



Australian Government
Australian Public Service
Commission

Enterprise Bargaining Guide

Enterprise bargaining

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Disclaimer

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The advice and information contained within this guide is 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.

D. Overview of the Guide

This guide covers some of the key areas and questions that Commonwealth agencies should consider during the enterprise bargaining process. *Enterprise Bargaining* represents the second part of the guide and follows *Preparing to Bargain*. The next and final part, *Post-bargaining* will deal with the activities following a successful employee ballot.

Human resources and workplace relations practitioners from a number of Australian Public Service (APS) have been consulted in the development of this guide.

What is enterprise bargaining?

Enterprise bargaining is the formal negotiation between an employer, employees and their representatives for an enterprise agreement. The aim of the bargaining process is to reach agreement on employees' terms and conditions of employment, including remuneration, and matters relevant to the manner in which work is to be performed. Enterprise agreements, being the result of enterprise bargaining, are collective industrial instruments and are made between an employer and their employees under the national workplace relations system.

Key points

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

E. Enterprise Bargaining

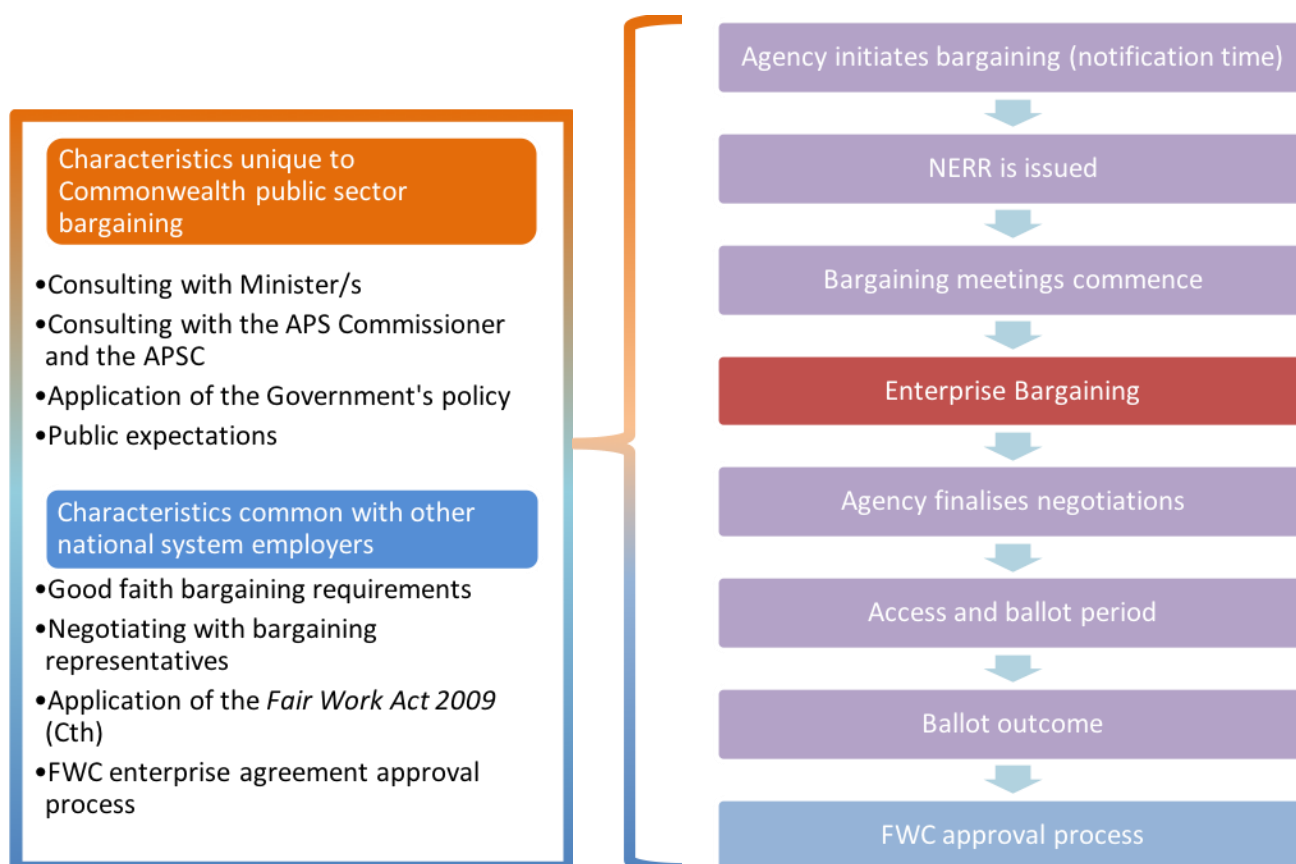
This part deals with some of the key issues Agency Heads should consider during bargaining.

E1 | Public sector bargaining

Enterprise bargaining in the Commonwealth public sector operates in the same national workplace relations system established by the *Fair Work Act 2009* (Cth) as other national system employers.

Outline of the bargaining process in the Commonwealth

Below is an outline of the enterprise bargaining process in the Commonwealth public sector:



Note: refer to the mandatory timeframes prescribed for certain steps in the process in the *Fair Work Act 2009* (Cth).

Comparison to private sector employers

Agencies are subject to similar obligations and processes when bargaining as private sector corporations and entities. For example, private corporations have boards of directors and other governance structures similar to Government Ministers. These directors may set parameters for the agency's executive to bargain within, similar to the Government's bargaining policy.

Ministers

Agencies should keep their Minister informed of significant and key developments in the enterprise bargaining process. Enterprise bargaining can directly affect the operations of an agency, especially when industrial action is likely to occur. Many agencies have obligations to provide services to the public and businesses. Some agencies can and do experience significant public scrutiny and media coverage during enterprise bargaining. This is especially the case when industrial action affects the provision of services to the community.

Agencies bargain on behalf of the Commonwealth as the employer. Through Government Policy, the Government as the employer publically decides what outcomes it seeks or takes certain positions in bargaining. The role of agency bargaining teams is to deliver on these decisions and directions.

Australian Government Policy

The Australian Government may periodically publish a policy framework (the Policy) that sets the parameters for Commonwealth entities in developing workplace arrangements like enterprise agreements. This was outlined in section C6 'Developing a bargaining position' in Part 1 of this Guide. Commonwealth agencies are expected to comply with the Policy, or in some cases to apply it to the extent practicable.

The Policy reflects the Government's key objectives for bargaining and workplace relations in the public service. The existence of the Policy is a long standing approach undertaken by consecutive Governments and similar approaches are applied by State and Territory Governments. The Policy will usually also set out the approval requirements outside of the agency's own internal operations, before a proposed enterprise agreement can progress to a ballot of employees.

The Government's current Policy is dated February 2018.

Australian Public Service Commission (APSC)

The APSC is the agency responsible for providing advice on the application of the Policy to agencies bargaining in the Commonwealth. The APSC also monitors the progress of bargaining across the Australian Government and supports the APS Commissioner in administering the Policy. Agencies should remain in contact with the APSC prior to and during enterprise bargaining. The APSC will assist agencies in complying with the Policy. It is important to note the APSC and the APS Commissioner are not bargaining representatives.

Agencies should note that the APSC review process is iterative in nature. This process involves the APSC reviewing multiple drafts of the proposed enterprise agreement and remuneration proposal. Therefore, agencies should allow for this when developing timeframes for bargaining. It is recommended agencies engage early on with the APSC and be clear about their bargaining positions. This includes, for example, explaining why specific changes are proposed in an amended enterprise agreement and/or remuneration proposal.

Agencies should seek more information directly from the APSC about the application of the Policy in their circumstances.

Employee bargaining representatives and unions

Some agencies have very small workforces and may have no union involvement or nominations by employee bargaining representatives. In these cases, an agency may have the ability to hold bargaining meetings with their entire workforce.

For larger agencies, employee bargaining representatives are typically identified after the NERR is issued. Specific unions will have coverage of specific groups of employees and their members and be default bargaining representatives. Employees may also appoint themselves or another person as a bargaining representative (who is not the default bargaining representative) in writing. For further information regarding the NERR refer to section E2 'Commencing bargaining'.

Medium sized to larger agencies will likely have employee bargaining representatives and unions as part of their bargaining process. While there are public sector specific unions in the Commonwealth, many agencies will also have union coverage for technical and specialist roles. In most agencies, some groups of non-unionised employees may also nominate and some individuals may self-nominate, or nominate another person, as representatives for bargaining.

Employee and union bargaining representatives have a legitimate role to play in bargaining. Recognising and meeting with these representatives is a good faith bargaining requirement. For further information refer to section E4 'Good faith bargaining'.

E2 | Commencing bargaining

Pre-bargaining survey

Many agencies choose to undertake a survey of employees prior to commencing enterprise bargaining. This kind of survey helps to inform and in some cases may support elements of the agency's bargaining position. When drafting this survey, agencies should take care not to trigger the notification time. Agencies cannot withdraw from enterprise bargaining once the notification time has occurred. There is no other option but to undertake enterprise bargaining when this occurs and issue a notice of employee representational rights (NERR) as soon as possible (and within 14 days). As a result, some agencies choose to undertake the survey a few days prior to releasing a notice of employee representational rights to avoid any confusion.

Notification time

Section 173 of the *Fair Work Act 2009* (Cth) details the process to commence bargaining. The notification time begins when:

1. an agency agrees to bargain or initiates bargaining for an agreement;
2. a majority support determination or scope order comes into operation; or
3. a low paid authorisation comes into operation.

Usually, the Chief Negotiator who bargains on behalf of the Agency Head (the 'employing authority') triggers the notification time by agreeing to or initiating bargaining.

Because employers should not commit to bargain until they are ready to do so agencies should take care to ensure they only agree to or initiate bargaining deliberately. This could occur accidentally during activities including conversations with employee representatives and communication with employees more generally. For example, union representatives may seek a response concerning their proposed log of claims/draft enterprise agreement. Responding may trigger the notification time.

Notice of Employee Representational Rights

Section 173 of the *Fair Work Act 2009* (Cth) requires that after the notification time the agency must then take all reasonable steps to notify employees, who will be covered by the proposed agreement and are currently employed, of the right to be represented. This must happen as soon as practicable and no later than 14 days after the notification time. This notice is known as the notice of employee representation rights or 'NERR'.

Many agencies will issue the NERR at the same time as agreeing or initiating bargaining, also known as the notification time. It is important that agencies strictly refrain from changing the content of the NERR template at all. The template is available on the Fair Work Commission's website.

The Fair Work Commission (the FWC) may not approve an enterprise agreement where the NERR was issued incorrectly. This may be where an agency has provided a NERR later than required, amended the standard wording used in a NERR, or attached additional information with the notice sent to employees. In such

circumstances, the agency must stop bargaining and initiate bargaining afresh (including the issue of a new NERR). Simply issuing a new NERR during a continuing period of bargaining will not resolve the defect.

Further Information

An enterprise agreement is made by the employer and their employees. In the APS, the employer is the Commonwealth of Australia acting through the relevant 'employing authority'.

An employing authority is defined as a person described in Schedule 6.3 of the *Fair Work Regulations 2009* (Cth). Under the *Fair Work Regulations 2009* (Cth), for the purposes of enterprise bargaining, the employing authority is the Agency Head.

An employing authority may also be an officer authorised by the principal executive officer of a Commonwealth Authority employing a person in public sector employment.

Note: the Minister for Finance and the Public Service or equivalent, is not a bargaining representative. Bargaining representatives are employers, or persons who negotiate a proposed enterprise agreement on behalf of those employees to be covered by the agreement, as set out in the *Fair Work Act 2009* (Cth).

