

## EXPLANATORY STATEMENT

### *Public Service Act 1999*

#### **Determination under subsection 24(3)— Non-SES employees to be moved to the Department of Home Affairs by determination under paragraph 72(1)(a) of the *Public Service Act 1999***

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**

In late-December 2017, the Department of Immigration and Border Protection will become the Department of Home Affairs (**Department**). The creation of the Department of Home Affairs will result in APS employees being transferred into it from the Attorney General's Department (**AGD**), Department of Infrastructure and Regional Development (**DIRD**), Department of the Prime Minister and Cabinet (**PM&C**) and Department of Social Services (**DSS**).

Section 72 of the PS Act provides for the movement of APS employees affected by an administrative re-arrangement. As a result of the administrative re-arrangements described above, the Australian Public Service Commissioner will make determinations pursuant to section 72 of the PS Act, moving a number of APS employees from the AGD, DIRD, PM&C and DSS to the Department with effect from the issuing of the associated Administrative Arrangements Order (**AAO**).

The issuing of the associated AAO following the announcement will move relevant pieces of legislation from the AGD, DIRD and PM&C under the authority of the Minister for Home Affairs. In order to ensure employees can continue to lawfully exercise certain legislative powers, and to ensure effective delivery of critical Government functions, the relevant APS employees will need to transfer on the same date.

There are significant differences between the industrial instrument that will operate in the Department and those that operate in departments from which staff will be transferring in. This complexity, coupled with the timing of this administrative re-arrangement, particularly the impact of public holidays, means that payroll arrangements for relevant APS employees are unable to be transferred to the Department of Home Affairs at the same time as the section 72 determinations move the employees.

#### **Effect of the Determination**

The Determination has the effect of maintaining the terms and conditions of employment (including remuneration) that applied to the transferring employees prior to their move to the

Department of Home Affairs. This will remain in place for a limited period of time until payroll arrangements can be completed.

However, the Determination will remain in place to the extent necessary to maintain a pay increase contained in the *Attorney-General's Department Enterprise Agreement 2016* scheduled to occur during the operation of the Determination.

### **Period of operation**

The Determination will continue in force until a new Workplace Determination, made by the Fair Work Commission, comes into operation in the Department of Home Affairs.

The Determination will cease to apply to an employee if they:

- cease to be an employee in the Department of Home Affairs; or
- are promoted within in the Department of Home Affairs.

‘Promoted’ is intended to have the same meaning as in other APS instruments, and so only refers to ongoing assignment of a higher classification.

### **Reasons for making the Determination**

The Public Service Minister is of the opinion that it is desirable to make the Determination under subsection 24(3) because of exceptional circumstances as a result of the following circumstances:

- ordinary arrangements for ensuring the smooth transition of employee terms and conditions during a machinery of government change are not available, due to the need to transfer employees immediately to ensure they can lawfully exercise important legislative powers;
- the machinery of government change is occurring in close proximity to the Christmas holiday period, reducing the number of business days that would otherwise be available between the commencement date and the first pay run;
- the machinery of government change involves a large number of employees across four different agencies.

### **Consultation**

In the circumstances, consultation was not considered reasonably practicable, due to the need to maintain confidentiality over Government decision-making prior to announcement, and the need to urgently maintain employee's terms and conditions.

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