over computer systems and/or storage media used to create and manage current and inactive digital records of the transferred business.
- Gaining agency to check records received for completeness against control records and/or lists or other documentation supplied by the transferring agency.
- Gaining and transferring agency to update systems that control records to reflect the movement of records.
- Transferring agency to provide gaining agency with copies of Record Authorities that relate to transferred business; copies of National Archives transfer documentation for records in archival custody relating to transferred business; details of storage, maintenance or other charges imposed by the National Archives or a service provider for which the inheriting agency will take responsibility.
- Gaining and transferring agencies to provide National Archives with details on how functions have been re-allocated so NAA systems can be updated.
- Transferring agency to contact the National Archives to arrange for the possible transfer of sentenced archival records no longer required for current business.
- Gaining and transferring agencies to decide on access arrangements for categories of records needed by both the transferring and gaining agencies.
- Gaining and transferring agencies to agree on arrangements for splitting accounts for records storage and maintenance charges.
- Gaining and transferring agencies to make arrangements for archiving websites that need updating, and make necessary adjustments to file lists reflecting the new responsibilities.
- Gaining and transferring agencies to ensure that all information and records, including websites and other data which has previously been made publicly available, are stored, transferred and used in accordance with the Privacy Act and the FOI Act and, as a matter of best practice, the Principles on open public sector information.

# Appendix B: Checklist – Setting up a new APS agency

The following list provides some suggestions for implementation and issues for consideration. Not all of these issues will be relevant in every situation.

## Planning

- Establish a steering committee to coordinate implementation of governance arrangements, accommodation, people management, financial management, information and records management, security.
- Refer to relevant legislation and guidelines, including:
  - *Public Service Act 1999*, particularly sections 72 and 24, which provide for movement of staff and their terms and conditions of employment
  - *Financial Management and Accountability Act 1997*, particularly section 32, which allows for transfers of appropriations between agencies and to new agencies
  - *Fair Work Act 2009*, which contains provisions for agreement making in the APS
  - *Acts Interpretation Act 1901*, particularly sections 19B to 19C, which are relevant to Administrative Arrangements Order changes, and
  - *Foundations of Governance in the Australian Public Service*, available at <http://www.apsc.gov.au/publications-and-media/archived-publications/publications-archive/foundations-of-governance>.
  - *Declaration of Open Government* (Australian Government 2010 – available at <http://www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html>)
  - *Principles on open public sector information* (OAIC 2011 – available at [http://www.oaic.gov.au/publications/agency\\_resources/principles\\_on\\_psi\\_short.html](http://www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html))
  - *Australian government intellectual property manual* (Australian Government 2012 – available at <http://www.ag.gov.au/Intellectualproperty/Pages/Australiangovernmentintellectualpropertyrules.aspx>)
  - *Web guide* (Australian government – available at <http://webguide.gov.au/>)
  - *FOI Fact sheet 4 - The information publication scheme for Australian Government agencies* (OAIC – available at [http://www.oaic.gov.au/publications/fact\\_sheets/FOI\\_fact\\_sheet4\\_the\\_information\\_publication\\_scheme.html](http://www.oaic.gov.au/publications/fact_sheets/FOI_fact_sheet4_the_information_publication_scheme.html)), and
  - *Guidance for agency websites: 'Access to information' web page* (OAIC – available at [http://www.oaic.gov.au/publications/agency\\_resources/guidance\\_for\\_agency\\_websites.html](http://www.oaic.gov.au/publications/agency_resources/guidance_for_agency_websites.html))

## Governance

- Comply with relevant legislation and policy
- Prepare instruments for the Minister and/or Secretary to delegate or sub-delegate powers and functions under the PS Act, FMA Act and other relevant legislation.
- Establish mandatory committees (e.g. audit, occupational health and safety, workplace relations) and advisory committees.
- Develop governance documents, for example, MoUs, Heads of Agreement, Ministerial Determinations, etc.
- Develop Corporate Plan, Business Plan, Information Asset Management Framework etc.

## Financial management (including taxation issues)

- Memorandums of understanding to be developed covering implementation issues, including decisions regarding costs, payment of invoices, recovery of moneys and transfer of assets, liabilities, revenues and expenses.



- Recovery of moneys expended on transition costs to be effected as soon as possible.
- Recruit or second a Chief Financial Officer.
- Chief Financial Officers of transferring and gaining agencies to agree on the amount of appropriation balances relating to the transferred function to be transferred within the indicative timeframe agreed during the planning phase. The agreement is to cover any unspent section 31 receipts due to the transferred function.
- Arrange for bank accounts to be renamed or opened and for signatories to be changed.
- Gaining agency to develop financial management and payroll systems or arrange to remain on transferring agency's systems for interim period.
- Gaining agency to liaise with Finance to arrange access to the Central Budget Management System and ensure new responsibilities are reflected in outcomes and outputs framework.
- Liaise with Finance regarding any expected requirements to transfer, establish, abolish or vary Special Accounts.
- Gaining agency to consider whether outcomes are still appropriate and, if not, seek changes through Additional Estimates or Budget process.
- Gaining and transferring agencies to arrange to report on functions in financial statements for relevant period and include notes to financial statements about the restructure and partial reporting of a function.
- The section 49 financial statements of an abolished agency must be prepared and signed by a Chief Executive nominated by the Finance Minister.
- Take appropriate action to cancel or obtain an Australian Business Number, if relevant.
- Review Chief Executive's Instructions and issue new internal delegations as required.
- The PS Act requirements for annual reports require that gaining agencies must report on the transferring function for the entire reporting period.
- Gaining agency and transferring agency to contact Comcover to discuss whether a review of the risk profile and adjustment of premiums needs to be considered.
- Gaining agency and transferring agency to contact Finance to discuss whether adjustment of the agencies' superannuation employer contribution rate is required.

## People management

- Identify all employees to be moved—seek advice from the Commission where necessary.
- If employees are moving from an existing APS agency, check that transferring agency has advised the Commission of details of ongoing and non-ongoing employees to be moved (names, AGS numbers and classification levels) to allow for preparation of determination under section 72 of the PS Act.
- If employees are moving into the APS, prepare section 72 determination in consultation with the Commission.
- Negotiate with transferring agency and individual employees to establish temporary movement agreements (in accordance with section 26 of the PS Act) where necessary.
- Prepare submission to Commission to establish SES cap (where intention is to employ SES staff), seeking advice from Commission.
- Note any outstanding action relating to employees (incomplete recruitment action, breaches of Code of Conduct, disputes, harassment claims, reviews of action, occupational health and safety issues, non-performance assessments, etc.) that are in train at the time of the move. Discuss handling of these cases with the Commission if necessary.
- Allocate AGS numbers to new employees.
- Allocate an approved APS classification to each employee under clause 6 of the Public Service Classification Rules.

