



Public Service Act 1999

No. 147, 1999

**An Act to provide for the establishment and
management of the Australian Public Service, and
for other purposes**

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Public Service Act 1999

No. 147, 1999

An Act to provide for the establishment and management of the Australian Public Service, and for other purposes

[Assented to 11 November 1999]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Public Service Act 1999*.

Note: See also the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

Part 1 Preliminary

Section 2

2 Commencement

- (1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
- (2) If this Act does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

3 Objects of this Act

The main objects of this Act are:

- (a) to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public; and
- (b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; and
- (c) to define the powers, functions and responsibilities of Agency Heads, the Public Service Commissioner and the Merit Protection Commissioner; and
- (d) to establish rights and obligations of APS employees.

4 This Act binds the Crown

This Act binds the Crown in right of the Commonwealth, but does not make the Crown liable to be prosecuted for an offence.

5 This Act extends to things outside Australia

- (1) This Act extends to acts, omissions, matters and things outside Australia (unless the contrary intention appears).
- (2) This Act extends to all the Territories.

6 Engagement of employees in Department or Executive Agency

- (1) All persons engaged on behalf of the Commonwealth as employees to perform functions in a Department or Executive Agency must be engaged under this Act, or under the authority of another Act.

Section 6

- (2) Subsection (1) does not apply to:
 - (a) persons engaged on an honorary basis; or
 - (b) persons engaged to perform services in the Australian Secret Intelligence Service.

- (3) This section does not, by implication, affect any power that an Agency Head might otherwise have to engage persons as independent contractors.

Part 2—Interpretation

7 Interpretation

In this Act, unless the contrary intention appears:

acting SES employee means a non-SES employee who is acting in a position usually occupied by an SES employee.

Agency means:

- (a) a Department; or
- (b) an Executive Agency; or
- (c) a Statutory Agency.

Agency Head means:

- (a) the Secretary of a Department; or
- (b) the Head of an Executive Agency; or
- (c) the Head of a Statutory Agency.

Agency Minister means:

- (a) in relation to a Department—the Minister who administers the Department; or
- (b) in relation to an Executive Agency—the Minister who administers the Agency; or
- (c) in relation to a Statutory Agency—the Minister who administers the provision of the Act that provides for the appointment of the Head of the Agency.

APS means the Australian Public Service established by section 9.

APS employee means:

- (a) a person engaged under section 22; or
- (b) a person who is engaged as an APS employee under section 72.

APS employment means employment as an APS employee.

APS Values means the values in section 10.

Section 7

AWA has the same meaning as in the *Workplace Relations Act 1996*.

award has the same meaning as in the *Workplace Relations Act 1996*.

category of APS employee means one of the following categories:

- (a) ongoing APS employees;
- (b) APS employees engaged for a specified term or for the duration of a specified task;
- (c) APS employees engaged for duties that are irregular or intermittent.

certified agreement has the same meaning as in the *Workplace Relations Act 1996*.

Classification Rules means rules made under section 23.

Code of Conduct means the rules in section 13.

Commissioner means the Public Service Commissioner appointed under this Act.

Commissioner's Directions means directions issued by the Commissioner under section 11, 15 or 36.

Department means a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency.

Executive Agency means an Executive Agency established under section 65.

Head:

- (a) in relation to an Executive Agency—means the person appointed as the Head of the Agency under section 67; and
- (b) in relation to a Statutory Agency—means the person declared by an Act to be the Head of the Agency.

Head of Mission means the head of:

- (a) an Australian diplomatic mission; or
- (b) an Australian consular mission.

Section 8

locally engaged employee means a person engaged under section 74.

Merit Protection Commissioner means the Merit Protection Commissioner appointed under this Act.

non-ongoing APS employee means an APS employee who is not an ongoing APS employee.

non-SES employee means an APS employee other than an SES employee.

ongoing APS employee means a person engaged as an ongoing APS employee, as mentioned in paragraph 22(2)(a).

overseas means outside Australia and the Territories.

Presiding Officer means the President of the Senate or the Speaker of the House of Representatives.

Prime Minister's Department means the Department of the Prime Minister and Cabinet.

Public Service Minister means the Minister who administers this Act.

Secretary means the Secretary of a Department.

SES means the Senior Executive Service established by section 35.

SES employee has the meaning given by section 34.

Statutory Agency means a body or group of persons declared by an Act to be a Statutory Agency for the purposes of this Act.

8 Workplace Relations Act

- (1) This Act has effect subject to the *Workplace Relations Act 1996*.
- (2) Subsection (1) is not intended to imply anything about the relationship between this Act and any Act other than the *Workplace Relations Act 1996*.

Part 3—The Australian Public Service

9 Constitution of the APS

The Australian Public Service consists of Agency Heads and APS employees.

10 APS Values

- (1) The APS Values are as follows:
- (a) the APS is apolitical, performing its functions in an impartial and professional manner;
 - (b) the APS is a public service in which employment decisions are based on merit;
 - (c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
 - (d) the APS has the highest ethical standards;
 - (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
 - (f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
 - (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
 - (h) the APS has leadership of the highest quality;
 - (i) the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
 - (j) the APS provides a fair, flexible, safe and rewarding workplace;
 - (k) the APS focuses on achieving results and managing performance;
 - (l) the APS promotes equity in employment;

Section 11

- (m) the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
 - (n) the APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
 - (o) the APS provides a fair system of review of decisions taken in respect of APS employees.
- (2) For the purposes of paragraph (1)(b), a decision relating to engagement or promotion is based on merit if:
- (a) an assessment is made of the relative suitability of the candidates for the duties, using a competitive selection process; and
 - (b) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and
 - (c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and
 - (d) the assessment is the primary consideration in making the decision.

