FairWork Commission

DECISION

Fair Work Act 2009
s.266 - Industrial action related workplace determination

Commonwealth of Australia as represented by the Department of Home Affairs

(B2016/1232)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT KOVACIC
COMMISSIONER JOHNS

SYDNEY, 11 JANUARY 2019

Industrial action related workplace determination

[1] The background to this matter is set out in our Statement of 8 June 2018[1] (the June 2018 Statement). In that Statement the Full Bench set out its intentions regarding a number of remuneration related issues. This Decision determines the remaining issues regarding the Department of Home Affairs Workplace Determination 2018 (the Determination) as foreshadowed in the June 2018 Statement and where necessary provides more substantive reasons for our previously outlined approach on remuneration related issues. This Decision also sets out in further detail our reasons for not granting an interim wage increase in December 2017 as sought by the Australian Institute of Marine and Power Engineers (AIMPE)[2].

[2] Draft workplace determinations were provided by the Commonwealth of Australia as represented by the Department of Home Affairs[3] (the Department) and the Community and Public Sector Union[4] (CPSU). By way of background, Departmental employees are currently covered by *Department of Immigration and Citizenship Enterprise Agreement 2011-2014*[5] (the DIAC Agreement) and a number of determinations made under s.24 of the *Public Service Act 1999* (the PS Act – the determinations will hereafter be referred to as s.24 determinations).

Interim wage increase – reasons for not granting

[3] We made a statement on transcript[6] on 19 December 2017 declining to grant AIMPE's application for an interim wage increase of 2 per cent. In that statement we undertook to provide detailed reasons for not granting the increase in our decision regarding the workplace determination. The statement which was published on 21 December 2017[7] included the following:

> **"[2]** With regard to the Australian Institute of Marine and Power Engineers' application for an interim wage increase of 2 per cent pending finalisation of a workplace

determination for the Department of Immigration and Border Protection, we thank the parties for their detailed written and oral submissions.

[3] We have had regard to those submissions, but in view of the Home Affairs Non-SES Moving Employees Determination 2017 (the Home Affairs Determination), we consider that granting an interim increase would effectively be a leap into the unknown given that there is no material presently before the Commission regarding the terms and conditions of employment of those employees who will be covered by the Determination. We have therefore decided not to grant the application."[8]

[4] We set out below our further reasons for not granting the interim wage increase sought by AIMPE.

[5] Section 601 of the *Fair Work Act 2009 (Cth)* (the Act) deals with writing and publication requirements for the Fair Work Commission's (the Commission) decisions and provides scope for the Commission to issue interim decisions. Specifically, s.601(1) provides as follows:

"601 Writing and publication requirements for the FWC's decisions

(1) The following decisions of the FWC must be in writing:

(a) …

(b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;

(c) ...

Note: For appeals and reviews, see sections 604 and 605."[9]

[6] Section 267 of the Act deals with the terms of an industrial action related workplace determination and provides as follows:

"267 Terms etc. of an industrial action related workplace determination

Basic rule

(1) An industrial action related workplace determination must comply with *subsection* (4) and include:

(a) the terms set out in subsections (2) and (3); and

(b) the core terms set out in section 272; and

(c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(2)) for the determination.

Terms dealing with the matters at issue

> (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period.
>
> *Coverage*
>
> (4) The determination must be expressed to cover:
>
> (a) each employer that would have been covered by the proposed enterprise agreement concerned; and
>
> (b) the employees who would have been covered by that agreement; and
>
> (c) each employee organisation (if any) that was a bargaining representative of those employees."[10]

[7] Further, we note that the Act does not include a provision which explicitly empowers the Commission to issue an interim workplace determination. As such, if the Full Bench was to have granted an interim wage increase in this case it would have had to rely on s.601(1)(b) of the Act.

[8] More specifically, for a decision granting an interim wage increase in this case to have any legal effect the Commission would be required to issue an interim determination giving effect to that interim wage increase. However, any such interim determination would be inconsistent with s.267 of the Act in that it would not include the agreed terms for the determination [s.267(2)] and terms which the Commission considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period [s.267(3)]. In other words, it is not possible to issue an interim determination which only partially deals with one of the many matters in issue in this case.

[9] The June 2018 Statement included the following:

> "**[9]**... At the hearing on 16 April 2018 the Full Bench sought the Department's view on issuing a separate decision on the wages claim. While the Department did not object to that approach the Full Bench has decided not to adopt that course but rather to issue this Statement."[11] (Endnotes omitted)

[10] The further reasons outlined above as to why we did not grant an interim wage increase apply equally to our decision not to issue a separate decision on the wages claim in this case.

Legislative framework

[11] The legislative scheme which regulates the making of a workplace determination is found in Part 2-5 of the Act. Division 3 of Part 2-5 deals with an industrial action related workplace determination and regulates the circumstances in which the Commission must make a determination and the content rules for the determination made.

[12] As to the circumstances in which the Commission must make a determination, the Commission must do so as quickly as possible if:

(a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and

(b) the post-industrial action negotiating period ends; and

(c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement.[12]

[13] As noted in the June 2018 Statement[13]:

"• on 5 October 2016 Commissioner Wilson issued an Order[14] terminating protected industrial action in support of the then proposed Department of Immigration and Border Protection (described interchangeably as DIBP or the Department as it subsequently became the Department of Home Affairs) enterprise agreement. The following day the Commissioner issued a Decision[15] outlining his reasons for terminating the protected industrial action; and

• the post-industrial action negotiating period failed to result in agreement on any of the substantive issues in dispute, with subsequent attempts to narrow the range of issues on which the parties had not reached agreement unsuccessful."

[14] As to the content rules for the determination, ss.267 and 268 of the Act together with Division 5 of Part 2-5 of the Act deal exhaustively with the content of an industrial action related workplace determination. Only four kinds of terms may be included in a workplace determination. These are discussed briefly below.

Agreed terms[16]

[15] Relevantly, in respect of an industrial action related workplace determination, an agreed term is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement. As noted above, the post-industrial action negotiating period failed to result in agreement on any of the substantive issues in dispute.

Terms dealing with matters at issue[17]

[16] An industrial action related workplace determination must include the terms that the Commission considers deal with the matters that were still at issue at the end of the post-industrial action negotiation period. In the absence of agreement between the parties on any issues the Full Bench is therefore required to determine each and every aspect of the workplace determination.

Core terms[18]

[17] The 'core terms' of a workplace determination are set out in s.272 as follows:

"272 Core terms of workplace determinations

Core terms

(1) This section sets out the core terms that a workplace determination must include.

Nominal expiry date

(2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.

Permitted matters etc.
(3) The determination must not include:

(a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or

(b) a term that would be an unlawful term if the determination were an enterprise agreement; or

(c) any designated outworker terms.

Better off overall test

(4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.

Safety net requirements

(5) The determination must not include a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:

(a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or

(b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees)."[19]

[18] As should be apparent from the above, apart from ensuring that the workplace determination contains only terms that are about permitted matters, not contain unlawful terms or designated outworker terms, passes the better off overall test (BOOT), does not contravene s.55 of the Act and complies with the requirements of Subdivision E of Division 4 of Part 2-4 of the Act, the only expressed "core term" is a term specifying a nominal expiry date that is no more than 4 years after the workplace determination comes into operation.

[19] As noted in the June 2018 Statement,[20] the duration of the workplace determination proposed by the parties ranged from effectively twelve months based on the CPSU's proposed nominal expiry date of 30 June 2019 (assuming a commencement date of the 1 July 2018 for the workplace determination) to three years as proposed by the Department, AIMPE and employee bargaining representatives, Ms Elizabeth Ryan and Mr Jon Holmes. Further, in the June 2018 Statement[21] we indicated that given the difficult, protracted and ultimately unsuccessful negotiations for an agreement we considered the CPSU's proposed timeframe too short to enable the parties to rebuild their relationship and that a period of three years was too long before the parties had the opportunity to bargain again. Against that background we indicated that a nominal expiry date two years after the date of commencement of the

workplace determination would, among other things, provide the parties with an opportunity to rebuild their relationship. We will therefore include a nominal expiry date two years after the date of commencement of the workplace determination in the determination we make.

Mandatory terms[22]

[20] The 'mandatory terms' of a workplace determination are set out in s.273 as follows:

> **"273 Mandatory terms of workplace determinations**
>
> *Mandatory terms*
>
> (1) This section sets out the mandatory terms that a workplace determination must include.
>
> *Term about settling disputes*
>
> (2) The determination must include a term that provides a procedure for settling disputes:
>
> (a) about any matters arising under the determination; and
>
> (b) in relation to the National Employment Standards.
>
> (3) Subsection (2) does not apply to the determination if FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).
>
> *Flexibility term*
>
> (4) The determination must include the model flexibility term unless FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).
>
> *Consultation term*
>
> (5) The determination must include the model consultation term unless FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements)."[23]

[21] There is no agreement about the terms of the dispute settlement procedure for inclusion in the determination. The CPSU's proposed procedure provides for the Commission to arbitrate in circumstances where mediation or conciliation fails to resolve a dispute, whereas the Department's proposed determination only authorises the Commission to arbitrate in circumstances where the parties to the dispute consent. There are also a number of other differences. We will deal with this issue later in this Decision.

[22] The Department and CPSU have both proposed that the model consultation term be included in the determination. However, the CPSU also proposes the retention (with some amendments) of a number of consultation related provisions of the DIAC Agreement, i.e. provisions relating to the National Staff Consultative Forum (NSCF) and local forums and

workplace delegates[24]. Consistent with s.273(5) of the Act and the views of the Department and CPSU the model consultation term will be included in the determination we make. We will further consider the abovementioned consultation related provisions in the DIAC Agreement which the CPSU seeks to retain later in this Decision.

[23] The individual flexibility arrangements (IFAs) provision proposed by the CPSU is broader than that proposed by the Department in that it *inter alia* provides for an individual flexibility arrangement to also deal with remuneration and leave whereas the Department's provision mirrors the model flexibility term as set out in the *Fair Work Regulations 2009* (the Regulations)[25]. In the absence of an agreed flexibility term, s.273(4) of the Act provides that the determination must include the model flexibility term. Accordingly, the model flexibility term will be included in the determination we make.

[24] On a related issue, the CPSU has included its proposed flexibility term in the section of its proposed workplace determination dealing with other conditions and arrangements, whereas the Department has included the model term in the section of its proposed determination concerning remuneration. Given that both parties flexibility term provides scope for an IFA to deal with arrangements about when work is performed, we consider the provision more appropriately belongs in the section dealing with other conditions and arrangements.

Coverage[26]

[25] An industrial action related workplace determination must be expressed to cover:

(a) each employer that would have been covered by the proposed enterprise agreement concerned; and

(b) the employees who would have been covered by that agreement; and

(c) each employee organisation (if any) that was a bargaining representative of those employees.

[26] The coverage provisions of the Department's and the CPSU's proposed determinations were identical save for the latter's provision referring to the Secretary of DIBP as opposed to the Department of Home Affairs. Coverage is dealt with in clause 2 of the draft determination proposed by each party.[27] As the DIBP no longer exists, we will adopt the coverage term proposed by the Department in the determination we make.

Merits arbitration

[27] In determining the matters at issue, the Commission is required to take into account each of the factors set out in s.275.

"**275 Factors the FWC must take into account in deciding terms of a workplace determination**

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

(a) the merits of the case;

(b) for a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive;

(c) for a workplace determination other than a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination;

(d) the public interest;

(e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time."[28]

[28] The reference to 'include' where second appearing in the first line of s.275 suggests that the Commission is not confined to those considerations alone, and can have regard to any other relevant considerations in the circumstances of the particular case.[29] The provisions found at ss.577 and 578 are therefore relevant. Section 577 provides as follows:

"**577 Performance of functions etc. by the FWC**

The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581)."[30]

[29] Section 578 provides:

"**578 Matters the FWC must take into account in performing functions etc.**

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's

responsibilities, pregnancy, religion, political opinion, national extraction or social origin."[31]

[30] Apart from these matters, a Full Bench in *Transport Workers' Union of Australia v Qantas Airways Limited; Q Catering Limited*[32] *(Qantas Airways)* made the following observations in relation to the merits considerations with which we agree:

"**[33]** This is obviously an important consideration although it is neither possible nor desirable to exhaustively list the disparate merit considerations that might be considered relevant in this matter.

[34] EBA7 is an appropriate starting point because it represents the package of terms the parties have previously agreed to apply, the terms under which the parties are presently operating, and the basis for the negotiations conducted by the parties. If terms have not been operating satisfactorily or if circumstances have changed such as to warrant a change, then a party seeking the change must make out a case for the change. Traditional merit considerations will be relevant. These fall generally within the concepts contained in the objects of the Act including the achievement of productivity and fairness through enterprise level collective bargaining, noting that this arbitration is in substitution for bargaining between the parties that did not result in an agreement.

[35] It is also relevant to have regard to practices of other employers in the airline industry and the terms and conditions applying to their employees. Such information is capable of being relevant to the fairness of particular terms as well as the appropriateness of the package of benefits in a highly competitive environment. We note in this regard that in many respects, the current wages and conditions of the employees covered by this arbitration are the highest or among the highest of comparable employees in the airline industry in Australia.

[36] As the arbitration involves the replacement of an enterprise agreement, limitations on powers for making modern awards are not relevant. However issues of principle and the approach of industrial tribunals to particular matters will be relevant to the merits of the case. These include the general reluctance of industrial tribunals to interfere with the right of management to manage its business, unless some unfairness to employees is demonstrated. The Full Bench decision in the *XPT Case* is frequently quoted as stating the relevant principle. The Bench expressed the principle in these terms:

> "It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable. The test of injustice or unreasonableness would embrace matters of safety and health because a requirement by an employer for an employee to perform work which was unsafe or might damage the health of the employee would be both unjust and unreasonable."

[37] The extent to which the parties have been prepared to deal with matters in enterprise bargaining negotiations and their approach to such matters for this and other

groups of employees will also be relevant. Such practices may provide a guide to deciding what provisions are fair and reasonable in a workplace determination applying at this enterprise."[33] [Endnotes omitted]

[31] Section 275(b) is not relevant in this case as the Commission is not tasked with making a low-paid workplace determination.

[32] Section 275(c) requires the Commission to take the interests of the employers and employees who will be covered by the determination into account. This consideration calls for an appropriate balance between the legitimate expectations of the employers and employees.[34]

[33] Section 275(d) requires the Commission to take the 'public interest' into account. The public interest imports a discretionary value judgment confined only by the subject matter, scope and purpose of the Act and refers to matters that may affect the public as a whole such as the achievement or otherwise, of the objects of the Act, employment levels, inflation and the maintenance of appropriate industrial standards.[35]

[34] The statutory distinction between the interests of the employer and employees on the one hand found in s.275(c) and on the other, the public interest found in s.275(d) means that the public interest is distinct from the interests of the parties, though the considerations may overlap so that which is in the public interest might also be in the interests of one or more of the parties.[36]

[35] One of the factors which the Commission must take into account and found in s.275(e) is 'how productivity might be improved in the enterprise ... concerned'. The meaning of the word 'productivity' in this context was considered by a Full Bench in *Schweppes Australia Pty Ltd v United Voice Victoria Branch*[37] *(Schweppes)* which stated as follows:

"**[37]** The term 'productivity' appears in several Parts of the Act:

- Part 1-1 - Introduction; s.3 - Object of the Act;
- Part 2-3 - Modern Awards: s.134 - The modern awards objective;
- Part 2-4 - Enterprise agreements; s.171 - Objects of the Part, ss.241 and 243 - Low paid bargaining and authorisation;
- Part 2-5 -Workplace determinations; s.262 - special low paid workplace determination and s.275 - Factors to be taken into account in deciding the terms of a workplace determination;
- Part 2-6 - Minimum wages; s.284 - The minimum wages objective; and
- Part 2-8 - Transfer of business; ss.318-320 - Making and variation of transferable instruments.

[38] 'Productivity' is not defined in the Act but given the context in which the word appears it is clear that it is being used to signify an economic concept. It may be regarded as a technical word and hence evidence may be admitted to interpret its meaning.

[39] The Productivity Commission defines productivity as:

> "...a measure of the rate at which outputs of goods and services are produced per unit of input (labour, capital, raw materials, etc). It is calculated as the ratio of the quantity of outputs produced to some measure of the quantity of inputs used"

[40] Similarly, the Commonwealth Treasury also defines productivity by reference to volumes of inputs and output:

> "Productivity is a measure of the rate at which inputs, such as labour, capital and raw materials, are transformed into outputs. The level of productivity can be measured for firms, industries and economies. Productivity growth implies fewer inputs are used to produce a given output or, for a given set of inputs, more output is produced."

[41] *The Oxford Dictionary of Economics* (2012) similarly defines productivity as the 'amount of output per unit of input achieved by a firm industry or country'.

[42] We accept that the conventional economic meaning of the word productivity is the number of units of output per units of inputs. Productivity is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. Schweppes incorrectly equates productivity with the average cost of labour per unit, which, properly understood, is a measure of nominal unit labour costs.

[43] In our view productivity, as used in the Act, refers to the conventional economic meaning of the quantity of output relative to the quantity of inputs. It is quite different in concept to the price of output and price of inputs, including the price of labour.

[44] The legislative context is also important. Context may require a word to be read more narrowly than if was considered in isolation. In this regard we note that the 'modern awards objective' (s.134) requires consideration of the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden. The distinction between productivity and employment costs recognises that whilst employment costs will be affected by productivity in relation to the quantity of labour input required, the price of labour constitutes a separate and distinct consideration. A similar distinction is made between productivity and business competitiveness and viability in the 'minimum wages objective'. It may be presumed that Parliament intended the word productivity to have the same meaning throughout the Act.

[45] Accordingly, we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed to the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

> **[46]** Financial gains achieved by having the same labour input - the number of hours worked - produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense. A reduction of unit labour costs, achieved under Schweppes' shift proposal through less overtime and lower shift loadings, does not constitute productivity within that conventional meaning. Similarly, an increase in the value of output achieved through product differentiation and a higher average value of the quantity of output is not productivity in the conventional sense."[38] [Endnotes omitted]

[36] As to s.275(f) and (g), these matters are of some controversy in this matter. The first of these matters is directed to the conduct of the bargaining representatives during bargaining for the agreement in question and therefore focuses on the bargaining process leading to the termination of the industrial action and this arbitration.[39] The consideration of conduct should be applied against the background of the rights and obligations available to parties involved in enterprise bargaining under the Act.[40] In general, conduct that is lawful and available under applicable laws would not be considered unreasonable because the scheme of the Act, as with predecessor legislation, permits parties to take protected industrial action and engage in robust negotiation tactics in support of their claims in enterprise bargaining.[41] We give consideration to these factors later in this decision.

[37] Section 275(g) requires the Commission to take into account incentives to continue to bargain at a later time, and is consistent with the encouragement of collective bargaining and the desirability of parties making enterprise agreements central to the objects of the Act.[42]

The Department's case

[38] The Department contended that on any view the CPSU's proposed workplace determination came at an extraordinary cost to the public purse. The Department further contended that the CPSU's endeavour to persuade the Full Bench to adopt a predisposition towards existing terms and conditions was flawed for several reasons, including that the CPSU's proposed workplace determination went beyond the existing terms and conditions and sought to "cherry pick" the more beneficial provisions of the DIAC Agreement and the *Australian Customs and Border Protection Service Enterprise Agreement 2011-2014*[43] (the ACBPS Agreement which together with the DIAC Agreement will be referred to as the Agreements). The Department also posited that the CPSU did not suggest that there were any gains in productivity attributable to measures in its proposed workplace determination, adding that any productivity gains which had been secured by the Department following integration were predominantly attributable to the introduction of new technologies and systems of work.

[39] The Department submitted that the parties' outlines of submission in opening revealed two significant differences in the positions of the CPSU and the Department in relation to the task of the Full Bench. First, they differ on the approach of the former Australian Industrial Relations Commission in *CFMEU v Curragh Queensland Mining Ltd*[44] *(Curragh)* and second they differ on the issue of whether the Full Bench ought to start from a disposition that a party seeking to make a case for change from existing terms and conditions has the onus of making a case for that change. As to the first issue, the Department submitted that to the extent that the CPSU sought an outcome that was in some way founded upon what would have happened had bargaining continued that should be rejected, adding that it would be speculative to say the least as to what the outcome may have been in circumstances where the parties had such entrenched positions and were most unlikely to reach agreement. With regard to the second

issue, the Department contended that the objective considerations in s.275 of the Act did not afford any presumptive primacy to the status quo and that if presumptive primacy was to be afforded to a single pre-existing enterprise agreement it would be the DIAC Agreement on the basis that it had historically applied to the majority of employees who would be covered by the workplace determination.

[40] In respect of the s.275 considerations, the Department submitted that:

- the merits of its proposal were informed by
    - its limited and diminishing financial resources which confirmed the need to secure improvements in productivity and efficiency and reduce labour costs, and
    - the requirement for flexibility and agility in its workforce in order to perform its public duty efficiently and effectively;
- the suggestion that the Full Bench should simply retain the terms and conditions of the various pre-existing enterprise agreements that applied to Departmental employees through the use of schedules to the proposed workplace determination should be rejected;
- there was merit to its claim for a determination which relieved it from the sub-optimal levels of productivity and efficiency of its workforce arising from the constraints of the Agreements in relation to hours of work, rostering, disparate terms and conditions of employment for similar roles and remuneration and allowances;
- there was also merit to its case in relation to the impact of the CPSU's proposal on jobs and the financial position of the Department and its ability to fulfil its statutory functions;
- in assessing the merits the Commission should also have regard to a number of general economic factors;
- the interests of employers may include ease of administration, productivity gains through better utilisation of resources, cost savings, greater certainty and flexibility, reducing the size of the workforce and the introduction of new technologies to lower operating costs and in this case also includes ensuring that it was able to operate as efficiently and effectively as possible in the strict regulatory environment in which it exists;
- the interests of employees may include increased income, avoidance of disruption to domestic life, greater security employment with opportunities for advancement and having input into operational decisions without interfering with managerial prerogative;
- the assessment of the interests of employers and employees is evidence-based;
- the total cost of its salary increase proposal for the three years of its proposed workplace determination was $144.9 million;

- its proposed workplace determination, if made, would result in a phased reduction in staffing levels over three years, with that reduction in staffing levels to be facilitated by natural attrition;

- the estimated cost of the CPSU's proposed determination was $613.9 million over three years which would result in additional costs over and above the Department's proposal of $469 million over three years;

- there was public interest in a government agency adhering to the policies of the government of the day adding that this is what the Department sought to do during bargaining;

- consistent with authority there was significant public interest in the Full Bench giving weight to the Government's Workplace Bargaining Policy in the context of the Government's overall fiscal strategy;

- the evidence firmly established that the Department was unable to fund the cost of the CPSU's proposed workplace determination internally;

- there was considerable downward pressure on the Department's operating budget;

- as both Mr Swan and Dr Emerson conceded, the Government's capacity to meet costs is a matter for the Government of the day;

- there was significant public interest in ensuring that the terms of any workplace determination could be funded through internal funding within the Department, adding that such a position was not undermined in any way by the evidence of Mr Wayne Swan and Dr Craig Emerson;

- the Commission must look favourably upon terms which support or permit potential improvements in productivity;

- one way in which the Commission could contribute to productivity improvement was to give attention to unreasonable restraints on productivity and to eliminate them where ever that can be done consistent with the maintenance of fair standards of treatment for employees;

- in respect of the conduct of bargaining representatives, at its highest the evidence established nothing more than that the Department refused to make concessions sought by the CPSU during bargaining;

- it accepted that all bargaining representatives took a strong stand in the negotiations but that in pursuit of that stand no one acted inappropriately;

- anything said or done outside of bargaining was not relevant when considering the conduct of bargaining representatives;

- the CPSU had failed altogether to establish that the Department had acted unreasonably or contrary to the good faith bargaining requirements during bargaining;

- throughout bargaining the CPSU rigidly adhered to its endorsed bargaining position, adding that at no stage did the CPSU document a proposal in relation to a composite rate of allowances, a proposal on wages that would establish pay parity for all employees or a proposal for the removal of unnecessary duplication of allowances;

- it was entirely appropriate for the Department to engage in bargaining in accordance with the parameters set by the Government's Workplace Bargaining Policy, adding that there was nothing contrary to the good faith bargaining requirements in a non-party exercising some influence over a party negotiating an enterprise agreement;

- it made appropriate concessions on numerous occasions during bargaining, gave genuine consideration to the proposals put by the CPSU through bargaining, gave genuine consideration to the wishes and demands of employees and responded to CPSU proposals or requests for information in a timely manner;

- the matters in ss.275(f) and (g) were not of sufficient gravity to influence the outcome or the content of the workplace determination in this case;

- in reaching a view as to the entirety of the workplace determination, the Commission should stand back and make an overall assessment as to whether the package of terms and conditions of employment is a disincentive to future bargaining, i.e. the Commission should leave room for the parties to negotiate a new enterprise agreement to replace the workplace determination.

[41] The Department contended that its proposed workplace determination sought to promote a rational and measured set of terms and conditions of employment. In its submissions, the Department dealt at length with the competing remuneration proposals. In the June 2018 Statement we set out the Department's position on remuneration.[45] Given that the June 2018 Statement set out our intentions regarding a number of remuneration related issues (including wages), we do not repeat here the Department's submissions regarding remuneration.

[42] In respect of the evidence in this matter, the Department submitted that where there was a disparity between the evidence of its witnesses Mr Murali Venugopal and Mr David Leonard on the one hand and the union officials and delegates on the other hand, that the account given by Messrs Venugopal and Leonard was to be preferred. The Department also stated that it did not challenge the credit of any of the CPSU delegates or officials though it contended it was apparent from the evidence that they gave that they were heavily invested in the opinions that they expressed. As such, the Department posited that their evidence was less than objective and less likely to assist the Full Bench in carrying out its task. The Department maintained that there was no reason to reject or devalue the evidence of any of its witnesses.

[43] Beyond that, the Department submitted that the prerequisites set out in s.266 of the Act had been met, that its proposed workplace determination included the core terms required by s.272 of the Act and the mandatory terms for the purposes of s.273 of the Act, and that its proposed determination comfortably satisfied the BOOT.

[44] In its Outline of Oral Submissions[46], the Department contended that the CPSU's submissions disregarded the distinction between negotiation and arbitration, invited the Full

Bench to evaluate the negotiating position of the parties near the end of bargaining and diverted attention from the merits of the provisions of the parties respective workplace determinations. The Department further contended that the CPSU invited the Full Bench to adopt a number of terms from its third proposed enterprise agreement (third offer)[47] as the starting point for the purposes of the workplace determination, adding that if accepted it would have the effect of removing any incentive to bargain.

[45] The Department submitted that the following extract from the decision in *Curragh* should guide the Full Bench:

> "… Nevertheless, there is much to be said in cases of this kind for preserving, as far as it can be preserved, the traditional distinction between negotiation and arbitration so that the task of arbitration can take place without any need to examine the relative correctness of the parties' negotiating positions or tactics unless such an examination contributes in an objective way to an evaluation of the merits of the claim. Such an approach is not inconsistent with the requirement upon the Commission to have regard to the extent to which the conduct of the negotiating parties during the bargaining period was reasonable."[48]

[46] While the Department acknowledged that its third offer contained a package of terms and conditions that were acceptable to it at a time when it had been subjected to significant industrial action, it submitted that the compromises offered in those circumstances represented a proxy for its interests in the context of these proceedings. The Department added that it should not be criticised for not including the compromised conditions in its proposed determination in circumstances where *inter alia* those conditions were rejected by the CPSU and employees and the CPSU never compromised on its bargaining position.

[47] As to the criticisms of the development of its proposed workplace determination, the Department rejected any suggestion that Mr Leonard was on a frolic of his own, positing that the process by which an employer arrives at the contents of a proposed workplace determination was not within the scope off any of the factors in s.275 of the Act.

[48] Also in its Outline of Oral Submissions the Department responded to the CPSU's submissions on a range of issues, including allowances and other entitlements, performance management and consultation. Similarly, the Department also responded to the submissions of AIMPE, Ms Ryan and Mr Holmes on a number of matters in issue.

[49] Key aspects of the Department's oral submissions included that:

- it was wrong to say that any presumed primacy should be given to anything, adding that if there was to be any presumed primacy given to anything it certainly was not the ACBPS Agreement[49];

- the decisions in *Qantas Airways* and *Health Services Union v Austin Health*[50] *(Austin Health)* stand for the proposition that in making a workplace determination the Commission should avoid, to the extent that it can, including any material which might be described as aspirational content[51];

- those decisions informed its position in relation to the CPSU's claims regarding freedom of association and occupational health and safety and to a certain extent also informed its position in relation to performance management[52];

- were the Commission to adopt a number of terms in the Department's third offer as the starting point for the purposes of the workplace determination it would have the effect of removing any incentive to bargain[53];

- in terms of the productivity improvements that had occurred since integration, there was no clear evidence that those productivity gains were attributable to labour input[54];

- in terms of how productivity might be improved, the evidence was that the Department was satisfied that the flexibilities that would be delivered up through its proposed workplace determination and the removal of unreasonable restraints would deliver up productivity gains[55];

- in respect of the CPSU's alternative proposal as outlined in its correspondence of 12 April 2018[56] (see below)

    - the proposal simply complicated things by adding another layer, particularly as the Commission would still be required to determine whether the content proposed in the CPSU's correspondence is appropriate to form the terms of a workplace determination having regard to s. 275 of the Act[57],

    - if the proposal simply involved a matter of attaching a schedule and saying that consideration of those matters could be left until later then the CPSU was inviting the Commission to abrogate its statutory responsibility to make a workplace determination[58],

    - the proposal was antithetical to an essential element of the CPSU's case, i.e. the need for equity or parity in terms and conditions of employment for all employees doing the same work[59],

    - the suggestion that it was appropriate for the Commission to adopt the CPSU's alternative approach should not be accepted[60], and

    - it would be totally inappropriate for the Commission to be seduced by the alternative position as offering some convenient or easy way out[61].

[50] Ms Jenet Connell, the Chief Operating Officer (COO) and Deputy Secretary Corporate of DIBP; Mr Steven Groves, DIBP's Chief Financial Officer (CFO) and First Assistant Secretary, Finance Division; Mr David Leonard, DIBP's Assistant Secretary, Work Health and Safety and Enterprise Agreement Taskforce; Mr Murali Venugopal, DIBP's First Assistant Secretary, People Division; and Mr Clive Murray, Assistant Commissioner, Strategic Border Command with the Australian Border Force (ABF), all gave evidence for the Department. Their evidence is summarised below.

Ms Jenet Connell

[51] In her witness statement[62] Ms Connell provided an overview of the 2015 integration of the former DIAC and Australian Customs and Border Protection Service (ACBPS) to form DIBP (hereafter referred to as integration) stating that integration was formally completed on 30 June 2016. Among other things, Ms Connell deposed that the pursuit of a unified culture of integrity and professionalism had been inhibited by the inequity in terms and conditions of employment between the former DIAC and ACBPS. Ms Connell further deposed that a unified workplace culture would not be achieved unless DIBP secured:

- streamlined terms and conditions of employment by way of a single industrial instrument;
- a technological environment which was consistent and streamlined across the entire agency; and
- operationally efficient accommodation for its entire workforce with a significantly reduced number of premises which enhanced the coordination and co-location of complimentary elements of DIBP's operations.

[52] Key aspects of Ms Connell's oral evidence included that:

- DIBP Senior Executive Service (SES) salaries had been increased in November 2016 and July 2017;[63]
- the failure to achieve a new enterprise agreement for DIBP within 12 months of integration, consistent with the expectation set out in the joint Australian Public Service Commission (APSC) and Department of Finance publication *Machinery of Government Changes A Guide for Agencies*,[64] was not through a lack of effort, adding that there was no exemption from the Government's Workplace Bargaining Policy to facilitate integration;[65]
- the Department continues to deliver and meet growing volumes of activity and its key performance indicators;[66]
- some staff had been involved in the introduction of new technologies to assist with their roles, later accepting that where this had occurred the intent was to free up staff to do higher level work with the result being that some employees may be performing at a higher skill level;[67] and
- she did not necessarily agree with the proposition that employees had taken on increased responsibility since integration.[68]

Mr Clive Murray

[53] Mr Murray provided two witness statements.[69] In his first witness statement Mr Murray provided a comprehensive overview of the establishment, structure, operations and future priorities of the ABF. Among other things, Mr Murray deposed that:

- since integration there had been significant reforms to the way in which DIBP targeted areas of risk and intervened to minimise vulnerabilities in the various domains in which it operated;

- the ABF needed to move its resources away from relatively low level transactional-based work which could be facilitated through improved technology measures so as to deploy personnel into roles requiring the exercise of professional judgement in relation to areas of higher assessed risk;

- to do this it needed the means to generate a sense of "one" ABF and have the ability to upskill its officers without the distraction caused by the current differing industrial arrangements; and

- the activities of the ABF continued to increase, e.g. since 2011-2012 incoming air cargo had increased by 90 per cent, imported sea cargo had grown by 17 per cent and the number of international air and sea travellers had increased by approximately 25 per cent.

[54] In respect of the impediments arising from DIBP's existing industrial arrangements, Mr Murray deposed that the DIBP workforce was made up of people performing the same duties in blended teams but who were engaged on different terms and conditions of employment. Examples cited by Mr Murray included the inequities in rostering arrangements due to different working hours for officers formally covered by the Agreements and the different conditions applying to Executive Level (EL) 2 employees under those Agreements. Mr Murray further deposed that:

- this impaired the development of a unified professional law-enforcement culture in the ABF and was a genuine impediment to the cultural change management strategies to establish a credible, professional ABF;

- this was continuing to prove difficult to manage in a day-to-day operational environment;

- the Department's proposed workplace determination removed these constraints, while a number of terms of the CPSU's proposed workplace determination had the potential to seriously impair or undermine the ABF's operations;

- the significant upfront cost of the CPSU's proposal would have a material effect on DIBP's financial position with a consequent impact on the ABF's capacity to fulfil its principal functions; and

- many of the allowances under the current industrial arrangements which the CPSU sought to preserve were a disincentive for some employees to leave positions with generous entitlements.

[55] In his witness statement in reply,[70] Mr Murray *inter alia* responded to aspects of the witness statements of a number of CPSU witness statements. In particular, Mr Murray:

- disagreed with Mr Michael Suijdendorp's statement that it would be difficult for DIBP to attract and retain suitable qualified and committed staff in the absence of standards of remuneration which kept pace with external employers, citing two recent recruitment rounds which had attracted 2,300 applicants; and

- in respect of Ms Brooke Muscat-Bentley's statement, agreed that there were areas of DIBP's operations where volumes were increasing such as airports but disagreed that this had necessarily increased workload pressures on individual employees beyond what was ordinarily expected of ABF personnel in their day-to-day activities.

[56] In his oral evidence Mr Murray attested that:

- the expectations of staff had grown in the sense that they had greater responsibility in terms of being deployed in mobile and agile teams, later acknowledging that ABF employees were both cooperating in implementing the reforms outlined in his witness statement and performing at a higher level;[71]

- not all ABF personnel were working in "blended" teams, i.e. teams comprised of ABF and DIBP staff;[72]

- with regard to the ABF 2020 document[73], he was not suggesting that there were any obstacles to achieving the various objectives (the so-called eight pillars) set out in the document though there were some impediments in terms of growing a culture of a professional ABF;[74]

- the fact that staff had not had a pay increase for four years was having an impact on morale;[75]

- the ABF had been able to deal with any concerns about allowances making people inflexible by directing staff to relocate, adding that staff movements were happening;[76]

- he disagreed that requiring marine engineers to work 195 days as opposed to 191 days each year was not fair or unreasonable in the circumstances;[77] and

- he was unable to explain why the quantum of allowances proposed in the Department's workplace determination was lower than what had been proposed in the various agreements which were voted on by employees.[78]

Mr Murali Venugopal

[57] Mr Venugopal filed three witness statements.[79] In his first witness statement Mr Venugopal provided a detailed overview of integration, the current industrial instruments applying to DIBP, the enterprise agreement negotiations for DIBP, the composition of DIBP's workforce, Australian Public Service (APS) employment arrangements and relevant legislation and an outline of what he considered to be essential elements for a workplace determination. Among other things, Mr Venugopal deposed that:

- integration required a particular focus on leadership and culture and the development of a new workforce model, adding that it was essential for DIBP to secure terms and conditions of employment which would support an agile and mobile workforce;

- limited financial resources imposed a significant constraint upon DIBP when negotiating for an enterprise agreement and in proposing its workplace determination;

- more than half of DIBP's expenditure was on labour costs, adding that given the abovementioned financial resourcing constraints the net cost of any enterprise agreement would have a direct impact on labour costs and jobs;

- throughout the enterprise agreement negotiations DIBP sought to secure an outcome which would preserve a workforce which could sustain an efficient and effective service in the face of increasing demands and diminishing resources; and

- the Department's proposed workplace determination would result in a phased reduction in staffing levels over three years facilitated by natural attrition whereas the CPSU's proposed workplace determination would result in an immediate and drastic reduction in staffing levels such that he could not see how DIBP could sustain an efficient and effective service.

[58] As to the essential elements of a workplace determination, Mr Venugopal deposed that they were:

- establishing a single set of terms and conditions which included consistent working hours for all employees, a single set of pay ranges and a rationalised allowance structure that reflected a multi-skilled, deployable location based workforce;

- allowing change to be progressed without disproportionate consultation while providing for consultation on major change and proposals to change working hours and arrangements;

- providing the flexibility required to operate an around-the-clock frontline operation with highly variable work requirements in a way which allowed the Department to determine when work was required to be performed, to set employee attendance requirements after appropriate consultation and which provided flexibility for employees within operational constraints;

- providing remuneration outcomes which were sustainable and affordable; and

- providing location based allowances which reflected contemporary standards.

[59] Mr Venugopal further deposed that the Department's current workplace settings were debilitating and entrenched inflexibilities through skill and location based allowances, constrained the Department's ability to deliver the necessary operational model required to protect Australia's border and manage the movement of people and goods across it and were not fit for purpose for a modern, skilled workforce that worked in blended teams. More specifically, Mr Venugopal deposed that:

- the current allowance based structure of terms and conditions entrenched employees in certain locations and roles because the income differential associated with some allowances meant that employees were reluctant to take up new positions which did not carry the same allowances;

- the administration of the 60 or so existing allowances required manual intervention by payroll staff and an understanding of each allowance and how and when it applied;

- the current consultation provisions were ineffective; and

- performance management was another area in need of reform, describing the current performance assessment and measurement mechanisms as inefficient and resulting in management being reluctant to undertake any performance management for fear of getting buried in a detailed and inefficient process.

[60] In his second witness statement[80] Mr Venugopal provided a more detailed overview of the enterprise agreement negotiations. In doing so, Mr Venugopal disputed aspects of Mr Muffatti's evidence and denied any suggestion that the Department's conduct throughout the negotiations was anything other than reasonable and in accordance with good faith bargaining requirements. Mr Venugopal also deposed that in the context of bargaining meetings over the period late August to late September 2016 the CPSU position remained largely unchanged, adding that at no stage did the CPSU table a direct response to any enterprise agreement proposed by the Department or table a draft of its own. Beyond that, Mr Venugopal acknowledged that the Department had been able to secure improvements in productivity over the period since the expiry of the Agreements. Those productivity improvements he deposed stemmed from advancements in technology, the development and more targeted use of intelligence, streamlining processes through the use of technology and through programs such as the Trusted Trader Programme. Mr Venugopal added that these improvements in productivity had been achieved through considerable financial investment by the Department.

[61] Mr Venugopal used his third witness statement[81] to tender a number of documents relating, among other things, to the Department's terms and conditions of employment.

[62] Mr Venugopal was cross examined extensively regarding a number of issues, particularly the performance management provisions reflected in the Department's proposed workplace determination. Key aspects of Mr Venugopal's oral evidence were that:

- in January 2016 he became the Department's lead negotiator in the enterprise bargaining negotiations;[82]

- at no stage did he discuss with the APSC the progress of the enterprise bargaining negotiations;[83]

- the Department indicated in proceedings in the first half of April 2016 relating to the suspension of the CPSU's protected industrial action that it was ready to put a further proposed agreement on the table in the enterprise bargaining negotiations;[84]

- there were no enterprise bargaining negotiations between 27 April 2016 (when CPSU protected industrial action was suspended) and 30 August 2016, primarily as a result of the caretaker period from mid-May until the latter part of July 2016 and the need to obtain APSC approval of the proposal to be tabled;[85]

- the Department was constrained in bargaining by the Government's Workplace Bargaining Policy and by its bargaining position/agency specific considerations;[86]

- the removal of policy matters from the proposed agreement resulted in employees not having recourse to the proposed agreement's dispute resolution procedure over those matters;[87]

- the Department's workforce had been agile, flexible and able to adapt following integration;[88]

- he did not agree that that there was no impediment in the Department's current employment arrangements to the workforce being agile, flexible and adaptable, citing the range of location and job specific allowances as an example but later conceding that he did not have any direct experience in directing an employee to move and that employee refusing to do so because of the Department's existing industrial arrangements;[89]

- it was not the case that the difference between the Department and bargaining representatives was that the Department wanted to reduce conditions to the lowest common denominator, though he acknowledged that employees who currently received the Use of Force Allowance would be around $700 per annum worse off under the Department's proposed composite allowance while those employees who were also paid the Custodial Firearms Instructor Allowance would be a further $700 per annum worse off under the proposal;[90]

- the CPSU indicated in the negotiations that it was willing to discuss a composite allowance on the basis that no one went backwards;[91]

- his criticism of the CPSU for not providing a proposed agreement was not unfair in circumstances where he had not asked the union to do so because it was his expectation that the CPSU would provide him with alternative clauses;[92]

- on 9 September 2016 Mr Richard Muffatti responded to his request to provide in writing the CPSU's position as to how bargaining could be resolved[93], adding that Mr Muffatti had also put to him in meetings that the Department's failure to depart from the Workplace Bargaining Policy was causing problems in reaching agreement, that the Department was being inflexible and that the Department's proposals would reduce the take-home pay of CPSU members;[94]

- the negotiations turned on what the Department sought;[95]

- the Department did change its position on some key issues in the negotiations in September 2016, e.g. on 27 September 2016 on the issue of hours of work the Department agreed that it would grandfather a 7 hour 21 minute working day for former ACBPS employees, though he agreed the Department's proposed workplace determination provided for a 7 hour 30 minute working day for all employees;[96]

- with regard to the comments in his witness statement on the issue of performance management:

    - he had not conducted a formal review of performance in the Department,

- data drawn from the Department's performance management system indicated that in 2015-2016 one employee had been rated as not meeting requirements out of a workforce of 14,000,

- the Department's proposed approach, i.e. shifting those provisions setting out the details of the Department's performance management process from the enterprise agreement to policy documents, predated his involvement in the enterprise bargaining negotiations,

- the Department's proposed approach of replicating the existing approach in policy documents would not result in the removal of any impediments or streamlining, and

- managers approached performance management with some degree of hesitation in circumstances where the process was reflected in an enterprise agreement as opposed to a policy document, agreeing that this might be as a result of fears that under the former arrangement a dispute might be brought before the Commission;[97]

- the Department's third offer was costed at $206 million whereas its proposed workplace determination was costed at $144.9 million, disputing that this was because the Department's third offer was significantly more generous than its proposed workplace determination;[98]

- the motivation behind the difference between the Department's third offer and its proposed workplace determination was that the latter more truly reflected the Department's position, adding that the motivation was not to punish employees for voting down the third offer and that the workplace determination was entirely parity driven;[99] and

- further on the issue of performance management he deposed that:

    - the existing arrangements were inefficient for several reasons, including that the current arrangements provided for a three point rating scale as opposed to a five point rating scale which he considered provided a better opportunity to provide meaningful feedback,

    - the Department's proposed workplace determination simply referred to the existence of a performance management framework and did not contain aspirational language whereas the Department's third offer had slightly aspirational language,

    - not a lot of disputes over performance management had been brought to the Commission in recent years by either the Department or its employees,

    - a right of review under s.33 of the PS Act would remain under the Department's proposed approach to performance management,

    - clause 6.7 in the Department's third offer merely replicated what was in policy, and

- accepted that whatever was written in an agreement was enforceable and was therefore a right and that should performance management provisions be removed from the determination they would no longer be enforceable and therefore would no longer be a right.[100]

Mr Steven Groves

[63] Mr Groves filed three witness statements[101]. In those witness statements, Mr Groves *inter alia* provided an overview of the Commonwealth budget cycle and associated processes, the major elements of the DIBP budget and costings of both the Department's and CPSU's proposed workplace determinations (including the assumptions underpinning those costings). Mr Groves also responded to several of the witness statements lodged on behalf of the CPSU, i.e. the witness statements of Mr Swan, Dr Emerson, Mr Christopher Callanan, Professor Martin Watts and Ms Muscat-Bentley. Key aspects of Mr Groves' evidence included that:

- for the year ending 30 June 2016, DIBP incurred a technical operating loss of $22 million of which $23 million was attributable to movements in the long-term bond rate and the impact that had on the calculation of employee provisions (i.e. the value of accrued but untaken leave);

- the total cost of the Department's proposed determination was $144.9 million whilst the total ongoing additional cost of the CPSU's proposal was $613.9 million over three years;

- the Department would be required to run at a significant operating loss in the first year of operation of the CPSU's workplace determination given that the direct budgetary impact in the first year would be $364.5 million (comprised of $175.5 million representing the one-off cost of the CPSU's proposed backdated pay increases and the $189 million upfront cost of the ongoing 10 per cent pay increase);

- meeting the cost of the Department's proposed determination would require cost savings equating to 657 full-time equivalent (FTE) positions over three years, whilst the CPSU's proposed determination would require cost savings equating to some 1900 FTE positions over three years (excluding any allowance for the cost of redundancies);

- he agreed with Mr Swan and Dr Emerson that decisions on the allocation of funds were a matter for the Government of the day but in respect of their option concerning the Contingency Reserve in the Commonwealth Budget he saw no justification for any such provision;

- disputed aspects of Mr Callanan's, Professor Watts' and Ms Muscat-Bentley's evidence; and

- DIBP was under critical and increasing financial pressure and was struggling to meet the Government's objectives within current fiscal policy settings.

[64] In his oral evidence Mr Groves disputed that there had been savings to the Department due to the absence of any pay rise to employees for over four and a half years, suggesting that

there was no saving if the Department employed more people.[102] Mr Groves further stated that there was no identifiable separate pool of money that was made up of any saving from not having to pay salary increases[103]. Mr Groves also attested that a one per cent increase in salary incurred a cost in the order of $14 million.[104] As to the efficiencies resulting from integration, these were estimated at $270 million over a four-year period, with an ongoing saving of $90 million per annum built into the Department's base appropriation.[105]

Mr David Leonard

[65] Mr Leonard tendered two witness statements[106]. In those witness statements Mr Leonard provided a very detailed overview of the history of bargaining in the Department and rebutted aspects of the evidence of a number of CPSU witnesses, i.e. Mr Rupert Evans, Ms Natalie Hartman, Mr Muffatti, Ms Muscat-Bentley and Ms Stacey Harris. In his witness statements, Mr Leonard also provided a detailed explanation of the rationale underpinning the Department's position on various elements of its proposed workplace determination (Mr Leonard's evidence in this regard will be set out as appropriate when dealing with the matters in issue below). Among other things, Mr Leonard deposed that:

- there were 18 'Round One' bargaining meetings over the period 14 April 2015 to 27 May 2015 which did not produce an agreement, adding that in September 2015 the Department put its first proposed agreement to a ballot of employees with the agreement not voted up;

- there were five 'Round Two' bargaining meetings held over the period 26 November 2015 to 3 February 2016 which did not produce an agreement, with the proposed agreement again rejected by employees;

- there were six 'Round Three' bargaining meetings held over the period 30 August 2016to28 September 2016 which again did not produce an agreement, with the Department's third offer again not voted up (the ballot occurred after the CPSU's protected industrial action had been terminated);

- throughout the course of negotiations the Department's objective was to make an enterprise agreement that provided for:

    - a single set of terms and conditions reflecting the integrated Department,

    - a sustainable salary increase, with the Department having an open mind as to how the remuneration offer was to be structured,

    - a rationalised allowance structure,

    - flexibility to ensure that the workforce could adapt to meet operational demands, and

    - a concise set of employment conditions without aspirational content or matters that were appropriately provided for in law or better suited to procedural or policy documents;

- he rejected any suggestion that those who participated in the bargaining process on behalf of the Department had acted in any way unreasonably or contrary to the principles of good faith bargaining, though he accepted that from time to time bargaining representatives on all sides encountered a level of frustration with the process which may have manifested itself in some tension bubbling to the surface during discussions;

- any suggestion that the Department was in some way constrained against its will to put offers which were in strict conformity with the Government's Workplace Bargaining Policy was totally without foundation;

- the Department's position throughout bargaining was governed by a range of relevant considerations one of which was the Government's Workplace Bargaining Policy, with the other two being its financial position and the need to rationalise the entire range of terms and conditions of employment;

- at no stage did the Department revoke agreement previously provided in relation to terms and conditions because the matter was deemed not to meet the Government's Workplace Bargaining Policy; and

- any suggestion that the Department remained intransigent in the Round Two bargaining meetings had no foundation.