- Assign duties to new or transferred employees in accordance with section 25 of the PS Act.
- Develop performance agreements with individual employees.
- Establish whether any clearances (e.g. security) are needed for new or transferring employees.
- Conduct induction sessions and provide information packages to new and transferred employees.
- Liaise with Finance about superannuation issues.
- Liaise with Comcare about managing compensation cases for employees moved as a result of a MoG change.
- Appoint security office, fire wardens and first aid officers.
- Develop non-SES work level standards.
- Contact the Commission's APSjobs Gazette Manager to develop Public Service *Gazette* profile and access.
- Establish procedures for breaches of the APS Code of Conduct and determining sanctions (s.15(3) of PS Act), and dealing with whistleblower reports (s.16(2) of PS Act and Regulation 2.4).
- Ensure HR system can provide data to the APS Employment Database (APSED), current EEO data and information for the Commission's annual State of the Service Report.
- Establish a workplace diversity program (s.18 of PS Act) and any procedures for special programs.
- Establish recruitment policies and procedures, including in relation to conditions of engagement deemed relevant by the agency (e.g. probation, health checks, security and citizenship).
- Establish induction program, staff development plan and other policies (e.g. underperformance, fitness for continued duty, loss of qualifications, reviews of actions, IT use, receipt of gifts and hospitality, harassment, OH&S).
- Provide details of an agency contact officer to the Commission's mailing list administrator at [apscmastermailinglist@apsc.gov.au](mailto:apscmastermailinglist@apsc.gov.au).

### Remuneration and other conditions of employment

- Consult the Commission about any workplace relations implications of the change and, if necessary, seek legal advice.
- Initiate action to develop enterprise agreement if needed.

### Accommodation, furniture and equipment

- Obtain post office box.
- Arrange interim accommodation, furniture and equipment, having regard to Finance standards.
- If relevant, develop an MoU with transferring agency about provision of interim accommodation, furniture and equipment.
- Arrange removal of furniture and equipment if required.

### Information and communications technology

- Arrange access to switchboard, telephones, facsimile machine and computers.
- Arrange interim access to ICT services.
- Develop ICT access policy for employees.
- Develop internet and intranet sites.

## Information and records management

- Make arrangements for information and records management – contact National Archives for start-up advice and refer to the OAIC [Principles on open public sector information](#).
- Transfer records in all formats including records in databases.
- Check records received for completeness against control records and/or lists or other documentation supplied by the transferring agency.
- Update systems that control records to reflect the movement of records.
- Provide National Archives with details on how functions have been re-allocated so NAA systems can be updated.

# Appendix C: Case studies – Setting up a new APS agency

Prompted by the need for improved guidance on MoG changes, the Australian Public Service Commission interviewed for these case studies Ms Patricia Scott, Dr Martin Parkinson, Ms Barbara Bennett and Mr Nicholas Wilson who had each started a department or agency from scratch.

The case studies are not intended to be good practice guides but rather personal stories to illustrate some of the challenges faced by the agency heads.

Please note that the case studies refer to industrial arrangements that were in place prior to the introduction of the *Fair Work Act 2009*.

## 1. Creating the Department of Human Services and the Department of Broadband, Communications and the Digital Economy

It's not so common that a newly elevated Departmental Secretary is also put in charge of a newly created department. Ms Scott was promoted from the Deputy Secretary level at PM&C to set up the Department of Human Services in 2004.

### The Department of Human Services

The Department of Human Services (DHS) was and is a novel concept, a small, flexible department set up to broker advances in policy and service delivery among Centrelink and five other delivery agencies.

Fortunately, a Prime Ministerial speech and a statement by the Secretary of PM&C had set out the clear role for DHS:

*"We tend to look at service delivery as an afterthought rather than as a policy priority and I would want and I will expect the new Minister responsible for this to see service delivery as the efficient, timely and sympathetic service delivery as a policy goal in itself and not as some kind of bureaucratic incident of the performance of the policy."*

*The Hon John Howard, 22 October 2004*

*"I think one of the things we lack on the public service both at a Commonwealth and a State level is a consolidated focus on the efficient and timely and sympathetic delivery of services. We tend to look at service delivery as an afterthought rather than as a policy priority."*

*Dr Peter Shergold, 17 November 2004*

Extensive use was made of these statements as a first authority, and as a lever for inter-departmental cooperation, however, there were many sceptics and some blockers. In future agency creations, Ms Scott recommended the Secretary of PM&C write directly to fellow portfolio Secretaries and agency heads to explain the new agency's purposes and functions and call on their organisations for support and cooperation.

### Early priorities and concerns

The catch was that the 'flexible concept' of DHS didn't come with additional budget funding. It was expected to negotiate funding from the policy departments that were already in contract with the service agencies. Realistically, Ms Scott recalled, this was always going to take time—but meanwhile the reporting requirements and the expenses started ticking over immediately. Some payroll costs were absorbed temporarily by PM&C, to be reimbursed as soon as was practicable.

At the operational level, the new department had at first no designated accommodation and no real staffing cover. It lacked basic necessities like a permanent address, information technology, and a business identity or Australian Business Number (ABN). But at least it was part of a larger portfolio, which usefully chipped in with temporary accommodation.

In policy and procedural terms, things weren't easy either. As can happen, the first signpost on the governance 'roadmap', the new AAO, was not totally conclusive. The AAO implied that relevant policy matters would remain with the purchasing agencies. In practice, some adjustments to policy and amendments to legislation proved to be required. Basic funding for the new department from the purchasing agencies was still being resolved some months later.

In 2004, there appeared to be no established 'checklist' or set of guidelines to colour in the rest of the roadmap. Vital items like the Assets Register, Freedom of Information delegations, and Privacy Act requirements, took time to be noticed and addressed.

Later in the year the Commission's publication *Foundations of Governance* was available in draft but even it proved to be only part of a very long checklist of requirements.

### Handling the practical challenges

One early opinion was that the new DHS 'wouldn't need' a legal team. But Ms Scott felt first and foremost she wanted a capable lawyer and Chief Financial Officer (CFO).