11 Commissioner's Directions about APS Values

- (1) The Commissioner must issue directions in writing in relation to each of the APS Values for the purpose of:
- (a) ensuring that the APS incorporates and upholds the APS Values; and
 - (b) determining where necessary the scope or application of the APS Values.
- (2) For the purposes of this Act other than this section, the APS Values have effect subject to the restrictions (if any) in directions made under subsection (1).

12 Agency Heads must promote APS Values

An Agency Head must uphold and promote the APS Values.

13 The APS Code of Conduct

- (1) An APS employee must behave honestly and with integrity in the course of APS employment.
 - (2) An APS employee must act with care and diligence in the course of APS employment.
 - (3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
 - (4) An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, *Australian law* means:
 - (a) any Act (including this Act), or any instrument made under an Act; or
 - (b) any law of a State or Territory, including any instrument made under such a law.
 - (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
 - (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
 - (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
 - (8) An APS employee must use Commonwealth resources in a proper manner.
 - (9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
 - (10) An APS employee must not make improper use of:
 - (a) inside information; or
 - (b) the employee's duties, status, power or authority;
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Section 14

in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

- (11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

14 Agency Heads bound by Code of Conduct

- (1) Agency Heads are bound by the Code of Conduct in the same way as APS employees.
- (2) Statutory office holders are bound by the Code of Conduct in the same way as APS employees.
- (3) In this section:

statutory office holder means a person who holds any office or appointment under an Act, being an office or appointment that is prescribed by the regulations for the purposes of this definition.

15 Breaches of the Code of Conduct

- (1) An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection (3)) to have breached the Code of Conduct:
 - (a) termination of employment;
 - (b) reduction in classification;
 - (c) re-assignment of duties;
 - (d) reduction in salary;
 - (e) deductions from salary, by way of fine;
 - (f) a reprimand.
- (2) The regulations may prescribe limitations on the power of an Agency Head to impose sanctions under subsection (1).

- (3) An Agency Head must establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. The procedures:
 - (a) must comply with basic procedural requirements set out in Commissioner's Directions; and
 - (b) must have due regard to procedural fairness; and
 - (c) may be different for different categories of APS employees.
- (4) The Commissioner must issue directions in writing for the purposes of subsection (3).
- (5) An Agency Head must take reasonable steps to ensure that every APS employee in the Agency has ready access to the documents that set out the procedures referred to in subsection (3).

16 Protection for whistleblowers

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or
- (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.
- (c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.

17 Prohibition on patronage and favouritism

- (1) A person exercising powers under this Act or the regulations:
 - (a) in relation to the engagement of APS employees; or
 - (b) otherwise in relation to APS employees;must do so without patronage or favouritism.
- (2) This section does not apply to giving, or carrying out, a direction under subsection 39(2) about a Head of Mission.

Section 18

18 Promotion of employment equity

An Agency Head must establish a workplace diversity program to assist in giving effect to the APS Values.

19 Limitation on Ministerial directions to Agency Head

An Agency Head is not subject to direction by any Minister in relation to the exercise of powers by the Agency Head under Division 1 or 2 of Part 4 in relation to particular individuals.

Part 4—APS employees

Division 1—APS employees generally

20 Employer powers etc. of Agency Head

- (1) An Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the Agency.
- (2) Without limiting subsection (1), an Agency Head has, in respect of APS employees in the Agency, the rights, duties and powers that are prescribed by the regulations.

21 Prime Minister's directions to Agency Heads

- (1) The Prime Minister may issue general directions in writing to Agency Heads relating to the management and leadership of APS employees.
- (2) A direction under subsection (1) must be published in the *Gazette* within 14 days after the direction is issued.

22 Engagement of APS employees

- (1) An Agency Head, on behalf of the Commonwealth, may engage persons as employees for the purposes of the Agency.
 - (2) The engagement of an APS employee (including an engagement under section 72) must be:
 - (a) as an ongoing APS employee; or
 - (b) for a specified term or for the duration of a specified task; or
 - (c) for duties that are irregular or intermittent.
 - (3) The usual basis for engagement is as an ongoing APS employee.
 - (4) The regulations may limit the circumstances in which persons may be engaged as mentioned in paragraph (2)(b) or (c).
 - (5) An engagement for a specified term may be extended, subject to any limitations prescribed by the regulations.
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Section 23

- (6) The engagement of an APS employee (including an engagement under section 72) may be made subject to conditions notified to the employee, including conditions dealing with any of the following matters:
 - (a) probation;
 - (b) citizenship;
 - (c) formal qualifications;
 - (d) security and character clearances;
 - (e) health clearances.
- (7) Subsection (6) does not, by implication, limit the conditions that may be applied to the engagement of an APS employee.
- (8) An Agency Head must not engage, as an APS employee, a person who is not an Australian citizen, unless the Agency Head considers it appropriate to do so.