Employers may also appoint representatives to bargain for them. Refer to page 23 of this guide for further commentary on this point.

Commonwealth bargaining

Outside the application of *Fair Work Act 2009* (Cth), there are a number of factors particular to Commonwealth enterprise bargaining that makes it different and similar to private sector bargaining. These will be detailed in the sections to follow.

E3 | Driving bargaining as the employer

This section of the guide outlines some of the key considerations for employers in enterprise bargaining. This section does not deal with bargaining strategies or the nuances of negotiations.

Reaching in-principle agreement

Enterprise agreements are collective arrangements made directly with employees (although often ‘negotiated’ through their representatives). Therefore, reaching in-principle agreement with the bargaining representatives, while ideal, is not always possible and should not be the primary measure of success in bargaining. Negotiators must ensure they do not become fixated on simply achieving an in-principle agreement with bargaining representatives at the expense of their own objectives as an employer. Agencies will often face different, sometimes contradictory, forces in bargaining. Bargaining teams have the job of drafting and negotiating agreements that balance employee demands, meet business/operational requirements and comply with Government’s expectations (including any relevant wages policy), while trying to reach a successful ballot.

Negotiation is a process where parties attempt to resolve their differences and try to reach agreement through exploring options and exchanging offers. However, this is not the objective of enterprise bargaining and may not be achievable in every circumstance. The primary objective is getting an enterprise agreement that sets out clearly the terms and conditions of employment for its duration, which supports the operations of the agency and which employees will vote for.

The role of the employer

Just like any other employer, agencies are responsible for initiating and concluding bargaining. Therefore, agencies must recognise that they need to drive the bargaining process.

Agencies cannot sit passively and just respond to events in bargaining without risking losing control of the process. Agencies (through their Chief Negotiator) must understand their objectives in bargaining. Agencies need to drive bargaining to develop solutions. Ways an employer could drive bargaining can include (for illustrative purposes only):

Proposing a schedule of bargaining meetings

Setting the agenda for bargaining meetings

Taking action items from bargaining meetings and following up on action items

Setting timeframes for discussion of particular bargaining topics

Telling bargaining representatives when it’s appropriate to address particular issues in writing

DO NOT simply run through the employee representative’s logs of claims

E4 | Good faith bargaining

Representatives engaged in an enterprise agreement bargaining process are required to abide by the good faith bargaining provisions in accordance with section 228 the *Fair Work Act 2009* (Cth). Good faith bargaining obligations apply to all bargaining representatives, not just the employer.

The legislated good faith bargaining obligations are:

1. attending, and participating in, meetings at reasonable times;
2. disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
3. responding to proposals made by other bargaining representatives for the agreement in a timely manner [**Note:** employers and employee bargaining representatives do not have to agree or make concessions];
4. giving genuine consideration to the proposals of other bargaining representatives for the agreement and giving reasons for the bargaining representative's response to those proposals;
5. refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
6. recognising and bargaining with other bargaining representatives for the agreement.

These good faith bargaining obligations are explained in more detail in this section.

In addition to the legal good faith bargaining obligations, APS employees possess additional obligations under the *Public Service Act 1999* (Cth) and the APS Values which include the requirement to be respectful and act ethically.

Further Information

For more detailed information regarding good faith bargaining obligations and applications for good faith bargaining orders, the FWC's Enterprise Agreement Benchbook should be consulted.

Good faith bargaining obligations in practice

Below is a non-exhaustive breakdown of good faith obligations agencies may consider during enterprise bargaining. This list outlines some of the most common issues concerning good faith bargaining obligations.

1. Attending, and participating in, meetings at reasonable times:

- ✓ Agencies should ensure they attend and participate in bargaining meetings;
- ✓ Agencies should meet and explain their positions in person (as opposed to only in writing). The purpose of these meetings is to demonstrate to the bargaining representative 'whether the proposal or modified form of it might be acceptable' [*APESMA v Peabody Energy Australia Coal Pty Ltd [2015] FWCFB 1451*]; and
- ✓ Even if the agency is not in a position to bargain on a matter (e.g. the agency is developing a final position), bargaining representatives should be met with and allowed to submit and explain their proposal.

2. Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner:

- ✓ Representatives do not need to disclose confidential or commercially sensitive information;
 - Agencies hold commercially sensitive information, e.g. commercial products or paid services provided to the community;
 - Agencies hold significant confidential information, for example related to the Federal Budget or Cabinet decisions;
 - Information may be confidential if it reveals the personal information of employees or is related to internal bargaining position deliberations; and
 - Agencies should be able to justify their decisions to withhold documents (e.g. on relevance grounds, or if they are considered to be confidential or commercially sensitive).

3. Giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals:

- ✓ Agencies cannot adopt the role of a 'disinterested suitor' and must actually participate in bargaining;
- ✓ 'Consideration' does not mean that agencies must agree with a proposal or make concessions;
- ✓ Agencies should listen to the views of bargaining representatives, seek more information where required and offer alternatives;
- ✓ Agencies should provide their reasons for disagreeing with a proposal with as much specificity as possible; and
- ✓ In this context, agencies should take responsibility for driving bargaining and therefore take control of the negotiation process. Further information is contained section E3 'Bargaining mindset'.

4. Responding to proposals made by other bargaining representatives for the agreement in a timely manner

- ✓ Agencies should respond to other bargaining representatives' claims in writing at an appropriate time, even if it only to refute or disagree with these claims; and
- ✓ Agencies should inform bargaining representatives if they are unable to respond in time and advise when they may be able to do so.

5. Recognising and bargaining with the other bargaining representatives for the agreement:

- ✓ Employers must bargain with and recognise other representatives; and
- ✓ The *Fair Work Act 2009* (Cth) identifies those persons who are bargaining representatives at section 176.

6. Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining:

- ✓ Capricious or unfair conduct can take the form of a range of actions.

Capricious or unfair conduct

Capricious or unfair conduct is a good faith bargaining term provided for in legislation. Below are a few examples of activities that are capricious or unfair and examples that are not. In most cases, behaviour can only be determined to be capricious after examining the context of the particular case.

Examples of unfair or capricious conduct include:

- barring bargaining representatives from attending meetings.
- engaging in detrimental conduct towards an employee because they are a bargaining representative.
- preventing employees from appointing a representative in bargaining.*
- making statements that do not accurately portray the position of another bargaining representative.
- making statements that mischaracterise other bargaining representatives' actions or intent.
- scheduling meetings in way to purposefully limit participation.

Examples that are NOT unfair or capricious conduct include:

- communicating directly with employees for the purpose of engaging in bargaining matters (so long as the employer is not bypassing the representatives and this communication is consistent with information provided to representatives).
- putting a proposed EA to vote without the agreement of bargaining representatives where there has been an impasse in bargaining.
- engaging in an employer response action as a response to protected industrial action.
- restructuring rosters for a legitimate operational reason (with appropriate consultation, as required).

***Note:** however, a union can only act as a bargaining representative if they are eligible to represent the industrial interests of the employee.

Making concessions

Agency Heads and other parties in bargaining do not have to make concessions or reach agreement on a proposed draft enterprise agreement. They can do this while still meeting their good faith bargaining obligations. This is because good faith bargaining obligations are procedural in nature.

For this reason, it is important agencies understand their organisational objectives, context and cost implications for changes to the enterprise agreement so they can refute and argue against claims and positions of other bargaining representatives where necessary. Examples of situations where an Agency Head can say 'no' to a position taken by another bargaining representative, can include (for illustrative purposes only):

Employee bargaining representative position	Agency response	Agency explanation
Increase annual leave credits	No, an increase to annual leave credits for employees adversely impacts on productivity and costs.	Costings of the bargaining position demonstrates this.
Increase detail in performance management process	No, the increased detail is prescriptive and risks further disputation.	A very small minority of employees are impacted. What is the underlying issue?
Guarantee shiftworker rosters	No, doing so limits flexibility for employees and management.	Doing so would greatly impact operations and the agency's ability to service the public.
Introduce pet bereavement leave	No, including a new leave type is unnecessary.	Existing leave entitlements and management discretion is available and sufficient.
Introduce a glasses allowance	No, the glasses allowance is already in HR policy documents.	Having the glasses allowance in policy provides flexibility to employees and management.

Agencies can take a robust or hard stance in bargaining as a negotiation strategy. However, agencies must always meet their procedural obligations under the *Fair Work Act 2009* (Cth) and behave in accordance with the APS Code of Conduct and APS values set out in the *Public Service Act 1999* (Cth).

Bargaining orders

If any bargaining representative has concerns that one or more of the bargaining representatives for the proposed agreement have not met or are not meeting the good faith bargaining requirements, they may apply to the FWC for good faith bargaining orders. Notice of the relevant concerns must first be given to the bargaining representative thought to be in breach of their good faith bargaining obligations. Depending on the facts, evidence and arguments presented, the FWC may decide to grant a good faith bargaining order.

Bargaining orders may require a particular course of action be taken to progress bargaining and/or stop the parties from acting in a certain way. Most often, it is employee bargaining representatives who make bargaining order applications. However, in certain circumstances it may be appropriate for employers to do so.

Commonwealth agencies must consider all legal, practical and reputational implications and the APSC's views before such an application is made.

E5 | Developing bargaining protocols

Bargaining protocols are arrangements made for the enterprise agreement negotiation process. In some cases, an agency and bargaining representatives may reach agreement on a set of arrangements. However, agencies can introduce bargaining protocols unilaterally and provide arrangements that the agency considers to be appropriate and reasonable.

Protocols can be a formal document or an informal verbal agreement that outlines arrangements for the negotiation process. These arrangements guide the conduct of the parties during bargaining specifically in bargaining meetings. Protocols help create a pattern of normative behaviour governing the negotiation, potentially reducing the administrative burden associated and allowing representatives to focus on the substantive issues at hand.

Note: agencies may also consider providing facilities to bargaining representatives, but this should always be at the discretion of the agency to determine what is appropriate and reasonable.

Bargaining protocols in practice

The content of the protocols will vary between each bargaining round. Regardless of the specific content of the protocol, it is advisable that they be principles-based, uncontroversial and flexible in order to provide a sound basis for the conduct of meetings. If the agency and bargaining representatives cannot reach agreement on protocols, the agency may decide how to progress. Below are some examples of the kinds of protocols terms that agencies can apply.

Membership of bargaining teams

- Attendance and requests to attend bargaining meeting
- Procedures for inviting guests to bargaining meetings
- Outlining contact details for representatives

Deadlines on requests

- Establishing deadlines and procedures around posing requests to bargaining representatives
- It may reduce the imposition of unreasonable requests for information or responses

Facilitation

- Establishing rules for who facilitates bargaining meetings
- Establishing rules for changing these procedures

Establishing procedures for responding to tabled claims

- Establishing rules for the tabling of claims
- Establishing procedures for the tabling of responses to claims

Treating documents without prejudice

- Establishing rules on the treatment of documents and information produced during bargaining
- Treating all documents and discussions without prejudice unless otherwise indicated

Good faith obligations

- Establishing that all bargaining representatives are subject to good faith requirements under the FWA.

Administration

- Establishing administrative norms and procedures
- For example: meeting venues, dates for meetings, length of meetings, the provision of materials/agendas before meetings and post meeting summaries or minutes

E6 | Employee representative's log of claims

Using an employer logs of claims

Agencies could prepare a log of claims, reflecting the changes required to support the agency's operational goals. Such documents should clearly state the agency's requirements from bargaining, priorities and bargaining positions. Agencies need to have a clear understanding of what they want to achieve, informed by the expectations of Government and the agency's executive. Further information on developing bargaining positions for an employer log of claims is in Part 1 of the Enterprise Bargaining Guide 'Preparing to bargain'.

