

Premier's Department

NSW Government Fair Pay and Bargaining Policy 2023

Industrial Relations, Premier's Department

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Contents

1	Introduction.....	1
2	Application	1
3	Enhancements to remuneration and conditions during 2023-24.....	2
4	Governance Arrangements	3
	4.1 Governance Framework.....	3
	4.2 Preparing for bargaining	3
	4.3 Approval of bargaining interests.....	3
	4.4 Approval to finalise negotiations.....	4
	4.5 Process	5
5	Bargaining and productivity reforms	5
	5.1 Mutual gains bargaining	5
	5.2 Enhancements to Productivity.....	6
6	Negotiation Principles.....	6
7	Guaranteed minimum conditions of employment	7
8	Management of wage bargaining and industrial matters	8
	8.1 Requests for information	8
	8.2 Legal Representation.....	8
9	Reporting.....	9
10	Annexure A – Bargaining Process.....	10

1 Introduction

- 1.1. The NSW Government's Fair Pay and Bargaining Policy 2023 ("the Fair Pay Policy") enables public sector employees and unions to effectively engage with government agencies through a cooperative approach to bargaining, departing from the traditional adversarial approach to industrial relations.
- 1.2. The Fair Pay Policy provides for a cultural change, which improves industrial relations practice, service delivery, and decision-making to create a more flexible, highly skilled, mobile, high performing, and outcome driven public sector. The policy aims to restore the sector to being an employer of choice and a leader in innovative work practices.
- 1.3. A mutual gains approach to bargaining facilitates a cooperative approach to rebuilding and improving access to essential government services while also investing in our public sector workforce through enhancements to pay and improvements to working conditions, that enable them to deliver the world class public services that the people of New South Wales can rightly expect.
- 1.4. Improvements to employment conditions should take into account the Government's fiscal circumstances and budgetary environment.
- 1.5. Outcomes from negotiations should deliver employment conditions that are competitive and support improvements to the delivery of government services to the New South Wales community. Agencies are encouraged to pursue reforms that promote greater employee mobility and flexibility, to attract and retain our workforce.
- 1.6. Bargaining agendas should consider workforce planning strategies and identify areas of skill shortage when proposing measures to address attraction and retention of the public sector workforce. This includes reviewing a range of issues such as recruitment, training, smart job design and/or redesign, working conditions, and remuneration. Improvement strategies must consider non-monetary benefits or incentives. Any additional remuneration proposed should be targeted, based on identifiable needs, and within the context of a comprehensive strategy to manage any attraction and retention issues.
- 1.7. Agencies should ensure that appropriate resourcing and capability is dedicated to the mutual gains bargaining process to optimise bargaining outcomes.

2 Application

- 2.1. The Fair Pay Policy applies to the Government sector as defined in the *Government Sector Employment Act 2013*, including Public Service agencies, the Teaching Service, the NSW Police Force, the NSW Health Service, the Transport Service of NSW, independent statutory bodies, and persons identified in section 5 (1) (b) – (f) of the *Government Sector Employment Act 2013*.
- 2.2. State Owned Corporations, including their subsidiaries, are encouraged to adopt the terms of the Fair Pay Policy and include a commitment to do so within their Statement of Corporate Intent.
- 2.3. The Fair Pay Policy applies to any negotiations, variations, and claims or offers by agencies that impact on remuneration or other conditions of employment, whether or not they are formalised in an industrial instrument.

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- 2.4. For the purposes of the Fair Pay Policy, an industrial instrument shall mean an award, agreement, determination, common law contract, or any other arrangement regulating the remuneration or other conditions of employment of public sector employees (including senior executives and CEOs).
- 2.5. Local agreements – including local working hours arrangements made pursuant to clause 10 of the *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009* and any successor award must also comply with the Fair Pay Policy.
- 2.6. No offers may be made that would enhance employment terms and conditions until bargaining approvals have been obtained in accordance with the Fair Pay Policy.
- 2.7. This Policy replaces the previous policy directives contained in *Premier's Memorandum M2022-05 NSW Public Sector Wages Policy 2022* and *M2022-02 Management of Industrial Disputes and Bargaining Matters*.