23 Classification Rules

- (1) The Public Service Minister may, by notice in the *Gazette*, make rules about classifications of APS employees.
- (2) The Classification Rules may apply, adopt or incorporate, with or without modification, any of the provisions of an award, as in force at a particular time or as in force from time to time.
- (3) Agency Heads must comply with the Classification Rules.
- (4) An Agency Head cannot reduce the classification of an APS employee without the employee's consent, except in the following cases:
 - (a) as a sanction under section 15;
 - (b) in accordance with Commissioner's Directions made under section 36;
 - (c) on the ground that the employee is excess to the requirements of the Agency at the higher classification;
 - (d) on the ground that the employee lacks, or has lost, an essential qualification for performing duties at the higher classification;
 - (e) on the ground of non-performance, or unsatisfactory performance, of duties at the higher classification;

- (f) on the ground that the employee is unable to perform duties at the higher classification because of physical or mental incapacity;
 - (g) in other circumstances prescribed by the regulations.
- (5) If a relevant award, certified agreement or AWA contains procedures to be followed when reducing the classification, then a reduction is of no effect unless those procedures are followed.

24 Remuneration and other conditions

- (1) An Agency Head may from time to time determine in writing the remuneration and other terms and conditions of employment applying to an APS employee or employees in the Agency. A determination is of no effect to the extent that it would reduce the benefit to an employee of any individual term or condition applicable to the employee under an award, certified agreement or AWA.

Note: Other Commonwealth laws deal with matters such as superannuation, compensation, long-service leave and maternity leave.

- (2) A determination under subsection (1) may apply, adopt or incorporate, with or without modification, any of the provisions of an award or certified agreement, as in force at a particular time or as in force from time to time.
- (3) The Public Service Minister may, by notice in the *Gazette*, determine the remuneration and other terms and conditions of employment applying to APS employees, if the Public Service Minister is of the opinion that it is desirable to do so because of exceptional circumstances.
- (4) A determination under subsection (3) overrides any determination under subsection (1), to the extent of any inconsistency.

25 Assignment of duties

An Agency Head may from time to time determine the duties of an APS employee in the Agency, and the place or places at which the duties are to be performed.

Section 26

26 Voluntary moves between Agencies

- (1) An Agency Head may enter into an agreement in writing with an APS employee for the employee to move to the Agency Head's Agency from another Agency.
- (2) Subject to the regulations, the agreement has effect according to its terms, by force of this section.

27 Compulsory moves between Agencies

- (1) The Commissioner may, by direction in writing, move an excess APS employee to another Agency, without anyone's consent.
- (2) For the purposes of this section, an APS employee is an *excess APS employee* if, and only if, the Agency Head has notified the Commissioner in writing that the employee is excess to the requirements of the Agency.

28 Suspension

The regulations may make provision in relation to the suspension from duties of APS employees, with or without remuneration.

29 Termination of employment

- (1) An Agency Head may at any time, by notice in writing, terminate the employment of an APS employee in the Agency.
Note: The *Workplace Relations Act 1996* has rules and entitlements that apply to termination of employment.
- (2) For an ongoing APS employee, the notice must specify the ground or grounds that are relied on for the termination.
- (3) For an ongoing APS employee, the following are the only grounds for termination:
 - (a) the employee is excess to the requirements of the Agency;
 - (b) the employee lacks, or has lost, an essential qualification for performing his or her duties;
 - (c) non-performance, or unsatisfactory performance, of duties;
 - (d) inability to perform duties because of physical or mental incapacity;

- (e) failure to satisfactorily complete an entry-level training course;
 - (f) failure to meet a condition imposed under subsection 22(6);
 - (g) breach of the Code of Conduct;
 - (h) any other ground prescribed by the regulations.
- (4) The regulations may prescribe grounds or procedures applicable to the termination of the engagement of non-ongoing APS employees.
- (5) Subsection (4) does not, by implication, limit the grounds for termination for a non-ongoing APS employee.

30 Retirement

- (1) An APS employee who has reached the minimum retiring age is entitled to retire at any time by notice in writing to the Agency Head.
- (2) The *minimum retiring age* is 55 years, or such higher or lower age as is prescribed by the regulations.

31 Forfeiture of additional remuneration

- (1) If an APS employee receives any non-Commonwealth remuneration for performing duties as an APS employee, then the Agency Head may give a notice in writing to the employee in relation to the whole, or a specified part, of the remuneration.
- (2) The amount notified by the Agency Head:
- (a) is taken to have been received by the employee on behalf of the Commonwealth; and
 - (b) may be recovered by the Commonwealth from the employee as a debt in a court of competent jurisdiction.
- (3) If an Agency Head receives any non-Commonwealth remuneration for performing duties as an Agency Head, then the Agency Minister may give a notice in writing to the Agency Head in relation to the whole, or a specified part, of the remuneration.
- (4) The amount notified by the Agency Minister:
- (a) is taken to have been received by the Agency Head on behalf of the Commonwealth; and
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Part 4 APS employees

Division 1 APS employees generally

Section 32

(b) may be recovered by the Commonwealth from the Agency Head as a debt in a court of competent jurisdiction.

(5) In this section:

non-Commonwealth remuneration means any remuneration from a person other than the Commonwealth.