Perhaps neophyte agencies, Ms Scott thought, should be sent out with a starter kit of financial resources and systems. Even a relatively small organisation is still going to require the full spectrum of governance functions and reporting requirements—and therefore there are diseconomies of scale. She surmised that you might need a base of around \$10m 'even to run a small department' properly.

Especially in its early months, a new department also needs experienced hands on deck to monitor its growth trajectory and to advise accurately on the projected financial and staffing requirements.

Ms Scott and her 'ground floor' team from 2004 have not forgotten the early hurdles that they faced, in terms of formulating viable and defensible arrangements for the DHS procedures, finances, equipment, contracts, and staffing.

The Chief Executive's Instructions (CEIs), for example, were borrowed and adapted from those then applying at PM&C. A proprietary financial system was taken down from the shelf. Although it lacked the full suite of APS-friendly functionalities, it was robust enough to enable the beginning of prompt and independent financial management.

The Department might have wished for a 'quick fix' for its offices and equipment. Instead, it was destined to accept temporary accommodation and services from its host portfolio, for want of suitable APS or agency contracts that could be 'piggybacked' in short order. Several disruptive moves of premises were to follow.

Apart from the short-term issue of the payroll, DHS had to find suitable arrangements to pay its incoming staff fairly and equitably when people were being drawn from a variety of agencies. There was and are means available but early advice would have been of great assistance.

### Achievements

DHS was one of the first agencies to implement the previous government's 'Uhrig' reforms for clearer lines of responsibility and accountability. Although it took some months, the separate boards of Centrelink and the Health Insurance Commission (now Medicare Australia) were abolished consistent with the Prime Minister's statement.

Ms Scott is proud that her department of 2004-07 served its Ministers and the Australian Government so well. It was a leap towards a greater focus on delivery. It provided much of the impetus for Centrelink to receive its own administered budget in due course.

### **The Department of Broadband, Communications and the Digital Economy**

With the incoming Rudd Government there were significant AAO changes. The Department of Communications, Information Technology and the Arts (DCITA) was abolished. The sports, arts and part of the IT functions went elsewhere and the remaining functions went into the new Department of Broadband, Communications and the Digital Economy (DBCDE).

The policy and program circumstances of the two departmental creations were quite distinct. The common thread was a Secretary striving to deliver from day one, while simultaneously facing daunting legal, financial and staffing challenges.

What is easier, renaming and configuring a department or abolishing and creating a new and different one? Undoubtedly the answer is not formally abolishing a department because the links disrupted in the accountability framework take some time to repair.

Initially, Ms Scott and her advisers had imagined that DBCDE would be DCITA renamed with some functional adjustments. On 4 December 2007, the government issued formal notification of the abolition of DCITA and establishment of DBCDE in the Commonwealth Gazette. DCITA staff had no advance warning of the abolition of the agency. The natural expectation of government was that DBCDE would be up and operating on 'business as usual' as quickly as possible.



That's easier said than done, if the Secretary and Department have not been allocated any staff or money. Restoring these required significant effort and reliance on other agencies that also seemed unprepared for the changes. Technical skills and experience of this nature may not be familiar, even to well-drilled APS executives familiar with AAO changes.

### Handling the practical challenges

Section 32 of the FMA Act provides the mechanism for adjusting appropriations between agencies. Although the section 32 determinations in this case had retrospective effect, there were several days between the abolition of DCITA and the implementation of those agreements where staff had to continue business as usual with no appropriations. It was only after the implementation of the section 32 determinations and the allocation of staff that DBCDE could address issues such as financial delegations, drawing rights and CEIs.

Several days after the abolition of DCITA, which left DCITA staff as 'officials at large', the Commissioner made a determination under section 72 of the PS Act allocating staff to DBCDE. The determination had retrospective effect to the date of DBCDE establishment. The making of the determination also allowed DBCDE to address human resource/personnel delegations.

The abolition of DCITA also affected workplace agreements, including the DCITA Collective Agreement and AWAs with non-SES employees. The Public Service Minister had to make a determination under subsection 24(3) of the PS Act to rectify the anomalies (but days had elapsed).

Under the MoG changes, some DCITA functions and staff were to move to Department of Health and Ageing, Department of Environment, Water, Heritage and the Arts, and the Department of Innovation, Industry, Science and Research. Section 32 determinations and section 72 determinations underpinned these moves.

Although DBCDE personnel and financial management and accountability arrangements were normalised within a couple of weeks of the AAO changes, much effort was necessary behind the scenes to tally the divisions of money, and to arrange suitable assignments of staff into the three receiving departments. Union cooperation, Scott comments, was important in this sensitive period of staff mobility and adjustment but more importantly because their certified agreement no longer had status.

Other elements of the changeover were reminiscent of the DHS scenario—a lag in getting ABN arrangements and issuing new FOI authorisations. Unlike DHS, there were also substantial carry-overs of contracts and funding arrangements, and the necessary adjustments and notifications for these took time. Lacking firm guidance on the correct delegations for GST accounting purposes, the new DBCDE managed to develop its own procedures, and later have these ratified. Changing DCITA's name to DBCDE would not have generated as many legal issues nor would it have required the same level of effort.

### Good practice in setting up a new agency

With Ms Scott and her various advisers having worked through (at least) two agency creations or abolitions, their collegiate discussions may provide further pointers for 'good practice' in the creation of new APS agencies:

- Is abolition really necessary? Why not just a name change and an AAO change? Abolition means you are maximising disruption. Other alternatives are often available.
- If 'old' agencies must be abolished in the creation of 'new', short lead-times (rather than none at all) for planning would help minimise the organisational disturbances—actual abolition of old agencies can create difficulties in forming the new agencies. If such is necessary, it could be as well to have a small window that allows the officials to plan, particularly to get the necessary (FMA Act /PS Act) legal instruments in place.
- Agencies should be advised from the top (PM&C) of new-agency starts and the coordination and cooperation requirements—when new agencies are created, true cooperation from the other agencies is vital. A formal coordination advice from the head of PM&C would assist in this regard.
- The central agencies should keep on reviewing what are the 'must do' guidelines and procedures for new-agency formation—perhaps it is time for a working party of the central agencies (Finance, PM&C, Treasury and the Commission) to redevelop and maintain the 'must do' guidelines and 'default setting' procedures for any budding new agency.
- There should be a starter pool of financial resources and systems for new agencies—if not a fully-fledged budget, a new agency will be better placed to rise to the expectations of

government if it carries with it a resource pool or 'starter budget', an experienced CFO, and an appropriate financial system.

