Public Sector Workplace Relations policies
December 2012 update
## Contents

1. **The Public Sector Workplace Relations policies** .......................................................... 1  
   - Introduction ......................................................................................................................................... 1  
   - General principles ................................................................................................................................. 1  
   - Governance, administration and oversight ......................................................................................... 2  
   - Making enterprise agreements ............................................................................................................ 4  
   - Managing industrial action .................................................................................................................. 9  
   - Dispute resolution ............................................................................................................................... 11  
   - Termination of employment ................................................................................................................. 11  
   - Redundancy, redeployment and retrenchment ................................................................................... 12  
   - Employee entitlements on transfer from the public sector to a private provider ................... 15

2. **Attachments** .............................................................................................................................. 19  
   - Attachment 1 – Constitutional limitations ......................................................................................... 19  
   - Attachment 2 – Work/Family model clauses ..................................................................................... 20  
   - Attachment 3 – Public Holidays ......................................................................................................... 29  
   - Attachment 4 – Model Enterprise Agreement dispute resolution clause ....................................... 31  
   - Attachment 5 – Termination of Employment .................................................................................... 34  
   - Attachment 6 – Victorian Public Service redeployment policy ......................................................... 36

3. **Glossary and contact details** ...................................................................................................... 40
1. The Public Sector Workplace Relations policies

Introduction
The Government values public sector employees and encourages and promotes workplaces where managers and employees cooperatively and proactively work together to create positive workplace cultures.

This document reflects the Government’s position on a number of public sector workplace relations matters and sets out various standards and requirements, particularly with regard to the negotiating and making of enterprise agreements.

General principles
The Government is committed to a public sector workplace relations framework that:

- promotes measurable improvements in service delivery, workforce productivity and workplace reform;
- is fiscally sustainable;
- promotes and fosters a culture of open, respectful and meaningful engagement between employees and management;
- complies with all legislative requirements;
- promotes the public sector as a preferred employer;
- ensures employees have a clear understanding of their role and contribution within their department or agency;
- provides flexibility to public sector employers in developing enterprise agreements;
- ensures a consistent approach to managing employee relations issues across the public sector while allowing individual departments flexibility to deal with issues;
- supports the development of fair, cooperative, safe and productive workplaces throughout the public sector;
- fosters best practice human resource management programs and policies that encourage innovation, standards of high performance, employee skill acquisition and utilisation; and
- incorporates and addresses key issues of governance and risk.

Individual departments and agencies have flexibility in deciding the specific content of enterprise agreements and what should be provided for in departmental and agency policies. The Government’s wages policy allows for differences in enterprise agreement wage outcomes in return for genuine productivity gains (refer Wages Policy on page 7).
## Governance, administration and oversight

The following table illustrates the governance, administration and oversight of public sector enterprise agreements.

### Governance and Administration of Public Sector Agreements

<table>
<thead>
<tr>
<th>Responsible department or agency</th>
<th>Key responsibilities</th>
<th>Additional responsibilities</th>
</tr>
</thead>
</table>
| **Portfolio department or agency** | • timely development of management log including funding strategies which are consistent with Government policy  
  • negotiating with employees and their bargaining representatives in accordance with the approved management log  
  • settling agreements following DTF certification  
  • reporting to Government (via the PSIR Unit) on any workplace matter which is likely to impact on Government policy, or have budgetary considerations in order to obtain authority to conclude negotiations | **Departmental secretary**  
  • overall management of workplace relations within department, portfolio agencies and associated projects  
  • ensuring that departmental policies and practices are consistent with Government policies and applicable legislation  
  • engaging directly with employees to build a strong workplace culture and harmonious working environment  
  • coordinating and endorsing management logs, settlement positions and enterprise agreements for the department and portfolio agencies |
| **Agency Chief Executive Officer (or equivalent)** | • management of workplace relations within agency  
  • ensuring agency policies and practices are consistent with Government policies and applicable legislation  
  • informing portfolio department of workplace relations matters as required  
  • engaging directly with employees to build a strong workplace culture and a harmonious working environment  
  • providing management logs, settlement positions and enterprise agreements, including funding strategies, to portfolio department |
<table>
<thead>
<tr>
<th>Responsible department</th>
<th>Key responsibilities</th>
<th>Additional responsibilities</th>
</tr>
</thead>
</table>
| Department of Treasury and Finance (DTF) | • providing information and strategic advice to Government and DTF executive on public sector workplace relations and workplace reform matters  
• achieving budgetary sustainable or cost-beneficial enterprise agreements for the public sector which support workforce and service delivery reform  
• overseeing and coordinating the assessment and approval of public sector management logs, settlement positions and enterprise agreements, consistent with Government policy objectives  
• ensuring departments and agencies comply with the Government’s workplace relations policies | Public Sector Industrial Relations (PSIR) Unit in DTF  
• coordinating public sector workplace relations for the Victorian Government  
• collaborative working with DPC and the State Services Authority to develop workplace relations and people management frameworks and policies and strategies to support the public sector in achieving the Government’s service delivery objectives  
• guiding and assisting public sector agencies throughout the enterprise bargaining process and on workplace relations policy  
• managing relationships with key stakeholders including public sector unions |
| Department of Premier and Cabinet (DPC) | • considering whole-of-government implications arising from workplace relations matters including enterprise agreements, and providing strategic advice on whole-of-government workforce reform issues  
• briefing on agreements or management logs for non-major agencies employing more than 200 employees where the management log or agreement raises whole-of-government issues |  

Consultation between public sector employers and public sector unions

The Government supports consultation, dialogue and information exchange between public sector employers, employees and public sector unions.

Departments and agencies are responsible for their stakeholders including liaising with bargaining representatives. Departments and agencies should approach central agencies as required in relation to specific whole of government consultation issues.

Making enterprise agreements

Key principles

Departments and agencies are to negotiate enterprise agreements in good faith with all non-executive level employees and their bargaining representatives.

The aim of these workplace relations policies is to facilitate agreement making and to maintain a degree of consistency across the Victorian public sector.

The Government’s guidance on agreement making and approval processes, which supplements these policies, is available from the PSIR Unit.

Agreement outcomes:

- must operate prospectively;
- must be fiscally sustainable;
- should result in measurable improvements in service delivery, workforce productivity and reform; and
- must not result directly in reductions in services or increases in charges.

Government approval

Government generally distinguishes departments and agencies as either ‘budget’ or ‘non-budget’ based on their main funding source. There are different approval processes and governance arrangements for budget and non-budget agencies. DTF can advise agencies whether they are budget or non-budget for the purpose of these policies.

Public sector agencies are required to engage with portfolio departments and DTF to ensure that management logs and settlement positions are submitted for consideration in a timely manner, and in ensuring that compliance with these policies occurs throughout the enterprise agreement making process.

Agreement making for budget-funded major agreements (i.e. those with a large public sector workforce such as the public service, nurses, doctors, health professionals and administrators, teachers, police and certain emergency services) operates under a separate process and the portfolio Minister is required to report directly to the relevant Cabinet Committee.

Agencies must not proceed to a formal employee ballot until the agreement has received final Government approval. Further detail is provided for the guidance of Public Sector Agencies and is available from the PSIR Unit.
The table below summarises the main governance arrangements.

<table>
<thead>
<tr>
<th>Type of EBA</th>
<th>Stage of EBA Approvals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Management Log</td>
</tr>
<tr>
<td><strong>Budget-funded, major agreements</strong></td>
<td>Government</td>
</tr>
<tr>
<td><strong>Budget-funded, non-major agreements</strong></td>
<td>Standing Committee (DTF Deputy Secretary and DPC Deputy Secretary)</td>
</tr>
<tr>
<td>200 employees or greater and/or specific whole-of-government issues</td>
<td>DTF Deputy Secretary</td>
</tr>
<tr>
<td>Fewer than 200 employees and no specific whole-of-government issues</td>
<td>DTF Deputy Secretary</td>
</tr>
<tr>
<td><strong>Non-budget agreements</strong></td>
<td>DTF approval*</td>
</tr>
</tbody>
</table>

* A copy of the management log for non-budget agreements must be submitted to the PSIR Unit for approval nine months prior to negotiations commencing.

The guidance for Public Sector Agencies provides further information on approval processes.

**Preparation**

Agencies must discuss enterprise agreement proposals, written or otherwise, with the PSIR Unit before commencing negotiations with employees and their bargaining representatives. The PSIR Unit must also be provided with regular advice and updates on the progress of negotiations, including provision of draft agreements where practicable.

Agencies are required to secure the relevant approval of the management log at least six months (for budget funded agencies) and nine months (for non-budget funded agencies) in advance of the nominal expiry date of any existing agreement or date stipulated in that agreement for the commencement of negotiations.

Before reaching agreement in-principle with employee bargaining representatives, public sector employers are required to obtain certification from DTF on the settlement position. Specifically, agencies will need to seek certification from DTF on the costs of the proposed agreement and the intended funding strategy to ensure that it complies with wages policy.

**Coverage and type**

Generally, agreements should cover all non-executive level employees. Executive employees employed under Government Sector Executive Remuneration Panel (GSERP) contracts should be excluded from the coverage of enterprise agreements.