3 Enhancements to remuneration and conditions during 2023-24

- 3.1. For instruments which are due to expire prior to 30 June 2024, immediately following the expiry of the current industrial instrument, agencies may offer an annual increase to employee remuneration comprising of:
 - 4.3.1. 4.0 per cent increase to salary and salary related allowances for one year; and
 - 4.3.2. 0.5 percentage point increase to superannuation.
- 3.2. Where instruments are yet to expire, an interim increase of 1 per cent may be available from 1 July 2023, with the remainder of the 4.0 per cent increase approved for FY2023-24 to be provided at the time the instrument is renewed, subject to the concurrence of the Treasurer and Minister for Industrial Relations.
- 3.3. For multi-year instruments that expire after 1 July 2024 an interim increase rates of pay by up to 4.0 per cent for one year may be available from 1 July 2023, subject to the concurrence of the Treasurer and Minister for Industrial Relations, with the rate from 1 July 2024 being the percentage increase previously provided for in the instrument.
- 3.4. An additional increase may be provided in FY2023-24 where parties identify substantial efficiency improvements, including changes to work practices and work systems which provide demonstrable enhancements to the delivery of services to the public. Where such improvements have been identified, the Portfolio Minister must seek approval of the Expenditure Review Committee of Cabinet (ERC) for an additional increase within the nominal term of the current industrial instrument.
- 3.5. Additional enhancements to remuneration or other conditions of employment may also be provided where the associated cost is offset by savings. Such proposals must be submitted for consideration by the Senior Officials Wages Advisory Committee (SOWAC) for assessment before proceeding to ERC for approval, prior to any offers being made.

4 Governance Arrangements

4.1 Governance Framework

- 4.1.1 Throughout bargaining processes agencies will be subject to mandatory requirements around key decision-making points. This promotes equitable outcomes, transparency, and accountability and alignment of agency interests and objectives with whole of government priorities.
- 4.1.2 There are mandatory processes that must be complied with during the preparation, approval, bargaining, and implementation stages.
- 4.1.3 Before bargaining commences and arrangements are confirmed, there is a two-stage approval process required as part of mutual gains bargaining:
 - a. Approval of agency interests in preparation for mutual gains bargaining (section 4.3); and
 - b. Approval of final proposal.
- 4.1.4 Agencies should ensure that periodic assessments are undertaken to ensure compliance with the Fair Pay Policy at each stage of the process.

4.2 Preparing for bargaining

- 4.2.1 Agencies should identify areas where industrial relations reform will support the strategic priorities for the agency and Government and determine their bargaining interests, priorities, and objectives.
- 4.2.2 Agencies should determine the key bargaining participants at the earliest opportunity including who those authorised to make offers and provide clear advice to employee representatives and unions.
- 4.2.3 Agencies will nominate senior managers with relevant expertise to be the lead negotiator and project manager with responsibility for the strategic progress of the negotiations and to ensure compliance with the Fair Pay Policy for the timely consideration of decisions.
- 4.2.4 Agencies may also authorise a number of bargaining representatives with specialist knowledge to participate in negotiations (e.g. human resources, finance, operations).
- 4.2.5 Industrial Relations, Premier's Department will issue guidance and facilitate access to relevant mutual gains bargaining training. Specified training may be mandatory for Government sector bargaining representatives.

4.3 Approval of bargaining interests

- 4.3.1 Agencies will consider, prepare, and submit draft bargaining proposals which identify interests and opportunities for reform for approval to SOWAC in a timely manner with sufficient flexibility to meaningfully participate in mutual gains bargaining.
- 4.3.2 Industrial Relations, Premier's Department and NSW Treasury will assist the agency to develop their bargaining proposal including the reforms, savings measures, and proposed bargaining strategies covering wages and conditions. Agencies are encouraged to engage with Industrial Relations and NSW Treasury at the earliest opportunity when developing draft bargaining proposals.

