

ENTERPRISE BARGAINING

A public-sector update

LANDER
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Guide

INTRODUCTION

With recent changes in government, there have been notable changes to public sector wages policies and enterprise bargaining frameworks in New South Wales, Victoria, and for Commonwealth public servants.

These are hot on the heels of the Secure Jobs, Better Pay amendments, which made a number of changes to the enterprise bargaining provisions of the *Fair Work Act 2009* (Cth).

While the wages policy in Queensland hasn't been updated as recently, significant developments are underway in wages negotiations, with the Queensland Government close to agreement in relation to numerous certified agreements.

In this update, our legal experts outline the recent changes implemented across state and national jurisdictions and their impact on public sector employers and employees.

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NEW SOUTH WALES



NEW SOUTH WALES

The Labor Party was voted into power in the New South Wales state election on 25 March 2023. During his election campaign, Premier Chris Minns promised to scrap the wages cap for public sector employees to allow for open negotiations with public sector workers.

The public sector wages cap was an issue of contention during the election campaign, prompting outgoing Premier Dominic Perrottet to issue a joint statement with the Treasurer arguing that NSW Labor's plan to scrap the *NSW Public Sector Wages Policy 2022* (2022 Wages Policy) would cause an almost \$9 billion "black hole in the state's budget".

NSW Labor Leader Chris Minns responded by stating the Labor party is not committed to offering inflation-level increases and cannot commit to consumer price inflation (CPI).



FWC rules on NSW Government 2022 Wages Policy

A Full Bench of the Fair Work Commission (FWC) recently exercised its powers of arbitration under the *Fair Work Act 2009* (Cth) in relation to the application of the 2022 Wages Policy for two NSW Government agencies, Sydney Trains and NSW Trains. The decision offers an indication of what unions will likely be seeking in NSW public sector negotiations moving forward.

The FWC determined that the 2022 Wages Policy did not reflect the maintenance of real wages for Sydney Trains and NSW TrainLink employees under the *Sydney Trains and NSW TrainLink Enterprise Agreement 2022* (2022 EA). The result was cumulative wage and salary increases over two years of:

- 3.53% from 1 May 2022; and
- 4.03% from 1 May 2023.

The unions had sought total increases of 6% effective from 1 May 2021, 1 May 2022 and 1 May 2023.

As a net result, the Full Bench's decision amounted to a 1% wage increase (operative from 1 May 2022), and a further 1% wage increase (operative from 1 May 2023) on top of the wage increases that had been agreed in the 2022 EA.

In making its decision, the FWC considered the one-off payment of \$4,500 received by employees, which was payable as at the date the 2022 EA was made.

Background to the Fair Work Commission's decision for Trains

Ninety-three percent of Sydney Trains and NSW TrainLink (Trains Entities) employees who voted on the 2022 EA were in favour of the agreement, which was later approved by the Fair Work Commission on 10 February 2023.

To finalise the issue of Sydney Trains and NSW TrainLink employees' wages following a period of robust bargaining, industrial action and disputes, the Combined Rail Unions (CRU) and Trains Entities agreed to arbitrate the question: "what increases to remuneration should apply or the Commission award effective between 1 May 2021 and 30 April 2024?". Any increases awarded by the Commission would be in addition to the increases agreed in the 2022 EA.

The Full Bench centred its consideration on the 2022 Wages Policy and arguments about actual and projected changes to the rate of CPI, to determine an appropriate level of remuneration.

The Trains Entities submitted that the 2022 EA offered generous wages that generally exceeded pay rises received by other NSW Government employees. With respect to the 2022 Wages Policy, the Trains Entities submitted the policy was vital for maintaining fiscal sustainability within NSW and had been key in allowing the state to withstand budgetary pressure from the pandemic and maintain significant capital spending. The Trains Entities also submitted during the hearing that they had acted consistently with the 2022 Wages Policy.

The CRU submitted the 2022 Wages Policy is just a policy and does not impede the Commission in determining wages for the Trains Entities. The CRU also expressed that wage increases in previous enterprise agreements of Sydney Trains and NSW TrainLink provided higher wages than the maximum under the state's wages policy.