- The Commission should identify and support better transitional arrangements for new agencies' staffing and staff entitlements—with staff moving in and out quickly under conditions of uncertainty when agencies are formed, the new agency, the Commission, and union, should do their utmost to work together for the best outcomes in the staff transitions, with fair-pay and conditions maintained.
- New agencies should have access to central agency assistance and contract arrangements, for their essential short-term accommodation and services—getting the accommodation and services 'up to speed' is disruptive for new agencies, and it might assist if relevant central-agency arrangements and contracts could be accessed or 'piggybacked' to ease the short-term burden.
- The central agencies should consider a 'mercy' rule to time-limit negotiation of the resource divisions for new agencies—the ultimate division of policy, program, resource and staffing can drag on in new-agency formations, and the central agencies might consider the application of a '90-day rule' for the resolution of claims.

## 2. Creating the Department of Climate Change

After the 2007 election, Dr Martin Parkinson was promoted from Deputy Secretary in the Department of the Prime Minister and Cabinet, where he was on secondment from Treasury, to set up a new Department of Climate Change (DCC). The first of his new peers that he consulted was Ms Patricia Scott, who had been elevated from a similar position in 2004 to lead the Department of Human Services (DHS) and whose case study is included above.

The inaugural Secretary of DCC and his team had to develop the complex organisational machinery that would attend the raising of any new agency—unusually steep policy and delivery challenges also lay ahead. No sooner had the new Minister been sworn in, than the new Department was immediately involved in the UN Climate Change Conference of December 2007 in Indonesia.

Interestingly, many of the DCC policy and finance executives involved in the agency's formation are now toiling from within to help establish yet another new agency—the Australian Climate Change Regulatory Authority which would absorb a portfolio agency, the Office of the Renewable Energy Regulator, and a regulatory function conducted within DCC, the Greenhouse & Energy Data Officer, and be responsible for regulation of the (yet to be passed) Carbon Pollution Reduction Scheme.

### Background

Given Australian Labor Party election commitments, after the 2007 election there had been a working assumption that an 'Office of Climate Change' might be developed within PM&C. Very early discussions between the Prime Minister and the Secretary of PM&C confirmed the new Government's interest in establishing a separate department. Officials promptly worked out a new structure, which was reflected in the AAO.

Notably, DCC was positioned to remain within the Prime Minister's portfolio. This was a visible sign of the intention for it to assume 'central policy' type functions, or a 'central agency' like role. The challenge then was to flesh out the Department's incipient policy positions, while at the same time delivering on its demanding task-load. As it happened, the Government was to issue its Carbon Pollution Reduction Scheme (CPRS) White Paper just after the Department's first anniversary.

### Early priorities and concerns

The nascent DCC would draw a number of its initial functions and staff complements from three agencies—the Department of the Environment, Water, Heritage and the Arts (DEWHA), PM&C (both substantive PM&C officers and some on secondment from other agencies to the Task Force Dr Parkinson had been leading), and the Department of Foreign Affairs and Trade (DFAT). Most of the officers working in functional areas that were picked up by the AAO were happy with the requirement to 'follow the function' (others were not and were not moved). Other personnel were seconded in from agencies such as the Productivity Commission, with the new Secretary also calling on experienced ex-Treasury officers to assist over a short bridging period.

Initially, the DCC staff worked from their separate accommodations at the three main contributing Departments. Meanwhile, the suite of corporate functions, the 'everything that you take for granted' on stepping inside a mature APS agency, was not there to begin with. Weeks

were required, for example, just to set up the agency banking arrangements and register as a business for the ABN and GST requirements.

Quickly, DCC had to develop its three policy ‘pillars’—reducing Australian emissions; adapting to unavoidable climate-change impacts; and helping to shape a global solution. ‘Gradually, iteratively,’ the Department then worked with the Minister to broaden and deepen the Government’s climate-change policy framework.

### **Handling the practical challenges**

The given priority of the Department was to develop and coordinate Australian Government actions on climate change. But, in the early months at least, the Secretary was spending quite a proportion of his time sorting out administrative complexities. For want of an ‘impartial broker’, or fully agreed protocols and procedures for agency formation, he and his executives experienced very significant delays and ‘opportunity costs’ in this implementation phase.

Unlike Ms Scott, Dr Parkinson had access to the publication *Implementing Machinery of Government Changes: A good practice guide*. In a long and varied APS career, he had ‘never thought’ about having to create an agency before, and found this guide very useful as a starting point.

Like Ms Scott, Dr Parkinson still had to work hard to mobilise manageable arrangements for ongoing DCC funding, systems and staffing. Fortunately, he had immediate access to the services of a skilled Chief Finance Officer (CFO) who was looking for a new challenge. This was an essential underpinning if a finance- and reporting-compliant organisation was to be built up from day one.

Consequential to the transfers of agency functions, it took some time to make the necessary adjustments of appropriations under section 32 of the FMA Act. These funding transfers tended to be based on ‘marginal costs, not average costs’ of functions. In DCC’s view, the latter might have been more appropriate in the case of a new agency. Dr Parkinson clearly believes DCC had an inadequate capital base to deliver on the tasks it has been allocated.

Similar to DHS, DCC had the experience of waiting for its Additional Estimates funding to come through after the budget. With the lack of cash on hand, it too was ‘borrowing’ resources from other agencies to be repaid later on. The DCC executives suggested that any new-agency start was not dissimilar to a new-business start, and as such would benefit from an orderly injection of an ‘equity base’ or start-up capital.

If Government chooses to create a key new agency, it would have an expectation that the central agencies and the APS generally be ‘enablers’ and facilitators in its formation. In that case, DCC wondered if there was not a place for having a central-agency ‘SWAT team’ ready to assist in new-agency formations, especially those that might be likely to take place after any Federal election. If such a team turned out not to be needed, it could be disbanded readily, with little lost for the APS having been better prepared.

For the early part of 2008, DCC had staff and systems sitting informally in three different agencies, not a totally satisfactory arrangement either for the providers or for DCC. ‘It’s not their core business,’ remarked the CFO of the providers. There did not appear to be clear precedents or processes for DCC to (either) develop its own systems or use other agencies’ systems by agreement.

With the assistance of DEWHA, DCC had managed to finalise its 2007-08 financial result with only a slight delay. It had since implemented its own financial system, and as the system has been further developed, division heads were now in a much sounder position to manage their own budgets accurately and efficiently. Further, DCC negotiated ongoing access to the PM&C ICT systems and migrated to the new systems some 15 months after establishment. A key consideration in this decision was the fact that DEWHA does not operate a protected IT environment, a state of affairs incompatible with DCC’s role.