32 Right of return for election candidates

(1) This section applies to a person if:

- (a) the person resigned as an APS employee in order to contest an election prescribed by the regulations; and
- (b) the resignation took effect not earlier than 6 months before the closing date for nominations; and
- (c) the person was a candidate in the election but failed to be elected.

(2) The person is entitled to be again engaged as an APS employee, in accordance with the regulations and within the time limits prescribed by the regulations.

33 Review of actions

(1) An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment. However, an APS employee is not entitled to review under this section of APS action that consists of the termination of the employee's employment.

(2) The regulations may prescribe exceptions to the entitlement.

Note: For example, the regulations might provide that there is not entitlement to review if the application for review is frivolous or vexatious.

(3) Without limiting subsection (1), regulations made for the purposes of that subsection may provide for the powers available to the Merit Protection Commissioner, or any other person or body, when conducting a review under the regulations.

(4) Regulations for the purposes of subsection (1):

Section 33

- (a) may provide for an initial review to be conducted within the responsible Agency; and
 - (b) may provide that applications for review of particular kinds of APS action are to be made directly to the Merit Protection Commissioner; and
 - (c) must provide for an application for review to be referred to the Merit Protection Commissioner if the applicant is not satisfied with the outcome of an initial review within the responsible Agency; and
 - (d) in the case of a review following an application or referral to the Merit Protection Commissioner, must provide for the review to be conducted by a person nominated by the Merit Protection Commissioner or by a 3 member committee constituted in accordance with the regulations.
- (5) A person or body that has conducted a review under this section may make recommendations in a report on the review but does not have power to make any binding decision as a result of the review, except as provided by the regulations.
- (6) If the Merit Protection Commissioner is not satisfied with the response to recommendations contained in a report on a review under this section, the Merit Protection Commissioner may, after consulting the Public Service Minister, give a report on the matter to the Agency Minister of the responsible Agency and to either or both of the following:
- (a) the Prime Minister;
 - (b) the Presiding Officers, for presentation to the Parliament.
- (7) In this section:

action includes a refusal or failure to act.

APS action means action by a person in the capacity of an Agency Head or APS employee.

responsible Agency, in relation to APS action, means the Agency in which the person who did the action was at the time of the action.

Section 34

Division 2—The Senior Executive Service

34 SES employees

SES employees are those APS employees who are classified as SES employees under the Classification Rules.

35 Constitution and role of SES

- (1) The Senior Executive Service consists of the SES employees.
- (2) The function of the SES is to provide a group of APS employees each of whom, within his or her Agency:
 - (a) provides one or more of the following at a high level:
 - (i) professional expertise;
 - (ii) policy advice;
 - (iii) management; and
 - (b) promotes co-operation with other Agencies; and
 - (c) by personal example and other appropriate means, promotes the APS Values and compliance with the Code of Conduct.

36 Commissioner's Directions on SES matters

The Commissioner must issue directions in writing about employment matters relating to SES employees, including engagement, promotion, redeployment, mobility and termination.

37 Incentive to retire

- (1) An Agency Head may give a notice in writing to an SES employee in the Agency, stating that the employee will become entitled to a payment of a specified amount if the employee retires within a period specified in the notice.
- (2) If the employee retires within the specified period, by notice in writing to the Agency Head:
 - (a) the employee is entitled to be paid the specified amount; and
 - (b) the employee is taken, for all purposes, to have been compulsorily retired from the APS.

38 Commissioner's certificate required for termination of SES employment

An Agency Head cannot terminate the employment of an SES employee unless the Commissioner has issued a certificate stating that:

- (a) all relevant requirements of Commissioner's Directions under section 36 have been satisfied in respect of the proposed termination; and
- (b) the Commissioner is of the opinion that the termination is in the public interest.

Section 39

Division 3—Heads of Mission

39 Heads of Mission

- (1) The appointment of a Head of Mission by the Governor-General cannot take effect unless the person is an APS employee or a person employed under the *Australian Trade Commission Act 1985*.
- (2) An Agency Head must comply with any direction in writing by the Agency Minister:
 - (a) directing the Agency Head to engage a particular person as an APS employee so that the person can become a Head of Mission; or
 - (b) directing the Agency Head to assign particular duties to an APS employee who has been appointed as a Head of Mission.

Part 5—The Public Service Commissioner

Division 1—Commissioner's functions etc.

40 Public Service Commissioner

- (1) There is to be a Public Service Commissioner.
- (2) The staff necessary to assist the Commissioner must be persons engaged under this Act.
- (3) For the purposes of this Act:
 - (a) the Commissioner and the APS employees assisting the Commissioner together constitute a Statutory Agency; and
 - (b) the Commissioner is the Head of that Statutory Agency.

