



Australian Government
Australian Public Service
Commission

Enterprise Bargaining Guide

Preparing to bargain

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Disclaimer

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The information and suggestions contained within this guide are not, in any way, legal advice. This guide is not a substitute for independent professional advice. Where required, practitioners should obtain appropriate professional advice relevant to their particular circumstances. Agencies should supply any legal advice sought to other agencies as required by legislation.

Links to external websites

Where external websites are referenced or linked to, they are provided for the reader's convenience and do not constitute endorsement of the materials on those sites.

A. Overview of the Guide

This guide covers some of the key areas and questions that Commonwealth agencies should consider during the enterprise bargaining process. *Preparing to Bargain* represents the first part of the guide. Later sections deal with the bargaining process, post-bargaining considerations and some of the risks associated with bargaining. These separate sections will be progressively released during 2018. A number of human resources and workplace relations practitioners from a number of Australian Public Service (APS) agencies have been consulted in the development of this guide.

What are enterprise agreements?

Enterprise agreements are collective industrial instruments that set employment conditions for employees to whom they apply and are made between the employer and applicable employees, following negotiations between the parties (which may include their representatives). Enterprise agreements are regulated by the national workplace relations system established by the *Fair Work Act 2009* (Cth) and other relevant legislation.

Key points

- ✓ This guide provides only general guidance materials that are meant to be purely advisory in nature.
- ✓ This guide seeks to help workplace relations practitioners refresh their knowledge on bargaining.

B. Key Players in Commonwealth Bargaining

This part deals with some of the key stakeholders involved in enterprise bargaining in the Commonwealth public sector.

B1 | Role of the Australian Public Service Commission (APSC)

The APSC provides advice and information to agencies about the application of the Government's workplace relations policies, including bargaining. The APSC monitors the progress of bargaining across the Commonwealth public sector and reports on emerging strategic issues to the relevant Public Service Minister.

The APSC and the APS Commissioner are not bargaining representatives for the purposes of individual agency agreements.

B2 | Role of agency senior leadership

In Commonwealth enterprise bargaining, agency heads act as the employing authority for the Commonwealth as defined in the *Fair Work Act 2009* (Cth) and other relevant legislation where the Commonwealth is ultimately the employer. Agency heads are responsible for the bargaining process and ensuring their agency complies with Government policy where applicable.

During bargaining, an agency head may delegate their authority to a 'chief negotiator' to bargain on their behalf. The chief negotiator attends bargaining meetings, conducts negotiations and is responsible for ensuring their agency's objectives in bargaining are achieved.

The role of the Senior Executive Service (SES), however described, is to provide strategic leadership in Commonwealth agencies. This includes promoting cooperation within and between agencies to deliver outcomes across agencies and portfolios, and providing strategic direction for agencies' bargaining objectives. In some agencies, EL2 employees may share the responsibilities outlined in this section.

Further information:

Are SES employees covered by enterprise agreements?

It has been the case previously that some SES employees have been covered by an enterprise agreement. However, most SES employees have typically been covered by individual contracts or determinations made under relevant legislation. These arrangements are appropriate given the status and complexity of SES roles and work they perform. SES employees are part of the senior management group within individual agencies and play an important role in explaining and promoting the management position throughout the bargaining process. Having SES employees negotiate and provide strategic direction on the creation of an enterprise agreement, when those employees are also covered by the enterprise agreement, could lead to allegations of perceived conflicts of interest.

B3 | Role of employee bargaining representatives

An employee bargaining representative is a person (or organisation) 'appointed' to negotiate an enterprise agreement on behalf of an employee covered by the agreement. Employee bargaining representatives can be union representatives, other employees, professional associations or any other persons nominated in accordance with the *Fair Work Act 2009* (Cth). Once nominated, the legislation affords specific rights and obligations to these bargaining representatives. A union will be the default bargaining representative for an employee member who does not make a specific appointment.

B4 | Role of the Fair Work Commission

The Fair Work Commission (the FWC) is Australia's national workplace relations tribunal. The FWC's powers and functions are derived from the *Fair Work Act 2009* (Cth) and are carried out by these members and its administrative staff. The FWC generally does not get involved in the preparatory stages of bargaining (i.e. before bargaining commences). The one exception is where an employer refuses to bargain for an enterprise agreement. In this circumstance, the FWC may direct the employer to commence bargaining by making a majority support determination on application by a representative of the employees wishing to bargain.

Further information:

What is a majority support determination?

Where the majority of employees want to bargain for a new enterprise agreement and the employer refuses, section 236 of the *Fair Work Act 2009* (Cth) provides that an employee bargaining representative can apply to the FWC for a majority support determination. Where the Commission is satisfied that a determination is warranted and it is made, the employer is required to bargain for a new enterprise agreement. The making of a majority support determination does not, however, compel the employer to make an enterprise agreement. It simply draws the employer into the bargaining process.

C. Setting the Stage for Bargaining

This part deals with some of the key issues agencies should consider prior to commencing negotiations.

C1 | Setting up a bargaining team

Chief Negotiators need to assemble a team of capable individuals who can support them inside and outside of the bargaining room. These individuals need to share the agency's values and their vision for bargaining and be highly engaged, resilient, suitably experienced and actively looking to work in a bargaining team. The sometimes high profile and protracted nature of bargaining may discourage some from participating in the bargaining process. There is no legal requirement or restrictions on who can be on an agency's bargaining team. Chief Negotiators must carefully consider the skills and capabilities they need.

Negotiation roles

This refers to the individuals present at the bargaining table. These team members bargain for the agency and represent management. Generally, a maximum size of four negotiation roles is recommended for most agencies, with fewer individuals for smaller agencies. This group should contain at least one operational manager with front-line experience in applying the current enterprise agreement. These individuals must also have appropriate standing with the senior leadership who ultimately endorse the negotiation team's proposed enterprise agreement.

Support roles

This refers to the individuals who assist the Chief Negotiator and team members in preparing for bargaining. This could include drafting correspondence, performing analysis, collecting feedback and other coordination activities. These individuals generally have a human resource (HR) and/or industrial relations (IR) background with a sound understanding of the operation of the current enterprise agreement.

Subject matter experts

Subject matter experts are the individuals brought into the bargaining team on an as needs basis. These individuals from various fields may assist with building a communications plan, providing legal advice and developing financial models. Subject matter experts will not be involved throughout bargaining, but will make themselves available as required by those in the negotiation and support roles. The key skills and capabilities of the negotiation team, support team and subject matter experts may include:

Negotiation roles	Support roles	Subject matter experts
<ul style="list-style-type: none"> • Negotiation skills • HR and IR knowledge • Communication skills • Resilience • Organisational knowledge • Necessary seniority 	<ul style="list-style-type: none"> • HR and IR knowledge • Practice using the agreement • Analytic skills • Co-ordination skills 	<ul style="list-style-type: none"> • Communication • Finance • Legal • Data analysis • Mediation • Operational history

C2 | Evaluating the agency's context

The second substantive step in preparation is to understand the context in which bargaining will occur. Agencies could undertake this in a number of ways, for example using the well known SWOT analysis (or Strengths, Weaknesses, Opportunities and Threats). Whatever approach is taken, the agency's goal is to develop a holistic understanding of its situation. This exercise should account for the stakeholders that are involved, to varying degrees, in bargaining.