[66] Key aspects of Mr Leonard's oral evidence included that:

- approximately 2000 employees would not get a pay rise for a couple of years under the Department's proposed workplace determination, with a number of EL 2 employees unlikely to get any pay increase during the life of the determination;[107]

- he was unable to indicate how many employees would lose out were the Commission to include the Department's proposed composite allowance in the workplace determination it made;[108]

- the Department was not negotiating with the APSC as well as bargaining representatives on issues such as the five per cent rule on promotion but rather was giving the APSC arguments as to why it should have policy approval for what it was proposing in respect of those issues;[109]

- with regard to the Department's interactions with the APSC in respect of the Department's third offer, he adopted a practice of making sure that the APSC had quite good visibility of the Department's drafting and thinking so as to expedite the approval process, characterising the approach as "taking insurance against having made the wrong judgement"[110]

- the Department's proposed determination differed from its third offer as it was framed around terms which were considered most appropriate for the Department going forward whereas earlier proposed agreements were prepared in an attempt to reach agreement with the workforce;[111]

- the Department's proposed determination removed some elements contained in its third offer that were desirable to employees and replaced them with things that were desirable to the Department, with those changes including the removal of provisions relating to the right to representation, policies and procedures only being introduced or varied following consultation, salary increases only applying to those employees within the salary bands proposed for the workplace determination, the NSCF, and retention periods for excess employees;[112]

- he agreed that the Department's proposed determination sought extensive change from the current DIAC Agreement and s.24 determinations and would entail a significant diminution of existing terms and conditions;[113]

- the Department's third offer was approved by the APSC as consistent with the Government's Workplace Bargaining Policy, adding that the offer supported the Department's strategic objectives, fitted within its funding envelope and in the Department's view was a fair and balanced offer which it could live with;[114]

- the Department's proposed determination retreated significantly from its third offer, accepting that it was less fair to employees and less balanced than the third offer but disagreeing that this was because the Department sought to punish employees for voting down that offer;[115]

- the Government's Workplace Bargaining Policy, affordability and the tolerance of the Department's Executive for reductions in staff numbers were factors which drove the Department's various wage offers;[116]

- there were approximately 740 ABF employees in receipt of the Use of Force Allowance, acknowledging that the $1,500 per annum Composite Allowance (into which the Use of Force Allowance would be rolled) in the Department's proposed workplace determination would see these employees lose $700 per annum;[117]

- he used the APSC to assist with drafting of the Department's proposals;[118]

- with reference to the APSC email of 22 July 2015[119], the APSC was co-ordinating bargaining for agencies generally in terms of when agreements would be put out to vote;[120]

- the APSC was an integral part of bargaining for the DIBP agreement though he disagreed that the effect of the APSC's involvement was that the negotiations with bargaining representatives were almost irrelevant;[121]

- he did not believe that APSC approval was sought in respect of the Department's proposed workplace determination;[122]

- he did not canvass the changes between the Department's third offer and its proposed workplace determination with the APSC nor did he or the Department prepare any document comparing those two documents;[123]
- it was a conscious decision of the Department's Executive to "go harder" in the Department's proposed workplace determination when compared to its third offer;[124]

- there were very few matters relating to under-performance in the Department which had come before the Commission, adding that he could not recall a specific example;[125]

- the Department did not formally respond to Ms Ryan in respect of her drafting suggestions regarding performance management, though the issue of performance management was discussed on a number of occasions in the negotiations for an agreement;[126]

- there was no briefing specifically provided to the Department's Executive as to the removal of access to the Commission in respect of disputes relating to performance management;[127] and

- he could not recall any specific briefing document being provided to the Department's Executive outlining the significant changes reflected in the Department's proposed workplace determination when compared to its third offer, though there were discussions with the Executive regarding the approach to be taken in respect of remuneration and allowances.[128]

The CPSU's case

[67] In its submissions the CPSU contended that following integration the structure of the Department had changed dramatically, with the work demands on employees and organisation of work also changing and the work becoming more complex. The CPSU further contended that this had resulted in large cost savings to the Commonwealth and that productivity had improved.

[68] As to bargaining, the CPSU expressed the view that the Commonwealth had taken an approach in negotiations that it would dictate the terms of bargaining, adding that it did so via the Workplace Bargaining Policy which it strictly applied in the negotiations. As a result, the CPSU continued, the Commonwealth faced a dual challenge in achieving agreement with its employees in the Department – it needed to deal with the complexities associated with the integration of two large agencies with divergent terms and conditions while it insisted on applying a bargaining policy which the CPSU characterised as inflexible and clearly unfair. The CPSU noted that the Commonwealth failed in bargaining.

[69] The CPSU described the Department's workplace determination as adopting a lowest common denominator approach which sought to reduce terms and conditions. Further, the CPSU contended that its proposed workplace determination should be adopted by the Commission and that the Commission should be cognisant of the interests of employees who it considered had been treated poorly. More particularly, the CPSU stated that its interest was in maintaining existing wages and conditions and that it sought parity for employees who were working side by side doing the same job but on different terms and conditions as a result of integration.

[70] Also in its submissions, the CPSU set out the legislative requirements relevant in this case drawing on the decisions in *Australian Municipal, Administrative, Clerical and Services Union v Western Australian Government Railways Commission*[129]*(Westrail)*, *Curragh*,[130] *Health Services Union of Australia v Alkira Centre and others*[131], *Qantas Airways*,[132] *Australian Licenced Aircraft Engineers Association, The v Qantas Airways Limited*[133]

(ALAEA), *Australian International Pilots Association v Qantas Airways Limited*[134] *(AIPA)*, *Parks Victoria v The Australian Workers' Union and others*[135] *(Parks Victoria)* and *Schweppes*[136] among others. Having regard to those decisions, the CPSU submitted that the Commission should:

"a. Assess the respective positions of the parties in relation to the bargain and arrive at a conclusion which could be regarded as being an appropriate result in the context of the bargaining which has taken place, had it concluded successfully (*Westrail*);

b. Not engage in "*subjective prognostication*" as to the outcome of negotiations had they been concluded (*Curragh*);

c. Make an objective assessment of the factors set out in the Act to determine the terms that the determination should contain (*Curragh*);

d. Exercise broad judgement to produce an outcome which is a fair compromise between the legitimate expectations of the respective parties and which also takes the public interest into account (*Curragh*);

e. Apply the factors in s.275 in a way that has a general bearing on the package of terms to be contained in the Workplace Determination and a more specific bearing on many of the particular claims (*Qantas Airways*);

f. Deal with matters at issue in a way FWC considers appropriate having regard to the factors contained in s.275 (*ALAEA*);

g. Consider the public interest in preserving existing industrial standards (*Parks Victoria*);

h. Determine productivity by reference to the quantity of output relative to the quantity of inputs rather than the costs of labour (*Schweppes*);

i. Assess and balance the impact of the various terms proposed in the interests of the employer and its employees, and the public interest, and the other statutory considerations within s.275, having regard to the matters within s.577 and s.578 of the Act (AIPA);

j. Objectively assess the statutory factors and make an overall judgement as to an appropriate determination to apply to the operations concerned until the parties replace the determination with a new enterprise agreement (*Parks Victoria* and *Qantas Airways*);

k. Assess the specific proposals advanced by each party and require a firm evidentiary basis for change to be established in circumstances where industrial arrangements have been long regulated by agreements entered into by the parties (*AIPA*); and

l. Take into account the time between the nominal expiry date of the previous agreements and the operative date of the workplace determination as a factor in deciding the wage increases to be included in the workplace determination (*Parks Victoria* and *Schweppes*)."[137]

[71] Beyond this, the CPSU dealt with the core terms to be included in the workplace determination, submitting that:

- it sought the inclusion of the model consultation term as set out in the Regulations together with some terms which were in addition to the model consultation clause, e.g. provisions relating to the NSCF;

- the issue of whether a term providing for a consultative committee could be included in a workplace determination was considered by the Full Bench in *Essential Energy Workplace Determination*[138] *(Essential Energy)*, with the Full Bench in that case including a term which provided for the establishment of a consultative committee;

- it sought the inclusion of the model dispute resolution term found in the Regulations; and

- it sought the inclusion of the right to arbitrate disputes in the workplace determination.

[72] The CPSU went on to provide a detailed summary of the witness evidence before giving consideration to the matters in ss. 275, 577 and 578 of the Act. In respect of the latter, key aspects of the CPSU's submissions included that:

- the nature and the extent of the changes in the workplace arising from integration were relevant to the merits of the case [s.275(a)], the interests of the employer and employees [s.275(c)], the question of productivity [s.275(d)], and the promotion of harmonious and cooperative workplace relations;

- the first integration involved significant workplace change and in particular included changes in the way work was performed, the skills required to perform the work and organisational changes, with the nature of the change and its impact on employees set out in a number of documents produced by the Department;

- Mr Murray's evidence confirmed the increasing activities of the ABF and the initiatives introduced to meet that increase in work such as blended teams and that the Department had higher expectations of staff and that staff were expected to exercise higher-level skills than previously and have greater responsibility;

- Ms Connell's and Mr Groves' evidence was that integration had resulted in savings of at $270 million to consolidated revenue;

- each of the employee witnesses gave evidence of the changes in the workplace;

- the Department's treatment of employees, e.g. the failure to apply the Machinery of Government provisions on terms and conditions of employees and the failure to take heed of the low morale of employees, told against awarding the terms sought by the Department;

- the employee witnesses gave evidence of the hardship associated with the failure to reach agreement and the reduction in remuneration for some former ACBPS employees arising from the reduction in allowances and the wage freeze;

- the CPSU witnesses were critical of the Department's approach in bargaining, adding that those criticisms were justified and that the Commission should take that into account when considering the claims made in this matter;

- a further matter telling against the merit of the position taken by the Department in this matter was the lack of authenticity in the terms of its proposed workplace determination, citing the following three factors as relevant in this regard

    - the Department moved its position from its third offer with the intent to 'go in harder' in the terms of its proposed workplace determination,

    - the terms of its proposed determination had not been considered, let alone endorsed by the Department's Executive, and

    - the Department had led no evidence of the need to change the current terms and conditions;

- the second integration which saw the creation of the Department took effect on 20 December 2017, with Ms Muscat-Bentley deposing that there was no consultation about the arrangements with the CPSU or affected employees;

- the Transport Security Inspector Allowance which previously applied to the Office of Transport Services (formerly part of the Department of Infrastructure, Regional Development and Cities) and the terms that relate to the Crisis Co-ordination Centre (formerly part of the Attorney-General's Department) should be included in the workplace determination; and

- it agreed with the Department's description of the contrast between the approaches of the parties as being "stark".

[73] In its oral submissions the CPSU reiterated aspects of its written submissions and contended *inter alia* that:

- the Full Bench should have regard to the fact that as the employer it was within the Commonwealth's power to allocate adequate funding for fair wage increases to its employees, adding that the Department's budget should be no constraint in coming to a position where the Department's employees were paid fairly[139];

- the decision to integrate the various elements which comprise the Department was a decision of the Commonwealth which should have been acknowledged in bargaining and which should have resulted in the Government's Workplace Bargaining Policy not being applied as rigidly as it was[140];

- in this case the employer decided to unilaterally move all former ACBPS employees to lesser conditions[141];

- the Department's composite allowance proposal was resisted because it meant that people would be worse off[142];

- with regard to material presented by the Department to justify the terms of its proposed workplace determination, there was no evidence provided of examples of regulatory prescription that had impeded improving productivity and, other than in a speculative way, the Department was unable to say that the current performance management system was somehow impeding the way that employees were managed[143];

- the Commonwealth should not be allowed to simply disregard the conditions on which it employed its staff prior to unilaterally changing those conditions through Machinery of Government changes, later adding that the Commonwealth had created a problem for itself[144];

- the Department's version of pay equity would result in around 2000 employees receiving no pay rise during the life of the Department's proposed workplace determination[145];

- it had adopted a highest common denominator approach and that its position was also that no one should go backwards[146];

- it had not raised a good faith bargaining claim against the Department in the context of s.275 of the Act[147];

- the APSC was intimately involved with the bargaining by providing instructions as to what should or should not go in proposals and in approving proposals that may or may not be put, adding that there were a group of people that were working on the negotiations and making decisions about the negotiations that were not at the negotiating table[148];

- it was open to the Full Bench to make a finding that the Department paid no regard to the views of employees or the views of the negotiators[149];

- in respect of the Department's contention that any productivity increases that had occurred had been through technology, its view was that technology does not do it on its own as the workforce must be upskilled and reorganised if the benefits of technology were to be realised[150];

- an alternative was for the workplace determination to comprise two parts, the first applying to all employees containing all the matters appearing in plain black text in Annexure 4 to the CPSU's final submission and the second only applying to ABF employees in respect of a number of matters drawn from the ACBPS Agreement, e.g. hours of work[151]; and

- the provisions in its proposed workplace determination regarding retention periods in redundancy situations reflected the broader APS standard, adding that the Commission should have regard to the broader public sector in respect of this issue.

[74] The following all gave evidence for the CPSU:

- Mr Rupert Evans, CPSU Deputy National President;
- Dr Craig Emerson, Managing Director of Craig Emerson Economics Pty Ltd;
- Mr Richard Selim, ABF officer and CPSU workplace delegate;
- Mr Michael Suijdendorp, Senior Border Force Officer in Western Australia and CPSU Governing Councillor;
- Mr Christopher Hyde, a DIBP employee in Canberra;
- Mr Garry Loughnan, a DIBP employee in Victoria;
- Ms Brooke Muscat-Bentley, acting CPSU Deputy National Secretary;
- Ms Natalie Hartman, CPSU Industrial Officer;
- Mr Richard Muffatti, CPSU Industrial Officer;
- Ms Susan Jones, a DIBP employee in NSW and CPSU Section Secretary;
- Ms Amanda Kumar, a DIBP employee in NSW;
- Mr Mark Fontana, a DIBP employee in NSW and CPSU Governing Councillor;
- Ms Stacey Harris, a DIBP employee in Victoria and CPSU Section President;
- Professor Martin Watts, Emeritus Professor in the Faculty of Business and Law, University of Newcastle[152];
- Professor Michael O'Donnell, Head of the School of Business, University of NSW (Canberra)[153];
- Professor Cathy Humphreys, Professor of Social Work at the University of Melbourne[154];
- the Hon Wayne Swan MP, former Treasurer (2007-2013) and Deputy Prime Minister (2010-2013);[155]
- Mr Christopher Callanan, a former SES employee with DIAC;[156]
- Mr Matthew Taylor, CPSU Industrial Officer; [157] and
- Mr Ian Ryall, CPSU Industrial Officer.[158]

[75] Professors Watts, O'Donnell and Humphreys and Messrs Swan, Callanan, Taylor and Ryall were not required for cross examination.

Mr Rupert Evans

[76] In his witness statement[159] Mr Evans provided a comprehensive overview of bargaining in DIBP over the period 2014-2016, touching on, among other things, the Government's Workplace Bargaining Policy, CPSU protected industrial action and the Department's proposed workplace determination. Mr Evans' evidence drew on his 20 years' experience in APS bargaining as either a CPSU officer or official. Key aspects of Mr Evans' evidence can be summarised as follows:

- staff morale had been significantly affected by the current round of bargaining and the approach taken by the Department, adding that there was a significant trust deficit owing to the manner in which the Department had conducted itself during bargaining;

- an online survey of CPSU members in the Department in May 2017 found *inter alia* that over 60 per cent of respondents reported either a significant or severe impact on their personal or family circumstances as a result of not having received a pay rise since 1 January 2014, with 89 per cent of respondents reporting that their workload had increased in the past five years;

- the Government's Workplace Bargaining Policy combined with the negotiating stance of the Department contributed to the lengthy delays in the bargaining process and the lack of agreement overall;

- the Department had repeatedly offered the same or substantially the same proposed enterprise agreement throughout bargaining, noting that the Department's proposed workplace determination fell below any of the offers made during bargaining;

- the CPSU Outcomes Position, which was developed in October 2015 through a survey of CPSU members, was a revised position which identified a path forward for negotiations in each agency; and

- a copy of the CPSU Outcomes Position was provided to the Department on 19 November 2015[160] and subsequently formed the basis of the CPSU position for bargaining in DIBP.

[77] Also in his witness statement, Mr Evans responded to various aspects of the witness statements of Messrs Leonard and Venugopal. In doing so Mr Evans deposed, among other things, that the CPSU was always supportive of and advocated for an approach which saw the rationalisation of comparable conditions in the Agreements.

[78] In his oral evidence Mr Evans attested that:

- he did not attend any of the bargaining meetings, either pre or post-integration;[161]

- the effect of what the CPSU sought both in bargaining and its proposed workplace determination would result in an improvement in some pay and conditions for former 'immigration' employees, adding that where there were common conditions the CPSU also sought to negotiate a consolidation of those conditions;[162]

- with regard to list of allowances set out in the CPSU position paper forwarded by Mr Muffatti to Mr Venugopal on 9 September 2016[163], he did not believe that Mr Muffatti's letter was the first time that the CPSU had sought or been prepared to discuss a consolidation of conditions but did not know if anything had been put in writing prior to the letter;[164]

- he was not aware of a list of allowances which the CPSU would be prepared to remove for reasons of unnecessary duplication having been prepared by the CPSU negotiating team and given to the Department;[165]

- the Department's approach in the negotiations when the issue of consolidation of conditions (including workplace rights and pay scales) was sought to be raised was not one of wishing to entertain these things and was characterised to him on more than one occasion as a "take it or leave it approach"[166];

- the CPSU's position, which the Department was well aware of, was that it did not want an enterprise agreement that resulted in people losing take home pay[167];

- the CPSU's position is that people should be employed on the same terms and conditions for performing the same work[168];

- the CPSU position paper involved a movement in respect of the quantum of the pay claim from 4 per cent per annum to 2.5-3.0 per cent per annum and a move away from seeking new rights and conditions other than family and domestic violence leave[169];

- Mr Muffatti went into the August 2016 bargaining meetings with the intention of putting questions to the Department's bargaining team in a way that would further the CPSU's interests in respect of its applications for good faith bargaining orders against various Commonwealth agencies;[170] and

- with regard to the flyers which the CPSU issued to members regarding bargaining in DIBP, it was not the CPSU's strategy to undermine any level of trust employees may have had in the Department and the bargaining process.[171]

Dr Craig Emerson

[79] Dr Emerson appeared as an expert witness having been asked by the CPSU to provide a report which focused on aspects of Mr Groves' evidence. In his report,[172] Dr Emerson, among other things, stated that the Commonwealth had four options to meet the costs associated with the outcome of the workplace determination:

- it could seek to identify underspends in other portfolios;

- it could identify savings from within other portfolios;

- if Government revenue was running ahead of Budget estimates this could be a source of funds; and

- the Government could engage in deficit financing, i.e. allow the size of the Budget deficit to rise.

[80] Dr Emerson stated that it was also possible that some allowance for the outcome of the workplace determination process had been made in the Budget's Contingency Reserve, adding that drawing from that Reserve did not increase the Budget deficit.

[81] In his oral evidence Dr Emerson accepted that the ultimate decision on financing the cost of the workplace determination rested with the Prime Minister and full Cabinet and was a matter for the Government of the day[173].

Mr Richard Selim

[82] Mr Selim has worked in a number of roles within the Department's Marine Unit since 2001. In his witness statement[174] Mr Selim deposed, among other things, that his work environment and the operational context of that work had seen significant challenges in order to meet the maritime threats that had arisen over the past 16 years. Mr Selim further deposed that he considered the existing set of terms and conditions of employment had not been a significant impediment to meeting those threats and challenges and had enabled DIBP to effectively manage its operational needs while maintaining stability in work patterns and deployments of employees. As to bargaining in DIBP, Mr Selim deposed that his experience was limited to engagement over marine conditions. Mr Selim further stated that during bargaining DIBP demonstrated a lack of willingness to discuss proposals put forward, adding that DIBP's proposals would have a significant impact financially and through the degradation of long standing conditions.

[83] Also in his witness statements, Mr Selim provided a detailed overview of various issues relating to the terms and conditions of employment of Marine Unit employees as they relate to the Department's and the CPSU's proposed workplace determinations (Mr Selim's evidence in this regard will be set out as appropriate below when dealing with the matters in issue regarding the Marine Unit). Beyond that Mr Selim deposed that he supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some of the issues which he considered would directly affect him and other employees. Those issues were:

- remuneration and salary increases;

- salary on engagement, movement or promotion;

- increases to allowances, highlighting that the Department's proposal to either remove or curtail the application of allowances would result in reductions of pay between $10,000 and $15,000 for many Marine Unit employees and that the failure to index allowances as proposed by the Department would mean that the value of allowances would diminish over time;

- higher duties allowance, stating that as Marine Unit employees were only paid higher duties allowance while they were on patrol it was important that the allowance was payable from the commencement of higher duties, particularly where higher duties were shared around;

- recovery of overpayments;

- removal of employee representational rights; and

- removal of workplace delegates' facilities and protocols, adding that as a CPSU workplace delegate it was important that he undertake that role within the confines of operational security constraints and, given the sensitivities of the work of Marine Unit employees, that it would sometimes be undesirable to discuss workplace matters which can involve operational detail over unsecured channels.

[84] In his oral evidence Mr Selim attested, among other things, that:

- Marine Unit employees already performed work beyond 195 days in a year and the CPSU's proposed determination envisaged that they would be working more than 191 days in a year;[175]

- in respect of incidentals allowance, Marine Unit employees had access to communication streams to communicate with family while operating vessels and that all food, snacks and drinks were provided while on board;[176] and

- the matters covered by the Department's proposed ABF composite allowance were already compensated for Marine Unit employees by the sea-going commuted allowance, adding that the CPSU pressed for payment of both allowances to Marine Unit employees.[177]

Mr Michael Suijdendorp

[85] Mr Suijdendorp provided two witness statements.[178] In his first witness statement Mr Suijdendorp deposed that over the past five years there had been significant changes in the way the work at Australian international airports was organised and allocated, e.g. in 2016 Smart Gates were introduced for outgoing passengers significantly reducing the number of staff required. Mr Suijdendorp also deposed that he supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some of the issues which he considered would directly affect him and other employees. Those issues were:

- remuneration and salary increases, also referring to the reduction in night shift penalty from 30 to 15 per cent which occurred upon integration as a result of the failure to preserve the higher rates in the s.24 determinations;

- pay equity, pointing out *inter alia* that there were several former ACBPS EL 1 managers working at Perth International Airport earning $108,833 per annum working alongside former DIAC EL 1 colleagues earning $103,393 per annum;

- salary on engagement, movement or promotion, stating that the 5 per cent minimum increase on promotion should be retained as it provided employees a genuine financial incentive to seek promotion and develop career paths;
- salary, noting that the Department's proposed workplace determination removed the top of the salary range bonus provided in the ACBPS Agreement;

- increases to allowances;

- competency assessment and training officer (CATO) and custodial firearms instructor (CFI) allowances, contending that these allowances recognised the expert knowledge relevant staff had acquired and impart to other ABF officers and also served a role in attracting and retaining volunteer staff to these roles;

- district and geographic allowances;

- excess travel time and excess fares;

- operational trainer separation allowance;

- self-contained breathing apparatus allowance, contending that there was no justification for removing this allowance; and

- use of force allowance.

[86] In his second witness statement, Mr Suijdendorp identified what he considered to be two main problems with the Government's Workplace Bargaining Policy, i.e. the requirement that there be no enhancement to existing conditions of employment and the requirement to streamline agreement content. With regard to the first of those issues, Mr Suijdendorp deposed that the practical effect of this requirement was that many long-standing allowances contained in the ACBPS Agreement were not capable of inclusion in an agreement for the Department.

[87] Key aspects of Mr Suijdendorp's oral evidence included that:

- the CPSU's proposed workplace determination, by seeking to preserve the various localities which under the ACBPS Agreement attracted a remote locality allowance, would extend eligibility for the allowance to former DIAC employees who work in locations that under the DIAC Agreement did not attract the allowance[179];

- the justification for conferring a remote locality allowance on someone living in the location prior to taking up employment was that the disadvantage of living in the location applied to that person irrespective of whether they were domiciled there or moved there[180]; and

- in respect of the CATO allowance, if someone was employed at a classification level that took into account the responsibility involved the allowance would not be necessary[181].

Mr Christopher Hyde

[88] Mr Hyde is a Cyber Security Analyst with DIBP. Mr Hyde deposed in his witness statement[182] that in the last five years his workload had increased by at least 400 per cent with very little in the way of automation/systems being delivered to offset the loss of staff. Mr Hyde also deposed that he supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some of the issues which he considered would directly affect him and other employees. Those issues were:

- remuneration and salary increases;

- pay equity, adding that his work area in DIBP was one of the first to integrate with the equivalent area from ACBPS and that despite the roles and responsibilities being identical the salary difference between former DIAC and ACBPS staff in the team varied by between $2,000 and $4,500 per annum;

- increases to allowances, stating that the Department's proposal to keep allowances such as the restriction allowance static over the life of its proposed workplace determination would result in staff in his area having a significant part of their remuneration frozen for another three years;

- recovery of overpayments;

- removal of employee representational rights;

- removal of workplace delegates facilities and protocols, adding that it was essential that there be a clear articulation of these rights in the workplace determination;

- personal leave, in particular the non-inclusion in the Department's proposed determination of those provisions in the DIAC Agreement relating to anticipating personal leave and additional paid personal leave; and

- allowances, including airport allowance, disturbance or disruption allowance, executive extended commitment allowance, higher duties allowance, irregular maritime arrival allowance and school holidays assistance.

[89] In his oral evidence Mr Hyde, when questioned about the circumstances set out in his statement where he and a colleague were either likely to or did exhaust their accrued paid personal leave, agreed that under the Department's proposed workplace determination the Department could grant both he and his colleague miscellaneous leave with or without pay in such circumstances.[183] In respect of the irregular maritime arrival allowance, Mr Hyde accepted that it may be the case that the only people currently in receipt of the allowance were some employees on Christmas Island.[184]

Mr Garry Loughnan

[90] Mr Loughnan is a Customs Compliance Supervisor with DIBP. In his witness statement[185] Mr Loughnan that there had been a significant reduction in staffing in his team over the past couple of years and that the combined effect of those reductions and the delay in bargaining for a new agreement had had a significant effect on staff morale. Mr Loughnan further deposed that he supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some of the issues which he considered would directly affect him and other employees. Those issues were:

- remuneration and salary increases, including the related issues of pay equity, salary advancement, salary on engagement, movement or promotion, and increases to allowances;

- the proposed removal of employee representational rights and workplace delegate facilities, deposing that the current facilities arrangements were the only mechanism by which he was able to secure sufficient time away from his regular duties to work on his witness statement or secure paid release from work to represent CPSU members and provide evidence in this matter;

- the proposed removal of conditions for EL employees, e.g. the additional 4 days paid absence per year without any reduction in leave credits;

- in respect of redundancy, the proposed removal of accelerated separation;

- the proposed changes to hours of duty, i.e. the adoption of standard working hours of 7 hours 30 minutes per day which would affect former ACBPS employees who currently worked 7 hours 21 minutes per day;

- changes to leave arrangements, including the reduction in compassionate leave from 3 to 2 days per occasion and the removal of event and emergency leave in the Department's proposed determination;

- changes to allowances, e.g. the removal of the clothing allowance and changes to higher duties allowance arrangements; and

- changes to when overtime becomes payable under the Department's proposed determination.

[91] Under cross examination Mr Loughnan:

- attested that he had not cited a single event where there was "resistance and outright obstruction" from Departmental managers to CPSU requests for him to be released from his work;[186]

- accepted that the existing provisions regarding accelerated separation in redundancy situations and event and emergency leave were entirely discretionary provisions;[187]

- agreed that in respect of personal leave the only difference between the Department's and the CPSU's proposed approach was that the Department wanted personal leave to accrue progressively throughout the year whereas the CPSU wanted the entitlement to crystallise fully at the commencement of the year;[188]

- agreed with regard to the CPSU's proposed uniform allowance that the Department provided general duties officers with safety footwear and five pairs of socks and that there was no requirement for general duties officers to wear stockings as skirts and dresses were no longer supplied[189]; and

- agreed that the provenance of the clothing allowance included in the CPSU's proposed determination was to enable officers to have suitable clothing to attend tribunal or court proceedings, accepting that the allowance was to make provision for business attire but adding that it provided for a level of clothing which was above what would be required for normal business attire.[190]

Ms Brooke Muscat-Bentley

[92] Ms Muscat-Bentley provided two witness statements.[191] In her first witness statement Ms Muscat-Bentley provided an overview of bargaining in DIBP over the period 2014 to 2016, i.e. covering both the pre and post-integration period. Among other things, Ms Muscat-Bentley deposed that:

- CPSU members had been significantly impacted by not having received a wage increase since 2013 and by the loss of some employment conditions as a result of integration;

- the current pay disparity between DIBP and former ACBPS employees had a disproportionate effect on women due to the predominantly female workforce in DIBP prior to integration when compared to the majority male workforce in ACBPS prior to integration;

- throughout the bargaining process DIBP repeatedly put forward offers that substantially reduced members' rights, conditions and pay;

- the most significant barrier to reaching agreement was the Government's Workplace Bargaining Policy;

- while a range of former ACBPS conditions were preserved via two s.24 determinations, a number of conditions were either reduced or removed, e.g. night shift loading was reduced from 30 to 15 per cent while the 2 per cent top of the salary range bonus and the formula for when overtime was paid were both removed;

- in October 2015 the CPSU conducted a survey of its entire APS membership to seek their views on a potential way forward in agency bargaining with the survey results shaping the CPSU Outcomes Position which highlighted a revised pay claim and maintaining rights and conditions;

- the CPSU Outcomes Position was provided to DIBP on 28 October 2015 and had since then formed the basis of the CPSU's bargaining position in DIBP;

- the dog handling allowance was negotiated as part of the negotiations leading to the ACBPS Agreement and against the background of dog handlers in other APS agencies and law enforcement jurisdictions being paid more than their ACBPS counterparts;

- Mr Leonard's suggestion that the allowance would no longer be necessary if those APS Level 3 employees in receipt of the allowance were reclassified as APS Level 4 employees overlooked the fact that not all employees who received the allowance were APS Level 3 employees, adding that she was aware of employees at other classification levels who performed the duties intermittently and received the allowance when they did so;

- ACBPS and now DIBP have historically been less inclined to settle disputes as and when they arise, adding that it had been more common in DIBP to have to formally invoke the dispute resolution process and pursue matters in the Commission; and

- in her view the dispute resolution process included in the workplace determination to be made by the Commission should provide for arbitration, adding that without that ability she was concerned that the Department could obstruct the settlement of disputes.

[93] Under cross examination Ms Muscat-Bentley agreed that in recent times the only disputes that had progressed to arbitration before the Commission had been referred by the Department rather than the CPSU[192] and that a number of former ACPBS employees at the EL 1 and APS Level 3 and 6 would have received a pay increase as a result of having transitioned to the DIAC Agreement post-integration[193].

[94] In her further witness statement, Ms Muscat-Bentley dealt with the second integration which occurred on 20 December 2017 and entailed the transfer to the Department of a number of employees from the Departments of Social Services and Prime Minister and Cabinet, the Attorney-General's Department and the Office of Transport Security from the Department of Infrastructure, Regional Development and Cities. By way of background, the second integration also resulted in DIBP being renamed the Department of Home Affairs. More particularly, Ms Muscat-Bentley provided an overview of the consultation which had occurred regarding the transfer of employees, deposing that the Department had not consulted on the terms and conditions of the transferring employees which would be preserved by s.24 determinations. Ms Muscat-Bentley further deposed that in the absence of such consultation the CPSU was not in a position to know the full extent of the impact of changes to terms and conditions on the transferring employees. However Ms Muscat-Bentley stated that:

- an example of an allowance that was payable to transferring employees prior to their transfer was the Transport Security Inspector Allowance which applied to the Office of Transport Services and was worth $3,442 per annum;

- based on an email[194] from the Department which was copied to a CPSU Organiser, she was aware that the Department was paying, or proposed to pay, an allowance to employees in the Crisis Co-ordination Centre (CCC) which had transferred from the Attorney-General's Department;

- this allowance or extra entitlement did not appear in the Department's proposed workplace determination; and

- she had not seen information from the Department about how the CCC allowance and additional leave would be codified and/or how it would interact with the workplace determination.

Ms Natalie Hartman

[95] Ms Hartman in her witness statement[195] provided a detailed overview of both the pre and post-integration enterprise agreement negotiations in DIBP. Key aspects of Ms Hartman's witness statement included that:

- the Government's Workplace Bargaining Policy had a noticeable effect on bargaining in DIBP, contending that when bargaining for the DIAC Agreement the parties jointly developed a pay formulation which met the requirements of the then

Government's bargaining policy but also delivered an effective pay outcome which was greater than the cap provided for in that bargaining policy;

- management representatives appeared to be hobbled by the strictness of the current Government's Workplace Bargaining Policy and provided bargaining positions which were extremely similar across the APS;

- separate bargaining in DIBP and ACBPS (i.e. bargaining prior to integration) slowed down toward October 2014 when integration appeared likely;

- 18 negotiations occurred in DIBP prior to integration on 1 July 2015;

- such was the difference in mood during this round of bargaining that she recalled one occasion when the negotiations became hostile, deposing that the incident as reported to her by the CPSU bargaining team involved the DIPB lead negotiator at the meeting threatening to initiate a 'Code of Conduct' complaint against one of the CPSU's bargaining team;

- while the matter was ultimately resolved, the incident highlighted the importance of employees who took on a representative role being protected against arbitrary threats from their employer;

- with regard to DIBP's first pay offer, DIBP tabled its proposed offer at the bargaining meeting of 14 May 2015, adding that at the same time as those negotiations were underway DIBP issued an all staff email advising employees of its proposed offer;

- this resulted in members of the CPSU bargaining team receiving messages from members advising of the email and the structure of the pay proposal while they were still in the bargaining meeting;

- there was a significant gap between the last bargaining meeting in May 2015 and the eventual vote on the first offer in September 2015;

- in October 2015 the CPSU developed the CPSU Outcomes Position as a path forward for negotiations to reach agreement, adding that on 19 November 2015 Mr Evans wrote to DIBP providing a copy of the CPSU Outcomes Position; and

- in bargaining after the first 'No" vote it appeared that the DIBP management team had become entrenched in its position and was focused on making the least amount of change required to deliver a narrow "Yes" vote by employees.

Mr Richard Muffatti

[96] Mr Muffatti was the CPSU's lead negotiator from December 2015 when he replaced Ms Hartman who had commenced a period of leave. In his witness statement.[196]Mr Muffatti provided, among other things, a detailed overview of the four bargaining meetings he attended in 2016. Key aspects of Mr Muffatti's witness statement included that:

- DIBP appeared to have been directed by the APSC in respect of clauses which it had proposed in bargaining, highlighting that the clauses proposing the removal of pre-decision consultation and clauses regarding dispute settlement procedures and IFAs had been virtually uniformly proposed by other agencies;

- the APSC had also directed DIBP such that the Department reversed its position in bargaining in relation to some provisions which it had initially advised that it was willing to agree to, citing the minimum 5 per cent increase on promotion as an example;

- there were a number of issues which arose during the course of bargaining which the Department undertook to provide a response on but on which no response was provided, e.g. further information on its composite allowance proposal and a request for further information on the costings regarding its proposed change to overtime payments;

- notwithstanding the efforts of the CPSU to seek a resolution to bargaining, the negotiations significantly lost momentum by September 2016;

- the Department only met with the CPSU seven times in the final year of bargaining, adding that in those meetings DIBP scarcely took on board the CPSU's feedback or sought to work with it to formulate agreed content which employees might support;

- DIBP continued to produce the same or substantially the same proposal for an agreement and then insisted on submitting that proposal to a vote of employees with little negotiation; and

- the Department's proposed determination fell below the position which it advanced in bargaining in a number of respects, including removing the requirement to consult on the creation of or variations to policies, removal of provisions relating to representation, removal of grandfathering in respect of hours of work for former ACBPS employees and the relocation of details regarding performance management to policy.

[97] Also in his witness statement Mr Muffatti responded to aspects of Messrs Leonard's and Venugopal's witness statements. In respect of Mr Venugopal's statements, Mr Muffatti deposed *inter alia* that the CPSU was not opposed to a composite allowance, though it was opposed to a composite allowance which significantly reduced the take home pay of employees currently in receipt of the allowances which the composite allowance would replace. Mr Muffatti also disagreed with Mr Venugopal's statement that employees had adequate protection in place under policies.

[98] In his oral evidence Mr Muffatti accepted that comments included in the draft versions of proposed agreements circulated on 23 and 30 September 2017[197] reflected the Department's response to matters that had been raised by the parties in the course of negotiation meetings.[198] Mr Muffatti also accepted that at no stage during the negotiations had the CPSU put a document to the Department which identified its position in respect of a composite rate of agreed allowances, wages arrangements that would establish pay parity for all employees or its position on the removal of unnecessary duplication of allowances. However, Mr Muffatti later reiterated that aspect of his witness statement relating to

composite allowance (see above) and in respect of pay parity referred to the CPSU's Outcomes position document which had been provided to DIBP.[199]

Ms Susan Jones

[99] Ms Jones is an Investigator working in the Regional Investigations NSW area of DIBP. In her witness statement,[200] Ms Jones deposed that many former ACBPS conditions were not preserved in the s.24 determinations made post-integration, adding that new staff who had commenced with the ABF post-integration were not covered by those determinations (except in the Marine Unit). As to workload, Ms Jones deposed that over the past five years the workload for investigations had increased, in part due to increased complexity, while capacity to meet operational challenges had not. Ms Jones further deposed that the overall effect of the bargaining process in DIBP had been to foster a deep mistrust of management and the Department as a whole.

[100] Beyond that, Ms Jones deposed that she supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some of the issues which she considered would affect her and other employees. Those issues included:

- remuneration and salary increases;
- pay equity, adding that DIBP's approach did not create equity or unity and that she considered the CPSU's claim the most expedient and equitable approach to curing discrepancies and unifying the entire workforce;
- recovery of overpayments, observing that due to the significant number of overpayments which continued to occur post-integration it was important that there be a strong set of rules to protect employees against the adverse effects of these errors;
- hours of duty, stating that the proposal for a 7 hours 30 minutes working day across the board effectively meant that she would be working 2.04 per cent extra for no additional remuneration;
- flexible working arrangements, including issues such as the capacity to cash out flex-time leave credits and the treatment of work related travel out of hours as flex-time;
- domestic care support scheme;
- reasonable additional hours and overtime;
- car parking;
- a raft of allowances, including work location, motor vehicle, clothing, CATO, CFI, forensic specialist, first aid, operational safety trainer, operational capability trainer, operational trainer separation and use of force allowances; and
- National Surveillance Unit hours of work.

[101] In her oral evidence Ms Jones agreed *inter alia* that she was satisfied with the current arrangements for car parking at Sydney airport and wanted to see them continue[201] and that under the CPSU's proposed workplace determination access to the domestic support care scheme was at the Department's discretion.[202]

Ms Amanda Kumar

[102] Ms Kumar is a Forensic Document Examiner with DIBP. In her witness statement[203] Ms Kumar described, among other things, changes to her work, contending *inter alia* that there was now a greater level of scrutiny associated with the work she does. Ms Kumar deposed that staff morale in the Department was low partly as a result of integration and the effect of the protracted bargaining round. Beyond that Ms Kumar deposed that she supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some of the issues which she considered would affect her and other employees. Those issues included the absence of a provision relating to part day travel allowance from the Department's proposed determination, the proposed approach to remuneration and salary increases, pay equity and increases to allowances reflected in the CPSU's and Department's proposed determinations (with Ms Kumar expressing he preference for the CPSU's approach on these issues) and the inclusion of a forensic specialist allowance in the CPSU's proposed determination. In canvassing the forensic specialist allowance issue, Ms Kumar deposed that:

- the practice in the former ACBPS was that IFAs were used to enhance salary for forensic officers;
- she had accepted an offer of an IFA under which she was paid an additional $8,000 per annum; and
- she disagreed with aspects of Mr Leonard's evidence regarding this issue.

[103] In her oral evidence Ms Kumar agreed that a forensic specialist allowance was not a feature of either of the Agreements[204] and that what was being proposed by the CPSU was the introduction of a legally enforceable entitlement under the workplace determination which neither former DIAC nor ACBPS employees presently had.[205] Ms Kumar also attested that if the CPSU proposal was granted she anticipated that her IFA would cease.[206]

Mr Mark Fontana

[104] Mr Fontana is a Leading Border Force Officer/Sponsor Monitoring Officer. In his witness statement[207] Mr Fontana deposed *inter alia* that over the last five years there had been an ever increasing need for work to be managed efficiently and that during the Department's extended bargaining process he had seen many changes in the general demeanour of staff in the workplace. Mr Fontana further deposed that integration and the associated cultural changes had had a significant effect on the overall morale of Departmental employees, adding that many employees he speaks to were actively looking for outside employment as they took real issue with the changes thrust upon them.

[105] Mr Fontana also deposed that he supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some

of the issues which he considered would directly affect him and other employees. Those issues were:

- remuneration and salary increases, deposing that he felt employees had not received any of the benefits of the savings made by the Department, including the savings associated with not having to pay wage increases since 2013;

- pay equity, stating that inequities in pay and conditions arising from integration remained significant and divisive in the workplace and that he was not sure the Department's approach to the issue as reflected in its proposed workplace determination would facilitate pay equity;

- salary advancement;

- increases to allowances;

- flexible working arrangements, noting that the Department's proposed determination did not state that applications for flexible working conditions would only be declined for genuine reasons and expressing concern that the Department was seeking to swing the balancing of employees needs and operational requirements firmly in its favour;

- the Christmas/New Year period;

- the removal of employee representational rights;

- performance management, highlighting that the Department's proposed determination sought to remove large parts of the existing entitlements and did not include many of the details which formed part of the existing arrangements; and

- managing underperformance, stating that the Department's proposed determination sought to remove key existing provisions relating to managing underperformance and that this would have serious consequences for employees.

[106] Mr Fontana's oral evidence added little to the issues dealt with in his witness statement.

Ms Stacey Harris

[107] Ms Harris is Branch Coordinator – Case Management and Status Resolution in DIBP's Melbourne office. In her witness statement,[208] Ms Harris deposed that over the last five years her personal workload had not changed significantly but that within the branch where she worked budgeted actual staffing levels had significantly reduced without a commensurate drop in the workload employees were required to perform. Ms Harris further deposed that the combination of reducing staff resources, integration and the way it had been managed and the protracted enterprise agreement negotiations had had a significant negative effect on morale.

[108] Beyond that, Ms Harris deposed that she supported the CPSU's proposed workplace determination and did not support the Department's proposed determination and set out some

of the issues which she considered would directly affect her and other employees. Those issues were:

- remuneration and salary increases, deposing that the Department had taken the savings it had achieved from no salary or superannuation increases and the reduction in staffing and either returned this money to Government or spent it on other priorities while employees had received no share in the fruits of their labour in achieving significant productivity gains;

- pay equity, suggesting that another by-product of integration was that the distinct pay disparity aligned to gender given that ACBPS had a predominantly male workforce whereas DIAC had a predominantly female workforce meaning that where these employees now work side-by-side the disparity in pay rates disproportionately disadvantaged women in the workplace;

- recovery of overpayments;

- removal of employee representational rights, adding that the non-inclusion of the current DIAC Agreement provisions regarding these issues in the Department's proposed determination would lead to a significant erosion of workers' ability to access and achieve natural justice in the workplace;

- removal of workplace delegates facilities and protocols;

- hours of duty;

- performance management framework, noting that the Department's proposed determination removed all clauses from the DIAC Agreement which gave any specificity or clarity about the timeframes, detail, appeal rights and operation of performance management and underperformance processes and disagreeing with the Department's proposed five point rating scale for performance management on the basis that there was no way of knowing how the Department intended to use the scale to manage performance;

- first aid allowance, expressing the view that the allowance should remain separate and distinct from the Department's proposed volunteer allowance on the basis that the level of responsibility, frequency and seriousness of first aid officer duties were clearly distinct from those of the various volunteer roles captured by the volunteer allowance;

- uniform, deposing that were a number of non-ABF officers who were currently required to wear a non-ABF departmental provided uniform who were not provided with shoes, socks and stockings as part of the uniform and that these employees were located in detention centres where conditions of work meant there was more than the normal wear and tear on the shoes and socks they were required to wear and purchase for work purposes;

- higher duties allowance;

- volunteer allowance;

- school holiday assistance;
- allowances and paid leave;
- flexible working arrangements;
- public holidays and additional holidays; and
- personal leave for compelling reasons.

[109] Ms Harris' oral evidence added little to the issues dealt with in her witness statement.

Professor Martin Watts

[110] Professor Watts appeared as an expert witness for the CPSU. Professor Watts principle fields of research have been contemporary macroeconomic and labour market policy and the measurement of segregation and spatial econometrics. Specifically, Professor Watts was asked to provide his opinion on the wage claims made in this case. Among other things, Professor Watts stated in his report[209] that taking consumer price index (CPI) growth figures for 2014-2017 (where the figure for 2016-2017 was partially forecast) the estimated cumulative loss of pre-tax real wages for APS employees who had had a wage freeze for three years was about 6.2 per cent assuming a steady (exponential) increase in the CPI over each of the three years. Professor Watts further stated that the wage freeze would operate to both encourage current employees of DIBP and other APS agencies to seek alternative employment and prospective employees from outside the APS to look elsewhere for new employment challenges. Beyond this, key aspects of Professor Watts' report included that:

- Mr Groves' assessment of the impact of the wage increases proposed both by the Department and the CPSU was predicated on an assumption of zero labour productivity growth;
- the claim that DIBP (and other APS) employees warranted an improved wage offer as part of their enterprise agreement(s) could be justified on the basis of the relative deterioration of APS pay when compared to the rest of the public sector and the private sector; and
- increases in the order of 4 per cent per annum for DIBP employees and other APS employees who have suffered a wage freeze would assist in redressing their relative decline in remuneration and may be a more pragmatic approach to addressing the impact of the wage freeze.

[111] Professor Watts provided a further witness statement[210] in which he responded to the third witness statements of Messrs Groves and Venugopal. In summary, Professor Watts deposed that the further material provided by Messrs Groves and Venugopal in those statements did not change the opinions he had expressed in his report.

Professor Michael O'Donnell

[112] Professor O'Donnell's expert report[211] discussed issues related to the measurement of productivity in the public sector and the challenges that agency managers and union representatives faced when attempting to bargain in an environment where there was strong central oversight of the bargaining process. In his report, Professor O'Donnell stated *inter alia* that in the public sector it was difficult to accurately measure the contribution of a single input such as labour and that another challenge with measuring public sector productivity was that outputs were often not well defined or easily measured. Professor O'Donnell's report also provided an overview of key aspects of the APS bargaining frameworks that had applied over the period 1997 to 2017.

Professor Cathy Humphreys

[113] Professor Humphreys' particular field of research and practice is family domestic violence. Professor Humphreys gave expert evidence for the CPSU and was previously engaged by the Australian Council of Trade Unions to prepare a report[212] to assist the Commission in relation to the issue of family and domestic violence leave which was considered as part of the four yearly review of modern awards. Specifically, Professor Humphreys stated that she continued to hold the opinions expressed in that report and that she considered the matters that are relevant to the merits of inserting the CPSU's proposed family violence leave provision into the workplace determination were the same as those addressed in that report. In short, Professor Humphreys' report concluded that the workplace was potentially an important arena in which to counter domestic and family violence and that an entitlement to leave could provide the catalyst for workplaces to play a stronger role in providing solutions to this form of violence. A copy of Professor Humphreys' report was attached to her expert evidence in this matter.

The Hon Wayne Swan MP

[114] Mr Swan appeared as an expert witness having been asked by the CPSU to provide a report[213] which focused on aspects of Mr Groves' evidence. In his report, Mr Swan stated that the Budget process was defined by rules and procedures that the federal Cabinet chose to adopt, adding that the Cabinet could alter these arrangements at its own discretion. Mr Swan further stated that in his experience when there was an urgent need of national security or a threat to the economy, the Cabinet and the Prime Minister acted. In respect of the challenges faced by DIBP, Mr Swan stated that the Cabinets he was a member of would have acted as staff cuts of the magnitude suggested by Mr Groves, bankruptcy of the Department or a disreputable industrial outcome would have been considered unacceptable. Other key aspects of Mr Swan's report included that:

- a Minister faced with crippling staff cuts or a budget blowout caused by underfunding of an industrial outcome could take a submission to the Expenditure Review Committee of Cabinet;

- in the Governments in which he served provisions were made anticipating likely industrial outcomes arising from enterprise bargaining;

- he would be surprised if provision had not been made in successive Budgets over the past three years for modest increases in employee expenses arising from the conclusion of the bargaining round;

- if a program or entity faced unprecedented growth or demand to the point where it may have difficulty meeting outputs and outcomes under current Budgetary settings, Additional and Supplementary Estimates provided an opportunity for a Government to revisit previously announced Budgetary settings; and

- the Commonwealth's capacity to meet costs depended on the priorities a government assigned to competing objectives, adding that it could seek savings elsewhere in the Budget, underspends in other portfolios, or for macroeconomic reasons it could choose either deficit financing or revenue increases.

Mr Christopher Callanan

[115] In his witness statement,[214] Mr Callanan responded to those aspects of Mr Groves' witness statement concerning increased workloads. In particular Mr Callanan commented on how funding was distributed to meet workloads. Mr Callanan's comments in this regard drew on his experience as DIAC's State Director – South Australia where he was familiar with the funding agreement entered into between DIAC and the Commonwealth Department of Finance regarding DIAC's visa program. Specifically Mr Callanan deposed that:

- in theory the funding agreement would allow program managers to anticipate increases or decreases in visa applications and transactions and to resource staffing levels up or down accordingly to deliver the expected outcomes;

- in practice program managers often could not harness the full benefit of anticipated increases in workload due to impediments such as delays in recruitment, staffing restrictions and the allocation of agreed budgets; and

- in his experience program managers more often than not found ways to manage within their allocated budgets to deliver expected program outcomes, adding that they also found ways to increase efficiency and productivity so that actual delivery was cheaper than the funding provided under the funding model.