41 Commissioner's functions

- (1) The Commissioner's functions include the following functions:
 - (a) to evaluate the extent to which Agencies incorporate and uphold the APS Values;
 - (b) to evaluate the adequacy of systems and procedures in Agencies for ensuring compliance with the Code of Conduct;
 - (c) to inquire into reports made to the Commissioner (or to a person authorised by the Commissioner) as mentioned in section 16;
 - (d) to consider and report to the Public Service Minister on any matter relating to the APS (including such a matter referred to the Commissioner by the Public Service Minister);
 - (e) to promote the APS Values and the Code of Conduct;
 - (f) to inquire into alleged breaches of the Code of Conduct by Agency Heads and to report to the appropriate authority on the results of such enquiries (including, where relevant, recommendations for sanctions);
 - (g) to develop, promote, review and evaluate APS employment policies and practices;
 - (h) to facilitate continuous improvement in people management throughout the APS;

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- (i) to co-ordinate and support APS-wide training and career development opportunities in the APS;
 - (j) to contribute to, and foster, leadership in the APS;
 - (k) to provide advice and assistance on public service matters to Agencies on request;
 - (l) any function prescribed by the regulations.
- (2) A report by the Commissioner under subsection (1) may include recommendations.
- (3) For the purposes of paragraph (1)(f), the *appropriate authority* for a report about an Agency Head is:
- (a) the Prime Minister, if the Agency Head is a Secretary; or
 - (b) the Agency Minister, if the Agency Head is the Head of an Executive Agency; or
 - (c) the Presiding Officers, if the Agency Head is the Head of a Statutory Agency that is prescribed by the regulations for the purposes of this paragraph; or
 - (d) the Agency Minister, if the Agency Head is the Head of a Statutory Agency that is not prescribed by the regulations for the purposes of paragraph (c).

42 Commissioner's Directions

- (1) Commissioner's Directions cannot create offences or impose penalties.
- (2) Agency Heads and APS employees must comply with Commissioner's Directions.
- (3) Commissioner's Directions may be made by applying, adopting or incorporating any matter in Classification Rules as in force from time to time, or at a particular time.
- (4) Commissioner's Directions are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

43 Commissioner's inquiry powers

- (1) Each of the following is a *special inquiry* for the purpose of this section:

- (a) an inquiry that is conducted by the Commissioner for the purpose of paragraph 41(1)(a), (b) or (g) and is notified by the Commissioner in the *Gazette*;
 - (b) an inquiry that is conducted by the Commissioner for the purpose of paragraph 41(1)(c) or (f);
 - (c) an inquiry on a matter referred to the Commissioner under paragraph 41(1)(d) by the Public Service Minister, by notice in the *Gazette*.
- (2) The following provisions apply in relation to a special inquiry (with references to the Auditor-General being replaced by references to the Commissioner):
- (a) sections 32, 33, 34 and 35 of the *Auditor-General Act 1997*;
 - (b) any other provisions of the *Auditor-General Act 1997*, or of regulations under that Act, that are relevant to the operation of section 32, 33, 34 or 35 of that Act.

44 Annual report

- (1) After the end of each financial year, the Commissioner must give a report to the Agency Minister, for presentation to the Parliament, on the activities of the Commissioner's Agency during the year.
- (2) The report must include a report on the state of the APS during the year.
- (3) An Agency Head must give the Commissioner whatever information the Commissioner requires for the purpose of preparing the report referred to in subsection (2).
- (4) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

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Division 2—Commissioner's appointment, conditions etc.

45 Appointment of Commissioner

The Commissioner is to be appointed by the Governor-General on a full-time basis for a period of up to 5 years specified in the instrument of appointment.

46 Remuneration etc.

- (1) The remuneration and other conditions of appointment of the Commissioner are as determined in writing by the Agency Minister.
- (2) For each determination, the Agency Minister must seek the advice of the Remuneration Tribunal and take that advice into account.
- (3) Each determination must be published in the *Gazette* within 14 days after the determination is made.

47 Removal from office

- (1) The Governor-General may remove the Commissioner from office if each House of the Parliament, in the same session of the Parliament, presents an address to the Governor-General praying for the removal of the Commissioner on the ground of misbehaviour or physical or mental incapacity.
- (2) The Governor-General must remove the Commissioner from office if the Commissioner does any of the following:
 - (a) becomes bankrupt;
 - (b) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
 - (c) compounds with his or her creditors;
 - (d) assigns his or her remuneration for the benefit of his or her creditors.

48 Acting Commissioner

- (1) The Agency Minister may appoint a person to act as Commissioner:
 - (a) if there is a vacancy in the office of Commissioner, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Commissioner is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

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Part 6—The Merit Protection Commissioner

Division 1—Merit Protection Commissioner's functions etc.

49 Merit Protection Commissioner

- (1) There is to be a Merit Protection Commissioner.
- (2) The staff necessary to assist the Merit Protection Commissioner must be persons engaged under this Act and made available by the Public Service Commissioner.

50 Merit Protection Commissioner's functions

- (1) The Merit Protection Commissioner's functions include the following functions:
 - (a) to inquire into reports made to the Merit Protection Commissioner (or to a person authorised by the Merit Protection Commissioner) as mentioned in section 16;
 - (b) to inquire into alleged breaches of the Code of Conduct by the Commissioner and report to the Presiding Officers on the results of such enquiries (including, where relevant, recommendations for sanctions);
 - (c) to inquire into an APS action, at the request of the Public Service Minister, and to report to the Public Service Minister on the results of the inquiry;
 - (d) such functions as are prescribed by regulations made for the purposes of section 33;
 - (e) such other functions as are prescribed by the regulations.
- (2) The following provisions apply in relation to an inquiry under paragraph (1)(c) (with references to the Auditor-General being replaced by references to the Merit Protection Commissioner):
 - (a) sections 32, 33, 34 and 35 of the *Auditor-General Act 1997*;
 - (b) any other provisions of the *Auditor-General Act 1997*, or of regulations under that Act, that are relevant to the operation of section 32, 33, 34 or 35 of that Act.

