

## EXPLANATORY STATEMENT

### Issued by authority of the Minister for the Public Service

*Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024*

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.

The National Commission for Aboriginal and Torres Strait Islander Children and Young People (Commission) will be established on 13 January 2025 as an Executive Agency pursuant to section 65 of the PS Act.

To facilitate commencement on 13 January 2025, the Commission will be staffed by seconded employees from the Department of Social Services (DSS). Commission employees will be engaged by the Commission following its establishment.

The purpose of the *Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024* (Determination) is to apply the terms and conditions in the *Department of Social Services Enterprise Agreement 2024-2027* (DSS Agreement) to non-SES employees of the Commission, with some modifications to adapt the DSS Agreement to the circumstances of the Commission. The DSS Agreement is incorporated under subsection 14(1) of the *Legislation Act 2003* (Legislation Act).

Details of the Determination are included in the Attachment.

Consistent with subsection 24(3) of the PS Act, the Public Service Minister is of the opinion this Determination is desirable because of exceptional circumstances. The Determination will ensure that employees of the Commission are provided terms and conditions of employment that are consistent with the entitlements that were bargained for as part of APS-wide bargaining and that are consistent with the DSS Agreement. This will provide certainty on the terms and conditions for employees of the Commission.

#### **Consultation**

As there are currently no employees engaged, or proposed to be engaged, in or working for the Commission, it is not possible to consult with affected employees about the determination. However, limited consultation was undertaken with the Community and Public Sector Union (CPSU) about the determination, including applying the terms and conditions of the DSS Agreement to Commission employees. No concerns with the proposed approach were raised by the CPSU.

#### **Impact Analysis**

No Impact Analysis is required for the measures contained in the *Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024* because it does not result in more than a minor change in behaviour or impact for people, business or community organisations.

### **Exemption from disallowance and sunseting**

The *Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024* is a legislative instrument for the purposes of the Legislation Act.

The note contained under subsection 24(3) of the PS Act clarifies that the disallowance and sunseting provisions of the Legislation Act do not apply to a determination made under subsection 24(3) of the PS Act.

Item 27(b) of section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Legislation Regulations) provides the source of exemption from disallowance. The Explanatory Statement for the Legislation Regulations provides that instruments made under this provision are all internal management tools for Government and should continue to be exempt from disallowance.

A Statement of Compatibility with Human Rights, prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required, as paragraph 15J(2)(f) of the Legislation Act only requires a Statement to be prepared for disallowable legislative instruments.

Item 54(b) of section 12 of the Legislation Regulations provides the source of exemption from sunseting. The Explanatory Statement for the Legislation Regulations provide that instruments made under this provision are all internal management tools for Government, intended to have ongoing effect, and should continue to be exempt from sunseting.

It is essential that an instrument made under subsection 24(3) of the PS Act continues to be exempt from disallowance and sunseting, so that terms and conditions of employment can be established and maintained for affected employees.

### **Commencement**

The Determination commences on the day after it is registered with the Federal Register of Legislation.

Authority: subsection 24(3) of the PS Act

**DETAILS OF INSTRUMENT**

*Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024*

**Section 1 - Name**

Section 1 provides that the title of instrument is the *Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024*.

**Section 2 - Commencement**

Section 2 provides that the instrument commences on the day after it is registered with the Federal Register of Legislation.

**Section 3 - Authority**

Section 3 provides that the instrument is made under subsection 24(3) of the PS Act.

**Section 4 - Definitions**

Section 4 defines the terms used in the instrument.

**Section 5 – Application of this Instrument**

Section 5 provides that the instrument applies to all non-SES employees employed in the National Commission for Aboriginal and Torres Strait Islander Children and Young People under the PS Act.

**Section 6 – When this instrument ceases to apply to Covered Employees**

Section 6 provides that the instrument ceases to apply to a non-SES employee to whom the instrument applies if an enterprise agreement, or workplace determination made under the *Fair Work Act 2009* (FW Act) applies to the employee.

**Section 7 – Terms and conditions of employment**

Subsection 7(1) provides that the terms and conditions of employment of a non-SES employee to whom the instrument applies are the terms and conditions set out in the DSS Agreement as amended by the instrument. The terms and conditions of the DSS Agreement as in operation immediately before the commencement of the instrument are incorporated under subsection 14(1) of the *Legislation Act 2003*.

Enterprise agreements are approved by decision of the Fair Work Commission and are published on the Fair Work Commission's website. The DSS Agreement can be accessed through the Fair Work Commission's website (<https://www.fwc.gov.au>).

Paragraph 7(2)(a) provides that where the DSS Agreement uses the term 'Agreement' to refer to the Enterprise Agreement, the reference to 'Agreement' is a reference to the Enterprise Agreement as applied by the instrument (unless context provides otherwise).

Paragraph 7(2)(b) provides that a reference to 'the Secretary of the Department of Social Services' in the DSS Agreement is a reference to the Commissioner of the National Commission for Aboriginal and Torres Strait Islander Children and Young People.

Paragraph 7(2)(c) provides that a reference to 'Secretary' in the DSS Agreement is a reference to the Commissioner.

Paragraph 7(2)(d) provides that a reference to 'the Department of Social Services' in the DSS Agreement is a reference to the National Commission for Aboriginal and Torres Strait Islander Children and Young People (unless context provides otherwise).