Commonwealth agencies operate in challenging circumstances. Their legislative framework, obligations to government and taxpayers ensure a need to understand their strategic environment. Agencies must appreciate the risks involved in enterprise bargaining and what they need to achieve from the process. Agencies should consider their operational goals (as discussed in corporate/business plans, surveys, and in consultation with senior management) as well as any productivity gains that may be brought about. Regardless of which model is employed in the analysis, the goal is to promote strategic thinking and planning and will always be dependent on the nature of the agency's business and outcomes sought. Enterprise agreements should achieve an appropriate balance between the interests of the agency and their employees, but must support the operations of the agency and provide its workforce with the support and flexibility needed to manage current and future pressures.

Understanding the agency's macro context

Examining the agency's context from the broadest possible perspective allows the agency to gain an understanding of its macro context and determine some of the underlying forces that may be present in bargaining. There are many different ways to undertake this analysis and all are equally valid as long as they assist an agency in thinking strategically.

A useful approach to consider is the PEST model.¹ This encourages consideration of the Political, Economic, Social and Technological environments. The illustration below uses the four categories to note key issues and considerations that an agency might face when preparing for bargaining. This example is not an exhaustive list of possible issues, nor would it apply in every agency's context.

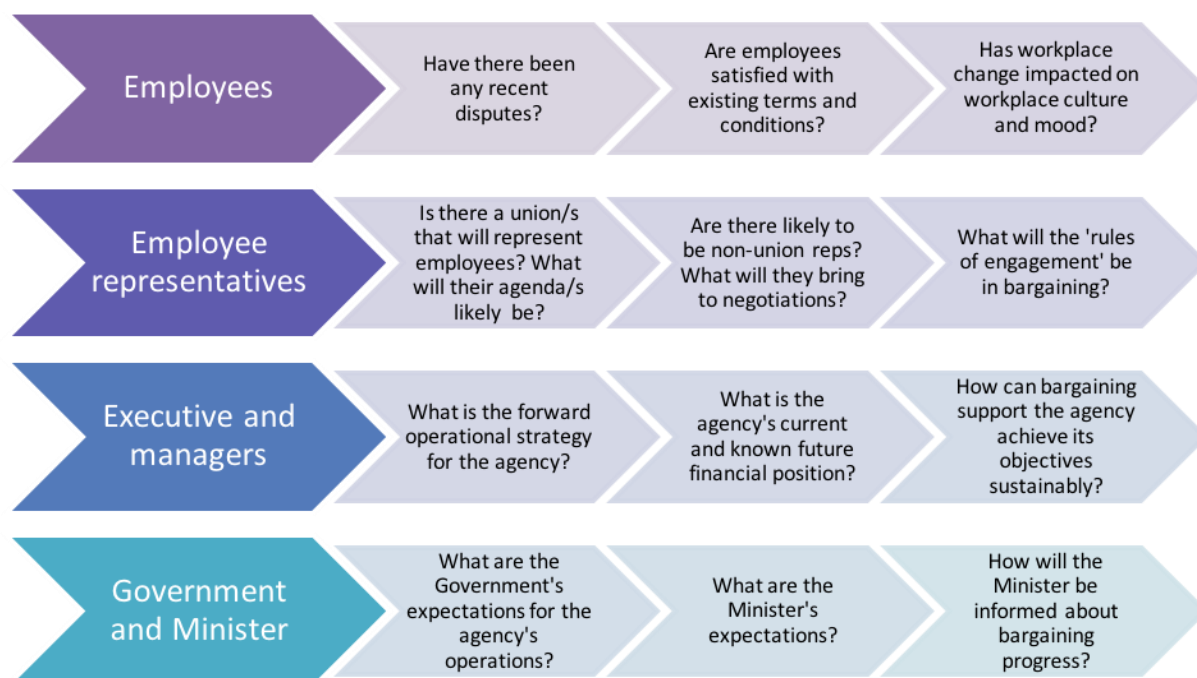
Political	Maintaining the reputation of the Commonwealth as an employer
	Managing Machinery of Government changes
	Complying with Government policy and expectations
Economic	Addressing underlying award changes
	Providing affordable pay increases given the agency's budget and taking into account productivity gains
	Mitigating the potential for disruption to service delivery operations
Social	Meeting future business needs and operational requirements
	Meeting community standards and expectations
	Promoting workplace flexibility
Technological	Introducing new systems that will disrupt existing work patterns
	Addressing the changing nature of work and employee expectations
	Reforming workplaces to adapt to technological change

¹ AGUILAR, F. J. (1967). *Scanning the business environment*. New York, Macmillan.

Understanding the micro context

Following on from the influences of the macro environment, attention should be given to the internal operations and cultural climate of the agency. This involves thinking about how current operational issues and workplace relations matters may influence bargaining for an enterprise agreement.

In this exercise, it is useful to identify the key stakeholders and individuals the agency will need to engage with during bargaining. The example below identifies some of the key stakeholders and poses questions agencies could consider.



Some of these stakeholders will not be actively involved in the bargaining process itself, but they could have an impact on how bargaining progresses. These various stakeholders may have divergent interests, expectations and objectives.

Further information:

It is important to recognise that the steps identified in this guide are not performed in isolation. This guide does not suggest there is a pre-defined, rigid or consecutive order of activities. The various activities presented in this guide from C3 'Consulting with Senior Leaders' to C9 'Timeframes for bargaining' would likely occur concurrently.

For example, an agency may first consult with various internal stakeholders before presenting their findings to senior leadership. Alternatively, an agency could consult with these various groups concurrently and analyse the feedback once it is all collected.

Agencies may even forgo some steps and perform others that are not discussed in this Guide. It all depends on the individual circumstances of each agency and the resources available to each bargaining team.

Pulling it all together and thinking strategically

Strategic thinking affords the agency the opportunity to pull together assumptions and conclusions regarding what they should take into account before progressing to enterprise bargaining. Below is an illustration of the kinds of questions agencies should ask themselves prior to bargaining. This is not an exhaustive list and will vary between agencies, based on individual circumstances. These questions exemplify the issues that may be present, ranging from prior experiences in bargaining to ongoing operational requirements and future priorities.

Reviewing existing arrangements	Is the current enterprise agreement working for our Agency and staff?
	Can issues with the current agreement actually be resolved in bargaining?
	Do changes need to be made to comply with Government policy or legislation?
Determining strategic priorities	What do our Portfolio Budget Statements and corporate plan outline?
	Have we received guidance from our Agency Head or Minister?
	What future flexibilities might we need to propose to our staff?
Assessing the last round of negotiations	Where did we succeed in negotiations?
	Where did we fall short in negotiations?
	What other lessons from the previous bargaining round will inform our approach?
Reviewing employee engagement, trust and morale	Are staff satisfied with our current enterprise agreement?
	Are staff engaged with the direction management espouses?
Anticipating claims/proposals	What will the bargaining representative want from bargaining?
	What will our staff want from bargaining?
	Is there capacity to genuinely reach agreement with bargaining representatives?
Analysing the underlying award and other legislative obligations	Is there a new or revised underlying award?
	Has legislation been updated since the last round of bargaining?
	Have there been any legal decisions since the last bargaining round that impact on the operation of the current agreement or bargaining process?
Analysing current operations and service delivery requirements	Will our budget and funding requirements change in the near future?
	What will be our future service delivery requirements?
Determining if bargaining is necessary	Do we need a new enterprise agreement?
	Have we assessed the viability and appropriateness of all workplace arrangements available to us and our staff?

