

EXPLANATORY STATEMENT

Select Legislative Instrument No. 276, 2013

Subject— *Public Service Act 1999*
Public Service Amendment (Public Interest Disclosure and Other Matters)
Regulation 2013

The *Public Service Act 1999* ('PS Act') provides for the establishment and management of the Australian Public Service ('APS') and other matters including the powers and functions of the Australian Public Service Commissioner ('Commissioner') and the Merit Protection Commissioner ('MPC'). Subsection 79(1) of the PS Act provides that the Governor-General may make regulations prescribing matters required or permitted by the PS Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the PS Act.

Paragraphs 41(2)(o) and 50(1)(a) of the PS Act provide an inquiry role for the Commissioner and the MPC respectively, associated with inquiring into whistleblower reports.

The *Public Interest Disclosure Act 2013* ('PID Act') establishes a framework to encourage and facilitate reporting of wrongdoing by public officials in the Commonwealth public sector. It makes provision for the making of 'public interest disclosures', for the investigation of such disclosures, and for the protection of disclosers. The *Public Interest Disclosure (Consequential Amendments) Act 2013* ('PID Consequential Act') repeals the APS whistleblowing scheme in section 16 of the PS Act, as well as the functions of the Commissioner and MPC of inquiring into whistleblower reports, and inserts new functions for the Commissioner and MPC to inquire, subject to regulations, into public interest disclosures as defined in the PID Act, to the extent that the disclosures relate to alleged breaches of the APS Code of Conduct.

This new function does not give the Commissioners the power to determine whether an APS employee has breached the Code; rather, it enables them to report to an agency head that it is appropriate to commence a Code of Conduct investigation in respect of a particular employee in accordance with agency procedures. The PID Act and the PID Consequential Act come into effect on 15 January 2014.

The *Public Service Amendment (Public Interest Disclosure and Other Matters) Regulation 2013* (the 'Amendment Regulation') makes a number of amendments to the *Public Service Regulations 1999* (the 'Principal Regulations') to support the new functions of the Commissioner and the MPC. The Amendment Regulation also makes two minor, unrelated amendments to the Principal Regulations.

The primary purpose of the Amendment Regulation is to provide details of how the new inquiry powers of the Commissioner and the MPC in paragraphs 41(2)(o) and 50(1)(a) of the PS Act operate alongside the inquiry powers set out in the PID Act. In the development of the PID Act and its passage through Parliament it was agreed that it would not limit the existing functions or jurisdiction of the Commissioner or the MPC. The Amendment Regulation repeals regulations in the Principal Regulations which support the PS Act whistleblowing framework, and insert analogous regulations setting out arrangements for the Commissioner and the MPC to consider allegations concerning breaches of the Code of Conduct consistent with their new functions and the PID Act.

The Principal Regulations provide for the actions an agency head may take following a recommendation by the MPC in relation to a review of action that relates to an APS

employee's employment (including reviews of findings of breaches of the APS Code of Conduct, and sanction decisions). The Amendment Regulation requires an agency head to follow their agency's written procedures (as stipulated under subsection 15(3) of the PS Act) if they make a breach determination or sanction decision that was different from their original decision or from the MPC recommendation following a review by the MPC.

The Amendment Regulation also amends regulation 9.2 of the Principal Regulations to replace reference to the Information Privacy Principles ('IPPs') with reference to the Australian Privacy Principles ('APPs'). This amendment is consequential to the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*, which introduces the APPs.

The Amendment Regulation also makes a number of other, minor consequential amendments to the Principal Regulations.

The PS Act does not specify any conditions that need to be satisfied before exercising the power to make regulations. The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Department of the Prime Minister and Cabinet ('PM&C') and the Office of the Commonwealth Ombudsman were consulted on the regulations relating to public interest disclosures. No further consultation was required given the earlier consultation undertaken on the PID Act and PID Consequential Act by PM&C. The Attorney-General's Department was consulted on the amendments to regulation 9.2. No further consultation was needed as these amendments are of a minor nature and do not substantially alter existing arrangements. Similarly, no consultation was required on the amendments to regulation 5.32, as these are intended to articulate more clearly the existing policy position.