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- 4.3.3. It is recommended that bargaining proposals be approved no later than six months prior to the expiry of the current industrial instrument, to enable sufficient time for bargaining. If a submission requires approval by ERC additional time should be allowed.
- 4.3.4. Industrial Relations may issue guidance, recommendations, or other requirements in relation to the terms to be included in instruments to promote whole of government reform, efficiency, and consistency. This may include preparation of draft model clauses to assist with consistency with sector wide arrangements including conditions of employment.
- 4.3.5. The bargaining proposal must include details of proposed changes to wages and conditions of employment, productivity and efficiency improvements including changes to work practices, work systems etc., which provide demonstrable enhancements to the delivery of services to the public. This includes the provision of advice on how the delivery of each of the measures will be quantified and reported, and details of the proposed bargaining strategy.
- 4.3.6. Submissions are to be provided to Industrial Relations, Premier's Department who will coordinate advice and analysis of bargaining proposals for SOWAC.
- 4.3.7. SOWAC will review the proposed bargaining proposal and, where any proposed increases to remuneration or other conditions of employment are consistent with the Government's policy and wage settings, it may approve the bargaining proposals.
- 4.3.8. Bargaining proposals must include confirmation of participation in relevant bargaining training offered by the Industrial Relations and identify bargaining participants including the lead negotiator and decision makers.
- 4.3.9. Where bargaining proposals, including increases to remuneration or other conditions of employment increase employee related expenses that are not contemplated by Government policy and priorities, following consideration of SOWAC, the agency's portfolio Minister and the Minister for Industrial Relations are to submit the bargaining proposal to ERC for consideration.
- 4.3.10. When submitting a bargaining proposal to ERC, the proposal must:
- a. be presented in the form of a Cabinet Minute;
 - b. contain a Financial Impact Statement endorsed by NSW Treasury;
 - c. include an analysis of economic impacts of the bargaining proposal; and
 - d. be submitted jointly by the Portfolio Minister and the Minister for Industrial Relations.
- 4.3.11. When considering bargaining proposals, SOWAC and ERC may consider whole of government implications and potential flow on impacts across the public sector.
- 4.3.12. ERC may require agencies to prepare an additional business case to support the quantum of any proposal.
- 4.3.13. Agencies may discuss options for reform with employee representatives and unions as they develop their bargaining proposals, but only where those discussion are held on a without prejudice basis.

4.4 Approval to finalise negotiations

- 4.4.1. Following the conclusion of bargaining, final bargaining positions must be approved by SOWAC and/or ERC before arrangements can be finalised.

4.5 Process

- 4.5.1. An agency may settle an industrial instrument within bargaining approvals given by SOWAC or ERC, in consultation with Industrial Relations, Premier's Department.
- 4.5.2. In appropriate cases, Industrial Relations, Premier's Department will provide additional support and assistance with negotiations.
- 4.5.3. Before filing an industrial instrument (or consenting to its filing), agencies must advise Industrial Relations, Premier's Department of the outcome of the negotiations or offers made and provide a copy of the proposed industrial instrument for approval.

5 Bargaining and productivity reforms

5.1 Mutual gains bargaining

- 5.1.1. Mutual gains bargaining is a collaborative approach to bargaining where parties reach a consensus by identifying key needs and interests, with a view to ensuring that concerns are addressed, areas of conflict resolved, and a mutual agreement is achieved.
- 5.1.2. Agencies are required to engage in mutual gains bargaining as the primary approach with relevant parties when undertaking bargaining.
- 5.1.3. Parties should share relevant information for each key interest and any common criteria which will be used to evaluate options during the bargaining process.
- 5.1.4. Two types of consultative forums will support mutual gains bargaining across the sector to facilitate discussions on the Government's financial position and delivery of reform improvements.
- 5.1.5. The Peak Engagement Council, comprising of representatives of NSW Treasury, Industrial Relations, Premier's Department and Unions NSW, will provide a forum to share information, have ongoing dialogue about the fiscal position of the state, the performance of agencies across the public sector, and track bargaining outcomes.
- 5.1.6. Engagement Councils (EC) in agencies should be established, comprising of senior decision makers and the relevant union representatives to facilitate the delivery of reform improvements. The ECs should provide an ongoing consultative forum for agencies including driving, monitoring, and recording improvements in public service delivery.
- 5.1.7. A key component of mutual gains bargaining will be the availability of joint training to assist the parties for negotiations and to support adherence of good faith and mutual gains bargaining principles.