What is the purpose of an enterprise agreement?

Enterprise agreements are not simply negotiated as ends unto themselves. Apart from being industrial instruments that set out the terms and conditions of employment, they can assist or hinder an agency's capacity to meet their business requirements and operational needs. Enterprise agreements must balance the expectations and general needs of employees with the agency's capacity to perform its functions.

Did you know?

Agencies are not required to renew or enter into enterprise agreements under the Government's bargaining policy or under industrial legislation. Agencies may legitimately choose to not initiate bargaining when the expiry date of their current enterprise agreement is approaching, but they can be compelled to bargain for an enterprise agreement by employees through a majority support determination (see p.6).

Do you need to bargain a new enterprise agreement?

After evaluating the macro and micro contexts, an agency could determine that it is not necessary to bargain for a new enterprise agreement. This would especially be the case where the current agreement requires no change from an operational perspective and the agency is aware that the majority of its employees have no expectation that bargaining is necessary. For example, employees' views could be gauged via surveys and through consultation.

Some agencies have never bargained for an enterprise agreement. These agencies use other equally valid and legitimate workplace arrangements to provide pay, and other terms and conditions of employment to employees. Further, many agencies have overlapping industrial instruments that cover different groups of employees. For example, an agency could retain an enterprise agreement past its nominal expiry date and their Agency Head could make a determination that applies an annual pay increase, or utilize individual arrangements permitted at law to supplement conditions of employment.

Implementing a determination over the top of an enterprise agreement that works well for the agency and its staff could be a viable alternative to bargaining. The agency would typically consult with employees and, where they choose, their representatives regarding the proposed terms of the determination before the determination is implemented. This approach, in appropriate circumstances, could deliver an outcome to employees more quickly than through the bargaining process for a new enterprise agreement.

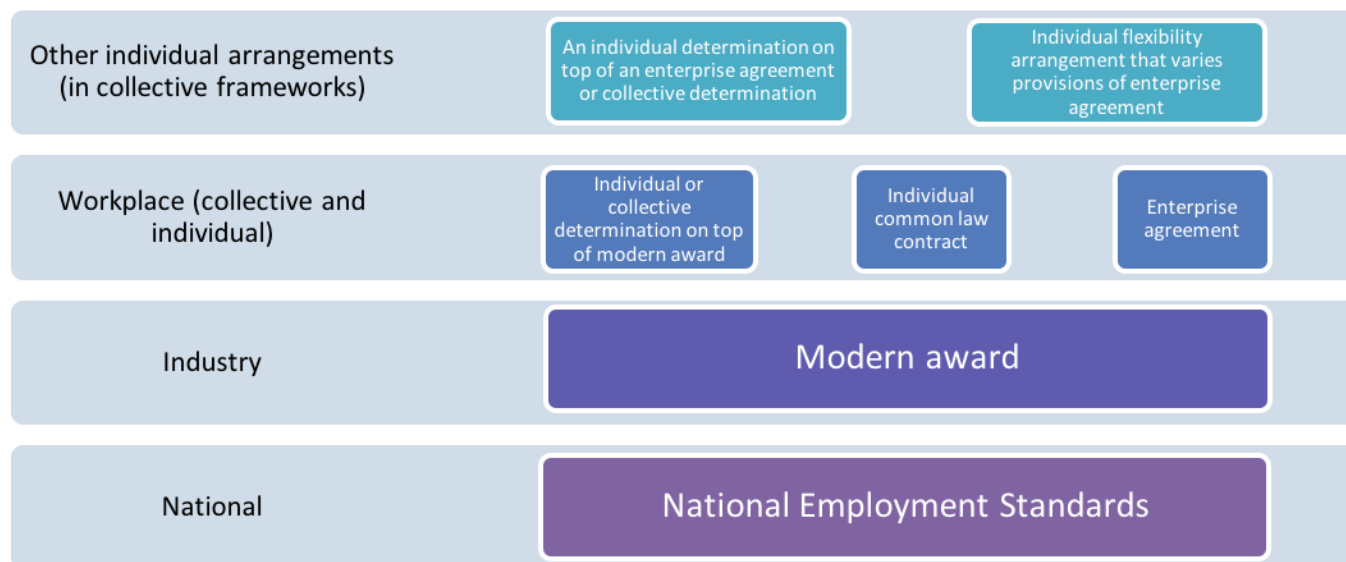
Further information:

What happens when an enterprise agreement nominally expires?

An enterprise agreement continues after its nominal expiry date, unless it is replaced by a new enterprise agreement, or it is terminated by the FWC. When a determination is made on top of an enterprise agreement, the underlying enterprise agreement continues to operate. The determination can only maintain or improve the terms and conditions applicable under the enterprise agreement; it cannot diminish provisions in the enterprise agreement. Agencies should seek legal advice and consult with the APSC when deciding to change employment arrangements.

How do agreements fit into Australia's workplace relations framework?

The illustration below demonstrates how a combination of workplace arrangements can operate together to determine an employee's terms and conditions of employment. Many Commonwealth agencies already use multiple workplace arrangements in practice. For example, specialist employees may have an individual flexibility arrangement in conjunction with an agency's enterprise agreement, or they may be subject to an individual determination or contract. The illustration below shows the different employment arrangements available.



National system

At the national level, the National Employment Standards (NES) are enshrined in the *Fair Work Act 2009* (Cth). These are minimum entitlements that must be provided to all employees and cover matters such as leave, hours of work, public holidays, termination and redundancy. Workplace arrangements cannot reduce the NES.

Industry arrangements

The industry level includes modern awards as determined by the FWC. Awards are a safety net that supplement the NES and prescribe the further minimum conditions that apply to specific industries and workforces. Awards applying to Commonwealth employment include the *Australian Public Service Enterprise Award 2015* and the *Australian Government Industry Award 2016*. In practice, the applicable award is only relevant where an enterprise agreement is not operating in a Commonwealth agency. Otherwise, the relevant award is the benchmark for the application by the FWC of the 'Better Off Overall Test' (BOOT) when approving a proposed enterprise agreement. The FWC must be satisfied that every employee covered by the proposed enterprise agreement is better off under that agreement than they would be if they were employed under the relevant award.

Enterprise level / Workplace

Several workplace arrangements can build on a modern award. A determination may only maintain or improve award provisions and can be made on a collective or individual basis. Common law contracts are individual agreements, which can also supplement award conditions. The provisions of the award cannot be contracted out

of via this individual arrangement (each award term must be met) but there is scope for monetary benefits to be offset in certain circumstances, through a 'rolled' up rate of pay.

An enterprise agreement is a collective agreement reached between an employer and more than one employee, and generally negotiated through their respective representatives. Enterprise agreements must be approved by the FWC before they can lawfully commence and are assessed against stringent approval requirements (which include process steps and content requirements, including the BOOT).