No Regulation Impact Statement is required for the measures contained in the Amendment Regulation because there is no impact on business or the not for profit sector.

The Amendment Regulation commences according to the following timeframes:

- schedule 2 to the Regulation, which includes the amendments relating to public interest disclosures, commences at the same time as sections 3 to 83 of the PID Act commence (these sections make up the substance of the PID Act);
- schedule 3 to the Regulation (which amends regulation 9.2 of the Principal Regulations) commences on 12 March 2014, being the date that the amendments to the Privacy Act (including the repeal of the IPPs and the introduction of the APPs) come into effect; and
- the remainder of the Regulation commences on the day after the Regulation is registered.

Detail of the Amendment Regulation is in the [Attachment](#).

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

Public Service Amendment (Public Interest Disclosure and Other Matters) Regulation 2013

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for the *Public Service Amendment (Public Interest Disclosure and Other Matters) Regulation 2013* (the ‘Amendment Regulation’), in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Amendment Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Amendment Regulation

The Amendment Regulation amends the *Public Service Regulations 1999* (the ‘Principal Regulations’) to give effect to provisions of the *Public Interest Disclosure (Consequential Amendments) Act 2013* (‘PID Consequential Act’) and the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (‘Privacy Amendment Act’). Notably, the Amendment Regulation clarifies the functions of the Australian Public Service Commissioner (‘Commissioner’) and the Merit Protection Commissioner (‘MPC’) in dealing with public interest disclosures.

Section 13 of the *Public Service Act 1999* (‘PS Act’) sets out the APS Code of Conduct, which is binding on APS employees. Section 16 of the PS Act provides protection for APS employees who make ‘whistleblower reports’ and provides that details relating to inquiries into whistleblower reports are contained in the Principal Regulations. Paragraphs 41(2)(o) and 50(1)(a) of the PS Act provide an inquiry role for the Commissioner and the MPC respectively, associated with inquiring into whistleblower reports.

The PID Consequential Act repeals section 16 and paragraphs 41(2)(o) and 50(1)(a) of the PS Act and inserts new paragraphs 41(2)(o) and 50(1)(a), which give the Commissioner and MPC respectively the function of inquiring, subject to regulations, into public interest disclosures as defined in the PID Act, to the extent that the disclosures relate to alleged breaches of the APS Code of Conduct. The amendments in the Amendment Regulation set out the circumstances in which the Commissioners may decide to inquire into disclosures; make provision for the Commissioners to decline to inquire, or inquire further, into disclosures; and make provision for the process of inquiry.

The *Public Interest Disclosure Act 2013* (‘PID Act’) and the PID Consequential Act come into effect on 15 January 2014.

In addition, the Amendment Regulation amends regulation 5.32 of the Principal Regulations to provide certainty for APS employees that all findings of a breach of the APS Code of Conduct or the imposition of sanctions by an agency head must be made in accordance with the agency procedures established under subsection 15(3) of the PS Act for determining Code of Conduct breaches, and sanctions where appropriate. The amendment deals with circumstances in which the MPC has reviewed an agency’s decision in respect of a Code of Conduct determination or sanction decision, and, following the review, the agency head proposes to make a Code of Conduct finding or a sanction decision that was not the same as either the agency head’s original decision or the MPC’s recommendation. In those circumstances, the regulation as amended requires the agency head to follow their subsection 15(3) procedures in making the new determination.

Human rights implications

The Amendment Regulation engages the following human rights.

Right to freedom of expression

The right to freedom of opinion and expression is contained in article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) of the ICCPR protects an individual's freedom of expression in any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right protects not only the ability to impart information or ideas but also the ability to receive them. Freedom of expression may be limited under Article 19(3) only where provided for by law and when necessary to protect the rights or reputations of others, national security, public order or public health or morals.

The amendments in the Amendment Regulation relating to public interest disclosures support and facilitate the making of such disclosures by public officials, and support the aim of the PID Act that public officials who make disclosures are protected from adverse consequences. In providing a further avenue for public officials to make protected disclosures—i.e. to the Commissioner and MPC—the Amendment Regulation engages and promotes the right to freedom of expression.