Senior managers and senior technical specialists may be covered by enterprise agreements and any special employment arrangements peculiar to their status and position may be addressed via the individual flexibility arrangement facility that is mandatory in all enterprise agreements.

Enterprise bargaining outcomes must not involve deeds, side agreements or understandings unless the specific and prior approval of the relevant Cabinet Committee has been obtained.

Departments and agencies must forward:

a) any request from employees or their bargaining representatives for a Ministerial direction to enable two or more employers to bargain together; and
b) the proposed response to the request to the Minister for Finance (through the PSIR Unit) and the relevant portfolio Minister for assessment and approval. Where the employers propose to initiate such an
application the same requirements apply. In any submission seeking endorsement of a course of action, departments and agencies will be expected at a minimum to specify the following:

– the employers who will be covered by the agreement;
– the employees who will be covered by the agreement;
– the person (if any) nominated by the employers to make applications under the *Fair Work Act 2009* (FW Act) if a single interest employer authorisation is made;
– the justification for the proposed course of action; and
– the extent of consultation with stakeholders.

**Negotiations**

The Government supports the principles of freedom of association and recognises the right of employees to nominate a union or alternative bargaining agent as their representative in enterprise agreement negotiations.

Negotiations are to be conducted by the department or agency in consultation with the PSIR Unit. DTF certification of settlement positions is required before reaching agreement in-principle with employee bargaining representatives.

**Content – General principles**

During the bargaining process, employers and their representatives should be mindful of Government policy and ensure that they do not offer or accept terms that are inconsistent with Government policy.

It is the Government’s expectation that enterprise agreements:

1. Clearly and concisely articulate the workplace arrangement by:
   a) focusing on core terms and conditions relating directly to the employment relationship
      
      Agencies should consider whether matters proposed to be included in the enterprise agreement most appropriately reside in that document (e.g. core terms and conditions relating directly to the employment relationship) or in other organisational policy documents (e.g. mission statements, guiding principles, policy statements and the like).
   b) avoiding duplication or incorporation of statutory rights and requirements that exist independently of the agreement
      
      As a general approach, agencies should avoid the inclusion of clauses that duplicate or replace existing statutory requirements. An exception may be made where the FW Act requires the inclusion of the provision in the agreement.
   c) drafting provisions in plain English
      
      Agencies should promote the use of plain English and avoid provisions which are unduly complex or legalistic.

2. Support a dynamic and flexible workplace by including clauses which:
   a) are principled not prescriptive
      
      Agencies are encouraged to develop objectives/principles and indicators of performance rather than unduly prescriptive provisions. Government considers that agencies and bargaining representatives should achieve the same substantive outcome without creating unintended consequences or inefficiencies associated with specifying a particular method of implementation or procedure.

      Provisions which encourage flexibility in the workplace are provisions which are not prescriptive or procedural in nature.
b) encourage flexible workplace practices

The Government is supportive of the right of public sector employees to undertake their role in a flexible manner where appropriate, including by the use of individual flexibility clauses in relation to arrangements about when work is performed, overtime rates, penalty rates, allowances and leave.

Agencies should use the model flexibility term and the model consultation term in the Fair Work Regulations 2009 as a guide when formulating the mandatory provisions about these matters.

c) preserve appropriate management prerogative

Government considers it is appropriate and desirable that both it (as policy holder) and senior management are able to retain the ability to promote and provide for a high performing and adaptable workplace.

Government supports the inclusion in agreements of provisions that support, rather than diminish, management prerogatives. Provisions that provide for any alteration to rights or responsibilities attaching to roles addressed specifically in any State or Commonwealth legislation should not be included.

Likewise, the inclusion of provisions restricting the use of contractors is inconsistent with the Government’s expectations and should not be included in agreements.

3. Protect freedom of association

Government supports and promotes the freedom of public sector employees to be represented by an employee organisation such as a trade union, including in enterprise bargaining where they are free to choose their own bargaining representatives.

Agreement provisions should reflect the choices of employees in this respect and the Government’s neutrality and therefore not include clauses that are intended to benefit a group of employees, either directly or indirectly, by virtue of their choice of bargaining representative.

4. Are consistent with Victoria’s referral of powers and constitutional limitations

Agencies should ensure that matters that purport to override constitutional limitations expressed in the High Court Re AEU and Victoria v The Commonwealth decisions or the referral of industrial relations matters by Victoria to the Commonwealth are not included in enterprise agreements. These limitations are outlined in Attachment 1.

Content – Wages policy

Departments and public sector agencies must adhere to the wages policy as follows:

- A wage guideline rate of 2.5 per cent per annum, so that the total cost of an agreement (including conditions, allowances or any other agreement related payments) is no more than 2.5 per cent annualised.
- There is no ceiling or limit on wage outcomes. However, enterprise agreement outcomes in excess of the wage guideline rate must be fully offset by genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations. These gains must be bankable, i.e. they must generate savings that will be available to fund any outcome in excess of the wage guideline rate.
- Enterprise agreement outcomes within the wage guideline rate must be fiscally sustainable and funded through ongoing and financially viable sources.
- Departments and agencies will be required to demonstrate that the funding of costs associated with their agreements accords with this policy and with sound and sustainable
financial practices. Departments and agencies should provide evidence of workforce reforms proposed to be achieved through the agreement negotiations.

- The use of revenue to fund an agreement is capped at the wage guideline rate of 2.5 per cent per annum. Enterprise agreement outcomes in excess of the wage guideline rate must be funded through genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations.
- Where entities receive a combination of revenue and DFM indexation, the combined contribution to funding an agreement outcome must not exceed 2.5 per cent per annum of the starting salary base (including on-costs).

In complying with wages policy, departments and agencies should be aware of the following:

- Where the Minister for Finance considers an agreement contains provisions or outcomes that have broader public sector impacts the agreement may be referred to the relevant Cabinet Committee for consideration.
- All agreed wage outcomes between employers and employees need to take into account the recent decision by the Commonwealth Government to increase the employer superannuation guarantee.
- In exceptional circumstances, if a department or agency anticipates that it will not be able to sustainably fund the likely outcome of negotiations, the portfolio Minister must submit a business case to the relevant Cabinet Committee at least twelve months prior to the commencement of negotiations for a new agreement. The submission should:
  - request a base review be undertaken by DTF;
  - outline a business case which supports the request;
  - demonstrate prima facie that cost increases flowing from the likely outcome of negotiations cannot be managed within the department’s or agency’s total budget without adversely affecting service delivery; and
  - guarantee that any additional revenue sources identified by a price review will not be used for other purposes and will remain available until the relevant agreement is approved by Fair Work Australia (FWA) and commences operation.

Content – Work and family

Departments and agencies must as a minimum abide by the parental leave, personal/carer’s leave and compassionate leave provisions provided for as part of the National Employment Standards (NES) under the FW Act (for more detail see Attachment 2).

Public sector enterprise agreements may include paid parental leave. The entitlement is in addition to payments available under the Commonwealth Paid Parental Leave Scheme (Commonwealth PPL Scheme).

Public sector employers must not reduce existing paid parental leave entitlements of employees upon the expiration of a current enterprise agreement by absorbing the Commonwealth PPL Scheme to offset the cost of existing enterprise agreement entitlements.

The PSIR Unit has developed parental leave, and personal/carer’s/compassionate leave model clauses for use by agencies in new agreements (Attachment 2: Work/Family model clauses). The model clauses provide guidance for agencies taking into account the requirements of the FW Act and relevant state legislation.

Departments and agencies are encouraged to adopt family friendly work practices and to recognise their benefits. These include:
• increased productivity;
• flexibility within workplaces;
• availability of a wider pool of skilled labour, particularly among women and older workers;
• greater capacity to address labour and skill shortages and attract and retain skilled workers;
• greater scope to develop and realise the full potential of the workforce, new technologies and innovative work practices;
• less stress and better health; and
• more cohesive and caring communities which support families.

Date of first pay increase

• The operative date for the first increase can be no earlier than the date in-principle agreement is reached between the negotiating parties and should not pre-date the nominal expiry date of the existing agreement. Agencies are required to submit a separate application to the PSIR Unit to lock in the operative date for the first salary increase. (See template application in the guidance for Public Sector Agencies)
• The actual payment of salary increases cannot be made until the agreement commences operation (i.e. approval by FWA).

Content – public holidays

The legislative entitlements of Victorian public sector employees to public holidays are summarised in Attachment 3.

Managing industrial action

General

Departments and agencies are responsible for implementing strategies for dealing with industrial action and minimising its impact.

Departments and agencies need to be aware of the operational implications and the legislation that applies in planning and preparing for any potential industrial action. They should also ensure that responses to industrial action are appropriate and proportional to the action involved.

Further guidance on these matters, which supplements these policies, is available from the PSIR Unit for departmental and agency managers and supervisors. Departments and agencies must obtain and comply with this guidance in relation to any industrial action with which they may be involved.