Mr Matthew Taylor

[116] Mr Taylor has been employed by the CPSU in various roles since 1999 and deposed that as a result of his experience with the CPSU and prior to that in the APS and the then Professional Officer's Association he had developed a knowledge of terms and conditions of employment in the APS. In his witness statement[215] Mr Taylor detailed the history of remote locality conditions, redundancy and redeployment and performance management provisions in the APS.

Mr Ian Ryall

[117] In his witness statement[216] Mr Ryall provided an overview of the enterprise agreement negotiations in the then ACBPS in the last quarter of 2014 and early 2015 (the last bargaining meeting was on 11 February 2015), deposing that at the meetings in early 2015 the ACBPS was awaiting approval by the APSC of its proposed agreement for negotiation.

AIMPE's case

[118] AIMPE urged the Commission to adopt a sensible approach to the workplace determination.[217] AIMPE confined its submissions primarily to matters relating to the Marine Unit, contending that it considered there were very few issues for the Commission to determine in that regard other than the issue of whether Marine Unit employees were required for duty on 191 (as is currently the case) or 195 days. We will deal more specifically with AIMPE's submissions in that regard when dealing with the matters in issue below. AIMPE posited that one approach open to the Commission would be to make a determination which provided separate terms and conditions for the different agencies which together comprise the Department (e.g. ABF), with the status quo maintained and the Commission simply determining the level of pay rise. Other key aspects of AIMPE's submissions were that:

- throughout the bargaining process it had conducted itself appropriately and complied with the requirements in s.275 of the Act;
- it supported Ms Ryan's submissions on the issue of performance management;
- the Department's proposed approach regarding the recovery of overpayments was harsh and unreasonable, submitting among other things that there had to be evidence that an employee could make the proposed repayments;
- the Department's second and third offers provided for 191 days of duty per annum for Marine Unit employees, adding that as the Department had agreed to that approach twice the determination should provide for 191 days; and
- AIMPE members were disappointed to see that the Department had in its proposed workplace determination reneged on its previous agreement to 191 days.

[119] Mr Christopher Regan and Mr Dominic Worthington both gave evidence on behalf of AIMPE. Neither person was required for cross examination.

Mr Regan

[120] Mr Regan is an AIMPE delegate working on the ABF vessel Cape St George. In his witness statement[218] Mr Regan deposed that he attended many of the negotiation meetings both pre and post-integration, adding that the proposed agreements which the Department put to a vote of employees were significantly better than its proposed workplace determination. Beyond that Mr Regan canvassed a number of issues relating specifically to those elements of the Department's proposed determination concerning the Marine Unit. Those issues will be set out when dealing with the matters in issue below.

Mr Worthington

[121] In his witness statement[219] Mr Worthington dealt with a number of issues related to the crewing and rostering arrangements for the Ocean Shield vessel, one of the Marine Unit's vessels. Mr Worthington's statement was received on the basis that it was a submission.

[122] Specifically, Mr Worthington deposed that the vessel's crew wholeheartedly supported the initiative to conduct every other crew change in a mainland port. While Mr Worthington welcomed the stated aim of ABF Command to achieve a 28 day on/28 day off roster he also highlighted a number of shortcomings with the contracted civilian holding crew model, e.g.

uncertain availability and quality of contracted civilian holding crews. An alternative, Mr Worthington deposed, was to enable the majority of the ship's company to work the 28 day on/off roster and for some of the ship's officers to work a slightly modified duty roster.

Ms Ryan's case

[123] In her submissions Ms Ryan expressed the view that the Department's 'affordability' argument and the constraints imposed by the Government's Workplace Bargaining Policy did not justify the Commission making a workplace determination in the terms sought by the Department. Further, those considerations did not support the proposition that the Department's proposed workplace determination provided fair and reasonable salary increases or sufficient reason to support a removal of significant existing rights and entitlements either in full or part. As to the Government's Workplace Bargaining Policy, Ms Ryan noted that while not binding on the Commission it was relevant, adding that it should not be given any greater weight than any of the other factors which the Commission is required to take into account.

[124] Ms Ryan also pointed to the possibility of the ABF becoming a separate authority within the Home Affairs portfolio, suggesting that as such the proposition of a separate enterprise agreement for the ABF would seem to have some merit.

[125] Specifically, Ms Ryan urged the Commission to take a pragmatic approach by making a workplace determination that provided for:

- a minimum duration of 2 years (preferably 3 years);
- pay parity;
- frontloaded salary increases on commencement;
- the status quo in respect of allowances generally;
- the grandfathering of some specific allowances and employee terms and conditions; and
- the streamlining of clauses to remove aspirational language and process content, while retaining existing rights and entitlements.

[126] Ms Ryan posited that the evidence in this case had shown the Department's proposed workplace determination to be significantly deficient when compared to the proposed agreements which it had put to a vote by employees. To that end, Ms Ryan urged the Commission to take into account the Department's third offer in terms of the positions which the parties had reached some agreement on. Ms Ryan further posited that the CPSU's proposed workplace determination would seem to provide a comprehensive set of provisions for consideration by the Commission, save for omissions on the part of the CPSU in failing to update some provisions to reflect current legislation. Ms Ryan also urged the Commission to give due consideration to alternate provisions proposed by the independent bargaining representatives.

[127] As to those aspects of Ms Ryan's submissions which go to the content of the workplace determination, we will deal with those submissions when considering the matters in issue below.

[128] Ms Ryan provided a witness statement[220] but was not required for cross examination. In her witness statement Ms Ryan stated that she was not involved in the negotiations which occurred pre-integration for separate DIBP and ACBPS agreements. Ms Ryan also deposed that the focus of her claims were limited to the issues of remuneration and performance management. In respect of those issues Ms Ryan expressed the view that:

- a larger percentage of the total salary increase over the first two years of a workplace determination would provide employees with real dollar value;

- the workplace determination should clearly articulate the core obligations and the protections applying to an employee and the Department; and

- while an employer should not be unreasonably constrained in the effective and efficient management of performance issues, equally so, an employee should be afforded reasonable support, guidance and opportunity to achieve full performance.

[129] Appended to Ms Ryan's statement were proposed alternative clauses in respect of performance management. We will consider those proposed alternative clauses when dealing with the matters in issue below.

Mr Holmes' case

[130] Mr Holmes submissions focussed largely on remuneration related issues. In the June 2018 Statement we set out Mr Holmes' position on remuneration[221]. Given that the June 2018 Statement set out our intentions regarding a number of remuneration related issues (including wages), we do not repeat Mr Holmes' submissions on remuneration here. Other key aspects of Mr Holmes' submissions included that:

- the Department's witnesses had failed to provide any specific examples of how the current terms and conditions of employment had hindered the attainment of the Department's objectives, highlighting that Mr Murray had spoken glowingly of the Department's achievements and how it was meeting the challenge of achieving Government objectives with reduced resources and that when asked Ms Connell was unable to identify a particular provision which was impeding a culture of integrity;

- the mobile employment force exemplified the capacity of the Department to implement flexible and agile work arrangements under its existing industrial arrangements;

- the CPSU had submitted a number of claims that were superfluous in many ways, citing as examples the cold work disability allowance which was no longer relevant as Cargo Examination Officers no longer entered refrigerated shipping containers to examine goods and the intermittent driving allowance which he contended had become redundant years before the ACBPS Agreement had passed its nominal expiry date;

- he no longer pressed his claim for the cashing out of personal leave;
- the determination should provide for a paid Christmas close down for all non-rostered employees in the Department;
- the issue of allowances had seen two polarised views presented to the Commission;
- he agreed with the Department's claim that certain allowances should not be granted where the activity naturally formed part of an employee's role, citing the flying disability allowance as an example;
- as a compromise he proposed a quantum of $1,500 for the work location allowance;
- the use of force allowance should not be replaced in the workplace determination and the transport security inspector/vehicle safety standards inspector allowance that was applicable to employees transferred to the Department from the Office of Transport Security until 7 February 2018 should be included in the workplace determination;
- the Department's proposed abandonment of employment provision should not be reflected in the workplace determination; and
- the dispute resolution provision should provide for the Commission to arbitrate disputes in circumstances where the evidence was that few disputes affecting the Department necessitated recourse to determination by the Commission.

Sections 275(f) and (g) considerations – was the conduct of the bargaining representatives reasonable during bargaining for the agreement and have they complied with the good faith bargaining requirements?

[131] Before turning to deal with the matters in dispute, we will firstly consider the matters at ss.275(f) and (g) given that as previously noted they are of some controversy in this matter. For reasons of clarity, we indicate that the other factors set out in s.275 will be considered as appropriate in respect of the matters in issue.

[132] As to the factors at ss.275(f) and (g), the CPSU contended that the Department took an approach in the negotiations that it would dictate the terms of bargaining, adding that it did so by following and strictly applying the Government's Workplace Bargaining Policy in the negotiations. To reinforce the point the CPSU highlighted that in their evidence Mr Evans and key members of the CPSU negotiating team (both pre and post-integration) were critical of the approach the Department took in bargaining. The CPSU further contended that those criticisms were justified and that the Commission should take that into account when considering the claims made in this matter.

[133] Having regard to the chronology of bargaining set out in its submissions, the CPSU highlighted the delay associated with bargaining, contending that in circumstances where the Commonwealth had adopted a position that there would be no retrospective wage increases any delays were always to its advantage. In particular the CPSU highlighted that from the time of integration on 1 July 2015 until its protected industrial action was terminated in September 2016 there had been 11 days of negotiations, adding that over that 15 month period two proposed enterprise agreements had been put to and rejected by employees. The CPSU

submitted that the Commission could infer from this that the Department was not engaging in the negotiation process and was relying on a strategy of attrition, adding that the delays disadvantaged employees and that the Department relied on this to achieve acquiescence to the substandard agreements it proposed.

[134] Drawing on the communications between the Department and the APSC[222], the CPSU submitted that the Department had greater engagement with the APSC about the course and substance of the bargaining than it did with bargaining representatives, particularly over the appropriate means of remunerating employees under the new arrangements. The CPSU submitted that this again was a factor that was relevant for the purposes of s.275 of the Act.

[135] Finally, the CPSU contended that given the changes in the Department following integration and the inability of the parties to reach agreement over a long period of time that the Department's slavish application of the Government's Workplace Bargaining Policy could not be excused by the Department claiming it was bound to apply the Policy, particularly as the Policy made provision for an exemption and no exemption was ever contemplated by the Department.

[136] As mentioned above, in its oral submissions the CPSU stated it had not raised a good faith bargaining claim against the Department in the context of s.275(g) of the Act.

[137] The Department on the other hand submitted that it could not be said that it acted in any way inappropriately in the bargaining negotiations, adding that at its highest the evidence established nothing more than it refused to make concessions sought by the CPSU during bargaining. This it submitted could not be said to be unreasonable or to amount to a failure to comply with the good faith bargaining requirements. The Department accepted that all bargaining representatives took a strong stand in the negotiations but contended that in pursuit of that stand no one acted inappropriately, noting that throughout bargaining the CPSU rigidly adhered to its endorsed bargaining position. The Department also submitted that anything said or done outside of bargaining was not relevant for the purposes of ss.275(f) and (g) of the Act.

[138] More particularly, the Department contended that the CPSU had altogether failed to establish *inter alia* that it had acted unreasonably or contrary to the good faith bargaining requirements during bargaining or to reconcile its submissions about the Department's bargaining conduct with the fact that there was no evidence of CPSU bargaining representatives making any concession whatsoever during bargaining in respect of the CPSU's major issues.

[139] As to the Department's interactions with the APSC, the Department contended that the level and nature of that communication was consistent with the Government's Workplace Bargaining Policy and the roles and responsibilities of the APSC. With regard to the CPSU's contention that the Department had failed to abide by the Machinery of Government Guidelines, the Department disputed that any such failure or breach had occurred, highlighting that the Guidelines merely indicate that any s.24 determination is expected to be replaced by workplace agreement as soon as practicable which will "generally be within 12 months".

[140] In summary, the Department submitted that the matters in ss.275(f) and (g) were not of sufficient gravity to influence the outcome or content of the workplace determination in these proceedings.

[141] AIMPE submitted that it had complied with the requirements of s.275 of the Act.

[142] Ms Ryan submitted that the evidence in this matter highlighted several concerns going to the conduct of the parties, in particular the central protagonists. Ms Ryan noted that while the CPSU was not totally without fault it was the conduct of the Department that had been particularly emphasised. Ms Ryan contended that on the face of emails between the Department and the APSC it seemed that the Department was engaging in discussions with the APSC about tactics in bargaining and with respect to specific ballots and issues yet to be put to bargaining representatives in the negotiations. Ms Ryan also contended that the APSC played a part in bargaining strategy as to how to best achieve a yes vote and was even involved in the timing of the Department putting agreements to a vote. This, Ms Ryan submitted, seemed to be clearly outside the remit of the APSC in terms of their responsibility for the Workplace Bargaining Policy. Ms Ryan further submitted that the evidence strongly suggested the Department's conduct throughout bargaining had not been transparent and genuine. Ms Ryan urged the Commission in circumstances where it came to the view that there had been a breach of good faith bargaining on the part of any party in these proceedings to ensure that consequences flowed from such non-compliance.

[143] Mr Holmes did not address the factors at ss.275(f) and (g) in his submissions.

[144] In the June 2018 Statement we observed that it "would be accurate to describe the negotiations as involving both robust and hard bargaining over an extended period of time on the part of DIBP and the Community and Public Sector Union"[223]. There is nothing in the material before the Commission which causes us to alter our view in that regard. The negotiations were undoubtedly difficult for a number of reasons, including the steadfast commitment to the bargaining agendas adopted by the key protagonists (i.e. the Department and the CPSU) and the very significant constraints imposed by the Government's Workplace Bargaining Policy.

[145] With particular regard to factors at ss.275(f) and (g) of the Act, while the approaches adopted by the Department and the CPSU in bargaining pushed the boundaries on occasions, the material before us does not support a finding that the conduct of the bargaining representatives was unreasonable during bargaining or that any of the bargaining representatives did not comply with the good faith bargaining requirements. Accordingly, these factors do not impact on the determination we make. Nevertheless, we wish to take this opportunity to firstly comment on one issue which was raised during Mr Leonard's cross examination regarding the APSC's role and secondly suggest that consideration be given incorporating some flexibility into the Government's Workplace Bargaining Policy to deal with the difficulties which frequently arise in bargaining where machinery of government changes are involved. We also wish to comment on the evidence of Messrs Venugopal and Leonard.

[146] With regard to the interactions between the Department and the APSC in this case, having reviewed the various communications referred to by the CPSU in its submissions we consider that overwhelmingly those interactions were consistent with the APSC's role under the Government's Workplace Bargaining Policy. However, we also consider that there was at least one instance where in our view the APSC inappropriately exceeded its "gatekeeper" role. Specifically, on 22 July 2015 the APSC sent an email to a number of agencies which read as follows:

"Dear Colleagues

As you may be aware from recent discussions, there are now a number of agencies who are close to being able to put EAs out for a vote. We have identified your agencies as those who are in this category, or who could be with some quick work on obtaining final approvals. You or your staff may have already had discussions with me or other staff from the APSC along those lines.

Given recent experience, we think there is value in a coordinated approach to timing, such that a number of EAs are put out to a vote on or near the same day. Our informal discussions with agencies so far suggest thinking is coalescing around two clusters of voting dates: a first group around the week commencing 17 August and the later group in or about the week commencing 31 August.

With that in mind, would you let me know:

- whether you'd be interested in being part of a coordinated strategy; and
- whether you think you will be sufficiently advanced in terms of bargaining and approvals in the next week or two, to be able to facilitate this.

We will do everything we can from our end to facilitate the necessary policy approvals.

Given the sensitivities involved, we'd ask that these discussions be treated confidentially."[224]

[147] The above email was preceded on 10 July 2015 by an email exchange between the APSC and Mr Leonard in which the APSC sought input into a brief it was preparing to the then Minister Assisting the Prime Minister for the Public Service seeking approval of the proposed DIBP agreement. The draft brief included the following:

"21. Should you approve the proposed agreement, we would include the Department in a coordinated ballot timing strategy with other agencies."[225]

[148] With regard to the above paragraph, Mr Leonard subsequently enquired of the APSC as to where the Department would be "sitting" in respect of that strategy[226]. The APSC responded on 13 July 2015 as follows:

"We are looking at coordinating another group to go forward in the first half of August. Based on recent form it seems to be a strategy that works. The trick will be lining up a range of approvals over the next few weeks."[227]

[149] We note that the Workplace Bargaining Policy in operation at the time of the above exchange, i.e. the Australian Government Public Sector Workplace Bargaining Policy March 2014, included the following:

"Partnership with the Australian Public Service Commission

> The Australian Public Service Commission (APSC) provides support and advice to agencies on the Australian Government's employment and workplace relations policies in order to promote effective agreement making across the sector. In addition to the service provider to agencies by the APSC, the APSC requests that agencies:
>
> - respond to requests made by the APSC within a timely fashion;
> - advise the APSC about any significant employment relations matters; and
> - provide data to the APSC as requested to assist with workforce reporting requirements.
>
> …
>
> **8) Approval Requirements for Enterprise Agreements and Other Collective Arrangements**
>
> 8.1 Agencies are expected to comply with any instructions issued by the APSC in relation to this policy…
>
> *At the conclusion of bargaining*
>
> d. A draft enterprise agreement, or other collective arrangement, must be provided to the APSC for assessment against Government Policy prior to an agency seeking the Ministers' approval of the Agreement …
>
> 8.2 The Ministers' approval of the agreement must be received before the agreement is put to a vote of employees."[228] ('The Ministers' were defined in the Policy as "The Minister Assisting the Prime Minister for the Public Service and the relevant agency Minister".)

[150] The above email extracts show the APSC engaging in a strategic role regarding the timing of votes on proposed agency agreements. This in our view is inconsistent with the role of the APSC as set out in administering the Government's Workplace Bargaining Policy and providing advice to agency on the Government's employment and workplace relations policies. We further note that the Government's Workplace Bargaining Policy 2018 differs from its predecessors in a number of respects but still obliges agencies to, among other things, ensure that the APSC is informed of significant developments in bargaining, including Commission proceedings and industrial disputation/action.

[151] As to the second issue, we would observe that it is abundantly clear from the material before us that there were significant differences between the terms and conditions provided for in the Agreements. In our view, the task of negotiating an enterprise agreement which provided a common set of terms and conditions of employment for all employees, something that is envisaged by the previously mentioned *Machinery of Government Changes A Guide for Agencies*[229] publication, in a way that balanced the interests of the Department and its employees was made nigh on impossible by the absence in the Government's Workplace Bargaining Policy of any meaningful scope to recognise the unique circumstances existing in this case. Paragraph 13 of the Government's Workplace Bargaining Policy 2018 provides that "Exemptions from any provision of the policy are to be approved by the Minister Assisting

the Prime Minister for the Public Service and the agency's portfolio Minister. Exemptions will only be approved in exceptional circumstances." In the industrial context, to be "exceptional" circumstances must be out of the ordinary, or unusual, or special, or uncommon. They cannot be regularly, routinely or normally encountered. Given that machinery of government changes are a regular occurrence in Australian Government employment, though we acknowledge that the differences in terms and conditions of employment may not be of the magnitude of those existing in this case, it is unlikely that paragraph 13 could have been relied upon in this matter. Consequently, we would suggest that consideration be given to incorporating some degree of flexibility into the Workplace Bargaining Policy to enable circumstances such as those existing in this case to be more effectively dealt with in a constructive and collaborative way.

[152] Finally, we deal with the evidence of Messrs Venugopal and Leonard. First we observe that Mr Venugopal's evidence often failed to rise above mere assertions unsubstantiated by any probative material, e.g. Mr Venugopal asserted that the DIAC Agreement impeded the workforce from being agile, flexible and able to adapt but was unable to provide any examples based on his experience[230]. Further, Mr Venugopal's evidence at times bore little resemblance to the facts, e.g. his claim that the Department's proposed determination removed aspirational statements when compared to its third offer when in respect of performance management it involved the removal of rights (see extract from the transcript below when dealing with the issue of performance management). We also note that on a number of occasions the Commission had to ask Mr Venugopal to answer the questions put to him[231]. This did not reflect well on Mr Venugopal and in practical terms diminished the weight we attached to his evidence.

[153] As to Mr Leonard's evidence, it was at times lacking in detail or substance. For instance, in respect of the Department's proposals regarding allowances Mr Leonard was unable to answer questions regarding the savings to be achieved as a result of the introduction of a composite allowance[232] resulting in the Commission having to call for documents. In our view the questions should have been reasonably anticipated given that the composite allowance proposal was highly contentious in the negotiations for an agreement. Again, this did not reflect well on Mr Leonard.

[154] Finally, as previously mentioned, Mr Leonard attested that it was a conscious decision of the Department's Executive to "go harder"[233] in the Department's proposed workplace determination when compared to its third offer. In our view the Department's approach in this regard raises legitimate questions as to whether the Department has complied with the *Legal Services Directions 2017* which require the Commonwealth and Commonwealth agencies to act as model litigants in the conduct of litigation. Among other things, the obligation to act as a model litigant requires the Commonwealth and Commonwealth agencies to act consistently in the handling of claims and litigation[234]. The Department's retreat from its third offer is, in our view, arguably inconsistent with this requirement.

Matters in issue

[155] Drawing on the index of both the Department's and the CPSU's proposed workplace determinations the matters in dispute can be broadly grouped under the following headings:

1. technical matters;

2. remuneration;

3. working hours and arrangements (including shiftwork arrangements);

4. leave;

5. performance management;

6. allowances;

7. consultation;

8. redeployment and redundancy;

9. travel and location based allowances (including international travel);

10. conditions specific to marine employees;

11. conditions specific to designated National Surveillance Unit employees;

12. dispute resolution;

13. other conditions and arrangements; and

14. definitions.

[156] We deal with each of these matters separately below.

1. Technical matters

[157] The proposed provisions dealing with technical matters as set out in the Department's and the CPSU's proposed determination are in similar terms. However, there are several key differences. Those key differences include the nominal expiry date of the workplace determination, whether policies, guidelines and administrative instruments are incorporated into and form part of the workplace determination and the circumstances in which such instruments may be made or varied.

[158] We considered the duration of the workplace determination in the June 2018 Statement, indicating that a nominal expiry date two years after the commencement date of the workplace determination would enable the parties with an opportunity to rebuild their relationship and enable the creation of the Department to be bedded down thereby providing the parties with an insight into the issues which might appropriately be considered in bargaining[235]. This latter point goes to the consideration at s.275(h) of the Act, while rebuilding the parties' relationship is in the interests of employers and employees [s.275(c)] as well as the public interest [s.275(d)].

[159] The Department's and the CPSU's draft workplace determinations include a clause dealing with the Interaction of Policies. The following is common to both proposed workplace determinations:

> "The operation of this Determination is supported by policies, procedures and guidelines. If there is any inconsistency between the policies, procedures and guidelines and the terms of this Determination, the express terms of this Determination will prevail."[236]

[160] However, the Department's proposed provision also includes an explicit statement that "policies, procedures, and guidelines which support this Determination are not incorporated into, and do not form part of, this Determination."[237]

[161] On the other hand, the CPSU's proposed provision also includes the following which is drawn from the ACBPS Agreement (clause 4.0.5):

> "Those policies, guidelines and administrative instruments are incorporated into, and form part of this Workplace Determination. These instruments may only be made or varied following consultation with employees, and their nominated representative(s). These instruments will be subject to the dispute settlement provisions of this Workplace Determination."[238]

[162] The CPSU submitted that we should include the above in the workplace determination for several reasons including that:

- the Department was prepared to agree to consultation prior to any changes to policy during bargaining;
- drawing on Mr Muffatti's evidence, significant entitlements, with real impact upon the take-home pay of employees, are contained in policy, procedures, guidelines and administrative instruments; and
- it is consistent with principles of fairness and industrial justice that employees are able to progress disputes about policies through the dispute settlement procedure.

[163] The Department submitted that the Commission should reject the CPSU proposal. More specifically, the Department contended that incorporation of policies, guidelines and administrative instruments in the workplace determination would, among other things, have the effect of leaving anyone who may not have complied with the policy exposed to proceedings against them seeking the imposition of a penalty or perhaps injunctive relief seeking to prevent them from proceeding because there was an arguable case that they propose to do so other than in accordance with the strict terms of the policy. The Department further contended that any such exposure was contrary to the interests of employees, the Department and the public interest. Beyond this, the Department posited that:

- any such proceedings or any provision which conferred a right of veto upon the ability of the Department to vary its policies and procedures to accommodate the dynamic environment in which it operated was antagonistic to the considerations in s.275 of the Act; and
- requiring employees and the Department to determine their rights from multiple and potentially dichotomous documents created uncertainty and diminished productivity in the application and understanding of the respective instruments.

[164] It is not common for enterprise agreements to incorporate policies and guidelines, though reference is frequently made to policies providing further guidance on particular issues. For this reason, we do not intend to incorporate such documents into the workplace determination which we will make. Nevertheless, we consider that there is significant value in employees being provided an opportunity to comment on draft policies and proposed variations to existing policies prior to those policies being finalised. The opportunity to comment on our view has the potential to identify operational issues and/or impacts which may have been overlooked or not considered. This, in our view, would be in the interest of both the Department and its employees. Accordingly, we will include in the determination which we will make a requirement that the Department provide employees such an opportunity. We do not consider providing employees with an opportunity to comment on policies to be inconsistent with s.273(5) of the Act.

2. Remuneration

[165] The June 2018 Statement dealt extensively with a number of remuneration related issues (including wages). In summary, we indicated in that Statement that the workplace determination we will make would:

- provide wage increases totalling 7 per cent over the period of operation of the determination, comprised of 4 per cent from the date of the Statement (i.e. 8 June 2018) and a further 3 per cent which will take effect 12 months after the workplace determination commences operation;[239]

- include a salary range for each APS and EL classification level which reflected the higher of the maximum salary and the lower of the minimum salary under either the DIAC or ACBPS Agreements and that where the minimum salary for a classification level was lower than the maximum salary for the classification level immediately below we would adjust the minimum salary level so that it was above the maximum salary for the lower classification level;[240]

- for those employees whose current salary was above the maximum salary for their classification level would receive either no or a reduced wage increase until such time as the salary range we determine for their classification catches up with their current salary;[241]

- provide for a minimum increase in remuneration of 4 per cent on promotion in circumstances where the minimum salary for the classification level to which the employee has been promoted is less than 4 per cent above the employee's pre-promotion salary;[242]

- include salary ranges for Legal Officers, Public Affairs Officers, Medical Officers and training classifications which aligned as far as possible/appropriate with the salary ranges for APS and EL classifications;[243]

- provide for salary advancement of 3 per cent in circumstances where an employee's performance was assessed as having 'met expectations' and where the employee had performed duties at their substantive level or above for a total of at least 6 of the last 12 months;[244] and

- not provide for the payment of a lump sum bonus capped at 2 per cent to those employees within 4 per cent of the maximum salary for their classification level as per the ACBPS Agreement.[245]

[166] On 19 June 2018 the Department provided the Commission with a copy of the s.24 determination made by the Secretary of the Department giving effect to the Full Bench's intention in terms of the initial 4 per cent wage increase for employees.

[167] With regard to the salary range for each APS and EL classification, we have slightly varied the approach set out in the June 2018 Statement in a couple of respects. First, in respect of the APS Level 1 classification we have adopted the minimum salary for this classification in the DIAC Agreement rather than the lower rate specified in the ACBPS Agreement. We have done so to avoid any concern that casual APS Level 1 employees would not be better off overall under the Determination we will make. Second, in determining the salary range for each APS and EL classification, where the minimum salary for a classification level in either the DIAC or ACBPS Agreement was lower than the maximum salary for the classification level immediately below we have adopted the pay point from whichever of the Agreements is above the maximum for the classification level immediately below rather than simply adjust the minimum salary for the particular classification level. Specifically, for the APS Level 2 and 3 classifications we have adopted the minimum salary from the DIAC Agreement, while for the APS Level 4 classification we have adopted the second pay point from the DIAC Agreement on the basis that it is $57 per annum above the maximum for the APS Level 3 drawn from the ACBPS Agreement. We have adopted this approach to minimise any administrative task associated with translating employees into the common pay scale we have determined for APS and EL classifications.

[168] As noted above, in the June 2018 Statement we canvassed the issue of salary ranges for Legal Officers, Public Affairs Officers, Medical Officers and training classifications. We also noted that the commencement salary ranges and pay points proposed by the Department and the CPSU in respect of Medical Officers were identical. This is also the case in respect of training classifications, i.e. the Trainee APS and Graduate APS classifications. Accordingly we will adopt those commencement salary ranges and pay points for those classifications groups. However, in the Statement we also signalled that our intention to align the salary ranges for other classification groups as far as possible/appropriate with the salary range for APS and EL classifications raised other issues. In particular we noted, in respect of the Senior Public Affairs Officer A classification, the need to insert one or more intermediate pay points given the wide salary range that would result from aligning the maximum salary for this classification with the maximum salary for the EL 2 classification. This is also the case in respect the Principal Legal Officer classification. Against that background, we foreshadowed that we would give further consideration to these issues.

[169] In the table below we set out, in respect of the Legal Officer classification group, both the Department's and the CPSU's proposed commencement salary ranges and pay points and the commencement salary ranges (i.e. prior to the initial 4 per cent wage increase) and pay points which will be reflected in the determination we make. By way of explanation, we note that the ACBPS Agreement (unlike the DIAC Agreement) did not include pay rates for a separate Legal Officer classification group, though it did include grandfathered pay rates for classifications titled Legal 1 and Legal 2. Further, we indicate that that the yellow shading in the table indicates rates of pay which were identical in both the Department's and CPSU's proposed determinations. Against that background, where the rate was not agreed, we have

generally adopted the rate proposed by the Department. The exception to this is the maximum salary range for EL 2 equivalent positions where we have aligned the maximum salary with the maximum salary for the EL 2 classification. In addition, we have inserted an additional pay point in the Principal Legal Officer classification. The additional pay point is shown in red in the table below and is the mid-point between the minimum and maximum commencement salaries which we will include in the determination we make.

Classification level		**Current Salary under Department's Proposed Determination**	**Starting Point under CPSU's Proposed Determination**	**Pay Points as determined by FWC prior to application of 4% salary increase**
Legal Officer	APS Level 4	$66,283	$68,041	$66,283
	APS Level 5	$72,022	$74,095	$72,022
	APS Level 6	$74,321	$74,321	$74,321
		$78,054	$78,054	$78,054
		$86,894	$86,923	$86,894
Senior Legal Officer	EL 1	$98,564	$98,564	$98,564
		$106,945	$106,945	$106,945
		$118,000	$118,000	$118,000
Principal Legal Officer	EL 2	$127,452	$127,452	$127,452
		$134,059	$143,092	$135,272
				$143,092

[170] The above comments and the approach we have taken in respect of the Legal Officer classification group are equally applicable to the Public Affairs Officer classification group. The table below sets out both the Department's and the CPSU's proposed commencement salary ranges and pay points and the commencement salary ranges and pay points which will be reflected in the determination we make in respect of Public Affairs Officers.

Classification level		**Current Salary under Department's Proposed Determination**	**Starting Point under CPSU's Proposed Determination**	**Pay Points as determined by FWC prior to application of 4% salary increase**
Public Affairs Officer 1	APS Level 4	$60,452	$61,971	$60,452
		$66,736	$68,041	$66,736
	APS Level 5	$67,399	$68,042	$67,399
		$72,856	$74,095	$72,856
Public Affairs Officer 2	APS Level 6	$76,188	$76,188	$76,188
		$78,054	$78,054	$78,054
		$80,442	$80,442	$80,442
		$87,806	$87,806	$87,806
Public Affairs Officer 3	EL 1	$104,800	$104,800	$104,800
		$106,945	$106,945	$106,945
		$115,836	$115,836	$115,836
Senior Public		$114,697	$114,697	$114,697

Affairs Officer B	EL2	$124,463	$124,463	$124,463
Senior Public Affairs Officer A	EL 2	$121,022	$121,022	$121,022
		$131,103	$143,092	$132,057
				$143,092

[171] Where an employee's current salary aligns with one of the pay points set out above for their classification level, they will translate to that pay point. However, in circumstances where their current salary does not align with any of the pay points set out above they will translate into the relevant salary range at the pay point immediately above their current salary.

[172] As to the issue of salary advancement, it was not disputed that Legal, Public Affairs and Medical Officers should advance to the next pay point for their classification on the same basis as other employees entitled to salary advancement. However, the Department proposed in its determination that employees under the Legal Officer and Public Affairs Officer 1 classification broadbands would only advance from one APS classification level to the next where the employee's performance was assessed as having met expectations, where there was sufficient work available at the higher classification level and the employee had the necessary qualifications to perform work at the higher classification level. In its submissions the Department posited that automatic progression through classification levels was unmerited as it resulted in surplus employees at higher classification levels without regard to whether there was suitable work available at that classification level to perform. The Department further posited that progression therefore ought to be controlled to harness productivity.

[173] As to the issue of salary advancement from one APS classification to the next for the Legal Officer and Public Affairs Officer broadbands, the CPSU's proposed determination maintained the approach in the DIAC Agreement, i.e. where an employee had been working at or above their substantive classification level for at least 6 out of the past 12 months and their performance was rated as having 'met expectations'. In support of its approach, the CPSU submitted that the Department had led no evidence to suggest that the approach in the DIAC Agreement had resulted in inappropriate advancement, led to inefficiencies or otherwise should not be retained for these employees on a merit basis.

[174] In the absence of any material before the Commission indicating that the approach reflected in the DIAC Agreement had been problematic we are not satisfied that the Department's case for change has been made out [s.275(a)]. Accordingly, the determination we make will provide for employees classified as either a Legal Officer or Public Affairs Officer 1 to advance from one APS classification level to the next within those classification broadbands where the employee's performance is assessed as having 'met expectations'.

[175] While on the issue of salary advancement, one aspect not dealt with in the June 2018 Statement concerned the date on which salary advancement would occur. The Department's proposed determination provides for eligible employees to receive their annual salary advancement on the first pay cycle after 1 October each year. The DIAC Agreement provides for salary advancement to occur on the first full pay period occurring on or after 1 July each year. The Department submitted that pushing back the date for salary advancement to 1 October meant that salary advancement would occur after corporate and budget planning processes and performance reviews had concluded. The Department further submitted that pushing back the date would also enable it to budget for salary advancement following the federal Budget. The CPSU submitted that there was no evidence from the Department that the

current employee performance cycle had caused any operational or administrative difficulties which might justify what would be in effect a three month delay in the payment of salary advancement to eligible employees. The CPSU further submitted that there was no evidence that the date of effect of the payment salary advancement could not remain at 1 July each year even if it was not paid until later in the year, e.g. in the first pay period following 1 October each year as proposed by the Department.

[176] In circumstances where salary advancement is contingent on an employee's performance having been assessed as 'met expectations' it is clear that performance reviews need to have concluded so as to determine which employees are eligible for salary advancement. We therefore see merit in the date of salary advancement aligning more closely with the conclusion of the Department's performance management cycle. The other arguments advanced by the Department in support of pushing back the date of salary advancement are much less convincing in our view and on their own would not justify doing so. While for the reason outlined above we see merit in pushing back the date of salary advancement to 1 October each year, we are concerned that when implemented this change would see eligible employees lose on a one off basis between $313 and $858 (calculated on the minimum salary applying after the 4 per cent wage increase for each APS and EL classification level). While we note the CPSU's proposal that salary advancement could be paid after 1 July each year but backdated to 1 July, that approach carries with it the administrative costs associated with backdating. For this reason and having particular regard to s.275(e) of the Act we are not attracted to this approach. An alternative approach which we will adopt is to push back the date of salary advancement to the first pay cycle after 1 October each year and provide eligible employees with a one-off lump sum payment to compensate for the later operative date of salary advancement on implementation. This approach has regard to the merits of the issue [s.275(a)] and the interests of the employers and employees who will be covered by the determination [s.275(c)]. As to the quantum of the one-off payment, we determine an amount of $600 which will be payable to those employees who satisfy the requirements for salary advancement on the first pay cycle on or after 1 October 2019.

[177] Beyond the above issues, an examination of the parties' respective submissions and proposed workplace determinations indicates that there are differences between the Department's and the CPSU's proposed workplace determinations in respect of several remuneration related issues. Those issues are recovery of overpayments, superannuation, salary on reduction or termination of an individual instrument, salary packaging and death of an employee. We deal with each of those issues separately.

Recovery of Overpayments

[178] The Department's proposed determination includes a provision which authorises the Secretary in circumstances where agreement on recovery arrangements regarding an overpayment cannot be reached to recover the overpayment from the employee's fortnightly pay at a rate of no more than 20 per cent of the employee's fortnightly pay.

[179] In its submissions the Department highlighted that as at March 2017 employees owed it in the order of $2 million of which $300,000 related to overpaid travel entitlements. Specifically, the Department submitted that absent its proposed provision it would be left to sue an employee to recover a debt with the consequential litigation costs to which it and the employee would be exposed. This it contended would not be conducive to harmonious

workplace relations, would not be fair to either it or the employee and would be contrary to the public interest.

[180] During the proceedings the Commission raised the issue of whether the Department's proposed provision was consistent with s.324 of the Act. On this issue the Department submitted *inter alia* that none of the provisions in ss.323-326 of the Act rendered unlawful the inclusion in the workplace determination of its proposed provision and nor did s.272(3) of the Act render the provision impermissible. The Department also submitted that any deduction made in accordance with its proposed provision would, subject to s.326 of the Act, not be rendered unlawful by s.323 of the Act because it would be "authorised by or under a law of the Commonwealth" as per s.324(1)(d) of the Act.

[181] In his witness statement[246] Mr Leonard deposed that overpayment was a significant problem for the Department with the total balance of staff debt approximately $2 million. Mr Leonard also deposed that the DIAC Agreement required agreement from the employee before recovery could proceed, adding that this resulted in employees refusing to engage in the negotiation process leaving the Department no other option but to pursue legal avenues. Against that background, Mr Leonard expressed the view that the Department should not be stifled in its attempt to recover public funds nor should it be required to resort to legal processes to effect recovery. As to the 20 per cent rate of recovery specified in the Department's proposed provision, Mr Leonard deposed that the Department considered this maximum rate to be reasonable and that the Department was required to consider potential hardship on an employee. Mr Leonard also noted that where an employee disputed the Department's decision on the calculation of an overpayment or the rate of repayment that it would be open to the employee to utilise the dispute resolution provisions of the workplace determination.

[182] The CPSU's proposed clause relating to overpayments, among other things, provides that:

- a recovery arrangement take into account the nature and amount of the debt, the employee's financial circumstances and any potential hardship to the employee;

- the Department is entitled to make deductions from the employee's remuneration for the purpose of recovering the debt where an employee agrees in writing; and

- nothing precluded the Department from pursuing recovery of the debt in accordance with an Accountable Authority Instruction issued under the *Public Governance, Performance and Accountability Act 2013 (Cth)* or through other available legal avenues.

[183] The CPSU in its submissions contended that in his evidence Mr Leonard struggled to justify the approach to overpayments reflected in the Department's proposed determination. The CPSU also submitted that the fact that overpayments were a significant problem for the Department ought not to justify departure from the fundamental obligation of a party seeking to recover a debt to prove the debt, adding that the Department's proposed determination gave no recourse to an employee in circumstances where the Department wrongly calculated the amount of any overpayment.

[184] The CPSU relied on the evidence of Ms Harris and Ms Jones. In her witness statement[247] Ms Harris disputed Mr Leonard's contention that the Department was unable to recover debts because employees refused to cooperate, deposing that in her experience most employees wanted to engage in the process but had particular difficulty in navigating the Department's processes especially where overpayments were not their fault. Ms Harris further deposed that the loss of a clear, concise, step-by-step enforceable process for determining whether a debt existed and then following that through to concluding a repayment schedule that was open, transparent and fair and reasonable to the employee and did not put them into financial and other hardship would be of significant detriment to employees. As previously noted, Ms Jones evidence[248] was that due to the significant number of overpayments which continued to occur post-integration it was important that there be a strong set of rules to protect employees against the adverse effects of these errors.

[185] AIMPE referred to ss.323-326 of the Act and posited that a 20 per cent deduction was harsh and unreasonable and could not be to the benefit of the employee as required by the Act, adding that this was the reason the legislature had left it to the courts to determine recovery in circumstances where the parties could not come to an agreement. AIMPE made it clear that it was not contending that repayments should not be made or that the Department should not be able to recover overpayments but that its view was that whatever arrangement was put in place had to be fair and reasonable.[249]

[186] Ms Ryan submitted that the overpayment issue seemed largely attributable to a systems problem and that the Department's proposed determination made no provision for consideration of hardship circumstances that may occur from time to time. Further, with particular regard to ss.324 and 326 of the Act, Ms Ryan suggested that any overpayment clause contained in the workplace determination reflect what is permitted under the Act.

[187] Sections 324 and 326 of the Act both deal with the issue of deductions. Those sections provide as follows:

> "**324 Permitted deductions**
>
> (1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:
>
> (a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or
>
> (b) the deduction is authorised by the employee in accordance with an enterprise agreement; or
>
> (c) the deduction is authorised by or under a modern award or an FWC order; or
>
> (d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.
>
> Note 1: A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:
>
> (a) forgo an amount payable to the employee in relation to the performance of work; but
>
> (b) receive some other form of benefit or remuneration;

will be permitted if it is made in accordance with this section and the other provisions of this Division.

Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

(2) An authorisation for the purposes of paragraph (1)(a):

(a) must specify the amount of the deduction; and

(b) may be withdrawn in writing by the employee at any time.

(3) Any variation in the amount of the deduction must be authorised in writing by the employee.

326 Certain terms have no effect

Unreasonable deductions for benefit of employer

(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:

(a) directly or indirectly for the benefit of the employer or a party related to the employer; and

(b) unreasonable in the circumstances.

(2) The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.

Unreasonable requirements to spend or pay an amount

(3) …

Deductions or payments in relation to employees under 18

(4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or

(b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee."[250] (Underlining added)

[188] Section 279(1) of the Act provides that the Act "applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation."[251] Under the Department's proposed provision the Secretary is only empowered to authorise a deduction from an employee's fortnightly pay in circumstances where an agreement on recovery

arrangements cannot be reached. In our view this appears to be inconsistent with s.324(1)(b) of the Act. Given the reference to "FWC order" in s.324(1)(c) of the Act we do not consider the Department's previously mentioned interpretation of s.324(1)(d) to be correct.

[189] For the above reasons, we are not satisfied that the Department's proposed approach is consistent with s.324 of the Act or that it would be enforceable given the terms of s.326 of the Act. Accordingly, we do not intend to include in the determination we will make scope for the Secretary to authorise deductions from an employee's fortnightly pay to recoup an overpayment.

Superannuation

[190] The provisions relating to superannuation in the respective determinations were in almost identical terms save that the CPSU's proposal mirrored the terms of the DIAC Agreement in the following respect:

> "The Department may choose to limit superannuation choice to complying superannuation funds which:
>
> - allow employee and/or employer contributions to be paid fortnightly …" (underlining added)

[191] The Department's proposed determination streamlined this aspect of the superannuation provision and in particular did not include the underlined words above. The Department submitted that its proposed clause maintained, with minor changes to improve expression, the terms of the DIAC Agreement and that no bargaining representative had articulated a basis for opposing those terms.

[192] In the absence of any suggestion that the operation of the provision in the DIAC Agreement had been problematic, the basis for the Department's proposed editorial change has not been made out [s.275(a)]. We will however change the reference to 'Department' to 'Secretary' given that this terminology is reflected elsewhere in the parties' respective proposed provisions.

Salary on Reduction or Termination of an Individual Instrument

[193] The Department's proposed determination seeks the inclusion of a provision which deals with salary where an employee is reduced in classification at the direction of the Secretary. The Department submitted that such a clause merely supplemented the Secretary's powers under s.23(4) of the PS Act and that a clause that catered for redeployments, discipline and underperformance consistent with the PS Act had merit.

[194] The CPSU submitted to the extent that the Department was empowered under the PS Act to reduce an employee's classification that it was unnecessary to include such a provision in a workplace determination. The CPSU further submitted that it appeared that the Department sought to extend the power to reduce an employee's classification to redundancy situation, adding that it opposed this.

[195] Section 23(4) of the PS Act provides as follows:

"(4) An Agency Head may reduce the classification of an APS employee, without the employee's consent, only in the following circumstances:

(a) as a sanction under section 15;

(b) in the case of an SES employee--in accordance with Commissioner's Directions issued under subsection 11A(1);

(c) on the ground that the employee is excess to the requirements of the Agency at the higher classification;

(d) on the ground that the employee lacks, or has lost, an essential qualification for performing duties at the higher classification;

(e) on the ground of non-performance, or unsatisfactory performance, of duties at the higher classification;

(f) on the ground that the employee is unable to perform duties at the higher classification because of physical or mental incapacity;

(g) in other circumstances prescribed by the regulations."[252]

[196] For reasons of clarity we consider that there is merit in including a provision in the workplace determination dealing with where an employee is reduced in classification without their consent in accordance with the PS Act. However we do not consider the clause proposed by the Department provides sufficient clarity in this regard. Accordingly, we will include the following clauses in the determination we make:

"Where an employee agrees in writing to be reduced in classification, the Secretary will determine a salary for the employee at a rate applicable to the lower classification level.

Where in accordance with section 23(4) of the *Public Service Act 1999* an employee is reduced in classification without their consent, the Secretary will determine a salary for the employee at a rate applicable to the lower classification level."

[197] The CPSU also seeks retention of a provision in the DIAC Agreement which deals with the issue of salary on termination of an individual industrial instrument. Neither party addressed this issue in their submissions. We assume the provision was intended to deal with employees transitioning from former Australian Workplace Agreements (AWAs) and that there are no Departmental employees who continue to be covered by AWAs. In the absence of any material before the Commission pointing to the need for retention of such a provision we will not include such a provision in the determination we make.

Death of an Employee

[198] The CPSU seeks the retention of the following provisions from the DIAC Agreement:

"11.7 … Before making any payments or ceasing the employee's salary, the Secretary shall make contact with the employee's family to discuss the department's process in these circumstances.

11.8 Any monies owing to the Commonwealth because of advanced annual leave credits will be waived."

[199] The CPSU provided no specific submissions in respect of these provisions.

[200] The Department opposed the incorporation of a requirement for it to contact an employee's family before ceasing the employee's salary but did not explicitly address the retention of clause 11.8 of the DIAC Agreement in its submissions.

[201] While we consider contacting an employee's family in such circumstances to be good practice, we are not convinced that such a provision needs to be incorporated in a workplace determination particularly as doing so would expose the Department to the risk of sanction for non-compliance. Further, we consider that the issue is a matter more appropriately considered in future bargaining [s.275(h)]. As to the waiving of any monies owing due to the Commonwealth because of advanced annual leave credits, in the absence of any submissions on this issue, we are not convinced of the merits of including such a provision in the workplace determination we will make [s.275(a)].

[202] Remuneration related provisions which appear in the same terms in the parties' proposed workplace determinations concern payment and supported salary. We will incorporate those provisions in the determination we make.

3. Working hours and arrangements (including shiftwork arrangements)

[203] In the June 2018 Statement we foreshadowed that the workplace determination we will make would provide that hours of work for all employees are 7 hours 30 minutes per day or 37.5 hours per week. The Department sought this arrangement on the basis that the majority of employees worked 37.5 hours per week, while the CPSU's proposed determination provided for hours of work of 7 hours 21 minutes per day or 36.75 hours per week.

[204] More particularly, the Department submitted that its proposed determination adopted a balanced approach which would see a minority moved to the majority position, contending that different start and finish times disrupted rostering, work planning, the scheduling of deployments and operational briefings, and logistics such as transport. The Department further submitted that its proposal would remove these inefficiencies, optimise the amount of input overall and thereby generate productivity. Beyond that, the Department contended that:

- there was no public interest in reducing the total amount of hours worked at the Department;
- the NES imposed a maximum 38 hour week;
- the vast majority of the APS work a 37.5 hour week or longer;
- a harmonised standard week was in its and employees' interests;
- employees performing the same job but working different hours undermined cohesiveness and inhibited the creation of a unified culture; and
- in respect of part-time employees, employees who chose to increase their part-time fraction by 2.04 per cent would receive an equivalent windfall increase in the pre-existing leave balances.

[205] The CPSU submitted that its proposal best achieved fairness and equity for all employees. In support of its submissions, the CPSU relied *inter alia* on Mr Loughnan's evidence that increasing the hours of work for former ACBPS employees to 7 hours 30 minutes per day increased their working hours by 2.04 per cent without compensation and that part-time staff would be required to increase their working hours.

[206] In our view, having hours of work set out 7 hours 30 minutes per day or 37.5 hours per week may result in a modest improvement in output which in turn may positively impact on productivity [s.275(e)]. Further, having a common set of hours of work which apply across the Department is in the interest of the employer and employees [s.275(c)], though we note it entails a small increase in hours of work for former ACBPS employees.

[207] On the general issue of hours of work, the CPSU's proposed determination included a number of general provisions relating to hours of work drawn from the DIAC Agreement. Those provisions were clauses 4.5, 4.7, 4.10 and 4.11 of the DIAC Agreement. Clause 4.7 deals with the issue of standard hours of duty. In her witness statement Ms Harris noted that the Department sought to remove that aspect of clause 4.7 which provided scope for the Secretary and employees to agree in writing on alternative standard hours agreed with that agreement capable of being terminated on at least two weeks' notice. Ms Harris deposed that the existing provision provided clarity as to the actual hours employees were required to attend duty in their particular work area and that it was of concern to CPSU members that the Department could change their hours without sufficient notice or consultation. The Department opposed the CPSU's provision, contending that it impeded its prerogative to design its working patterns according to the needs of its operational domains thereby impeding the potential for productivity improvement. The Department further contended that changes to standard hours are otherwise subject to reasonableness constraints, protections under the Act and other legislation such as work health and safety legislation.