5.2 Enhancements to Productivity

- 5.2.1. Industrial Relations, Premier's Department, will work with stakeholders, agencies, and NSW Treasury to assist in identifying potential areas of productivity reforms and improvements to enhance the value of services to the people of New South Wales.
- 5.2.2. Agencies should advise Industrial Relations, Premier's Department of any substantial productivity and efficiency improvements including changes to work practices, work systems etc., which provide demonstrable enhancements to the delivery of services to the public that emerge during bargaining.
- 5.2.3. Public sector productivity is the quantity and quality of public services or outcomes delivered for a given amount of public resources (labour, equipment/technology, natural resources). Productivity improvements in the public sector could include:
 - a. Delivering the same service (quality or quantity) at a lower cost;
 - b. Delivering a better service (quality or quantity) at the same cost;
 - c. Achieving a large reduction in cost, with a slight reduction in service quality; and/or
 - d. Achieving a large improvement in service quality, with a small increase in cost.

6 Negotiation Principles

- 6.1. Agencies should approach negotiations in a cooperative and problem-solving manner, focussing on common interests, objectives, and long-term mutual gains. All parties are expected to bargain in good faith and operate in an open manner, with integrity and honesty.
- 6.2. Agencies should ensure appropriate communication with their employees and unions regarding their bargaining agenda position, the negotiating process, and outcomes.
- 6.3. Any increases to employee related costs, including wages, allowances, superannuation must be supported with commensurate reforms to work practices, work systems etc., which provide demonstrable enhancements to the delivery of services to the public and/or cost savings.
- 6.4. New industrial instruments should not predate the expiry of existing instruments.
- 6.5. Industrial legislation sets out when the terms of a new instruments commence operation. In limited circumstances the new terms of the instrument may operate retrospectively¹. Any proposals to apply the new terms retrospectively should be included in bargaining proposals and set out the reasons and exceptional circumstances to justify the retrospective application of any changes.
- 6.6. Remuneration and other conditions of employment should be negotiated concurrently and, where possible, contained in a single, comprehensive industrial instrument.
- 6.7. Awards and Agreements must contain a no extra claims clause that has been approved by SOWAC.
- 6.8. Agencies are not permitted to enter into arrangements that 'leave reserved' matters or claims to be negotiated or determined during the life of an industrial instrument, unless for exceptional circumstances and approved by Industrial Relations, Premier's Department.
- 6.9. All wages and conditions matters should be resolved in the negotiating process and, where appropriate, incorporated in the industrial instrument. However, this does not prevent variations being made with the agreement of the relevant parties should the need arise.

¹ s. 15 & 17, Industrial Relations Act 1996 (NSW) and s. 186, Fair Work Act 2009 (Cth)

7 Guaranteed minimum conditions of employment

- 7.1. Public sector employees are entitled to the following guaranteed minimum conditions of employment:
- 7.1.1. Unpaid parental leave that is the same as that provided by the National Employment Standards.
 - 7.1.2. Paid parental leave that applies to the relevant group of public sector employees on the commencement of this Policy.
 - 7.1.3. Paid domestic and family violence leave that applies to public sector employees on the commencement of this Policy.
 - 7.1.4. Employer payments to employee superannuation schemes or funds (being the minimum amount prescribed under the relevant law of the Commonwealth).
 - 7.1.5. Long service or extended leave (being the minimum leave prescribed under section 54 of the *Government Sector Employment Act 2013* or the *Long Service Leave Act 1955*, whichever Act is applicable to the employment concerned).
 - 7.1.6. Annual leave (being the minimum leave prescribed under the *Annual Holidays Act 1944*).
 - 7.1.7. Sick leave entitlements under section 26 of the *Industrial Relations Act 1996*.
 - 7.1.8. Public holiday entitlements under the *Public Holidays Act 2010*.
 - 7.1.9. Part-time work entitlements under Part 5 of Chapter 2 of the *Industrial Relations Act 1996*.
- 7.2. Existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.
- 7.3. Equal remuneration is payable for men and women doing work of equal or comparable value.