Protected action ballots

As soon as an agency becomes aware that an application to FWA for a ballot order might be made or has been made, it must immediately provide to the PSIR unit:
• a copy of the application, if it has been provided to the agency, as well as any other related documents and information;
• a summary of the agency claims;
• a copy of the union log of claims;
• the agency’s view on whether the ballot application should be challenged and if so which items listed on the application can be challenged and on what grounds.
Where departments and agencies consider the circumstances justify challenging the granting of a protected action ballot order, they are required to consult with the PSIR Unit and seek the approval of the portfolio Minister and the Minister for Finance (through the PSIR Unit) before challenging the granting of the application. Further detail is provided in the guidance for Public Sector Agencies in relation to reviewing protected action ballots.

Protected action involving total stoppage – deduction from pay
Employers are obliged by the FW Act to make deductions from the pay of employees engaged in industrial action involving a total stoppage of work. Departments and agencies must notify the portfolio Minister and the Minister for Finance (through the PSIR Unit) before proceeding to make any such pay deductions in response to a total stoppage of work during a period of protected action.

Protected action involving partial work bans – deduction from pay
Where the department or agency believes industrial action warrants application of section 471 of the FW Act (dealing with proportional pay deductions), it must notify the portfolio Minister and the Minister for Finance (through the PSIR Unit) before proceeding to implement the procedures under that section. In any notification, departments and agencies are expected to outline:

- why the action taken by employees warrants the application of section 471;
- what proportion of employees’ pay is intended to be deducted; and
- the method by which the proportion was determined.

Employer response action
Departments and agencies must seek the prior approval of the portfolio Minister and the Minister for Finance (through the PSIR Unit) before engaging in ‘employer response action’ as defined in section 411 of the FW Act.

Applications to suspend or terminate protected action
Where a department or agency intends to apply to FWA for orders to suspend protected industrial action (for example, on the ‘cooling off’ ground) the portfolio Minister and PSIR Unit must be advised.

Where a department or agency intends to apply to FWA for orders to suspend or terminate protected industrial action which may lead to the arbitration of bargaining outcomes by FWA (for example, on the grounds of threat to the safety, health or welfare of a part of the population), the prior approval of the portfolio Minister and the Minister for Finance (through the PSIR Unit) are required.

Unprotected industrial action
A department or agency must notify and obtain the prior approval of the portfolio Minister and the Minister for Finance (through the PSIR Unit) before:

- applying to the courts to seek or enforce any order in relation to unprotected industrial action; or
- making claims in the courts for industrial torts; or
- seeking civil remedies in respect of any claims for payment during any period of industrial action; or
- taking any other form of legal action in response to industrial action.

A department or agency must notify the portfolio Minister and the Minister for Finance (through the PSIR Unit) before proceeding to:
• make any deductions from pay (as provided for in the FW Act) as a result of unprotected action; or
• apply to FWA for orders to stop or prevent unprotected industrial action.

Dispute resolution

Departments and agencies must ensure that they have the appropriate frameworks in place to reduce the possibility of disputes arising in the workplace and processes in place to respond to and manage such disputes at the local work level whenever possible.

Employers should adopt internal procedures that provide for mediation or conciliation involving an experienced provider before any consideration is given to the possibility of seeking a determination from an external source.

A model clause for enterprise agreements containing procedures for dealing with disputes is provided for the guidance of public sector employers in Attachment 4.

Termination of employment

Departments and agencies should ensure that due process and procedural fairness are applied to help ensure that any termination is not unlawful or harsh, unjust or unreasonable. These principles should also be applied to any other disciplinary actions.

Under the Public Administration Act 2004, public sector body heads are required to establish employment processes that, among other things, will ensure that public sector employees are treated fairly and reasonably, equal employment opportunity is provided and public sector employees have a reasonable avenue of redress against unfair or unreasonable treatment.

The constitutional limitations relating to redundancy identified by the High Court do not prevent departments and agencies engaging in a consultative process with employees and their representatives when a decision has been made to restructure the workplace, introduce new technologies or change existing work practices which affect employees (refer to the Redundancy, Redeployment and Retrenchment policy).

For information on legal obligations relating to termination of employment, refer to Attachment 5.
Redundancy, redeployment and retrenchment

Application – employers

‘Victorian public sector agency’ means all:

- departments and public sector bodies under the *Public Administration Act 2004* (PAA);
- public sector bodies under other Victorian legislation; and
- public health services, schools and TAFE Institutes.

Universities and Institutes of Technology are specifically excluded, except for the TAFE division of the four dual sector universities (note that a specific exemption applies to TAFE funded general staff).

Application – employees

This policy applies to employees in the above applicable public sector bodies, other than:

- executives on contracts who are not entitled to compensation on termination; and
- casual and temporary employees who are not generally entitled to redeployment and retrenchment benefits if their employment is terminated. Similarly, fixed term contract employees who have completed their term of employment are generally not entitled to redeployment or retrenchment benefits. Further advice should be sought if the casual or fixed-term nature of an employee’s employment is unclear.

Consultation obligations

Consistent with obligations associated with implementation of change provisions contained within agreements, employers have a responsibility to consult with employees and to treat them fairly and reasonably and to apply objective and non-discriminatory criteria consistently. Employers must ensure policies and employment processes are in place to protect these rights, and all managers and employees are aware of these processes and rights.

Employees should be advised as early as possible of organisational changes, including the various management-initiated outcomes that may ensue. If the changes are likely to result in surplus roles, the employer must ensure that employees are aware that they could be redeployed, and should redeployment prove unsuccessful, that their employment will end in retrenchment.

Priority on redeployment

An employee whose role has been declared surplus to needs is entitled to be considered for redeployment as a first step. Redeployment is a preferred outcome having regard to an employee’s training, knowledge and background. The employee must be advised in writing of the actual date their employment role is declared surplus to needs, details of the redeployment process, and their rights and obligations.

For departments and agencies covered by the *Victorian Public Service Workplace Determination 2012*, the Victorian Public Service redeployment policy is set out in Attachment 6.

In agencies not covered by the *Victorian Public Service Workplace Determination 2012*, the entitlement to redeployment is limited to employment opportunities within the particular agency concerned. In addition, these agencies must have regard to their obligations under relevant enterprise agreements and awards.
Employee obligations

An employee whose role has been declared surplus is required to actively participate in redeployment. This includes identifying appropriate retraining needs, developing a resume and CV to assist in securing redeployment, actively monitoring and exploring appropriate redeployment opportunities and working with their appointed case manager.

A redeployee who has rejected a comparable role that they have been offered following a merit based selection process will be ineligible for a departure package.

Support to affected employees

Employers are to ensure that employees affected by organisational change are provided with support and assistance to consider and pursue the options available to them. The assistance may include, but is not limited to:

- counselling and support services;
- retraining;
- preparation of job applications;
- interview coaching;
- time off to attend job interviews; and
- provision of independent financial advice for employees eligible to receive a separation package.

The separation packages

Two separation packages have been endorsed by Government:

- Voluntary Departure Package (VDP); and
- Targeted Separation Package (TSP).

The VDP is an ‘early retirement scheme’ which may be offered in circumstances where larger scale structural change or staff reductions are required. In accepting a VDP, employees retire or resign from their employment and accept conditions relating to future re-employment with the Victorian public sector.

The TSP is a compulsory retrenchment package and action of last resort.

Both separation packages are Government benchmark standards and are not to be exceeded.

Departments and agencies must comply with Australian Taxation Office (ATO) requirements in regard to the application of separation packages and with the genuine redundancy considerations in the Termination of Employment policy statement, as well as relevant Commonwealth industrial and taxation legislation.

Continuous service for both the VDP and TSP refers to Victorian public sector agency employment only. Employment with the Commonwealth, other States or local government is not included.

Continuous service includes all periods of service in any approved public sector agency, provided there are no breaks between or within each period other than breaks caused by approved leave and provided that no special separation payments have been made with respect to any of these periods.
Voluntary Departure Package – key features

Typical situations in which a VDP program might be used could include an overall reduction in employee numbers within an organisational unit to achieve budget targets, adjustment of employee numbers to reflect changes in work volume or the introduction of new technology and early preparation for a planned change in the mode of delivering the organisation’s services. For example, plans may include reducing the existing number of employees as work practices and productivity levels are brought into line with industry standards.

The VDP comprises:
- 4 weeks pay in lieu of notice;
- a lump sum voluntary departure incentive of up to $10 000 (for a full time employee);
- plus 2 weeks’ pay per completed year of continuous service up to a maximum of 15 years.

Note the 4 weeks pay in lieu of notice is to be paid irrespective of the actual notice of termination provided by the employer. The VDP is an early retirement scheme for taxation purposes attracting significant taxation concessions. One of the requirements of the ATO is that an employer must obtain the prior approval of the ATO before conducting a VDP program.

In considering requests from an employer, the ATO will examine a number of criteria relating to the design and operation of the program including:
- the reason for the program;
- the identifiable employee groups (i.e. groups must be identified on the basis of objective criteria such as location, classification, job category or organisational group) from which employees will be invited to participate in the program;
- any groups within this broader group specifically excluded from participating in the program;
- the criteria on which offers of packages will be made, including criteria on which requests can be rejected (e.g. key personnel, minimum operating staffing requirements);
- the number of packages the employer will make available; and
- that employees are not compelled to accept offers and may withdraw an expression of interest at any time prior to accepting an offer.

Departments and agencies should consider the employee groups that will be invited to participate in the program and the design of criteria on which offers will be made having regard to their operational requirements and availability of funding.