Agencies are able to use their own log of claims to drive bargaining as discussed in section E2 'Bargaining mindset'. The agency can then discuss the employees' log of claims in the context of the agency's log of claims. This allows the agency to set the pace of and drive bargaining forward.

What is an employee representative's log of claims?

An employee representative's log of claims (or perhaps a draft enterprise agreement) is the official record of the position of the employees they represent. The log usually takes the form of correspondence provided by a union on behalf of their members. In some cases, employee (non-union) bargaining representatives may also provide the agency with a formal log of claims on behalf of the cohort of employees they represent.

Agencies will often receive a log of claims from employee bargaining representatives that set out their initial position. Employee bargaining representatives will usually use this log of claims to anchor themselves in bargaining and argue around these positions.

Agencies may choose to discuss the components of the employee representative's log of claims within the context of discussing the agency's own log of claims, in order to drive their agenda. It is important that agencies have evidence of their responses, as any alleged lack of response could form part of a good faith bargaining dispute. Written evidence ensures agencies are meeting their good faith bargaining obligations and shows the agency is genuinely trying to reach a consensus. Agencies can also provide a formal response to new claims made in bargaining periodically.

In some cases, a log of claims may seek to address issues outside the parameters of what is achievable in enterprise bargaining. The claim may not be possible or realistic within the legislative and policy framework that exists. The claim may also seek to prescribe managerial instruction or restrict how the agency operates. Agencies should simply respond to these claims and explain why the agency cannot agree to them.

Employee expectations

Agencies that proactively engage with their employees, inside and outside of bargaining, should have a strong understanding of their employees' expectations and priorities. In this way, agencies can verify the claims made by employee bargaining representatives. Agencies could undertake periodic employee surveys about the enterprise agreement issues that matter most to them. This approach is also helpful to dispel misinformation about what actually concerns employees, particularly during an employee ballot.

E7 | Communicating with employees

An essential element of successful enterprise bargaining is effective communication with employees. The agency's employees are the ones who vote in the ballot on the proposed enterprise agreement. Employees are likely to receive the proposed agreement more positively when they are informed and consulted.

Agencies are encouraged to develop a communication plan before bargaining commences, as discussed in *Part 1 - Preparing to Bargain*. The bargaining team should work in conjunction with their communications team to develop the plan. The plan should be regularly reviewed and adjusted if necessary, throughout the bargaining process.

Each agency will have different circumstances to consider when designing the communication plan. There is no one size fits all approach when it comes to communicating effectively with employees in a variety of locations and roles. Communication resources must be accurate, respectful and accessible to all employees. All communication activities must be underpinned by good faith bargaining requirements obligations under the *Public Service Act 1999* (Cth) and the APS Values.

Communicating in bargaining

Upon commencing bargaining, agencies should set the scene for their employees and appropriately manage expectations. Most employees are unlikely to know the fundamentals of industrial relations or the nuances of enterprise bargaining. Agencies should seek to explain to their employees the context of their operations, what they hope to achieve through bargaining and their requirements within the bargaining policy and legislation.

Agencies need to be proactive when it comes to communicating with employees and engaging them in the bargaining process. Other bargaining representatives will fill an information vacuum left by the bargaining team. Communication must be factual, clear and timely. It should also focus on the bargaining team's key messages.

To build and maintain this trust, employees expect factual and timely information. It is the role of the employer to respond to or refute any inaccurate information quickly, with accurate information.

Agencies must consider other events or contentious issues occurring during bargaining. These issues may detract from an agency's messaging during the access and ballot period. Employees themselves may not distinguish between bargaining and other employer actions or activities outside of bargaining. For example, the introduction of a controversial policy may derail efforts to build support for an enterprise agreement that provides the agency with discretion over certain conditions.

Communicating through line managers

Agencies should seek to communicate to their employees in bargaining through their line managers. Many employees would naturally prefer to receive information about bargaining through their immediate manager/supervisor, whom they trust. This means it is important that messages from line managers are consistent with the messages communicated by the agency's senior leadership.

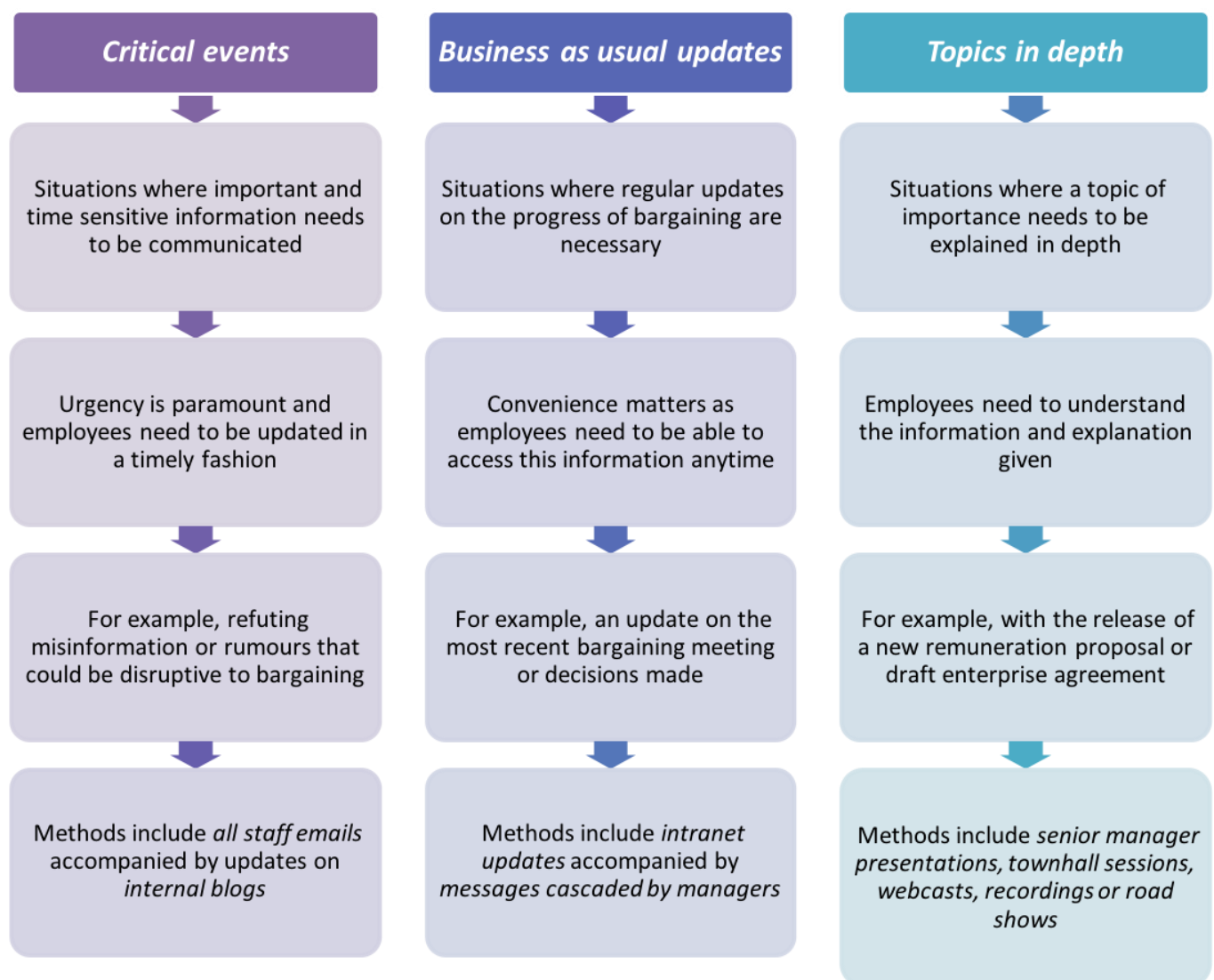
This face-to-face communication should come from someone that employees know and trust. Line managers can be effective conduits passing common queries and issues raised within their teams/branches back to the

bargaining team. As such, bargaining teams should assist their agency's line managers by providing them with regular updates on the progress made in bargaining or official responses to misinformation.

Agencies should educate and encourage line managers to see their role as a manager and not simply as an employee. For this reason, some agencies hold separate meetings for line managers and employees to address the separate issues each face.

Choosing a communication method

There is no one size fits all approach to choosing a communication method for your agency. Employee preferences may change over the course of bargaining, so choose the communication approach that best suits your needs. The graphic below describes three situations in which a different communication channel may be more suited to a particular type of message.



Communication channels

There are many different channels for communicating effectively with employees during the bargaining process. Most agencies choose a mix of channels to suit their needs, resourcing and employee circumstances. The examples below describe the most common communication channels employed during the bargaining process.

All staff emails

- Direct messages to all employees
- Advise employees of major events in bargaining

Letters and memos

- Formal agency letters to employees
- Issue the NERR for employees on leave

Intranet portals

- Updates on a bargaining specific moderated intranet page
- Post Q&A factsheets or key facts

Managers communicating the information

- Using line managers to cascade information
- Disseminate key messages and respond to employee queries

Senior management presentations

- Senior managers traveling around to agency sites
- Provide major updates, like a remuneration proposal

Webcasts/video recordings

- Online recordings of senior managers providing updates on bargaining
- Q&A session and general updates on bargaining

E8 | Records management

Maintaining accurate records is an essential element of enterprise bargaining. Commonwealth agencies have policies and procedures for recordkeeping. Agencies should contact the National Archives of Australia if they are unclear on their obligations. Effective recordkeeping ensures that the information collected, analysis undertaken, rationale given, decisions made and actions taken in bargaining are documented for the future.

This allows the agency to learn from multiple rounds of bargaining by retaining and transferring knowledge. These records form part of the agency's organisational memory. Future bargaining teams may inquire as to why certain decisions were taken previously in bargaining and would naturally look for accurate and comprehensive records for answers.

Record keeping in bargaining

Below are a few examples of the kinds of records that a bargaining team may keep. They illustrate that there are many documents inside and outside the bargaining room that agencies should account for when recordkeeping.



Effective recordkeeping extends to a bargaining team's internal documents. For example, bargaining teams should maintain version control of the various drafts of their proposed enterprise agreement highlighting changes made over time. This ensures the team can reflect on what progress has been made and can easily refer to these changes. As such, recordkeeping can assist an agency in meeting its good faith bargaining obligations. These documents can be used to demonstrate where the agency has engaged with bargaining representatives.

Effective record keeping is also very helpful when it comes time to completing forms required by the FWC. Following a successful employee ballot, agencies must seek FWC approval of the proposed agreement. The prescribed forms to support the approval application require the provision of detailed information. Effective records allow an agency to compile the relevant information with greater ease, whether the NERR, key dates in bargaining or evidence of explaining the effects of the agreement to staff.

There are situations where an agency may be compelled or strongly encouraged to disclose information. Below are a few examples where effective recordkeeping could play an important role in evidencing the agency's actions. These include dealings with bargaining representatives, members of the public, in parliamentary hearings and at the FWC.



Further Information

For the purposes of the *Archives Act 1983* (Cth) a 'Commonwealth record' is essentially a record that is the property of the Commonwealth or of a Commonwealth institution. This includes records that are created or received in the course of bargaining.

Therefore, it may not be appropriate to release certain information in some circumstances if it would jeopardise the employer's position in bargaining, or if the records are not relevant to bargaining.

Agencies could contact the APSC for further information regarding the disclosure of bargaining related information.