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(3) The regulations may authorise the Merit Protection Commissioner to charge fees (on behalf of the Commonwealth) for the performance of functions prescribed under paragraph (1)(e).

(4) In this section:

action includes a refusal or failure to act.

APS action means an action in relation to the employment of an APS employee, being an action by another APS employee or by an Agency Head.

51 Annual report

- (1) After the end of each financial year, the Merit Protection Commissioner must give a report to the Public Service Minister, for presentation to the Parliament, on the activities of the Merit Protection Commissioner during the year.
- (2) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.
- (3) The report must be included in the Public Service Commissioner's report under subsection 44(2).

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**Division 2—Merit Protection Commissioner's
appointment, conditions etc.**

52 Appointment of Merit Protection Commissioner

The Merit Protection Commissioner is to be appointed by the Governor-General on a full-time basis for a period of up to 5 years specified in the instrument of appointment.

53 Remuneration etc.

- (1) The remuneration and other conditions of appointment of the Merit Protection Commissioner are as determined in writing by the Agency Minister.
- (2) For each determination, the Agency Minister must seek the advice of the Remuneration Tribunal and take that advice into account.
- (3) Each determination must be published in the *Gazette* within 14 days after the determination is made.

54 Removal from office

- (1) The Governor-General may remove the Merit Protection Commissioner from office if each House of the Parliament, in the same session of the Parliament, presents an address to the Governor-General praying for the removal of the Merit Protection Commissioner on the ground of misbehaviour or physical or mental incapacity.
- (2) The Governor-General must remove the Merit Protection Commissioner from office if the Merit Protection Commissioner does any of the following:
 - (a) becomes bankrupt;
 - (b) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
 - (c) compounds with his or her creditors;
 - (d) assigns his or her remuneration for the benefit of his or her creditors.

55 Acting Merit Protection Commissioner

- (1) The Public Service Minister may appoint a person to act as Merit Protection Commissioner:
 - (a) if there is a vacancy in the office of Merit Protection Commissioner, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Merit Protection Commissioner is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Part 7—Secretaries of Departments

56 Creation of offices of Secretary

- (1) On the establishment of a Department, an office of Secretary of that Department is established by force of this subsection.
- (2) On the abolition of a Department, the office of Secretary of that Department is abolished by force of this subsection.
- (3) The Prime Minister may allocate a name to any office of Secretary, and may change the name from time to time.
- (4) Subject to subsection (3), the name of the office of Secretary of a Department is “Secretary of the [*name of Department*]”.

57 Responsibilities of Secretaries

- (1) The Secretary of a Department, under the Agency Minister, is responsible for managing the Department and must advise the Agency Minister in matters relating to the Department.
- (2) The Secretary of a Department must assist the Agency Minister to fulfil the Agency Minister’s accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department.

58 Appointment etc. of Secretary

- (1) The Prime Minister may appoint a person to be the Secretary of a Department for a period of up to 5 years specified in the instrument of appointment.
 - (2) Before making an appointment of the Secretary of the Prime Minister’s Department, the Prime Minister must have received a report about the vacancy from the Commissioner.
 - (3) Before making an appointment of any other Secretary, the Prime Minister must have received a report about the vacancy from the Secretary of the Prime Minister’s Department.
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- (4) The person preparing the report must consult the person who is expected to be the Agency Minister at the time when the appointment is made.
- (5) The same person may hold more than one office of Secretary but is to be paid remuneration in respect of only one such office.
- (6) An appointment under this section is not affected by any defect or irregularity in or in connection with the appointment.

59 Termination of appointment

- (1) The Prime Minister may, by notice in writing, terminate an appointment of Secretary at any time.

Note: In *Barratt v Howard* [1999] FCA 1132, the Federal Court of Australia described the basis on which requirements of procedural fairness applied to the termination of an appointment of Secretary under section 37 of the *Public Service Act 1922*.

- (2) Before terminating the appointment of the Secretary of the Prime Minister's Department, the Prime Minister must have received a report about the proposed termination from the Commissioner.
- (3) Before terminating any other appointment, the Prime Minister must have received a report about the proposed termination from the Secretary of the Prime Minister's Department.

60 Engagement of former Secretaries

At any time after the appointment of a Secretary is terminated under section 56 or 59, the Prime Minister, on behalf of the Commonwealth, may engage the former Secretary to perform specified duties (otherwise than as an APS employee), on terms and conditions determined by the Prime Minister.

61 Remuneration and other conditions

- (1) The remuneration and other conditions of appointment of a Secretary are as determined in writing by the Prime Minister.
- (2) For each determination, the Prime Minister must seek the advice of the Remuneration Tribunal and take that advice into account.

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- (3) Each determination must be published in the *Gazette* within 14 days after the determination is made.

62 Acting Secretary

- (1) The Prime Minister may appoint a person to act as the Secretary of a Department:
- (a) if there is a vacancy in the office of Secretary, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Secretary is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

63 Annual report

- (1) After the end of each financial year, the Secretary of a Department must give a report to the Agency Minister, for presentation to the Parliament, on the Department's activities during the year.
- (2) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

Part 8—Management Advisory Committee

64 Management Advisory Committee

- (1) There is to be an APS Management Advisory Committee, with the function of advising the Government on matters relating to the management of the APS.
- (2) The Committee consists of the following persons:
 - (a) the Secretary of the Prime Minister's Department, as Chair;
 - (b) all the other Secretaries;
 - (c) the Commissioner, as executive officer;
 - (d) such other persons as are nominated in writing by the Secretary of the Prime Minister's Department.