Initially, the new DCC had drawn on the DEWHA models for its Chief Executive’s Instructions and its delegations (although the delegations had to be ‘set’ at higher levels than those applying in DEWHA given the lack of clarity around finances).

DCC was not able to draw on a central APS-property group that could resolve its accommodation issues quickly. In 2008, it gained access to a former Tax Office city property, initially earmarked for DEWHA but no longer required by that department. The whole of DCC was finally co-located by mid-2009, some eighteen months after its establishment.

Getting on top of the remuneration and performance-development systems had also taken quite some time. DCC now had its own Collective Agreement in place, but noted that the development of such an agreement is a 'big thing' even for a mature agency.

Though DCC is not yet a fully mature agency itself, continuing to face significant system development challenges, its executives were already developing the arrangements for the Australian Climate Change Regulatory Authority (ACCRA). The Department is growing ACCRA inside DCC, ready to be spun off upon royal assent to the CPRS legislation. The original start date had been delayed, but ACCRA is expected to rapidly overtake the Department in size—developing ACCRA in-house has led to very rapid growth in DCC which had not been anticipated or planned for at DCC's creation.

Growing a new regulatory agency within the portfolio department has also brought with it a range of additional challenges. Formulating a regulatory authority is different to quickly invoking a new department of state, DCC noted, in that there will usually be underpinning legislation and there is some breathing-space or period of notice before the authority has to be operational. However, similar budget-funding uncertainties and issues of 'start-up capital' were already being experienced. In addition, the supporting infrastructure required to undertake the regulatory functions are quite different to those required for a policy department—meaning DCC was trying to develop and implement systems for two separate organisations at the same time.

### **Achievements**

After directing DCC for 18 months, the Secretary believed that the Department had been remarkably successful in delivering on its prime menu of key responsibilities. The greenhouse-reporting and emissions-trading legislation had been 'huge' pieces of legislative reform by any comparison, as had been development of the Renewable Energy Target. The ongoing global climate change negotiations have been a continuing priority and far more resource intensive than budgeted for, meaning the Department was juggling priorities across a limited resource base in a way rarely seen. 'This group of people has been phenomenally successful in delivering on tasks,' he added, but thus far 'less successful in embedding ourselves in the central structures'.

The Department had delivered excellence, but at the cost of operating short-term in a way that was not sustainable over the medium term. A relatively inexperienced SES cadre, and high staff turnover, were issues in the first year. Although there had been goodwill, staff at first tended to operate within their 'silos' while searching for the development of a consistent Departmental theme and culture they could fit in with.

Dr Parkinson was keen to improve on DCC's rankings in its first (2008) *State of the Service* results. Now was the time to build up a sustainable department 'operating more at a pace that people can manage' and having better staff training and succession plans.

There remained challenges to achieve the full 'breadth of engagement' that would be required for a sustainable 'central policy' or central-agency role. Some items of climate-change policy—the CPRS and the Renewable Energy Target for example—were inside the Department. Others—to do with energy efficiency, broader renewable energy matters, or carbon capture and storage—lay wholly in other departments or, in the case of adaptation, spread across multiple departments, layers of government and the private sector.

### **Good practice in setting up a new agency**

The Secretary and the DCC executives welcomed the Commission's case study exercise, urging a more businesslike approach to MoG changes, especially those that might reasonably be expected to occur after any election. In their view, this might comprehend, but would certainly go beyond, the *Implementing Machinery of Government Changes* good practice guide, useful though this may be.

The DCC also suggests that:

- The central agencies could establish post-election 'SWAT teams' to fast track new administrative arrangements—to assist governments post-election with their new arrangements, there perhaps ought to be a 'standing capacity' in the form of a central-agency team ready to advise and assist new agencies as they are being formed.
- The Commission should coordinate the critical SES 'bridging-support' that new agencies may need, and should coordinate the secondment of APS executives or ex-executives who would be of invaluable assistance in keeping the early stages of new-agency formations 'on track'.



- There could be access to an independent ‘honest broker’ for new agency starts—there would be merit in having a co-funded ‘honest broker’ or ‘impartial broker’, to help negotiate the first stages of any new agency’s resourcing and services, with involved parties to honour any agreements reached.
- A proper start-up capital base should be allowed for new agencies—to better meet government’s expressed requirements, perhaps new agencies would benefit from more predictable injections of ‘start up’ capital, that are less dependent on the set budget cycles or resourcing formulas.

### 3. Creating the Workplace Authority

Ms Bennett was the CEO of Comcare until June 2007. The Minister of that time appointed her to become the inaugural Director of the new Workplace Authority in his portfolio.

Ms Bennett underlined the special issues that can attend the creation of a smaller statutory authority, as distinct from a department of state.

#### Background

On 28 May 2007, the Government had decided to shift the Employment Advocate function from being an office within the former Department of Employment and Workplace Relations (DEWR) portfolio into the new statutory Workplace Authority. This would be enabled under the *Workplace Relations Amendment Act* to begin on 1 July 2007.

The Authority was created to advise employers, employees and organisations on workplace relations issues, and to promote fair and flexible workplace relations practice. Through the Additional Estimates for 2007-08, the Authority was to receive a (net) \$46m in expense measures and \$14m for capital (establishment) measures.

#### Early priorities and concerns

At the outset, Ms Bennett consulted the good practice guide *Implementing Machinery of Government Changes*. She appreciated the useful ‘field of issues’ or ‘shopping list’ that it gave a new agency head to consider. But it didn’t cover off ‘the journey, or how to get there’ in the way that case studies might have done.

In her case, the agency’s start date was known two months ahead. This foreknowledge did not ease things as much as might have been expected. It created a sense of work being ‘stockpiled’ or held over for the new agency to deal with once it was going. After 1 July, the fledgling Authority would still have to ‘draw down’ from DEWR for funds and services, until such time as its own Additional Estimates came through.

The Authority had been created to be independent in a particular aspect of industrial relations, but Ms Bennett saw the continuing presence of the larger parent department as making ‘quite a distinction’ in her authority to go down certain paths. Whereas a DEWR (or indeed any other department) would tend to work off a general policy remit or charter from its Minister, she noted, the purpose of a statutory authority was more circumscribed.

This meant that careful negotiation would be required with the Minister and with DEWR, if the former were to decide he wanted to vary somewhat what the Authority was doing. ‘It’s about clarity in what your role is’, Ms Bennett added, or the need to strike a prompt understanding with the Minister as to the Authority’s short-term and longer-term goals.