8 Management of wage bargaining and industrial matters

- 8.1. Wage bargaining and industrial matters are a joint responsibility of the Portfolio Minister and the Minister for Industrial Relations. Decisions on industrial matters require the concurrence of the Minister for Industrial Relations to ensure a coordinated, whole-of-government approach.
- 8.2. Without limiting innovation in negotiations, the Minister for Industrial Relations will ensure strategic alignment and overall consistency across Government in all wage bargaining matters and potential and actual industrial disputes together with Portfolio Ministers who are responsible for the efficient and effective operation of agencies within their portfolio, including the management of any industrial relations matters.
- 8.3. Upon the commencement of industrial proceedings, agencies must advise Industrial Relations, Premier's Department of the nature and status of the proceedings and provide regular updates as the matter progresses. Portfolio Ministers must seek the concurrence of the Minister for Industrial Relations on all decisions relating to the proceedings, including the decision on whether agencies can commence proceedings or seek to progress the matters to arbitration.
- 8.4. Portfolio Ministers must ensure that the Minister for Industrial Relations is consulted on wage bargaining matters and industrial disputes within their area of responsibility to ensure that they are resolved in a manner that:
 - a. is consistent with bargaining proposals approved by the ERC or SOWAC in accordance with this policy;
 - b. aligns with the Government's strategic objectives; and
 - c. prioritises the fair and timely resolution of wage negotiations and disputes.
- 8.5. Where proposals for wage bargaining matters and industrial disputes are submitted to ERC, they are to be submitted jointly by the Portfolio Minister and the Minister for Industrial Relations.

8.1 Requests for information

- 8.1.1. Agencies may be required to provide information and/or advice in relation to bargaining matters as required to Industrial Relations, Premier's Department – for example copies of correspondence, financial analysis, draft clauses or other associated bargaining information.

8.2 Legal Representation

- 8.2.1. The engagement of solicitors and counsel should be limited to requests for advice or representation in relation to:
 - a. complex and contentious arbitration;
 - b. options to deescalate threats of industrial action that impact on the delivery of essential services, the welfare of the community or the economy of the state; or
 - c. industrial action which adversely impacts on the delivery of essential services, the welfare of the community or the economy of the state.