Commonwealth considerations

Agencies looking for further information on Commonwealth record keeping requirements and legislative obligations should consider:

Information on the National Archives of Australia website:

<http://www.naa.gov.au/information-management/index.aspx>

E9 | Drafting clauses and changing your bargaining position

While one goal of enterprise bargaining might be to clarify intentions of bargaining representatives in the document, the ultimate goal of an enterprise agreement is that the provisions are clear to employees and managers. Both employees and managers have to apply the enterprise agreement to their circumstances on a daily basis. That is why it is important to draft clear and unambiguous clauses in agreement.

Legislative requirements

When drafting enterprise agreements, there are content requirements in the *Fair Work Act 2009* (Cth) agencies must consider. The illustration below sets out the content requirements for enterprise agreements made under the *Fair Work Act 2009* (Cth) and is a non-exhaustive list.

Permitted matters	Mandatory terms	Unlawful terms
<ul style="list-style-type: none"> •Matters pertaining to the employer-employee relationship •Terms about deductions from wages •Terms about how the enterprise agreement will operate •Matters pertaining to employer-union relationships 	<ul style="list-style-type: none"> •Coverage term •Nominal expiry date •Individual flexibility term •Consultation term •Dispute resolution term 	<ul style="list-style-type: none"> •Discriminatory terms •Objectionable terms •Right of entry terms •Opt out clauses that allow the employer or employees to alter the coverage of an enterprise agreement*

***Note:** There are also limitations on terms relating to superannuation (contributions to non-prescribed funds) and other limitations in section 194 of the *Fair Work Act 2009* (Cth).

Further Information

For more detailed information regarding permitted matters, mandatory terms and unlawful terms, the FWC's Enterprise Agreement Benchbook should be consulted.

Interpreting enterprise agreement clauses

Interpretation of enterprise agreements can be a complex process, but must begin with consideration of the ordinary meaning of the words having regard to the context and purpose of the provisions. Therefore, it is paramount to ensure that your enterprise agreement is drafted as clearly as possible in plain English.

It may be effective to have the assistance of someone with legal drafting experience to review the enterprise agreement to avoid unintended consequences. Minor drafting issues may actually be important in the interpretation. Long sentences, ambiguous wording and incorrect clause references that change the meaning of clauses are problematic. Additionally, broad aspirational statements that suggest (or imply) that the agency will do something have implications in that they might be subject to dispute.

In the past, many agreements in the Commonwealth contained pages of HR policies that did not necessarily provide employees with any entitlement, but provided a guide for supervisors in carrying out their duties. Such content should not be contained in an enterprise agreement.

Evaluating a draft enterprise agreement

Below is a set of questions agencies should ideally ask themselves as they draft their enterprise agreement.

- ✓ *Do all clauses support the operation of the agreement and the organisation?*
 - Clauses that are restrictive and overly procedural risk making the enterprise agreement unworkable or may be an administrative burden.
 - Clauses that were previously problematic to human resource functions and have not been amended in the newly drafted agreement will continue to be an administrative burden.
- ✓ *Does it meet content and approval requirements under the Fair Work Act 2009 (Cth) and with other legislation?*
 - Enterprise agreements that fail to comply with legislative requirements, including changes that have occurred since the agency last bargained, may not be approved by the FWC during its approval stage.
- ✓ *Does the document as a whole read clearly and coherently?*
 - Employees, line managers, human resources and workplace relations practitioners use the enterprise agreement often.
 - Bargaining teams could ask persons not involved in bargaining and who are unfamiliar with the draft enterprise agreement to read it. Having someone external read the proposed draft agreement can be effective as the draft may assume knowledge, or use unnecessary acronyms or confusing language.
 - Having individuals in the human resources and workplace relations read the proposed draft agreement can be particularly effective. These individuals will likely use the enterprise agreement on a daily basis.
- ✓ *Are there any issues with syntax – tense, tone and voice is consistent throughout the document?*
 - Clauses which are long, ambiguous and subjective open the enterprise agreement to differing interpretations and disagreement. For example, an incorrect voice or tense may lead to inaccurate assumptions about from whom and when approval can be sought for access to an entitlement.
- ✓ *Does the enterprise agreement define necessary terms?*
 - Some terminology can be defined through legislation, however agencies must ensure subjectivity is kept to a minimum when it comes to entitlements and conditions.

- ✓ *Are clause references throughout the document accurate?*
 - Accurate clause referencing is essential to reading an enterprise agreement as it was intended. Agencies risk employees being misinformed or claiming subjectivity where referencing is incorrect or inconsistently applied in the agreement.
- ✓ *Does the clause have any unexpected flow on effects?*
 - Clauses that are not consciously and correctly drafted may have unexpected flow on effects for other aspects of the agency's operations.
- ✓ *Is it consistent with the Australian Government's Policy?*
 - Agencies must comply with relevant Government policies.
 - While bargaining policies are revised intermittently, it is common practice for the Commonwealth Government to establish a policy which determines the scope for wage outcomes and changes to employment conditions in the public sector and this must be adhered to.

E10 | Progressing to an employee ballot

Deciding when to progress to an employee ballot

Agencies should progress to an employee ballot for a proposed enterprise agreement when a number of conditions have been met:

- ✓ The agency is satisfied that bargaining has concluded or has reached an impasse.
- ✓ The draft agreement has been negotiated with bargaining representatives, noting that all parties do not need to reach a consensus to progress to a ballot. However, an agency must fulfil their good faith bargaining obligations or risk bargaining representatives seeking good faith orders from the FWC to stop the ballot.
- ✓ The agency has consulted with the APSC and, where required, received approval from the APS Commissioner for their draft enterprise agreement and remuneration proposal.
- ✓ The agency considers there is a strong likelihood of the majority of eligible voters voting 'Yes' to the proposed enterprise agreement.
- ✓ The proposed draft enterprise agreement requires no further edits and the agency is satisfied with its content.
- ✓ At least 21 days have passed since the last NERR was issued.

Note: As outlined in section E1 'Public sector bargaining', the APSC review process is iterative. Agencies must account for the time taken for the APSC review process and the APS Commissioner's consideration of any proposed draft enterprise agreement and proposed remuneration package. Agencies should engage with the APSC early on to avoid any issues.

Continuing to consult with senior management

Agency bargaining teams should consult with senior management throughout the bargaining process. It is important to update management on challenges, successes, trends and major events during bargaining. Senior management especially may be able to provide the bargaining team with the high-level context and strategic direction of the agency.

Senior management may also have insights on broader issues within the agency. For example, senior managers may be aware of major events within the agency that could affect the agency's ability to hold a ballot on a certain date. These events could affect employee voting turnout, attitude and sentiment within the agency more broadly.

Preparing for the employee ballot

Section 181 of the *Fair Work Act 2009* (Cth) outlines that employers may request employees approve a proposed enterprise agreement by voting on it via a ballot or by an electronic method. A secret ballot is not required, so a ballot could be as simple as a show of hands where only a small number of employees are involved. Electronic methods could include an email exchange (where undertaken by the agency), telephone voting, or an online system.

Different ballot providers will offer different kinds of services. Agencies should engage a ballot provider well before the ballot is expected. This is because ballot providers may have limited availability at certain times in year, for example late in the year.

Agencies need to account for a number of different administrative issues when preparing to progress to a ballot, including:

- ✓ Preparing documents and communication materials for employees to promote the proposed enterprise agreement. These documents should include an explanation of the terms and the effect of the terms of the agreement.
- ✓ Preparing senior leaders and managers for the access period to promote staff voting in favour of the agreement.
- ✓ Choosing to use a ballot provider to administer the ballot. However, very small agencies with a very small number of eligible employees may decide not to use a ballot provider and conduct the ballot internally.
- ✓ Determining how many staff are on leave or seconded and will not be in the office during the access and ballot period. Employers must take all reasonable steps to ensure these staff have access to the agreement and the ability to participate in the ballot.
- ✓ Determining which employees are eligible to participate in the ballot. For example, which casual employees can vote in the ballot? Agencies should seek legal advice where appropriate.
- ✓ Choosing a period of time to hold a ballot that provides the greatest opportunity for eligible employees to vote.
- ✓ Choosing a period of time to hold a ballot that takes into account any external events that may impact on the vote (e.g. school holidays, busy periods for the agency).
- ✓ Considering whether terms of the agreement are adequately explained, taking account of demographic, cultural or linguistic backgrounds of employees.

Fair Work Commission approval process

Within 14 days of an enterprise agreement being voted up by employees an agency must apply to have the agreement approved by the FWC. This application includes the submission of a number of forms available on the FWC's website, such as Forms F16, F17 and F18.

Agencies are urged to consider the requirements of and potentially prepare these forms in advance (to the extent practicable) of the vote. This is because these forms are complex, detailed and lengthy. The provision of comprehensive, precise information at lodgement can reduce delays in the approval process.

If an agency does not meet the 14-day deadline, the FWC will dismiss an application to approve a proposed enterprise agreement unless it is satisfied that it is fair to extend the deadline.¹ Agencies should ensure each form is completed correctly (including signature requirements) or risk a delay or even dismissal of the application for approval.

¹ Note however that there is no discretion to extend the deadline for lodgement of a greenfields agreement.

Legislative requirements for a vote

The *Fair Work Act 2009* (Cth) provides certain obligations for an enterprise agreement vote to be valid. Agencies must comply with these legislative obligations.

The vote cannot occur until 21 days have passed since the last notice of employee representational rights (NERR) was issued.

The seven days immediately prior to the ballot commencing is a consideration period for employees called the 'access period'. An access period can be longer than this, but it cannot be shorter than the legislative requirement.

Before the start of the access period, the employer must take all reasonable steps to notify employees of the time, place and method of voting. At the commencement of the access period, the employer must provide employees with access to the agreement and all incorporated material. Access to these materials must continue for the entire duration of the access period. Alternatively, the employer may provide a personal copy of the material to each employee during (and preferably at the start of) the access period.

The agency and the relevant union(s) must disclose certain financial benefits (if any) that they or parties closely connected to them must derive under the terms of the proposed agreement. Employees must have access to any disclosure documents before they vote on the proposed agreement.²

Immediately following the access period is the 'ballot period'. There is no minimum specified length of a ballot period. However, agencies should decide on a length of ballot based on the size of their workforce and their operating context.

An enterprise agreement is made when the majority (50% plus one vote) of the valid votes are for the proposed enterprise agreement.

Further Information

For more detailed information regarding access periods, ballots and employee eligible, the FWC's Enterprise Agreement Benchbook should be consulted.

² For further information refer to fact sheet titled 'FS013 Disclosure Requirements for Bargaining Representatives', published by the Australian Government Registered Organisations Commission available on [this page](#). See also sections 179, 179A and 180(4A)-(4B) of the *Fair Work Act 2009* (Cth).

E11 | Explaining and promoting the enterprise agreement

Legislative obligations – Explaining the enterprise agreement

Agencies have specific legislative obligations under section 180 of the *Fair Work Act 2009* (Cth) when it comes to communicating with staff about a proposed enterprise agreement. They require that agencies:

1. Take all reasonable steps to notify relevant employees (i.e. those employees employed during the ballot period and are covered by the agreement) of the dates and times of the access and ballot periods, and the voting method that will be used.
 - In practice, agencies mail out (physical and via personal email) voting instructions prior to the start of the access period to those employees on leave during the access and ballot period. Agencies need to coordinate this with their ballot provider where one is being utilised.
2. Take all reasonable steps to provide the written text of the enterprise agreement and any other material incorporated by reference in the agreement to relevant employees.
 - In practice, agencies mail out (physical and via personal email) links to copies of the proposed enterprise agreement and supporting documents prior to the start of the access period to those employees on leave during the access and ballot period.
3. Ensure that throughout the access period relevant employees have access to copies of the agreement and any other material incorporated by reference, or are provided with copies during the access period.
 - In practice, agencies ensure this period extends to the ballot period as well. Some agencies will post a copy of the proposed enterprise agreement and other supporting documents on their intranet, internet or both.
4. Have an access period for a proposed enterprise agreement that is the seven clear days (seven complete 24 hour periods) ending immediately before the start of the voting period.
 - In practice, agencies may choose to have longer access periods so as not to risk falling below the seven-day minimum required access period length.
5. Prepare a disclosure document (if required) and provide employees with access to the document, and any disclosure document provided by the relevant union, before employees vote on the proposed agreement.³
6. Take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, are explained to relevant employees, and that they are explained in an appropriate manner taking in account the particular circumstances and needs of the relevant employees. Particular employee circumstances could include employees from a culturally and linguistic diverse background, young employees and employees who did not have a bargaining representative.