The Full Bench was critical of the 2022 Wages Policy and did not consider significant weight should be attached to it, as:

- no evidence was provided by the Trains Entities as to why the policy introduces particular percentage limits on increases to the cost of employee remuneration and other conditions, particularly when compared to the 2011 policy which appeared referable to the RBA's inflation target rate of 2-3%;
- the 2022 EA does not comply with the 2022 Wages Policy, as the agreement provides for wages above the 3% increase per annum limit in the policy;
- historically, the Trains Entities' 2018 enterprise agreements did not comply with the 2011 NSW Government Wages Policy; and
- the outcome of the judgment with respect to the Trains Entities will not impact the application of the 2022 Wages Policy on the rest of the NSW public sector (explained further below).

NEW SOUTH WALES

What does the Full Bench's decision mean for other NSW Government agencies?

The Full Bench firmly stated that the outcome of the arbitration for the Trains Entities will not affect the application of the 2022 Wages Policy on the rest of the NSW public sector. However, in practical terms it will likely set union expectations for similar outcomes in negotiations with other agencies moving forward.

IR Act mandates 2022 Wages Policy

The Full Bench outlined in the decision that the 2022 Wages Policy remains in force for the majority of the NSW public sector due to the [Industrial Relations Act 1996](#) (NSW) (IR Act), which constrains the NSW Industrial Relations Commission (NSWIRC) from awarding pay increases beyond the limits of the policy. The Full Bench:

- cited section 146C(1) of the IR Act, which constrains the award-making powers of the NSWIRC so that a government policy on conditions of employment for public sector employees must be given effect to if mandated by the regulations;
- cited clauses 6 and 6A of the [Industrial Relations \(Public Sector Conditions of Employment\) Regulation 2014](#) (NSW) (Regulation) which declare the wage increase caps in the 2022 Wages Policy, meaning all public sector employees' wages are capped and subject to the policy; and
- stated that employees do not have collective bargaining rights under the IR Act (in that they do not have any right to take protected industrial action).

Clause 6A(5) of the Regulation contemplates that pay increases may exceed those set out in the Regulation where agreement is reached. However, the 2022 Wages Policy provides that increases in remuneration or other conditions of employment that increase employee-related costs by more than 3% per annum can only be considered by government employers where the associated cost is offset by achieved employee-related cost savings and the enhancement is approved by the Cabinet Standing Committee on Expenditure Review. The Trains Entities are incorporated entities and therefore national system employers within the meaning of section 14 of the *Fair Work Act 2009* (Cth). Consequently, the Trains Entities' employees are not subject to the IR Act and Regulation.

Where does the 2022 Wages Policy apply?

The 2022 Wages Policy currently applies to most public sector employees, including public servants, health workers, police officers and teachers who have already received wage increases in accordance with the 2022 Wages Policy for FY 2022-23.

Moving forward, clause 6A(3) of the Regulation prescribes a 3.5% increase for FY23-24 if the employer has supported the introduction of one or more productivity reforms.

What does a new Labor government mean for bargaining?

The NSW Government's decision to scrap the wages cap under the 2022 Wages Policy is likely to mean that bargaining across all public sector employers is open to allow for increased wage negotiations. However, for an increase above 3.5% in FY23-24, this would either require agreement as per regulation 6A(5) (provided the relevant criteria are met) or a change to the Regulation.

Beyond FY23-24, the decision of the Full Bench may provide an example of a pay rise increase for NSW public servants. If the public sector wages policy is officially scrapped, this may mean that government employers will return to the model of identifying cost savings initiatives to fund an offer in negotiations that is reasonable, rather than in accordance with a cap on wages introduced by the government. However, it is notable that the Victorian Labor government has maintained a 3% wages cap (more on this in the following section).



STATE UPDATE

VICTORIA



VICTORIA

On 4 April 2023, the Victorian Government announced its new Victorian Public Sector Wages Policy.

The policy will provide employees in the Victorian public sector with:

- an annual wage increase of 3% per year, which is an increase from 1.5%;
- a lump sum “agreement sign-on bonus” equal to 0.5% of overall agreement costs; and
- any additional entitlements which are obtained as a result of employers seeking productivity improvements and efficiencies, although this will depend on the specific employer.

Unlike the situation in NSW, the Victorian Government has maintained a cap on public sector wages. When announcing the new policy, Minister for Industrial Relations Tim Pallas indicated that the increase was to account for inflation and rising living costs, and that the increase maintains the crucial balance between fiscal responsibility and supporting public sector employees.