Other individual arrangements

Individual arrangements (such as determinations or common law contracts) can also build on the employment arrangements in a collective determination, or enterprise agreement. A further individual arrangement relevant in a collective context is an individual flexibility agreement (IFA). An IFA is made directly between an employer and an employee and can vary specified terms of an enterprise agreement as long as the employee will be better off overall on the IFA in comparison to the terms of the enterprise agreement. IFAs do not need to be approved by the FWC, but they need to be genuinely agreed and may be terminated on 28 days' notice.

Further information:

What is an offset/absorption clause?

Modern awards provide various allowances and other monetary entitlements that apply to differing sections of the workforce.

An offset clause is a term in a common law contract that specifically states that remuneration over and above rates set in the modern award is directed to offset the employer's obligation to pay other specified monetary benefits.

This allows employers to absorb particular monetary obligations under the award as part of an employee's overall remuneration package. Without this clause, agencies may be required to pay, for example, the various allowances provided for in the relevant award on top of their remuneration package.

Agencies should seek legal advice when considering the inclusion of an offset clause in an individual employment arrangement.

What is the Better Off Overall Test (BOOT)?

The BOOT is conducted by the FWC when it assesses whether employees would be better off overall on a proposed enterprise agreement in comparison to the relevant modern award. The test is not conducted on a line-by-line basis, but it is as relevant to the position of every employee under the enterprise agreement.

Agencies should seek legal advice and/or consult with FWC materials to learn more about the BOOT.

C3 | Consulting senior leadership

Senior leaders play an essential role in bargaining and should therefore be consulted during the development of the agency's bargaining position.

Some agencies establish a steering committee that oversees and guides bargaining in the agency. Membership of such a committee could include the agency head or chief operating officer, select senior managers and the human resources manager. Generally, committee members should represent key areas of the organisation, including finance and human resources. The committee generally endorses the agency's bargaining position, holds the negotiation team accountable to that mandate and assists with the making of strategic decisions that guide the bargaining process.

Risk management

Agencies should develop a risk management plan when preparing for bargaining.

A risk management plan will identify and assess each risk, determine risk criteria, establish the owners of risk outcomes and settle on appropriate strategies and activities to mitigate risks. Senior leaders need to 'own' these risks as they could have significant reputational, financial or operational impacts for the agency.

The risk management plan should be endorsed by the agency's senior leadership. Below is a rough outline of a simplistic risk plan that identifies a number of senior leaders who act as owners of specific risks. It is important to remember that agencies create risk plans according to their own internal procedures and this example is intended to be purely illustrative.

In this example, 'Controls' refers to actions taken by the agency prior to the risk eventuating. 'Risks' refers to the potential issues in question. 'Actions' refers to the strategies implemented if the risk eventuates. Depending on the risk calculations made, risk owners may sit with senior leaders of different levels of seniority.

Senior leaders may have their own perspectives on the grading of a specific risk in a risk matrix or on who should be the owner of a specific risk, which is why consultation is necessary. The consultative process does not guarantee the agency has the capacity to deal with all the possible risks effectively, but it does ensure the necessary discussions occur beforehand.



C4 | Consulting line managers

What do managers want from an enterprise agreement?

Managers are an invaluable resource for enterprise bargaining teams. Consulting with line managers in order to determine their recommended changes to support agency operations is a critical step in the preparatory phase. Line managers understand the operational needs of the agency and apply the enterprise agreement on a daily basis when dealing with staff. They may also interpret clauses, what conditions are provided for and how they affect their operations differently to corporate functions or the bargaining team. Enterprise agreements should always support the agency's operations and the views of line managers who rely on it should be sought whilst preparing to bargain.

Managers' roles in bargaining

Bargaining for an enterprise agreement can often be a change management process. When agencies seek to commence enterprise bargaining, employees generally understand that some degree of change will be proposed. Even if the changes proposed by an employer in bargaining are not substantial, the immediate signal to employees will typically remain the same.

As such, an important element of any change management process is determining the identity of the change agents for the agency. For most agencies, they will be the line managers of the organisation who assist in facilitating the delivery of messages from senior leaders to employees.

Consulting with managers before bargaining commences offers an agency the opportunity to seek their feedback on the current enterprise agreement. This could be achieved, for example, through a survey of line managers. The consultative process helps develop a bargaining position that accounts for the views of people who actively use the enterprise agreement every day. Feedback from managers should be collated and broadly summarised, to identify key topics of interest and to accurately capture the relevant proposed changes.

Managers also have a stake in bargaining because their enterprise agreement can both reflect and codify their managerial prerogative. Beyond offering feedback, managers are instrumental in assisting employees understand bargaining proposals and the progress of bargaining generally. Managers act as a conduit, collecting feedback from employees and communicating the moods and attitudes of affected staff to the bargaining team and senior leaders.

Below are some simplified examples of the kinds of bargaining issues different groups of line managers may be interested in.

**Economics policy
managers - Studies
assistance
arrangements**

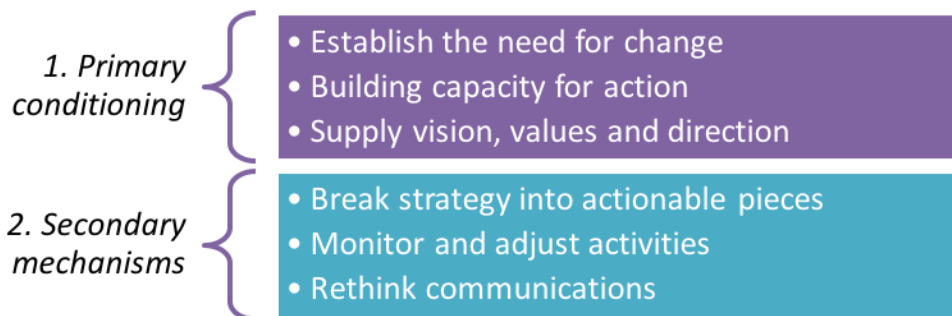
**Remote
programme
managers -
Remote localities
allowances**

**Call centre
managers - shift
worker
arrangements**

**Biosecurity
inspection
managers -
overtime
arrangements**

Explaining change to managers

Agencies must recognise that various groups of employees, managers included, see change differently and are often legitimately concerned about their own circumstances. The agency should first explain the rationale for any proposed change and achieve management support for this. This is critical, as managers will similarly need to explain to employees why change is necessary. This approach can be illustrated from a change management perspective by a two-step process, as set out below.²



The first step, called ‘primary conditioning’, reflects the need to prepare an agency’s managers for the bargaining process. It requires senior leaders to espouse a clear vision and explain the agency’s context. This is essentially a scene setting exercise to prepare managers for bargaining. The second step, termed ‘secondary mechanisms’, refers to the need to reinforce and refine the original communication efforts. This would occur throughout each stage of bargaining. Some examples of activities that agencies can undertake when consulting with managers are outlined below.