³ For further information refer to fact sheet titled 'FS013 Disclosure Requirements for Bargaining Representatives', published by the Australian Government Registered Organisations Commission available on [this page](#). See also sections 179, 179A and 180(4A)-(4B) of the *Fair Work Act 2009* (Cth).

- In practice, agencies have held voluntary meetings with employees or information sessions on the proposed enterprise agreement and remuneration proposal. The Chief Negotiator, other SES or human resource practitioners knowledgeable about the proposed enterprise agreement package, would undertake these sessions and explain the terms of the enterprise agreement, and take questions from the audience.
- Other agencies have also posted additional documents explaining the terms and conditions that have changed. A few agencies have even written plain English documents outlining the purpose of each clause in the proposed enterprise agreement. Many agencies provide information for line managers to talk through in branch or group meetings.
- It is essential that agencies keep records of these activities to demonstrate that the agency actively sought to inform employees of the enterprise agreement.
- Agencies should take extra steps for those employees with particular and unique circumstances. For example, some agencies have staff working in remote and isolated parts of Australia.

Overall, agencies should seek legal advice where unsure of their obligations under the *Fair Work Act 2009* (Cth). The FWC will not approve an enterprise agreement voted up in a ballot, where the employer fails to meet and is unable to demonstrate that they met these legislative requirements.

Promoting the enterprise agreement

Communication strategy

Agencies should comprehensively plan their communication strategies in the lead up to an employee ballot. Bargaining teams and managers are not neutral parties. Putting out a draft enterprise agreement with a statement encouraging eligible employees to participate in the ballot is not enough.

Agencies are still subject to their good faith bargaining obligations during this period. Agencies instead need to be accurate and complete in their communication about the proposed agreement. This is supported by agency obligations under the APS Code of Conduct.

Examples of communication materials used to promote a proposed agreement, include:

- ✓ Q&A factsheets addressing common questions about the proposed enterprise agreement;
- ✓ comparison documents showing the difference between the current and proposed agreements;
- ✓ documents containing scenarios that demonstrate the application of the proposed agreement in practice;
- ✓ workplace briefings / town hall meetings to explain the proposed agreement in depth;
- ✓ cascading messages through line managers promoting the proposed agreement; and
- ✓ posters and computer screensavers promoting the benefits of the proposed agreement.

Enterprise agreement package

Agencies should actively promote their proposed enterprise agreement package when progressing to a vote. This package must include the draft enterprise agreement, remuneration proposal and possibly any accompanying human resource policy documents.

The agency should accurately promote the benefits of their package and why employees should vote yes for the proposed enterprise agreement. It is a campaign for votes, but undertaken within the context of employees being fully informed on the terms of the proposed agreement (and the campaign must not involve any misrepresentations or misleading statements).

Messaging technique

Agencies should consider their tone, style and attitude when messaging the promotion of a proposed enterprise agreement. This is just as critical as the content of the message developed, because the message provides cues that frame how the agreement will be considered.

Messaging should always be tailored to meet the agency's underlying objectives, context and bargaining history. For example, the messaging of a proposed agreement must change between an agency's first and third ballot, or if the union in bargaining is running a neutral campaign on the draft agreement. Is the agency looking to minimise uncertainty, espouse a vision, clarify misinformation or obtain individual buy-in?⁴ Agencies may find it useful to seek input from communications subject matter experts.

Employees matter when developing a message. This includes the demographics of the workforce, seniority, geographic dispersion and technological sophistication. It informs what kinds of messages the agency should develop and how to communicate them. These decisions should be supported by feedback received from employees identifying their concerns, expectations and aspirations from bargaining.

⁴ GOODMAN, J & TRUSS, C. (2004). *The medium and the message: communicating effectively during a major change initiative*. Journal of Change Management, 4:3, 217-228.

E12 | Holding a successful vote

There is no requirement for agencies to hold a vote for the proposed agreement in a particular fashion. Section 181 of the *Fair Work Act 2009* (Cth) provides that the vote could occur by a ballot, an electronic method or some other method. This could include postal voting, telephone voting or online voting, as examples. Attendance voting through placing a completed ballot paper in a designated box or by a show of hands is also possible.

An enterprise agreement is 'made', a term defined under the *Fair Work Act 2009* (Cth), where the majority of those employees who cast a valid vote, voted to approve the proposed enterprise agreement. This would be at least 50% of all valid votes, plus one additional vote.

Further information on agency activities following a successful ballot can be found in the next part of the guide.

Key timeframes in legislation

Each agency's specific bargain will be subject to operational considerations. However, there are a number of key timeframes to consider under the *Fair Work Act 2009* (Cth). Where your bargaining process is not consistent with these timeframes, regardless of the ballot outcome the FWC cannot approve the enterprise agreement.

Employers must check that they have met these timeframes prior to commencing the ballot. The timeframes include:

Time limit - A NERR must be provided to employees covered by the proposed enterprise agreement within 14 days of the notification time*

Minimum time period - A valid vote can only commence until at least 21 days has past since the last NERR was issued (*this period does not include the day on which the NERR was issued*)

Minimum time period- An access period must be the 7-day period ending immediately before the start of the vote. It cannot be less than 7 days.

Time limit - An application to approve an agreement with the FWC must be made within 14 days of successful vote ending.

***Note:** For further information on NERRs see E2 'Commencing Bargaining'.

Further information:

As employers, agencies have legislative requirements under the *Fair Work Act 2009* (Cth) to take all reasonable steps to ensure that the terms and effects of the proposed enterprise agreement they are asking employees to vote on are explained to relevant employees during the access period.

For this reason, agencies should take active steps to explain the proposed agreement's terms and effects. This could take the form of information sessions and/or publishing informative supporting documents.

Agencies should also keep evidence of the actions taken, to explain the terms and effects of the proposed enterprise agreement. Agencies can use this evidence to demonstrate to the Fair Work Commission that they took all reasonable steps to explain the agreement to relevant employees.

Relevant cases that demonstrate this include, *CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266 and *Health Services Union v Clinpath Laboratories Pty Ltd; Strath, Jenny and Others* [2018] FWCFB 5694.

Other resources:

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>

E13 | After an unsuccessful vote

While an unsuccessful ballot is disheartening for the enterprise bargaining team, it provides a chance to look back with fresh eyes. The period after an unsuccessful ballot provides time for a break from the bargaining process and to review the agency's negotiation and communication strategies. This period also provides an opportunity to reflect, think critically and ask tough questions, which can be harder to do in the middle of bargaining. An unsuccessful vote does not mean the bargaining process failed. Employers may need to conduct more than one vote in order to obtain employee approval of their proposed agreement. The critical challenge is to maintain alignment between the Agency's objectives and engagement with employees.

Following an unsuccessful vote, agencies should acknowledge the contribution of all parties and the amount of work involved to get to a ballot by the bargaining team and lessons learnt from this experience.

A negotiation audit

Following the unsuccessful ballot, an agency should undertake a negotiation and bargaining strategy audit. Another audit opportunity arises at the end of the year when negotiations often temporarily pause. Conducting an audit at these times allows the agency to reflect on progress made and begin to plan for the next period of negotiations. Key steps in a negotiation audit can include:⁵

Step 1: Outline the negotiation structure

- Pull together the Chief Negotiator, the bargaining team and other key figures
- Describe the structure of negotiations and key parties involved
- Outline the objectives and priorities of the parties

Step 2: Map out the negotiation process

- Map the actual sequence of events in the negotiations
- Identify critical events and important events
- Determine where are the problems and challenges during bargaining

Step 3: Reflect on your actions

- Individuals should consider their own role and contribution in negotiations
- Reflect on the actions taken in bargaining and potential areas for improvement
- Jointly discuss how each individual's actions contribute to the bargaining team

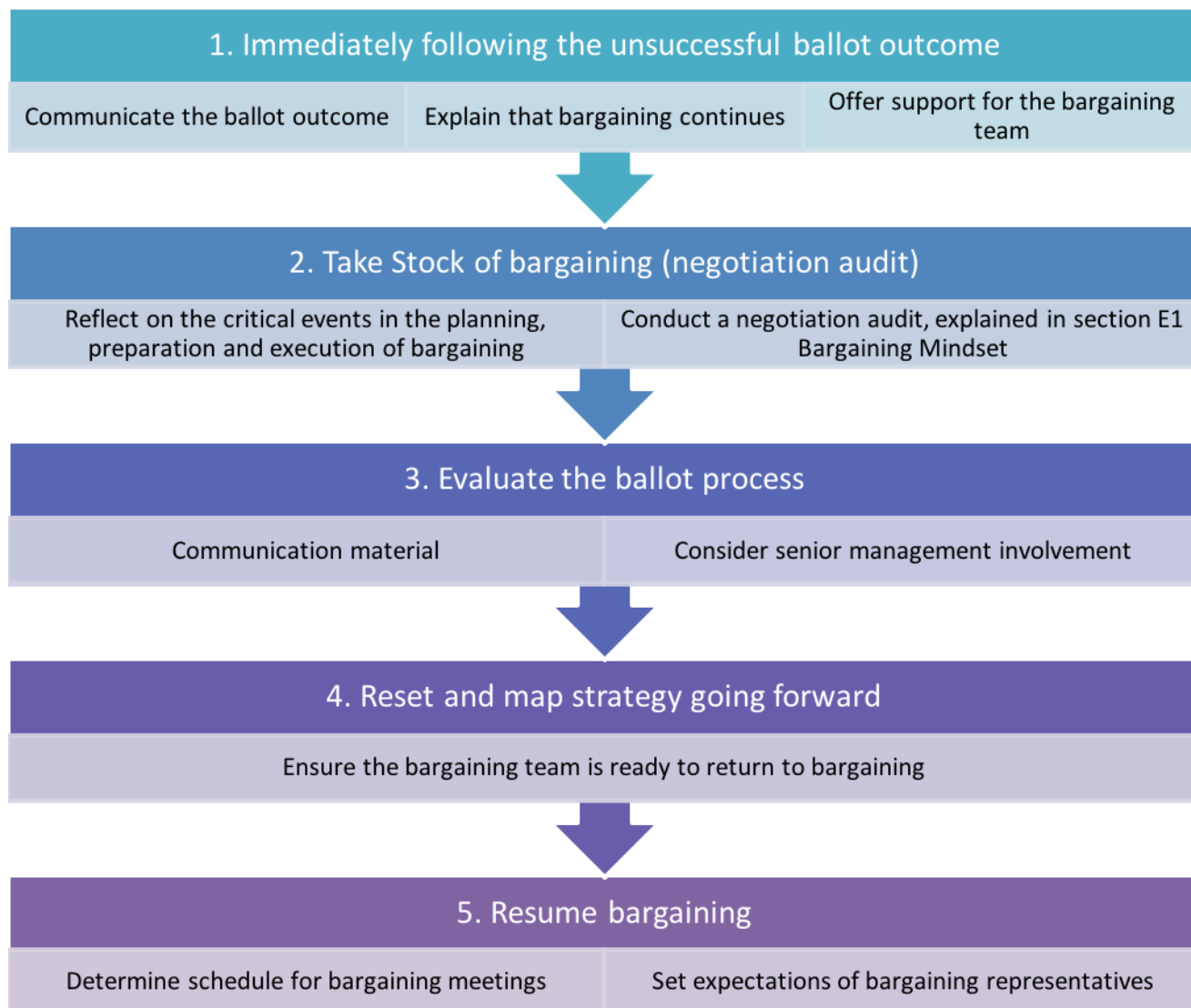
Step 4: Review the negotiation outcomes

- Consider the perspective of the other parties
- Reflect on the progress made in bargaining over the negotiation period

⁵ FELS, R. E. (2012). *Effective Negotiation: From research to results* 2nd edition. Port Melbourne, Cambridge University Press.