Departments and agencies considering operating a VDP program are advised to contact the ATO first to ascertain specific ATO requirements and approval criteria.

Government policy is that:
- employees must be being paid and in ongoing employment to be eligible for a VDP;
- employees on unpaid leave, probation or trial, in fixed term (including executives) or casual roles, as well as WorkCover recipients and essential services staff are ineligible for a VDP;
- the calculation of each week’s pay is affected by part-time or former part-time work;
• a 3-year restriction on re-employment in the Victorian public sector applies. Recipients of a VDP are required to agree not to seek or accept re-employment or any other fee for service from any public sector employer for a minimum of three calendar years from the date of their separation. However, in extraordinary circumstances, an agency head may approve earlier re-employment, but there must be no undertakings made to this effect prior to an employee’s departure as a VDP recipient; and
• the formulation of the package is based on completed years of continuous service with the Victorian public sector only.
The Government may at times revise this policy.

**Targeted Separation Package – key features**

TSPs should only be used in circumstances of bona fide redundancy. Bona fide redundancies will arise where facilities or functional areas are closing, the organisation is being wound up, or where employees’ skills are no longer required in the public sector. TSPs are not voluntary, they are compulsory retrenchment packages applied by an employer in circumstances where the work is not required to be performed by the employer and where there is no opportunity for continued employment of the employee.

Decisions on which particular roles are declared excess or surplus must be made on objective non-discriminatory criteria that are consistently applied. Employers should familiarise themselves with the requirements of the respective enterprise agreement and applicable legislation.

Departments and agencies should exhaust redeployment opportunities before applying a TSP.

The TSP comprises:
• 4 weeks pay in lieu of notice on cessation;
• if the employee is over 45 years of age and has completed at least 2 years of continuous service, the notice period is increased by 1 week; and
• 2 weeks pay per completed year of continuous service up to a maximum of 10 years.
The Government may at times revise this policy.

**Employee entitlements on transfer from the public sector to a private provider**

*Public Administration Act 2004 provisions*

The PAA provides for transfers between the public service and public sector entities on conditions that are no less favourable overall.

The PAA also stipulates public sector values and employment principles that Victorian public sector departments and agencies that are bound by the Act to apply. Those agencies not bound by the PAA are expected to benchmark against the principles under the Act.

The principles require that employment processes ensure that employees are treated fairly and reasonably, that equal employment opportunity is provided and that employees have an avenue of redress against unfair or unreasonable treatment.
Interaction with the *Fair Work Act 2009*

This policy is subject to the application of the transfer of business provisions of the FW Act.

Transfer of functions to a private provider

The Victorian Government, through its departments and agencies, may determine to transfer responsibility for the delivery of existing ancillary services to a private provider. In such instances, the following six principles will apply and provide direction to all parties and set out the consultative requirements, job offers, terms and conditions of employment, service benefits and processes.

Any departures from this operating framework and principles will require the prior endorsement of Government. Contact the PSIR Unit to discuss any proposals in the first instance.

Employees affected by a transfer of function to the private sector are expected to actively participate in the agreed change processes with the new provider to attain employment. This may include, for example, attending meetings and providing a resume/CV.

Principle (1) – consultation on change

Public sector employers must consult with their employees regarding any proposed change that involves a transfer from public to private sector employment, or the implementation of process mechanisms relating to the transfer.

In accordance with this policy, departments and agencies are required to notify employees and their representatives of the impending change as soon as practicable following the date of the decision. Public sector employers, generally, are also required to consult regularly with affected employees and their representatives and give prompt consideration to matters raised in order to ensure that change initiatives are implemented with the involvement of all relevant parties.

Departments and agencies also must adhere to their consultative obligations concerning the implementation of change as contained in enterprise agreements, awards or as formalised in departmental or agency policies.

Principle (2) – employment offers

Where a project involves the private sector taking over certain services or functions currently performed by employees in the public sector, the Government expects that the new provider will make offers of employment to all or most of the pre-existing employees involved wherever practicable. What is practicable may vary in each particular circumstance and will be subject to any agreed transitional arrangements and recognise the prerogative of the private provider to make decisions around employment.

This requirement has a number of objectives:

- to ensure that a new employer will do everything practicable to attract and employ existing public sector employees; and
- to minimise the number of public sector employees who could potentially become redundant as a consequence of the particular project.

Such offers of employment will precede normal recruitment processes and will allow for reasonable adjustment, including re-training, where employees selected may not meet all the new job requirements.
Principle (3) – employees who accept an offer of employment

Employees who accept an offer of employment with the new provider will be employed on terms and conditions that, in overall terms, result in no net disadvantage and are no less favourable than those to which the employee was entitled prior to accepting the offer. It should also be noted that, having regard to the particular circumstances of the transfer, the transfer of business provisions in the FW Act may be applicable.

For members of defined benefit funds, the issue of superannuation portability is more complex. This would be decided on a case-by-case basis with guidance from DTF having regard to the principle of no net disadvantage to employees or any increased exposure of the State due to continued membership of the fund.

In all cases, the terms and conditions of employment including applicable superannuation arrangements would be provided to employees with their offer of employment.

Employees are encouraged to seek independent professional advice and carefully consider their personal circumstances.

Principle (4) – continuity of service for leave purposes

If the new provider makes an employment offer to employees and it is accepted, the public sector service of the employees will be regarded as being ‘continuous’ for leave purposes and employees will retain all service benefits associated with continuous service.

Furthermore, subject to the specific partnership arrangements agreed with the new provider and applicable legislation, employees may have the option of either:

- being paid out for any unused accrued annual leave, long service leave and rostered days off or reasonable amounts of time in lieu; or
- maintaining those leave balances with the new provider.

Consistent with Principle (3) above, it is expected that the maintenance of conditions that are in overall terms no less favourable, will be accompanied by a commitment by the new provider (again in accordance with contractual terms) to recognise previous public sector service for the purposes of transferring accumulated entitlements, such as sick leave, annual leave and long service leave.

In circumstances where continuity of employment applies and unused leave is transferred, it would be expected that the new provider will agree to recognise public sector service in the determination of any subsequent retrenchment payments.

Principle (5) – employees not offered jobs

Where final job offers to employees by the new provider are not made, the employing department or agency can commence redundancy, redeployment and retrenchment action in accordance with the Redundancy, Redeployment and Retrenchment Policy contained in this publication and any applicable award or enterprise agreement.

Principle (6) – employees who reject or fail to accept a job offer, or who refuse to or fail to cooperate with the new provider

Employees should consider any offer they receive and be aware of the possible consequences should they reject or fail to accept such offer of employment. Employees should also be aware of the possible consequences if they refuse to or fail to cooperate with the new provider in relation to recruitment and employment. Employees are encouraged to liaise with their department or agency prior to making a final decision.
Employees who reject or fail to accept an offer of employment with the new provider will be subject to normal redeployment processes. However, they may be ineligible for a redundancy package if the employment offer provides for continuity of service and terms and conditions that, in overall terms, result in no net disadvantage and are no less favourable than those to which the employee was entitled immediately prior to the offer (disregarding the ‘public sector attributes’ of the employment).

Employees who refuse to or fail to cooperate with the new provider in relation to recruitment and employment with the new provider will be subject to normal redeployment processes, however, they may be ineligible for a redundancy package (depending on the reasons for the employee’s failure).
2. Attachments

Attachment 1 – Constitutional limitations

The High Court decisions

In *Re AEU; ex parte Victoria* (1995) 184 CLR 188 and *Victoria v The Commonwealth* (1996) 187 CLR 416, the High Court identified constitutional limitations, based on the principle that the Commonwealth could not make laws that would impair the States’ capacity to function as governments.

The High Court has determined that the Commonwealth industrial tribunal cannot set conditions of appointment or employment for persons engaged in higher levels of Government such as Ministers, ministerial assistants and advisers, heads of departments, high level statutory office holders, parliamentary officers and judges. Commonwealth awards or agreements may apply to other public sector employees subject to the limitations outlined below.

The implied limitation prevents FWA from determining conditions which bind the Victorian public sector with regard to matters including:

- number and identity of persons to be employed;
- qualifications and eligibility for employment;
- term of appointment of such persons; or
- number and identity of persons to be made redundant (including, for example, payment of severance pay).

These limitations have been reflected in exclusions from the Victorian Government’s referral of matters to the Commonwealth under the *Fair Work (Commonwealth Powers) Act 2009*. Additional exclusions apply to Victoria Police Officers.

Departments and agencies must continue to observe these constitutional limitations when formalising awards and agreements. Departments and agencies should also familiarise themselves with the constitutional limitations relating to genuine redundancies in the Termination of Employment policy statement (refer page 11).
Attachment 2 – Work/Family model clauses

Parental leave

The National Employment Standards (NES) deal with unpaid parental leave. In addition to the entitlements under the NES, employees may be eligible for parental leave payments under the Commonwealth Paid Parental Leave Scheme.


Overview

This attachment provides a parental leave, a personal/carer’s leave and a compassionate leave model clause for use by departments and agencies.

The model clauses, developed by the PSIR Unit, provide guidance as to what is required in a public sector enterprise agreement based on the requirements of the NES under the FW Act.