[208] We note that where the Department seeks to change standard hours of work it would be required to consult employees and their representatives in accordance with the consultation term we will include in the determination we make. A sentence to that effect will be included in the determination we will make. Beyond that, we are not satisfied that it is necessary to include the abovementioned clauses drawn from the DIAC Agreement [s.275(a)] and consider it appropriate that the Secretary, after consultation with employees and their representatives, have the capacity to vary standard hours of work to meet the operational requirements of the Department. We note that a failure to consult could be the subject of a dispute in accordance with the determination's dispute resolution procedure.

[209] There are a range of other issues related to working hours which we will deal with under broad headings of flex-time, flexible working arrangements/variable working hours, reasonable additional hours and overtime, time off for EL employees, public holidays, shiftwork arrangements and other issues.

Flex-time

[210] The CPSU submitted that the Department's proposed determination sought to both remove a number of aspects of the DIAC Agreement provisions relating to flex-time and introduce a number of restrictions which did not currently exist. Specifically, the CPSU contended that the Department's proposed determination:

- removed provisions which *inter alia* provided that travel undertaken for business purposes was time on duty, which dealt with meal breaks and core hours, which enabled employees to cash out accumulated flex-time and which allowed employees and managers in client service areas to reach agreement on non-shift work rosters;

- expanded the flex-time bandwidth in the ACBPS Agreement from 7:30 am to 6:30 pm to 7 am to 7 pm which would impact on all Marine Unit employees; and

- included new provisions which provided that flex-time would not apply to casual employees and must be approved by the Secretary, requiring that flex debits be offset by any overtime, empowered the Secretary in certain circumstances to acquit an employee's excess flex debits with deductions from their annual leave credits or by requiring an employee to take leave without pay and empowered the Secretary to withdraw flex-time where there were concerns about an employee's performance or if the employee was misusing flex-time.

[211] In summary, the CPSU sought to retain the flex-time provisions in the DIAC Agreement though adopting the more beneficial flex credit and flex debit carryover provisions from the ACBPS Agreement. The CPSU relied on the evidence of Mr Fontana, Ms Jones and Ms Harris.

[212] The Department submitted that its proposed determination largely replicated and streamlined the flex-time regime in the DIAC Agreement, adding that unnecessary language and aspirational content had been removed to assist the Commission in its obligation to draft in plain English. The Department further submitted that as flex-time was peculiar to the public sector and the APS in particular that flex-time arrangements negotiated in other APS arrangements provided a useful guide. Key aspects of the Department's submissions included that:

- a provision explaining the purpose of flex-time would assist in interpreting and applying the workplace determination and for this reason had merit,

- with regard to its proposed provision relating to flex-time availability, it ought to be entitled to take into account its operational requirements and public service standards when arranging its workforce;

- a situation where flex-time arrangements were continued, despite there being no work or insufficient work to perform in flex hours, had the potential to diminish productivity;

- a maximum flex credit of one standard week and a maximum flex debit of 10 hours was a common feature of APS enterprise agreements;

- procedures ought to be in place to ensure that employees balanced flex credits and debits prior to termination, adding that merely providing payment on termination without procedures to ensure balances settle removed the potential for it to best manage an employee's notice period according to work requirements with the consequent potential to diminish productivity;

- the facility to cash out flex credits had the potential to incentivise overwork and reduce the taking of flex leave thereby diminishing the productivity benefit of flex-time; and

- the CPSU and its members had previously agreed to clauses identical or similar to those which it proposed regarding the purpose and availability of flex-time, flex-time and insufficient work, flex-time at cessation of employment and the withdrawal of flex-time in other APS enterprise agreements.

[213] In broad terms both the Department and the CPSU sought to retain key elements of the flex-time arrangements reflected in the DIAC Agreement. We agree with that general approach. As to the various changes which the Department sought, a contention it advanced in support of a number of those changes was that the CPSU and its members had agreed to identical or similar provisions in other APS enterprise agreements. If anything that contention supports a finding that the Department's proposed changes are more appropriately the subject of future bargaining. For this reason and consistent with s.275(h) of the Act, we are not prepared to include those provisions proposed by the Department which require flex debits to be offset by any overtime (this issue his discussed in further detail below in the context of reasonable additional hours and overtime), empower the Secretary in certain circumstances to acquit excess flex debits with deductions from an employee's annual leave credits or by requiring an employee to take leave without pay and which empower the Secretary to withdraw flex-time where there are concerns about an employee's performance. However, we believe that there should be scope in the workplace determination for the Secretary to respond to changing operational requirements by determining that flex-time does not apply in particular areas where flex-time inhibits the Department's capacity to meet those changed operational requirements. The determination we will make will include scope for the Secretary to do so but only after consultation with employees and their representatives in accordance with the workplace determination's consultation term.

[214] As to the other provisions which the CPSU contended had been removed in the flex-time arrangements proposed by the Department, we note that some of those provisions are included in the Department's proposed determination but have been moved, e.g. the provisions regarding travel undertaken for business purposes appear at clauses 9.2 and 9.3 of the Department's proposed workplace determination while a provision dealing with meal breaks is at clause 3.12. The other provisions cited by the CPSU, i.e. provisions relating to core hours and the cash out of accumulated flex-time and providing scope for employees and managers in client service areas to reach agreement on non-shift work rosters, are more appropriately considered in future bargaining [s.275(h)].

[215] In respect of the CPSU's proposal to increase the maximum flex credits and debits to align with those in the ACBPS Agreement, we consider that proposal is best considered in future bargaining [s.275(h)].

Flexible working arrangements/variable working hours

[216] The CPSU's proposed determination retained various provisions in the DIAC Agreement relating to variable working hours and part-time arrangements as well as clause 4.1 of the Agreement which provided *inter alia* that "applications for flexible working conditions will only be declined for genuine operational reasons and the employee will be

provided with reasons in writing." In addition, the CPSU sought the inclusion of additional provisions relating to part-time employment. The provisions dealt with training for part-time employees and provided a right to return to full time work for those employees who elected to work part-time for personal reasons. The CPSU's submissions did not address its proposals regarding flexible working arrangements/variable working hours.

[217] The Department opposed the CPSU's proposals contending that each of the proposals failed on merit and public interest grounds. More particularly, the Department submitted that the Act together with those aspects of the Department's proposed workplace determination dealing with working arrangements provided a fair framework for both employees and it to cater for situations in which flexible working arrangements were desirable.

[218] We note that the Department's proposed determination includes a provision stating that "An employee may request a change in working arrangements in accordance with Division 4, Part 2-2 of the *Fair Work Act 2009*". For reasons of clarity, and consistent with the Act, we will add the following sentence to the Department's proposed provision:

> "Where an employee makes such a request, the Secretary may refuse the request only on reasonable business grounds and will provide the employee a written response within 21 days stating whether the request has been granted or refused."

[219] As to those provisions relating to variable working hours, in the absence of any substantive submissions as to why those provisions should be retained, we are not satisfied that the merit of including those provisions in the determination we will make has been established [s.275(a)]. In respect of the CPSU's additional provisions relating to part-time employment, we consider that there is merit in including in the determination we will make a right to return to full time work for those employees who elected to work part-time for personal reasons [s.275(a)]. However, we consider that the issues dealt with in the CPSU's proposed provision relating to training for part-time employees are more appropriately dealt with in policies and through the overtime provision in the determination we will make.

Reasonable additional hours and overtime

[220] The CPSU in its submissions summarised the effect of the various changes to the existing arrangements regarding reasonable additional hours and overtime which were reflected in the Department's proposed workplace determination. The changes referred to included:

- changes to when overtime is payable for employees working flex-time arrangements, standard hours and shift arrangements and casual employees;
- changes to overtime meal allowance arrangements, particularly for EL employees;
- changes to time off in lieu (TOIL) arrangements;
- removal of provisions regarding the minimum payment for emergency duty and overtime, payment when there are multiple overtime attendances, and rest relief after overtime which applied under the ACBPS Agreement; and
- insertion of new minimum payment provisions for non-continuous overtime.

[221] With regard to the first of the above issues, the CPSU contended that the Department's proposed determination had the effect of reducing the entitlement to overtime under the Agreements for employees working flex-time arrangements by increasing the number of hours that they must work before being able to claim overtime. Specifically, the Department's proposed determination provides *inter alia* that employees working flex-time arrangements must work in excess of 8 hours and 30 minutes on any day between Monday to Friday inclusive before being eligible for overtime. The CPSU further submitted that the trigger for overtime for employees working flex-time arrangements under the DIAC Agreement, i.e. 8 hours, presented the same unfairness as proposed in the Department's determination although to a lesser extent. As such, the CPSU contended that the arrangements which applied under the ACBPS Agreement, i.e. overtime was payable for work in excess of 7 hours and 21 minutes, should apply.

[222] Other key aspects of the CPSU's submissions regarding the issue of reasonable additional hours and overtime included that:

- the Department had led no evidence as to why the option of taking overtime as TOIL should not continue or suggesting that the existing provisions had led to operational difficulties or unreasonable additional costs through other inefficiencies, adding that the existing arrangement ought to be retained;

- it agreed with the Department's proposed clause regarding the minimum payment for non-continuous overtime;

- in respect of emergency duty which was currently paid at double time as opposed to the usual overtime rates (i.e. time and a half for the first three hours and double time thereafter), the circumstances attaching to emergency duty (i.e. returning to duty outside of normal working hours without prior notice) warranted the additional compensation;

- the overtime meal allowance amounts currently paid to employees in accordance with the DIAC Agreement were more appropriate than the guidance provided by the Australian Taxation Office (ATO) in its relevant rulings, adding that the Department had led no evidence to justify its proposed changes concerning the payment of overtime meal allowance to EL employees;

- the provision in the ACBPS Agreement for employees to refuse to work overtime should be retained in the determination; and

- in the absence of any evidence to support the changes to the rest relief after overtime provisions in the DIAC Agreement, the existing provisions ought to be retained on the basis that they represented a fair balance between ensuring appropriate rest for employees on the one hand and, on the other hand, ensuring that employees were available to perform work when required.

[223] The CPSU drew on the evidence of Ms Jones and Mr Loughnan in support of its submissions regarding the Department's proposed overtime arrangements for employees working flex-time.

[224] In its submissions regarding reasonable additional hours and overtime the Department submitted, among other things, that:

- its proposed determination allowed it to direct the performance of reasonable additional hours to meet operational requirements and allowed employees to decline to work those additional hours if they were unreasonable;

- under its proposed determination the NES factors would govern what would be considered reasonable whereas the list of factors in the CPSU's proposed determination was inconsistent with the NES thereby introducing uncertainty into the regulation of the matter;

- an overtime regime that was responsive to the different type of work arrangements applying in the Department had merit, adding that each working arrangement had different flexibility and disability in the way it was applied;

- the additional words in the CPSU's proposed determination regarding TOIL did not impose any substantive obligations and were therefore unnecessary;

- there was no different disability or change in work value for instances of emergency duty when compared to overtime which would justify a different rate;

- the only difference between the parties respective provisions relating to overtime meal allowance appeared to be drafting, adding that the Department's provision was better expressed when compared to the CPSU's proposed determination; and

- similarly the Department's proposed clauses relating to rest relief after overtime were plainer and ought to be preferred.

[225] Also in its submissions the Department took issue with Ms Jones' evidence that she would need to accrue over an hour of flex-time before an entitlement to overtime arose. Specifically, the Department contended that its proposed flex-time arrangements were not mandatory and that Ms Jones had the option to be paid overtime instead of flex-time and that a one hour barrier was fair in all the circumstances taking into account the benefits of flex-time arrangements.

[226] We deal firstly with the issue of when overtime becomes payable. We see no basis for distinguishing between employees working flex-time or other arrangements in terms of when overtime becomes payable. In our view, overtime should be payable in respect of work performed by an employee at the direction of the Secretary beyond the employee's ordinary hours of work or outside the span of hours specified in the determination we will make. In short, our approach in respect of additional hours performed within the span of hours can be summarised as follows:

- for full-time employees overtime will be payable for work performed at the direction of the Secretary beyond 7 hours and 30 minutes in a day;

- for part-time employees overtime will be payable for work performed at the direction of the Secretary beyond the employee's agreed regular hours for a day; and

- for casual employees overtime will be payable for work beyond 37.5 hours in a week.

[227] All work performed by the above groups of employees at the direction of the Secretary which is outside the span of hours will be payable as overtime. For full-time and part-time employees, work performed at the direction of the Secretary which is not continuous with the employee's ordinary hours of work on any day will also be payable as overtime.

[228] For shiftworkers, overtime will be payable for work performed at the direction of the Secretary which is outside the employee's normal rostered ordinary hours of work for a day or in excess of the employee's weekly hours of ordinary duties or an average of the standard weekly hours of duty over a cycle of shifts.

[229] Our proposed approach has regard to the interests of the Department and employees [s.275(c)] and provides an incentive for the parties to continue to bargain on the issues of reasonable additional hours and overtime [s.275(h)].

[230] Our decisions in respect of the other issues which we must determine regarding reasonable additional hours and overtime are set out below.

- *Emergency duty* – we consider that emergency duty is different to most overtime which is often continuous with an employee's ordinary hours of duty and/or is foreseen. Against that background, we consider the existing arrangement which provides that such emergency duty is paid at double time continues to be appropriate.

- *Overtime meal allowance* – we see no reason why the ATO reference rate should not be relied upon. The reasonable amount for overtime meal allowance expenses specified by the ATO for 2018/2019 is $30.60[253]. Relying on the ATO rate avoids the need to adjust the amount of overtime meal allowance. The CPSU arguments against using the ATO rate are not compelling in our view.

- *Scope to refuse additional hours* – we consider that there is merit in the determination acknowledging that an employee may refuse to work additional hours if they are unreasonable. While we note the Department's submission that information as to what might be unreasonable is provided on its intranet with advice also available to employees from the Department's human resources area, we think there is benefit in referring to s.62(3) of the Act, which sets out the factors which must be taken into account in determining whether additional hours are reasonable or unreasonable, in the determination we make. Including such a cross reference balances the Department's desire for brevity and the interests of employees in understanding their rights in this regard [s.275(c)].

- *Rest relief after overtime* – we note that under both the Department's and the CPSU's proposed determinations an employee is entitled to payment at double time in circumstances where they are required to resume work without having had 8 consecutive hours, plus reasonable travelling time, off. We also note that the Department's proposed determination provides that employees should be provided "a break of at least 8 consecutive hours off duty, plus reasonable travelling time, between 2 periods of ordinary duty." In our view this has the same practical effect as the CPSU's proposed determination which provides that an employee may "absent

themselves from work with no loss of pay until they have been off duty for a period of eight consecutive hours, plus reasonable travelling time." We prefer the Department's proposed approach.

- *TOIL* – we consider it appropriate that TOIL should be able to be taken within a reasonable period of the overtime having been worked and that where that is not possible the employee should be able to request that the additional hours worked be paid as overtime at the rate they would have been paid when the overtime was worked. In addition, the provision we will include will make it clear that any untaken TOIL will be paid out on termination.

Time off for EL employees

[231] The CPSU's proposed determination includes provisions drawn from the ACBPS Agreement which provide EL employees "a minimum of four whole days paid absence per calendar year, without deduction from leave credits" in recognition of their contribution. The CPSU submitted that the provisions had applied to ACBPS employees for some time and that there was no evidence that during that time the provisions led to unreasonable costs being incurred by ACBPS or that the provisions were administratively unworkable. The CPSU further submitted that:

- there was no evidence generally to support the removal of the provisions;

- there were positive reasons for the inclusion of the provisions, including the positive effect that the provisions had in ensuring equity and fairness of entitlements across EL employees; and

- the issue ought to properly be the subject of negotiations for a future enterprise agreement.

[232] In his witness statement[254] Mr Loughnan deposed that the provisions were introduced in the ACBPS in 2010, describing the pre-existing arrangements as a "cap-in-hand"[255] system which was completely dependent on a manager's discretion and which resulted in inconsistencies in how additional hours worked were recognised.

[233] The Department's proposed determination provides the Secretary with the discretion to grant EL employees time off in recognition of additional hours worked. The Department, drawing on Mr Leonard's evidence, opposed the CPSU's claim on the basis that EL employees were highly remunerated and were expected to work reasonable additional hours when required and without compensation. Mr Leonard deposed, among other things, that providing for a minimum 4 days leave undermined the purpose of the higher remuneration for EL employees and that some EL employees would not work any additional hours while others would work additional hours totalling more than 4 days per annum. With respect to Mr Muffatti's evidence that the 4 days leave for EL employees equated to these employees working an additional 9 minutes each day, the Department submitted that time off for EL employees should not be based on a simple accounting exercise such as Mr Muffatti's and that time off ought to be provided at point in time situations where an employee had far exceeded the work level expectations at those times.

[234] While we envisage that EL employees would work in excess of 37.5 hours per week on occasions, the fact that EL employees in the APS are not generally entitled to overtime is reflective of the expectation that they are required on occasions to work additional hours. There is no material before us which points to EL employees in the Department either individually or as a group being required to consistently work what might be considered as excessive additional hours. As such, we are not satisfied of the merits of providing for an additional four days leave for all EL employees [s.275(a)]. In our view, the issue is more appropriately addressed on a case-by-case basis as proposed by the Department. While we disagree with the CPSU's proposed clause, we agree with its contention that this issue is appropriately addressed through future bargaining [s.275(h)].

Public holidays

[235] The Department's proposed determination in respect of public holidays does not include explicit reference to the Labour Day (or equivalent) public holiday nor does it include scope for the Secretary to determine additional holidays as per the DIAC Agreement. The Department opposed the inclusion of the CPSU's proposed clauses regarding additional holidays (see below), contending that there was no public interest in the claim and that it lacked merit in view of the additional cost burden.

[236] The CPSU's proposed determination on the other hand includes provisions dealing with the above aspects. In addition, the CPSU's proposed determination includes an additional clause which requires the Secretary to declare additional holidays in the event that a public holiday falls on a Saturday or Sunday and a State and/or Territory government does not declare a substitute public holiday. The CPSU submitted that the Department lead no evidence to support the removal of the abovementioned provisions and that they ought to be retained. As to its proposed additional clause, drawing on Ms Harris' evidence, the CPSU submitted that the clause was supported by a clause in DIAC's 2012 and 2015 Working Hours policy documents.

[237] With regard to the issue of whether the Labour Day (or equivalent) public holiday is specified in the determination, we note that the CPSU's proposed provision includes the words "if proclaimed by State or Territory governments."[256] We further note that:

- the NES relating to public holidays does not specify Labour Day (or equivalent) as a public holiday (see s.115(1) of the Act); and

- the Labour Day (or equivalent) public holiday if proclaimed by a State or Territory government would be captured by clause 3.37(h) of the Department's proposed determination which entitles employees to observe the following as holidays at their normal work location "any other day, or part day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part day, or a kind of day or part day, that is excluded by the Fair Work regulations from counting as a public holiday."

[238] In other words, the practical effect of not including an explicit reference to the Labour Day (or equivalent) public holiday is zero as employees would be entitled to the public holiday in accordance with the Department's proposed clause 3.37(h). Against that

background, and having regard to the CPSU's proposed provision, we see no need to include reference to the Labour Day (or equivalent) public holiday in the determination we will make.

[239] As to the CPSU's proposed provisions relating to additional holidays, we do not consider the case for their inclusion has been made out by the CPSU [s.275(a)] nor do we consider their inclusion to be in the public interest [s.275(d)] in that their inclusion would enable the Secretary to effectively override a decision by a State or Territory government(s).

Shiftwork arrangements

[240] The CPSU's proposed determination provides for a night shift loading of 30 per cent for rostered and performed duty between the hours of midnight and 6:00 am. In its submissions the CPSU highlighted that this arrangement was not preserved in the s.24 determination and was consequently removed for all ACBPS employees upon integration. The CPSU sought to retain the former ACBPS rate and apply it to all Departmental employees. Whilst the CPSU noted Mr Leonard's evidence that the detriment to former ACBPS employees as a result of the 30 per cent rate not being reflected in the Department's proposed determination was somewhat offset by the proposed payment of shift penalties during annual leave, it contended that there was no justification for the removal of the entitlement. The CPSU further submitted that there was no evidence that the provision would lead to unreasonable costs being incurred by the Department, that it was administratively unworkable or generally to support the removal of the entitlement. In addition, the CPSU submitted that there were positive reasons for its inclusion in the determination and that it ought to properly be the subject of negotiations between the parties at the time an enterprise agreement is being negotiated to replace the terms of the workplace determination. The CPSU relied on Mr Suijdendorp's evidence in support of its submissions.

[241] Beyond that, the CPSU contended that the Department's proposed determination entailed a number of changes to the existing shiftwork provisions. Those changes included inserting a new definition of shift work and the removal of provisions dealing with issues such as shiftwork and public holidays, emergency duty, domestic business related travel, annual leave, personal leave, rest relief and consultation.

[242] The Department submitted that the shiftwork arrangements in the workplace determination needed to provide optimal flexibility so as to ensure the determination meets the various needs across the Department's expansive operational remit. This, the Department contended, was achieved by providing for a flexible and clear definition of shiftwork which confirmed the Department's prerogative to determine instances where shiftwork was to operate. The Department further submitted that its proposed determination sought to create this flexibility whilst ensuring that the provisions were informed by appropriate consultation and notice obligations, adding that the consultation notice obligations were not triggered where roster changes were imposed as a disciplinary or conduct related sanction. As to the shiftwork penalty rate, the Department submitted that it sought to apply the arrangement in the Award. The Department also submitted that its proposed position which provided for the payment of 100 per cent of shift penalties during annual leave involved a compromise between the competing positions that previously applied, adding that this compromise struck a fair balance between the competing positions.

[243] The Department also highlighted that its proposed determination ensured that shift penalties were not computed into allowances based on salary. The Department submitted that

the CPSU had not articulated a justification for incorporating shift penalty payments into the calculation of other entitlements.

[244] In response to Ms Jones' and Mr Mufatti's criticism of the lack of consultation arrangements regarding shiftwork in the Department's proposed determination, the Department noted that the model consultation term required consultation on changes to rosters and ordinary hours of work. The Department contended that the model term was an exhaustive regime for consultation on roster changes.

[245] The shiftwork loadings provided in the Department's proposed determination are consistent with those applying in most modern awards, including the Award, and were also included in the DIAC Agreement. While we note the non-provision of the enhanced loading contained in the ACBPS Agreement has had a financial impact on some former ACBPS employees, it was not disputed that the impact would be offset to some extent by the Department's proposal to pay 100 per cent of shift penalties while on annual leave. Little material was put before us as to the rationale for the higher night shift loading or any unique disabilities which it was intended to address. As such, we are not satisfied that the CPSU has established the merits of including such a loading in the determination we will make [s.275(a)]. Further, we agree with the CPSU's contention that the issue ought to properly be the subject of negotiations between the parties at the time an enterprise agreement is being negotiated to replace the terms of the workplace determination [s.275(h)].

[246] As to those provisions in the CPSU's proposed determination concerning consultation regarding the introduction, variation and cessation of shiftwork arrangements, those provisions impose additional consultation requirements on the Department. Their inclusion in the determination in the absence of agreement on their inclusion, would in our view be inconsistent with s.273(5) of the Act.

[247] Including shiftwork provisions in that section of the workplace determination dealing with working hours as opposed to a separate section avoids the need to replicate (as reflected in the CPSU's proposed determination) a number of provisions which are already dealt with in the working hours section, e.g. emergency duty and rest relief. Further, other provisions set out in the shiftwork section of the CPSU's proposed determination are in our view more appropriately dealt with in other sections of the determination, e.g. leave.

[248] Finally, the CPSU sought to include a provision dealing with "Overs and Unders" in its proposed determination. The provision requires, among other things, the Department to hold discussions with the CPSU on a solution to the issue of over or under crediting wages for some shiftworkers based on their pattern of hours. The CPSU relied on Ms Muscat-Bentley's evidence in support of its proposed provision. Ms Muscat-Bentley's evidence was that the term "Overs and Unders" was the vernacular name for the situation which arose when an employee, due to the operation of their roster, either worked under or over their rostered hours of work over the settlement period. More specifically, Ms Muscat-Bentley deposed that the issue was a significant one which CPSU members deeply cared about, adding that it could be a highly emotive issue for staff members when their hours of work were not managed properly in circumstances where employees varied their hours to be flexible for the Department and then did not enjoy the same reciprocity when it came to balancing their hours worked. Ms Muscat-Bentley further deposed that the CPSU was supportive of reaching a solution to the problem by agreement and sought a consultative approach to doing so.

[249] The Department on the other hand opposed the clauses on the basis that they impinged upon the model consultation term and interfered with its managerial prerogative to implement change. The Department further contended that there was nothing prohibiting the CPSU from raising roster issues with it absent the provision.

[250] We are not prepared to include the CPSU's "Overs and Unders" provision in the determination we will make for a number of reasons. First, there is no material before the Commission pointing to either the size of the problem or the need for the provision [s.275(a)]. Second, the requirement for the Department to discuss the issue with the CPSU would, in the absence of agreement on the inclusion of the proposed provision, potentially be inconsistent with s.273(5) of the Act. Third, we agree with the Department's submission that the CPSU could raise the issue with the Department in the absence of a provision being included in the workplace determination. Fourth, we consider that the issue is more appropriately addressed through future bargaining [s.275(h)].

Other issues

[251] Other disputed issues which we need to determine are unauthorised absences, abandonment of employment, the level of casual loading and Medical Officers and private practice. We deal with those issues below.

(a) Unauthorised absences

[252] The CPSU's proposed determination includes a provision from the DIAC Agreement which provides that where an employee is absent without approval for a period of 30 minutes or more during a flex-time settlement period, the manager may require them to work additional time to make up the period of absence.

[253] The Department's proposed determination on the other hand provides that all benefits under the determination cease where an employee is absent without approval until the employee resumes duty or is granted leave.

[254] The CPSU contended that the Department had led no evidence in support of its proposed provision, while the Department contended that the CPSU's proposed provision lacked merit and was complex as it required supervisors and employees to aggregate minutes of unauthorised absences over four week blocks and may generate disputes.

[255] The Department's submissions have merit in our view, as its proposed approach is administratively simpler. Accordingly, we will adopt its proposed provisions in respect of unauthorised absences.

(b) Abandonment of employment

[256] The Department's proposed determination included a provision dealing with abandonment of employment. The Department in its submissions contended that the provision supplemented its power under s.29(3)(c) of the PS Act to terminate employment for non-performance of duties by way of abandonment. The Department further contended that the PS Act did not prescribe qualitative or procedural instructions for affecting termination for the non-performance of duties including abandonment, and that the proposed provision filled this regulatory gap by prescribing time limits upon which an employee is deemed to abandon their

employment. The Department also noted that the power to terminate for abandonment was subject to the usual fetters on administrative decision making.

[257] The CPSU opposed the Department's proposed provision submitting *inter alia* that no evidence was led by the Department of any circumstances in which an employee had been unreasonably absent from the workplace and the Department had been unable to appropriately manage the situation. The CPSU also highlighted that the abandonment of employment provision had not been reflected in the Department's third offer.

[258] In the absence of any evidence indicating problems with the operation of the existing regime governed by the PS Act, we are not satisfied of the merits of including an abandonment of employment clause in the determination we will make [s.275(a)]. Further, we consider this issue is more appropriately addressed through future bargaining [s.275(h)].

(c) Casual loading

[259] The CPSU seeks a casual loading of 25 per cent. The CPSU did not deal substantively with this issue in its submissions, though it was identified in the CPSU's Final Submissions as existing content from the ACBPS Agreement.[257]

[260] The Department opposed the claim contending that there was no evidence before the Commission to suggest that the work value of casual employees had changed since integration or that there would be a productivity return from the increase. While the Department noted that the Award provided for a 25 per cent casual loading, it submitted that the base rates of pay provided for in its proposed determination exceed the base rates of pay such that casual employees were better off overall despite the lower loading. The Department also noted that the casual loadings negotiated in the former DIAC and ACBPS reflected this.

[261] We note that the Agreements both provide for a casual loading of 20 per cent.[258] Against that background, and in the absence of any substantive submissions from the CPSU, we do not believe that the merits of the CPSU's proposed change have been made out [s.275(a)].

(d) Medical Officers and private practice

[262] The CPSU's proposed determination includes a provision from the DIAC Agreement concerning Medical Officers and private practice. The CPSU submitted that this clause was appropriate to be included in a workplace determination because Medical Officers were more readily able to and in fact did exercise their profession outside of their employment. The CPSU further submitted that the clause not only made clear the entitlement to perform work outside of the Department but also set clear guidelines as to the circumstances when such employment would be allowed both for the benefit of the Department and for an employee's information.

[263] The Department opposed the continuation of these provisions contending that the way in which Medical Officers divided their employment with the Department and private practice ought to be a pre-negotiated contractual matter rather than an industrial entitlement. The Department also submitted that it ought to be able arrange its medical work in line with pre-agreed fractional work time rather than on a piecemeal basis which required an assessment of operational requirements on each occasion a Medical Officer sought to be excused from duty.

[264] We agree with the Department's contentions that the issues covered in the existing clause are more appropriately dealt with in the contractual arrangement between the Department and the individual Medical Officer.

4. Leave

[265] There are a range of issues relating to leave which the Commission is required to determine. For ease of reference, we deal with those issues under specific headings such as annual leave, personal carers leave and so on.

General provisions

[266] The CPSU took issue with aspects of the Department's proposed workplace determination setting out general provisions relating to leave. In in its submissions the CPSU highlighted that the Department's proposed determination did not include:

- the provision in the DIAC Agreement committing the Department to providing employees with leave arrangements which are flexible and easy to administer; and

- the provision in the ACBPS Agreement which provides scope for the Secretary to agree in writing with an employee to vary the employee's leave entitlement to meet particular workplace or operational requirements or additional responsibilities.

[267] The CPSU submitted that the Department had provided no evidence to support its proposed changes and that the above provisions ought to be retained in the workplace determination. The CPSU also stated that it did not object to the new and additional machinery provisions contained in the Department's proposed workplace determination.

[268] The Department in its submissions stated that the CPSU had not articulated its reasons for opposing the general provisions clauses set out in its proposed workplace determination.

[269] As to the provisions which the CPSU wishes to see reflected in the workplace determination, we note that the provision which is drawn from the DIAC Agreement provides no entitlement but is rather a statement of intent. We see no merit in including the provision in the determination we will make [s.275(a)]. In respect of the provision drawn from the ACBPS Agreement, we note that the CPSU does not appear to have included the provision in its proposed workplace determination. We further note that the relevant clause in the ACBPS Agreement provided that any variation of entitlements would be facilitated through an IFA. The model flexibility term which is to be included in the determination we will make does not identify leave as one of the matters which an IFA can deal with. The inclusion of such a provision is therefore of arguable utility. Be that as it may, in the absence of any information regarding the circumstances in which the provision may have been utilised and the extent to which it has been utilised or any material pointing to the need for such a provision being put before the Commission, we are not satisfied as to the merit of including such a provision in the determination we will make [s.275(a)]. Accordingly neither of the provisions sought by the CPSU will be included in the determination we will make.

Annual Leave

[270] The key matters in issue regarding annual leave are:

- the Department's proposed clause 4.14 which provides that where an employee works two shifts on a Sunday, i.e. one ending early and one starting late in the day, only one shift counts for the purposes of accruing the additional weeks' annual leave for shiftworkers

    - the CPSU does not agree that this limitation should be placed on the number of Sunday shifts that should count for the purposes of accruing additional leave;

- the CPSU's claim for an extra week's annual leave for Container Examination Facility (CEF) workers who work rotating shifts across a 6 day roster

    - the CPSU stated in its submissions that the entitlement to additional leave for CEF workers was part of the ACBPS Agreement,

    - the CPSU submitted there was no justification at the time of integration for removal of the entitlement,

    - the CPSU further submitted that there were positive reasons for inclusion of the provision in the workplace determination, including fairness and equity, there was no evidence that the provision would lead to unreasonable costs being incurred by the Department or that the provision was administratively unworkable,

    - in addition the CPSU stated that the issue ought to properly be the subject of negotiations for an enterprise agreement to replace the workplace determination; and

- the exclusion of a range of provisions regarding annual leave which appear in the Agreements, including provisions relating to eligibility for annual leave, the purpose of annual leave, the approval of annual leave, taking annual leave at half pay, recall to duty from annual leave and personal leave on annual leave

    - the CPSU in its submissions stated that it sought to retain the rights and entitlements regarding annual leave contained in the DIAC Agreement (unless otherwise agreed) and the entitlements for shiftworkers to additional annual leave as contained in the ACBPS Agreement,

    - the CPSU further submitted that the Department had led no evidence in support of the changes that it proposed to the annual leave entitlements of employees,

    - the CPSU noted in its submissions that the Department's third offer provided for annual leave to be taken at half pay,

    - other than as set out below, the Department did not address this issue in its submissions.

[271] The Department submitted that:

- with regard to its proposed clause 4.14, the purpose of providing an additional half a day of annual leave was to compensate employees for the disability of working on a Sunday, adding that there was no merit justification for double counting two or more periods of duty worked on the same Sunday;

- the CPSU's claim for additional annual leave for shiftworkers at CEFs ran counter to the way additional leave was provided for all other shiftworkers;

- the 6 day roster system was now defunct save for one facility in Brisbane;

- the agreed purpose of affording additional annual leave for shiftworkers was for time worked on Sundays and Public Holidays not Saturdays;

- CEF workers in Brisbane did not experience the same disability as all other shiftworkers in that they did not work Sundays, as such the CPSU's proposal lacked merit;

- it opposed the workplace determination providing scope for employees to take annual leave at half pay;

- it had in excess of 1,600 employees with annual leave balances exceeding 40 days largely because many employees utilised flex-time accruals instead of annual leave;

- annual leave at half pay exacerbated the challenge of managing excessive annual leave balances;

- the taking of annual leave at half pay had the potential to undermine the ability for managers to allocate work appropriately and evenly across the workforce; and

- the resulting strain on work allocation had the potential to undermine productivity as a consequence.

[272] With regard to the Department's proposed clause 4.14, we note that the provision is drawn from the DIAC Agreement. No material was put to us indicating that the provision had operated in a way that disadvantaged employees. Accordingly, we see no reason not to include the proposed clause in the determination we will make.

[273] As to the CPSU's claim for an extra weeks' annual leave for CEF workers, we note that the Department's proposed provisions reflect the relevant provisions in the Award. Further, having regard to the limited material put before the Commission regarding this issue, we are not satisfied of the merits of the claim [s.275(a)]. Further, we consider that the issue is more appropriately the subject of future bargaining [s.275(h)].

[274] Finally, in respect of those provisions of the Agreements which the CPSU contends do not appear in the Department's proposed workplace determination, we note that

- the provision setting out the purpose of annual leave is aspirational in that it provides no entitlement – its inclusion in the workplace determination has not in our view been justified on merit grounds [s.275(a)] as the statement is more appropriately reflected in supporting policy documents;

- the provision providing that the approval of annual leave will not be unreasonably withheld is dealt with in the NES [s.88(2)];

- the provision relating to recall to duty from annual leave is dealt with in the Department's proposed workplace determination at clauses 4.9 and 4.10;

- we are not satisfied as to the merits of providing for annual leave at half pay [s.275(a)], particularly in circumstances where it has the potential to impact on productivity [s.275(e)] and we consider the issue is more appropriately addressed in bargaining for an enterprise agreement to replace the workplace determination [s.275(h)]; and

- we consider that there is merit in the workplace determination including a provision which deals with personal leave on annual leave [s.275(a)].

Personal/Carer's Leave

[275] There are several matters in issue in respect of personal/carer's leave. They are:

- the CPSU's claim for a provision which enables employees to take up to one day of personal leave each year without the need to specify a reason or provide evidence

    - in support of its claim the CPSU contended that there are public policy reasons for including such an entitlement in terms of reducing the burden on the healthcare system caused by employees visiting medical practitioners for the purpose of obtaining evidence for the employer and that an employee's ability to access their entitlements during periods of illness without having to attend a doctor would aid recovery,

    - the CPSU further contended that there was no evidence that the provision would lead to unreasonable costs being incurred by the Department or that the provision was administratively unworkable;

- the CPSU's claim for an employee's personal leave entitlement to be credited on commencement and each anniversary thereafter as per the Agreements

    - the CPSU relied on Mr Loughnan's evidence in support of its claim,

    - Mr Loughnan's evidence was that the entitlement provided a real benefit to employees and ensured that employees who were just starting their career were not formally disadvantaged by unplanned absences,

    - the CPSU submitted that there was no justification for the removal of this provision and that the Department had led no evidence that the operation of the clause would be administratively unworkable or that it would lead to unreasonable costs being incurred by the Department,

    - the CPSU also submitted that there were positive reasons for the inclusion of the provision such as the significant effect that the provision had on employee

welfare and that the issue ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination; and

- the exclusion from the Department's proposed workplace determination of a number of provisions relating to personal/carer's leave which appear in the DIAC Agreement, including the scope to access personal/carer's leave for a range of compelling personal circumstances such as for compassionate reasons, religious or cultural observance, genuine emergency situations, scope to anticipate up to 10 days personal/carer's leave, the requirement to develop and implement organisational health initiatives and the discretion for the Secretary to grant up to 10 additional days personal/carer's leave in certain circumstances

    - in short, the CPSU wanted these provisions reflected in the workplace determination we will make,

    - with regard to the scope to access personal/carer's leave for a range of compelling personal circumstances, the CPSU submitted that the inclusion of such provisions in the determination would not foster a culture whereby personal leave is something simply to consume and that annual leave was not intended to cover the personal circumstances covered by such provisions, adding that the inclusion of such provisions would preserve annual leave for the purpose of employees having a period of rest and recreation away from the work environment,

    - the CPSU relied on the Mr Hyde's evidence in support of the inclusion of a provision providing discretion for the Secretary to grant up to 10 additional days personal/carer's leave in certain circumstances.

[276] The Department in its submissions opposed the CPSU's claims that:

- personal/carer's leave be credited up front;

- the circumstances in which personal/carer's leave be extended to include "compelling circumstances" – the Department opposed the claim on the basis that personal/carer's leave was a safety net for employees who were unable to attend work due to illness or caring responsibilities and ought to be preserved for that purpose and no other purpose thereby ensuring that such leave remained accessible in times of most need;

- employees be able to take up to one day of personal leave each year without the need to specify a reason or provide evidence – the Department submitted that the absence of a requirement for evidence created the potential for employees to misuse their personal leave entitlement; and

- employees be able to anticipate up to 10 days personal leave – the Department submitted that in circumstances where employees accrued 18 days of personal leave per annum a sufficient safety net was afforded employees, adding that the CPSU's claim lacked merit. The Department also highlighted that the Secretary maintained the discretion to provide paid leave in the case of long-term illness via miscellaneous leave.

[277] Beyond that, in its submissions the Department highlighted that its proposed workplace determination largely replicated the notification requirements in respect of personal/carer's leave that were found in the NES, noting that clause 4.68 of its proposed determination provided the Secretary with the discretion to require satisfactory documentary evidence in circumstances where an employee was absent on personal leave for a period of 2 consecutive days or less. The CPSU submitted in respect of the Department's proposed clause 4.68 that there was no justification for the provision which would be to the detriment of employees accessing their lawful entitlements.

[278] The Department also referred to clauses 4.71 and 4.73 in its proposed determination which were not agreed. Those clauses respectively empower the Secretary to grant personal leave where an employee has had contact with a person suffering from a notifiable infectious disease or to grant unpaid personal leave where accruals were exhausted. In respect of the first of those clauses, the Department submitted that absent such a clause an employee would be required to access another form of leave. The Department also contended that the CPSU's opposition to these clauses was unexplained.

[279] Having regard to the parties' submissions regarding the matters in issue in respect of personal/carer's leave we are not satisfied as to the merits of the CPSU's claims (other than in respect of the basis on which personal/carer's leave accrues) or the Department's proposed clause 4.68 [s.275(a)]. In our view these matters are more appropriately dealt with in bargaining for an enterprise agreement to replace the workplace determination [s.275(h)].

[280] As to the basis on which personal/carer's leave accrues, we note that the Agreements both provide that on commencement of an employee's ongoing employment with the APS they will be credited with 18 days paid personal leave and that in subsequent years personal leave accrues progressively throughout the year. The Department in its submissions provided no rationale for its opposition to this claim. In our view, the inclusion of such a provision has regard to the interests of the Department and employees [s.275(c)]. Such a provision is in the interest of the Department in that it avoids the need for this cohort of employees, i.e. ongoing employees who are new to the APS, to apply for other forms of leave and in doing so minimises the risk of disputes where alternative forms of discretionary leave may not be granted. Such a provision is also in the interests of employees as it minimises the risk of an employee having to take leave without pay.

[281] With regard to the Department's proposed:

- clause 4.71, we note that the provision is drawn from the ACBPS Agreement and assume that it is a response to the risk of ACBPS and now ABF employees being exposed to notifiable diseases in the course of their work and is necessary given that such exposure, while it may render an employee unable to attend work, would not necessarily result in an employee being eligible for personal leave because they are not fit for work due to a personal illness or injury affecting the employee. Against that background, the inclusion of such a provision in the workplace determination has regard to the interests of the employer and more particularly in this case employees; and

- clause 4.73, we consider that there is merit in including such a provision in the determination we will make [s.275(a)]. However consistent with the relevant

provision in the Award, we consider that the provision should provide that the Secretary may grant either paid or unpaid personal leave in circumstances where the employee has exhausted their personal leave accrual and is not fit for work due to a personal illness or injury affecting the employee.

Compassionate Leave

[282] The matter in dispute regarding compassionate leave relates to the quantum of leave, with the CPSU seeking 3 days leave per occasion (2 days per occasion for casual employees) and the Department's proposed workplace determination providing for 2 days compassionate leave per occasion.

[283] The CPSU proposed provision drew on the ACBPS Agreement which provided 2 days compassionate leave per occasion in circumstances where a member of the employee's family or household contracts an illness or sustains an injury that poses a threat to their life and 3 days bereavement leave per occasion where a member of the employee's family or household dies. The CPSU submitted that its proposed determination better addressed the circumstances of an employee needing to access the entitlement and represented a compromise between the entitlement provided in the Agreements. The CPSU relied on Mr Loughnan's evidence in support of its proposed approach. In his evidence Mr Loughnan gave an account off his personal experience of needing to apply for and use compassionate and bereavement leave under the ACBPS Agreement. Mr Loughnan also gave evidence that in practice under the ACBPS Agreement employees were generally given 5 days off work when a member of their family passed away, adding that in his experience the entitlement was appropriately used and was never the subject of abuse.

[284] The Department contended that Mr Loughnan's concerns were misplaced highlighting that leave became available on each occasion that it was required such that an employee could access leave to attend to a family member who is dying and then access an additional two days leave to grieve and make any necessary funeral arrangements.

[285] With regard to the CPSU's proposed provision, we note that when compared to the ACBPS Agreement it provides an additional days' leave in circumstances where a member of the employee's family or household contracts an illness or sustains an injury that poses a threat to their life. The CPSU provided no justification for this enhancement. In the absence of any such justification, we do not consider that the increase is justified on merit grounds [s.275(a)].

[286] As to the additional days' compassionate leave provided for in the CPSU's proposed determination in circumstances where a member of the employee's family or household dies, we note that the NES provides for 2 days compassionate leave per occasion in those circumstances whereas the Award provides an additional days' compassionate leave per occasion across the board for other than casual employees. We further note that in respect of those employees transferred to the Department as part of the second integration, only those employees transferred from the Office of Transport Security did not enjoy 3 days' compassionate leave upon the death of a family or household member. Against that background, the determination we will provide 3 days' compassionate leave per occasion in circumstances where a member of the employee's family or household dies. For casual employees, the period of unpaid leave in these circumstances will be 2 days per occasion.

[287] In summary, our approach in respect of compassionate leave not only has regard to the merits [s.275(a)] but also seeks to balance the interests of the employer and employee [s.275(c)]. Further, it also provides an incentive to continue to bargain on this issue at a later time [s.275(h)].

Ceremonial Leave

[288] The CPSU noted in its submission that the Department's proposed workplace determination removed a provision from the DIAC Agreement that ceremonial leave will not count as service. The CPSU stated that it did not oppose the Department's proposal to remove the relevant provision of the DIAC Agreement. However, the CPSU appears to have overlooked clause 4.2 of the Department's proposed workplace determination which provides that, subject to a contrary intention, unpaid leave provided for in the determination will not count as service for any purpose. We note that the CPSU's proposed workplace determination provides that ceremonial leave does not count as service for any purpose.

[289] Against that background, the determination we will make will provide for 10 days unpaid ceremonial leave over a 2 year period, with that leave not counting as service for any purpose.

Defence Reserve Leave

[290] The CPSU stated in its submissions that it agreed with the provisions in the Department's proposed workplace determination regarding defence reserve leave.

Long Service Leave

[291] The matters in issue regarding long service leave are whether the workplace determination should:

- provide scope for an employee to apply for personal leave or compassionate leave where they become ill or suffer bereavement while on long service leave and have their long service leave re-credited; and

- include those provisions in the Department's proposed workplace determination which provide that the grant of long service leave is subject to the operational requirements and the approval of the Secretary and specify the minimum period for which an employee may be granted long service leave.

[292] The CPSU supports the retention of the existing provision in the DIAC Agreement which provides access to personal and compassionate leave while on long service leave and does not include the abovementioned provisions in the Department's proposed workplace determination. The CPSU in its submissions disputed Mr Leonard's evidence that where an entitlement such as long service leave was sufficiently regulated by legislation the Department's proposed determination merely referred to that legislation. More specifically, the CPSU submitted that the Department's proposed determination in respect of long service leave did more than simply point to the relevant legislation, contending that it sought to supplant the legislative framework through the inclusion of the provisions mentioned in the second dot point above. The CPSU further submitted that no strong case had been advanced for the inclusion of those provisions and nor was there a strong case for the need to enhance

the legislative framework as sought by the Department. In support of its preferred approach the CPSU submitted that the Department had led no evidence that the operation of the existing clause had been administratively unworkable or that retaining the current provision would lead to unreasonable costs being incurred by the Department. The CPSU also submitted that the issue also ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination.

[293] The Department submitted that it opposed the inclusion of a provision in the workplace determination which provided scope for an employee to apply for personal leave or compassionate leave where they become ill or suffer bereavement while on long service leave and have their long service leave re-credited. The Department further submitted that the entitlement was not provided for in the *Long Service Leave (Commonwealth Employees) Act 1976* (the LSL Act).

[294] With regard to the inclusion of a provision providing for the re-crediting of long service leave in certain circumstances, no material was put before the Commission as the extent to which this provision had been utilised. We further note that the entitlement is not one that is provided under the LSL Act and did not apply under either the ACBPS Agreement or any of the enterprise agreements which previously covered those employees transferred to the Department as part of the second integration. Against that background, we are not convinced on the merit of including such a provision in the workplace determination [s.275(h)]. We consider that the non-inclusion of such a provision will also provide an incentive for the parties to bargain on the issue at a later time [s.275(h)].

[295] As to the additional provisions in the Department's proposed workplace determination which the CPSU objects to, we see nothing unreasonable in a grant of long service leave being subject to operational requirements and the Secretary's approval. Indeed s.16(2) of the LSL Act provides that an "an approving authority may, at any time, grant"[259] (underlining added) an employee who has qualified for long service leave a period of long service leave at full or half pay.

[296] In terms of the provision specifying a minimum period of long service leave to be taken, we note such a provision is a common provision in Commonwealth public sector enterprise agreements. For example, such a clause is included in the ACBPS Agreement and all of the enterprise agreements which previously covered those employees transferred to the Department as part of the second integration. Further, we see nothing unreasonable in the determination specifying a minimum period of long service leave to be taken as this has the potential to reduce the administrative workload associated with processing applications for long service leave, even if only marginally.

[297] Against that background, we consider that there is merit in including the provisions in the determination we will make [s.275(a)] and that doing so also provides an incentive for the parties to bargain on the issue at a later time [s.275(h)].

Miscellaneous leave

[298] The CPSU seeks to maintain the provisions relating to miscellaneous leave as per the DIAC Agreement, whereas the Department has sought to streamline the provisions in its proposed workplace determination. The CPSU highlighted in its submissions that in doing so the Department has removed the reference to ongoing and non-ongoing employees being

eligible to apply for miscellaneous leave and the reference to miscellaneous leave being granted where an employee is unable to attend or remain at work due to a decision by the Secretary to close an office or a work area due to an emergency event. The CPSU submitted that there was no justification for the removal of this provision and that the Department had led no evidence that the operation of the clause would be difficult to administer or otherwise a problem for the Department or that it involved an unreasonable cost for the Department. The CPSU further submitted that the issue also ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination.

[299] The Department submitted that its drafting was plainer and ought to be preferred and that much of the additional words sought be the CPSU were superfluous.

[300] We consider that the Department's proposed provision is unclear as to who is eligible for miscellaneous leave and arguably also narrows the scope of miscellaneous leave to circumstances which are considered to be in the interests of the Commonwealth. Further, we consider there is merit in making clear in the provision that the Secretary will grant miscellaneous leave with pay in circumstances where, as a result of a decision by the Secretary, an office or work area is closed due to an emergency event [s.275(a)]. Accordingly, we will include the following provision in the determination we will make:

> "**Miscellaneous Leave**
>
> X.1 The Secretary may grant employees miscellaneous leave for a purpose considered to be in the interests of the Commonwealth or where the reason for the leave is not covered by this Determination. The leave granted may be:
>
> - for the period requested or another period,
> - with or without pay,
> - subject to conditions, and
> - if leave is granted without pay – the leave may count for service for some or all purposes.
>
> X.2 The Secretary will grant miscellaneous leave with pay in circumstances where an employee is unable to attend work, or remain at work, due to a decision by the Secretary to close an office or work area in response to an emergency event."