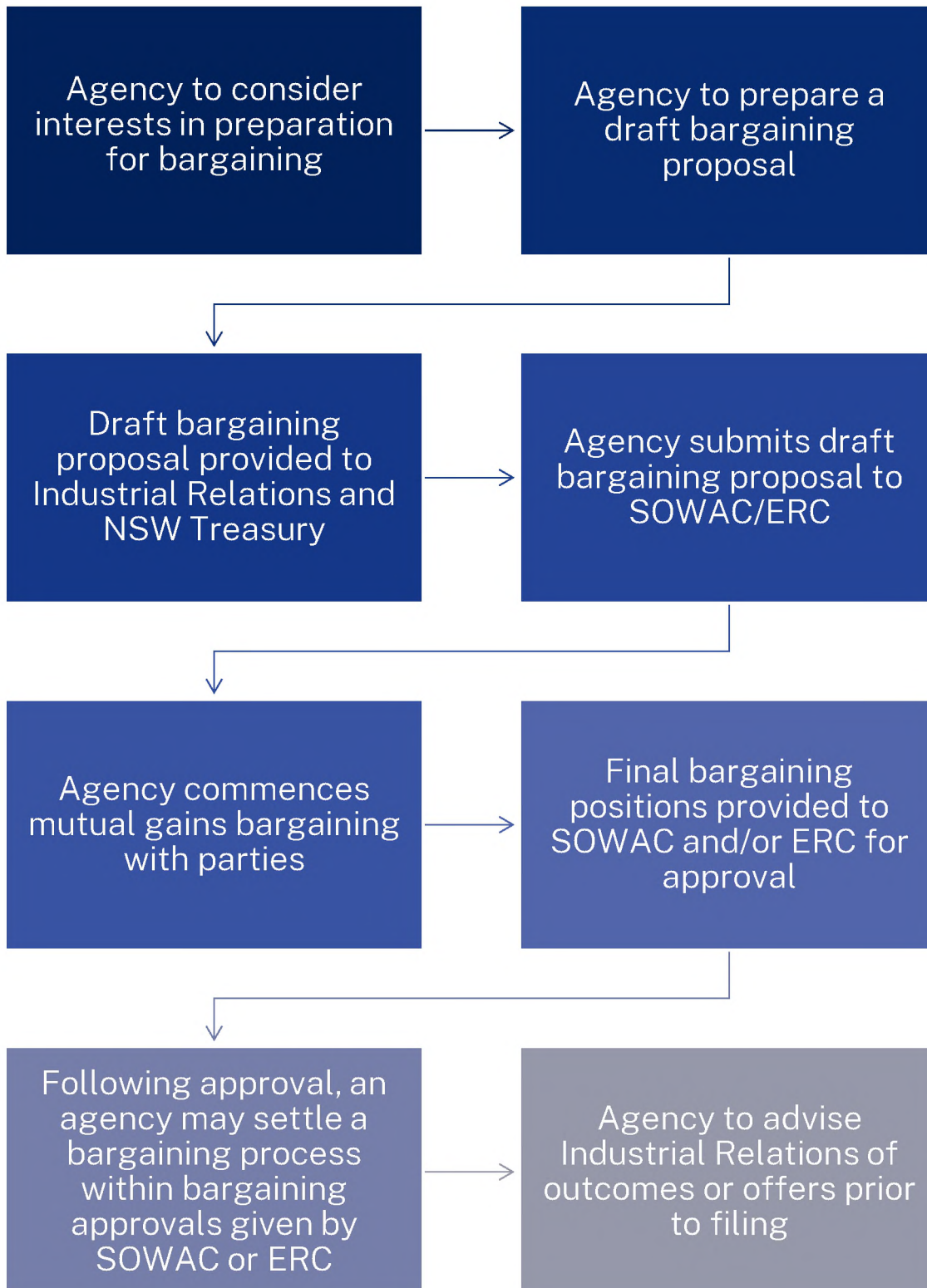
- 8.2.2. Legal representation in conciliation and/or compulsory conferences should only occur by exception. There may be occasions where it will be appropriate to engage legal practitioners and/or counsel to ensure the timely and efficient resolution of matters.
 - 8.2.3. Agencies engaging legal representation are required to comply with the NSW Government's Model Litigant Policy for Civil Litigation².
 - 8.2.4. It is recommended that agencies seek legal advice from Government solicitors on bargaining or dispute matters in the first instance, such as solicitors employed by a government agency or the from the NSW Crown Solicitor's Office as the need arises.
 - 8.2.5. Legal practitioners and/or counsel should be engaged in a timely matter and legal advice as to mitigation strategies ought to be considered as soon as practicable in the face of escalating threats which have an adverse impact.
 - 8.2.6. Prior to engaging legal practitioners and/or counsel, agencies are encouraged to seek advice from Industrial Relations, Premier's Department to support a consistent approach to bargaining and dispute resolution.
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9 Reporting

- 9.1. Agencies will be required to report to SOWAC at six-month intervals on progress towards the achievement of cost savings and implementation of changes to work practices/work systems and enhancements to the delivery of services to the public.
- 9.2. Industrial Relations, Premier's Department will periodically report to the Minister for Industrial Relations and ERC on the status of wage outcomes and industrial arrangements, including the implementation of changes to work practices/work systems and the enhancements to the delivery of services to the public, as reported by agencies.

² M2016-03-Model Litigant Policy for Civil Litigation

10 Annexure A – Bargaining Process



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