Ms Bennett would have preferred to have an implementation or steering committee working from the outset. In the first month of the Authority, she did not have the senior levels of support that would have allowed this to get going. Similarly, the requirement for an audit committee was evident, and was on the good practice guide’s ‘machinery of government’ list, but it could not be established immediately. With limited resources, getting on top of the known financial and reporting requirements was a struggle early on.

Another subtlety was that some critical groundwork and corporate knowledge rested with DEWR people who were not moving to the new Authority or former Office of Employment Advocate staff who did not join the new agency. Without immediate access to this knowledge, and the relevant trail of decisions, the new Authority could fall into error from being less than fully informed. ‘You need more strategic support in the first six months,’ Ms Bennett commented, suggesting that any new agency needed stronger-than-average SES support to get through its early months. Astute SES secondments, from the parent agency or from some other, would help in that regard.

## Handling the practical challenges

The Authority's first Director now reviewed the early challenges that had arisen in its funding, staffing and services.

In theory, the Authority had begun exactly at the start of 2007-08, with 'full-year' funding. In practice, it was going to take some months to get into full operational mode, with a resultant underspend for 2007-08, and flow on consequences for funding in the out-years. Perhaps, observed Ms Bennett, the standard budget and appropriation sequences were a little inflexible for new agencies. The funding imbalances that she had experienced could have been averted via a 'more sophisticated' projection of funding requirements, or a better 'spread' of the first-year funding.

Looking at it another way, perhaps the 'drop dead' date of 1 July 2007, with the new Authority directly assuming certain DEWR functions and client services, but still having to buy back internal services from DEWR over quite a period, was problematic. A transitional approach might have worked better (including for the clients).

The new Authority was destined to extract its functions and staff from just two agencies, DEWR and the Office of the Employment Advocate. Yet the staffing adjustments proved to be surprisingly complex.

The former Employment Advocate had already been a separate Statutory Officer—but his underpinning staff had all been attached to 'mainstream' DEWR. It was difficult to ascertain exactly how many staff had previously been assigned to his purposes, and if the correct numbers of people would be moving across to the new Authority.

Those staff that did arrive carried across quite a number of different industrial arrangements, some of which were more favourable than others. And, at the time, all the SES staff came with their individual Australian Workplace Agreements. The legacy effects of these varying individual staff arrangements made it harder to negotiate fair pay and conditions across the agency, and to negotiate the Collective Agreement when it came to that point.

In the short term and for some parts the longer term, the Authority had to 'draw down' from DEWR for a variety of administrative supports, including finance systems, information technology and ministerial services.

Although there was a covering memorandum that went into considerable detail, the Authority found it hard to determine if it was getting the correct quantities of assets, equipment and services at reasonable or benchmark cost. No independent avenue or third party existed that could be used to mediate on such matters, and the Authority did not have immediate access to its own Chief Financial Officer to advise the Director. If any new agency has to draw on parent-agency services over some period of time, she noted, there is a risk that it may not continue to get the priority of service that it may feel it needs.

Purchasing arrangements were also a problem initially. The Authority discovered that there were contractual limitations to making use of DEWR's 'portfolio panel' of providers, and that there would have to be a delay in order to make its own appointments. Also, the delegations within the Authority were set 'too high' initially, and had to be reset several times.

Finally, Ms Bennett found she was by no means the first head of a new agency to face a spartan accommodation scenario first-up. 'It's a major distraction', she commented, 'when you are trying to motivate people to get early results.'

## Achievements

Functional statements and formal memoranda aside, Ms Bennett certainly called on her informal networks, which meant she 'could be on the phone immediately' to sort out problem issues affecting the stakeholders.

She had also signalled to the stakeholders that there was bound to be a little 'trial and error' in the early days, and that she would appreciate their feedback.

'Bringing people along when it looked insurmountable at the time' was quite an achievement for the Authority. This was reflected in good 'State of the Service' results for the management of change, and in a smooth transition when there was a change of government later in 2007. The Authority's first financial statements did not attract any qualifications, also a very good result in the circumstances.

## Good practice in setting up a new agency



Ms Bennett thought that the risks would be much higher if someone with little Commonwealth experience were to start a new agency, not having had a thorough understanding of the APS governance requirements, in particular financial and reporting requirements.

Her own experience at taking the helm in a new statutory agency led to various suggestions for good practice:

- There should be ‘budget honesty’ rules for the prompt and fair division of resources that are being reallocated to new agencies—if the government chooses to set up new agencies out of old, it is important that the arrangements for the division of resources be prompt and transparent, so that both agencies can get on with their core business.
- There should be ‘flexible short-term’ budget (also SES) provisions for new agencies—more flexibility in the first rounds of new-agency budgets and appropriations, and strategic secondments of key SES staff, would help new agencies to get started and focus on the key tasks set by government.
- The Commission should assist in anchoring the early governance arrangements for new agencies—if the Commission could advise and assist on the early governance and reporting structures, this might help the new agency to focus on its key tasks, while still meeting the key reporting requirements of government.
- The *Implementing Machinery of Government Changes* good practice guide should be kept up to date and up to the mark—the guide is an important and useful tool that the Commission and Finance should keep on developing, updating and correcting.
- The establishment period is a challenge not only for senior staff but for all staff—they are often initially confused about expectations and direction. A lot of time needs to be invested by leadership very early on to put in place the strategic direction and to ‘sell’ it to staff and stakeholders.

## 4. Creating the Workplace Ombudsman

Mr Wilson had been in charge of the Office of Workplace Services (OWS) for over a year, when he was appointed as the first Workplace Ombudsman from 1 July 2007. OWS had already been in existence as an executive agency in DEWR, but now the Ombudsman was to be a statutory authority.

Mr Wilson noted that the more ‘radical’ period of change and growth had been the initial creation of OWS in the Department in 2006. At that time, DEWR had promoted OWS as an ‘independent agency with an expanded scope’ to monitor workplace rights and obligations, with more capital-city and regional inspectors to be in place by the end of 2006.

The Ombudsman’s separation from the Department in July 2007 heralded a further period of growth, with staff numbers climbing a further 20-25% by the end of that year. Mid-2009 staff levels were about 400.

Another period of major change was now upon the Ombudsman in 2009. He had been involved since 2008 in an establishment taskforce of agency heads planning for the introduction of Fair Work Australia. This new organisation was to operate from 1 July 2009, progressively absorbing the existing Australian Industrial Relations Commission, Australian Industrial Registry, and Workplace Authority.