Next steps following an unsuccessful ballot

Below is an outline of the activities agencies can undertake following an unsuccessful ballot.



Agencies should examine critical events in the bargaining process, including planning (prior to bargaining phase), preparation (the bargaining phase) and execution (the ballot). Taking stock provides an opportunity to evaluate the strategy undertaken, the allocation of resources and expectations going forward. In most situations, there is no advantage in rushing back to bargaining straight away without learning what led to an unsuccessful ballot outcome.

Consulting with senior leaders, managers, corporate areas, employees and their representatives should help the agency pinpoint the unresolved issues and assess the mood of the workforce. Then, a new strategy must be developed to find an acceptable proposal (consistent with the agency's objectives and mandate, particularly around remuneration).

It might also be useful to refresh bargaining team members if they are experiencing fatigue. This may also help to reset the relationship with bargaining representatives.

F. Fair Work Commission

Enterprise bargaining may not always proceed smoothly. In some circumstances, agencies and other bargaining representatives may find themselves at the FWC, which performs the role of an industrial relations tribunal. This part of the guide deals with some of the key issues agencies should consider regarding the role of the FWC.

F1 | Matters in the Fair Work Commission

Agencies should look to the *Fair Work Act 2009* (Cth) and their enterprise agreement to determine what powers the FWC has, what method of dispute resolution applies and whether an application can be made to the FWC to deal with the dispute in question.

When faced with a dispute or potential matter in the FWC, agencies should seek legal advice, consult with the APSC and consider the positives and risks of engaging in a particular method of dispute resolution (e.g. the binding nature of arbitration).

Mediation, conciliation and arbitration

'Mediation', 'conciliation' and 'arbitration' are methods of dispute resolution facilitated by the FWC to deal with the various types of disputes between enterprise bargaining representatives or any parties before the FWC that arise in relation to the *Fair Work Act 2009* (Cth).

Disputes can relate to termination of employment, general protection of workplace rights, workplace bullying, right of entry, interpreting an award or agreement, engaging in industrial action and other matters that may arise from creating an enterprise agreement. It is rare that disputes arising from bargaining end up as proceedings in the FWC, however agencies should be aware of the possibility in their dealings with employee bargaining representatives.

The three methods of the FWC's dispute resolution process are as follows:

Conciliation or mediation

- Conciliation and mediation are informal methods of dispute resolution involving the facilitation of dialogue between parties by the FWC with the aim of finding an agreeable solution for everyone.
- The parties do not have to come to an agreement.
- The *Fair Work Act 2009* (Cth) does not distinguish between mediation and conciliation, but given their ordinary meanings the key difference is that a conciliator may offer his or her opinion as to the merits of each party's position, while a mediator does not.

Arbitration

- Arbitration is a formal method of dispute resolution involving the provision of evidence and arguments to the FWC before a decision is made by the FWC.
- Parties are bound by the arbitrator's decision.
- Arbitration generally only involves the parties involved in the bargaining related dispute.

Representation in the FWC

Bargaining representatives or any other parties engaged in a dispute at the FWC may only be legally represented if granted permission by the FWC. This contrasts the procedure in other courts which allow parties to be legally represented as a matter of course.

However, agencies may use in-house expertise at the FWC. APS agencies can also call on the Australian Government Solicitor (AGS) because the agency is part of the APS, so its use is not considered representation. This means that agencies proposing or planning to utilise the services of the AGS in proceedings cannot be ordered not to by the FWC.

Agencies should make sure to consider the FWC's position on representation prior to seeking legal representation for a FWC dispute.

Further Information

In *Stephen Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 the FWC interpreted the phrase 'represented in a matter before the FWC' to include certain out-of-court activities that occur after a matter comes before the FWC. These are likely to include preparing submissions, negotiating a resolution and other prehearing steps, but is unlikely to include legal advice (a subsequent FWC decision confirmed that permission is not required to obtain legal advice from a paid agent: see *Stringfellow v Commonwealth Scientific and Industrial Research Organisation* [2018] FWC 1136). The practical implications of this case are that a party should apply to the FWC for permission to be represented as soon as a matter comes before the FWC, if they intend to engage a lawyer or paid agent to assist with preparing documents and other pre-hearing steps.

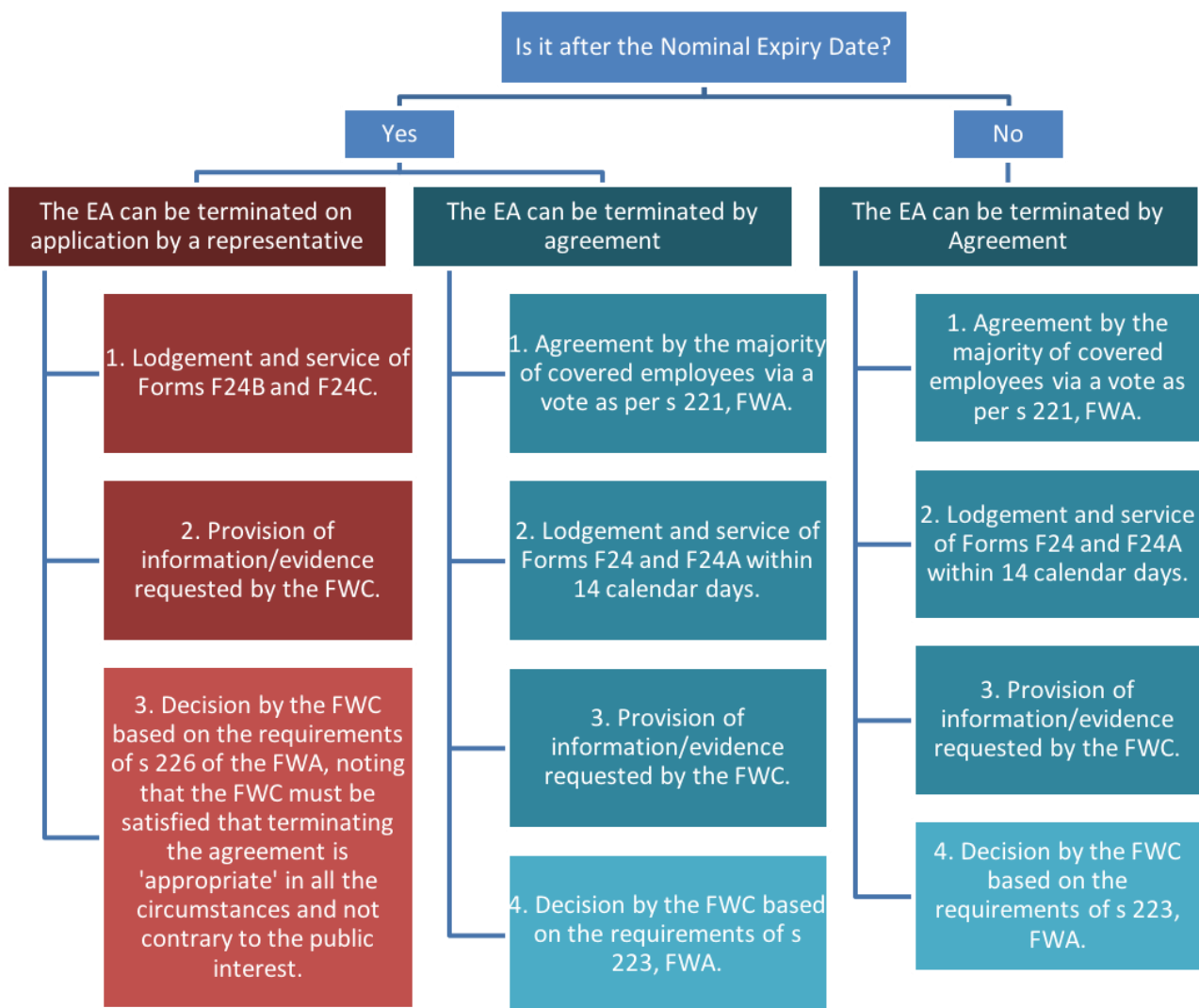
F2 | Terminating the enterprise agreement

Enterprise agreements are not automatically terminated as a result of passing beyond their nominal expiry date and continue to operate in perpetuity unless replaced by a new enterprise agreement or officially terminated.

It should be noted that it is exceedingly rare for enterprise agreements to be terminated in the public sector and this should only be considered when absolutely necessary. In certain circumstances, for example where an out of date enterprise agreement operates and restricts the work of an agency, it may be in an agency's best interests to explore the option of terminating its enterprise agreement. Termination applications are likely to have significant implications for an agency's workforce, including a likely return to Award coverage only. Agencies should seek legal advice and contact the APSC before deciding to commence a termination application.

The way in which termination can be brought about depends on whether the agency's current enterprise agreement's nominal expiry date has been passed or not.

This flowchart explains the basic means of terminating an agreement under the *Fair Work Act 2009* (Cth):



The FWC must terminate an agreement if:

In the case of a termination application by a bargaining representative, under section 225 of the *Fair Work Act 2009* (Cth):

- The FWC is satisfied that it is not contrary to the public interest to do so; and,
- The FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
 - (1) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
 - (2) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

In the case of a termination application by agreement, under section 222 of the *Fair Work Act 2009* (Cth):

- The FWC is satisfied that each employer covered by the agreement complied with giving employees a reasonable opportunity to decide (etc.) in relation to terminating the agreement; and,
- The FWC is satisfied that the termination was agreed to in accordance with whichever of subsection 221(1) or 221(2) applies (those subsections deal with agreement to the termination of different kinds of enterprise agreements by employee vote); and,
- The FWC is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and,
- The FWC considers that it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations (if any) covered by the agreement.

Further Information

Example of Commonwealth agency terminating an enterprise agreement:

The matter of Australian Rail Track Corporation's (**ARTC's**) application for termination of the *Australian Rail Track Corporation Enterprise Agreement 2014* (2014 EA) [2018] FWCA 641 is an example of a Commonwealth entity terminating their enterprise agreement under section 225 of the *Fair Work Act 2009* (Cth).

The Corporation had recently voted up a new enterprise agreement (**New Agreement**) which superseded the 2014 EA. The New Agreement covered most of the 55 employees covered by the 2014 EA, and measures were put in place to protect the terms and conditions of the small number of employees not covered by the New Agreement.

It should be noted that the Corporation's application was supported by all 55 employees in writing and not opposed by any unions representing the employees. The FWC terminated the 2014 EA, noting that it considered the termination to be appropriate and not against the public interest.

G. Industrial action

This part covers how to plan for industrial action, discusses how to communicate with stakeholders during industrial action, and outlines the different types of industrial action available to employees and what options might be available to employers who are facing industrial action.

G1 | Industrial action and industrial action ballots

What is protected industrial action?