Primary conditioning - activities



- ☐ surveying managers on key issues in the current enterprise agreement
- ☐ introducing a mailbox to take suggestions on bargaining
- ☐ releasing FAQs on industrial rights and obligations during bargaining
- ☐ providing communication materials on facts about bargaining to managers
- ☐ run forums for managers to ask questions and address staff concerns on bargaining
- ☐ senior leaders holding talks to share the direction and vision for the agency

Secondary mechanisms - activities



- ☐ re-surveying managers on pros and cons of proposed draft enterprise agreement
- ☐ use a mailbox to direct queries managers receive from staff
- ☐ releasing factsheets on the draft agreement with scenarios explaining proposed changes
- ☐ providing communication materials on facts about the progress made in bargaining
- ☐ hold town hall meetings for managers and staff to ask questions about the draft agreement
- ☐ actively and accurately correcting misinformation

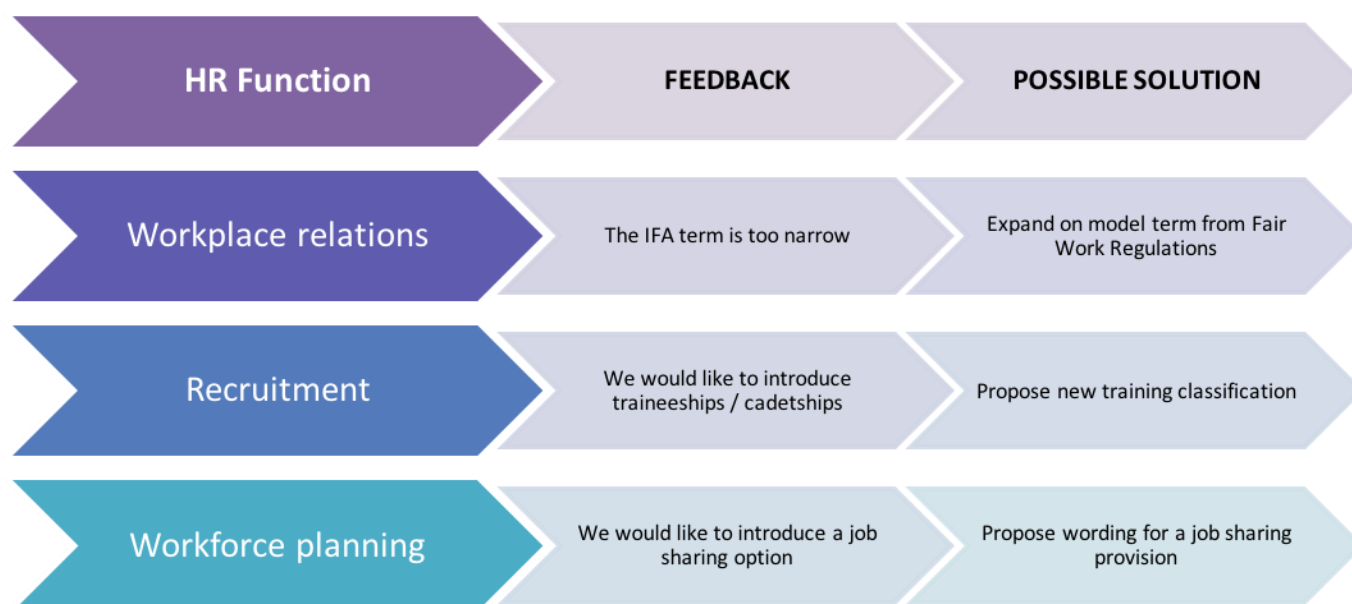
² PETTIGREW, A. & WHIPP, R. (1991). *Managing Change for Competitive Success*. Oxford, Blackwell.

C5 | Consulting corporate functions

Human Resource (HR) Personnel

HR personnel must be consulted prior to bargaining as, like managers, they apply and interpret the enterprise agreement on a daily basis. Each specific area of HR can offer important perspectives on the operation and implementation of the enterprise agreement. These personnel are most likely to know which aspects of an enterprise agreement are not operating as intended, are causing inefficient administration within the agency, or do not adequately cater for the needs of sections of the agency's workforce.

Agencies should seek feedback from their HR personnel on how the current enterprise agreement is operating in practice and how it is currently administered. Directly engaging with HR teams through workshops is one approach. Workshops can be an effective way for HR personnel to discuss challenges and consider options for improving the enterprise agreement. The simplified example below is an outline of the feedback received from a couple of HR functions identifying a proposed change to the existing arrangements and the relevant solution.



Other Agency Functions

Whilst preparing for bargaining, agencies should also consult with all functions within their organisations. Functions may be involved in bargaining and could potentially offer subject matter experts. Bargaining teams should not make assumptions about the 'value' other functions could offer to the bargaining process, because each function will have their own perspective on the terms of the proposed enterprise agreement. Below are some simplified examples of the kinds of bargaining issues other functions may be interested in.

Property -
changes to
accommodation
arrangements

**Information
Technology** -
changes to
workforce
scheduling

Finance -
funding the
remuneration
proposal

**Legal and
Communications**
- specialist
classification
structures

C6 | Consulting employees

Communication with employees is an ongoing process, and does not start and stop at the commencement and conclusion of bargaining respectively. Communication should continue throughout the bargaining journey, which includes the period between bargaining rounds. A key to achieving successful bargaining outcomes for the agency and employees is for employees to regard management as a trusted and reliable source of information.

Communicating directly with employees

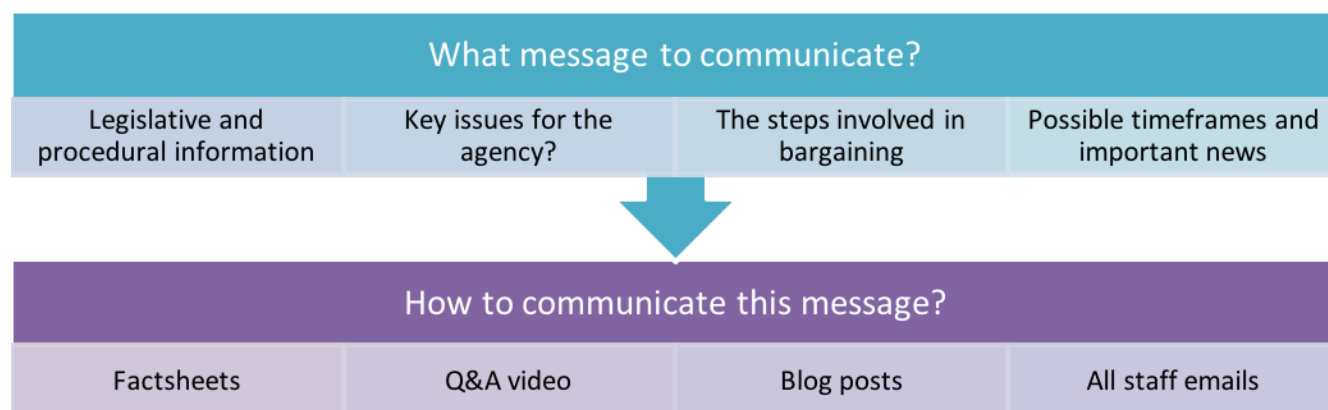
Agencies need to communicate with their employees prior to bargaining. Agencies should communicate early on to establish a supportive and informed climate for bargaining as described in section C3 ‘Consulting managers’ in order for employees to be fully engaged on the bargaining journey. An agency can gauge the mood and attitudes of its employees by talking directly to them (e.g. at forums or branch/team meetings), or via other means which may provide anonymity and/or draw out more frank feedback (e.g. surveys or a designated email or mailbox).