Parental Leave

Subject to the terms of this clause employees are entitled to paid and unpaid maternity, paternity/partner and adoption leave and to work part-time in connection with the birth or adoption of a child.

The provisions of this clause apply to full-time, part-time and eligible casual employees, but do not apply to other casual employees.

An eligible casual employee means a casual employee:

a) employed by an employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and

b) who has a reasonable expectation of ongoing employment, but for the pregnancy or the decision to adopt.

For the purposes of this clause, continuous service is work for an employer on a regular and systematic basis (including any period of authorised leave or absence). *(Insert any existing or agreed portability arrangements).*

An employer must not fail to re-engage a casual employee because:

a) the employee or employee’s spouse is pregnant; or

b) the employee is or has been immediately absent on parental leave.

The rights of an employer in relation to engagement and re-engagement of casual employees are not affected, other than in accordance with this clause.

1.1 Definitions

1.1.1 For the purpose of this clause child means a child of the employee under school age except for adoption of an eligible child where ‘eligible child’ means a person under the age of 16 years who is placed with the employee for the purposes of adoption, other than a child or step-child of the employee or of the spouse of the employee or a child who has previously lived continuously with the employee for a period of six months or more.
1.1.2 For the purposes of this clause, spouse includes a de facto spouse, former spouse or former de facto spouse. The employee’s ‘de facto spouse’ means a person who lives with the employee as husband, wife or same sex partner on a bona fide domestic basis, although not legally married to the employee.

1.2 Basic entitlement

1.2.1 Employees, who have or will have completed at least twelve months continuous service, are entitled to a combined total of fifty two weeks paid and unpaid parental leave on a shared basis in relation to the birth or adoption of their child. An employee who does not satisfy the qualifying service requirement for the paid components of leave or an employee who is an eligible casual employee, shall be entitled to leave without pay for a period not exceeding fifty two weeks.

Leave available is summarised in the following table:

<table>
<thead>
<tr>
<th>Type of leave</th>
<th>Paid leave</th>
<th>Unpaid leave</th>
<th>Total combined paid and unpaid leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maternity leave</td>
<td>_ weeks</td>
<td>_ weeks if primary care giver 52 weeks (if primary care giver)</td>
<td></td>
</tr>
<tr>
<td>Paternity/partner</td>
<td>_ weeks</td>
<td>_ weeks if primary care giver 52 weeks (if primary care giver)</td>
<td></td>
</tr>
<tr>
<td>Adoption leave – primary care giver</td>
<td>_ weeks</td>
<td>_ weeks 52 weeks</td>
<td></td>
</tr>
<tr>
<td>Adoption leave – secondary care giver</td>
<td>_ weeks</td>
<td>_ weeks 3 weeks</td>
<td></td>
</tr>
</tbody>
</table>

1.3 Employee couple – Concurrent leave

1.3.1 Parental leave is to be available to only one parent at a time in a single unbroken period. However, both parents may simultaneously take:

a) in the case of paternity/partner leave an employee shall be entitled to a total of _ days paid leave (which need not be taken consecutively) and up to _ weeks unpaid leave in connection with the birth of a child for whom he or she has accepted responsibility which may be commenced up to 1 week prior to the expected date of birth; and

b) in the case of short adoption leave for the secondary care giver _ week’s unpaid leave which may be commenced at the time of placement.

1.3.2 Subject to 1.7.1(a), the total concurrent leave must be for a period of three weeks or less. Where the employer agrees, the employee may start concurrent leave earlier or end concurrent leave later than provided for in 1.3.1.

1.4 Maternity leave

1.4.1 An employee must provide notice to the employer in advance of the expected date of commencement of parental leave. The notice requirements are:

a) of the expected date of confinement (the employer may require the employee to provide evidence that would satisfy a reasonable person or a certificate from a registered medical practitioner stating that the employee is pregnant) – at least ten weeks; and

b) of the date on which the employee proposes to commence maternity leave and the period of leave to be taken – at least four weeks.
1.4.2 When the employee gives notice under 1.4.1(a) the employee must also provide a statutory declaration stating particulars of any period of paternity/partner leave sought or taken by her spouse and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment.

1.4.3 An employee will not be in breach of this clause if failure to give the stipulated notice is occasioned by confinement occurring earlier than the presumed date.

1.4.4 Subject to 1.2.1 and unless agreed otherwise between the employer and employee, an employee may begin parental leave at any time within six weeks immediately prior to the expected date of birth, however, the period of leave granted shall be no more than 52 weeks.

1.4.5 Where an employee continues to work within the six week period immediately prior to the expected date of birth of the child or is on paid leave under 1.10.2 an employer may require the employee to provide a certificate from a registered medical practitioner that she is fit for work in her present position. The employer may require the employee to start maternity leave if the employee:

a) does not give the employer the requested certificate within seven days after the request; or

b) within seven days after the request for the certificate, gives the employer the medical certificate stating that the employee is unfit to work.

1.4.6 Where leave is granted under 1.4.4 during the period of leave, an employee may return to work at any time as agreed between the employer and the employee, provided that the actual return to work date does not exceed four weeks from the date desired by the employee.

1.4.7 Personal illness leave and special maternity leave

a) Where the pregnancy of an employee, not then on maternity leave, terminates other than by the birth of a living child, the employee, must as soon as practicable, give notice to the employer of the taking of leave advising the employer of the period, or expected period, of the leave in accordance with the following:

i. where the pregnancy terminates during the first twenty weeks, during the notified period/s the employee is entitled to access any paid and/or unpaid personal illness leave entitlements in accordance with the relevant personal leave provisions;

ii. where the pregnancy terminates after the completion of twenty weeks, during the notified period/s the employee is entitled to paid special maternity leave not exceeding the amount of paid maternity leave available under 1.2.1, and thereafter, to unpaid special maternity leave.

iii. If an employee takes leave for a reason outlined in 1.4.7(a)(i) and 1.4.7(a)(ii), the employer may require the employee to provide evidence that would satisfy a reasonable person or a certificate from a registered medical practitioner.

b) Where an employee not then on maternity leave is suffering from an illness whether related or not to pregnancy an employee may take any paid personal illness leave to which she is entitled and/or unpaid personal illness leave in accordance with the relevant personal illness leave provisions.
1.5 Paternity/partner leave

1.5.1 An employee will provide to the employer at least ten weeks prior to each proposed period of paternity/partner leave, with:

a) evidence (the employer may require the employee to provide evidence that would satisfy a reasonable person or a certificate from a registered medical practitioner) which names his or her spouse and states that she is pregnant and the expected date of confinement or states the date on which the birth took place; and

b) written notification of the dates on which he or she proposes to start and finish the period of paternity leave; and

c) a statutory declaration stating:
   - except in relation to leave taken simultaneously with the child’s mother under clause 1.3.1 or clause 1.7.1(a) that he or she will take the period of paternity/partner leave to become the primary care-giver of a child;
   - particulars of any period of maternity leave sought or taken by his or her spouse; and
   - that for the period of paternity/partner leave he or she will not engage in any conduct inconsistent with his or her contract of employment.

1.5.2 The employee will not be in breach of 1.5.1 if the failure to give the required period of notice is because of the birth occurring earlier than expected, the death of the mother of the child, or other compelling circumstances.

1.6 Adoption leave

1.6.1 The employee shall be required to provide the employer with written notice of their intention to apply for adoption leave as soon as is reasonably practicable after receiving a placement approval notice from an adoption agency or other appropriate body.

1.6.2 The employee must give written notice of the day when the placement with the employee is expected to start as soon as possible after receiving a placement notice indicating the expected placement day.

1.6.3 The employee must give the following written notice of the first and last days of any period of adoption leave they intend to apply for because of the placement:

a) Where a placement notice is received within the period of eight weeks after receiving the placement approval notice – before the end of that eight week period; or

b) Where a placement notice is received after the end of the period of eight weeks after receiving the placement approval notice – as soon as reasonably practicable after receiving the placement notice.

1.6.4 Generally the employee must apply for leave to the employer at least ten weeks before the date when long adoption leave begins or fourteen days in advance for short adoption leave. An employee may commence adoption leave before providing such notice where, through circumstances beyond the control of the employee, the adoption of a child takes place earlier.
1.6.5 Before commencing adoption leave, an employee will provide the employer with a statement from an adoption agency of the day when the placement is expected to start and a statutory declaration stating:

a) that the child is an eligible child, whether the employee is taking short or long adoption leave or both and the particulars of any other authorised leave to be taken because of the placement;

b) except in relation to leave taken simultaneously with the child’s other adoptive parent under clause 1.3.1 or clause 1.7.1(a) that the employee is seeking adoption leave to become the primary care-giver of the child;

c) particulars of any period of adoption leave sought or taken by the employee’s spouse; and

d) that for the period of adoption leave the employee will not engage in any conduct inconsistent with their contract of employment.

1.6.6 An employee must provide the employer with confirmation from the adoption agency of the start of the placement.

1.6.7 Where the placement of a child for adoption with an employee does not proceed or continue, the employee will notify the employer immediately. The employer will then nominate a time, not exceeding four weeks from receipt of notification, for the employee’s return to work.