Paragraph 7(2)(e) provides that a reference to 'Department' or 'Departmental' in the DSS Agreement is a reference to the National Commission for Aboriginal and Torres Strait Islander Children and Young People (unless context provides otherwise).

Paragraph 7(2)(f) provides that a reference to an 'employee' in the DSS Agreement is a reference to an employee to whom the instrument applies.

Paragraph 7(2)(g) provides that a reference to 'commencement of the Agreement' in the DSS Agreement is a reference to the commencement of the instrument.

Paragraph 7(2)(h) provides that clause 3 of the DSS Agreement (which specifies when the Enterprise Agreement commences) is omitted. This is because the commencement of the operation of the Enterprise Agreement is not relevant to the Determination. This has no effect on an employee's terms and conditions of employment.

Paragraph 7(2)(i) provides that clause 4 of the DSS Agreement (which specifies the nominal expiry date of the Enterprise Agreement) is omitted. This is because the nominal expiry date of the Enterprise Agreement is not relevant to the Determination. This has no effect on an employee's terms and conditions of employment.

Paragraph 7(2)(j) provides that clauses 10 – 15 of the DSS Agreement (which set out the procedures for individual flexibility arrangements) are omitted. This is because in accordance with the FW Act an individual flexibility arrangement may only be made under the Enterprise Agreement and so the clauses are not relevant to the Determination. An employee may apply for flexible work arrangements in accordance with the Determination and under clause 157 of the DSS Agreement. In addition, the Commissioner can make a determination under section 24(1) of the PS Act to determine terms and conditions for individual employees where it is appropriate, having regard to individual circumstances.

Paragraph 7(2)(k) provides that clause 18.1 of the DSS Agreement (which provides that the base salaries in Attachment A of the DSS Agreement include a 4.0 per cent increase from the first full pay period on or after 1 March 2024 (14 March 2024)) is omitted. This is because clause 18.1 effected a pay increase on 14 March 2024 and no longer has any work to do. The terms and conditions set by the Determination reflect this pay increase and so this has no effect on an employee's terms and conditions of employment.

Paragraph 7(2)(l) provides that clauses 20 – 21 of the DSS Agreement (which provides for one-off payments when an employee's salary is above the top of the range pay point for their classification upon commencement of the Enterprise Agreement) is omitted. This is because clauses 20 – 21 applied on the commencement of the Enterprise Agreement (12 March 2024) and no longer have any work to do. This has no effect on an employee's terms and conditions of employment.

Paragraph 7(2)(m) provides that clauses 412 – 414 and Table 2 (which provide for remote locality assistance for certain employees who were in receipt of such assistance on 1 May 2012) of the DSS Agreement are omitted. This is because clauses 412 – 414 are not relevant to any employee (current

or future) engaged in the Commission and so would have no work to do. This has no effect on an employee's terms and conditions of employment.

Paragraph 7(2)(n) provides that references to 'Workplace Consultative Forum' in clauses 90, 94 and 154 of the DSS Agreement are omitted and substituted with National Commission for Aboriginal and Torres Strait Islander Children and Young People Consultative Committee, where one is in place<sup>1</sup>.

Paragraph 7(2)(o) provides that the heading 'Workplace Consultative Forum' preceding clause 437 and clauses 437 – 442 of the DSS Agreement (which sets out the operation of the Department of Social Service's Workplace Consultative Forum) are omitted and are substituted with the following:

**National Commission for Aboriginal and Torres Strait Islander Children and Young People Consultative Committee**

The Commissioner may establish a National Commission for Aboriginal and Torres Strait Islander Children and Young People Consultative Committee to discuss relevant workplace matters.

A National Commission for Aboriginal and Torres Strait Islander Children and Young People Consultative Committee will operate subject to an agreed terms of reference and structure for the term of the *Public Service (Terms and Conditions of Employment) (National Commission for Aboriginal and Torres Strait Islander Children and Young People) Determination 2024*. Representation on the committee will be in accordance with the terms of reference.

Paragraph 7(2)(p) provides that clause 452 of the DSS Agreement (which provides for maintenance of disputes notified under the *Department of Social Services Enterprise Agreement 2018 to 2021*) is omitted. This is because no employees had notified a dispute for the purposes of clause 452 and so the clause had no work to do. This has no effect on an employee's terms and conditions of employment.

**Section 8 – Procedure for dealing with disputes**

Section 8 provides that clauses 444 to 451 of the DSS Agreement (Dispute Resolution) (as applied by the Determination) is a term or condition of employment applying to an employee to whom this Determination applies and, for the purposes of paragraph 738(d) of the FW Act, is a term that provides for a procedure for dealing with disputes arising under the instrument.

**Section 9 – Interaction with other determinations made under the PS Act**

Section 9 provides that to the extent possible, the instrument is to operate concurrently with any determination made under subsection 24(1) of the PS Act, and that the instrument does not prevent a determination made under subsection 24(1) of the PS Act increasing the amount of salaries, allowances or other monetary entitlements provided for under the instrument.

**Section 10 – Interaction with the NES and the APS Award**

Section 10 provides that the instrument has no effect to the extent that it would exclude the National Employment Standards provided for in Part 2-2 of the FW Act, and that while the instrument is in force, the *Australian Public Service Enterprise Award 2015* does not apply to non-SES employees in the National Commission for Aboriginal and Torres Strait Islander Children and Young People.