Consulting with employees does not necessarily mean the agency will agree with the suggestions or feedback received. However, the process will highlight key areas of concern and interest for employees. Agencies should then respond to the feedback they receive from employees in a timely manner. Properly responding can be just as important as consulting. The agency should reiterate what may or may not be achievable and explain why. Employees are more likely to remain engaged with the process where they believe the agency has considered their views and been upfront and open with them.

Establishing your communications methods

Agencies have to communicate different messages or information to employees prior to, during and after bargaining. Multiple communications channels and strategies will likely be needed. The examples below illustrate how different communication approaches can be tailored to a particular message. For example, legislative and procedural information that simply outlines employee rights and obligations during bargaining could be best placed in factsheets on the agency’s intranet. Such information can then be accessed at any time, updated as required and employees can be directed to the information when related questions arise.

It is important to establish a simple, authoritative source of information (which may be delivered through multiple channels) early in order to minimise the risk of misinformation. Depending on the agency, the source of information may be the agency head, head of corporate/HR, chief negotiator, or another nominated, credible spokesperson.



Agencies should communicate and consult with their employees throughout bargaining. Employees want to know how proposed changes to the enterprise agreement will affect them. If agencies fail to provide employees with accurate and timely updates on bargaining, misinformation and rumours can take hold. Employees could form an unbalanced view about the proposed agreement if the agency does not provide employees with regular and appropriate updates and does not correct misinformation.

Agencies may wish to communicate specific messages over the course of bargaining, for example:

When?	What?
At the start of bargaining	The agency's major goal for bargaining, how it wishes to conduct bargaining and the benefits of facilitating success in the bargaining process. For example, an agency may wish to outline its plan to deliver a new enterprise agreement before the current agreement expires in order to provide pay rises as soon as is possible.
Before a bargaining meeting	The agency's genuine involvement in bargaining, the agenda for and objectives of the meetings, an update on the status of bargaining and, where appropriate, issues standing in the way of the proposed agreement going to employees for a vote.
After a bargaining meeting	What was discussed during the bargaining meeting, efforts made and reasons for the position adopted, any resolutions and steps to be taken to go to a vote.
At other, regular intervals	Actions taken by the agency to facilitate agreement on contentious terms and conditions and/or position-specific case studies that show how employees would be better off or otherwise affected under the proposed agreement.
In response to incorrect information (e.g. a media report)	The agency's position and the information that been incorrectly published. For example, where an employee bargaining representative has incorrectly stated that the average employee would be worse off under the proposed agreement, an agency may wish to provide clear figures to correct the misstatement.

Communicating with employees through managers

Helping managers communicate with their employees about the bargaining process is important, as discussed in Section C3 'Consulting Managers'. Whilst it is essential for agencies to have a single source of information, as discussed in Section C6 'Consulting Employees', it is natural that employees like to receive such information face-to-face. When this face-to-face communication comes from someone who they know and trust, such as their immediate manager/supervisor, it is more likely to be understood and provide a platform for an open and healthy discussion about the process. Communications relevant to the bargaining process need to be supported by providing managers with the tools and information necessary to communicate messages directly with their staff.

It is, therefore, imperative that agencies assist their line managers by providing them with constant timely and accurate information about developments in bargaining and related processes. Feedback received from employees through these exchanges will also enable managers to capture any issues/concerns and work with the agency's bargaining team and/or senior management to ensure that matters are appropriately addressed.

C7 | Developing a bargaining position

An informed bargaining position

Agencies should not develop a bargaining position in isolation. An agency's bargaining position will be informed by analysing the agency's objectives, context, consulting with senior leaders, managers and employees, as discussed earlier in this guide. In practice, an agency would perform all these activities, while concurrently developing its bargaining position. Any feedback received will also help to support and inform the bargaining position ultimately taken.

Legislative obligations

Agencies need to consider their legislative obligations, as identified in Section C1 'Evaluating the agency's context'. Changes to legislation or its application over the life of the current enterprise agreement may require amendments to the proposed enterprise agreement. Proposals to address legislative changes must form part of the agency's bargaining position and should be identified as such.

Agencies must ensure the proposed enterprise agreement will comply with the National Employment Standards, pass the 'Better Off Overall Test' applied by the FWC, and meet the content and process requirements for approval. Agencies could consider seeking legal advice where they are unsure about any compliance related obligations.

Further information:

Enterprise agreements and other workplace arrangements cannot contradict or provide less of an entitlement than the National Employment Standards ('NES') established in the *Fair Work Act 2009* (Cth). The NES are a guaranteed set of minimum employment entitlements provided to all employees in the national workplace relations system.

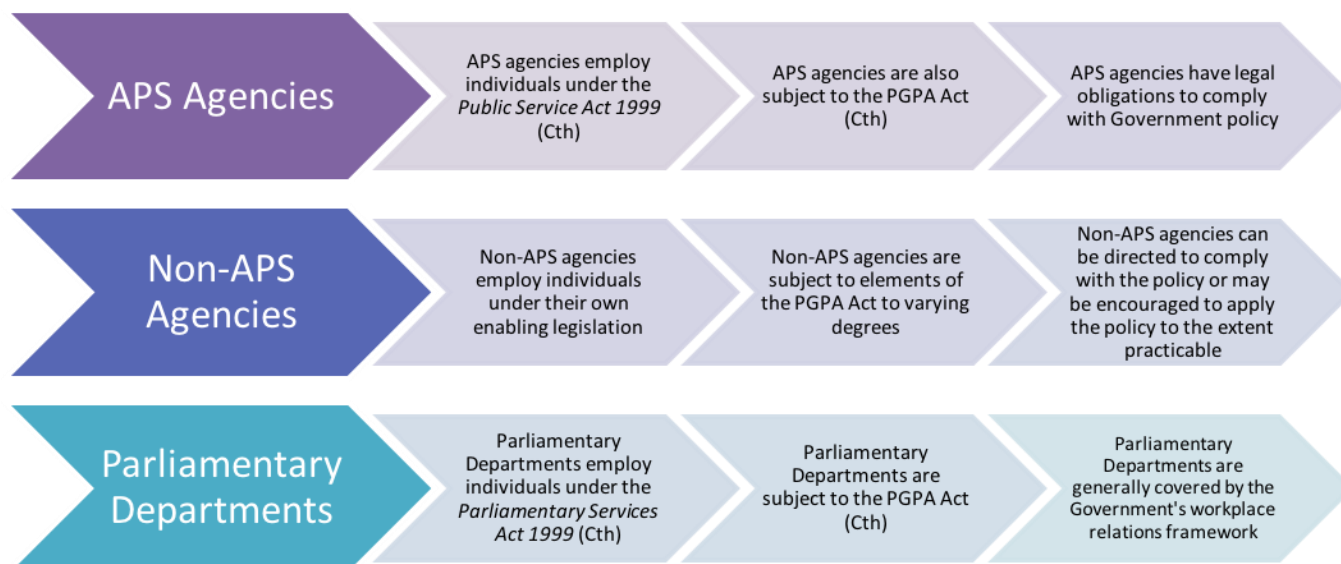
Workplace Relations Policy Framework

The Australian Government periodically publishes a policy framework (the 'policy') that sets the parameters for Commonwealth entities in the development of workplace arrangements. This is a longstanding approach undertaken by consecutive Governments. It is also a common approach taken by State and Territory governments regarding their own state and territory public sectors.