Parental Leave

[301] The CPSU in its submissions stated that it no longer pressed its claims which sought to increase the quantum of unpaid parental leave to 4 years in total and the quantum of paid parental leave to 26 weeks in total.[260]

[302] The CPSU in its submissions also raised a number of issues relating to adoption/foster leave, maternity leave and supporting partner leave. In particular, the CPSU submitted that the Department's proposed workplace determination did not include a range of provisions relating to the above forms of leave that appeared in either the DIAC or ACBPS Agreement and also included a new provision which provided that supporting partner leave was only available to

an employee who had completed at least 12 months continuous service with the APS and who was not eligible for maternity leave or adoption/foster leave. The provisions which the CPSU contended appeared in either the DIAC or ACBPS Agreement and were not reflected in the Department's proposed determination included provisions which:

- stated that employees received the more favourable entitlement from either the *Maternity Leave (Commonwealth Employees) Act 1973* (the ML Act) or the Act[261];
- allowed employees to elect to spread the payment of paid maternity leave over a longer period;[262]
- stated that unpaid adoption/foster leave would not break the employee's period of continuous service;[263]
- provided an employee with less than 12 months service to adoption leave on a pro-rata basis;[264]
- provided two days unpaid pre-adoption leave;[265] and
- provided that an employee with less than 12 months continuous service would be eligible for one week's unpaid supporting partner leave.[266]

[303] In short, the CPSU sought to preserve the status quo through the inclusion of the above provisions in the workplace determination. More specifically, the CPSU submitted that there was no justification for the removal or modification of these provisions and that there was no evidence that the provisions were administratively unworkable or would lead to unreasonable costs being incurred by the Department. The CPSU further submitted that there was no valid reason in support of the additions to the current provisions which the Department sought, that there were positive reasons for retaining the current provisions as they are and that the issue also ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination.

[304] The Department in its submissions largely dealt with those aspects of the CPSU's claims regarding parental leave which were no longer pressed.

[305] In respect of the issue of unpaid pre-adoption leave we note that the Department's proposed determination at clause 4.49 provides for unpaid adoption/foster leave in accordance with Subdivision B of Division 5 of Part 2-2 of the Act which provides for up to 2 days of unpaid pre-adoption leave [s.85]. In other words, contrary to the CPSU's contention, the Department's proposed determination does provide for unpaid pre-adoption leave. However, we consider that the Department's proposed provision would provide greater clarity for employees if it referred to the quantum of unpaid pre-adoption leave. Accordingly, we will include the Department's proposed provision dealing with unpaid pre-adoption leave in the determination we make but will vary it to refer to the quantum of leave, i.e. up to 2 days as per the NES.

[306] As to the other provisions which the CPSU seeks to have reflected in the workplace determination, we consider those issues are more appropriately addressed in bargaining for an enterprise agreement to replace the determination [s.275(h)].

Purchased Leave

[307] The matters in dispute relating to purchased leave concern that aspect of the Department's proposed workplace determination which states that an employee cannot apply for purchased leave if they have excess annual leave credits, defined elsewhere in the proposed determination as "in excess of two years accrual" annual leave and the renaming of extended purchased leave as sabbatical leave.

[308] The CPSU opposed the above aspects of the Department's proposed workplace determination. In respect of the first issue, the CPSU submitted that the Department provided no evidence in support of its claim and contended that there were reasons not to admit the claim, including that the current entitlement can be accessed by any worker including one who may at the time have excess annual leave credits but a definite and approved plan to acquit those credits. As to the second issue, the CPSU submitted that the term 'sabbatical' imparted a purposive element which the term 'extended purchased leave' did not and that the latter term also had the advantage of being more likely to be understood by the workforce as it was the current terminology in the DIAC Agreement.

[309] The Department submitted in respect of the first issue that excess annual leave credits ought to be utilised before the grant and taking of purchased leave, while in respect of the second issue the term 'sabbatical leave' had a custom and usage which assisted it and its employees to understand the purpose at administration of the entitlement as the term 'extended purchased leave' was not a concept known to industrial relations practice.

[310] Dealing with the first issue, we see no reason why an employee with excess annual leave credits should be excluded from applying for purchased leave. For instance, it might be that an employee is saving their annual leave and wishes to access purchased leave so that they might take an extended overseas holiday. Having regard to the CPSU's submissions, a relevant consideration in deciding whether or not to approve an application to purchased leave by an employee who has excess annual leave credits should be whether or not the employee has in place an approved plan to acquit their excess annual leave credits. In our view, such an approach is appropriately reflected in policy rather than in a workplace determination.

[311] As to whether the term extended purchased leave or sabbatical leave is used, this in our view is a somewhat esoteric debate about semantics. We consider that the term sabbatical is commonly understood to denote a long break from work and for that reason we will use that terminology in the workplace determination we will make.

[312] Finally and in respect of the second issue, we observe that it is an indictment on both the Department and the CPSU that the Full Bench is required to determine such a minor issue which has no bearing on the actual entitlement afforded to employees.

Unpaid Leave

[313] The CPSU stated in its submissions that its claim in respect of unpaid leave was no longer pressed.

Study Leave

[314] The CPSU's proposed workplace determination sought to retain the entitlements in the DIAC Agreement regarding study leave and financial assistance whereas the Department's proposed workplace determination simply provides discretion for the Secretary to approve study leave and financial assistance for approved courses that are relevant to the Department's operational requirements. By way of background, the DIAC Agreement provides *inter alia* financial assistance of up to $793 for the first approved subject in a semester and up to $566 per semester for each additional subject and for paid study leave of up to 7 hours 30 minutes per week during each semester.

[315] The CPSU submitted that the Department had led no evidence for any basis upon which the current entitlements ought to be removed. The CPSU also contended that its proposed determination provided certainty for those seeking approval for study leave so as to enable them to know whether or not they could afford to undertake any course of study whereas the Department's proposed approach provided no such certainty and did not ensure that people undertaking study were supported equally.

[316] The Department did not address this issue in its submissions.

[317] In the absence of any justification for the Department's proposed approach we are not satisfied as to the merits of the approach [s.275(a)]. Accordingly, the determination we make will reflect the CPSU's proposed approach.

Event Leave

[318] The CPSU's proposed workplace determination included a provision drawn from the ACBPS Agreement which provided that the Secretary may grant employees leave with or without pay where it is considered to be in the interest of the Department. In support of its proposed provision the CPSU submitted that there was no justification for the removal of this provision and that the Department had led no evidence that the operation of the clause would be difficult to administer or otherwise a problem for the Department or that it involved an unreasonable cost for the Department. The CPSU also submitted that the issue ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination. The CPSU relied on Mr Loughnan's evidence which included that event leave was more broadly used for DIBP sporting events, adding that staff participation in such events greatly fostered staff morale and led to a healthier workplace overall.

[319] The Department stated that it was able to grant miscellaneous leave for events considered to be in the interest of the Commonwealth, adding that in circumstances where miscellaneous leave would continue to apply that the removal of event leave was of no consequence. The Department in its submission highlighted Mr Loughnan's oral evidence that event leave was entirely discretionary.[267] Mr Leonard's evidence was event leave appeared to be something that could be catered for through miscellaneous leave.

[320] In circumstances where miscellaneous leave is broad enough the deal with the circumstances in which event leave might be granted we see little merit in the workplace determination including what appears to be a duplicate form of leave [s.275(a)]. The CPSU's argument that there was no justification for the removal of the entitlement to event leave is far from compelling. Further, we note that to the extent that miscellaneous leave does not adequately cater for the circumstances which event leave was intended to cover that there is no impediment to the CPSU seeking to raise the issue in future bargaining [s.275(h)].

Emergency Leave

[321] The CPSU's proposed workplace determination included a provision drawn from the ACBPS Agreement which provided that the Secretary may grant employees 3 days paid leave in a financial year to attend to emergency situations other than a caring situation. In support of its proposed provision the CPSU submitted that there was no justification for the removal of this provision and that the Department had led no evidence that the operation of the clause would be difficult to administer or otherwise a problem for the Department or that it involved an unreasonable cost for the Department. The CPSU also submitted that the issue ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination. The CPSU relied on Mr Loughnan's evidence which included that this type of leave was rarely used but was highly valuable to people experiencing the stress of emergency situations and should be maintained. Mr Loughnan also deposed that as a supervisor in ACBPS for 17 years he had never seen this form of leave abused by his staff. The CPSU also disputed Mr Leonard's evidence to the effect that this form of leave was open to abuse, contending that his evidence should be given no weight as he offered no evidence that emergency leave had ever been abused.

[322] The Department's proposed determination does not provide for emergency leave. In its submissions the Department included emergency leave in a group of provisions proposed by the CPSU which it contended were inconsistent with prior workplace determinations and characterised as discretionary provisions which did not bestow any substantive entitlement on employees. Mr Leonard's evidence was that the qualifying criteria for this form of leave were vague and open to abuse and that the CPSU's provision was unnecessary as flex-time and other forms of leave, i.e. annual, personal, emergency service volunteer and miscellaneous leave, were able to cater for all types of emergency situations.

[323] The terms of the miscellaneous leave provision, which will be included in the determination we make is in our view broad enough to deal with the circumstances which emergency leave potentially covers. We highlight the reference in the miscellaneous leave provision to "or where the reason for the leave is not covered by this Determination" as the basis for that view. In those circumstances, we are not satisfied of the merit of including in the determination another form of leave, i.e. emergency leave, which would overlap with miscellaneous leave [s.275(a)].

Family Violence Leave

[324] The CPSU's proposed determination includes provisions relating to family violence leave. Those principles provide, among other things, that an employee experiencing family violence will have access to 20 days per year of non-cumulative paid leave. The CPSU relied on Professor Humphreys' evidence in support of its proposed provisions. In addition, the CPSU:

- submitted that the Department had provided no evidence that its proposed clause would be difficult to administer, would otherwise impede operations or would lead to an unreasonable cost for the Department;

- referring to Mr Leonard's evidence, contended that there was no evidence before the Commission that miscellaneous leave could be satisfactorily accessed in family and

domestic violence situations and that flexible working provisions were inadequate to deal with the range of situations that family and domestic violence entailed; and

- contended that there were positive reasons for the inclusion of its proposed provision, including the positive effect that it would have on the continuing employment of employees who were living through family and domestic violence.

[325] The Department submitted that the Commission should not entertain the inclusion of a paid family violence leave provision when paid family violence leave had been rejected by the Commission as inappropriate in the modern award context. The Department further submitted that:

- the evidentiary case advanced by the CPSU did not warrant a finding that the s.275 considerations favour the inclusion of the CPSU's proposed clause in the workplace determination; and

- a range of leave entitlements were available to mitigate the effects of domestic violence.

[326] There have been a number of significant developments regarding family and domestic violence leave during 2018. First, in a decision issued on 26 March 2018[268] a Full Bench of the Commission decided to provide five days leave per annum to all employees (including casuals) experiencing family and domestic violence. It was also decided that such leave will be available in the event that an employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for them to do that thing outside their ordinary hours of work. In a subsequent decision[269] handed down on 6 July 2018, the Full Bench determined to include the following model term in all modern awards.

"**Leave to deal with Family and Domestic Violence: Model Term**

X.1 This clause applies to all employees, including casuals.

X.2 Definitions

(a) In this clause:

family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

family member means:

(i) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(ii) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or

(iii) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

(b) A reference to a spouse or de facto partner in the definition of ***family member*** in clause X.2(a) includes a former spouse or de facto partner.

X.3 Entitlement to unpaid leave

An employee is entitled to 5 days' unpaid leave to deal with family and domestic violence, as follows:

(a) the leave is available in full at the start of each 12 month period of the employee's employment; and

(b) the leave does not accumulate from year to year; and

(c) is available in full to part-time and casual employees.

Note: 1. A period of leave to deal with family and domestic violence may be less than a day by agreement between the employee and the employer.

2. The employer and employee may agree that the employee may take more than 5 days' unpaid leave to deal with family and domestic violence.

X.4 Taking unpaid leave

An employee may take unpaid leave to deal with family and domestic violence if the employee:

(a) is experiencing family and domestic violence; and

(b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

X.5 Service and continuity

The time an employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the employee's continuity of service.

X.6 Notice and evidence requirements

(a) **Notice**

An employee must give their employer notice of the taking of leave by the employee under clause X. The notice:

(i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(ii) must advise the employer of the period, or expected period, of the leave.

(b) **Evidence**

An employee who has given their employer notice of the taking of leave under clause X must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.4.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

X.7 Confidentiality

(a) Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause X.6 is treated confidentially, as far as it is reasonably practicable to do so.

(b) Nothing in clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

X.8 Compliance

An employee is not entitled to take leave under clause X unless the employee complies with clause X."

[327] We note that the above model term has not been included in the Award.

[328] Second and more recently, the Parliament passed legislation varying the NES to provide employees with an entitlement to five days unpaid family and domestic violence leave in a 12 month period.

[329] Against that background, we will include the above model term in the determination we make.

Christmas/New Year period

[330] Both the Department's and the CPSU's proposed workplace determinations include provisions relating to the Christmas/New Year period.

[331] The Department's proposed provision empowers the Secretary to direct an employee to take leave between Christmas Day and New Year's Day inclusive. The only limitation on the Secretary's power to issue such a direction is in circumstances where an employee is not able to access annual leave for the period. In those circumstances the Secretary must consider whether there are reasonable grounds for the direction in relation to an employee, with the provision citing reasonable grounds as including but not limited to insufficient work or insufficient supervision in the period.

[332] On the other hand, the CPSU's proposed provision mirrored the equivalent provision in the DIAC Agreement. Specifically the DIAC Agreement provides *inter alia* that:

- where at least 75 per cent of the employees in a team or work group agree, and the Secretary approves, the team or work group may observe a close down over the Christmas and New Year period; and

- where, in the view of a manager, it is not appropriate for supervisory reasons or there is a lack of sufficient work during the holiday period, the Secretary may direct that

an employee at that office will observe that period of close down unless required to attend for duty.

[333] The Department opposed the requirement relating to 75 per cent of employees in a work area agreeing to the shutdown on the basis that it was not for employees to decide whether operations should continue during the Christmas/New Year period and that the discretion to institute a shutdown over this period ought to remain part of managerial prerogative. The Department further contended that its proposed approach further protected employees' interests by requiring it to verify that it has reasonable grounds to institute a shutdown period for a particular employee in circumstances where the employee does not have sufficient paid leave credits for the shutdown period. As to Mr Fontana's evidence, the Department submitted that there was nothing in its proposal which prohibited a workgroup managing the Christmas/New Year period by scheduling leave around the preferences of individual team members.

[334] Drawing on the evidence of Mr Fontana, the CPSU submitted that its proposed provision struck a balance between the reasonable needs of the business on the one hand and the fact that a direction to take leave during the Christmas/New Year period may not be convenient or in the best interests of individual employees, depending on their family and financial circumstances and their leave plans for the year. The CPSU further submitted that the Department had led no evidence suggesting that the arrangements as they currently exist had been unworkable or had led to employees working or not working when they either ought not to have or ought to have been doing so such as to impact in any way adversely upon the business, operations or financial circumstances of the Department.

[335] Mr Fontana's evidence was that the 75 per cent staff vote aspect of the current provision was agreed as part of the negotiations for the DIAC Agreement in circumstances where a CPSU claim for access to a paid Christmas closedown period was not agreed.[270]

[336] While we note the background to the 75 per cent staff vote aspect of the CPSU's proposed provision, we are not satisfied that the absence of such a provision in the determination we make would preclude employees in a work area suggesting that it closedown over the Christmas/New Year period or alternatively requesting annual leave for the period. As such, we are not convinced of the merits of this aspect of the CPSU's proposed provision [s.275(a)].

[337] As to that aspect of the Department's proposed provision which provides the Secretary with a virtually unfettered power to direct an employee to take leave over the Christmas/New Year period, in the absence of any material evidencing operational problems arising from the existing provision, we are not satisfied of the merit of the Department's proposed provision [s.275(a)]. In our view, the existing power to direct, predicated as it is on it not being appropriate for an employee to work over the Christmas/New Year period because of supervisory reasons or as a result of a lack of sufficient work during the holiday period, balances the interests of the employer and employees [s.275(c)]. Accordingly, the determination we make will reflect the CPSU's proposed provision regarding this aspect.

[338] In addition, we propose to include a requirement relating to the provision of notice to an employee where the Secretary proposes to direct that an employee at an office observe the Christmas/New Year period. We consider that such a requirement has merit as it would allow an employee to make any plans for the holiday period or alternatively dispute the direction if

they wished to do so [s.275(a)]. We consider that a period of one month's notice is appropriate and consistent with the period of notice specified in a number of modern awards regarding closedowns.

Cultural or religious days of significance

[339] The Department's and CPSU's proposed workplace determinations both provide the ability for the Secretary and an employee to agree to substitute a public holiday for a day of cultural or religious significance. However, the CPSU's proposed determination also includes a provision drawn from the ACBPS Agreement which provides that "Where an employee cannot work on a day for which a substituted holiday has been granted, the affected employee will work make-up time at times to be agreed with the Secretary." In support of its proposed provision the CPSU submitted that contrary to Mr Leonard's evidence flex-time and annual leave were insufficient to deal with this issue on the basis that there was no obligation to grant these forms of leave for cultural or religious reasons and that there were positive reasons for inclusion of the provision in terms of recognising religious and cultural diversity. The CPSU further submitted that there was no justification for the removal of this provision and that the Department had led no evidence that the operation of the clause would be difficult to administer or otherwise a problem for the Department or that it involved an unreasonable cost for the Department. The CPSU also submitted that the issue ought to be the subject of negotiations for an enterprise agreement to replace the workplace determination.

[340] The Department did not address this issue in its submissions.

[341] We are not satisfied as to the merits of the CPSU's proposed provision [s.275(a)]. In our view there are other mechanisms available under the workplace determination we will make to deal with the circumstances which the CPSU's proposed provision seeks to address. Contrary to the CPSU submissions, those mechanisms include flex-time and annual leave. Not including the provision also provides an incentive for the parties to bargain on the issue at a later time [s.275(h)].

Employees in receipt of compensation

[342] The CPSU in its submissions stated that it agreed with the Department to adopt its proposed terms on this issue.

Portability of accrued leave

[343] The Department's and the CPSU's proposed workplace determinations both deal with the issue of portability of agreed leave in similar terms, i.e. where an employee moves from another agency where they were an ongoing employee of the Parliamentary Service or the ACT Government Service unused accrued annual leave and personal/carer's leave will be recognised provided there is no break in continuity of service. The determinations also deal with the situation where an employee is employed on an ongoing basis and immediately prior to their engagement was employed as an ongoing employee. In those circumstances, both determinations provides scope for any accrued annual leave and personal/carer's leave to be recognised provided there is no break in continuity of service with the CPSU's determination adding the words "exceeding 2 months" after the reference to continuity of service.

[344] The CPSU in its submissions noted that the ACBPS Agreement provided that accrued leave would be recognised in circumstances where there had not been a break in continuity of service exceeding two months. The CPSU relied on Ms Jones' evidence which was that the entitlement provided a real benefit to employees and was necessary given the length and complexity of processes associated with onboarding staff, e.g. the performance of necessary checks and inductions. The CPSU further submitted that the Department had provided no evidence that the operation of the clause was difficult to administer, that it had had any adverse operational impact or had led to an unreasonable cost. In addition the CPSU submitted that the issue ought to properly be the subject of bargaining for an enterprise agreement to replace the workplace determination.

[345] The Department did not address this issue in its submissions though its proposed workplace determination noted the abovementioned difference.

[346] Based on the limited material put before the Commission regarding this issue we are not satisfied that the inclusion of the additional words proposed by the CPSU in the workplace determination is warranted [s.275(a)].

5. Performance management

[347] The following is that part of the Department's proposed workplace determination dealing with performance management:

> **Part 6 – Performance Management**
>
> **Performance Management Framework**
>
> a. All Employees other than Casual employees will participate in the Department's Performance Management Framework (PMF) in accordance with the Department's PMF Policy Statement. Employees will be required to have a Performance and Development Agreement (PDA) as part of this process.
>
> b. The scale for rating an Employee's performance under the Department's PMF is:
>
> - Exceeded all expectations,
> - Exceeded most expectations,
> - Met expectations,
> - Met most expectations,
> - Did not meet expectations.
>
> **Managing underperformance**
>
> a. Where the Secretary considers that an Employee (other than a Casual employee or a probationer) is not achieving, or is at risk of not achieving, the required standard of work performance, the Secretary may institute a process to manage that underperformance.
>
> b. Underperformance management can commence at any time, and need not be referable to the PMF."

[348] As can be seen from the Department's proposed provision, the details of the Performance Management Framework will be set out in the Department's PMF Policy Statement.

[349] In its submissions the Department stated that in the APS performance management is already regulated by a statutory regime which includes the *Australian Public Service Commissioner's Directions 2016* (the Directions), adding that the Directions required the Department to have performance management policies and processes in place. Further, the Department posited that its policy suite was exhaustive and that its Performance Management Policy had been created to comply with the Directions. The Department noted that the PS Act provided employees with protection from unreasonable application of the Department's performance management procedures by independent merit review and that the Act contained additional protection against unfair dismissal and adverse action that may be associated with performance management.

[350] Against that background, the Department posited that the procedures created by separate regulation were exhaustive and accommodated both employer and employee interests in performance management practice, adding that additional obligations were not justified on their merits and that the additional regulation sought by the CPSU would add unnecessary complexity to an otherwise complete regime. The Department further posited that there was no evidence before the Commission demonstrating that this regime was inadequate. The Department contended that what was being sought by the CPSU and Ms Ryan was in effect a second legislative instrument (i.e. the workplace determination) that duplicated what the Directions achieve and that this was unnecessary regulatory overlap inappropriate for a workplace determination. In addition, the Department contended that the current processes in the DIAC Agreement had created an environment where management was reluctant to undertake performance management for fear of getting buried in detail and inefficient process.

[351] As to the five point rating scale in the Department's proposed provision, the Department contended that the scale was appropriate given its relevance to salary advancement. In its submissions, the Department referred to Mr Venugopal's evidence that the current three point rating scale had resulted in one person being rated as not meeting expectations out of a workforce of approximately 14,000 employees. As such, the Department contended that a rating scale that enabled it to better communicate its performance assessment to an employee had more merit and would also assist the Department to better moderate salary advancement.

[352] The Department relied on the evidence of Messrs Venugopal and Leonard in support of its submissions regarding performance management.

[353] The CPSU's proposed determination essentially retained the performance management provisions of the DIAC Agreement. While retaining a three point rating scale, the CPSU's proposed determination adopted the nomenclature employed in the ACBPS Agreement for each point on the scale. In its submissions the CPSU, among other things, contrasted the Department's and its proposed performance management provisions, highlighting that the Department's proposed provision removed all clauses in the DIAC Agreement relating to performance management and development. More specifically, the CPSU submitted that the procedures for managing underperformance in the Agreements provided important assurances for employees that proper and fair processes would be applied to them in the management of

their performance which would be reviewable or able to be disputed under the disputes resolution procedure.

[354] With regard to the evidence relied upon by the Department, the CPSU submitted that little weight should be given to Mr Leonard's opinion that performance management was better dealt with by way of policy so that it could be adapted to changing circumstances as he was not a direct line manager or responsible for a significant number of employees' performance management. In respect of Mr Venugopal's evidence that managers were hesitant to undertake performance improvement processes if they were included in an enterprise agreement for fear that a dispute might ensue, the CPSU submitted that this was speculation based on hearsay. The CPSU further submitted that Mr Venugopal's evidence in this regard did not inspire confidence that the Department's intention was to continue to apply performance management practices as it had in the past.

[355] As to the Department's proposed rating scale, the CPSU posited that it had the potential to see employees who otherwise would have been rated 'effective' instead be rated as 'met most expectations' and therefore not receive salary advancement.

[356] In support of its submissions, the CPSU drew on the evidence of Mr Fontana and Ms Harris both of whom highlighted in their witness statements that the Department's proposed provision removed large parts and key elements of the existing arrangements. Ms Harris also disagreed with the Department's proposed five point rating scale on the basis that there was no way of knowing how the Department intended to use the scale to manage performance.

[357] As previously mentioned, appended to Ms Ryan's witness statement was an alternative performance management provision. In her submissions Ms Ryan posited that her proposed provision adopted a streamlined approach which eliminated aspirational content and process in a way that balanced the competing priorities and protected the existing rights and entitlements of employees while providing transparency and clarity for those covered by the determination. Beyond that, Ms Ryan described the Department's position on performance management as involving the removal of the detail from the existing provisions and their placement in policy. While Ms Ryan stated she was amenable to streamlining the provisions to remove detailed process, she also stated that this was not acceptable where that action gave rise to a loss of employee rights and entitlements. More particularly, Ms Ryan submitted that the Department's proposed performance management provisions did nothing to support the application and implementation of a performance management framework. Ms Ryan also noted that the Department's proposed provision went beyond its stated intention of streamlining the existing performance management provisions to remove aspirational content, contending that the provision removed key material that went to existing rights of an employee which were not aspirational, e.g. for an employee to understand the standards of performance that is expected of them. Ms Ryan contended that the evidence supported the inclusion of her proposed provision in the workplace determination.

[358] AIMPE, as previously noted, supported Ms Ryan's submissions on this issue.

[359] The issue of performance management was the subject of considerable attention in the proceedings given the significant departure which the Department's proposed provision represented from the arrangements currently applying in the Department. The Department's arguments as to the rationale for the change were in our view far from compelling.

[360] The following extract from Mr Venugopal's oral evidence highlights the paucity of the Department's arguments for its proposed approach to performance management.

> "MS RYAN: If I can take you back, sorry, in paragraph 99 - and I'll go back to that again. If we just recap, you say that:
>
> Current performance management assessment and measurement mechanisms are efficient.
>
> You say:
>
> Management is reluctant to undertake any performance management regime.
>
> You say for those reasons there are a number of employees who should be subject to performance management. How does the reluctance of managers to participate in any of the performance management regime and how does the inefficiency of the assessment and measurement mechanisms - how is it the reason why employees who should be being performed - I infer are not being performance managed?---So as I've explained in my statement, it is the detail and getting buried in the largely inefficient process that makes managers hesitant in dealing with matters, especially pertaining to under-performance.
>
> DEPUTY PRESIDENT KOVACIC: But is it your evidence that the processes won't change?---I beg your pardon?
>
> Is it your evidence, Mr Venugopal, that the process won't change?---Commissioner, the process itself won't change, but the key difference here is the fact that when a performance management process is actually part of an enterprise agreement as opposed to when it is actually part of guidance and policy in an enterprise - the difference in the way that managers approach it seems to be creating a bit of a problem in terms of the efficient application of those guidelines.
>
> Why is that?---I think part of it is a fear and reluctance that when something is returned into an enterprise agreement, as has happened in the past, there is a reluctance that it is exposed to the dispute resolution caveats of an enterprise agreement.
>
> Is the scope in scrutiny in terms of seeking review under the Public Service Act?---Yes, that is correct.
>
> It's the same scope for review. It's just a different mechanism?---That is correct, Commissioner.
>
> Why is that not an impediment?---I don't see managers having any hesitation in their decisions being scrutinised under section 33, for instance, of the Public Service Act or any other scrutiny, internal or external.
>
> On what basis do you form that view?---I'm forming that view simply based on my discussions with managers. Towards the end of the 2015-16 financial year, we tried to lift awareness regarding performance management across the organisation. My division, under my leadership, held lots of discussions and sessions not only with

managers - when I'm talking managers, very senior level managers - but also with supervisors right through from APS6 all the way up. Hundreds of staff went through training programs as well as discussion forums where they actually bought - identified individual cases where it was had and discussed. Of course I was not present in all of these meetings. However, I get regular feedback on how effective they are because I'm responsible for the framework. The feedback that I was getting back from senior managers as well as from my own staff who were closely involved in that, was the fact that every step in the under-performance management process specifically is part of the current enterprise agreement and, as a result of that, typically the involvement and, how can I say, the advocacy of union representatives often created a significant amount of hesitation, even on behalf of very experienced managers of actually dealing with under-performance.

Without having seen your policy, I presume that it enables a person to have a support person attend a performance management discussion?---Yes, it does.

That person can be someone - whether it's a colleague or it can be a union representative, irrespective of whether it's a policy or an agreement provision?---Yes, it does.

So what changes there?---Essentially the key change there is the fact that it is not forming part of the actual workplace determination or the enterprise instrument. As a result of that, it is not then open to at least this Commission's dispute resolution aspects, but, however, the protections that are available for public servants under the Public Service Act will continue to be available to them.

How many disputes over performance management have been brought to the Commission by the Department or its employees in recent years?---Not a lot.

VICE PRESIDENT CATANZARITI: No, and I'm the panel head, Mr Venugopal, just - exploring my interest. That's why I can't understand the argument, because we aren't inundated with disputes and you're saying the fact that there is an ability to come to the Commission is the reason the clause should be struck out of the enterprise agreement. That's the short point, isn't it?---Amongst other things, yes.

Not amongst other things. I mean, you're seeking to move the agreement out of the agreement and into a policy. You have said a number of times it's because there is an ability to go to the Commission?---Yes.

MS RYAN: I'll go back to paragraph 99 again. This is probably an extension of the comments made by the Vice President. You say the performance management regime needs to be more streamlined. We have probably gone over this, but I would like you to explain what that means to you?---So in terms of streamlining, it's all the things that we discussed so far. One is the rating scale. The second one is the fact that it is not part of the enterprise agreement. It is part of a policy setting. Amongst other things, it involves guidance, better - greater guidance for both managers and employees.

I put it to you that that guidance can be contained in a guidance document. It doesn't have to be in an agreement. Does that then mean that the other provisions that relate to the core entitlements, rights and responsibilities of the parties which includes all

employers, whether you're a manager or not - which I'll come to in a minute under the relevant statutory framework - cannot that be achieved in that way? It doesn't mean that you have to strip everything out?---It doesn't mean that, but at the same time that is the proposition I have put forward.

Does that then go to the rest of your statement in paragraph 99 that:

> *The policy approach to set down the relevant regime achieves that goal which, by extrapolation, management needs to be permitted to approach performance management in a flexible manner.*

I put it to you is that not more the intent of changing the content of the provisions in the workplace determination, to achieve that outcome. Is that not the motivation?---That was one of the motivations, yes.

Then, how does that provide a fair and equitable framework, for employees, given the comments made by my learned colleague, that that policy that's in policy, it's unenforceable. This policy has a provision that protects the worker, the employee, in terms of having a support person, that's unenforceable, what protection is provided to the employee?---All the protections that's afforded to employees under the legislation will still remain, whether it is in the enterprise agreement or not. I refer to section 33 of the Public Service Act. There is right of review, there is some (indistinct) protection, Commissioner, so it's all those aspects still remain.

But a support person, is that provided in that?---Yes, it is.

I take you to paragraph 93:

> *To align the objective of a streamlined agreement, the DIB proposal (which in this case is the workplace determination) seeks to be a clear and concise document that provides substantive terms and conditions of DIBP.*

How does that, in paragraph 93 then resonate with the statement in paragraph 99, that:

> *DIBP employees have adequate protection in place under the policies and statutory provisions.*

If the workplace determination provides for substantive terms and conditions, but those provisions which were in the former DIAC EA, in relation to performance management are no longer there. How can it be a streamlined document that provides clear and concise provisions that are substantive for an employee?---It's a clear and concise document to the extent that it excludes aspirational statements, or it also excludes the full detail - every bit of explanation that sits around each and every clause.

But I'm talking about substantive terms and conditions. When you're looking at the rights and entitlements and obligations. I'm not talking about process or aspirational statements, but the rights, entitlements and obligations of the parties in relation to performance management?---Ms Ryan, that's preserved and protected under the

legislation. Whether it is in the workplace determination or not. I have taken the point of view that it need not be, if it is protected by legislation.

I accept what you're saying, but my question is, how does a document provide the workplace determination - provide those substantive terms and conditions for an employee, if some of those are missing?---I'm of the view it's not missing.

Let me take you to - I'll go back to my comment before, because I have now found it. In terms of the content of performance management under part 6 in exhibit 4, and then under - - -

MR O'GRADY: If it assists the Commission, I think it's attachment RM17 to the witness statement of Mr Muffatti. This is ballot three.

MS RYAN: Thank you. Thank you, Mr O'Grady. If we compare what is at part 6 of the workplace determination, the content of the provisions there, with that provided in the third ballot. In the third ballot for performance management, has paragraphs 6.1 to 6.4, whereas the workplace determination has 6.1 to 6.2. The paragraph that appears to be missing - no, it's been rolled in. If we go to managing under performance, paragraphs 6.5 to 6.8, now replaced with 6.3 to 6.4. There's nothing there about the base rights and entitlements in the workplace determination. It's no longer there, what was in the third ballot. Clearly the third ballot provisions are less detailed than what is in the current DIAC agreement as proposed by the CPSU. But clearly, the workplace determination provisions are clearly different from this more streamlined, third ballot. Can you explain why that approach was taken?---That approach was taken on the basis that the workplace determination need not contain detail on the rights of employees when those rights are protected under the legislation. It goes back to that idea of not having aspirational statements and being, keeping the workplace determination streamlined. Am I allowed to expand the answer a little bit more, if that assists?

Certainly, if it assists the Bench, absolutely.

DEPUTY PRESIDENT KOVACIC: I'm just interested in how, when you look at your 6.7 of the third agreement, the agreement that was put out on the first ballot, and which refers to:

> *The employee will be notified in writing about the unsatisfactory performance. How it does not meet the required performance standard. The employee's Manager or other person nominated by the Secretary will assess the employee's performance over a period of time determined by the Secretary, the Senior Line Manager or relevant People Manager will consider the Manager's assessment before making a recommendation to the delegate about what action needs to be taken.*

How's that an aspirational statement?---Commissioner, all of that is contained in the draft policy that we put out as well as in the proposed draft policy that we - - -

One of the rationales you said in terms of the changes between version three, for want of a better description, and the draft determination, is the exclusion of aspirational statements. I'm just interested to see how you see those points in clause 6.7 as

aspirational statements?---Perhaps that goes into far more detail on procedure, than is necessary, in my view, that's all.

VICE PRESIDENT CATANZARITI: Mr Venugopal, the question you're being asked by the Deputy President, is how are those clauses aspirational? Simple proposition that's been put?---Maybe use of the term aspirational, is not appropriate in that context.

DEPUTY PRESIDENT KOVACIC: They're about rights, aren't they?---Beg your pardon?

They're about rights, aren't they?---I think Commissioner, it's about process, in my view.

Sorry?---In my view, it's about setting out the process. Those rights are available to employees under due process, in any case, and it is there in policy. This is repeating what's in policy.

VICE PRESIDENT CATANZARITI: Yes, Ms Ryan.

MS RYAN: Continuing from that point, how is it that the proposed provision for performance management which no longer sets out rights and entitlements and obligations for the parties involved, how does that provide a fair and equitable framework, performance management framework regime, for employees in a single document?---That single document. The existence of a performance management framework is enshrined in the draft workplace determination. That framework itself, exists outside the draft workplace determination and it is produced and settled through drafting and consultation with employees and their representatives.

I'm not sure you answered my question. I'll rephrase it. If an employee needs to know what their rights, entitlements, obligations in relation to performance management are, how are they going to get that, if they go to the workplace determination?---It won't be in the workplace determination, it will be in the policy.
They don't have a single document that they can go to; they need to go to the workplace determination, they need to go to policy and they need to go to the legislation to understand what their rights, entitlements and obligations are? I'm not talking about process of stepping through every point by point, I'm talking about just the core rights, obligations and entitlements?---When you put it that way, yes.

That's not equitable and fair to an employee to have that not contained in one document, to make it clear and concise to an employee?---I don't think it is.

VICE PRESIDENT CATANZARITI: You don't think it's equitable and fair, is that what you say?---Sorry, no it's rather - it's a non-negative, so what I meant is I don't think it is not fair and equitable.

How does that align with your paragraph 93(a)? It says:

> *The document should be clear and concise and provide substantive terms and conditions to employees of DIBP.*

When you contrast your latest management system and the union's most recent claim?---Commissioner, I explained that by saying that the document in my mind needs to achieve a couple of things. It needs to be clear and concise, number one, that's obvious and the second one is, it needs to give guidance to the employee and the manager, to the user of that document as to either the full details of what they need to know just then and there, or where it is that they can find it. That is my intention; my using those words.

Mr Venugopal, was this your decision to strip out the performance management clause or was it somebody else's?---It was my decision.

Mr Leonard had no role to play in relation to that decision?---We have had several discussions, yes, Commissioner.

COMMISSIONER JOHNS: But do you accept that when it's in the agreement it's enforceable and it is therefore a right that the employee has?---Commissioner I accept that whatever is written in the agreement is enforceable and therefore is a right.

When you remove it from the agreement, it's no longer enforceable. It's no longer a right of the employee, is it?---In a binary yes or no, no it won't be a right anymore, however - - -

So, it's a removal of rights that employees currently have, isn't it?---No, Commissioner, and if I'm allowed - - -

It's a right over here and it's not a right over there, it's a removal of a right, isn't it?---Yes, in that context yes, it would be. But if I'm - - -"[271]

[361] Having regard to Mr Venugopal's evidence it appears that the Department's proposed approach is premised upon removing the scope for disputes regarding performance management issues to be pursued under the workplace determination's disputes resolution procedure in circumstances where Mr Venugopal attested that very few performance management related disputes came before the Commission. Further, we note that the Department provided no probative evidence to substantiate Mr Venugopal's contention that managers were reluctant to tackle performance issues for fear of a dispute being notified to the Commission.

[362] In our view, the performance management provision in the determination needs to *inter alia* clearly state who the performance management framework applies to and provide clarity regarding the rights and obligations of employees and the Department and what will occur in circumstances where performance falls short of the standard expected. Among other things, employees have a right to know what is expected of them both in terms of the outcomes and behaviours expected and how their performance will be assessed. Further, the intent of any underperformance process should be to provide employees with the opportunity to achieve the expected level of performance in a timely way. The Department's proposed clause, other than clearly stating to whom it applies, fails to adequately deal with the other aspects outlined above. For that reason we will not include the Department's proposed clause in the determination we make.

[363] While we acknowledge the CPSU's clause by and large reflects the existing arrangements in the DIAC Agreement, we consider that there are some areas where it can be streamlined. Ms Ryan's proposed provision is a genuine attempt to modernise the existing provision in a way that balances the Department's desire to streamline the existing arrangements with the need to provide sufficient clarity/detail for employees. While we will incorporate elements of Ms Ryan's proposed clause in the determination, we believe the shift it entails is more appropriately considered in future bargaining. In summary, the performance management provision which we will include in the determination will be an amalgam of the provisions proposed by the CPSU and Ms Ryan. We set the clause out below after considering the issue of the rating scale to be included in the provision.

[364] In respect of the rating scale we have three proposals before us – the Department's proposal for a five point rating scale, the CPSU's proposal to retain the current three point rating scale (albeit with different nomenclature) and the four point rating scale reflected in Ms Ryan's proposed performance management provision. While we acknowledge a more granular rating scale may carry with it some potential benefits, in the absence of any material pointing to problems with the existing rating scale or outlining how either a four or five point rating scale would operate in practice we are not convinced of the merits of such a potentially significant change [s.275(a)]. Further, we consider the issue is one which is more appropriately addressed through future bargaining [s.275(h)]. Finally, we note that the terminology used in each of the proposed scales before us was similar and differed from that reflected in the DIAC Agreement. Accordingly, the determination will include the following ratings – Exceeded expectations, Met expectations and Did not meet expectations.

[365] The performance management provision we propose to include in the determination we make is as follows:

"**Part 6 – Performance Management**

Performance Management Framework

6.1 All employees (other than casual employees) must participate in the Department's Performance Management Framework (PMF). Further guidance regarding the PMF is set out in the Department's PMF policy.

6.2 All employees must have a Performance and Development Agreement (PDA) which is to be developed and agreed with their manager for each performance management cycle. The PDA must, among other things, set out:

(a) the outcomes the employee is expected to achieve;

(b) how the employee will achieve those outcomes;

(c) planned development activities; and

(d) the measures against which the employee's performance will be assessed.

6.3 The scale for rating an employee's performance under the PMF is:

- exceeded expectations;

- met expectations; and

- did not meet expectations.

6.4 If there is a disagreement over the performance expectations or the performance rating determined by the employee's manager, the matter may be referred to a PMF Reviewer. If no PMF reviewer has previously been nominated, the Reviewer will be a person agreed to by both the employee and their manager. If agreement on a Reviewer cannot be reached, an independent person will be appointed by the Secretary. Throughout the review process, the Reviewer, the employee and their manager will continue to together work constructively towards resolution.

Performance Improvement Process

6.5 Where an employee's performance (other than a casual employee or an employee on probation) is likely to be or has been assessed as 'did not meet expectations', a performance improvement process must be initiated. The aim of the performance improvement process is to assist the employee achieve the expected standard of performance.

6.6 The performance improvement process must provide procedural fairness and ensure that the employee:

- understands the standard of performance that is expected of them;

- understands the implications of not achieving the standard; and
- is provided with appropriate support and time to improve performance.

6.7 The performance improvement process can commence at any time during the performance management cycle where an employee's performance is considered as needing improvement. The process involves two steps – the first involving informal discussions and the second, if needed, a formal assessment period.

<u>Step 1 – Initial discussions</u>

6.8 Where a performance improvement process is triggered under clause 5.5, in the first instance discussions involving the employee and their manager must occur in an attempt to address the performance issues. Those discussions must be documented and identify any mitigating factors which may be impacting on the employee's performance, e.g. issues of a personal nature.

6.9 This step is to be no less than 4 weeks in duration but may, in exceptional circumstances, be extended by the Secretary.

<u>Step 2 – Assessment period</u>

6.10 The Assessment Period may be initiated by the Secretary where the initial discussions at Step 1 above have not resulted in the employee's performance returning to the expected standard.

6.11 Where an Assessment Period has been initiated, the employee must be issued with a formal warning. Further, the Secretary must appoint an assessor who is a senior employee from outside of the employee's work area to:

- establish a Performance Improvement Plan in consultation with the employee;
- monitor the employee's performance; and
- provide the Secretary with a written report at the end of the Assessment Period on whether the employee attained and sustained an acceptable standard of work performance.

6.12 The Assessment Period will be 8 weeks in duration but may, in exceptional circumstances, be extended by the Secretary.

6.13 If at the end of the Assessment Period the employee has attained and sustained the expected standard of work performance, no further action will be taken.

6.14 However, if at the end of the Assessment Period the employee has not attained and sustained the expected standard of work performance, the Secretary will determine what, if any, action should appropriately be taken. The appropriate action may include terminating the employee's employment.

6.15 Further information is provided in the Department's Managing Underperformance Policy."

6. Allowances

[366] Before we turn to deal with the specifics of allowances we wish to observe that there are a plethora of allowances which the Agreements provide. Against that background, the negotiations for an enterprise agreement for the Department provided an ideal opportunity for the key protagonists to have a meaningful conversation about rationalising the number of allowances in a way that balanced the interests of the Department and employees. Unfortunately in our view the parties "squibbed" it, though we acknowledge that the Government's Workplace Bargaining Policy provided no real incentive for a genuine conversation about rationalising allowances given the cap on salary increases. As a result, the Commission is left with having to wade its way through what are at times diametrically opposed positions on a raft of allowances.

[367] Initially we deal with the Department's proposed composite allowance. By way of background, we foreshadowed in the June 2018 statement that we did not intend to provide for the composite allowance proposed by the Department in the determination we make as in our view the issue was more appropriately dealt with in future bargaining[272] [s.275(h)]. A further important consideration in coming to that conclusion was the clear evidence that some employees would be up to $1,400 worse off under the Department's composite allowance proposal (see Mr Venugopal's oral evidence above). As such, our decision not to include the composite allowance in the determination we make has regard to the interests of employees [s.275(c)].

[368] The Department in its submissions stated that the composite allowance was intended to serve a number of purposes, including rolling up a number of allowances that might otherwise apply to the ABF as a whole. The allowances specified in the Department's submissions were work location/airport allowance, use of force allowance, cargo examination facilities allowance, cold work disability allowance, confines space disability allowance, dirty or offensive work disability allowance, epoxy-based materials allowance and the self-contained breathing apparatus allowance. While we deal with the issue of airport allowance in respect of travel related allowances (see below), the inference to be drawn from the Department's submission is that the other allowances specified in its submissions as being rolled up in the composite allowance continue to be relevant to its operations and therefore should be included in the determination we will make. We consider these allowances further below.

General issues regarding allowances

[369] The Department's proposed determination provides that allowances will be paid during periods of leave for a period of up to 3 months. The Department contends that a 3 month limitation is a fair and equitable measure in all of the circumstances, noting that during this period it would have paid all applicable allowances to an employee without having the benefit of the employee's services under the disabilities that attract the payment of the allowance. The CPSU submitted that there was no justification for the imposition of this limit and that employees should not be disadvantaged for exercising their rights to take leave. As such, the CPSU submitted that the Department's claim should be rejected.

[370] We are not satisfied of the merits of the Department's proposed approach [s.275(a)]. In our view, as posited by the CPSU, employees should not be disadvantaged because they take leave.

[371] The Department's proposed determination also includes at clause 5.2 a table which sets out the treatment of allowances for superannuation, long service leave and redundancy purposes. The Department contended that the table reflected the treatment of allowances for these purposes under the Agreements, with the provisions in the Agreements informed in part by the treatment of allowances under long service leave legislation and superannuation trust documents. The CPSU submitted that the status quo should be retained with respect to whether or not allowances should be considered as salary and for what purpose. The CPSU's proposed determination retains the present clauses relating to salary.

[372] We consider the Department's proposed clause to be to be a simple and clear way of setting out how allowances are to be treated for the purposes of superannuation, long service leave and redundancy. We note that the CPSU did not contend that the table was inaccurate. As such, we will include a table along the lines proposed by the Department in the determination we make. We note however that the reference in the table to composite allowance will need to be deleted and replaced with a reference to those allowances which were to be rolled up in the composite allowance.

[373] For the allowances we include in the determination that are treated as salary, the rates specified as applying upon commencement reflect the 4 per cent wage increase we have previously determined. Further, the determination will provide that those allowances will also be adjusted during the life of the determination by the 3 per cent wage increase which will take effect 12 months after commencement of the determination.

Allowances where the key matter in issue is quantum

[374] There are three allowances where the key matter in issue is the quantum of the allowance. Those allowances are community language allowance, departmental liaison officer allowance and escort duty allowance. We deal with each of these allowances below.

- Community language allowance – the Department's proposed workplace determination provides for an annual rate for this allowance of $1,034 for a Level 1 qualification/standard and $2,068 for a Level 2 qualification/standard whereas the amounts proposed by the CPSU are $1,130 and $2,263 respectively. The difference largely reflects the application of pay increases (and backdating in respect of the CPSU's proposed quanta). As we have previously decided not to backdate the wage increases we have determined, we consider the amounts proposed by the Department to be appropriate. The drafting of the parties' respective provisions regarding this allowance also differ slightly, with the Department streamlining the provision in the DIAC Agreement whereas the CPSU's proposed provision largely mirrors the provision in the DIAC Agreement. We consider the Department's proposed provision to be appropriate but will for reasons of clarity insert a reference to Aboriginal and Torres Strait Islander languages and Auslan after the words 'language skills'.

- Departmental liaison officer allowance – the Department's proposed workplace determination provides for an annual rate for this allowance on commencement of $17,590 whereas the amount proposed by the CPSU is $22,025. These rates are based on the rates in the DIAC and ACBPS Agreements respectively adjusted for the pay increases proposed by the Department and CPSU respectively. Given the size of the Home Affairs portfolio and having regard to the quantum of this allowance provided for in other APS agency enterprise agreements, we consider that an allowance of $21,270 per annum is appropriate. This amount has been calculated by applying 4 per cent wage increase we have determined to the amount payable under the ACBPS Agreement as of July 2013.

- Escort duty allowance – we will adjust the amounts provided in the DIAC Agreement in respect of this allowance to reflect the 4 per cent wage increase we have determined. This results in amounts of $531 per trip and $200 per day away.

Higher duties allowance

[375] There are several matters in issue relating to higher duties allowance (HDA). They are when the allowance becomes payable, the rate at which the allowance is payable, when a salary advancement occurs in respect of higher duties arrangements, administrative provisions relating to the application of the allowance and the allowance arrangements to apply in respect of periods of acting in the SES. We deal with each of these issues below.

- When HDA becomes payable – the Department's proposed workplace determination seeks to continue the arrangement in the DIAC Agreement which provides that HDA applies to a period of acting beyond 10 working days (the DIAC Agreement refers to "beyond the first two weeks"). Among other things, the Department submitted that it was reasonable for it to require the rudimentary performance of higher duties for short periods without additional remuneration. The Department relied on Mr

Leonard's evidence in support of its proposed approach. Mr Leonard's evidence included that through the provision of above Award salary payments the Department expected performance and flexibility from its employees and that the Department should have the flexibility of identifying temporary opportunities for employees to gain experience and exposure to work at higher levels for short periods of time without having to administer an additional allowance. Mr Leonard also noted that the Department's proposed determination provided it with discretion to pay HDA for periods of acting of less than 10 days.

- The CPSU on the other hand seeks that HDA be payable from the commencement of acting in a higher role. The CPSU relied on the evidence of Mr Loughnan, Ms Jones and Mr Selim. Key aspects of their evidence were that the Department's proposed approach would create an incentive for managers to rotate higher duties to avoid the payment of HDA rather than picking the best person for the job and would lead to exploitation under the guise of short periods of higher duties being developmental opportunities for staff. Mr Selim's evidence was that the shift pattern in the Marine Unit meant that additional payments for higher duties operated differently than in other areas and that it was important that HDA was payable from the commencement of higher duties particular where higher duties were shared around.

