

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 141

Subject - *Public Service Act 1999*

Public Service Amendment Regulations 2011 (No. 1)

Subsection 79(1) of the *Public Service Act 1999* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Public Service Amendment Regulations 2011 (No. 1) (the Amendment Regulations) amend the *Public Service Regulations 1999* (the Principal Regulations) to make changes that are consequential on:

- amendments to the Act made by *Fair Work Act 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*; and
- amendments to the *Aboriginal and Torres Strait Islander Act 2005*.

The Amendment Regulations also update the definition of the term ‘Commissioner’s Directions’ in the Dictionary to the Principal Regulations.

The Amendment Regulations do not alter policy or diminish the rights or entitlements of employees.

The Amendment Regulations were prepared in consultation with the Department of Education, Employment and Workplace Relations and the Department of Families, Housing, Community Services and Indigenous Affairs.

Details of the proposed Regulations are included in the Attachment.

The Act does not specify any conditions that need to be satisfied before exercising the power to make regulations.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Amendment Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Authority: Subsection 79(1) of the *Public Service Act 1999*

Details of Public Service Amendment Regulations 2011 (No. 1)

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Public Service Amendment Regulations 2011 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of the *Public Service Regulations 1999*

This regulation provides that the *Public Service Regulations 1999* (the Principal Regulations) are amended as set out in Schedule 1.

Schedule 1 – Amendments.

Item 1 – Substitution of subregulation 3.11(2)

Regulation 3.11 of the Principal Regulations relates to the termination of employment of non-ongoing Australian Public Service (APS) employees and provides that where an employment arrangement sets out procedures that apply to such terminations, those procedures must be followed unless they are prohibited content within the meaning given by the *Workplace Relations Act 2006* (WR Act) or would be prohibited content if the employment arrangement were a workplace agreement

This item amends subregulation 3.11(2) to recognise that where an employment arrangement that is a fair work instrument sets out procedures that apply to termination of employment of non-ongoing APS employees, those procedures must be followed unless they are an unlawful term within the meaning of the FW Act. Definitions of ‘fair work instrument’ and ‘unlawful term’ are included in the Principal Regulations.

Subregulation 3.11(2) also continues to deal with the situation of employment arrangements made before the commencement of the FW Act that are now transitional instruments under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and which set out procedures that apply to termination of employment of non-ongoing APS employees. This item amends subregulation 3.11(2) to provide that procedures in transitional instruments that are not awards must be followed provided that they are not prohibited content. Definitions of ‘prohibited content’ and ‘transitional instrument’ are included in the Principal Regulations.

Item 2 – Note at the end of subregulation 3.11(3)

This Note at the end of this subregulation points out that the WR Act has rules and entitlements that apply to termination of employment. This item amends the Note to recognise that the *Fair Work Act 2009* (FW Act) now contains these rules and entitlements in relation to termination of employment.

Item 3 – Substitution of paragraphs 3.13(c) and (d)

Division 3.2 of the Principal Regulations relates to the re-engagement of election candidates. Regulation 3.13 relates to the right of return to APS employment of former employees who have resigned to contest an election. It lists the types of elections that are prescribed for this purpose.

This item substitutes existing paragraphs 3.13(c) and (d) of the Principal Regulations with a new paragraph 3.13(c) which:

- recognises that the *Aboriginal and Torres Strait Islander Commission Act 1989* has been renamed the *Aboriginal and Torres Strait Islander Act 2005*;
- removes the reference to Division 7 of Part 3 of the *Aboriginal and Torres Strait Islander Commission Act 1989* as this Division was repealed by item 85 of Schedule 1 to the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005*; and
- replaces the reference to ‘section 142 of the *Aboriginal and Torres Strait Islander Commission Act 1989*’ with a reference to ‘Division 5 of Part 3A of the *Aboriginal and Torres Strait Islander Act 2005*’ which is the Division of that Act that contains rules about the election of persons as members of the Torres Strait Regional Authority.

Item 4 – Subregulation 3.14 (3) - definition of *required time*

This item makes a consequential change to subparagraph (b)(i) of the definition of ‘required time’ in subregulation 3.14 (3) to reflect the proposed amendments to regulation 3.13 described in item 3 above.

Item 5 – Substitution of subregulation 3.15(7)

Division 3.2 of the Principal Regulations relates to the re-engagement of election candidates. Where a person is re-engaged in accordance with section 32 of the Act and this Division, the person’s continuity of service for the purposes of calculation of leave entitlements and redundancy pay is not broken by the period between the person’s resignation and being re-engaged as an APS employee, although the period does not count as service.

This item amends subregulation 3.15(7) to recognise the introduction of the National Employment Standards (NES) under the FW Act which came into effect on 1 January 2010 and which replaced the Australian Fair Pay and Conditions Standard. Instead of specifically referring to leave entitlements and redundancy pay, new subregulation 3.15(7) now refers to an employee’s entitlements generally under the NES and an employment arrangement applicable to the employee.

The effect of this amendment is to provide that where an employee resigns from the APS to contest an election, fails to be elected, and is again engaged as an APS employee in accordance with section 32 of the Act, the period between the person’s resignation and being engaged again does not break continuity for the purposes of any entitlements under the NES or under an employment arrangement applying to the employee. This will ensure the continuation of the current arrangements in relation to leave and redundancy pay and also means that continuity would not be broken for a range of other entitlements under the NES including notice of termination of employment, access to parental leave and requests for flexible work.

Items 6 and 7 – Notes at the end of paragraph 8.1(3)(c) and paragraph 8.2(2)(c)

These items amend the Notes at the end of these two paragraphs to reflect subsection 24(1A) of the *Public Service Act 1999*.

Items 8 to 18 – Amendments to the Dictionary to the Principal Regulations

Items 8 to 9 and 11 to 18 amend the Dictionary to the Principal Regulations to repeal obsolete references and amend or insert new definitions of various terms used in Principal Regulations by cross reference to the definitions of those terms in the FW Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Item 10 updates the definition of ‘Commissioner’s Directions’ in the Dictionary to reflect the latest amendments to the *Public Service Commissioner’s Directions 1999* which came into effect on 7 July 2010.