Protected industrial action refers to actions taken, which are authorised by the FWC through a protected action ballot process, and that is notified and taken consistent with the ballot under *Fair Work Act 2009* (Cth).

Employees engaging in protected industrial action will have immunity from legal action, except for a list of exceptions set out in section 415 of the *Fair Work Act 2009* (Cth) (for example, in relation to action for defamation).

Protected industrial action under the *Fair Work Act 2009* (Cth) can only occur when:

- ✓ the parties are bargaining for a new single-enterprise agreement (that is not a greenfields agreement);
- ✓ the nominal expiry date of an existing agreement has passed;
- ✓ the FWC has approved a protected action ballot;
- ✓ at least 50% of eligible members vote in the ballot;
- ✓ there is a majority (50% plus one vote) in favour of the industrial action;
- ✓ the bargaining representatives are genuinely trying to reach agreement;
- ✓ the action is for permitted matters and not for unlawful terms, part of pattern bargaining or part of a demarcation dispute;
- ✓ the bargaining representatives have complied with all relevant notice requirements; and
- ✓ the employees and bargaining representatives have complied with all FWC orders.

What is unprotected industrial action?

Unprotected industrial action is any industrial action that is not protected under the *Fair Work Act 2009* (Cth).

This may include, for example, actions taken despite an unsuccessful application to initiate protected industrial action or actions which occur in addition to protected industrial actions approved by the FWC. If the action is also unlawful (e.g. taken when the enterprise agreement is in place and has not passed its nominal expiry date) there may be penalties for those involved in the action.

Activities not considered industrial action

There are exceptions to the definition of industrial action (whether protected or unprotected), being action that is authorised or agreed to by the employer, or action taken by an employee based on the employee's reasonable concern about an imminent risk to his or her health or safety, where the employee did not unreasonably fail to comply with a direction to perform other available work.

Industrial action ballots

What is a protected action ballot?

A protected action ballot is a secret ballot that asks eligible employees covered by the ballot to authorise the taking of lawful protected industrial action. Employees cannot engage in lawful protected industrial action until the proposed industrial action is approved by a vote in a protected action ballot. This ballot is organised by employees or their representatives who provide an employer with notice of their intention to hold a ballot.

Considering the protected action ballot application

Once an agency has received a copy of a protected action ballot application, they should note the range of actions included and the amount of notification to be given before taking protected action. The agency should also communicate the details of the ballot with their senior leadership, Minister's Office and the APSC.

Potential employer responses to protected action ballot

Agencies may also wish to seek their own legal advice about whether or not the application for a protected industrial action ballot could be challenged (e.g. the 'genuine agreement' criteria is not met because of the conduct of the employee bargaining representative in the bargaining processes). The agency may then ask the FWC not to approve the ballot or to vary the content of the proposed ballot actions.

An agency may consider the notice period for protected industrial action as insufficient given the potential for serious disruption to its business and customers. An agency could also seek clarification where the wording of proposed ballot question is ambiguous. In these situations agencies should seek legal advice before deciding on a particular course of action. Agencies are entitled to prepare for industrial action and seek to moderate a ballot which is unclear or incorrect, where it is appropriate and there is scope to do so.

Further Information

For more detailed information regarding industrial action and employer responses consult the FWC's Industrial Action Benchbook.

Agencies should consult with the APSC and seek legal advice when decided on a specific response to employees taking industrial action.

G2 | Preparing for industrial action and business continuity

Preparing for industrial action

Agency Heads need to be prepared for the possibility of protected industrial action. Where Agency Heads consider protected industrial action likely, Agency Heads should develop a management plan that may be informed by the risk management plan outlined in Section C3 'Consulting Senior Leadership'. An industrial action management plan should set out the processes and actions the agency would undertake to mitigate these risks and provide business continuity.

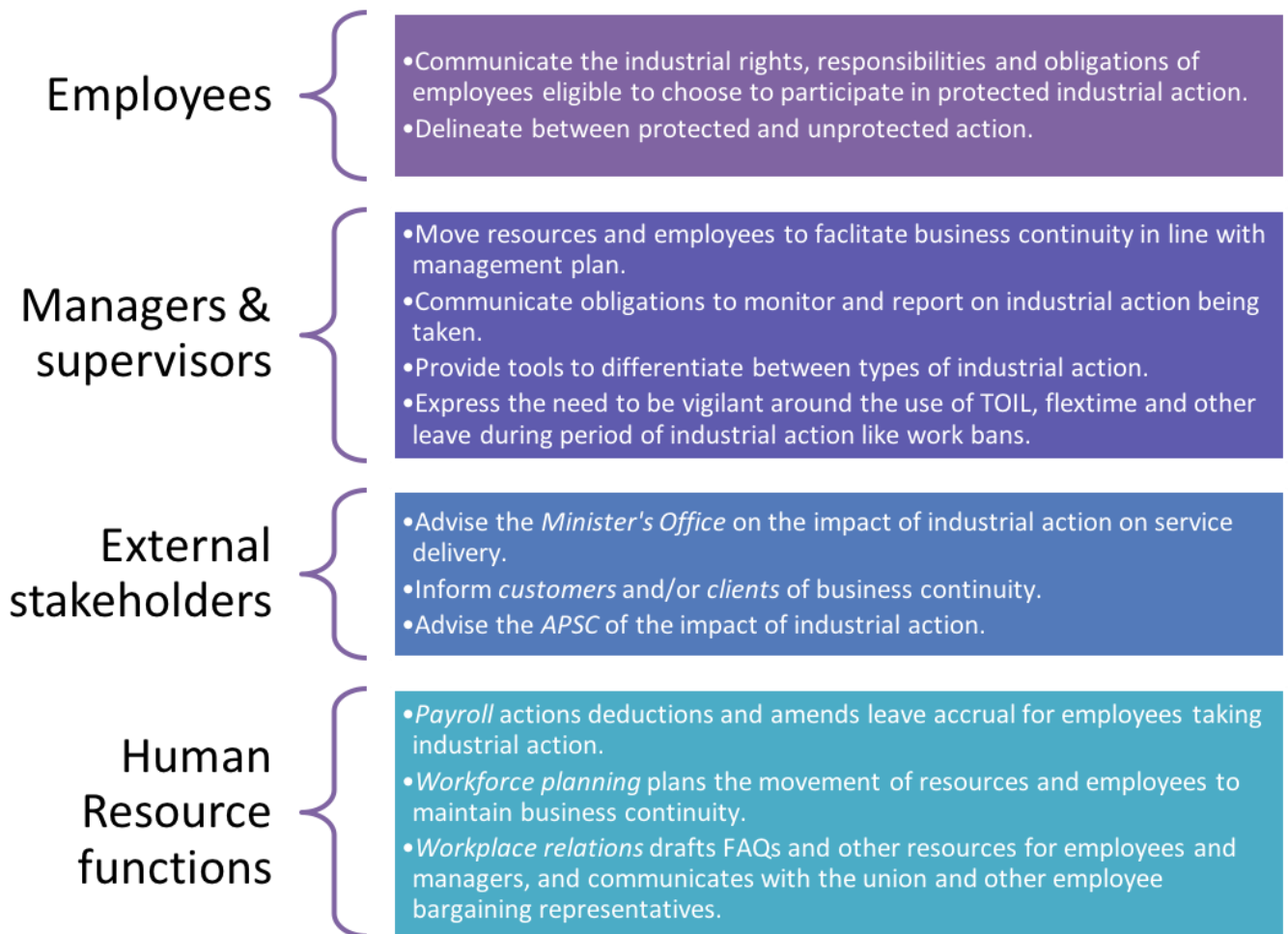
A management plan for dealing with industrial action should account for four main activities:

Implement systems to monitor industrial action	Gain access to legal and policy advice	Develop communication strategies	Consider employer responses to industrial action
<ul style="list-style-type: none"> • Agencies need systems in place to capture which staff undertake industrial action. • This includes working with managers to assess quickly which activities and are protected and which are not. • Payroll and other human resource functions need to be aware of and ready to action the agency's legislative obligations and management decisions. 	<ul style="list-style-type: none"> • Agencies need to have contacts in place to quickly request and receive legal and policy advice. • Advice regarding the bargaining policy should come from the APSC as they are responsible for administering the policy. 	<ul style="list-style-type: none"> • Agency communication needs to be clear, accurate, consistent and timely. • Agencies not only have to communicate with employees, but managers and supervisors (internally), as well as their Minister's Office, APSC and the public (externally). • Some agencies may have external customers who would be affected by industrial action that limits their operations and business continuity. 	<ul style="list-style-type: none"> • Agencies have a range of legal options that can be taken in response to protected and unprotected industrial action. • Some actions are required by legislation, but agencies have discretion with regard to others. • Agencies should also develop comprehensive legal and operational contingency plans in advance of any industrial action.

Managing industrial action and business continuity

After the protected action ballot has been completed and the result declared, the agency should expect the successfully voted on actions to commence within 30 days. The 30 day period is a legislative requirement, however the FWC can extend this period by up to another 30 days.

The agency must be prepared to implement their management plan described earlier. This plan should ideally be tailored to meet the requirements of different groups and stakeholders. Below is an outline of these different groups and what the management plan may set out for them.



G3 | Communicating with stakeholders about industrial action

Effectively communicating with stakeholders is critical to managing industrial action successfully. This starts with assessing the likely impact of industrial action and preparing a management plan to address business continuity concerns, as addressed in the earlier section.

This plan should include a communications element with the various stakeholders, from employees, managers, customers, the Minister's office and the APSC. Agencies need to notify internal and external stakeholders about the potential impacts of industrial action and provide a realistic assessment of business continuity.

Below is an outline of the stakeholders, communication channels and methods that should be identified in a communications plan regarding industrial action.

Unions	<ul style="list-style-type: none"> • Protected industrial action notices received via email • Maintain a working relationship to ensure members are aware of industrial rights and obligations • Work with the union to disseminate factual information
Employees	<ul style="list-style-type: none"> • Ensure all employees are aware of the implications and impact of industrial action • Ensure all employees know if they are eligible to take industrial action (each notice may apply to specific groups of employees) and their right to choose (if eligible) to participate
Customers, clients and the public	<ul style="list-style-type: none"> • Identify which services will be impacted and communicate it directly with customers and clients • Outline alternative arrangements and service availability • Reassure the public with factual information
Partner Agencies	<ul style="list-style-type: none"> • Identify projects and activities impacted by industrial action • Advise on impacts to business continuity and staffing
Minister	<ul style="list-style-type: none"> • Outline the impact on service delivery • Outline potential media coverage resulting from action