Part 9—Executive Agencies

65 Establishment etc. of Executive Agencies

- (1) The Governor-General may do any of the following, by order in the *Gazette*:
 - (a) establish or abolish an Executive Agency;
 - (b) allocate a name to an Executive Agency or the Head of an Executive Agency;
 - (c) identify the Minister who is responsible for an Executive Agency;
 - (d) specify the functions of an Executive Agency.
- (2) For the purposes of this Act, an Executive Agency consists of the Head of the Agency, together with the APS employees assisting the Head.
- (3) When an Executive Agency is established, an office of Head of the Agency is established by force of this subsection. The name of the office is “Head of the [*name of Agency*]”, unless the office of Head has a different name because of an order under subsection (1).
- (4) When an Executive Agency is abolished, the office of Head of the Agency is abolished by force of this subsection.

66 Responsibilities of Heads of Executive Agencies

- (1) The Head of an Executive Agency, under the Agency Minister, is responsible for managing the Agency.
- (2) The Head of an Executive Agency must assist the Agency Minister to fulfil the Agency Minister’s accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Agency.
- (3) The Head of an Executive Agency is accountable to the government, the Parliament and the public in the same way as the Secretary of a Department.

67 Appointment etc. of Head

- (1) The Agency Minister of an Executive Agency may appoint a person to be the Head of the Agency for a period of up to 5 years specified in the instrument of appointment.
- (2) Before making the appointment, the Agency Minister must have received a report about the vacancy from a relevant Secretary.
- (3) The Agency Minister may, by notice in writing, terminate the appointment at any time.
- (4) Before terminating the appointment, the Agency Minister must have received a report about the proposed termination from a relevant Secretary.
- (5) In this section:

relevant Secretary means the Secretary of any Department that is administered by the same Minister who is the Agency Minister of the Executive Agency.

68 Remuneration and other conditions

- (1) The remuneration and other conditions of appointment of the Head of an Executive Agency are as determined in writing by the Agency Minister.
- (2) For each determination, the Agency Minister must seek the advice of the Remuneration Tribunal and take that advice into account.
- (3) Each determination must be published in the *Gazette* within 14 days after the determination is made.

69 Acting Head

- (1) The Agency Minister of an Executive Agency may appoint a person to act as Head of the Agency:
 - (a) if there is a vacancy in the office of Head, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Head is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.

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- (2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

70 Annual report

- (1) After the end of each financial year, the Head of an Executive Agency must give a report to the Agency Minister, for presentation to the Parliament, on the Agency's activities during the year.
- (2) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

Part 10—Administrative arrangements and re-organisations

71 Arrangements with States and Territories

- (1) The Prime Minister may arrange with an appropriate authority of a State:
 - (a) for an APS employee to perform services for the State as an APS employee; or
 - (b) for a State employee to perform services in an Agency as a State employee.

- (2) In this section:

State means a State or Territory or an authority of a State or Territory.

72 Machinery of government changes

- (1) The Commissioner may do any of the following, if the Commissioner is satisfied that it is necessary or desirable in order to give effect to an administrative re-arrangement:
 - (a) move APS employees to another Agency (without anyone's consent), by a determination in writing;
 - (b) determine in writing that APS employees cease to be APS employees and become employees of a specified Commonwealth authority;
 - (c) determine in writing that non-APS employees cease to be employed as non-APS employees and become engaged as APS employees in a specified Agency;
 - (d) on behalf of the Commonwealth, engage any person as an APS employee in a specified Agency.
- (2) A determination by the Commissioner has effect according to its terms, by force of this section.
- (3) If an APS employee (the *transferred employee*) becomes an employee of a Commonwealth authority under paragraph (1)(b), the employee is entitled to remuneration and other conditions of

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employment that are not less favourable than the terms and conditions to which the employee was entitled as an APS employee, immediately before ceasing to be an APS employee, under:

- (a) an award, certified agreement or AWA; or
 - (b) a determination under this Act.
- (4) Subsection (3) ceases to have effect on the next occasion when there is a relevant variation in remuneration and conditions in the Commonwealth authority. For this purpose, *relevant variation* means a variation that:
- (a) results from the making or variation of an award, certified agreement or AWA; and
 - (b) applies to the transferred employee, or to a class of employees that includes the transferred employee.
- (5) The regulations may prescribe arrangements for determining any variation of the remuneration and other conditions of employment applicable to:
- (a) APS employees who are moved to another Agency under paragraph (1)(a); and
 - (b) persons who become APS employees under paragraph (1)(c).
- (6) In this section:

administrative re-arrangement means any increase, reduction or re-organisation in Commonwealth functions, including one that results from an order by the Governor-General.

Commonwealth authority includes a company in which the Commonwealth has a controlling interest.

non-APS employee means a person who is employed by the Commonwealth or by a Commonwealth authority, but does not include an APS employee.