1.6.8 An employee will not be in breach of this clause as a consequence of failure to give the stipulated periods of notice if such failure results from a requirement of an adoption agency to accept earlier or later placement of a child, the death of a spouse, or other compelling circumstances.

1.6.9 An employee seeking to adopt a child is, on the production of satisfactory evidence if required, entitled to unpaid leave for the purpose of attending any compulsory interviews or examinations necessary to the adoption procedure. The employee and the employer should agree on the length of the unpaid leave. Where agreement cannot be reached the employee is entitled to take up to two days unpaid leave. Where paid leave is available to the employee the employer may require the employee to take such leave instead.

1.7 Right to request

1.7.1 An employee entitled to parental leave pursuant to the provisions of clause 1.2.1 may request the employer to allow the employee:

a) to extend the period of simultaneous unpaid parental leave provided for in clause 1.3.1 up to a maximum of eight weeks;

b) to extend the period of unpaid parental leave provided for in clause 1.2.1 by a further continuous period of leave not exceeding twelve months;

c) to return from a period of parental leave on a part-time basis until the child reaches school age;

d) to assist the employee in reconciling work and parental responsibilities.

1.7.2 The employer shall consider the request having regard to the employee’s circumstances and provided the request is genuinely based on the employee’s parental responsibilities may only refuse the request on reasonable grounds related to the effect on the workplace or the employer’s business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.
1.7.3 Employee’s request and employer’s decision to be in writing

The employee’s request and the employer’s decision made under clauses 1.7.1 and 1.7.2 must be in writing. The employer’s response, including details of the reasons for any refusal, must be given as soon as practicable and no later than twenty one days after the request is made.

1.7.4 Request to return to work part-time

To enable a request under clause 1.7.1(c) to be considered prior to an employee’s return to work, it should be made as soon as possible and no less than seven weeks prior to the date upon which the employee is due to return to work from parental leave.

1.8 Variation of period of parental leave

1.8.1 Unless agreed otherwise between the employer and employee, where an employee takes leave under clause 1.2.1 and 1.7.1(b), an employee may apply to their employer to change the period of parental leave on one occasion. Any such change must be notified in writing at least two weeks prior to the start of the changed arrangements.

1.8.2 Where an employee did not give notice of taking the whole of their available parental leave period under clause 1.2.1, the employee may, by four weeks’ notice to their employer, extend their period of parental leave (provided that any such leave does not extend beyond the employee’s available parental leave period).

1.9 Parental leave and other entitlements

1.9.1 An employee may in lieu of or in conjunction with parental leave access any annual leave or long service leave entitlements which they have accrued subject to the total amount of leave not exceeding fifty two weeks or a longer period as agreed under 1.7.

1.9.2 Where a public holiday occurs during a period of paid parental leave the public holiday is not to be regarded as part of the paid parental leave and the employer will grant the employee a day off in lieu to be taken by the employee immediately following the period of paid parental leave.

1.10 Transfer to a safe job

1.10.1 Where an employee is pregnant and provides evidence that would satisfy a reasonable person that she is fit for work but it is inadvisable for her to continue in her present position during a stated period because of illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee, the employee will be transferred to an appropriate safe job (if there is one available) with no other change to the employee’s terms and conditions of employment until the commencement of maternity leave. The employer may require the evidence referred to above to be a medical certificate.

1.10.2 If there is no appropriate safe job available, the employee may take paid no safe job leave, or the employer may require the employee to take paid no safe job leave immediately for a period which ends at the earliest of either:

a) when the employee is certified unfit to work during the six week period before the expected date of birth by a registered medical practitioner; or
b) when the employee’s pregnancy results in the birth of a living child or when the employee’s pregnancy ends otherwise than with the birth of a living child.

The entitlement to paid no safe job leave is in addition to any other leave entitlement the employee has.

1.11 Returning to work after a period of parental leave

1.11.1 An employee should notify their intention to return to work after a period of parental leave at least four weeks prior to the expiration of the leave.

1.11.2 Subject to clause 1.11.3 an employee will be entitled to the position which they held immediately before proceeding on parental leave. In the case of an employee transferred to a safe job pursuant to 1.10 the employee will be entitled to return to the position they held immediately before such transfer.

1.11.3 Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee will be entitled to a position as nearly comparable in status and pay to that of their former position.

1.12 Replacement employees

1.12.1 A replacement employee is an employee specifically engaged or temporarily promoted or transferred as a result of an employee proceeding on parental leave.

1.12.2 Before an employer engages a replacement employee the employer must inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

1.13 Consultation and communication during parental leave

1.13.1 Where an employee is on parental leave and a definite decision has been made that will have a significant effect on the status, pay or location of the employee’s pre-parental leave position, the employer shall take reasonable steps to:

a) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

b) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

1.13.2 The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee’s decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to request to return to work on a part-time basis.

1.13.3 The employee shall also notify the employer of changes of address or other contact details which might affect the employer’s capacity to comply with 1.13.1.

1.14 Commonwealth Parental Leave Payment

Paid parental leave entitlements outlined in this clause are in addition to the payments available under the Commonwealth Paid Parental Leave Scheme.
2. Personal/carer’s leave

The provisions of this clause apply to full time and regular part time employees. See 2.6 for casual employees’ entitlements.

2.1 Amount of paid personal/carer’s leave

2.1.1 Paid personal/carer’s leave will be available to an employee when they are absent because of:

a) personal illness or injury; or

b) personal illness or injury of an immediate family or household member who requires the employee’s care or support; or

c) an unexpected emergency affecting an immediate family or household member; or

d) the requirement to provide ongoing care and attention to another person who is wholly or substantially dependent on the employee, provided that the care and attention is not wholly or substantially on a commercial basis.

2.1.2 Personal leave of:

a) (insert agreed or relevant sick leave or personal leave award entitlement) days/hours will be available in the first year of service;

b) (insert agreed or relevant sick leave or personal leave award entitlement) days/hours will be available per annum in the second and subsequent years of service.

2.1.3 An employee’s entitlement accrues progressively during a year of service according to the employee’s ordinary hours of work and unused personal/carer’s leave accumulates from year to year.

2.2 Immediate family or household

2.2.1 The term ‘immediate family’ includes:

a) spouse (including a former spouse, a de facto partner and a former de facto partner) of the employee. A de facto partner means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes); and

b) child or an adult child (including an adopted child, a step child or an exnuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee (or insert agency’s definition).

2.3 Use of accumulated personal/carer’s leave

2.3.1 An employee is entitled to use accumulated personal/carer’s leave for the purposes of this clause where the current year’s personal/carer’s leave entitlement has been exhausted.

2.3.2 (insert any notice, certification etc. provisions)

2.4 Absence on public holidays

2.4.1 If the period during which an employee takes paid personal/carer’s leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer’s leave on that public holiday.
2.5 Unpaid personal leave

2.5.1 Where an employee has exhausted all paid personal/carer’s leave entitlements, he/she is entitled to take unpaid carer’s leave to provide care or support in the circumstances outlined in 2.1.1(b), (c), or (d). The organisation and the employee will agree on the period. In the absence of agreement the employee is entitled to take two days’ unpaid carer’s leave per occasion.

2.6. Casual employees – Caring responsibilities and compassionate leave

2.6.1 Casual employees are entitled to be unavailable to attend work or to leave work:
   a) if they need to care for members of their immediate family or household who are sick and require care or support, or who require care due to an unexpected emergency, or the birth of a child; or
   b) if a member of the employee’s immediate family or a member of the employee’s household:
      • contracts or develops a personal illness that poses a serious threat to his or her life;
      • sustains a personal injury that poses a serious threat to his/her life; or
      • dies.

2.6.2 The organisation and the employee will agree on the period for which the employee will be entitled to be unavailable to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for two days per occasion. The casual employee is not entitled to any payment for the period of non-attendance.

2.6.3 The organisation will require the casual employee to provide satisfactory evidence to support the taking of this leave.

3. Compassionate leave for employees (other than casual employees)

3.1 Amount of compassionate leave

3.1.1 Employees are entitled to (insert agreed entitlement) day’s compassionate leave on each occasion when a member of the employee’s immediate family or a member of the employee’s household:
   • contracts or develops a personal illness that poses a serious threat to his or her life;
   • sustains a personal injury that poses a serious threat to his/her life; or
   • dies.

3.1.2 Any unused portion of compassionate leave will not accrue from year to year and will not be paid out on termination.

3.1.3 Such leave does not have to be taken consecutively.

3.1.4 An employee may take unpaid compassionate leave by agreement with the employer.

3.1.5 The organisation will require the employee to provide satisfactory evidence to support the taking of compassionate leave.
Attachment 3 – Public Holidays

Application of State and Commonwealth legislation

The public holiday entitlements of Victorian employees are contained in the Public Holidays Act 1993 (Vic) (the PH Act). In addition the FW Act provides for minimum standards relating to public holidays as part of the NES. Public sector employers are required to comply with both Acts as well as any applicable public holiday provisions in modern awards or enterprise agreements that cover their employees.