Generally, the policy framework covers remuneration, terms and conditions of employment and related workplace relations practices. The Government may also include rules about approval arrangements under the policy. Depending on the remit of the policy, it may apply to individual or collective arrangements, including enterprise agreements, determinations, IFAs and common law contracts.

The Government's current workplace bargaining policy is dated February 2018.

The illustration below identifies how the policy may generally apply to Commonwealth entities. APS agencies and non-APS agencies operate under different enabling legislation and are subject to the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) to varying degrees. It should also be noted that some agencies have dual staffing powers under both the *Public Service Act 1999* (Cth) and other enabling legislation.



Making comparisons with other employers

Agencies should frame their own enterprise agreement within a wider context, taking into account their own circumstances.

It is not uncommon for Commonwealth agencies to compare themselves with each other, as they share similar classification structures, job roles and may operate under the same bargaining policy. However, only comparing themselves with other Commonwealth agencies has the effect of developing a 'false' internal labour market.

Agencies are encouraged to consider the broad trends occurring across the Australian economy, including State and Territory government agencies and the private sector, rather than taking a narrow focus on Commonwealth agencies that often have their own specific operational circumstances and needs.

For these reasons, Commonwealth agencies should develop their bargaining position based on their own unique circumstances taking into account external information and trends where they are relevant to their operational challenges, government policies and operational goals, rather than simply adopting the practices of other agencies as a matter of course.

Assessing the risk and priority of bargaining positions

Agencies should take into account the risks associated with proposed changes to be pursued in bargaining and prioritise these proposed changes. Some proposals in bargaining will be more contentious than others. These proposed changes could be categorised as more risky and likely to face more opposition from bargaining representatives and employees.

Some risks may not eventuate but it is better to be prepared in advance. This is an exercise the agency should complete before bargaining commences as a means for preparing arguments and counterarguments, and ensuring the bargaining team is able to effectively articulate the case for change.

Agencies should prioritise their bargaining proposals based on importance. This identifies which proposals must happen, as opposed to those that are *desirable*.

The example below is illustrative of how an agency could consider identifying risk and prioritising bargaining positions. The three levels in each category offer a spectrum of expected level of risk and necessity.

RISK	LOW - proposed changes are stylistic, minor drafting changes or for readability
	MEDIUM - proposed changes are for clarification, to change agreement language or change the application of the clause in practice
	HIGH - proposed changes are to employee conditions or are in conflict with anticipated employee and employee representative proposals
PRIORITY	CONVENIENT - proposed changes are stylistic, minor drafting changes or for readability
	DESIRABLE - proposed changes are for clarification, change conditions or update the evidentiary requirements to be satisfied to access conditions
	NECESSARY - proposed changes go to legislative obligations, consistency with the bargaining policy or to meet operating requirements

Outlining a bargaining position

There are many different ways an agency could outline its bargaining position. There are two approaches articulated in this section of the guide. The first approach involves identifying only the terms and conditions where changes are proposed. The second approach involves undertaking a comprehensive clause-by-clause analysis of the enterprise agreement, outlining the agency's bargaining position(s).

Outlining a bargaining position is useful, because it summarises the decisions made and positions taken, and forms a record for the agency of their mandate going into bargaining.

Identifying terms and conditions

Specific conditions could be identified, as illustrated by the hypothetical example below. A justification or rationale should be provided that explains the necessity for a proposed change. The agency could identify what their current enterprise agreement provides for and what position they intend to adopt.

An alternative position could also be identified. Where the agency faces resistance to a proposed change, the alternative position could be considered as a possible fall back at an appropriate time in the negotiation (and have regard to the overall context and status of the bargaining more generally). In some cases, there may not be an alternative position, for example, where a proposed change is required based on legislative changes, or the requirements of Government policy.

Condition or entitlement	Current enterprise agreement entitlement/condition	Proposed bargaining position	Rationale for the proposed change	Alternative position
Higher duties	Minimum of 5 working days before higher duties allowance is applicable	Move to a minimum of 10 working days as a requirement	HR functions and managers support the move to introduce additional rigour to higher duties. Employees working less than 10 days are receiving developmental experience	A minimum of 8 working days before higher duties allowance is applicable
Annual leave	20 days per annum which accrues monthly	Annual leave must be accrued progressively	To meet BOOT requirements as per recent undertakings made by agencies and legal advice received	Nil, the current agreement is inconsistent with the NES
Purchased leave	No requirement for taking leave in blocks	Purchased leave must be taken in blocks of 5 working days	As per consultation with managers, who believe employees are using purchased leave to work de facto part time arrangement	Purchased leave is not taken in a pattern that, in effect, changes employment status
Healthy lifestyle allowance	Allowance is paid in accordance with Health and Wellbeing Policy	Remove the words in accordance from the enterprise agreement	The words 'in accordance with' risks incorporating policies into agreement	Nil, the current agreement is inconsistent with the bargaining policy

Comprehensive comparison of the agreement

Agencies using this approach systematically analyse their current enterprise agreements clause by clause, outlining their positions in a comprehensive manner. This can be an exhaustive list or may simply outline the clauses the agency intends to change. In some cases, it may be an effective exercise to outline the reasons for maintaining the status quo, especially where it is anticipated that bargaining representatives will bring forward claims to change particular clauses.

To some extent, this approach assumes that agencies intend to use their current enterprise agreement as a basis for bargaining. For some agencies, their current enterprise agreement may not work for them anymore and they may wish to re-write it completely. Agencies already operating under streamlined and succinct enterprise agreements would not necessarily need to take this approach.

The hypothetical example below identifies a personal/carer's leave clause and offers a specific bargaining position for each subclause. The rationale for the change is identified for each clause. An alternative position is included. This includes examples of subclauses that could be introduced.

Current clause wording	Proposed bargaining position clause wording	Rationale for the proposed change	Fall-back position in bargaining
F1.1 – Ongoing employees <i>will be granted paid personal/carer's leave on commencement and then, from the first anniversary of their commencement, will be entitled to 18 days personal/carer's leave for each year of service thereafter.</i>	F1.1 – Ongoing employees <i>will be entitled to 18 days personal/carer's leave for each year of service.</i>	The agency is looking to streamline its approach to providing personal/carer's leave. It no longer makes sense to provide an upfront accrual of paid personal/carer's leave as this results in greater unscheduled absences.	Nil, the current arrangements are no longer necessary.
F1.2 – Personal/carer's leave <i>accrues and is credited monthly.</i>	F1.2 – Personal/carer's <i>leave accrues progressively and is credited monthly.</i>	To meet <i>Fair Work Act 2009</i> (Cth) requirements as per recent undertakings made by agencies and legal advice received	Nil, the current agreement is inconsistent with the NES
F1.3 – Unused <i>personal/carer's leave will accrue from year to year, but will not be paid out on separation.</i>	Nil	Legislative obligations are already met	Nil, the current arrangements are sufficient.

C8 | Evidence supporting a bargaining position

Supporting evidence that justifies a bargaining proposal allows an agency to explain its rationale to employees and their representatives. It may also allow the agency to refute the claims of other bargaining representatives. It may not be possible to share the evidence in all situations. Some evidence may also be subjective or open to interpretation.

Qualitative and quantitative evidence

Qualitative evidence takes many forms, including feedback from senior leaders, managers, HR personnel, employees, and legal advice.