This policy is now in effect and will apply to all Victorian public sector employers, including those who are currently bargaining for a new enterprise agreement.



NATIONAL UPDATE

COMMONWEALTH



COMMONWEALTH

On 28 March 2023, the Australian Public Service Commission (APSC) released the [Australian Government Public Sector Workplace Relations Policy 2023 \(Policy\)](#)

The Policy provides a blueprint for enterprise bargaining in the Australian Public Service (APS) and the broader Commonwealth public sector. The Policy seeks to unify the APS through the negotiation of common conditions (which will boost flexibility and mobility) and standardising wages for all employees.

There are two parts to the Policy.

1. Part one applies to employees engaged under the *Public Service Act 1999* (Cth) (PS Act) (APS Policy).
2. Part two applies to employees at other Commonwealth agencies who are not engaged under the Act (Non-APS Policy).

Where an agency has dual staffing powers and seeks to cover both APS and non-APS employees under the same enterprise agreement, the APS Policy will apply to the negotiation of that enterprise agreement.

What is different at the Commonwealth level?

The Policy replaces the *Public Sector Interim Workplace Arrangements 2022* (Interim Arrangements), which were introduced by the Morrison government.

As a result of the Policy's introduction, the public sector wage cap has been removed. That being said, the Interim Arrangements will continue to operate until 31 August 2023 and employers will still be required to provide employees with the 3% pay increase set out under the Interim Arrangements as part of a scheduled annual remuneration review.

Agencies must incorporate the centrally negotiated Common Conditions into their agency-specific agreements unless an exemption is agreed by the APS Commissioner in exceptional circumstances.

Why has the new APS policy been introduced?

The purpose of the Policy is to re-establish the Commonwealth as a “*model employer and employer of choice*” by standardising pay and conditions across the APS. Under the Policy, agencies will need to take the following principles and objectives into account when enterprise bargaining.

1. **Being a model employer:** bargaining will support the goals of a more inclusive and diverse workplace, recognising the need for the APS to reflect the community it serves.
2. **Attraction and retention:** bargaining will ensure that the public sector remains

competitive as an employer and attracts the “best and brightest” employees.

3. **Administrative efficiency:** bargaining will look to increase commonality in conditions, reduce administrative burden, and result in productivity gains.
4. **Fairness and equity:** bargaining will seek to reduce fragmentation in pay throughout the public sector and ensure simple, standardised pay ranges and conditions.
5. **Sustainability:** bargaining will represent fair and fiscally responsible use of taxpayers' money in line with community expectations, and support the ability of Commonwealth agencies to function efficiently.

The Policy will ensure that negotiated outcomes as a result of bargaining reduce barriers to movement between agencies. One of the main barriers to movement has been pay fragmentation between agencies. While the Policy will also aim to standardise wages across the APS to allow employees to transfer more readily between agencies, this will likely take some time given the level of pay fragmentation within the APS.





Key aspects of the APS Policy

The APS Policy sets out expectations for both service-wide and agency-level bargaining for agencies that employ persons pursuant to the PS Act.

The APS Policy also applies to Senior Executive Service (SES) and equivalent employees. This is an important development, given this cohort of employees is not generally covered by an enterprise agreement.

Under the APS Policy, the APSC has sought to “centralise” enterprise bargaining by requiring agencies to appoint an APSC representative as their bargaining representative.

This representative will lead bargaining negotiations for:

1. a set of Common Conditions that apply across the APS, which are based on a list published by the APSC on its [website](#) and which must be included in agency agreements; and
2. any specific conditions that an agency will need to meet its operational requirements, e.g. specialised hours or rostering arrangements, allowances and professional development programs.

This representative will also be responsible for leading negotiations for a pay increase for the agency, which must be consistent with the Commonwealth pay offer or the outcome of the service-wide bargaining process.

The APSC will also be responsible for approving and publishing the outcomes of the service-wide bargaining process, as well as approving the final version of the proposed enterprise agreement before it is provided to employees for a vote.

Key aspects of the non-APS Policy

The non-APS Policy applies to all non-APS Commonwealth entities, Government Business Enterprises, public financial and non-financial corporations, and staff of Members of Parliament.