G4 | Responding to industrial action

Employer actions

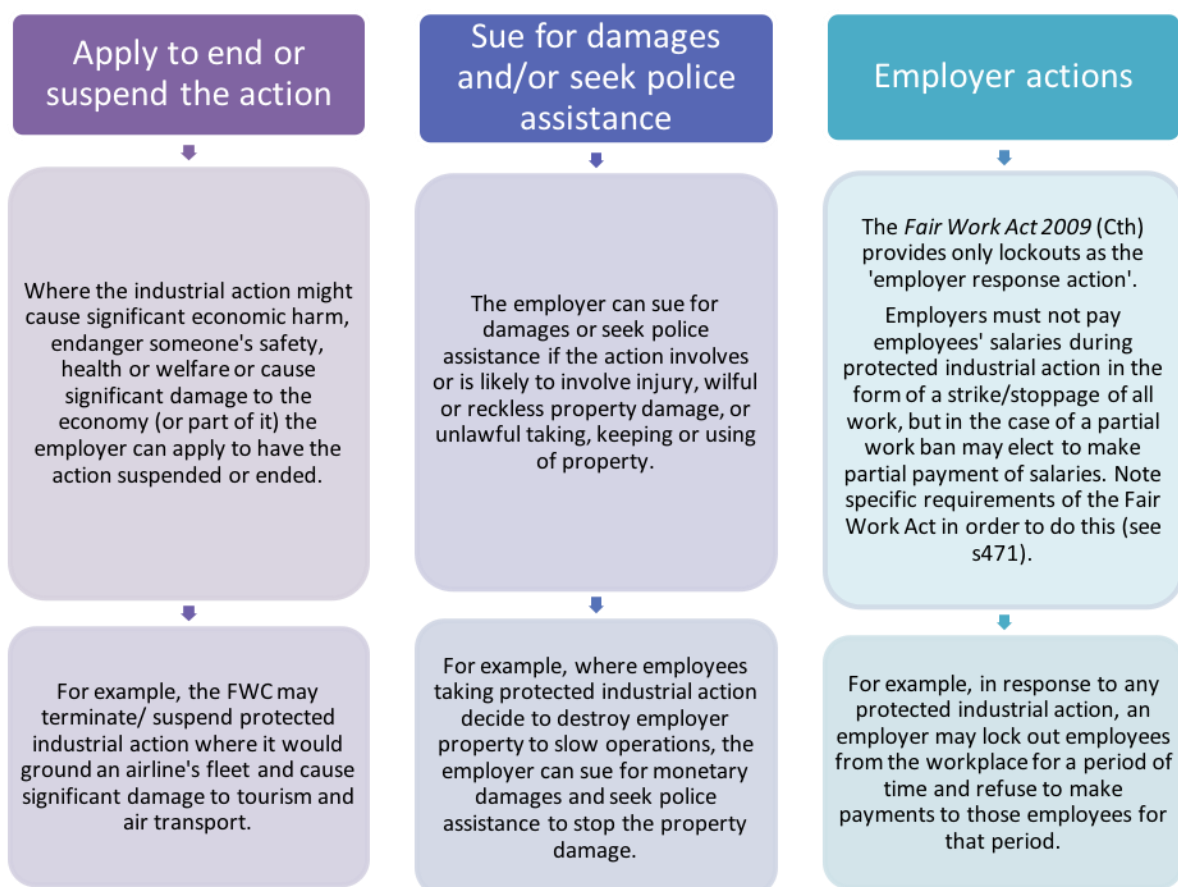
Where employees have engaged in industrial action, agencies may consider engaging in an employer response action. Employer response action is that which:

1. is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and
2. is taken by an employer in response to industrial action undertaken by a bargaining representative and/or employee covered by the proposed enterprise agreement (and which actually occurs, rather than being merely threatened or imminent).

The range of actions an agency can and should take will depend on whether the industrial action is protected or unprotected and what type of industrial action it is.

Protected industrial action

Where protected industrial action has been initiated, a number of options for recourse may exist for the employer, including:



When faced with notification of protected industrial action agencies should:

1. check that all of the FWC's requirements for the taking of the protected industrial action have been met; and

2. that the proposed action matches the actions authorised by the ballot.

If any discrepancies or contraventions are found, the bargaining representative should be advised of the issue and FWC proceedings may be brought to stop the action.

Payments to employees engaging in protected industrial action

Work stoppages

Agency Heads are prohibited from making payments to employees for the duration of the protected industrial action, with some exceptions for partial work bans. Therefore, an employee taking a work stoppage for an hour must have their salary deducted by that period of one hour. This can include periods less than an hour, for example deducting one minutes pay for one minute work stoppages.

Partial work bans

Special provisions (in section 471 of the *Fair Work Act 2009* (Cth)) apply in relation to paying employees during partial work bans. In response to partial work bans, employers can either:

- **refuse any work** from employees engaged in partial work bans;
- or **deduct partial payment** in proportion to the work that is not being performed as a result of the bans.

Agencies should take care to ensure deduction is approximately equivalent to the work patterns of the employees. This can be very difficult to surmise given work patterns can be fluid depending on the role. A partial work ban on using instant messaging applications or office phones in the workplace may not be easily quantifiable for an administrative job. In comparison, call centre employees refusing to use phones would be much more significant. This ambiguity offers Agency Heads three options in dealing with partial work bans, including:

- Paying employees undertaking the partial work ban their full salary; or
- Providing **written notice** to employees undertaking the partial work ban that the Agency Head will reduce payment of salary by a specified portion for the period of the partial work ban;⁶ or
- Providing **written notice** to employees undertaking the partial work ban that the Agency Head will refuse to accept any work from the relevant employees until they are prepare to perform their normal duties, and will therefore not pay employees at all for the period of the ban.

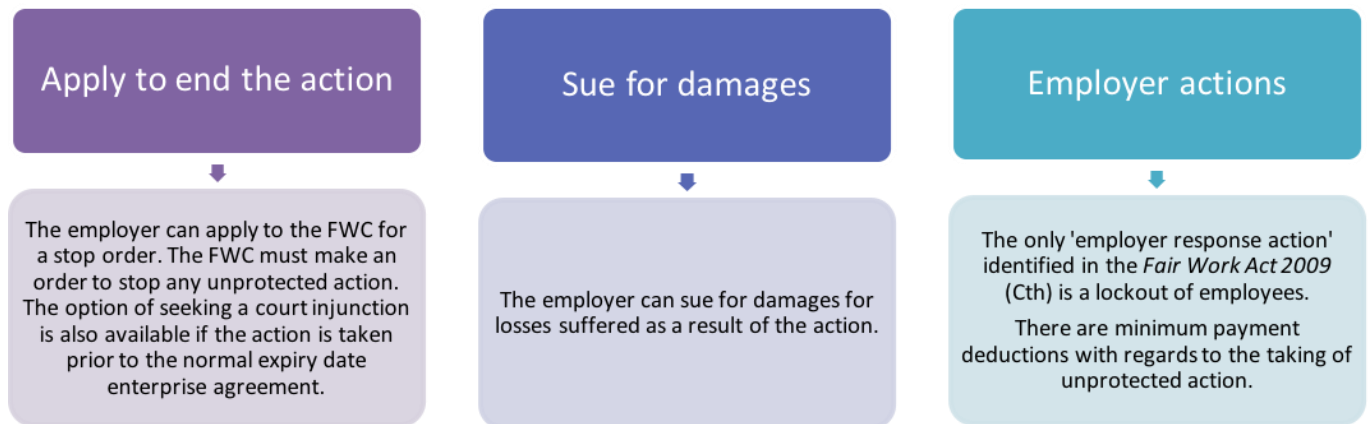
Overtime bans

There are specific rules on protected overtime bans. Agencies can only withhold payment where the employee refuses a request or requirement to work overtime. The refusal to work overtime must in be in contravention of the employee's obligations under a contract of employment, enterprise agreement or other industrial instrument.

⁶ Partial payments must comply with the requirements in section 471 of the *Fair Work Act 2009* (Cth) and any applicable regulations.

Unprotected industrial action

Where unprotected industrial action has been initiated as part of the bargaining process, a number of options for recourse may exist for the employer, including:



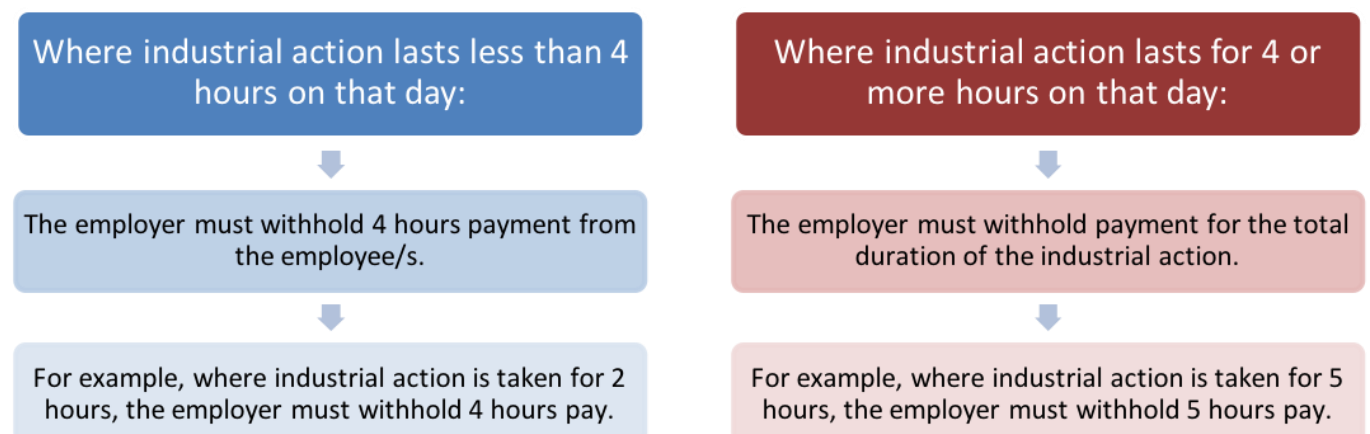
Payments to employees engaging in unprotected industrial action

Where an agency considers employees are taking unprotected industrial action, which is not protected under the *Fair Work Act 2009* (Cth), the agency should contact the APSC, consult with the FWC and seek legal advice.

Employees and unions are not entitled to take unprotected industrial and the *Fair Work Act 2009* (Cth) provides that agencies can seek FWC orders (and in some instances court orders) that such actions cease. There are significant penalties for non-compliance of these orders.

In the event of unprotected industrial action, employers must withhold pay from those employees involved in the action under section 474 of the *Fair Work Act 2009* (Cth). Failure to do so may result in a civil penalty to the employer. Employees and unions on behalf of their members must not ask for, or accept, payment from an employer where payment would contravene the above requirement.

The arrangement for deducting payments for employees engaged in unprotected industrial action is different to that for employees taking protected industrial action. Agencies are required to withhold a minimum of 4 hours pay per day of industrial action, as explained below:



It should be noted that additional rules/exceptions apply to payment of wages during an overtime ban and for actions taken where the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety.

Seeking FWC intervention

In specific circumstances outlined in the *Fair Work Act 2009* (Cth) an employer may seek to suspend or terminate protected industrial action, as determined by the FWC. Agencies should consult with the APSC and their Minister's Office when considering such a decision and seek legal advice.

This has occasionally occurred in the Commonwealth public sector in situations where the industrial action could cause significant economic harm, danger to the employees and/or where it threatens the welfare of the public.

Significant and compelling evidence is required before the FWC would agree to suspend or terminate industrial action on these grounds. Alternatively, an agency could seek suspension of industrial action to provide a cooling-off period where the FWC believes it would assist in reaching a resolution between bargaining representatives.

Employer response action

Employer response action refers to protected industrial action taken by the employer against employees. Section 19 of the *Fair Work Act 2009* (Cth) only provides for one form of employer response action which is a lockout of employees. It should be noted that:

- the response need not be proportional to the industrial action; and
- continuity of employment (e.g. for leave purposes) will not be affected by lockouts.

Other responses such as standing down employees for periods during which the employees cannot usefully be employed⁷ (noting this is a high threshold) or declining to pay employees for partial work bans (as per section 471 of the *Fair Work Act 2009* (Cth)) are not 'employer response actions' as defined by the *Fair Work Act 2009* (Cth).

The use of lockouts in the Commonwealth public sector is very uncommon and unusual, and agencies considering such actions should seek legal advice, consult with the APSC and their Minister's office, and consider whether imposing a lockout assists its overall bargaining strategy and improves the likelihood of reaching an agreement with employees. Lockouts risk further escalation and could impact the agency's service delivery obligations.

⁷ See Part 3-5 of the *Fair Work Act 2009* (Cth).