Quantitative evidence could refer to data that the agency collects through HR systems, surveys or other databases. For example, system reports can demonstrate usage patterns of specific entitlements and allowances over the life of the enterprise agreement. Other reports may show patterns of work and how specific provisions of the current enterprise agreement are applied in practice.

Evaluating the evidence

Agencies should evaluate their bargaining positions against the evidence they collect. Below are a few examples that demonstrate situations where evidence can inform the agency's bargaining position.

Identified position	Evidence collected	Analysis made	Bargaining Position
New employees are not engaged as trainees	HR records identifies there are very few training contracts made per year	This position is consistent with the quantitative evidence collected	The agency will insert new training classification to make it easier to engage new trainees
Access to purchased leave should be restricted as employees use purchased leave to work quasi part time arrangements	HR records show a very small number of employees use purchased leave multiple consecutive Mondays or Fridays	This position is not consistent with quantitative evidence collected	The agency will not expand eligibility criteria for using purchased leave

C9 | Timeframes for bargaining

Agencies should develop indicative process timeframes when preparing to commence bargaining. These timeframes should identify expected activities to progress bargaining in a timely manner. Developing these timeframes allows the agency to plan ahead and indicate to senior leaders their proposed strategic approach to bargaining. Timeframes relating to specific activities may need to be revised on an ongoing basis during the bargaining process depending on circumstances or unexpected events.

When does bargaining commence?

Bargaining commences when the employer notifies employees and their representatives that they have commenced negotiations for a new enterprise agreement.

Note: the *Fair Work Act 2009* (Cth) stipulates certain process requirements that must be complied with at the initiation of bargaining. For example as they relate to time periods in which Notices of Employee Representational Rights must be issued.

Further information:

Agencies looking for further information on their legislative obligations should consider:

The FWC provides an enterprise agreement benchbook:

<https://www.fwc.gov.au/resources/benchbooks/enterprise-agreements-benchbook>

The Fair Work Ombudsman also provides fact sheets on enterprise bargaining:

<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/enterprise-bargaining>

Approval requirements

Agencies should account for the various approval processes they will undertake when developing timeframes to commence bargaining. This includes seeking approval from the Agency Head, other senior leaders and, in some cases, the Minister/s. Agencies should also reasonably account for the time it takes to escalate briefs and decisions within the agency. In addition, these draft timeframes should provide sufficient time for senior leaders to consider the proposals.

Some agencies will need to keep their Minister/s and portfolio department informed about significant events in bargaining. In particular, agencies where industrial action has the potential to affect the delivery of services to the community especially need to keep their Minister/s informed.

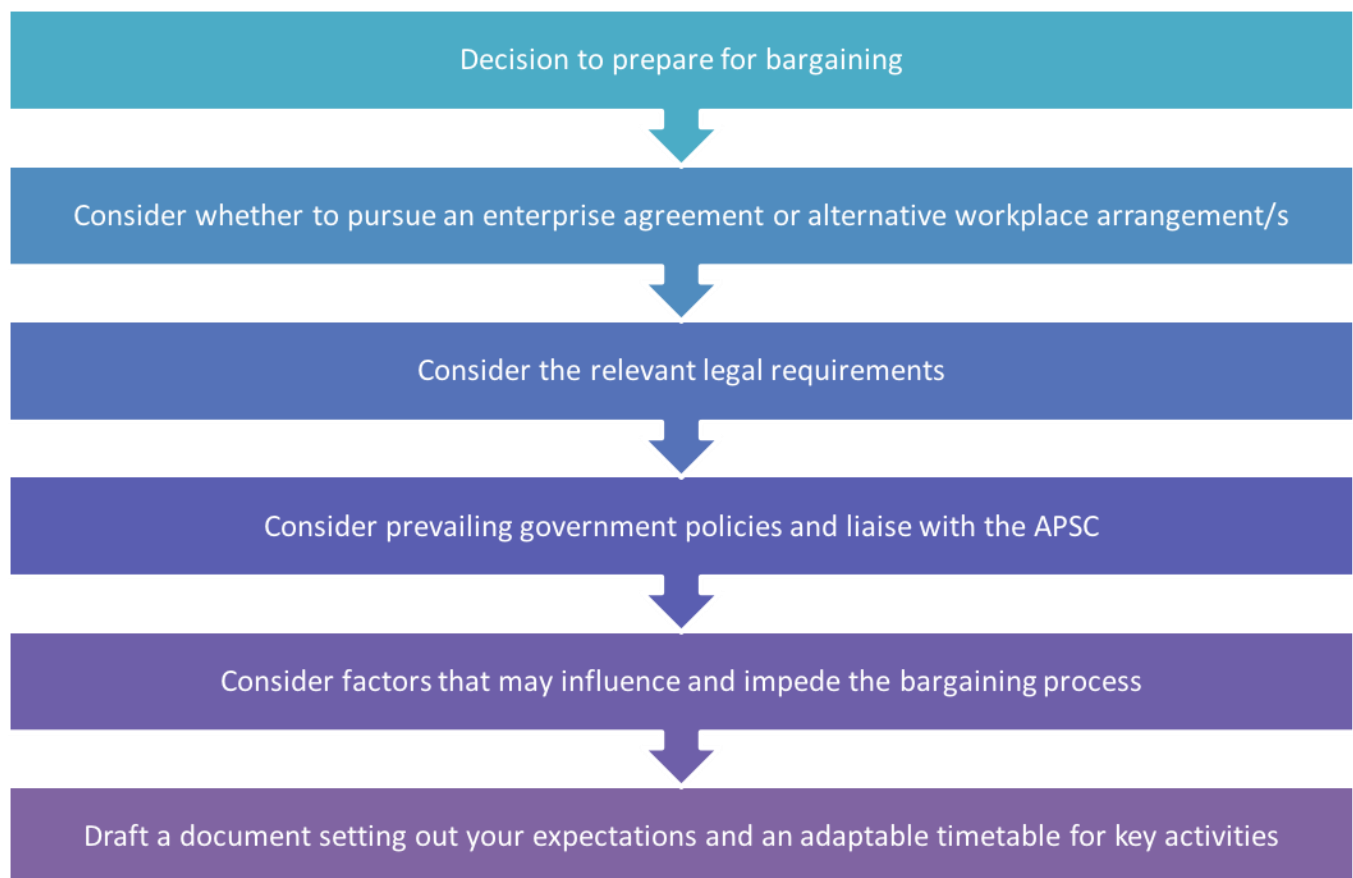
External factors

Agencies should also factor in external influences when developing draft timeframes. This can include seeking decisions from their Minister, the APSC, or other relevant parties. Agencies should engage early with the APSC to seek an indication of how long the approval process might take.

Federal budgets or a change of government often signal funding changes or Machinery of Government changes that could have a substantial impact on an agency's funding and costs. It is therefore important to consider whether a new government or budget may lead to delays in bargaining while the agency re-evaluates its financial position.

Preparing a Timeframe Document

The diagram below outlines the steps involved when drafting an agency's expected timeframes to commence bargaining. These steps are not exhaustive and only identify some of the key considerations in the period prior to bargaining commencing.



For questions related to this Guide, please contact the APSC Workplace Relations Group at WR.Capability@apsc.gov.au.