The non-APS Policy is broadly similar to the APS Policy in a number of respects, with two key differences.

First, unless otherwise provided in the Policy, these agencies will need to provide their bargaining position to the APSC for assessment before commencing negotiation. When preparing its bargaining position, these agencies must consider:

3. the APS Common Conditions or the APS bargaining position;
4. their relevant modern award which applies to its workforce;
5. the principles and objectives of non-APS bargaining; and
6. the Federal Government’s expectations as expressed through APSC circulars and guidance documents.

Second, these agencies are encouraged to incorporate the APS Common Conditions in their enterprise agreement where practicable, although there is no strict obligation to do so.

QUEENSLAND



QUEENSLAND

On 6 July 2020, the [Employment Security Policy](#) (Policy) was restored for government agencies as part of the Queensland Government's commitment to restoring fairness for its workforce.

Employment Security Policy

Among other things, the Policy provides for:

1. the approval of Cabinet for all major organisational change and restructuring in agencies that will significantly impact on the government workforce, or have major social and economic implications;
2. employees affected by performance improvement initiatives or organisational change to be offered maximum employment opportunities within the government, including retraining, deployment, and redeployment; and
3. retrenchment only to be undertaken in exceptional circumstances where deployment or redeployment are not options, and only with the approval of the Commission Chief Executive, Public Service Commission.

Policy to encourage union membership

The [Queensland Government Commitment to Union Encouragement](#) (Commitment) has been effective since 14 May 2015, reflecting the Queensland Government's commitment to encourage union membership among its employees.

Under the terms of the Commitment, a positive and supportive role must be taken to membership recruitment activity by unions. Passive acceptance of such activities is not sufficient.

The Commitment also mandates the following:

1. Encouraging the establishment of joint union and employer consultative committees at a central and agency level.
2. Promoting reasonable and constructive industrial relations education leave in the form of paid time off to acquire knowledge and competencies in industrial relations.
3. Providing an application for union membership and information on the relevant unions to all employees at the point of engagement and during induction.
4. At the point of engagement, providing employees with a document indicating that the relevant agency encourages employees to join and maintain financial membership of an organisation of employees that has the right to represent their industrial interests.
5. Subject to relevant privacy considerations, providing details of new employees to the unions.

Queensland Health enters consultation phase for enterprise bargaining agreements

Queensland Health and the relevant union parties have moved to consultation phase for each of the following enterprise bargaining agreements:

1. **Queensland Public Health Sector Certified Agreement (No. 11) 2022 (EB11)** for administrative, operational, professional and technical employees.
2. **Health Practitioners and Dental Officers (Queensland Health) Certified Agreement (No. 4) 2022 (HPDO4)** for health practitioners and dental officers.
3. **Medical Officers' (Queensland Health) Certified Agreement (No 6) 2022 (MOCA6)** for medical officers.

Proposed certified agreements for Queensland Department of Education employees

Proposed certified agreements for employees within the Department of Education (including teacher aides and cleaners) and accompanying consultation materials was released in late March 2023.

This follows the making of the *Department of Education State School Teachers' Certified Agreement 2022* in December 2022.



QUEENSLAND

Guidance for Government-Owned Corporations (GOCs)

For Queensland GOCs, the [Guidance for Chief Executive Officers: Agreement Making and Industrial Relations](#) (Guidance) issued on 7 July 2020 remains in place.

The Guidance outlines a framework of broad principles that apply to GOCs, as well as to Seqwater and Queensland Rail (both statutory authorities established under legislation).

There are multiple key stakeholders for the enterprise bargaining and industrial relations processes relevant to GOCs, including the Office of Industrial Relations (OIR), shareholding Ministers and their agencies, and the Queensland Treasury.

GOCs are required to respect the rights of their shareholders by complying with and supporting agreement-making policy and process; ensuring that wages outcomes and conditions enhance the performance culture of GOCs and are consistent with relevant policies of the state government; and liaising with and informing the OIR on industrial relations matters.

The three principles the Guidance provides for are as follows.

Principle 1: GOCs shall comply with and support the agreement-making policy and process.

Principle 1 provides that when negotiating wages agreement outcomes and conditions, GOCs ensure consistency with the GOC Wages Policy (which has been designed to reflect factors including competitive pressures, inflation rates, sector relativities, economic outlook and overall fiscal position) and compliance and consistency with other relevant state government policies, procedures and guidelines.