- We consider the 10 day qualifying period before HDA becomes payable to be appropriate given that periods of higher duties provide career development opportunities for employees [s.275(a)]. However, we consider that once an employee has completed that 10 day qualifying period in a calendar year that HDA should be payable from the commencement of subsequent periods of acting.

- The rate of HDA – the Department's proposed determination provides that HDA will be paid at the minimum salary level for the classification of the acting position or the Secretary's discretion a higher amount. The Department submitted *inter alia* that a default rule of providing HDA at the minimum salary level for the classification had logic and merit as at the time of commencement of higher duties the employee had not gained experience meriting a higher salary point within the classification. The CPSU's proposed determination provided that HDA would be the higher of the following – the minimum salary of the higher classification; the employee's substantive salary plus 5 per cent; if the employee had received salary advancement, the rate to which their salary was advanced or a higher rate as determined by the Secretary. While we agree that the default rule advocated by the Department has merit it overlooks the fact that the difference between the top of the salary range for some classification levels and the bottom of the salary range for the classification level immediately above is in some instances only $1. Accordingly, we consider that the minimum increase in salary that we previously determined should apply on promotion should also be the minimum in terms of the value of HDA. Accordingly, the following provision will be included in the determination we make.

  > "The payment of higher duties allowance will bring the employee's salary to the minimum salary level for the classification for the acting position, subject to the employee's adjusted salary being no less than 4 per cent above the employee's substantive salary. The Secretary may determine a higher amount of higher duties allowance."

- Salary advancement and HDA – the Department's proposed workplace determination provides for salary advancement for employees who have been on continuous higher duties for periods of 12 months or more and achieve a performance rating of 'met expectations'. The Department submitted in support of its proposed approach that salary advancement should reward employees for performance, experience and the acquisition of new skills and that a 3 month period was an insufficient time for employees to demonstrate performance and to develop and acquire skills particularly where the total period of higher duties was broken up over a review period. The CPSU's proposed determination provided for salary advancement when an aggregate of 3 months HDA had been performed in a review period. While we note the parties' respective positions, we are not satisfied of the merits of either approach [s.275(a)]. More particularly, we see no reason why the approach to salary advancement and HDA should be any different to the approach to salary advancement we have previously determined. Accordingly, we will include a provision in the determination providing that an employee in receipt of HDA will be eligible for salary advancement in respect of the HDA rate in circumstances where they have performed higher duties for an aggregate period of at least 6 of the last 12 months and their performance is assessed as having 'met expectations'. This approach not only has regards to the merits but also the interests of the Department and employees [s.275(a) and (c)].

- Administrative provisions relating to HDA – The Department's proposed determination provides that HDA counts as salary for the purposes of payment of overtime and shift penalties and the cashing out of annual leave. The CPSU's proposed determination draws on the relevant provision in the DIAC Agreement which also treats HDA as salary for the cashing out of flex credits. However, the CPSU's proposed determination extends that treatment to travelling and meal allowances, restriction allowance and excess travelling time. The Department opposed these extensions and the treatment of HDA as salary for the cashing out of flex credits. There is no merit in the CPSU's proposed extension of the circumstances in which HDA is treated as salary and the continued treatment of HDA as salary for the cashing out of flex credits [s.275(a)]. Further, we are not convinced of the need to include the CPSU's proposed provisions relating to the treatment of HDA on leave and the payment of HDA to part-time and shiftworkers as these issues are adequately dealt with elsewhere in the determination we will make [s.275(a)].

- HDA for periods of acting in the SES – the Department's proposed determination provides that the quantum of HDA where an employee acts in the SES is to be determined by the Secretary. The CPSU's proposed determination provides, among other things, that the amount of HDA will be no less than $12,185. The Department submitted in support of its proposed approach that the determination of HDA in these circumstances ought to be preferable to the commencing salary of the SES position in question rather than an arbitrary minimum floor which may result in remuneration outcomes that are unfair vis-a-vis the SES workforce. We agree with this submission and will therefore adopt the Department's proposed approach on this issue.

Allowances which the Department sought to roll up in composite allowance

[376] As mentioned above, the allowances which were to be rolled up into the composite allowance were work location/airport allowance, use of force allowance, cargo examination facilities allowance, cold work disability allowance, confined space disability allowance, dirty or offensive work disability allowance, epoxy-based materials allowance and the self-contained breathing apparatus allowance.

[377] Initially we note that the CPSU in its submissions stated that it no longer pressed its claim for an epoxy-based materials allowance.

[378] In respect of work location allowance, the Department submitted that site-based allowances such as the work location allowance were intended to compensate employees for working at locations that were traditionally considered isolated during non-standard business hours. The Department further submitted that all major airports were now considered to be within urban boundaries and that employees did not experience less amenity at an airport when compared to their colleagues who work in other locations. Mr Leonard deposed that the Department did not consider it reasonable to pay an allowance to compensate employees for their private travel to and from the workplace irrespective of the mode they chose to travel by. Mr Leonard also deposed that the majority of Departmental employees did not work at airport terminals, did not receive free parking and did not receive allowances to assist with the cost of getting to and from work.

[379] The CPSU submitted *inter alia* that there was no justification for the removal of the work location allowance and otherwise relied on Ms Jones' evidence. In her witness statement Ms Jones set out the background to the introduction of the allowance, deposing that it had its genesis in a recommendation by joint working party which conducted a review prior to bargaining for the ACBPS Agreement. Among other things, Ms Jones, who is based primarily at Sydney International Airport, deposed that she personally received an allowance of $63.80 per fortnight and paid $85 per fortnight for car parking. Ms Jones further deposed that the allowance in its current and proposed form went a long way to alleviating the financial pressure which working at Sydney airport placed on employees like her.

[380] Other than Ms Jones witness statement, there is little material before the Commission either detailing or substantiating the nature and level of disability suffered by Departmental employees working at locations which attract the work location allowance. In those circumstances, we do not believe that the merit of including the allowance in the determination we make has been made out [s.275(a)]. Given that a number of employees would currently be in receipt of this allowance we will include transitional arrangements in the determination. Those transitional arrangements will provide for a gradual withdrawal of the allowance over the life of the workplace determination. Specifically, the transition period will be two years, with the allowance reduced by 25 per cent every six months until it has been reduced to zero. Employees who move to those locations which currently attract the work location allowance after the commencement of the workplace determination will be entitled to the allowance consistent with the abovementioned transitional arrangements. This should minimise any disincentive for employees to move to those locations.

[381] As to the remaining allowances mentioned above, the Department opposed the CPSU's claims in respect of those allowances. Key aspects of its submissions in that regard included that:

- in respect of the various disability based allowances, i.e. cold work, confined space, dirty or offensive work and CEF composite allowance, Mr Leonard's unchallenged evidence was that the Department did not engage employees to perform work that triggered these disabilities though ABF officers may perform work from time to time that might give rise to triggering this type of work particularly in cargo or container examination environments;

- the use of force allowance was introduced at a time when the ACBPS first introduced firearms as protective equipment and was needed to incentivise a small proportion of a surveillance workforce who were not previously required to carry a firearm, adding that the carrying and discharge of firearms was now an inherent requirement of some positions of sworn ABF officers; and

- claims by Mr Loughnan and Mr Suijdendorp that the self-contained breathing apparatus allowance was paid in compensation for the qualifications and skills that were required to use this equipment did not justify the CPSU's claim.

[382] The CPSU sought the retention of each of these allowances primarily on the basis that there was no evidence to support the removal of the provisions, that the provisions would lead to unreasonable costs being incurred by the Department or that the provisions were administratively unworkable. The CPSU further submitted that any changes to the regime of allowances ought to properly be the subject of negotiations between the parties at the time that an enterprise agreement was being negotiated to replace the terms of the workplace determination. In support of its submissions regarding these allowances, the CPSU relied on the evidence of Mr Loughnan, Mr Suijdendorp, Ms Jones and Mr Hyde. The CPSU also disputed aspects of Mr Leonard's evidence regarding these allowances.

[383] We consider that there is merit in including these allowances in the determination we make as the circumstances which lead to their introduction based on the material before the Commission still exist, even if only on an irregular basis [s.275(a)]. Further, as submitted by the CPSU and consistent with our approach in respect of composite allowance, any rationalisation of these allowances is more appropriately the subject of future enterprise bargaining negotiations [s.275(h)].

Other allowances

[384] We turn now to deal with the raft of other allowances which are matters in issue. For reasons of brevity, we will generally just set out below our decision and any reasons for that decision in respect of those allowances, though on occasions we will refer to the parties' submissions and/or evidence. To be clear, where we do not refer to the submissions and/or evidence we have, in coming to our decision, had regard to the parties' respective submissions and any evidentiary material they may rely upon.

- Breakfast allowance – the circumstances in which this allowance is payable would attract overtime meal allowance. As such, we will not include breakfast allowance in the determination we make as to do so would involve unnecessary duplication.

- CATO and CFI allowance – Mr Leonard's evidence was that these functions would in future form part of the duties of designated ABF positions rather than continue to be performed by volunteers. However, there was no evidence before the Commission

as to if and when this change would occur. As outlined at the end of this decision, we intend to convene a conference (the intended conference) of the parties to work through any issues going to the implementation of the determination consistent with our decision. Subject to the Department establishing at that conference that the proposed change outlined above has in fact been implemented, we will not include this allowance in the determination we will make. Should implementation not have occurred the allowance will be included in the determination we will make.

- CEF allowance – the rationale for the allowance is not set out in the material before us. To the extent the allowance is intended to compensate employees for particular disabilities (e.g. cold work, confined spaces, etc.) we consider that the relevant allowances are the appropriate mechanism for dealing with those circumstances. Accordingly, we do not consider that the merits of including this allowance in the determination have been made out [s.275(a)] or that its inclusion is necessary.

- Clothing for specialist roles – we do not consider that the merits of including this allowance in the determination we will make have been made out [s.275(a)]. While there may have been some justification for the allowance when some of the specialist roles transitioned from uniformed roles to non-uniformed roles. However, we do not accept that is any longer the case.

- Disruption allowance – in circumstances where the determination we will make provides scope for the Secretary to authorise payments to employees in recognition of exceptional circumstances experienced or expenses incurred by an employee in the course of their employment, we do not consider it necessary to include a provision relating to disruption allowance.

- Dog Detector Unit footwear allowance – we are not satisfied as to the merits of including this allowance in the determination we make given the inconsistency between the evidence of Mr Loughnan and Mr Muffatti regarding the purpose of the allowance [s.275(a)]. We also note Mr Leonard's evidence that detector dog trainers are provided with footwear by the Department for all work purposes.

- Dog Unit handler allowance – Mr Leonard's evidence was that a Departmental review concluded that Detector Dog Handler positions should be classified at the APS Level 4 classification. However, it is not clear whether this has occurred. Consistent with the approach outlined above in respect of CATO and CFI allowance, subject to the Department establishing at the intended conference that Detector Dog Handler positions have in fact been reclassified, we will not include this allowance in the determination we will make. Should reclassification not have occurred the allowance will be included in the determination we will make.

- Domestic care support scheme – in circumstances where the determination we will make will provide scope for the Secretary to authorise payments to employees in recognition of exceptional circumstances experienced or expenses incurred by an employee in the course of their employment, we do not consider it necessary to include a provision relating to the domestic care support scheme in the determination we will make. We further note that no material put to us regarding the take up of the scheme by employees other than by Ms Jones.

- Excess travel time – we consider this issue adequately dealt with in the provisions relating to travel during working hours which we will include in the determination we will make (see below).

- Executive extended commitment allowance – Mr Leonard's evidence was that as at mid-January 2018 there were 13 EL employees in receipt of this allowance. To the extent that there are any EL employees still in receipt of this allowance we will grandfather the payment of that allowance while the circumstances warranting payment continue. If at the intended conference it can be demonstrated that there are no employees who currently revive the allowance it will not be included in the determination we make. More broadly, i.e. for those EL employees not in receipt of the allowance on commencement of the determination, we consider the scope for TOIL to be provided and/or for an IFA to be agreed to provide appropriate mechanisms by which longer periods of EL employees working extended hours can be recognised and rewarded.

- Flying disability allowance – the CPSU in its submissions stated that it no longer pressed its claim for the inclusion in the determination of a flying disability allowance.

- Forensic specialist allowance – Ms Kumar's evidence was that the practice in the former ACBPS was that IFAs were used to enhance salary for forensic officers and that she had accepted an offer of an IFA. We note that one of the aims of the option recommended by Review referred to in Ms Jones' witness statement was to support attraction and retention to the computer forensic officer role. As IFAs are being used by the Department as the vehicle to implement that Review's recommendations, we are not satisfied of the merit of introducing an allowance which would have the same effect [s.275(a)].

- Free Uniform – the CPSU's proposed determination includes a provision which states that employees who are required to wear a uniform will be provided with a uniform and replacement uniform free of charge. It was not disputed that the Department provided employees who were required to wear a uniform with a uniform free of charge. As such, we consider the inclusion of the CPSU's proposed provision to be unnecessary.

- Intermittent driving allowance – Mr Leonard's evidence was that the Department had no record of the allowance being paid since 2013. In the absence of any evidence pointing to the need for such an allowance we will not include the allowance in the determination we will make.

- Irregular maritime arrivals allowance – in circumstances where there have been no irregular maritime arrivals since July 2014 we are not satisfied as to the merit of including such an allowance in the determination we will make, particularly in circumstances where the remote localities provisions we have determined may apply at a particular detention centre facility.

- Kennel hands allowance – this allowance compensates employees who are required to perform work in conditions determined by the Secretary to be of an "insanitary nature". The allowance duplicates what the dirty and offensive allowance deals with,

i.e. work of an "unusually dirty or offensive nature", albeit at a higher monetary rate. We do not therefore consider it necessary to include the kennel hands allowance in the determination we will make as to do so would involve unnecessary duplication.

- Marine accommodation allowance – this issue is dealt with below in respect of travel under the heading of boating/seagoing allowance.

- Medical Officer processing allowance – Mr Leonard's evidence was that the circumstances which gave rise to this allowance no longer exist as irregular maritime arrivals were no longer occurring and no Medical Officer had been paid the allowance since 2016. Having regard to that evidence, and in circumstances where the determination we make will provide scope for the Secretary to authorise payments to employees in recognition of exceptional circumstances experienced or expenses incurred by an employee in the course of their employment, we do not consider it necessary to include a provision relating to this allowance in the determination.

- Operational safety trainer (OST) and operational capability trainer (OCT) allowance – Mr Leonard's evidence was that this allowance was introduced for attraction and retention purposes and those issues were better addressed through IFAs. However, Mr Leonard provided no evidence that the Department had adopted this approach in practice. Ms Jones' evidence regarding the unique nature of these roles and the specialist skillsets required in our view establishes the merits of this allowance [s.275(a)]. Accordingly, we will include the allowance in the determination we will make. The quantum of the allowance on commencement of the determination will be $5,410 per annum.

- Operational trainer separation allowance – we do not see any merit in this allowance in circumstances where operational trainers receive travelling allowance and are also paid the OST/OCT allowance.

- Office closure allowance – Mr Hyde's evidence was that this allowance which had been in existence since 2001 was initially negotiated to ensure that when the Department closed offices or moved work out a region that workers did not bear the cost of decisions made to relocate that work, particularly where workers were required to move to another location. Mr Hyde cited the example of when the Department decided to close its Gold Coast office and relocate the work to Brisbane. The domestic relocation expenses provision of the determination we will make would apply in circumstances where an employee moves to a job with the Department in a different geographical location from that in which the employee normally works and/or resides. This would adequately deal with the circumstances which Mr Hyde refers to as warranting the inclusion of this allowance. As such, we do not consider it necessary to include this allowance in the determination.

- Public Affairs Officers equipment – it was not disputed that the Department supplied Public Affairs Officers with all necessary equipment. We therefore do not consider that this provision should be included in the determination we will make.

- Restriction allowance – we will adopt the Department's proposed approach regarding this allowance as it reflects the approach in the DIAC Agreement.

- School holiday assistance – the matters in dispute in respect of this issue are whether assistance should be available in circumstances where an employee with school children has a request for annual or purchased leave during school holidays refused for operational reasons and the quantum of the allowance. While in respect of the first issue we note that the DIAC Agreement provided for school holiday assistance to be available in these circumstances, we consider that the provision of assistance in these circumstances should be discretionary rather than mandatory. The fact that school holiday periods are known well in advance enables employees to plan their school holiday leave in advance, thereby potentially avoiding child care costs. As to the second issue, the quantum of the allowance on commencement will be $27 per day up to a maximum of $270 per family per week. Our decision regarding this allowance has particular regard to the merits [s.275(a)] and the interests of the Department and employees [s.275(c)].

- Uniform allowance (includes the former shoe and stocking allowance) – in view of the conflicting evidence regarding the continuing payment of this allowance, we will include the allowance in the determination. However, the allowance will only be paid to those employees who are required to wear a uniform and who are not provided with shoes and socks as part of that uniform. The quantum of the allowance on commencement will be $286 per annum.

- Workplace responsibility allowance v first aid officer allowance and volunteer allowance – we see no reason why the previous first aid officer and volunteer allowances in the DIAC Agreement should not be included in a provision headed workplace responsibility allowance as per the Department's proposed determination, particularly as the rates proposed maintain the distinction in allowance rates which previously existed. We do not accept the CPSU's objection to this proposed approach. Further, the CPSU has not made its case for the extension of this allowance to additional roles such as Peer Support Officer. The quanta of the allowance on commencement will be $560 (Level 2 First Aid), $685 (Level 3 First Aid) and $346 (Other workplace responsibility).

7. Consultation

[385] As stated above, the model consultation term will be included in the determination we make.

[386] We turn now to consider those additional consultation related provisions which the CPSU seeks to have reflected in the determination. In short, the CPSU seeks to either retain or vary provisions in the DIAC Agreement relating to the NCSF and local forums and workplace delegates[273]. Specifically, the CPSU seeks to vary those aspects of the DIAC Agreement relating to the membership of the NCSF and the electorate for elected employee representatives and also seeks the insertion of a provision setting out the issues on which reports will be regularly provided to the NCSF.

[387] In its submissions the CPSU acknowledged that it sought the inclusion of terms in the determination which were in addition to the model clause. More specifically, the CPSU contended that the issue of whether a consultative committee could be included in a workplace determination was considered by the Full Bench in *Essential Energy*, with the Full

Bench in that case including a provision providing for the establishment of a consultative committee. The CPSU further submitted that:

- the Commission was not prevented from including terms which were in addition to the model consultation clause, such as those providing for the establishment of a consultative committee; and

- the Full Bench in this case must approach its task by first including the model consultation term and then assessing each further term that is sought to be included for its appropriateness.

[388] The Department submitted that any consultation obligations above those set out in the model consultation term detracted from the model term in substance and effect and could not be arbitrated. The Department contended that the CPSU sought additional consultation obligations beyond the scope of the model term, reiterating its view that in the absence of agreement any claim for additional consultation over matters extending beyond major change and regular rosters or ordinary hours of work could not be included in a workplace determination. In support of its submissions in this regard the Department relied on the decisions in *Essential Energy*, *Qantas Airways*, *Schweppes* and *Austin Health*.

[389] The NSCF provision in the DIAC Agreement with the changes sought by the CPSU highlighted is as follows:

"National staff consultative forum and local forums

2.9 A National Staff Consultative Forum (NSCF) is established under this Agreement to facilitate the harmonious operation of this Agreement. Where the Secretary and the NSCF agree, the Terms of Reference of the NSCF may be varied during the life of this Agreement.

2.10 The NSCF will be made up of electorates with employee representatives. Employees will be provided with the opportunity to vote for an employee representative in an electorate. The department recognises the importance of employee representation in consultative forums and will provide appropriate support and paid time during working hours for employee representatives to meet their representational functions.

2.11 The NSCF is the national consultative body for matters involving the conditions of employment of the department's employees. It is responsible for monitoring and advising on the implementation, application and intent of the provisions of this Agreement. It provides an opportunity for senior management, employees and their nominated representatives to consult on the implications of legislative, funding, organisational, technological and procedural changes for employees, and to consult on the implementation of this Agreement. Its members will seek to reach agreement through a process of consultation and discussion. The NSCF may form sub-committees and working parties as required from time to time to deal with specific issues.

2.12 The NSCF will be consulted on the establishment of and changes to existing guidelines, policies or instructions that relate to the provisions of this Agreement.

Other administrative guidelines, policies or instructions that relate to employment conditions of employees related to the provisions of this Agreement may also be referred to the NSCF for consultation.

There shall be regular reporting to the national consultative forum on:

1. the number, duration, classification and location of non-ongoing employees, contractors and labour hire workers

2. the number, classification and location of all positions

3. budgets for learning and development (including access to those budgets)

4. the number, classification and location of staff on Individual Flexibility Agreements, and the contents and reasons for those arrangements

5. issues affecting Movement Monitoring Officers, including classification, office accommodation, IT, vehicles, training and career development arrangements

6. progress on developments of a monthly reconciliation tool for extra duty for seagoing marine employees.

2.13 There will be consultative forums in each State, Territory and National Office that provide an opportunity for the department, its employees and their nominated representatives to meet and discuss issues relating to employment matters arising in the State, Territory or National Office.

2.14 The NSCF will meet at least three times per year. Additional meetings may be convened when necessary. The NSCF may deal with matters without meeting.

2.15 The Secretary will nominate a representative as a first point of contact for managers, employees or employee representatives on matters arising out of the operation of this Agreement. This representative will also provide secretariat support for the NSCF.

2.16 The NSCF will be chaired by the Secretary or the Secretary's nominee and will consist of:

- ~~three~~ departmental representatives (in addition to the Chair)

- elected employee representatives (consistent with clause 2.18 of this Agreement), ~~and~~

- ~~up to a total of five representatives covering the unions that are covered by this Agreement (as determined by those parties), subject to the provisions of clause 2.17 of this Agreement and the *Fair Work Act 2009*.~~

- six Community and Public Sector (CPSU) representatives and one CPSU organiser (as determined by the CPSU), and

- one Australian Institute of Marine and Power Engineers (AIMPE) representative.

2.17 Meetings of the NSCF will be at a time and place determined by the Secretary, and invitations to additional representatives may be made at the Secretary's discretion if issues of specific relevance to them are discussed, subject to the *Fair Work Act 2009*.

2.18 The electorate for the elected employee representatives are:

- ~~National Office Business Groups (which will include overseas coverage and the ACT region) which will elect one representative each~~

- ~~NSW which will elect one representative~~

- ~~Victoria/Tasmania which will elect one representative~~

- ~~Queensland/Northern Territory which will elect one representative~~

- ~~Western Australia which will elect one representative, and~~

- ~~South Australia which will elect one representative.~~

one representative from each National Office Business Group and will consist of a total of six ACT representatives:

54.1 Corporate;

54.2 Policy;

54.3 Intelligence and Capability;

54.4 Visa and Citizenship Services;

54.5 ABF Support; and

54.6 ABF Operations.

54.7 The regional elected staff representatives will comprise of one Departmental and one Australian Border Force (ABF) representative and will consist of:

54.8 NSW x 2;

54.9 Victoria/Tasmania x 2;

54.10 Queensland x 2;

54.11 Western Australia x 2; and

54.12 Central Region (South Australia/Northern Territory) x 2.

In the event that a new National Office Business Group is established, the Chair will, within six weeks, call for nominations and hold elections for a new Business Group Representative.

2.19 Further information is available in the department's National Staff Consultative Forum Terms of Reference."[274]

[390] As noted above, the CPSU drew on the decision in *Essential Energy* in support of the provisions relating to the NCSF in its proposed determination. On the issue of consultation, the Full Bench in *Essential Energy* determined as follows:

"**[14]** There being no agreed consultation term, s.273(5) requires that the model consultation term be included in the determination. Accordingly the model clause as it appears in Schedule 2.3 of the FW Regulations (with the subclause numbering re-formatted for consistency) will be included as the consultation term in the determination we make. The unions' proposed workplace determination filed on 28 June 2016 contained an additional provision concerning consultation entitled "*Workplace Practice Change*" (clause 1.14), which had as an essential feature a requirement that any such change of this nature be the subject of consultation in accordance with the consultation procedure before it could be implemented. We consider that is, in effect, a modification to the model consultation term because it widens the scope of matters which are required, under the model term, to be the subject of consultation. The model term requires consultation only in respect of "*a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees*" or a proposal to "*introduce a change to the regular roster or ordinary hours of work of employees*". Work practice changes clearly may extend beyond these matters. It would be inconsistent with the requirement in s.273(5) to include in the workplace determination the "*Workplace Practice Change*" provision proposed by the unions because it would mean, in substance and effect, that we had not included the model consultation term. Accordingly, that proposed provision will not be included in the workplace determination."[275]

[391] However, the Full Bench did provide for the establishment of a consultation committee in certain circumstances related to outsourcing. Specifically, the Full Bench decided to include the following provision regarding outsourcing in the determination it made:

6.1 OUTSOURCING

(1). *Basic Principles*

Outsourcing or contracting out will not diminish the working conditions of this Workplace Determination.

(2) Work will only be outsourced or contracted out when it can be demonstrated that:

(a) peak workloads cannot be met by Essential Energy's workforce including reasonable overtime; or

(b) where specific expertise, not available in Essential Energy's workforce, is required. Where recurring work requires such expertise, Essential Energy will make efforts to obtain this expertise by training and/or reorganising its existing workforce. Essential Energy will keep the relevant union(s) informed about such training and reorganisation; or

(c) the use of outsourcing or contracting out the work is commercially the most advantageous option taking into account safety, quality, performance, and cost.

(3) The following circumstances apply when Essential Energy is examining outsourcing or contracting out of work activities:

Phase 1: Testing the Market

(a) When Essential Energy is considering an outsourcing proposal and proposes to test the market through RFI processes or otherwise a consultation committee shall be formed comprising appropriate representation from Essential Energy and the applicable unions. The purpose of the committee will be to serve as a forum for Essential Energy to inform and consult the Unions and their members on the proposal, the reasons for the proposal and the intended process.

(b) During this period and in the consultative committee Essential Energy and the Unions will investigate whether it is viable for an internal proposal to be developed.

(c) The Phase 1 consultation process shall be completed within 28 days of Essential Energy notifying the Unions of its intention to commence consultation.

Phase 2: Go to Market

(a) If after assessing all of the relevant data, Essential Energy makes a decision to proceed to a request for proposal or tender it will notify the Unions and provide them and any employee with the appropriate time (relevant to the nature of the proposal which will be 28 days unless Essential Energy decides otherwise), to respond with suitable proposals in respect of possible alternative arrangements to outsourcing or contracting out.

(b) Assistance will be provided to employees to prepare an EOI or tender, and where necessary external assistance will be engaged at the cost of Essential Energy.

(c) …

(4) …

(6) Either party may refer this process to the Dispute and Grievance Resolution Procedure in this Workplace Determination.

(7) The parties will comply with their obligations under clauses 1.13 and 1.14 of this Workplace Determination prior to enacting the above. Nothing in this clause diminishes the parties' obligations under clauses 1.13 and 1.14."[276]

[392] In its decision the Full Bench noted that the above provision was:

"…the same as that contained in the proposed enterprise agreement put to a vote in May 2016 and also the same as that contained in Essential Energy's proposed enterprise agreement of 4 February 2016. It was therefore a provision which, although not ideal from Essential Energy's perspective, was one which it was prepared to agree to (and therefore, presumably, did not regard as being unduly constrictive of its future plans for outsourcing). We also note that at least the CEPU was, as at 3 May 2016, prepared to agree to a provision in these terms provided that it cross-referred to the dispute settlement procedure and that procedure retained a capacity for the status quo to be maintained pending resolution of the dispute … Accordingly the outsourcing clause in the First Draft was one which, at the ultimate stage of the bargaining process, at least the CEPU was prepared to accept."[277]

[393] With regard to the various cases beyond *Essential Energy* relied upon by the Department in respect of the consultation issue, we note that:

- *Austin Health* was determined under a different statutory framework (i.e. the *Workplace Relations Act 1996* – the WR Act;
- the issue of consultation was not in dispute in *Schweppes*; and
- in *Qantas Airways* the Full Bench declined to include consultation requirements in the context of a protocol proposed by the TWU in respect of contracting out and outsourcing given s.273 of the Act.

[394] In the absence of agreement the inclusion of a provision relating to a consultative forum/committee which imposed additional consultation requirements on an employer would in our view be inconsistent with s.273(5) of the Act. Having regard to the CPSU's proposed NCSF provision, we are concerned that aspects of it entail additional consultation obligations. For instance, the requirements in the CPSU's proposed provision "to consult on the implications of legislative, funding, organisational, technological and procedural changes for employees, to consult on the implementation of this Agreement" and for regular reporting to the NCSF on specified issues arguably establish additional consultation obligations. For this reason, we are not willing to include this level of detail in the determination we make.

[395] However, a consultative forum provision which simply established a mechanism through which consultation could occur on those issues set out in the model consultation term would not of itself be inconsistent with s.273(5) of the Act. To the contrary it may serve a useful purpose in building and maintaining a cooperative workplace relationship. Against the background of what we described in the June 2018 Statement as an "understandably fractured relationship"[278] and given the size of the Department we consider that providing for a consultative forum in the determination we will make has a potentially useful role to play. We note also that most enterprise agreements covering other APS agencies include provisions providing for a consultative mechanism[279].

[396] To that end we will include in the determination provisions providing for a NSCF to be established comprising Departmental, CPSU, AIMPE and elected employee representatives. The determination will also provide that the NSCF is to operate in accordance with agreed terms of reference which can only be amended with the agreement of the members of the NSCF and that the NSCF will meet no less than twice each year. Issues such as the size of the NSCF, the issues to be considered by the NSCF, whether the NSCF is to be supported by more localised consultative mechanisms and the support/facilities to be provided to employee members of the NSCF (including workplace delegates) are matters more appropriately agreed between the parties and reflected in the NSCF's terms of reference. As such, much of the detail included in the CPSU's proposed provision will not be included in the determination we will make, nor will the clause relating to workplace delegates. We consider the issue of what support the Department might provide to employee representatives, including workplace delegates, is more appropriately considered in the context of settling the terms of reference for the NSCF.

8. Redeployment and redundancy

[397] The CPSU in its submissions highlighted that the Department's proposed determination removed a number of provisions relating to redundancy and redeployment which were included in either or both the DIAC or ACBPS Agreements. The provisions highlighted by the CPSU which it contended the Department sought to remove included provisions relating to the consideration period in respect of offers of voluntary redundancy, the consultation process, provision of financial advice and retention periods.

[398] The CPSU submitted that in circumstances where the redundancy and redeployment provisions in the DIAC Agreement had been negotiated over many years they ought not to be removed without good reason. In its submissions, the CPSU compared its proposed redeployment and redundancy provision with the Department's proposed provision. Key aspects of the CPSU's submissions in this regard included that:

- the provision provided no real opportunities for an excess employee to search and apply for other redeployment opportunities in circumstances where the Department had decided that there was no suitable position available for redeployment;

- it did not offer assistance to employees attempting to redeploy elsewhere in the Department or the APS;

- the provision reserved to the Department the right to decide to make an employee forcibly redundant with little consultation, genuine discussion with the individual regarding the options available to that individual and little assistance or opportunity to genuinely seek redeployment;

- the process in the Department's proposed determination was unevenly weighted toward the removal of employees from APS employment; and

- the provision did not provide an employee who had been declared excess with a one-month period to consider an offer of voluntary redundancy.

[399] The CPSU in its submissions also highlighted that its proposed provision retained a number of clauses which presently were entitlements that all Departmental employees enjoyed under the DIAC Agreement but which the Department proposed to remove, i.e. the provision of financial assistance to an employee made an offer of voluntary redundancy, inclusion of shift penalties in the calculation of the severance benefit payable to employees and maintenance of the allowances that counted as salary for the purposes of calculating a severance benefit. Further, the CPSU disputed the Department's rationale for the removal of retention periods from its proposed determination, positing among other things that the redeployment and redundancy provisions of the workplace determination ought to strike a balance between the needs of the employer and the needs and interests of employees.

[400] The Department in its submissions noted that the entitlements and procedures concerning voluntary redundancy, retention and redeployment were at issue between the parties. The Department contended *inter alia* that:

- its proposal had merit based on the evidence;
- its proposal provided notice and redundancy pay entitlements equivalent to the Award and in excess of the NES entitlement and provided fair and equitable protection for excess employees facing unemployment;
- the need for a flexible redundancy and redeployment regime was acute in the light of the Department's budget and average staffing level (ASL) pressures;
- its proposal properly and fairly facilitated change by ensuring that there was a discretion to institute compulsory redundancies rather than requiring all redundancies to be voluntary;
- the decision in *Essential Energy* noted that prohibitions on compulsory redundancy were inappropriate for inclusion in a workplace determination;
- the consultation and redeployment and redundancy provisions of its proposed determination ensured that employees were afforded fair and necessary entitlements in redundancy and restructure situations including notice of likely redundancy, the ability to discuss ways to avert redundancy, the concomitant duty on the employer to consider anything arising from those discussions, and the possibility of redeployment, voluntary redundancy and accelerated separation; and
- the step-by-step, regimented and protracted regime sought by the CPSU only duplicated and prolonged procedures that would apply upon restructure decisions and ought to be avoided.

[401] The Department in its submissions also dealt with the issues set out below.

- <u>The definition of excess employee</u> – defining excess employees by 'class' rather than 'classification' had merit when one considered the broad remit of the Department's functions and the diverse skill sets deployed by its employees in the performance of their work, noting that skill sets at particular classification levels would differ significantly. Further, its proposal met the intended operation of the CPSU proposal

in any event as a class of employee was capable of being defined by reference to classification.

- Voluntary and involuntary redundancy – an employer's right to decide to retain particular skill sets or particular employees in favour of other skill sets or employees was a classical incidence of managerial prerogative, adding that the prospect of losing desired employees or desired skill sets by reason of a mandatory requirement to offer voluntary redundancy would not contribute to productivity.

- Notice period – there was no substantive difference between the parties, adding that the Commission ought to proceed with the wording it had previously prescribed in making the Award.

- Financial assistance – the Department opposed the inclusion of a provision requiring it to provide an amount of $750 for financial advice where an offer of voluntary redundancy had been made on the basis that the implications of a voluntary redundancy for an employee could be explained on a case-by-case basis by the Department or alternatively by an employee representative.

- Accelerated separation – the Department disputed Mr Loughnan's assertion that its proposal did not contain provisions for accelerated separation, highlighting that its proposal allowed an employee to cease employment prior to the termination date and within the notice period and that there was nothing in its proposal that would prohibit an even earlier termination by agreement.

- Retention periods – the Department characterised the retention period as a prohibition on the termination of an employee's employment for a period of either seven or 13 months and the imposition of an obligation on the Department to continue an employee's employment against its will. This the Department posited resulted in excess employees remaining employed whilst major change was occurring around them, resulting in limited opportunities to make a meaningful and welcome contribution and also had the potential to diminish productivity by potentially delaying the change sought to be brought about following an excess situation. The Department further posited that such an outcome was especially inappropriate for a professional law-enforcement environment.

[402] We turn now to deal with each of the matters in issue relating to redeployment and redundancy, dealing first with the issues of voluntary and involuntary redundancy and retention periods.

[403] Mr Leonard deposed in his witness statement that the Department's proposed determination did not wish to continue to provide for retention periods because the retention period regime imposed pressure on ASLs and the Department's wish to focus on redeployment of a short duration. Mr Leonard also deposed that should redeployment attempts fail, then termination for redundancy should follow.

[404] As previously noted, Mr Taylor's witness statement included an outline of the history of redundancy and redeployment provisions in the APS. That history shows that since at least 1977 APS employees had been entitled to extended periods of notice. For instance, the Public Service Arbitrator's Determination No. 509 of 1977[280] which applied to the Australian

Broadcasting Commission and APS departments included the following provision concerning notice of redundancy:

> "3. Where after the consultation referred to in clause 2 of this determination the Public Service Board decides that redeployment of any excess staff is not feasible:
>
> (a) a permanent officer, other than one coming within paragraph (b) hereof, shall be entitled to six months' formal notice that he is excess to the requirements of the service;
>
> (b) a permanent officer who has twenty or more years service or who is over 45 years of age shall be entitled to twelve months' formal notice that he is excess to the requirements of the service;
>
> (c) a temporary employee shall be entitled to one month's formal notice that he is excess to the requirements of the service."[281]

[405] Further, in 1987 the *Australian Public Service Redeployment, Retirement (Redundancy) Award 1987*[282] was made and introduced the delineation between voluntary and involuntary redundancy. In respect of involuntary redundancy, the award provided as follows:

> "8 – RETENTION PERIODS, REDEPLOYMENT AND INVOLUNTARY RETIREMENT
>
> (a) This clause applies to excess officers who are not retired with consent in accordance with clause 7.
>
> (b) Except with the consent of the officer, and subject to subclause 8(i), and excess officer shall not be retired under section 76W of the Act until the following retention periods have elapsed:
>
> (i) in the case of an officer who has 20 or more years of service or who is over 45 years of age – 13 months;
>
> (ii) in the case of other officers – 7 months.
>
> (c) …
>
> (i) We are a Secretary is of the opinion that there is insufficient productive work available for an excess employee during the employee's retention period, the Secretary may, after consulting the employee's union and the Board, retire the employee before the end of the retention period …"[283]

[406] While the Award does not provide for retention periods, what is clear from the above is that retention periods have a long history in Australian Government employment. We further note that the Agreements both provide for retention periods of either 7 or 13 months duration and that changes to retention periods have been included in a number of APS agencies, e.g. the *Department of Industry, Innovation and Science Enterprise Agreement*

2016[284] provides for redeployment periods of six months for employees with 20 or more years of service or who are over 45 years of age and four months for all other employees[285].

[407] As mentioned above, the Department submitted that the decision in *Essential Energy* noted that prohibitions on compulsory redundancy were inappropriate for inclusion in a workplace determination. The decision in *Essential Energy* included the following:

> "**[74]** The primary issue in relation to the redundancy provision to be placed in the workplace determination is whether there should be any prohibition or numerical restriction upon the capacity of Essential Energy to make employees involuntarily redundant. The starting-point submission of the unions is that the prohibition currently contained in the 2013 Agreement and its predecessors should be retained, while Essential Energy's claim is for it to have an entirely free hand in making employees redundant.
>
> **[75]** As a matter of general principle, we do not consider it is appropriate (except perhaps in particularly exceptional circumstances) to impose upon an employer by way of an arbitrated determination a prohibition of the nature sought by the unions. It is difficult to identify a proper justification for, in effect, requiring an employer to employ more persons than it needs to conduct its normal business functions. That would amount to compelling a business to subsidise employment, which would be in the nature of a social welfare decision appropriate for government and not for an industrial tribunal performing arbitral functions."[286]

[408] The circumstances in this case are different to those existing in *Essential Energy* in that in this case the CPSU is not advocating for either a prohibition or a numerical restriction on the Department's capacity to make employees involuntarily redundant. Accordingly, the general principle espoused by the Full Bench in *Essential Energy* is not relevant in this case.

[409] Against that background and having regard to the material before the Commission, we consider that any change to the existing arrangements regarding retention periods is better addressed through future bargaining [s.275(h)]. As such, the determination we make will reflect the approach regarding retention periods set out in the DIAC Agreement. The practical effect of our decision in this regard is that the determination will provide for both voluntary and involuntary redundancy. In those circumstances, we consider it both appropriate and necessary to include in the determination we make the existing timeframe for an employee to consider whether or not to accept an offer of voluntary redundancy, i.e. 1 month.

[410] Similarly, in respect of the accelerated separation provision sought by the CPSU and drawn from the ACBPS Agreement, we consider that the need for such a provision is better addressed through future bargaining, particularly in circumstances where there is no impediment to an employee and the Secretary agreeing that an employee be paid in lieu of notice.

[411] With regard to the definition of excess employee, the key issue to be determined is whether an employee should be described as excess by way of reference to being included in a "class of employees" or alternatively by reference to the employee's classification. In our view the reference to class of employees is broad enough to incorporate an employee's classification and other potential descriptors, e.g. all employees working in area X of the

Department. We note also that this is the language used in the Award. For this reason, we will adopt the definition proposed by the Department in the determination we make.

[412] As to the provision of financial advice, we note that this is a common feature of many APS enterprise agreements. We see considerable merit in employees obtaining independent financial advice in circumstances where they have been offered voluntary redundancy and believe that the Department should contribute to the cost of that advice. We will therefore include such a provision in the determination. As to the amount of financial assistance to be provided, the amount provided by other APS agencies varies considerably. For instance, the amount is $400 in the Department of Communications, $500 in the Departments of Prime Minister and Cabinet, Social Services and Human Services, $700 in the Department of Agriculture and Water Resources, $750 in the Department of Defence and $1200 in the Department of Jobs and Small Business. We note that the ACBPS Agreement provided employees who had been offered voluntary redundancy with an amount of $500 to obtain financial advice. Having regard to the abovementioned amounts we see no reason to adjust the current amount of assistance provided for this purpose under the DIAC Agreement, i.e. $640.

[413] The final issue which we need to decide is whether or not to include a provision dealing with consultation in respect of potential redundancies. As stated above, absent agreement the inclusion of a provision which imposed additional consultation requirements on an employer would in our view be inconsistent with s.273(5) of the Act. The CPSU's provision proposes discussions which arguably go beyond those contemplated in the consultation term to be included in the determination. As such, we do not propose to include the CPSU's proposed provision setting out the consultation process relating to potential redundancy situations. However, we consider it appropriate to cross reference the consultation provision in the determination in the clause relating to redeployment and redundancy. Further, we also consider it appropriate to include in the determination reference to the Department's obligations under Subdivision B of Division 2 of Part 3-6 of the Act regarding those circumstances where 15 or more employees are likely to be declared excess.

9. Travel and location based allowances (including international travel)

[414] There are a range of issues related to travel and location based allowances which are in issue. We will deal with those issues under the broad headings of travel during working hours, remote localities provisions, domestic travel arrangements, domestic relocation expenses, overseas conditions of service and other issues.

Travel during working hours

[415] The Department's proposed workplace determination provides that domestic business travel should be undertaken within the standard hours of duty or, where flex-time applies, within the flex-time bandwidth (clause 9.1). The Department's proposed determination further provides that for domestic business travel undertaken outside the flex-time bandwidth or outside ordinary working hours for those employees on standard working hours APS Level 1-6 employees may claim TOIL at single time while EL Employees may be considered for TOIL. In addition, the Department's proposed determination provides that overtime is payable to APS Level 1-6 when the travel is undertaken outside the flex-time bandwidth or outside ordinary working hours for those employees on standard working hours to escort a client in the employee's care and control.

[416] The CPSU's proposed workplace determination on the other hand reflects clauses 4.36 and 4.37 of the DIAC Agreement. Those provisions provide the following in addition to the abovementioned aspects reflected in the Department's proposed workplace determination:

- overtime for APS Level 1-6 employees in circumstances where they were already working overtime when they commenced travel to perform duties; and

- that employees undertaking domestic travel out of hours may claim up to one hour of flex-time each way for travel when the employee is travelling from their home to the airport and vice versa.

[417] The Department in its submissions contended that the CPSU's proposal, together with other provisions, created a complex regime that provided different entitlements for four different categories of employees – APS Level 1-6 employees, EL employees, employees on client duties travel and employees already working approved overtime. The Department further submitted that its proposed workplace determination dealt with business travel in a manner that was broad enough to include employees who do not work flex-time and removed the need to address travel for business purposes separately for flex-time workers and shiftworkers. In addition, the Department contended that its proposed determination provided a simple and fair entitlement for employees who travelled outside their standard or bandwidth hours and ensured that they received time off work commensurate with the time spent travelling. Mr Leonard's evidence was that the CPSU's proposal would almost certainly lead to confusion and disputes adding that the Department's proposed determination only regulated 'passive travel' and that the Department preferred to provide TOIL for travel out of hours because no work was performed during passive travel. Mr Leonard in his evidence noted that the CPSU's proposal provided EL employees with an automatic entitlement to TOIL for out of hours travel and stated that this was opposed by the Department as EL employees were expected to perform reasonable additional hours which may include passive travel.

[418] The CPSU contended that the Department provided no evidence in support of the removal of conditions which currently applied to Departmental employees. The CPSU also contended that travel was of a different nature to working reasonable additional hours worked in the ordinary course of employment as travel was necessarily more disruptive to an employee's daily routine and was more physically demanding. The CPSU further submitted that for these reasons it was appropriate that work related travel outside of ordinary hours be treated differently to additional hours worked in the ordinary course of employment.

[419] We see no reason why an APS Level 1-6 employee should not continue to be entitled to be paid overtime for travel out of hours in circumstances where they were already working overtime when they commenced domestic business travel. Further, as we previously noted, the fact that EL employees in the APS are not generally entitled to overtime is reflective of the expectation that they are required to work additional hours on occasions. Accordingly, we do not consider it appropriate that EL employees should be automatically entitled to TOIL for out of hours business travel [s.275(a)]. As to the amount of TOIL for travel between the employee's home and the airport and vice versa in circumstances where an employee undertakes business travel out of hours, we consider that this issue is more appropriately dealt with in policy.

Remote localities provisions

[420] By way of background, the DIAC Agreement provides for remote locality payments for ongoing employees permanently stationed in Cairns, Christmas Island, Dampier, Darwin, Port Augusta, Port Hedland and Thursday Island and Movement Monitoring Officers in the Torres Strait. The ACBPS Agreement on the other hand provides for:

- district and geographic allowances for employees who are required to move to a remote locality on a fixed term assignment in the following locations – Weipa, Gove, Thursday Island, Christmas Island, Dampier, Broome, Port Hedland, Carnarvon, Townsville, Esperance, Bowen, Mackay, Albany, Bundaberg, Bunbury, Burnie, Coffs Harbour, Eden, Geraldton, Gladstone, Launceston, Portland, Port Lincoln and Port Pirie; and

- district and geographic allowances for employees who reside in or who are required to move to Cairns or Darwin.

[421] What is clear from above is that the range of localities which attract remote localities conditions is much broader under the ACBPS Agreement when compared to the DIAC Agreement. Further, Port Augusta is the only location in the DIAC Agreement which does not appear in the ACBPS Agreement.

[422] We note also that the level of payments provided for in the Agreements also differs, e.g. a single employee located in Port Hedland would be entitled to $7,664 per annum under the DIAC Agreement but would be entitled to $10,148 (inclusive of a Leave Allowance of $2,475 which is payable in lieu of leave fares) under the ACBPS Agreement.

[423] As to the workplace determination, there are several aspects of remote localities conditions that are in issue. They are the localities which attract remote locality conditions, the quantum of district allowance, eligibility for district allowance and whether district allowance is payable during periods of leave taken at the end of a term transfer or posting to a remote locality.

[424] The Department's proposed workplace determination entitles employees who are required to relocate on a 'term transfer' or 'posting' to a district allowance and additional leave. The Department noted in its submissions that under its proposed determination the entitlement to remote localities conditions did not extend to permanent relocation. The Department further noted that the remote localities which would attract district allowances under its proposed determination did not include the following locations which appeared in the CPSU's proposed workplace determination – Bunbury, Bundaberg, Coffs Harbour, Gladstone, Launceston, Mackay and Yongah Hill/Northam (a detention centre facility). The Department submitted that it had applied the Australian Statistical Geography Standard (ASGS) Remoteness Structure for the determination of remoteness and that all but Yongah Hill/Northam were not aptly described as 'remote' according to the ASGS Remoteness Structure. The rationale as to why Yongah Hill/Northam would not attract a district allowance was not specified in the Department's submissions.

[425] The Department also highlighted in its submissions that:

- the CPSU's proposed determination entitled an employee who was domiciled in a defined remote location at the time of commencement of employment with the

Department to receive district allowance notwithstanding that the allowance was intended to recognise the disability associated with climate, isolation and the cost of living that might be experienced in the location;

- the CPSU's approach in this regard was difficult to reconcile with clause 599 of its proposed determination which appeared to limit eligibility for district allowance in respect of permanently stationed employees to those stationed at Darwin, Cairns or the Outer Torres Strait;

- the formulation of the Department's provision was to be preferred for simplicity;

- its proposed determination adopted the same district allowance rates for each category as contained in the Award whereas the CPSU's proposed determination provided significantly higher allowances, adding that the CPSU had led no evidence to justify its proposed rates;

- its proposed determination included an eligibility criteria for additional leave being 30 days service in the remote locality, contending that the absence of such a criteria in the CPSU's proposed determination would result in additional leave in respect of short fixed term assignments of under 30 days;

- its proposed determination provided an entitlement to leave fares as opposed to a leave allowance in lieu of leave fares, adding that it was the Department's preference to provide fares to the nearest capital city as per the Award; and

- the CPSU's proposed determination provided that district and geographic allowances were payable when an employee took annual or long service leave at the end of a fixed term assignment but not in respect of leave that accrued prior to that assignment, adding that the provision was unmeritorious in that the employees would not necessarily be suffering from a disability associated with a remote locality for which the allowance was intended to compensate.

[426] In summary, the Department submitted that the Commission should prefer its proposal for a number of reasons including that it:

- struck an appropriate balance between the remote localities provisions in the Agreements;

- did not apply to employees who permanently resided in remote locations;

- provided for additional leave days in conformity with the Award;

- provided for the cost of return fares to the nearest capital city to be met and removed the one-off leave allowance which, if included in the determination, would create the potential for employees to obtain windfall gains;

- provided for the Secretary to review the grading of remote localities from time to time to enable adjustment if warranted; and

- discontinued the unmeritorious provision extending the allowance to periods of leave at the end of an assignment.

