**EXPLANATORY STATEMENT**

***Public Service Act 1999***

**Determination under subsection 24(3) – Non SES employees-amendment of determination of 18 September 2013 (No. 2)**

**Authority**

Subsection 24(3) of the *Public Service Act 1999* (**PS Act**) provides that the Public Service Minister may, by legislative instrument, determine the terms and conditions of employment applying to Australian Public Service (**APS**) employees, if the Public Service Minister is of the opinion that it is desirable to do so because of exceptional circumstances.

**Background**

Section 72 of the PS Act provides a power for the Australian Public Service Commissioner (the Commissioner) to move APS employees to give effect to Machinery of Government changes, including an administrative re-arrangement resulting from a change to the Administrative Arrangements Orders (AAOs).

On 18 September 2013, the Governor-General in Council made AAOs in which a number of functions were effectively transferred from an existing APS Agency (**Losing Agency**) to a new or different existing APS Agency (**Gaining Agency**). On 3 October 2013 the AAOs were further amended.

As a result of the reallocation of a number of functions on 18 September 2013 the Commissioner made determinations pursuant to section 72 of the PS Act moving a number of APS employees between agencies (**transferring non SES employees**).

On 18 September 2013, the Minister Assisting the Prime Minister for the Public Service made a determination (**the Principal Determination**) under subsection 24(3) of the PS Act in respect of transferring non SES APS employees.

The purpose of the Principal Determination was to preserve the terms and conditions applying to the affected non SES employees that applied to them in the Losing Agency (ie their former agency). Without the determination their terms and conditions, generally speaking, would have been those of their Gaining Agency.

On 17 October 2013, the Administrator of the Commonwealth of Australia made an order pursuant to section 65 of the PS Act which had the effect of abolishing the Australian Agency for International Development (**AusAID**) as an Executive Agency on 1 November 2013 (**the** **Order**).

As a result of the administrative re-arrangements after 18 September 2013 including the Order, the Commissioner made determinations pursuant to section 72 of the PS Act moving a number of APS employees between agencies.

On 31 October 2013, the Minister Assisting the Prime Minister for the Public Service amended the Principal Determination to determine terms and conditions of employment for further classes of employees affected by the administrative rearrangements and to clarify that the Principal Determination ceases to apply to an employee if he or she moves voluntarily to another agency.

**Purpose of Amendments to the Principal Determination**

The present determination (**the Amendment Determination No. 2**) amends the Principal Determination of 18 September 2013 (as amended on 31 October 2013) in order to remove certain classes of employees from coverage. Notes in relation to amending clauses are at attachment A.

The determination provides

* effective from 30 January 2014, the Principal Determination ceases to apply to transferring non-SES employees who are employed in the following agencies:
* The Treasury
* The Attorney-General’s Department
* The Department of Industry
* The Department of Foreign Affairs and Trade
* The Department of Environment; and
* The Australian Trade Commission (Austrade).

Transferring non SES employees in these agencies will cease to have their terms and conditions from their Losing Agency preserved, and will become covered by the enterprise agreement that applies in their Gaining Agency.

The Principal Determination (as amended) will continue to apply to transferring non SES employees employed in the following agencies:

* The Department of the Prime Minister and Cabinet
* The Department of Health
* The Department of Infrastructure and Regional Development
* The Department of Social Services
* The Department of Employment; and
* The Department of Education.

The Determination will have no retrospective application.

**Reasons**

The Public Service Minister was of the opinion that it was desirable to make the Amendment Determination No. 2 under subsection 24(3) because:

* As the effects of the Machinery of Government changes have become clear, the agencies removed from scope by the Amendment Determination No.2 have identified that terms and conditions of employment of transferring non SES employees in those agencies are more appropriately determined by those agencies’ enterprise agreements; and
* The Public Service Minister was of the opinion that exceptional circumstances still apply in respect of the agencies which remain covered by the Determination.

**Consultation**

All agencies with APS employees covered by the principal Determination were consulted.

Authority: Subsection 24(3) of the *Public Service Act 1999*

Attachment A

**Notes on Clauses**

The instrument sets out amendments to the Principal Determination in the Schedule.

Item 1 to the Schedule inserts 3 new clauses into the Principal Determination.

Clause 5A provides that the Principal Determination ceases to apply to employees of certain named APS agencies from 30 January 2014.

Clause 5B provides that where an employee is removed from coverage under the Principal Determination by virtue of Amendment Determination No. 2 the annual salary that applies to the employee on 30 January 2014 is the greater of the annual salary that applied to the employee immediately before 30 January and the annual salary that would otherwise apply to the employee on 30 January 2014. This clause is necessary because when an employee ceases to be covered by the Principal Determination their terms and conditions are generally determined by the enterprise agreement of their employing agency. In some cases, in the absence of this clause, salary under the relevant enterprise agreement could be lower than salary preserved under the Principal Determination.

Clause 5C provides that the salary provided under clause 5B ceases to apply on the occurrence of a range of events, for example a new agency enterprise agreement.