Principle 2: Wages outcomes and conditions should enhance the performance culture of GOCs and must be consistent with relevant government policy.

The guidelines associated with Principle 2 include that GOCs must affirm and adhere to relevant state government industrial relations policies in Employment and Industrial Relations, including the enhancement of existing obligations due to policy or legislative changes where required.

Principle 3: GOCs will liaise with and inform OIR on industrial relations matters.

This Principle requires GOCs to keep the OIR informed of any industrial matters, matters likely to result in industrial action, and any employment-related matters that are expected to proceed to an industrial or civil tribunal.

Public Sector Act 2022 (QLD) in force

The new *Public Sector Act 2022* (QLD) (PSA) commenced on 1 March 2023, replacing the former *Public Service Act 2008*. Importantly, the PSA broadens the scope of the previous legislation and now applies to public service departments, and to public service and sector entities. The PSA does not apply to Queensland GOCs.

The PSA is one aspect of the response to two earlier reviews:

1. The 2019 comprehensive review of public sector laws, including the [Bridgman Review](#).

The Bridgman Review included a review of the [Public Service Act 2008](#) and other Queensland public employment laws including the [Hospital and Health Boards Act 2011](#). It was the first review of Queensland public sector laws that had

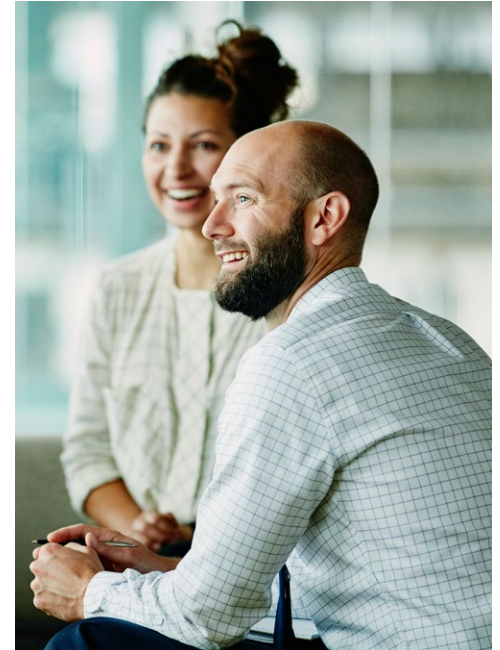
been undertaken since the late 1980s. The independent reviewer, Mr Peter Bridgman, considered that there were “significant problems and issues about the employment laws and practices that need resolution for a fair, responsive and inclusive public sector”. The Bridgman Review resulted in 99 recommendations focusing on how to make changes to public sector laws to put the employee at the “heart of the system”, and address other issues such as gender equity and equal opportunity.

The [Coaldrake Review](#), which focused on culture and accountability within the Queensland public sector.

2. The Coaldrake Review resulted in 14 recommendations directed at ensuring an accountability and integrity framework that, among other things, supports an ethical public sector culture and maintains the public’s trust in the decisions of the Queensland Government.

The PSA contemplates four priority areas, including creating a public sector that ensures fairness in the employment relationship and fair treatment of employees. On this front, the PSA establishes a range of employment arrangements for public sector employees, such as positive performance management principles, work performance principles and employment security.

A new [Discipline Directive 05/23](#) has been issued, which includes a range of significant changes, including limiting the number of possible discipline grounds that can be put to a subject officer. Further directives are likely to follow.



KEY CONTACTS

For more information on enterprise bargaining in the public sector and how recent developments apply to your organisation, please contact a representative of Lander & Rogers' Workplace Relations & Safety practice.



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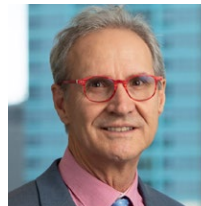
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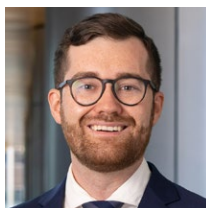
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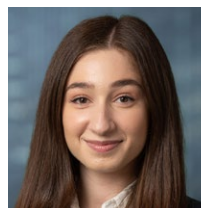
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