The key elements of the PH Act and the FW Act:

Days observed as public holidays in Victoria

Victorian employees are entitled to the following public holidays:

- New Year’s Day, 1 January
- Australia Day, 26 January
- Labour Day, the second Monday in March
- Good Friday
- Easter Saturday
- Easter Monday
- Anzac Day, 25 April
- Queen’s Birthday
- Melbourne Cup Day, the first Tuesday in November
- Christmas Day, 25 December
- Boxing Day, 26 December

Victorian employees are also entitled to the following additional or substitute days:

- When Christmas Day is a Saturday or a Sunday, a holiday in lieu shall be observed on 27 December.
- When Boxing day is a Saturday or a Sunday, an additional holiday shall be observed on 28 December.
- When New Years Day is a Saturday or a Sunday, an additional holiday shall be observed on the next Monday.
- When Australia Day is a Saturday or a Sunday, a holiday in lieu shall be observed on the next Monday.

While all public sector employees are generally entitled to the public holidays listed above, the FW Act provides that modern awards or enterprise agreements may include terms allowing for the substitution of the above listed public holidays for a day or part day agreed to by the employer and employees. In addition further substitute or additional days may be declared or prescribed from time to time by order of the Victorian Government and published in the Government Gazette as provided under the PH Act.
Request to work on public holidays

The FW Act provides that an employer may ask an employee to work on a public holiday if the request is reasonable. However, an employee may refuse the employer’s request to work if the request is not reasonable or the refusal is reasonable. Section 114 of the FW Act lists those matters that must be taken into account in determining whether such a request to work on a public holiday is reasonable.
Attachment 4 – Model Enterprise Agreement dispute resolution clause

Overview

The purpose of this model clause is to provide clarity and guidance to departments and agencies about what is required in a public sector enterprise agreement to satisfy both Government policy and the requirements of the FW Act.

Dealing with disputes

1.1 Disputes

1.1.1 Unless otherwise provided for in this agreement, a dispute about a matter arising under this agreement or the National Employment Standards, other than termination of employment, must be dealt with in accordance with this clause. This includes a dispute about whether an employer had reasonable grounds to refuse a request for flexible working conditions under [refer to relevant enterprise agreement clause] or an application to extend unpaid parental leave under [refer to relevant enterprise agreement clause].

1.1.2 For the avoidance of doubt, this clause does not apply to any dispute on a matter or matters arising in the course of bargaining in relation to a proposed enterprise agreement.

1.1.3 The employer or an employee covered by this agreement may choose to be represented at any stage by a representative, including an employer or employee organisation.

1.2 Obligations

1.2.1 The parties to the dispute, and their representatives, must genuinely attempt to resolve the dispute through the processes set out in this clause and must cooperate to ensure that these processes are carried out expeditiously.

1.2.2 Whilst a dispute is being dealt with in accordance with this clause, work must continue in accordance with usual practice, provided that this does not apply to an employee who has a reasonable concern about an imminent risk to his or her health or safety, has advised the employer of this concern and has not unreasonably failed to comply with a direction by the employer to perform other available work that is safe and appropriate for the employee to perform.

1.2.3 No person covered by the agreement will be prejudiced as to the final settlement of the dispute by the continuance of work in accordance with this clause.
1.3 Agreement and dispute settlement facilitation

1.3.1 For the purposes of compliance with this agreement (including compliance with this dispute procedure) where the chosen employee representative is another employee of the employer, he/she must be given reasonable opportunity to enable her/him to represent employees concerning matters pertaining to the employment relationship including but not limited to:

1.3.1(a) Investigating the circumstances of a dispute or an alleged breach of this agreement or the National Employment Standards;

1.3.1(b) Endeavouring to resolve a dispute arising out of the operation of the agreement or the National Employment Standards; or,

1.3.1(c) Participating in conciliation, consent arbitration or any other agreed alternative dispute resolution process.

1.3.2 Any release from normal duties is subject to the proviso that it does not unduly affect the operations of the employer.

1.4 Discussion of dispute

1.4.1 The dispute must first be discussed by the aggrieved employee(s) with the immediate supervisor of the employee(s).

1.4.2 If the matter is not settled, the employee(s) can require that the matter be discussed with another representative of the employer appointed for the purposes of this procedure.

1.5 Internal process

1.5.1 If any party to the dispute who is covered by the agreement refers the dispute to an established internal dispute resolution process, the matter must first be dealt with in accordance with that process, provided that the process is conducted in a timely manner and it is consistent with the following principles:

1.5.1(a) The rules of natural justice;

1.5.1(b) Appropriate mediation or conciliation of the dispute is provided;

1.5.1(c) Any views on who should conduct the review shall be considered by the employer; and

1.5.1(d) The process is conducted as quickly, and with as little formality, as a proper consideration of the matter allows.

1.5.2 If the dispute is not settled through an internal dispute resolution process, a party to the dispute may refer the dispute to Fair Work Australia (FWA) for conciliation.

1.6 Disputes of a collective character

1.6.1 The parties covered by the agreement acknowledge that disputes of a collective character concerning more than one employee may be dealt with more expeditiously by an early reference to FWA.

1.6.2 No dispute of a collective character may be referred to FWA directly unless there has been a genuine attempt to resolve the dispute at the workplace level prior to it being referred to FWA for conciliation.
1.7 Conciliation

1.7.1 Where a dispute is referred for conciliation, a member of FWA may arrange:
   a) conferences of the parties to the dispute and/or their representatives presided over by the member; and
   b) for the parties to the dispute and/or their representatives to confer among themselves at conferences at which the member is not present.

1.7.2 Conciliation before FWA shall be regarded as completed when:
   a) the parties to the dispute have reached agreement on the settlement of the dispute; or
   b) the member of FWA conducting the conciliation has, either of their own motion or after an application by either party, satisfied themselves that there is no likelihood that within a reasonable period, further conciliation will result in a settlement; or
   c) the parties to the dispute have informed the FWA member that there is no likelihood of agreement on the settlement of the dispute and the member does not have substantial reason to refuse to regard the conciliation proceedings as completed.

1.8 Consent arbitration

1.8.1 If the dispute has not been settled when conciliation has been completed, the parties to the dispute may agree that FWA proceeds to determine the dispute by consent arbitration.

1.8.2 Where a member of FWA has exercised conciliation powers in relation to the dispute, the member shall not exercise, or take part in the exercise of, arbitration powers in relation to the dispute if a party to the dispute objects to the member doing so.

1.8.3 Subject to sub-clause 1.8.4 below, the determination of FWA is binding upon the persons covered by this agreement.

1.8.4 An appeal lies to a Full Bench of FWA, with the leave of the Full Bench, against a determination of a single member of FWA made pursuant to this clause.

1.9 Conduct of matters before FWA

1.9.1 Subject to any agreement between the parties to the dispute in relation to a particular dispute and the provisions of this clause, in dealing with a dispute through conciliation or consent arbitration, FWA may conduct the matter in accordance with Subdivision B of Division 3 of Part 5-1 of the Fair Work Act 2009.
Attachment 5 – Termination of Employment

**Employer right to terminate employment**

Departments and agencies may terminate an employee’s employment where there is a valid reason connected with the employee’s capacity or conduct or the termination is based on the operational requirements of the department or agency (for example structural change leading to redundancy).

**Fair Work Act 2009 (FW Act)**

As a result of the Victorian referral of industrial relations matters to the Commonwealth, the termination of employment provisions of the FW Act apply to Victorian employees. Subject to constitutional limitations they also apply to many parts of the public sector (refer to the Constitutional Limitations policy statement).

The provisions of the FW Act, relevant employment agreements and Commonwealth awards must be adhered to.

The FW Act and its accompanying regulations provide that an employee may apply to FWA for relief in relation to a termination of employment on the ground that the termination was harsh, unjust or unreasonable – unless the employee:

- was a non award or agreement employee who was paid an annual salary that exceeds a prescribed amount in accordance with the regulations;
- had not served the minimum employment period of six months’ employment in respect of large employers and twelve months’ employment in respect of small employers;
- was a trainee to whom a training arrangement applied;
- was a casual employee not employed on a regular and systematic basis;
- was engaged under a contract of employment for a specified period of time, specified task or season (where this was not entered into specifically to avoid the provisions of the Act) and the employment ended at the end of that period of time, task or season; or
- any other additional exclusion as provided in the Fair Work Act Regulations.

**Period of notice required**

An employee’s employment must not be terminated unless he or she has been given the period of notice in writing or pay in lieu as set out below or he or she is guilty of serious misconduct such that it would be unreasonable to continue employment during the notice period.

**The required minimum period of notice as provided in the NES is:**

<table>
<thead>
<tr>
<th>Employee’s period of continuous service with the employer</th>
<th>Period of notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not more than 1 year</td>
<td>At least 1 week</td>
</tr>
<tr>
<td>More than 1 year but nor more than 3 years</td>
<td>At least 2 weeks</td>
</tr>
<tr>
<td>More than 3 years but not more than 5 years</td>
<td>At least 3 weeks</td>
</tr>
<tr>
<td>More than 5 years</td>
<td>At least 4 weeks</td>
</tr>
</tbody>
</table>
The minimum period of notice is increased by one week if the employee is over 45 years of age and has completed at least 2 years’ continuous service with the employer. Enterprise agreements may provide periods of notice in excess of the NES.