Part 11—Miscellaneous

73 Payments in special circumstances

- (1) The Public Service Minister may authorise the making of payments to a person under subsection (2) if the Public Service Minister considers it appropriate to do so because of special circumstances that relate to, or arise out of:
 - (a) the payee's employment by the Commonwealth; or
 - (b) another person's employment by the Commonwealth.
- (2) The Public Service Minister may authorise the making of any of the following payments:
 - (a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);
 - (b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).
- (3) Payments may be authorised under this section even though the payments would not otherwise be authorised by law or required to meet a legal liability.
- (4) An authorisation cannot be made under this section if it would involve, or be likely to involve, a total amount of more than \$100,000.
- (5) Conditions may be attached to payments under this section. If a condition is breached, the payment may be recovered by the Commonwealth as a debt in a court of competent jurisdiction.
- (6) Payments under this section are to be made out of money appropriated by the Parliament for the purposes of this section.

74 Locally engaged employees

- (1) An Agency Head, on behalf of the Commonwealth, may engage persons overseas to perform duties overseas as employees.
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- (2) Subject to this Act, an Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of locally engaged employees in the Agency.
- (3) An Agency Head is not subject to direction by any Minister in relation to the exercise of powers by the Agency Head under this section in relation to particular individuals.
- (4) This section does not, by implication, limit any other power of an Agency Head to engage persons to work overseas.

75 Attachment of salaries to satisfy judgment debts

- (1) The regulations:
 - (a) may provide for deductions to be made from the salary of a Secretary, the Head of an Executive Agency or an APS employee in order to satisfy a judgment debt; and
 - (b) may prescribe fees payable in connection with such deductions.

- (2) In this section:

judgment debt includes interest on a judgment debt.

76 Release of personal information

The regulations:

- (a) may authorise the disclosure, in specific circumstances, of personal information (within the meaning of the *Privacy Act 1988*); and
- (b) may impose restrictions on the collection, storage, access, use or further disclosure of information disclosed under regulations made for the purposes of paragraph (a).

Note: The *Freedom of Information Act 1982* and the *Privacy Act 1988* have rules about the disclosure of personal information.

77 Positions

- (1) An Agency Head may, in writing, create positions in the Agency.

- (2) An Agency Head may from time to time nominate any APS employee in the Agency to occupy a position in the Agency, but does not have to do so for all APS employees in the Agency.
- (3) A provision of any Act that applies to APS employees who are nominated under this section to occupy a position applies in the same way to APS employees who are not nominated under this section to occupy a position.

78 Delegations

- (1) The Prime Minister may, in writing, delegate to another Minister any of the Prime Minister's powers or functions under this Act (other than this section).
- (2) The Public Service Minister may, in writing, delegate to:
 - (a) another Minister; or
 - (b) a Parliamentary Secretary;any of the Public Service Minister's powers or functions under this Act (other than this section or section 24).
- (3) The Public Service Minister may, in writing, delegate to a senior official any of the Public Service Minister's powers or functions under section 23 or 73.
- (4) An Agency Minister may, in writing, delegate to a senior official any of the Agency Minister's powers or functions under this Act (other than this section).
- (5) The Commissioner may, in writing, delegate to a senior official any of the Commissioner's powers or functions under this Act (other than this section).
- (6) The Merit Protection Commissioner may, in writing, delegate to an APS employee any of the Merit Protection Commissioner's powers or functions under this Act (other than this section).
- (7) An Agency Head may, in writing, delegate to another person any of the Agency Head's powers or functions under this Act (other than this section).
- (8) An Agency Head cannot, under subsection (7), delegate powers or functions to an outsider without the prior written consent of the

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Commissioner. For this purpose, *outsider* means a person other than:

- (a) an APS employee; or
 - (b) a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.
- (9) A person (the *first delegate*) to whom powers or functions are delegated under subsection (5), (6) or (7) may, in writing, delegate any of those powers or functions to another person (the *second delegate*). However, if the first delegate is subject to directions in relation to the exercise of a power or function delegated under this subsection, the first delegate must give corresponding directions to the second delegate.
- (10) A power or function that is exercised or performed by a person under a delegation under subsection (9) is taken, for the purposes of this Act, to have been exercised or performed by the person who originally delegated the corresponding power or function under subsection (5), (6) or (7).
- (11) A person exercising powers or functions under a delegation under this section must comply with any directions of the person who delegated the power or function.
- (12) In this section:

Parliamentary Secretary means a Parliamentary Secretary appointed under the *Parliamentary Secretaries Act 1980*.

senior official means:

- (a) a person who holds any office or appointment under an Act; or
- (b) an SES employee or acting SES employee.

79 Regulations

- (1) The Governor-General may make regulations prescribing matters:
- (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

- (2) Without limiting subsection (1), regulations may be made for, or in relation to, any of the following:
- (a) confidentiality of information obtained by persons performing, or assisting in the performance of, functions under section 33, paragraph 41(1)(c) or paragraph 50(1)(a) or (c);
 - (b) immunity from civil action in respect of acts or omissions of persons performing, or assisting in the performance of, functions under section 33, paragraph 41(1)(c) or paragraph 50(1)(a) or (c);
 - (c) prescribing penalties for offences against the regulations by way of fines of up to 10 penalty units.
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*[Minister's second reading speech made in—
House of Representatives on 30 March 1999
Senate on 14 October 1999]*

(64/99)