Also from 1 July 2009, his own organisation was to re-appear with revised functions as the Fair Work Ombudsman (FWO). Mr Wilson, as it happened, was appointed to be the first head of FWO.

### Early priorities and concerns

In practical terms, the OWS was already operating fairly ‘independently’. The creation of the statutory authority in 2007 formalised that independence. This in turn led to some changes in the decision-making processes, and a slightly more formal or ‘arm’s length’ relationship with the Minister in some respects.

An Ombudsman, in Mr Wilson’s view, should equip the Minister with the information to answer pertinent questions (in the Parliament). It might be improper to discuss the ‘ins and outs’ of a particular employer or investigation with a Minister or advisers.

The previous OWS had already grown accustomed to the ‘workplace beat’ since 2006, but the new Ombudsman’s role and the attendant legislation led to a more pressured environment, and considerable media scrutiny over the May-September 2007 period especially.

The Ombudsman's inspectorial role also related to the workplace-advisory functions of the Workplace Authority, which was also (more) under the media spotlight. Both agencies were 'spokespersons', certainly not for the workplace legislation itself, but for the way in which the relevant administrative decisions were being made.

The promotion of the Authority encouraged the public and the media to contact the Ombudsman. He would carefully confine his comments to relevant facts or activities and not the policies. The situation was less 'volatile' now, but the media coverage continued. The Ombudsman perceived this not as a negative, but a positive asset in getting the message across about his organisation.

### **Handling the practical challenges**

With hindsight, the prior OWS cultural and workplace adjustment period made the July 2007 shift to the Ombudsman easier, even though this was only decided in May 2007.

While there may have been an assumption that no Chief Financial Officer (CFO) was required, this was not the Ombudsman's experience. Having a first-rate CFO who knew the 'ins and outs' of agency costings was vital. She was better qualified to argue, should the need arise, that her organisation didn't 'have enough money to really deliver what the Government wants'.

The Ombudsman's initial experience was that the standard financial assumptions 'were different to the costs being incurred'. In his view, it took some time to establish a more realistic costing base. Especially in the pre-Ombudsman or OWS period, there was a need to go back to Government on several occasions for more resources. To take one example, the OWS (or Ombudsman) faced particular pressures in providing reasonable accommodation at reasonable cost for the inspectors based at the regional sites.

The Ombudsman's Chief Executive's Instructions and Human Resource delegations were initially adapted from those that then applied in DEWR, and even now they were not so different. DEWR also provided the information technology (IT) services, which worked very smoothly, although the Ombudsman's IT cost structures were different to those of the parent department. Some planning and adjustment issues ensued, not so much with DEWR's IT prices themselves, but when they were applied 'retrospectively'.

Most of the staff who arrived at the Ombudsman in 2007 had individual Australian Workplace Agreements, although some came under the DEWR Collective Agreement. By mid-2007, the organisation had negotiated its own Collective Agreement.

### **Achievements**

After mid-2007, the Ombudsman realised that there was a need to rebuild relationships with employers, employer groups and unions. His objective was not that they should agree in all respects with the Ombudsman's role, which they well might not, but rather that they might come to understand and accept what he was about.

He was proud to see the organisation working so well in 2009. 'People are engaged, they do a good job; the community respects that.' Restyled as the Fair Work Ombudsman from July 2009, the organisation should continue to provide 'fearless' advice, maintaining its relationships with the Minister, the portfolio department, and the stakeholders.

### **Good practice in setting up a new agency**

Like the former Director of the Workplace Authority, who was also interviewed for these case studies, the Ombudsman thought that it would be really difficult for a new-agency head to come in successfully without prior senior experience in the APS.

Having come from the South Australian Public Service, he himself had a valuable learning and preparatory experience as the Industrial Registrar in the Australian Industrial Relations Commission machinery, before moving up to head the OWS.

Based on his own experience, the Ombudsman saw a certain amount of value in MoG change checklists, especially where new agencies might be created at a fast pace. But his main thought now was that perhaps the Commission and Finance should have a 'case manager' role to assist in new-agency starts.

'That's probably the most useful thing, just knowing that there was someone you could go to,' the Ombudsman concluded.

# Appendix D: Case study – Closing down an agency

## The wind-up of Land and Water Australia

### Background

Land and Water Australia (LWA) was one of the 16 rural research and development corporations formed under the *Primary Industries and Energy Research and Development Act 1989* that were created to foster innovation in Australia's agricultural production systems. LWA's unique charter was to invest in generating and managing new knowledge for sustainable and productive agricultural landscapes, while the other 15 corporations focused on particular industries and received levies from those industries.

LWA commenced activities on 3 July 1990. Its annual government funding was about \$13m per annum, which was leveraged to \$30-\$40m through partnerships. It was entering its fifth year of a five year strategic plan with over \$100m of active investments. It was a CAC Act agency with an Independent Board and about 40 staff (not APS employees).

In April 2009 the then Minister for Agriculture, Fisheries and Forestry, the Hon. Tony Burke, advised that a significant savings measure in the Commonwealth budget was to be a cessation of appropriation funding for the Corporation and the closure of the Corporation by 31 December 2009. 'Normal' operations were to cease immediately, and special government funding of \$6.7m was granted for 2009-10, with some specific activities identified to continue with other agencies.

The wind-up of LWA commenced immediately, and was successfully completed ahead of schedule and in accord with the Minister's instructions. At the final Board meeting, the Directors commended the professionalism of the staff and requested that the wind-up be presented to the Commonwealth as a case study.

This case study documents the key aspects of the wind-up that were critical to the success of the wind-up and may be of use to other organisations in a similar position.

### The wind-up plan

Immediately after being notified of the decision to close the Corporation, planning for the wind-up commenced. Within the first week, the Board was notified, an initial 'wind-up plan' (WUP) was developed and approved at an emergency Board meeting. That Board meeting also discussed the strategic responses of the Corporation to the decision and some principles that would be applied in the wind-up period and adhered to in the WUP—these included communication and media.

The WUP was designed as an evolving document, to reflect greater detail in planning as time progressed, changes in circumstance, and to be used to report to the Board and government on progress.

The principles agreed were:

- to maximise the legacy of 19 years of investment into sustainable and productive landscapes;
- transparent and accountable financial management; returning funds to the Commonwealth; and
- to treat staff and researchers with maximum dignity.