[427] Mr Leonard's evidence was that the Department's proposed determination reflected the regime under the Award in that it applied the ASGS for the determination of remoteness. Mr Leonard further stated that the Department's proposed determination reflected a more contemporary standard of what was considered remote and that where locations had been removed this was because of the application of the ASGS. As to the level of district allowance, Mr Leonard's evidence was that as the Department was seeking to apply above Award rates of pay there was no basis to provide above Award district allowance rates in the determination. Finally, in respect of the leave allowance reflected in the ACBPS Agreement and the CPSU's proposed determination, Mr Leonard's evidence was that the Department was able to satisfy its leave fares obligation in the more economical way outlined in clauses 9.15-9.19 of its proposed determination.

[428] The CPSU's proposed workplace determination draws heavily on the approach in the ACBPS Agreement. The CPSU submitted that the Department's proposal involved a substantial reduction in the allowances currently paid to employees working in areas previously covered by the ACBPS Agreement and who were currently living in remote localities covered by the DIAC Agreement. The CPSU submitted that while a small number of employees would receive increases in their district allowance as a result of the Department's proposal, some employees would have their entitlement to district allowance removed while for others it would be reduced by more than half or in the case of Broome by three quarters.

[429] The CPSU relied on Mr Suijdendorp's evidence in support of its submissions. Mr Suijdendorp's evidence was that the remote locality provisions in the ACBPS Agreement had a long history and had been the subject of numerous reviews over the past 20 years with the latest of these reviews conducted in March 2011. Mr Suijdendorp deposed that the remote localities conditions fulfil an integral role in attracting and retaining staff to remote locations and in addressing the increased costs of living, exorbitant rental costs and adverse climatic conditions and the effects of isolation.

[430] Dealing with the matters in issue regarding remote conditions, we note that the CPSU's proposed determination refers to the ATO's Australian Zone List and the ABS Australian Standard Geographical Classification – Remoteness Area Structure (clause 598) as the basis for grouping locations into tiers according to cost of living, climate and isolation factors. The Department's proposed determination states that the Secretary will have regard to the methodology prescribed in the Award in determining the applicability of remote locality conditions to a locality not specified in its proposed determination (clause 9.7) and that the remote localities specified in the proposed determination had been graded according to that system (clause 9.8). However, neither proposed determination is transparent as to the basis on which the remote localities specified in the respective determinations have been determined as remote. Our concern in this regard is twofold. First, we are not genuinely convinced that all of the locations classified as remote in the proposed determinations are in fact remote, e.g. it is unclear to the Commission why locations such as Coffs Harbour and Launceston are considered to be remote. Second, the absence of such a methodology is likely to be problematic should disputes arise about whether a location should or should not be considered to be remote and if so how it is to be graded for the purpose of remote locality conditions. With regard to Mr Suijdendorp's evidence, to the extent that the 2011 review referred to in his

witness statement involved a review of which locations should attract remote locality conditions it appears to have been limited to whether Geelong, Newcastle, Richmond, Wollongong and Coolangatta should continue to be considered remote[287].

[431] In our view, the methodology set out at clause 12.2 of the Award is an appropriate basis for determining whether district allowance should be payable in respect of a particular locality. We will reflect that methodology in the determination we make by calling up clause 12.2 of the Award. Against that background, we note that it is not necessary to specify the locations attracting remote locality conditions in the determination. However, in view of the possibility that some locations which currently receive a district allowance will no longer receive one as a result of the application of the above methodology we will include transitional provisions in the determination. Those transitional provisions will see a gradual withdrawal of district allowance for those locations no longer deemed as remote. The transition period will be two years, with the allowance reduced by 25 per cent every six months until it has been reduced to zero. Any additional annual leave and leave fares will not be subject to these transitional arrangements. This approach has regards to the merits [s.275(a)] and, in respect of the transitional arrangements, also has regard to the interests of employees [s.275(c)]. We also note that should the Secretary wish to continue paying district allowance to employees working in a particular locality that may not be deemed remote under the above methodology that this could be done by negotiating IFAs with relevant employees.

[432] As to the quantum of district allowance, we will provide for the following amounts, which will be adjusted in line with wage increases under the determination and which reflect the grading system set out in the Award. The amounts are based on those in the DIAC Agreement but are discounted by $1,000 for those without eligible dependents and $2,500 for those with one or more eligible dependents to reflect the fact that the amounts specified in the DIAC Agreement also included an amount for remote locality leave fares.

	Without eligible dependents	**With one or more eligible dependents and/or partner**
Grade 1	$1,555	$2,610
Grade 2	$4,110	$7,720
Grade 3	$6,664	$10,274
Grade 4	$8,581	$16,662

[433] As to the question of whether the allowance is payable on annual leave, we believe that the allowance should be payable during any leave taken while the employee is stationed at the locality. For employees on a term transfer or posting we consider the uplift date from the remote locality as the appropriate date from which the payment of district allowance during periods of annual leave is no longer payable.

[434] In respect of which employees are entitled to remote localities conditions, we agree with the Full Bench's comments in *Commonwealth v Community and Public Sector Union*[288] regarding remote conditions, district allowances and removal expenses:

> "Two things need to be said in addition to the situation where these have been long standing provisions. The first is that remote conditions and district allowance as are in the nature of a disability payment. It does not deal with the issue by creating two

> classes of persons who may suffer the same disability. If the disability no longer exists than that should be the focus rather than creating two classes of employees. The second observation is that employees cannot simply move from one location to another without approval. It is the approval process which should be the subject of examination rather than the course proposed by the Minister."[289]

[435] Against that background, we consider that remote locality conditions excluding remote locality leave fares should apply equally to all employees working on a continuing basis at the remote locality. Remote locality leave fares should only apply to employees working in a location on either a term transfer or posting.

[436] Also with regard to remote locality leave fares, we see no disadvantage to employees as a result of the Department's proposed approach of meeting for the cost of return fares to the nearest capital city as opposed to paying a leave allowance to employees in lieu of remote locality leave fares.

[437] The periods of additional annual leave applicable to employees working in remote localities is not disputed.

[438] We note that the DIAC Agreement included provisions dealing with 'Grandparented' remote localities assistance package which applied to employees stationed at Cairns, Darwin, Port Hedland or Thursday Island on 29 July 2004. No material was put before the Commission regarding the continuing relevance of these provisions though we note that the provisions were not included in the Department's proposed workplace determination. As such, we are not satisfied of the merit of their inclusion in the determination we will make [s.275(a)].

[439] Finally, we note that should issues arise regarding the attraction and retention of people to work in remote localities that the parties can seek to address those issues through bargaining for an enterprise agreement to replace the workplace determination [s.275(h)].

Domestic travel arrangements

[440] The CPSU submitted that the Department's proposed workplace determination did not include a number of provisions reflected in the Agreements, including the following:

- the requirement that the Department meet the costs of accommodation, meals or incidentals whilst an employee was travelling on official business;
- payment of an allowance when accommodation was not required, e.g. a camping or boating allowance if an employee was required to camp or be at sea for official purposes;
- an allowance (i.e. part day travel allowance) for employees required to travel but not required to stay overnight where the employee was absent for 10 hours or more;
- a motor vehicle allowance, including the capacity for the Secretary to authorise an employee to use a private motor vehicle where it would result in greater efficiency or less expense;

- the requirement that where the Secretary determined a lesser travelling allowance in circumstances where an employee was away from their home location for 21 days or longer the lesser travelling allowance would be "based on a reimbursement of reasonable costs"; and

- the entitlement to the continued payment of meals and incidental allowances in circumstances where an employee was in receipt of those allowances and applied for personal leave and was unable to return home as a result whilst in receipt of those allowances.

[441] The CPSU submitted that the Department had led no evidence nor made any submission in the evidence of its witnesses as to why these entitlements should be removed. The CPSU further submitted that the provisions were appropriate, that there was merit in them being retained and that there was nothing to suggest that they were unworkable, inefficient or otherwise excessive. The CPSU relied on Ms Jones' evidence in relation to the issue of vehicle allowance. Ms Jones' evidence was that travelling by private motor vehicle was the best option for some staff in certain circumstances and at other times it was a necessity, adding that she had personally undertaken travel for work purposes and used her own vehicle on many occasions particularly when required to travel to Canberra. Ms Jones further deposed that if the existing arrangements were open to being changed at the Department's discretion that she might be worse off either by being out of pocket if the amount of payment was lowered or alternatively by being required to spend more time travelling if forced to opt to travel by air.

[442] In respect of travelling allowance, the CPSU's proposed workplace determination provides, among other things, as follows:

> "736. The department will meet the costs of accommodation and fares, and provide a travel allowance (TA) for meals and incidental expenses for employees required to travel for work purposes, in accordance with the approved travel allowance rates for domestic business trips as per the applicable taxation determination."[290]

[443] In addition, the CPSU sought to retain those provisions in the ACBPS Agreement which classified travel according to its length and provided differing travel entitlements accordingly and which provided for the application of travel and related conditions to graduate trainees having regard to the Agreement. The CPSU posited that the provisions were clear and easy to understand. More particularly, the CPSU submitted that the Department had provided no evidence that the operation of these provisions were difficult to administer or otherwise a problem for the Department or that they had led to an unreasonable cost for the Department. The CPSU also submitted that the provisions ought to properly be the subject of negotiations at the time an enterprise agreement is being negotiated to replace the workplace determination.

[444] Similarly, the CPSU sought to retain those provisions in the DIAC Agreement regarding part day travel allowance (the DIAC Agreement provides for a part day travel allowance of $51). The CPSU relied upon Ms Kumar's evidence regarding this issue which was that the entitlement was important for workers who were required to travel but do not necessarily stay overnight, particularly as there had been pressure to avoid overnight stays while travelling for work. Ms Kumar gave an example of the additional time and costs

associated with her part-day travel, deposing that the part day travel allowance did not enable people to make money but just to ensure they are not out of pocket.

[445] The Department's submissions regarding the CPSU's proposed provision regarding fares and travelling allowance (see above) were that the words "as per applicable taxation determination" were ambiguous and that its proposed drafting should be preferred. In respect of the continued payment of travel entitlements where an employee fell ill whilst travelling for work purposes, the Department submitted that under clauses 9.20 and 9.21 of its proposed determination all travel related allowances would continue to apply in the circumstances. Beyond that, the Department submitted that:

- its proposed workplace determination provided for a camping allowance of $102 per overnight stay where an employee was required to camp in the performance of duties, adding that the rate was drawn from the DIAC Agreement;

- the CPSU's proposed determination sought to extend this allowance to overnight stays 'out at sea', adding that this was a double up on the marine accommodation allowance;

- the CPSU's proposed determination also provided for a higher allowance rate ($113 per overnight stay), imposed an obligation on the Department to provide all necessary equipment and accommodation costs where required and entitled staff to payment for meals and incidentals for each night for the duration of the trip;

- its proposed workplace determination provided for a separate sea-going vessel accommodation allowance for employees who were not 'sea-going maritime marine employees';
- the CPSU's proposed determination provided for a marine accommodation (non-marine employees) allowance which was based on the equivalent provision in the ACBPS Agreement but materially altered the allowance structure by removing the tiered distinction between classes of vessel and applied the highest allowance structure to all vessels;

- the CPSU proposal in this regard was an unmeritorious attempt to enhance conditions for non sea-going marine employees who have to stay overnight on a vessel;

- the Department's proposed clause 9.24 should be preferred;

- its proposed determination provided for a motor vehicle allowance calculated using the 'cents per kilometre' method prescribed by the *Income Tax Assessment Act 1997*, contending that its proposed clause had the benefit of simplicity and fairness and that the method was in conformity with clause 18.23 of the ACBPS Agreement and the Award;

- the CPSU's proposed clause regarding motor vehicle allowance was unnecessarily complicated;

- with regard to Ms Jones' evidence, the Department's proposed provision did not preclude an employee using their own vehicle to travel for work purposes where approved by Secretary;

- the CPSU's proposal for the payment of an additional 0.8 of a cent per kilometre where an employee was required to transport persons, transport tools or material and/or haul a caravan or trailer whilst using their vehicle for work purposes added unnecessary complexity to the administration of the entitlement and was therefore opposed; and

- the CPSU's proposed clauses which classified travel according to its length were unnecessary having regard to clauses 9.20 and 9.21 of the Department's proposed determination; and

- it opposed the CPSU's claim for part day travel allowance, adding that if the Commission were inclined to include the provision in the workplace determination that the quantum of the allowance should remain at $51 as per the DIAC Agreement rather that increase to $55 as proposed by the CPSU.

[446] We deal below with each of the matters in issue.

- Travel costs – with regard to the cost of fares and accommodation both the Department's and the CPSU's proposed determinations provide that these costs will be met, the only difference being that the Department's determination uses the term "reasonable costs" in respect of fares and accommodation. As to the cost of meals and incidental expenses, both determinations reference the rates set by the applicable taxation determination. In circumstances where there is no real substantive difference between the parties proposed clauses we will include that Department's proposed clauses in the determination we will make on that basis that the reference to "reasonable" is in our view appropriate [s.275(a)] and has regard to the interests of the Department and employees [s.275(c)] as well as the public interest [s.275(d)].

- Travelling allowance where an employee is away from their home location for a period of 21 days or longer (i.e. the CPSU's claim which classified travel according to its length) – having regard to our decisions below in respect of relocation costs, we do not consider that there is merit in including the clauses proposed by the CPSU which classify travel according to its length [s.275(a)]. However, in respect of the Department's proposed clause 9.22, we consider there is merit in the inclusion in the determination we will make of the words "based on a reimbursement of reasonable costs" as proposed by the CPSU [s.275(a)]. The inclusion of a reference to reasonable ensures consistency with the approach we have determined in respect of fares, accommodation and meal and incidental allowances and also has regard to the public interest [s.275(d)].

- Camping allowance – we will adopt the Department's proposed approach, though the quantum of the allowance will be adjusted in accordance with the adjustment we will determine in respect of allowances generally. The reference to accommodation costs/accommodation in the CPSU's proposed provision relating to this allowance is in our view confusing, which is one of the reasons why we prefer the Department's

proposed provision. Further, the CPSU did not outline the rationale underpinning the increased quantum of the allowance reflected in its proposed determination.

- Boating/sea-going allowance – while we note that this allowance reflects the approach in the DIAC Agreement we see no rationale as to why the rate for the allowance should be any different to the marine accommodation allowance. Accordingly, we will include the Department's proposed clause regarding this issue in the determination we make.

- Motor vehicle allowance – the parties' respective proposed determinations both refer to the ATO's "cents per kilometre" method. Accordingly, that approach will be reflected in the determination we make. As to a number of the other aspects which the CPSU seeks to have reflected in the determination, e.g. the circumstances in which the Secretary may authorise an employee using their vehicle for work purposes, we consider that those issues can be adequately dealt with in policy. However, for reasons of clarity, we will include a provision in the determination which provides that an employee who is receiving motor vehicle allowance may be reimbursed parking and toll fees incurred while using their vehicle where the Secretary is satisfied that those costs were reasonably incurred. As to the CPSU's claim for an additional amount of motor vehicle allowance in circumstances where an employee *inter alia* uses their vehicle to transport persons, we are not satisfied as to the merits of this claim given the absence of any evidence pointing to the need for such a provision [s.275(a)]. We also note the scope to bargain on this issue in the future should it be considered necessary [s.275(h)].

- Part-day travel allowance – the amount reflected in the DIAC Agreement is broadly equivalent to the amount specified in the applicable taxation determination for lunch and incidental expenses for 2018-2019. While we note that the rates specified in the applicable taxation determination only apply when an employee is travelling away from home overnight for work, as employees will generally need to purchase their lunch and incur other incidental expenses, e.g. drinks, while travelling we consider the inclusion of part day travel allowance in the determination we will make is warranted [s.275(a)]. However, we will also include a provision providing that part-day travel allowance is not payable in circumstances where lunch is provided to the employee, e.g. if attending a conference/seminar where lunch is provided. As to the quantum of the allowance, having regard to the current applicable taxation determination, we consider that the current rate of the allowance (i.e. $51) continues to be appropriate.

Domestic relocation expenses

[447] The Department's proposed workplace determination simply provides as follows in respect of this issue:

> "9.28 Where the Secretary requires an Employee to relocate from one Location to another Location, and it is necessary and reasonable for the Employee to move house in order to maintain employment, the Employee will be entitled to assistance with the cost of relocation as determined by the Secretary."[291]

[448] The DIAC Agreement provides as follows in respect of domestic relocation expenses:

"11.12 The department will meet fair and reasonable costs incurred by employees who relocate from one geographical location to another and which are:

- **term transfers** – the Secretary may identify management positions in State and Territory Offices and Immigration Detention Facilities as term transfer positions, that is, to be filled by employees stationed at the locality for a specified period (usually six months or more).

    - Employees who move from one geographical location to another, as a result of a term transfer, will receive assistance with relocation costs for them and their accompanying dependants; travel by car or by aeroplane, removals – uplift and storage of household furniture and personal effects; transport of domestic pets (up to $192); transfer allowance (unaccompanied $1,916; accompanied $3,194 and $639 per additional child); costs of sale and purchase of home; advance of bond money; settling in allowance; education costs allowance; and fares assistance. Further information is available in the Domestic Relocation policy

- **temporary transfers** – a movement undertaken by an employee for a temporary period to undertake specific duties, or provide assistance because of departmental business priorities, in a different geographical location from the employee's usual place of work (usually for less than six months)

    - Employees who move from one geographical location to another, as a result of a temporary transfer, will receive assistance with relocation costs; travel by car or by aeroplane, and travel allowance in accordance with clauses 9.6-9.8 of this Agreement. Fares assistance may also be available to employees who are required to transfer temporarily for more than three months. Further information is available in the Domestic Relocation policy

- **engagement, promotion or movement** to a job with the department in a different geographical location from that in which the employee normally works and/or resides. This includes employees recruited under the Graduate Development Program and the National Indigenous Cadetship Program, or

- **transferred for a temporary period** to undertake specific duties due to departmental business priorities.

11.13 Employees who reside in a Commonwealth dwelling will pay an amount from their salary as a rental contribution.

11.14 Employees may also move for personal or career development reasons. Where the Secretary determines that there is a need for an employee's skills in a new location where there has been difficulty recruiting suitable employees, they may approve the reimbursement of some or all of an employee's relocation expenses.

11.15 Further information is available in the department's Domestic Relocation policy."[292]

[449] The ACBPS Agreement takes a much more "belts and braces" approach setting out in detail the support which an employee is entitled to when they move to another location on either a fixed term or ongoing assignment. The ACBPS Agreement includes provisions dealing with removal expenses, disturbance allowance, settling in allowance, temporary accommodation allowance, sales and purchase allowance and education allowance which apply in the circumstances.

[450] The CPSU's proposed approach reflects the provisions of the ACBPS Agreement. The CPSU's claim C67 sought to correct an anomaly whereby an employee may be transferred to a location designated as their 'home base' despite their not actually having ever performed work at the location and thereby rendering them ineligible for domestic relocation assistance. The anomaly is not entirely apparent to the Commission, particularly as the CPSU provided no material to substantiate it. Accordingly, we consider the matter to be a non-issue.

[451] The Department submitted that flexibility in the administration of relocation conditions was important in order to enable it to provide appropriate responses to a range of personal circumstances and preferences, adding that relocation was not mandatory within the Department but rather was by choice. The Department submitted that the provisions relating to domestic relocations in the CPSU's proposed workplace determination were a complex combination of clauses. The Department further submitted that the CPSU's proposed provisions regarding this issue should be rejected for a number of reasons including that:

- the proposal sought to extend generous, extensive and rigid entitlements to many Departmental employees who did not currently have them under the DIAC Agreement;

- while the DIAC Agreement did confer an entitlement to assistance with relocation costs, uplift and storage of furniture, transfer allowance among others it left the details to the Department's Domestic Relocation Policy;

- the Department's practice was that relocations were administered through a process of engagement with the employee in which the Department considered the employee's particular circumstances;

- the provisions would impair the development of a mobile and agile workforce by imposing unnecessary complexity and consequential inefficiency into relocation arrangements; and

- the Department's Domestic Relocation Policy dealt comprehensively with allowances and other conditions to be applied where staff were to be relocated, adding that there had been no suggestion in the proceedings that the Policy was deficient in any material respect.

[452] The CPSU submitted that the Department's proposed workplace determination created uncertainty as to when the Secretary might require an employee to relocate, as to when it might be deemed to be necessary and reasonable for the employee to move house and whether an employee was entitled to domestic relocation expenses where there had been a temporary transfer. The CPSU also noted in its submissions that the Department's proposed provision gave ultimate discretions to the Secretary as to the extent of any assistance to be provided. The CPSU in its submissions referred to Mr Muffatti's evidence which highlighted the risks

associated with the Department's proposal to deal with relocation costs through policy. In particular, Mr Muffatti deposed that based on the Department's willingness to unilaterally change policy regarding rental assistance its proposal regarding relocation costs provided no protection for employees. In summary, the CPSU submitted that there was no industrial merit in the Department's position.

[453] A copy of the Department's Domestic Relocation Policy (published on 8 December 2016) was attached to Mr Venugopal's third witness statement[293]. We note that the document dealt with each of the matters which were reflected in the CPSU's proposed determination, though the monetary value of some of the matters are higher in the CPSU's proposed determination. The CPSU's concerns with the Department's approach essentially go to the enforceability of provisions set out in a policy document as opposed to the workplace determination. While we see some merit in the Department's proposed approach, we have some reservations about the Department's proposed provision in circumstances where the provision does not even refer to the Department's Domestic Relocation Policy. Against that background, we will include the following provision in the determination we make:

> "The Department will meet fair and reasonable costs incurred by employees who relocate from one geographical location to another in the following circumstances:
>
> - term transfer;
> - temporary transfer;
> - on engagement (e.g. employees recruited under the Graduate Development Program and the National Indigenous Cadetship Program), promotion or movement to a job with the Department in a different geographical location from that in which the employee normally works and/or resides;
> - where the transfer is for a temporary period to undertake specific duties due to departmental business priorities; or
> - any other circumstance as determined by the Secretary.
>
> Further information is available in the Department's Domestic Relocation policy.
>
> Relocations initiated by an employee for personal or compassionate reasons will generally be at the employee's own expense."

[454] The above provision is essentially a streamlined version of the equivalent provision in the DIAC Agreement. In our view the provision strikes the appropriate balance between the interests of the Department and the interests of employees [s.275(c)], particularly as employees have recourse to the workplace determination's dispute resolution provision in circumstances where they consider that the Department has not met fair and reasonable costs incurred as a result of relocation. We also consider that the provision provides greater certainty than the Department's proposed provision regarding when relocation assistance will be paid.

Overseas conditions of service

[455] The Department's proposed workplace determination simply provides as follows in respect of this issue:

> "9.29 Overseas Conditions of Service (OCOS) entitlements, including any overseas travel, are determined by the Secretary from time to time."

[456] This compares with the DIAC Agreement which includes a provision along the above lines but also the key elements of the package of conditions applying to employees on short term missions or long term postings overseas. However, the DIAC Agreement also provides *inter alia* that an OCOS Review Committee will operate as a sub-committee of the NSCF and will be consulted on any proposed changes to overseas conditions.

[457] The CPSU's proposed workplace determination reflects the existing DIAC Agreement provisions and also includes provisions drawn from the ACBPS Agreement relating overseas travel. Those provisions provide that employees travelling overseas for official purposes will be entitled to travel at business class and that where members of an employee's household travel at Departmental expense they will travel at the same standard as the employee. The CPSU's proposed determination also includes provisions relating to travel allowances rates for international travel, the standard of accommodation, international travel out of hours and rest periods in respect of international travel.

[458] The Department submitted that its proposed approach was simple, adding that the current OCOS document was a comprehensive document and that that there was no evidence that had been led that in any way criticised the content of that document. The Department described the CPSU's proposal in respect of overseas conditions as comprised of a complex combination of clauses and yet another example of the CPSU's 'cherry-picking'. The Department further submitted that in light of the comprehensive content of the OCOS documents there was no utility in the clauses proposed by the CPSU.

[459] With regard to that aspect of the CPSU's proposed determination which relates to consultation regarding overseas conditions of service via a sub-committee of the NSCF, as previously mentioned, absent agreement the inclusion of a provision which imposed additional consultation requirements on an employer would in our view be inconsistent with s.273(5) of the Act. For that reason, we are unable include such a provision in the determination we will make. Nevertheless we would strongly encourage the parties to reflect this approach in the terms of reference for the NSCF. We note further note that the CPSU's proposed determination does not require the NCSF to agree to any proposed changes to overseas conditions of service or alternatively require the Secretary to adopt any such changes recommended by the NSCF.

[460] A copy of the Department's OCOS 2015-2016 was attached to Mr Venugopal's third witness statement[294]. The document is a very comprehensive document which runs to almost 150 pages. Among other things, we note that the document provides as follows at paragraphs 1.1.8 and 1.1.9:

> "1.1.8 Unless stated otherwise, the conditions in this manual apply to DIBP employees, employed under section 22 of the *Public Service Act 1999* and assigned duties overseas for a period of usually more than 28 days. This includes employees on long term postings and STMs [short-term missions].

1.1.9 For all other official travel overseas, please refer to the Financial Management Directive."[295] (Underlining as per original)

[461] Having regard to the abovementioned OCOS document we are not convinced of the need to include the more detailed provisions concerning overseas conditions of service contained in the CPSU's proposed workplace determination [s.275(a)]. In our view, the Department's proposed approach appropriately meets the interests of the Department and employees [s.275(c)]. For these reasons, the Department's proposed clause will be included in the determination we make.

Other issues

[462] The CPSU submitted that the Department's proposed workplace determination did not include a range of provisions from the DIAC and ACBPS Agreements which governed travel and other related conditions. In short, the CPSU submitted that it sought to preserve the conditions in the DIAC Agreement except where it sought a comparable provision from the ACBPS Agreement. The provisions from the DIAC Agreement which the CPSU sought to have reflected in the workplace determination were:

- medical and compassionate travel entitlements;
- airport allowance;
- excess fares;
- temporary relocations;
- permanent relocation because of a reorganisation;
- emergency travel; and
- airport lounge membership.

[463] The CPSU further submitted that the Department's proposed determination would remove the following conditions which currently applied to employees in the Marine Unit and which previously applied to all employees under the ACBPS Agreement:

- disturbance allowance;
- settling allowance;
- temporary accommodation allowance;
- sale and purchase allowance;
- education costs allowance;
- other fares assistance; and
- geographical entitlements predating 3 August 2000.

[464] The CPSU relied upon the evidence of Mr Hyde in respect of the airport allowance issue. Mr Hyde's evidence included that the allowance dated back to about 1988 and sought to fairly compensate workers travelling to isolated establishment areas for work. Mr Hyde also stated that prior to the implementation of the clauses drawn from the DIAC Agreement, the Department struggled to find people who would work in these areas out of normal business hours as the availability of fresh food, public transport and other community facilities such as medical services did not exist.

[465] In respect of the issue of excess fares, the CPSU relied on the evidence of Mr Suijdendorp. Key aspects of Mr Suijdendorp's evidence in this regard were that:

- the purpose of the allowance was to ensure that employees were not out of pocket when required to temporarily work away from their normal workplace;
- it was common for Departmental employees to travel to another location at short notice to attend compulsory meetings or training sessions;
- he was sometimes directed to attend training at the Department's West Perth offices which were away from his usual workplace, i.e. Perth International Airport, and that the allowance assisted in covering the cost of city parking; and
- the reverse also applied in respect of office based employees directed to temporarily attend work at Perth International Airport.

[466] The Department opposed each of the CPSU claims in this regard for various reasons, including that the issue was dealt with in its proposed workplace determination or the matter was more appropriately left to policy.

[467] With regard to medical and compassionate travel entitlements and the various allowances referred to in the above list of allowances drawn from the ACBPS Agreement, we note that these issues are all dealt with in the Department's previously mentioned Domestic Relocation Policy. As such, we consider these issues to be appropriately covered by our intended approach regarding the issue of domestic relocation expenses.

[468] As to the other matters in issue, we deal with those below.

- Airport allowance – we note Mr Hyde's evidence that this allowance is intended to fairly compensate workers travelling to isolated establishment areas for work. We further note that to the extent that an employee temporarily working at an airport incurred additional travel costs that they may be entitled to excess fares (see below). In this regard, we note Mr Suijdendorp's evidence in respect of excess fares that employees directed to temporarily attend work at Perth Airport received the allowance to help cover the cost of public transport tickets or airport parking. Against that background, we are not satisfied of the merits of including this allowance in the determination we will make [s.275(a)].
- Excess fares/Temporary relocations/Permanent relocation because of a reorganisation – we consider it appropriate that employees should be compensated for any extra travel costs incurred as a result of temporarily working in a different

location from their usual place of work. However, the entitlement should not arise in circumstances where an employee is in receipt of travelling allowance or where the employee has been advised in writing that they will be permanently relocated to another location in within the city or town where they currently work.

- Emergency travel – in the absence of any material justifying the inclusion of a provision concerning emergency travel we are not satisfied of the merit of including such a provision in the determination we will make [s.275(a)].

- Airport lounge membership – the decision to provide airport lounge membership is a matter which is more appropriately dealt with in policy, particularly as the relevant provisions in the DIAC Agreement simply provided that employees "may be provided with airport lounge membership with the agreement of the manager." As such, we do not intend to include a provision regarding this issue in the determination we will make.

- Other fares assistance – in the absence of any material justifying the inclusion of these provisions we are not satisfied of the merit of their inclusion in the determination we will make [s.275(a)].

- Geographical entitlements predating 3 August 2000 – in the absence of any material indicating the continuing relevance of these provisions we are not satisfied of the merit of their inclusion in the determination we will make [s.275(a)].

10. Conditions specific to marine employees

[469] There are a range of matters in issue regarding the conditions which apply to Marine Unit employees. Those issues include hours of duty, minimum crewing levels, working patterns, notice periods, rest periods, tactical or emergency response, sea-going commuted allowance (including the rate payable), marine accommodation allowance, weekend work, extra duty, TOIL, domiciling and Southern Ocean operations allowance.

[470] By way of general overview, the CPSU in its submissions noted that the conditions in the ACBPS Agreement were preserved in their entirety for Marine Unit employees, adding that the Department's decision to preserve marine employee conditions in full was significant and should bear considerable weight in the Commission's determination. The CPSU, while noting that there was some agreement between the parties as to the Department's proposed changes, also submitted that the Department had not made an evidentiary case for the changes sought and the current regulation should therefore not be disturbed.

[471] The Department and AIMPE's submissions regarding conditions specific to marine employees focussed on the matters in issue.

[472] We turn now to deal with the matters in issue.

Hours of duty

[473] The Department sought to increase annual duty day and administrative day requirements for Marine Unit employees to reflect the increase in working hours to 7 hours and 30 minutes for all former ACBPS employees. The practical effect of this was that annual

duty day requirements would increase from 191 to 195. The Department submitted that the Marine Unit's roster arrangements and the duty day requirements were initially negotiated and calculated with reference to the 7 hours 21 minute day worked in accordance with the ACBPS Agreement. The Department further submitted that if hours of work were increased as per its proposal that there was merit in revisiting the underpinning calculations for the Marine Unit's duty day requirement, with the revised calculation amounting to an extra 4 duty days per annum. Among other things, the Department also submitted that:

- both its and the CPSU's proposed determinations were predicated on a nominal 10 hour day for Marine Unit employees;
- the performance of work for the safe operation and maintenance of the vessel may require more or less than 10 hours on any given day;
- whilst 195 duty days per year would be the expected amount of annual performance, crew members would either work more or less than this amount due to their fixed swing pattern;
- it was not as simple as requiring additional duty to be performed each day given the above;
- Mr Selim's and Mr Regan's proposals that the nominal day should be 10 hours and 12.5 minutes and 10 hours and 14 minutes respectively lacked merit;
- a number of Mr Selim's assertions were misplaced, e.g. that crew members are available to be called upon at any moment, 24 hours a day; and
- an alternative would be to reduce the rate of sea-going commuted allowance to account for nine minutes less nominal overtime, adding that an increase in the duty day requirement was superior for several reasons including that the rate of allowance would be maintained and that as such there would be no diminution in take home pay.

[474] The CPSU submitted that were the Commission to increase hours of work to 7 hours and 30 minutes per day that this change should be reflected in the Marine Unit by adding the additional time to the 'ordinary duty day', which would increase hours of work from 10 hours per day to 10 hours 12 minutes per day. This approach, the CPSU contended, would achieve the equity which the Department sought without the disproportionate increase in total work days per year for the Marine Unit. Mr Selim's evidence was that an increase in hours of work to 7 hours and 30 minutes per day would disproportionately affect marine employees as it would add an extra 5 days of work per annum.

[475] AIMPE submitted that the nominal 10 hours per day presented by the Department was purely administrative and could not be justified in the marine sector. AIMPE also highlighted a number of enterprise agreements in the maritime industry which provided leave ratios of 1:1[296], which were more generous than what the Department was offering. AIMPE also posited that marine engineers generally work more than 10 hours, 10 hours and 12.5 minutes or 10 hours and 14 minutes per day.

[476] We have previously determined to increase hours of work to 7 hours and 30 minutes per day. Against that background, and having regard to material before us in respect of the Marine Unit, we consider it appropriate to increase the annual duty day requirement for marine employees from 191 to 195 days per annum to reflect the increase in hours of work. We do not consider this to be onerous, particularly in view of Mr Selim's evidence that Marine Unit employees already perform work beyond 195 days in a year and the CPSU's proposed determination envisaged that they would be working more than 191 days in a year. Further, we do not consider any of the alternatives advanced by the CPSU and Mr Regan to have merit given that they entail an increase to notional daily hours of work [s.275(a)].

Minimum crewing levels

[477] The CPSU seeks minimum crewing provisions for the Marine Unit taken from the Department's third offer. The provision sought by the CPSU provides that minimum crewing levels will conform with the Marine Orders and ABF Vessel Management Plan under the *Navigation Act 2012 (Cth)* (the Navigation Act) and accord with advice from the Australian Maritime Safety Authority (AMSA).

[478] The Department opposed the claim on the basis that crewing is regulated by AMSA and there was no justification for the regulatory overlap that would arise as a result of the clause being included in the workplace determination we will make.

[479] We are not satisfied of the merits of the CPSU's claim in circumstances where crewing levels are regulated by the Navigation Act and AMSA [s.275(a)]. In our view the CPSU's proposed clause is unnecessary.

Working patterns

[480] The Department's proposed workplace determination varies the working patterns for particular vessels from those specified in the ACBPS Agreement. Specifically the Department seeks a 29 days on, 27 days off pattern for other sea-going vessels (currently these vessels work a 28:28 pattern) and 31:27 pattern for the ABFC Ocean Shield and similar large hulled vessels that are deployed to remote or overseas locations (these vessels also currently work a 28:28 pattern).

[481] The Department submitted that it sought these patterns in order to account for the duty time required to be performed to travel to the vessel and the duty required to complete crew changeover, adding that it was experiencing delays in manning vessels which had *inter alia* resulted in increased reliance on contract crews costing up to $1.5 million per annum. The Department further submitted that allowing for a greater overlap of duty between crews at port to enable crew changeover to occur would result in less reliance on contractor crews and at the same time not compromise vessel patrols at sea. The Department contended that increasing the tour spans as it proposed would also assist it in utilising Marine Unit employees to capacity and had the potential to contribute to productivity. The Department in its submissions also disputed aspects of Mr Selim's evidence, e.g. the Department submitted that Mr Selim's safety and fatigue concerns were not justified particularly when regard was had to the industrial instruments which were attached to Mr Regan's witness statements which contained swings of up to 10 weeks on:10 weeks off per year.

[482] Mr Leonard's evidence was that due to rostering constraints the Department was using contract crews to tend the ABFC Ocean Shield during changeover to meet minimum manning requirements despite 60 per cent of Departmental employee crew members not completing the required number of duty days each year. Mr Leonard further deposed that a 31:27 roster pattern for the ABFC Ocean Shield would allow for overlap which in turn would avoid the need to use contract crews.

[483] The CPSU sought no change to the existing arrangements, contending that the Department's proposed arrangements represented a significant degradation of employee entitlements. The CPSU relied on Mr Selim's evidence. Mr Selim's evidence was that working patterns were a feature of the ACBPS Agreement and were the result of extensive discussions at the time. More particularly, Mr Selim's evidence included, among other things, that:

- the proposed working patterns raised significant concerns for marine employees given that the ABFC Ocean Shield over the period of the ACBPS Agreement and s.24 determination performed all of its deployments at locations that may be considered remote, i.e. Christmas and Cocos Islands;

- the Department's proposal disregarded work health and safety considerations;

- the CPSU's proposed workplace determination included an approach that allowed for greater variation in working patterns in circumstances related to tactical, emergency or other operational reasons, with any days worked beyond the normal work pattern for each category of vessel to be paid as overtime at double time and not to be counted as part of the annual duty requirement;

- Mr Leonard's evidence understated the factors involved in operating vessels such as the ABFC Ocean Shield with factors such flight schedules to and from remote locations, minimum manning requirements and weather also playing a part;

- as to Mr Leonard's claim that 60 per cent of Departmental employee crew members did not complete the required number of duty days each year, this was also affected by other factors not related to swing lengths, e.g. inadequate management of the duty days of employees;

- Mr Leonard's suggestion that a 31:27 work pattern would eliminate these issues did not hold true; and

- with regard to Mr Regan's evidence, he was aware that in the maritime industry in general different roster patterns did apply resulting in employees being on vessels for periods of more than 30 days[297].

[484] AIMPE relied on Mr Worthington's submissions which *inter alia* stated that the "28 days on, 28 days off roster is infinitely possible within the bounds of the current EA independent of the Holding crew option"[298] and that vessels similar to the ABFC Ocean Shield are routinely operated on the Australian coast and internationally though "None of these vessel's [sic] attempt to maintain a 28 days on, 28 days off crewing roster."[299]

[485] Dealing with the merits of the Department's proposed provisions regarding working patterns, we note that the Full Bench in *Qantas Airways* stated that it was relevant to have regard to the practice of other employers in the industry (in that case the airline industry) and the terms and conditions applying to their employees[300]. To that end, we further note that the *Teekay Shipping (Australia) Pty Ltd/AIMPE (Engineer Officers) Government Services & Security Fleet Enterprise Agreement 2011*[301] which was appended to Mr Regan's witness statement specified a normal swing cycle for the MV Ocean Shield and MV Ocean Protector of "eight weeks +/- 7 days"[302]. Further, as mentioned above, Mr Selim in his oral evidence acknowledged different roster patterns do apply in the maritime industry resulting in employees being on vessels for periods of more than 30 days. Against that background, the Department's proposed working patterns do not appear to be any more demanding (and perhaps even less demanding) than those operating elsewhere in the maritime industry.

[486] Also relevant is Mr Leonard's evidence that 60 per cent of Departmental employee crew members do not complete the required number of duty days each year under the current working patterns. While we accept Mr Selim's evidence that other factors impact on this utilisation rate, the material before us points to the Department's proposed provision resulting in costs savings from reduced reliance on contract crews and potential productivity improvements [s.275(e)].

[487] Having regard to the above analysis, we are satisfied as to the merits of the Department's proposed provisions relating to working patterns [s.275(a)] and consider that they appropriately balance the interests of the Department and employees. To the extent that issues arise from implementation of the revised working patterns these can be considered in the context of bargaining for an enterprise agreement to replace the workplace determination [s.275(h)].

Notice periods

[488] The CPSU's proposed workplace determination includes provisions which *inter alia*:

- require the Department to give sea-going marine employees notification of their rostered duty days for a minimum period of 3 months in advance for strategic patrols; and

- a variation may be made to the strategic patrol roster following consultation with the affected employee and subject to 56 days' notice (prior to the commencement of the period of rostered duty) being provided where the variation is necessary to ensure the seagoing employee's duty day count is met.

[489] The CPSU's submitted that its proposed provision sought to maintain the notice requirement in the ACBPS Agreement. The CPSU submitted that its proposed approach did not require the Department to provide 56 days' notice of roster changes in a broad range of circumstances, adding that Mr Leonard had mistakenly characterised its proposal as doing so. Mr Selim deposed that an employee should be afforded sufficient notice in these circumstances as it may involve an employee having to reschedule or make arrangements to minimise the impact on their personal circumstances, e.g. childcare arrangements. Mr Selim also disputed Mr Leonard's evidence that the CPSU's proposal sought extend the 56 day notice period to any roster variation.

[490] The Department opposed the CPSU's proposal on the basis that it extended the obligation to provide 56 days' notice to all roster changes that were made to ensure an employee met their duty day requirements and not just extensions to swings as per the ACBPS Agreement. More particularly, the Department submitted that a 56 day notice period was unworkable adding that if granted the CPSU's claim would significantly impede its ability to schedule work flexibly and efficiently. The Department's proposed workplace determination provided for 7 days' notice of changes to rosters. Mr Leonard's evidence was consistent with the Department's submissions, deposing *inter alia* that forecasting variations to the roster 56 days in advance would be fraught with difficulty given likely changes to work requirements and leave period that would occur.

[491] AIMPE did not deal with this issue in its submission.

[492] Clause 22.5.2 of the ACBPS Agreement provides in respect of strategic patrols that "… to ensure the sea-going marine employee's 191 day count is met there may be a variation which may result in an extension to the roster, following consultation (including where possible alternative duty) with the affected sea-going marine employee, and with 56 days notice prior to the commencement of that extension". Further, clause 22.5.4 of the ACBPS Agreement provides as follows:

> "Customs and Border Protection undertakes to give sea-going marine employees notice of any changes to rostered duty. For the purpose of undertaking strategic patrols, sea-going marine employees will not be required to work on a rostered day off unless seven days notice prior to that duty has been given or upon prior agreement with the sea-going marine employee, with the exception of tasks that are referred to in clause 22.4.6 of this agreement."

[493] While we note the Department's contention that the 56 day period is too long, the Department provided no evidence as to operational difficulties associated with the existing requirement as per clause 22.5.2 of the ACBPS Agreement. Further, we note that under the Department's proposed 7 day notice period in respect of an extension to a strategic patrol that an employee could be at sea when they are advised of a change to the roster. This presents obvious practical difficulties for an employee who may need to make personal arrangements to accommodate the roster change. Against that background, we are not satisfied as to the merits of the Department's proposed approach to notice periods or any departure from the existing arrangement [s.275(a)]. As noted above, the CPSU submitted that its proposed provision sought to maintain the notice requirement in the ACBPS Agreement. However, there is some ambiguity in the drafting of the CPSU's proposed provision. To that end we will amend the provision so that it reads as follows:

> "Where an employee is rostered for duty on a strategic patrol and an extension to the employee's roster is necessary to ensure the employee's 195 duty day count is met, a variation may be made to the employee's roster following consultation with the affected employee and subject to notice of 56 days being provided prior to the commencement of that period of rostered duty."

[494] With regard to the Department's proposed determination, we note that the provisions are broadly consistent with clause 22.5.4 of the ACBPS Agreement. For this reason, we will retain those provisions in respect of roster changes which do not involve an extension to a strategic patrol necessary to ensure an employee's 195 duty day count is met. This approach

has regard to the interests of the Department and employees [s.275(c)] and also provides scope for the parties to bargain on this issue when negotiating for an enterprise agreement to replace the workplace determination [s.275(h)].

Rest periods

[495] The only difference between the Department's and the CPSU's proposed determinations concerns whether an agreement for a lesser rest period must be in writing as proposed by the CPSU. The CPSU also proposes that the reduction can only be agreed after the health and safety implications have been considered. The Department contended that neither requirement assisted with the administration of rest periods, adding that the requirement that agreement be in writing added an unnecessary administrative burden while health and safety would be considered as a matter of course.

[496] AIMPE, relying on Mr Regan's evidence, sought deletion of the provision in the Department's proposed workplace determination which stated that subject to operational requirements rostered days off would normally be provided at the employee's home location. AIMPE did not set out the basis of its opposition to the provision.

[497] While we accept that there is an administrative overhead associated with committing to writing an agreement to a lesser rest period, we consider that doing so constitutes good practice and provides protection to the parties should compliance issues subsequently arise. For this reason, we will include a requirement for agreement to be in writing. However, the absence in the determination of a provision requiring consideration of the health and safety implications does not in any way derogate the Department's obligations under work health and safety legislation. As such, we will not include such a requirement in the determination we will make. As to AIMPE's proposal, in the absence of any submissions on the issue, we are not satisfied of the merits of deleting the relevant provision, particularly as the CPSU does not object to the provision.

Tactical or emergency response

[498] Currently Marine Unit employees can be required to return to duty for tactical or emergency responses. There are three matters in issue regarding the issue of tactical or emergency responses. They are the Department's proposal to add strategic responses to the circumstances in which employees can be required to return to duty, whether tactical, emergency or strategic responses attract TOIL and/or overtime and AIMPE's claim for a danger money allowance for tactical and emergency responses.

[499] In respect of the first matter in issue, the Department's proposed workplace determination defines a strategic response as "a situation which, in the opinion of the Secretary, requires immediate or planned departmental response in order to maintain a particular maritime posture in non-routine circumstances." In support of its claim the Department submitted *inter alia* that:

- in order to address civil maritime threats the Government determines a postural requirement for a certain number of vessels in a particular region, with vessel patrols scheduled around these requirement;

- at times the Department had been unable to occupy particular marine posts due to emergency situations or unplanned work needs;

- a number of constraints have affected the manning of strategic posts in the past, including enterprise agreement restraints on the maximum patrol length;

- the inclusion of strategic response would address situations where there is a heightened risk situation with limited notice that must be addressed as a matter of priority, hence the inclusion of the word "non-routine circumstances" in the abovementioned definition;

- the words "marine posture" in the abovementioned definition refers to that part of the ocean that must be immediately occupied to mitigate the maritime risk;

- there is a strong public interest in ensuring that Marine Unit rostering arrangements are able to cater for the continued occupation of designated marine posts; and

- its proposal had potential to reduce the risk associated with leaving designated marine posts unoccupied, thereby contributing to productivity.

[500] The CPSU submitted that the Commission should determine that the tactical and emergency response clauses currently in effect as per the s.24 determination be maintained, with any expansion of the clauses to include strategic responses to be the subject of genuine negotiations between the parties. Mr Selim's evidence was that the inclusion of strategic response significantly expanded the current ability of the Department to vary a working pattern and extend a patrol. Mr Selim also deposed that the issue had not been the subject of bargaining and had only been included since the workplace determination process began in late 2016. Mr Selim further deposed that the CPSU had concerns as to the impact of the inclusion of strategic response may have on employees personal circumstances and that it had proposed that an employee be entitled to overtime when they performed work in excess of their normal working pattern.

[501] AIMPE submitted that the term strategic responses should not be included and that if tactical or emergency response were invoked that overtime should apply.

[502] We accept the public interest argument raised by the Department regarding the inclusion of strategic response [s.275(d)]. However, we are concerned with the broad definition of the term strategic response included in the Department's proposed determination. In our view there is a disconnect between the Department's submissions regarding the need for the inclusion of the term strategic response in the determination and the definition included in its proposed determination. While the former refers to the Government determining a certain postural requirement the definition does not make any such reference. Further, we consider the term 'non-routine circumstances' in the definition to be somewhat nebulous when compared to the explanation of the term provided in the Department's submissions. To address these flaws we will include the following amended definition in the determination we will make:

> **'Strategic Response'** is a situation which requires the Secretary to implement an immediate or planned departmental response in order to give effect to Government

requirement to maintain a particular maritime posture in response to a heightened risk situation which must be addressed as a matter of priority.

[503] As to the second matter in issue, Mr Selim deposed that the CPSU had proposed that overtime be payable when tactical or emergency response situations arise and employees performed in excess of their normal working patterns, with this overtime not counting as part of the duty requirement thereby eliminating double dipping. The Department submitted that the CPSU's proposed determination provided for both TOIL and overtime resulting in double compensation. The Department also submitted that all duty performed by Marine Unit employees should count towards their duty day requirement as employees were remunerated on the expectation that they will fulfil that requirement. In circumstances where tactical or emergency responses are currently compensated by way of TOIL and in the absence of any probative material supporting a departure from that approach, we are not satisfied of the merits of the CPSU's proposed approach [s.275(a)]. Accordingly, we will adopt the Department's proposed provisions regarding how employees are compensated for work performed in respect of tactical, emergency and/or strategic responses. We also note that should an employee exceed their annual duty day requirement that this will be compensated for via the extra duty reconciliation payment (see below).

[504] Finally, with regard to the third matter in issue, Mr Regan submitted that the definitions of tactical or emergency responses in the Department's proposed determination had been extended to international waters, whereas previously the terms were limited to the Australian Exclusive Economic Zone. Mr Regan contended that the Department's proposed determination did not recognise the danger associated with working in hostile and dangerous areas and should provide a danger money clause. Mr Regan submitted that such a clause might be drafted to provide an armed allowance of $30 per day if any Departmental, Navy or other Government personnel fire any weapons and provide scope for the parties to reach agreement on the payment of an allowance in areas such as war and disaster zones. AIMPE did not otherwise address the issue in its submissions.

[505] The Department opposed the claim, contending that Mr Regan had not explained how the discharge of a firearm at a particular location in the ocean created a disability that justified an allowance. The Department further submitted that there was no prospect of a Departmental vessel entering a war zone or any similarly dangerous area whilst in operation or to suggest that it planned to conduct tours in new oceanic areas that may be hostile or dangerous.

[506] In the absence of any probative evidence supporting AIMPE's claim we are not satisfied of the merits of the claim [s.275(a)]. To the extent that AIMPE maintains its claim, we consider that it is more appropriately considered in the context of bargaining for an enterprise agreement to replace the workplace determination [s.275(h)].

<u>Sea-going commuted allowance (including the rate payable)</u>

[507] The Department's proposed determination provides that the sea-going commuted allowance is paid in lieu of a number of matters, including the ABF composite allowance. In circumstances where we have determined not to provide for an ABF composite allowance in the determination as there is no need for that reference to be included in respect of the sea-going commuted allowance.