Termination of employment and genuine redundancy

In determining whether a termination was harsh, unjust or unreasonable, FWA must have regard to, among other things, whether there was a valid reason for the termination connected with the employee’s capacity or conduct or based on the operational requirements of the enterprise.

Departments and agencies which are subject to Commonwealth awards or agreements should also comply with any specific additional provisions in those awards or agreements.

Genuine Redundancy

Under the FW Act, an employee is not unfairly dismissed if FWA is satisfied that the dismissal was a case of genuine redundancy within the meaning of the Act.

Section 389 of the FW Act provides that an employee’s dismissal is a genuine redundancy if:

- the employer no longer required the employee’s job to be performed by anyone because of changes in the operational requirements of the enterprise; and
- the employer has complied with any obligation in an applicable modern award or enterprise agreement to consult about the redundancy.

An employee’s dismissal is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed within:

- the employer’s enterprise; or
- an associated entity of the employer.

If FWA is satisfied that the termination is a genuine redundancy it is precluded from continuing to hear the matter further.

It is good practice to comply with the above. However, departments and agencies should also familiarise themselves with the constitutional limitations that apply to the public sector (Attachment 1). FWA may be precluded from making orders where an employee is dismissed as a result of a bona fide redundancy (i.e. the employer no longer requires the employee’s job to be performed by anyone because of changes in operational requirements).
Attachment 6 – Victorian Public Service redeployment policy

Purpose

The aim of this policy is to specify the redeployment approach to be adopted across the Victorian Public Service (VPS) for employees covered by the Victorian Public Service (VPS) Workplace Determination 2012. The development of this policy is informed by current legislative provisions and the VPS Workplace Determination 2012.

Redeployment policy

In managing surplus employees public service body heads recognise their obligations and commit to placing surplus employees into vacancies for which they are suitable. Surplus employees are to commit to participate in the redeployment process in good faith including actively considering reasonable alternative employment.

Legislation

Part 3 of the Public Administration Act 2004 establishes that public service body heads, on behalf of the Crown, have all the rights, powers, authorities and duties of an employer in respect of the public sector body and employees in it. The employer’s power to redeploy a surplus employee is drawn from section 20 of the Act. Section 31A provides that the employer may assign work to an employee and section 28(1) provides that the employer may transfer an employee to duties in other public service bodies or in public entities.

Section 68(h) of Part 4 of the Public Administration Act 2004 requires the State Services Authority to monitor the effectiveness of redeployment processes within the public service.

VPS Workplace Determination 2012 redeployment principles

The VPS Workplace Determination 2012 sets out the following policy principles:

- The redeployment of surplus employees wherever practical and consistent with the application of merit.
- Surplus employees have priority to be placed in vacancies that occur within the public service unless the person is determined to be unsuitable for appointment to that vacancy by the prospective employing agency.
- The placement of surplus employees shall be managed at agency level. The redeploying agency is to provide individualised case management and support, including counselling, provision of job search skills, liaison and retraining to assist in achieving placements.
- Processes to be consistent with the application of the principles of fair and reasonable treatment and merit selection.
- Unplaced surplus employees to have access to departure packages only after a reasonable period.
- Retrenchment and payment of a separation package to be used as an action of last resort where redeployment within a reasonable period does not appear likely.
• Where a vacancy exists for which a redeployee is suitable and is the only candidate or the best candidate among redeployees, a valid offer will be made. Such an offer involves an offer of duties to a suitably qualified employee (which may be at the same or different level or status or the same or different general location as the employee’s previous employment).

• Redeployees will have priority access to vacancies both at the employee’s classification level and below their classification level and, where appropriate, will be provided with salary maintenance.

• Relinquishing agencies will provide support to redeployees being placed in alternative positions utilising high quality and professional expertise.

• Redeployees will actively engage in the redeployment process.

Redeployment process

The redeployment process commences after the identification of a surplus employee. The approach to managing a surplus employee in the VPS is set out below:

a) Preparing for Redeployment

Preparation for redeployment is to occur within two weeks of identification of a surplus employee:

• The employer is to appoint a case manager for each surplus employee.

• The case manager and the surplus employee will:
  – undertake a skills audit of the surplus employee;
  – organise/participate in CV preparation and interview skills training; and
  – agree on job search criteria (duties, location and classification).

b) Commencing Redeployment

On commencing the formal three month redeployment process:

• the case manager and the surplus employee are to identify all possible public service vacancies for matching and to discuss options to facilitate the matching process and any retraining required;

• the case manager will facilitate the consideration of the surplus employee by the relevant employer;

• the case manager will provide feedback to the surplus employee after a referral or interview;

• agencies will ensure that all relevant vacancies are reviewed to maximise the opportunities for valid offers for redeployment to be made. The aim will be to offer duties as close to the employees current level as is possible;

• where a vacancy exists for which a redeployee is suitable and is the only candidate or the best candidate amongst redeployees, a valid offer will be made;

• a valid offer involves an offer of duties to a suitably qualified employee (which may be at the same or lower level or status or the same or different general location as the employees previous employment); and
in using best endeavours to identify potential duties to offer surplus staff, priority should be accorded to duties in the following order:

- duties for which the employee is already qualified or who would become qualified for the position as a result of incidental or top up training within a reasonable distance from the location of existing duties and not less than at the same level or status;
- duties at a lower level or status (where this change of level or status is acceptable to the employee) within a reasonable distance from existing duties; and
- duties at a lower level or status and at a different location (where this change of level, status and location is acceptable to the employee).

c) Assignment or transfer to a suitable vacancy

- An assignment to an internal ongoing vacancy or transfer to an ongoing role in another agency completes the redeployment process.
- An assignment/secondment to a specific term vacancy requires that the case manager and surplus employee will continue to pursue ongoing vacancies during the placement.

d) Termination

- If redeployment is not achieved at the end of three months, employment will be terminated and the surplus employee will be provided with the current VPS retrenchment package.

e) Employee safeguards

- There will be a minimum period for redeployment of 3 months unless agreed otherwise.
- Placement in a specific term vacancy of up to 3 months temporarily stops the redeployment process.
- There will be salary maintenance for up to 6 months where the surplus employee is placed by agreement in a lower classified vacancy.
- Agencies undertaking redeployment processes will consult with the staff in affected workplaces and the relevant union covered by the VPS Workplace Determination 2012 to ensure that all parties can be confident that appropriate efforts are being made to place affected employees in properly assessed duties.
- Departmental grievance processes are available and are to be managed expeditiously in relation to issues raised by surplus employees. Where departmental grievance processes are utilised:
  - all time frames continue unless FWA recommends that specific time frames be suspended in which case agencies will observe FWA recommendations; and
  - where a union covered by the VPS Workplace Determination 2012 is representing the interests of aggrieved employees, the union is to be provided with necessary information so it can satisfy itself that the provisions of this policy have been complied with.
• Nothing in this policy disturbs any existing avenues of redress available to aggrieved employees. Where the process involves the operation of Clause 11 of the VPS Workplace Determination 2012 (Resolution of Disputes and Grievances), the full provisions of this clause shall apply including arbitration in accordance with Clause 11.11. Where these matters involve FWA, agencies will not challenge FWAs jurisdiction to address matters properly associated with redeployment unless the matters relate to termination on the ground of redundancy (which is outside the jurisdiction of FWA as set out in Re: AEU). While agencies recognise that FWA could decide to deal with all matters within its jurisdiction, this does not preclude agencies from seeking to argue that FWA should, as a matter of discretion, refuse to hear a matter on the basis that it has been appropriately dealt with by other processes.
3. Glossary and contact details

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ATO</td>
<td>Australian Taxation Office</td>
</tr>
<tr>
<td>DPC</td>
<td>Department of Premier and Cabinet</td>
</tr>
<tr>
<td>DTF</td>
<td>Department of Treasury and Finance</td>
</tr>
<tr>
<td>EBA</td>
<td>Enterprise Bargaining Agreement</td>
</tr>
<tr>
<td>FW Act</td>
<td><em>Fair Work Act 2009</em></td>
</tr>
<tr>
<td>FWA</td>
<td>Fair Work Australia</td>
</tr>
<tr>
<td>GSERP</td>
<td>Government Sector Executive Remuneration Panel</td>
</tr>
<tr>
<td>NES</td>
<td>National Employment Standards</td>
</tr>
<tr>
<td>PH Act</td>
<td><em>Public Holidays Act 1993 (Victoria)</em></td>
</tr>
<tr>
<td>PSIR Unit</td>
<td>Public Sector Industrial Relations Unit</td>
</tr>
<tr>
<td>TSP</td>
<td>Targeted Separation Package</td>
</tr>
<tr>
<td>VDP</td>
<td>Voluntary Separation Package</td>
</tr>
</tbody>
</table>

Throughout the document, references to ‘the relevant Cabinet Committee’ relate to internal government approval processes. Further guidance on these processes can be provided by the Public Sector Industrial Relations Unit (below).

Any questions in relation to the application of these policies should be referred to the PSIR Unit:

Public Sector Industrial Relations Unit
Department of Treasury and Finance
1 Treasury Place
Melbourne Vic 3002

Postal address
GPO Box 4379
Melbourne 3001

Phone: (03) 9651-0307
Fax: (03) 9651-0059