The Wind-up Plan covered:

- Governance and Management
- Risk Management
- Communication
- Budget
- Human Resources
- Research
- Intellectual Property Management

- Knowledge and Adoption
- Legacy Management
- Final Annual Operational Plan
- Final Annual Report
- Disposal of Assets
- Building Lease
- Storage and Archives.

The WUP and the ultimate success of the wind-up relied absolutely on the systems, processes and people at LWA. Each of these was operating well—efficiently, effectively and in an integrated fashion. For example, the organisation, prior to its closure, had received three unqualified Audit reports in a row, with no identified weaknesses. During the wind-up it received the fourth (for 2008-09) and fifth (for 2009-10) such reports. This is a testament to the FWA people as much as the systems and processes.

The critical ingredients to the success were:

- **Good people.** Land & Water Australia was blessed with high performing and passionate staff. This was never more evident than during the wind-up, and particularly with regard to the Wind-up team, where staff commitment to the principles of the wind-up was inspirational. The selection of the Wind-up team was important. Note also that two members of the Wind-up team had previous experience in closing an organisation, which was invaluable. Just as important was using existing staff who knew the organisation inside out (rather than bringing in external resources). People are the most important ingredient for a successful wind-up.
- **Time and resources.** The eight month period was adequate time to complete the task thoroughly and professionally. The \$6.7m special funding was necessary not only to 'save' most of our investments, but to ensure staff entitlements on hand were secured and that we had the human resources on hand to complete the wind-up.
- **Communication.** Continual communication, internally and externally, with providers and stakeholders, was an absolutely necessary but time consuming role. This was particularly important for the Executive Director in relation to the Board, the Minister's office, the Department, and key partners.
- **Planning.** Good planning and adaptive management, with robust reporting.
- **Systems and Processes.** Land & Water Australia had sound business systems and processes in place. However, the key to our excellence in this regard (e.g. five unqualified audit reports with no identified weaknesses in a row) were the quality of the people, and the culture of the organisation in implementing the systems and processes in an integrated fashion.

LWA put together this report in the hope that others involved in winding-up an organisation can learn from this case study and that it might assist in contributing to a smoother and more efficient process. The full report is available at [www.apsc.gov.au/publications-and-media/current-publications](http://www.apsc.gov.au/publications-and-media/current-publications).

# Glossary

<b>AAO</b>	Administrative Arrangements Order
<b>AAU</b>	Agency Advice Unit
<b>ABN</b>	Australian Business Number
<b>ACM</b>	Appropriations and Cash Management module of CBMS
<b>Administrative re-arrangement</b>	a term used to describe a variety of organisational or functional re-arrangement changes affecting the Commonwealth ( <i>see also</i> MoG change, and transfer of functions)
<b>Agency head</b>	the agency head (including departmental Secretary) as defined under the PS Act (which might be a different person to the Chief Executive under the FMA Act)
<b>APS</b>	Australian Public Service
<b>APSBF</b>	the Australian Public Service Bargaining Framework
<b>ATO</b>	Australian Taxation Office
<b>AWA</b>	Australian Workplace Agreement
<b>CAC Act</b>	<i>Commonwealth Authorities and Companies Act 1997</i>
<b>Carltona Principle</b>	under this principle, a person in whom a statutory power is vested may authorise an officer to exercise the power on his or her behalf, in some exceptional circumstances
<b>CBMS</b>	the Central Budget Management System
<b>Chief Executive</b>	the Chief Executive is defined under section 5 of the FMA Act as (a) for a prescribed Agency—the person identified by the regulations as the Chief Executive of the Agency; or (b) for any other Agency—the person who is the Secretary of the Agency for the purposes of the <i>Public Service Act 1999</i> or the <i>Parliamentary Service Act 1999</i> .
<b>CEIs</b>	Chief Executive's Instructions, issued under the FMA Act and Regulations, form a key part of an agency's internal controls and operational framework, focusing on the agency's particular needs, in order to promote the efficient, effective, economical and ethical use of public money, public property and other Commonwealth resources.
<b>Classification Rules</b>	Public Service Classification Rules 2000
<b>Commission</b>	Australian Public Service Commission
<b>Commissioner</b>	Australian Public Service Commissioner
<b>Commissioner's Directions</b>	Australian Public Service Commissioner's Directions 2013
<b>CSS</b>	Commonwealth Superannuation Scheme
<b>Finance</b>	Department of Finance and Deregulation
<b>FMA Act</b>	<i>Financial Management and Accountability Act 1997</i>
<b>FMOs</b>	Finance Minister's Orders
<b>FOI</b>	Freedom of Information
<b>FOI Act</b>	<i>Freedom of Information Act 1982</i> (Cth)
<b>FW Act</b>	<i>Fair Work Act 2009</i>
<b>Gaining agency</b>	the agency to which the function is being transferred
<b>GST</b>	goods and services tax

<b>Information Publication Scheme</b>	set out in Part II of the FOI Act
<b>ISAC</b>	Independent Selection Advisory Committee
<b>MoG change</b>	machinery of government change—used to describe a variety of organisational or functional changes affecting the Commonwealth (see also administrative re-arrangement and transfer of functions)
<b>MoU</b>	memorandum of understanding
<b>National Archives</b>	National Archives of Australia
<b>OAIC</b>	Office of the Australian Information Commissioner
<b>Open government</b>	the practice of ensuring that citizens can access the documents and proceedings of the government to encourage information sharing, engagement and participation
<b>PM&amp;C</b>	Department of the Prime Minister and Cabinet
<b>Privacy Act</b>	<i>Privacy Act 1988</i> (Cth)
<b>PSS</b>	Public Sector Superannuation Scheme
<b>PSSAP</b>	Public Sector Superannuation Accumulation Plan
<b>PS</b>	Public Service
<b>PS Act</b>	<i>Public Service Act 1999</i>
<b>Public sector information</b>	data, information or content that is generated, created, collected, processed, preserved, maintained, disseminated, or funded by (or for) the Government or public institutions
<b>Secretary</b>	see agency head
<b>SES</b>	Senior Executive Service
<b>SG</b>	Superannuation Guarantee
<b>SRC Act</b>	<i>Safety, Rehabilitation and Compensation Act 1988</i>
<b>Staff follow function</b>	affected employees are moved with their function, and their employment status (i.e. ongoing or non-ongoing) remains the same
<b>Transfer of functions</b>	a term used to describe a variety of organisational or functional functions changes affecting the Commonwealth (see also administrative re-arrangement and MoG change)
<b>Transferring agency</b>	the agency from which the function is being transferred