[508] Other matters in issue regarding the sea-going commuted allowance concern the description of the matters which the allowance is paid in lieu of and the rate of the allowance in respect vessels that are Bay, Torres Strait or Cape Class vessels.

[509] With regard to the first matter in issue, the ACBPS Agreement in clause 22.8 describes the sea-going commuted allowance as being paid "in recognition of the special duties performed and in lieu of any overtime, shift penalty, restricted duty and disability provisions, where these would normally apply, contained in this Agreement which would otherwise be payable in respect of up to 191 duty days per financial year."[303] The CPSU objects to the Department's proposed provision stating that the allowance is "paid in lieu of any overtime, flex-time, time off in lieu, restricted duty, other non-salary time related payments (e.g. shift penalties and the ABF composite allowance contained in this Determination that would otherwise apply." The CPSU relied on Mr Selim's evidence which appeared to primarily relate to the impact of the inclusion of the reference to the ABF composite allowance in the provision. In the absence of more compelling arguments we consider the Department's proposed drafting to be clearer in a number of respects and unlikely to have any impact on employees. For this reason, we will include it in the determination.

[510] As to the rate of the sea-going commuted allowance, the Department submitted that its proposed determination reflected the rates that applied under the ACBPS Agreement. The CPSU in its submissions acknowledged that the key difference between the parties on this issue concerned the rate of the allowance for vessels other than Bay, Torres Strait or Cape Class vessels, with the CPSU's proposed determination seeking an increase in the allowance rate from 62 per cent to 63 per cent. Mr Selim's evidence was that the other vessels captured by this category performed work patterns that were similar to Cape Class vessels and that as such the allowance rate should be the same. AIMPE's position regarding this issue was consistent with the CPSU's claim. In the absence of any probative material to substantiate Mr Selim's assertion we are not satisfied of the merits of the CPSU's claim regarding this issue [s.275(a)]. In our view, the claim is more appropriately considered in negotiations for an enterprise agreement to replace the workplace determination [s.275(h)].

Marine accommodation allowance

[511] The Department seeks to continue the 3-tiered allowance scheme that applied under the ACBPS Agreement which is reflective of vessel amenity. Mr Leonard's evidence regarding this issue set out the differences between the parties, deposing that:

- the Department opposed the CPSU's proposed single rate as there were distinct differences in the level of amenity and seagoing disability that applied to each of the classes of vessel specified in the Department's proposed clause;
- the grandfathered arrangement applied to employees who moved from Bay Class vessels to Cape Class vessels;
- the Cape Class vessels, which attracted a lower rate of marine accommodation allowance, were introduced 6 years ago;
- ACBPS had agreed to the grandfathered arrangement noting that a review of amenity was to be conducted once the new class of vessel was in full service;

- the subsequent review confirmed the placement of the Cape Class vessel at Category B in the 3 tier scheme; and

- 6 years was more than a sufficient adjustment period for affected employees.

[512] The CPSU on the other hand seeks a flat rate allowance to apply on all vessels. In particular, the CPSU highlighted that the Department's proposed determination did not include the grandfathered arrangements reflected in the ACBPS Agreement. The CPSU submitted that its proposed provisions represented a compromise whereby it would agree to discontinue the grandfathered arrangements and instead apply a single allowance rate for all vessels. Mr Selim's evidence was that the removal of the grandfathered arrangement would reduce employee's entitlements between $3,500 and $7,000 per annum, noting that the Department in its third offer continued to maintain the grandfathered arrangements. Mr Selim also deposed that the review of the rate of marine accommodation allowance for Cape Class vessels was conducted absent consultation with the CPSU, and that while it may be assumed that the larger vessel offered greater amenity, this was not necessarily the case and did not justify such a wide disparity between rates.

[513] While we note Mr Leonard's evidence, having regard to the limited material before the Commission regarding the grandfathered arrangement, we are not satisfied that it is appropriate for it not to be included in the determination we will make. The potential reduction in employee's entitlements is a significant consideration in our decision in this regard [s.275(c)]. In our view, the continuation of the grandfathered arrangement and/or any rationalisation of the 3 tier scheme of the marine accommodation allowance are matters more appropriately considered in negotiation for an enterprise agreement to replace the workplace determination [s.275(h)]. For the same reasons, we will not adopt the CPSU's proposed single rate. The quanta for the allowance on commencement will be Category A – $58.90 per night, Category B – $37.25 per night and Category C – $18.75 per night.

Weekend work

[514] The CPSU is seeking the inclusion of provisions relating to weekend work which are based on the Department's third offer. The parties' respective clauses on this issue are almost identical, the key difference being the reference to the annual number of duty days. We will adopt the Department's proposed provisions on the basis that they are slightly clearer.

Extra duty

[515] The Department submitted that both its and the CPSU's proposed workplace determinations provided the Secretary with the ability to roster employees beyond their annual duty day requirement where operational requirements necessitate it, adding that the key difference being that the CPSU's proposal required the employee's consent. The Department further submitted that consent ought not to precondition rostering arrangements and was not a feature of overtime. The Department also submitted that the usual industrial practice was to compensate an employee for overtime through a penalty payment, adding that its proposed determination did this via the extra duty reconciliation payment regime. In respect of that regime, the Department seeks to vary the frequency of any reconciliation payment from annually to biannually and the basis of any reconciliation payment so that it is calculated on the basis of salary exclusive of sea-going commuted allowance. The Department contended that varying the frequency of the payment would enable it to better manage duty

day balances in circumstances where 60 per cent of Departmental employee crew members were not completing the required number of duty days each year. As to the basis of the reconciliation payment, the Department contended that as the sea-going commuted allowance was a payment in lieu of shift penalties, possible overtime performed on a duty day beyond the standard day and possible disabilities experienced during deployments, its inclusion in the calculation of extra duty reconciliation payments involved double counting of the disability in performing more work than what was previously agreed.

[516] The CPSU in its submissions did not address the consent issue but opposed both of the Department's proposed changes to extra duty reconciliation payments. The CPSU submitted that the changes proposed by the Department would cause real detriment to the pay and conditions of marine employees and that any such changes should be the subject of genuine negotiations between the parties. The CPSU relied on Mr Selim's evidence in support of its submissions. Mr Selim deposed that the CPSU's proposed determination drew on the ACBPS Agreement, adding that the provisions in that Agreement had been a feature of agreements since at least 1998. Other key aspects of Mr Selim's evidence included that:

- while the Department's proposed change to the basis of the reconciliation payment may be considered appropriate for a shift worker who performed overtime and then departed the workplace it did not accord with the requirements of the marine working environment;

- if the Department's proposed approach to the calculation of the reconciliation payment was to be applied, then the employee should be compensated at that rate for the whole time they were on board the vessel;

- the Department's proposed change to the reconciliation period may see an employee who performed additional days due to tactical or emergency responses not compensated for that work for up to two years after it occurs;
- employees working patterns may be varied a number of times before any penalty applied, if at all; and

- the CPSU was unaware of any other employee(s) where reconciliations occurred over such a long period of time.

[517] Mr Regan's evidence on behalf of AIMPE was that if the sea-going commuted allowance was not included in the calculation of the reconciliation payment that work should be limited to the nominal hours per day. Mr Regan also submitted that a restriction component should apply to hours beyond nominal daily hours as employees could not go home.

[518] We have previously determined to vary the working patterns for particular classes of vessels to those proposed by the Department in large part due to the evidence that 60 per cent of Departmental employee crew members do not complete the required number of duty days each year. Against that background, we do not propose to provide for an extra duty reconciliation period of two years until the impact of the changed working patterns on duty day management becomes clear. Further, we are reluctant to do so given that the practical effect would be that employees may not be compensated for additional days worked for a period of up to two years which is far too long in our view. As to the basis on which reconciliation payments are calculated, there is some truth in the Department's contention that the inclusion of the sea-going commuted allowance in the calculation involves some double

counting. However, that submission overlooks the disabilities component of the sea-going commuted allowance and the fact that employees cannot return home at the conclusion of the additional duty. In those circumstances, we are not satisfied that the complete removal of the commuted allowance from the calculation is warranted in the absence of more detailed submissions and analysis of the issue [s.275(a)]. Further, we strongly agree with the CPSU that any changes to the extra duty reconciliation payment should be the subject of genuine negotiations between the parties [s.275(h)].

[519] Finally, we do not consider it necessary that an employee consents to the working of additional extra duty. The provisions in the NES providing that an employee may refuse to work unreasonable additional hours [s.62(2)] and setting out the factors to be taken into account in determining whether additional hours are reasonable [s.62(3)] provide adequate protection for employees.

Domiciling

[520] The matter in issue in respect of domiciling is whether marine employees are responsible for meeting the cost of travel to the nearest airport or port at their home location. By way of background, the ACBPS Agreement provides for reimbursement for the cost of travel from the crew member's home to the nearest airport or port.

[521] The Department's proposed workplace determination provides for the Secretary to designate a home location for marine employees and the Department administers travel from this home location. However, under the Department's proposed determination an employee is responsible for the cost of travel to the nearest airport or port at their home location. The Department submits that its position is consistent with the requirement for an employee to make their own arrangements in their own time and expense for travel to work. Mr Leonard's evidence reflected the Department's submissions. Mr Leonard's oral evidence was that the Department's proposed determination in respect of domiciling sought to remove an existing condition which would impact on marine employees in particular[304].

[522] The CPSU submitted that the evidence of both parties overwhelmingly favoured the retention of the current reimbursement arrangement, adding that the Department had adduced no evidence justifying the removal of the reimbursement arrangements. The CPSU also submitted that the current arrangements were significant for marine employees and that the removal or alteration of the arrangement ought to be the subject of genuine negotiations between the parties. Mr Selim deposed that the entitlement had been a feature of Marine Unit conditions since the mid 1990's. Mr Selim also deposed that the issue had not been raised in bargaining and that the Department's third offer reflected the existing arrangements.

[523] AIMPE made no submissions on this issue.

[524] We are not satisfied of the merits of the Department's proposed approach [s.275(a)]. In particular we do not accept that travel to the nearest airport or port equates to the requirement for an employee to make their own arrangements in their own time and expense for travel to work. Further, we fail to see how travel from the crew member's home to the nearest airport or port differs from a Departmental employee travelling on official business. In that case an employee would be reimbursed for the cost of travel to the airport (if travelling by air). In our view, the Department's proposed approach is better addressed through bargaining for an enterprise agreement to replace the workplace determination [s.275(h)]. Accordingly,

we will retain the current arrangements. However, we consider the current maximum amount of reimbursement, i.e. $135.25, to be quite generous. We will therefore include this amount in the determination we will make on the basis that it is fixed for the duration of the determination.

Southern Ocean operations allowance

[525] The matter in issue concerns the quantum of the Southern Ocean operations allowance. The quantum on commencement will be $195.10 for the seagoing vessel and foreign vessel when undertaking boarding activity categories and $139.05 for the foreign vessel category.

[526] Mr Regan deposed that the relevant provision in the Department's proposed workplace determination should state that the allowance is payable for voyages as per the definition of 'Southern Ocean operations' and specification of 'work performed'. We consider these references to be unnecessary.

Other issues

[527] There are a number of other matters in issue. We deal with these other issues below.

- Definitions – there are a number of differences between the definitions set out in the Department's and the CPSU's proposed workplace determinations. In its submissions the CPSU, drawing on the evidence of Mr Selim, highlighted that the definition of 'Duty day' in the Department's proposed determination omitted reference to ordinary duty and the length of that ordinary duty being 10 hours per day. It is not clear to us what the inclusion of those references in the definition would add having regard to other provisions in the Department's proposed determination. Accordingly, we are not satisfied of the merit of their inclusion in the definition [s.275(a)]. The CPSU also referred the to definition of 'strategic response' in its submissions. We have dealt with that issue above.

- Duties and training at a location other than home – the Department's proposed determination allows it to provide rest periods at locations other than an employee's home location, e.g. where an employee may be engaged in training. The CPSU and AIMPE both proposed that such arrangements be by written agreement. The Department opposed this on the basis that it added unnecessary administrative burden. Mr Leonard's evidence was that scope for rest periods at locations other than an employee's home location was provided for under clauses 22.24.3 and 22.24.4 of the ACBPS Agreement. We note that clause 22.24.2 of the ACBPS Agreement provides that "… where a sea-going marine employee is required to undertake duties and/or training at a location other than their home port, the sea-going marine employee may utilise days off in that location. This arrangement will be subject to written agreement … prior to deployment."[305] Further clause 22.24.3 provides that "Where a sea-going marine employee agrees to utilise days off at a location other than their homeport …"[306] In the absence of any evidence that the requirement for written agreement had been problematic or administratively cumbersome we are not satisfied of the merits of the Department's proposed approach [s.275(a)]. Further, we consider that the Department's proposal is more appropriately explored in bargaining for an enterprise agreement to replace the workplace determination [s.275(h)].

- Restriction allowance – the Department's proposed workplace determination provides for the payment of a restriction allowance when an employee is restricted on a day exceeding the 195 day annual duty day requirement. In the absence of any submissions by the CPSU or AIMPE regarding the Department's proposed provision we will include the provision in the determination on the basis that it is in the interest of employees [s.275(c)].

- Pro-rata sea-going commuted allowance payments – the denominator for the calculation of pro-rata sea-going commuted allowance payments will be 75 reflecting the fortnightly hours of work which we will include in the determination. AIMPE seeks clarification of the words 'rostered hours of duty' in the Department's proposed provision. We are not satisfied that such clarification is necessary [s.275(a)].

- Allowances and penalties during marine training – the matter in issue here is whether payment of the sea-going commuted allowance is offset when a employee is in receipt of the marine training allowance during periods of employee initiated training. The Department's position is that the commuted allowance is offset on the basis that the factors compensated for by that allowance do not exist when an employee is undertaking a training course. The CPSU's position, which is based on the Department's third offer, is that the commuted allowance is not offset. The CPSU's proposed provision reflects the approach in the ACBPS Agreement. We agree with the Department's proposed approach on this issue on the basis that payment of the sea-going commuted allowance when a employee is in receipt of marine training allowance entails compensating employees for disabilities that they are not exposed to while undergoing training.

- Dynamic positioning maintenance training – AIMPE proposed the inclusion of a clause relating to dynamic positioning maintenance training in the workplace determination we will make. Mr Regan in his witness statement offered no explanation as to why such a provision was needed. The Department contended that clause 10.59 of its proposed determination was broad enough to deal with such training if approved by the Secretary. In the absence of any justification by AIMPE for its proposed clause we are not satisfied of the merits of including such a provision in the determination[s.275(a)].

- Incidentals – the CPSU seeks the continuation of a payment for incidentals for each day a Marine Unit employee was accommodated on a vessel. The Department opposed this. Mr Selim deposed that the incidentals allowance had been a feature of Marine Unit conditions since the mid 1990's and its proposed removal would have a significant financial impact on employees (estimated by Mr Selim to be up to almost $3,200 per annum). Mr Selim also deposed that the removal of the payment had not been raised by the Department in the negotiations for an enterprise agreement and that the payment was reflected in the Department's third offer. As previously mentioned, Mr Selim's oral evidence was that Marine Unit employees had access to communication streams to communicate with family while operating vessels and that all food, snacks and drinks were provided while on board[307]. In circumstances where Marine Unit employees are provided free of charge with the items that an incidentals payment is intended to compensate for we do not consider that there is merit in

providing for a payment for incidentals in the determination as proposed by the CPSU [s.275(a)].

- OST allowance – the matter in issue concerns the quantum of this allowance. The quantum on commencement will be $648.05.

- Administrative support days – the CPSU's proposed workplace determination includes a number provisions which set out in greater detail what these days can be used for. The Department opposes the inclusion of these additional provisions. We are not satisfied as to the merit of the CPSU's proposed provisions [s.275(a)].

- Attendance at court days – the CPSU's proposed workplace determination includes a provision stating that when a marine employee is required to attend court for operational reasons the day will be counted as a duty day. The Department opposed the inclusion of the provision. We consider that for reasons of clarity there is merit in including the provision in the determination [s.275(a)].

- Marine Unit Engineers and Deck Officer Cadet Program – the CPSU's proposed workplace determination includes clauses stating that participants in Engineers and Deck Officers Cadet Program will be remunerated in accordance with the APS Graduate classification and referencing where further information is available. The Department submitted that the clauses were unnecessary. While we agree that the proposed clause referencing further information is unnecessary, we consider there is merit in providing clarity as to the remuneration for participants in the abovementioned Cadet Program [s.275(a)].

- Placement of crew leaving the Marine Unit – the CPSU's proposed workplace determination includes a provision which provides that the placement of sea-going marine employees leaving the Marine Unit will be subject to the ABF posting programme and related policies, workforce planning and operational requirements. The CPSU's proposed clause in based on the Department's third offer. Beyond that the CPSU offered no rationale for the provision. The Department described the CPSU's proposed provision as unnecessary. In the absence of any compelling argument as to the need for the proposed provision we agree that the provision is unnecessary.

11. Conditions specific to designated National Surveillance Unit employees

[528] The CPSU's proposed workplace determination sought to return to the conditions applying to the National Surveillance Unit (NSU) prior to integration.[308] However, in addition to maintaining the maximum hours designated NSU employees can work over a four week period, the CPSU's proposed provision does not include that aspect of the pre-existing provision dealing with on-call allowance. The CPSU's submissions provide no rationale for this omission. Ms Jones in her witness statement deposed that the work of NSU employees was at times tedious, physically uncomfortable, highly stressful and also dangerous, adding that it was extraordinarily fatiguing on these individuals. Ms Jones further deposed that it was for these reasons that working hours for NSU employees were limited to 184 hours in a designated four week period and that the Department's proposed increase in hours did not take into account the physical reality and demands on NSU employees.[309]

[529] Drawing on Mr Leonard's evidence[310], the Department posited that the composite surveillance allowance was intended to compensate NSU employees for the fact that they are routinely required to be contactable, willing and able to perform work at short notice. The Department submitted that the practical effect of the CPSU's omission of the on-call allowance was that NSU employees would become entitled to the higher rate of restriction allowance. This, the Department contended, ignored the historical compromise reached in prior rounds of bargaining on this issue. The Department further contended that the CPSU had failed to demonstrate any merit or evidentiary basis for its claim and that absent an explanation from the CPSU the Commission was entitled to proceed with the status quo. As to the maximum hours of work aspect of its proposed provision, the Department submitted that the increase from 184 to 188 hours reflected its proposed increase in the standard working day for former ACBPS employees to 7 hours and 30 minutes per day, adding that Ms Jones failed to recognise that the 188 hour limit is a maximum that could apply.

[530] In the absence of any justification for removal of the on-call allowance payable to NSU employees there is no basis for it to be excluded from the determination. The allowance on commencement will be $20.80.

[531] As to hours of work, no material was put before the Commission explaining how the maximum hours were derived given the standard working day of 7 hours and 21 minutes worked by former ACPBS employees. We note that the existing maximum of 184 hours equates to an average 46 hours per week, which is significantly in excess of the maximum 38 ordinary hours per week in the National Employment Standards. As such, we do not believe the case has been made out to increase the maximum number of hours as proposed by the Department particularly as NSU employees standard hours under the determination we will make will be 7 hours and 30 minutes per day.

12. Dispute resolution

[532] There is no agreement about the terms of the disputes settlement procedure for inclusion in the determination. The key issue in dispute is whether the procedure should provide for arbitration by the Commission other than by consent.

[533] The CPSU seeks the insertion of the model term for dealing with disputes for enterprise agreements as set out in Schedule 6.1 of the Regulations on the basis that it is a rationalised clause which is broadly adopted and strikes a fair balance between the interests of employees and the employer. The CPSU stated that it did not press for additional clauses, such as the preservation of the status quo during dispute resolution or further guidance with respect to work health and safety.

[534] The CPSU highlighted in its submissions the key differences between the dispute resolution term sought by the Department and the model term it advocated. In particular, the CPSU contended that the two most significant differences were:

- the lack of clarity over the steps to be taken at the workplace level under the Department's proposed clause; and

- the lack of an arbitral role for the Commission in the Department's proposed clause.

[535] Beyond that, the CPSU contended that:

- the model clause was the preferable provision;

- in contrast to the model clause the Department's proposed term in respect of the steps to be taken in the workplace introduced a level of complexity and the potential for narrow and technical jurisdictional arguments which was unnecessary and counter-productive;

- by requiring that all steps at the workplace level be exhausted the Department's proposed term was unnecessarily broad and lacked precision;

- Mr Leonard downplayed the difference between the Department's dispute resolution clause and the model term as not being significant;

- the ability for the Commission to determine disputes was fundamental to the efficient conduct of industrial disputation and assisted in avoiding industrial disputation as the parties recognised the potential for scrutiny of their actions in an accessible forum;

- it was thoroughly unsatisfactory that the Department sought to require individual employees to take a matter to a court of relevant jurisdiction instead of being able to access an outcome through a specialist tribunal;

- as acknowledged by Mr Leonard under cross-examination, the Department's position on this issue was a departure from the terms of its third offer; and

- Ms Muscat-Bentley's evidence should be preferred to Mr Leonard's evidence on the issue of dispute resolution.

[536] The Department submitted that its proposed clause gave preference to workplace level dispute resolution, highlighting that under its proposed clause the parties to a dispute must first discuss the dispute at the workplace level and, if the dispute remained unresolved, further discuss the dispute with senior management. The Department further submitted that this was in contrast to the CPSU's proposed clause which it contended only provided one opportunity to resolve the matter at the workplace level.

[537] On the issue of arbitration, the Department submitted that the inclusion in the dispute settlement term of scope for compulsory arbitration in the absence of agreement between the parties was not permissible in a workplace determination. The Department relied on the decisions in *Re Woolworths Ltd (t/as Produce and Recycling Centre) (Woolworths)*[311] and *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Another (Endeavour Energy)*[312]. The Department further submitted that:

- there was no provision in the Act expressly authorising the Commission to deal with a dispute by arbitration in the absence of the parties conferring upon the Commission the power of private arbitration;

- the CPSU's reliance on the model term was misconceived as the term was not mandatory or a default clause if parties did not agree to a dispute settlement term; and

- no evidence had been advanced to warrant a departure from the scope of its proposed procedure.

[538] Beyond that the Department highlighted that:

- both its and the CPSU's proposed dispute settlement procedure included a provision preserving the status quo whilst the parties were trying to resolve the dispute, contending that its proposal achieved what status quo clauses ought to achieve, i.e. the continuation of work in accordance with the employer's managerial prerogative to direct the performance of work without prejudice to the final outcome, and that the CPSU's proposed clause did not sufficiently tie the status quo to managerial prerogative;

- the balance of its proposed clause allowed a party to a dispute to be represented, included transitional arrangements for pre-existing disputes under previously applicable enterprise agreements and identified for the avoidance of doubt matters that were not within the scope of the dispute resolution procedure under the workplace determination, adding that no bargaining representatives had articulated a reason as to why these clauses were opposed and that each had merit; and

- given the various and complex sources of regulation that applied to APS employment that aspect of its proposed clause identifying those matters that were not within the scope of the dispute resolution procedure reduced the likelihood of disputes improperly being brought under the workplace determination.

[539] In terms of the steps to be taken at the workplace level, the Department's proposed clause provides as follows:

> "12.2 In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or Employees concerned and the relevant Manager.
>
> 12.3 If discussions in clause 12.2 do not resolve the dispute, then the dispute must be referred to senior management for the purposes of further discussions to try to resolve the dispute.
>
> 12.4 If:
>
> (a) all appropriate steps able to be taken under clauses 12.2 and 12.3 have been exhausted, and
>
> (b) the dispute is not resolved,
>
> (c) a party to the dispute may refer the dispute to the Fair Work Commission."[313]

[540] The Department's proposed clause appears to draw on the dispute resolution term in the *Australian Public Service Enterprise Award 2015*[314](the Award) except that it uses the word "exhausted" in clause 12.4(a) whereas the equivalent provision in the Award uses the

word "taken". In our view, the latter terminology is less likely to lead to jurisdictional arguments regarding whether or not all appropriate steps at the workplace level "have been exhausted". For that reason the latter terminology is preferred and will be included in the determination. Further, the Department's proposed clause provides for escalation of a dispute to senior management in circumstances where initial discussions at the workplace level do not resolve the matter whereas the CPSU's proposed clause is silent in this regard (though such escalation is not precluded under the CPSU's proposed clause).

[541] With regard to the issue of arbitration, the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission*[315] *(CFMEU v AIRC)* said as follows:

> "There is, however, a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by particular person or body and to accept the decision of that person as binding on them."[316] (Underlining added)

[542] Against that background, and having particular regard to the underlined text in the above extract from the decision in *CFMEU v AIRC*, the Commission is unable to require in a dispute settlement procedure that it determine disputes other than where the parties consent to the Commission doing so. Accordingly, the dispute settlement term to be included in the determination we will make will not provide for arbitration other than where the parties consent to that course of action.

[543] We note that the absence of access to arbitration other than where the parties consent is a significant loss for employees. In circumstances where the dispute settlement terms in the DIAC and ACBPS Agreements and the Department's third offer all provided for arbitration absent consent and in the absence of any evidence that the Agreements' dispute settlement terms had resulted in large numbers of disputes progressing to arbitration, the Department's position on this issue appears to us to be little more than opportunistic and deliberately punitive. In our view, the Department's approach on this issue does little to re-establish co-operative workplace relations. More broadly, we note that s.273 of the Act which sets out the mandatory terms of workplace determinations provides that the model flexibility and consultation terms are to be included in a workplace determination unless the Commission is satisfied that an agreed flexibility or consultation term for the determination would satisfy the relevant statutory requirements set out in the Act. However, in respect of a term about settling disputes, s.273 does not require the model term for dealing with disputes for enterprise agreements as set out in the Regulations to be included in a workplace determination where the parties are unable to reach agreement on the dispute term. While a matter for the Parliament, we would suggest that consideration be given to addressing this anomaly with a view to either mandating the inclusion of the model term or alternatively providing the Commission with discretion to include the model term in circumstances where arbitration without the need for the consent of the parties is a feature of the industrial instrument(s) applying at the enterprise.

[544] The status quo aspects of the Department's proposed term are consistent with the Award and for this reason will be included in the determination we will make. As to the provisions in the Department's proposed term dealing with 'Other matters':

- we will include in the determination the provision regarding representation, though it will be the second clause in the provision;

- we are concerned that the transitional arrangement provision in the Department's proposed workplace determination has the potential to disadvantage employees given that the dispute resolution terms of the Agreements both provided for arbitration whereas the determination will not. As such we will not include the Department's proposed provision in the determination we will make

- by way of background the transitional arrangement provision in the Department's proposed determination provides that disputes which commenced under an enterprise agreement that previously applied and which had not been concluded at the commencement of the determination will be progressed in accordance the dispute resolution term in the determination; and

- for reasons of clarity we will include in the determination sub-clauses (a) to (c) of which set out matters that a not within the scope of the dispute resolution term, but will not include the proposed clause (d) and (e) as we consider them to be unnecessary.

13. Other conditions and arrangements

[545] The CPSU seeks the retention of provisions from the DIAC Agreement relating to employee representation and freedom of association. In circumstances where the consultation and dispute resolution terms both provide that an employee may appoint a representative of their choice, we do consider it necessary to include a specific provision relating to employee representation in the determination. With regard to freedom of association, in circumstances where the Fair Work Information Statement refers to freedom of association we do not consider it necessary to include a provision relating to freedom of association in the determination. The Act requires that the an employer must give new employees the Fair Work Information Statement either before or as soon as practicable after the employee starts employment [s.125]. This in our view adequately informs employees of their rights in this regard.

[546] The CPSU also seeks the inclusion of a provision relating to occupational health and safety. The CPSU's proposed provision provides *inter alia* that all reasonable steps will be taken to provide employees with a healthy and safe workplace consistent with relevant health and safety legislation. The CPSU relied on Mr Muffatti's evidence which included the statement that historically the Commission and its predecessors had resolved all disputes in relation to health and safety in the workplace and that under the *Work Health and Safety Act 2011* (the WHS Act) Comcare did not have the same powers as the Commission.

[547] The Department opposed the inclusion of the provision proposed by the CPSU on the basis that:

- it would create an unsatisfactory situation where its compliance with its work health and safety obligations was governed by two statutory regimes, i.e. the WHS Act and the Act; and

- the burden of enforcing health and safety obligations should not be imposed on the Commission through the workplace determination, particularly as the WHS Act contained a procedure for resolving matters about work and health and safety.

[548] We are not satisfied of the merit of including the provision proposed by the CPSU in the determination given the existence of a separate regulatory framework under the WHS Act [s.275(a)]. Further, we consider the issue is one that is more appropriately addressed in bargaining for an enterprise agreement to replace the workplace determination [s.275(h)].

[549] The CPSU's proposed determination included provisions drawn from the ACBPS Agreement regarding EL employee conditions. Among other things, those provisions dealt with usage of mobile phones for limited personal use, the provision of airline lounge membership, business class travel for flights of more than 2 hours duration, additional time off and travelling allowance. In respect of EL 2 employees, the provision also dealt with the home garaging of Commonwealth vehicles and parking for those employees who did not home garage a Commonwealth vehicle. The CPSU's proposed provision limited the home garaging and parking aspects of the provision to those employees who had access to these entitlements prior to the determination we will make coming into effect.

[550] The Department opposed the CPSU's claim. Specifically, the Department submitted that:

- the Department's information technology policies regulated the entitlement to and use of work provided mobile phones and portable devices and that no evidence had been led to suggest that the workplace determination needed to supplement this regime;
- Mr Leonard's evidence was that employees were no longer provided with access to Commonwealth vehicles and as such there was no basis to continue the home garaging arrangements and no resulting inequity between employees necessitating parking entitlements or allowances; and

- the provision of airline lounge membership was a discretionary decision and as such should be excluded from the workplace determination and dealt with as a matter of policy.

[551] We previously determined, in respect of other employees, that the decision to provide airport lounge membership is a matter which is more appropriately dealt with in policy. There is no justification to depart from that approach in respect of EL employees. Our view in that regard applies equally to mobile phone issue. Having regard to Mr Leonard's evidence, there is no merit in that aspect of the CPSU's claim regarding the home garaging of vehicles and the provision of parking for EL 2 employees [s.275(a)]. Finally, there is no need to include the CPSU's proposed provision relating to travelling allowance for EL employees as it would merely replicate what we have determined will apply more generally. In summary, we will not include the provisions proposed by the CPSU providing conditions specific to EL employees.

[552] Lastly, the CPSU's proposed workplace determination included provisions drawn from the ACBPS Agreement which would require the Department to provide secure parking for employees working shifts and commit to use its best endeavours to continue to negotiate the provision of a discounted parking rate for those employees working at ABF House in Sydney and Brisbane. The CPSU relied on Ms Jones' evidence which was that the entitlements provided a real benefit to employees and were necessary. Ms Jones' evidence dealt almost exclusively with the value she attached to the discounted parking rate which the Department had been able to negotiate for employees working at Sydney airport.

[553] The Department described the CPSU's claim as a discretionary provision which did not bestow any substantive entitlement on employees.

[554] Based on the material before us we are not satisfied of the merits of including the provisions proposed by the CPSU in the determination [s.275(a)].

14. Definitions

[555] There are only minor differences between the Department's and the CPSU's proposed determinations. We will generally adopt the Department's proposed definitions. However, we will amend the definition of 'Dependant' in the Department's proposed determination so that it refers to an employee's 'spouse or de facto partner'. As a result, a definition of 'De facto partner' will also be included in the determination and the definition of 'Partner' will be amended so that it also refers to an employee's 'spouse or de facto partner'.

Statutory considerations

[556] We are satisfied that a workplace determination made in accordance with the conclusions we have reached in this decision would satisfy the requirement in s.272(4) that were the determination an enterprise agreement it would pass the BOOT under s.193 and hence also satisfy the requirement in s.267(1)(b).

Conclusion

[557] A copy of the draft determination we intend to make is attached. The determination is in draft form to provide the parties an opportunity to examine the document and identify any issues which go to the implementation of the determination consistent with this decision. To that end the Deputy President will in the coming weeks convene a conference of the parties to work through any such issues. It is our intention that this "tidying up" exercise be completed expeditiously so as to allow the determination to commence operation as soon as possible.

VICE PRESIDENT

Appearances:

Mr P. O'Grady QC together with *Mr S. Meehan* of Counsel and *Mr L. R. Howard* of Counsel for the Commonwealth of Australia represented by the Department of Home Affairs

Mr A. Slevin of Counsel for the Community and Public Sector Union

Mr M. Bakhaazi on behalf of the Australian Institute of Marine and Power Engineers

Ms E. Ryan on her own behalf

Mr J. Holmes on his own behalf

Hearing details:

2017
Canberra
October 16, 20 and 24-25
December 5-8 and 18-19.

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[1] [2018] FWCFB 3415 at [3]-[11].

[2] [2017] FWCFB 6887.

[3] Exhibit DIBP30.

[4] Exhibit CPSU5, see also Exhibits CPSU7 and CPSU8

[5] AE888602.

[6] Transcript of proceedings (19 December 2017) at PN6400.

[7] [2017] FWCFB 6887.

[8] Ibid at [2] and [3].

[9] *Fair Work Act 2009* (Cth) s.601(1).

[10] Ibid s.267.

[11] [2018] FWCFB 3415 at [9].

[12] Ibid s.266(1).

[13] [2018] FWCFB 3415 at [5] and [6].

[14] PR586132.

[15] [2016] FWC 7184.

[16] *Fair Work Act 2009* (Cth) ss.267(1)(a),(2)and 274(4).

[17] Ibid ss.267(1)(a) and (3).

[18] Ibid ss.267(1)(b) and 272.

[19] Ibid s.272.

[20] [2018] FWCFB 3415 at [41].

[21] Ibid.

[22] Ibid ss.267(1)(c) and 273.

[23] Ibid s.273.

[24] AE888602, DIAC Agreement at clauses 2.9-2.23.

[25] *Fair Work Regulations 2009* (Cth) Schedule 2.2.

[26] *Fair Work Act 2009* (Cth) s.267(4).

[27] Exhibit DIBP30; Exhibit CPSU7; Exhibit CPSU8; Exhibit CPSU5????

[28] *Fair Work Act 2009* (Cth) s.275.

[29] *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 at [46]; *AWU v Pioneer Construction Materials Pty Ltd* PR925916, 19 December 2002, at [32] – [33]; *CPSU v Australian Protective Service*, PR910682, 29 October 2001, at [12] – [13].

[30] *Fair Work Act 2009* (Cth) s.577.

[31] Ibid s.578.

[32] [2012] FWAFB 6612.

[33] Ibid at [33]-[37].

[34] Ibid at [39] citing *CFMEU v Curragh Queensland Mining Ltd* PRQ4464.

[35] *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 at [49]-[50]; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Randall v Australian Taxation Office* (2010) 198 IR 114 at [11].

[36] *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement* 2000 (2005) 139 IR 34 at [23]; See also *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540 at [129]-[131].

[37] [2012] FWAFB 7858.

[38] Ibid at [37]-[46].

[39] *Transport Workers' Union of Australia v Qantas Airways Limited; Q Catering Limited* [2012] FWAFB 6612 at [45].

[40] Ibid citing *CFMEU v Curragh Queensland Mining Ltd* PRQ4464.

[41] Ibid.

[42] Ibid at [55].

[43] AE890227.

[44] PRQ4464.

[45] [2018] FWCFB 3415 at [12].

[46] Department of Home Affair's Outline of Oral Submissions – tendered 16 April 2018.

[47] Exhibit CPSU20 at RM17.

[48] PR Q4464 at [44].

[49]Department of Home Affair's Outline of Oral Submissions – tendered 16 April 2018; see also Transcript of proceedings (16 April 2018) at PN30.

[50] (2009) 180 IR 41.

[51] Department of Home Affair's Outline of Oral Submissions – tendered 16 April 2018; see also Transcript of proceedings (16 April 2018) at PN43-PN45..

[52] Ibid at PN45.

[53] Ibid at PN147-PN149

[54] Ibid at PN199-PN212.

[55] Ibid at PN213.

[56] CPSU correspondence – 12 April 2018.

[57] Transcript of proceedings (17 April 2018) at PN580.

[58] Ibid.

[59] Ibid at PN581-PN583.

[60] Ibid at PN584.

[61] Ibid.

[62] Exhibit DIBP6.
[63] Transcript of proceedings (24 October 2017) at PN1061.
[64] Exhibit DIBP10 at Attachment MV-2.
[65] Transcript of proceedings (24 October 2017) at PN1133-1136.
[66] Ibid at PN1162.
[67] Ibid at PN1165; PN1179-1182.
[68] Ibid at PN1167.
[69] Exhibits DIBP8; Exhibit DIBP 9.
[70] Exhibit DIPB9.
[71] Transcript of proceedings (24 October 2017) at PN1315-1316 and PN1362-1365.
[72] Ibid at PN1322.
[73] Exhibit DIBP6 at Attachment JC-5.
[74] Transcript of proceedings (24 October 2017) at PN1366-1367.
[75] Ibid at PN1438-1439.
[76] Ibid at PN1467-1469.
[77] Ibid at PN1499.
[78] Ibid at PN1532.
[79] Exhibits DIBP10-DIBP12.
[80] Exhibit DIBP10.
[81] Exhibit DIBP11.
[82] Transcript of proceedings (24 October 2017) at PN1612-1619.
[83] Ibid at PN1655-1656.
[84] Transcript of proceedings (25 October 2017) at PN1685.
[85] Ibid at PN1695-1702.
[86] Ibid at PN1714-1739.
[87] Ibid at PN1740-1746.
[88] Ibid at PN1785.
[89] Ibid at PN1787-1800.
[90] Ibid at PN1813-1820.
[91] Ibid at PN1823.
[92] Ibid at PN1843-1846.
[93] Exhibit CPSU20 at RM15.
[94] Transcript of proceedings (25 October 2017) at PN1856-1870.
[95] Ibid at PN1876.
[96] Ibid at PN1912-1922.
[97] Ibid at PN1923-1959.
[98] Ibid at PN1966-1971.
[99] Ibid at PN1981-2008.
[100] Ibid at PN2024-2107.
[101] Exhibits DIBP13-DIBP15.
[102] Transcript of proceedings (25 October 2017) at PN2234-PN2236.
[103] Ibid at PN2233-2248; PN2236.
[104] Ibid at PN2249.
[105] Ibid at PN2284-2287.
[106] Exhibits DIBP16 and DIBP17.
[107] Transcript of proceedings (05 December 2018) at PN2571.
[108] Ibid at PN2579.

[109] Ibid at PN 2660-2662.

[110] Ibid at PN2667; PN2665-PN2669.

[111] Ibid at PN2690-PN2691.

[112] Ibid at PN2690-PN2804.

[113] Ibid at PN2805; PN2915.

[114] Ibid at PN2893-PN2909.

[115] Ibid at PN2910-PN2914.

[116] Ibid at PN2955.

[117] Ibid at PN2997-3014.

[118] Transcript of proceedings (6 December 2017) at PN3221.

[119] Exhibit CPSU17 at page 144.

[120] Transcript of proceedings (6 December 2017) at PN3337-PN3347.

[121] Ibid at PN3384-PN3396.

[122] Ibid at PN3501.

[123] Ibid at PN3510-PN3517.

[124] Ibid at PN3651-PN3658.

[125] Ibid at PN3700.

[126] Ibid at PN3728.

[127] Ibid at PN3731-PN3738.

[128] Ibid at PN3741.

[129] (1997) 74 IR 423.

[130] Q4464.

[131] PR928147.

[132] (2009) 180 IR 41.

[133] [2012] FWAFB 236.

[134] [2013] FWCFB 317.

[135] [2013] FWCFB 950.

[136] [2012] FWAFB 7858.

[137] CPSU Final Submissions at 1.3.5.

[138] [2016] FWCFB 7641.

[139] Transcript of proceedings (16 April 2018) at PN306.

[140] Ibid at PN307-PN309.

[141] Ibid at PN321.

[142] Ibid at PN3222.

[143] Ibid at PN326-PN329.

[144] Ibid at PN330-PN331; PN346.

[145] Ibid at 335.

[146] Ibid at PN342.

[147] Ibid at PN362.

[148] Ibid at PN372-PN373.

[149] Ibid at PN402-PN404.

[150] Ibid at PN411.

[151] The proposal was set out in correspondence sent by the CPSU's legal representative to the Department's legal representative on 12 April 2018 – a copy of the correspondence was provided to the Commission on 16 April 2018; Transcript of proceedings (16 April 2018) at PN422-PN424.

[152] Exhibits CPSU22, CPSU23 and CPSU36.

[153] Exhibits CPSU24 and CPSU25.

[154] Exhibit CPSU26.
[155] Exhibit CPSU27.
[156] Exhibit CPSU28.
[157] Exhibit CPSU29.
[158] Exhibit CPSU30.
[159] Exhibit CPSU9.
[160] Ibid at RE-17.
[161] Transcript of proceedings (7 December 2017) at PN4314-PN4315.
[162] Ibid at PN4411-PN4414.
[163] Exhibit CPSU20 at RM15.
[164] Transcript of proceedings (7 December 2017) at PN4471-PN4486.
[165] Ibid at PN4497-PN4499.
[166] Ibid at PN4537.
[167] Ibid at PN4597.
[168] Ibid at PN4622.
[169] Ibid at PN4637-PN4641.
[170] Ibid at PN4848-PN4852.
[171] Ibid at PN4863-PN4869.
[172] Exhibit CPSU10.
[173] Transcript of proceedings (8 December 2017) at PN5060.
[174] Exhibit CPSU11.
[175] Transcript of proceedings (8 December 2017) at PN5112-PN5114.
[176] Ibid at PN5124-PN5132.
[177] Ibid at PN5143 and PN5150.
[178] Exhibits CPSU12 and CPSU13.
[179] Transcript of proceedings (8 December 2017) at PN5238-PN5239.
[180] Ibid at PN5257.
[181] Ibid at PN5275.
[182] Exhibit CPSU14.
[183] Transcript of proceedings (8 December 2017) at PN5313-PN5318.
[184] Ibid at PN5329-5335.
[185] Exhibit CPSU15.
[186] Transcript of proceedings (8 December 2017) at PN5424-PN5428.
[187] Ibid at PN5458, PN5471 and PN5490.
[188] Ibid at PN5498-PN5500.
[189] Transcript of proceedings (18 December 2017) at PN5520-PN5528.
[190] Ibid at PN5695-PN5703.
[191] Exhibits CPSU18 and CPSU38.
[192] Transcript of proceedings (18 December 2017) at PN5792.
[193] Ibid at PN5795-PN5804.
[194] Exhibit CPSU38 at BMB-4
[195] Exhibit CPSU19.
[196] Exhibit CPSU20.
[197] Ibid at RM16 and RM17.
[198] Transcript of proceedings (18 December 2017) at PN5976-PN5986.
[199] Ibid at PN6000-PN6014.
[200] Exhibit CPSU32.

[201] Transcript of proceedings (19 December 2017) at PN6114.
[202] Ibid at PN6122-PN6129.
[203] Exhibit CPSU33.
[204] Transcript of proceedings (19 December 2017) at PN6173-PN6178.
[205] Ibid at PN6224.
[206] Ibid at PN6242.
[207] Exhibit CPSU34.
[208] Exhibit CPSU35.
[209] Exhibit CPSU22 at MW3.
[210] Exhibit CPSU23.
[211] Exhibits CPSU24 and CPSU25.
[212] Exhibit CPSU26 at CH3.
[213] Exhibit CPSU27.
[214] Exhibit CPSU28.
[215] Exhibit CPSU29.
[216] Exhibit CPSU30.
[217] *See* AIMPE closing submissions -15 March 2018 at [1].
[218] Exhibit AIMPE2.
[219] Exhibit AIMPE3.
[220] Exhibit RYAN1.
[221] [2018] FWCFB 3415 at [18].
[222] Exhibits CPSU16 and CPSU17.
[223] [2018] FWCFB 3415 at [4].
[224] Exhibit CPSU17 at pages 144-145.
[225] Exhibit CPSU16 at page 504.
[226] Ibid at page 508.
[227] Ibid at page 507.
[228] Exhibit CPSU19 at NH1.
[229] Exhibit DIBP10 at Attachment MV-2
[230] Transcript of proceedings (25 October 2017) at PN1785-PN1810.
[231] Ibid at PN1745, PN1844 and PN2089
[232] Ibid at PN2870-2881
[233] Transcript of proceedings (6 December 2017) at PN3658.
[234] Legal Services Directions 2017, Appendix B at clause 2(c).
[235] [2018] FWCFB 3415 at [41].
[236] Exhibit DIBP30 at clause 1.6; Exhibit CPSU8 at clause 5.
[237] Exhibit DIBP30 at clause 1.7.
[238] Exhibit CPSU8 at clause 6.
[239] [2018[FWCFB 3415 at [2].
[240] Ibid at [33].
[241] Ibid at [34].
[242] Ibid at [35].
[243] Ibid at [36].
[244] Ibid at [37] and [39].
[245] Ibid at [40].
[246] Exhibit DIBP16 at paragraphs 60-63.
[247] Exhibit CPSU35 at paragraphs 42-47.

[248] Exhibit CPSU32 at paragraphs 64-82.

[249] Transcript of proceedings (17 April 2018) at PN471-PN473.

[250] *Fair Work Act 2009* (Cth) ss.324, 326.

[251] Ibid at s.279(1).

[252] *Public Service Act 1999* s.23(4).

[253] https://atotaxrates.info/allowances/ato-reasonable-travel-allowances/.

[254] Exhibit CPSU15.

[255] Ibid at paragraph 67.

[256] Exhibit CPSU8 at 4.64.

[257] CPSU Final Submissions– Volume 4 at page 40.

[258] *See* DIAC Agreement, clause 3.6; ACBPS Agreement, clause 14.1.4.

[259] "Approving authority" is defined in s.4 of the LSL Act as including as the Chief Executive Officer of the employing agency with the term Chief Executive Officer defined as including the Agency Head within the meaning of the PS Act.

[260] CPSU Final Submissions– Volume 2 at page 345.

[261] DIAC Agreement, Clause 7.45.

[262] ACBPS Agreement, Clause 17.5.6.

[263] DIAC Agreement, Clause 7.10.

[264] ACBPS Agreement, Clause 17.5.9.

[265] Ibid at clause 17.5.11.

[266] Ibid at clause 17.5.18.

[267] Transcript of proceedings (8 December 2017) at PN5471.

[268] [2018] FWCFB 1691.

[269] [2018] FWCFB 3936.

[270] Exhibit CPSU34 at paragraphs 74-83.

[271] Transcript of proceedings (25 October 2017) at PN2049-PN2107.

[272] [2018] FWCFB 3415 at [42].

[273] AE888602, DIAC Agreement at clauses 2.9-2.23.

[274] *See* AE888602, DIAC Agreement at clause 2.9-2.19.

[275] [2016] FWCFB 7641 at [14].

[276] Ibid at Schedule.

[277] Ibid at [97].

[278] [2018] FWCFB 3415 at [41].

[279] *See* Department of Defence Enterprise Agreement (AE425115) at clause A5; Department of Human Services Enterprise Agreement (AE425884) at clause A9; Department of Agriculture and Water Resources Enterprise Agreement (AE424941) at clause 12; Department of Prime Minister and Cabinet Enterprise Agreement (AE424976) at clause 32; Department of Employment Enterprise Agreement (AE418262) at clause 255; Australian Taxation Office (ATO) Enterprise Agreement (AE425011) at clause 255 and Australian Public Service Commission Enterprise Agreement 2018-2021 (AE500637) at clause 262.

[280] 67 CPSAR 113.

[281] Ibid at 3.

[282] A0389.

[283] Ibid at clause 8.

[284] AE418374.

[285] Ibid at clause F2.

[286] [2016] FWCFB 7641 at [74]-[75].

[287] Exhibit CPSU12 at MS-2.

[288] (2015) 246 IR 380.

[289] Ibid at [38].

[290] Exhibit CPSU9 at clause 736.

[291] Exhibit DIBP30 at clause 9.28.

[292] AE888602, DIAC Agreement at clauses 11.13-11.15.

[293] Exhibit DIBP12 at MV-22.

[294] Ibid at MV-21.

[295] Ibid at page 7.

[296] *See* Farstad (Indian Pacific) Pty Ltd (Engineer Officers) Offshore Oil and Gas Enterprise Agreement 2015 (AE415626); Teekay Shipping (Australia) Pty Ltd/AIMPE (Engineer Officers) Government Services & Security Fleet Enterprise Agreement 2011 (AE899699); Teekay Shipping (Australia) Pty Ltd/AIMPE (Engineer Officers) Tanker Fleet Enterprise Agreement 2011 (AE898910); Teekay Shipping (Australia) Pty Ltd/AIMPE (Engineer Officers) Dry Cargo Fleet Enterprise Agreement 2011 (AE898987).

[297] Transcript of proceedings (8 December 2017) at PN5105-PN5106.

[298] Exhibit AIMPE3 at section 6.0.

[299] Ibid at section 6.1.

[300] [2012] FWAFB 6612 at [35].

[301] AE899699.

[302] Ibid at Part 6(a), (b).

[303] AE890227, ACBS Agreement at clause 22.8.

[304] Transcript of proceedings (5 December 2017) at PN2922-PN2935.

[305] AE890227, ACBPS Agreement at clause 22.24.2.

[306] Ibid at clause 22.24.3.

[307] Transcript of proceedings (8 December 2017) at PN5124-PN5132.

[308] CPSU Finals Submissions, Claim C68 at Annexure 3 of Volume 3.

[309] Exhibit CPSU32 at paragraphs 190-194.

[310] Exhibit DIBP16 at paragraphs 271-273.

[311] (2010) 192 IR 124.

[312] (2016) 244 FCR 178.

[313] Exhibit DIBP30 at clause 12.2.

[314] MA000124.

[315] [2000] HCA 16.

[316] Ibid at 30.