Right to privacy and reputation

The right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. In order for an interference with a right not to be 'arbitrary', the interference must be for a reason consistent with the relevant Convention and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.¹

The amendments in the Amendment Regulation relating to public interest disclosures support the right to privacy and reputation and the intention of the PID Act to allow a person to make a disclosure in confidence and without fear of reputational damage if they do not wish their identity to be known, while permitting limited disclosure of identity in order to conduct an investigation. In such cases the limited disclosure of the person's identity is reasonable and necessary, as, without it, an investigation of the alleged wrongdoing could not be conducted effectively (or, in some cases, at all).

The Amendment Regulation provides that the Commissioner or MPC may decide not to inquire, or inquire further, into a disclosure if he or she concludes that conducting or continuing the inquiry would not be justified in all the circumstances. The Regulation provides examples of circumstances that could arise which may be considered relevant to an assessment of whether to decline to inquire, or to inquire further, into a disclosure. These include where it would not be practical to conduct, or continue, an inquiry because the discloser has not consented to the use or disclosure of identifying information about the discloser. While the Commissioner and MPC would be expected to take care to ensure that a discloser's identity was protected to the extent that was reasonably possible, this provision recognises that in some circumstances identifying information may need to be disclosed in order to undertake an inquiry. Similarly, the Amendment Regulation includes provisions that require the Commissioner and MPC to consider, having regard to all the circumstances, whether to give a person about whom a disclosure has been made an opportunity to be heard

¹ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

in relation to the disclosure, and notes that if the Commissioner or MPC does do so, they may give the person information identifying the discloser to the extent that they consider appropriate in the circumstances.

This limited disclosure is reasonable and necessary, goes only so far as is needed to achieve its purpose, and serves a legitimate purpose—namely, the investigation of misconduct by public officials consistent with the principle of procedural fairness.

The Amendment Regulation also makes a minor technical amendment to regulation 9.2 of the Principal Regulations, to come into effect on commencement of the Privacy Amendment Act on 12 March 2014. This amendment will make no substantive change to the regulation, and will simply ensure that the regulation is consistent with the *Privacy Act 1988* as amended by the Privacy Amendment Act in referring to Australian Privacy Principles rather than Information Privacy Principles.

Right to work and rights in work

The right to work and rights in work is contained in articles 6(1) and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6 provides for the right to work, including a right to the opportunity to gain a living by work which is freely chosen or accepted. Article 7 provides for the right of everyone to the enjoyment of just and favourable conditions of work.

1. Amendments relating to public interest disclosures

The amendments in the Amendment Regulation relating to public interest disclosures support these rights by providing a further avenue of disclosure to public officials seeking to make a disclosure that relates to a suspected breach of the APS Code of Conduct. The amendments allow public officials to make such disclosures to the Commissioner or MPC in circumstances where the Commissioner or MPC is satisfied that it would be inappropriate for the discloser to make their disclosure to an agency head, or where the discloser has already made the disclosure to an agency head and is not satisfied with the outcome. These provisions allow for disclosures relating to the Code of Conduct to be considered by an independent, expert authority in these matters, and provide an additional means of disclosure for public officials in circumstances where, for example, they do not wish or are not able to make an ‘external disclosure’ under the PID Act.

The Commissioner and MPC may make recommendations to an agency, or may take other action consistent with their powers and functions, as a consequence of an inquiry into a disclosure.

2. Amendments to regulation 5.32

The amendment to regulation 5.32 of the Principal Regulations promotes APS employees’ rights in work by clarifying the drafting of the provision to ensure that it meets its policy intention.

The policy principles underpinning the legislative framework for responding to suspected misconduct in the APS operate on the premise that an agency must follow publicly available standards that meet minimum procedural requirements, including the requirement to afford procedural fairness. The requirement for published mandatory procedures ensures transparency and provides certainty for employees in the event that they are investigated for something that has the potential to affect their employment rights and interests as significantly as an investigation of suspected misconduct.

Absent the amendments, the operation of regulation 5.32 of the Principal Regulations appears to provide an avenue for an agency head to make a determination of misconduct outside the

mandatory procedures by requiring the agency head to make a decision after receiving a recommendation from the MPC that could be different from the agency head's original decision or the MPC's recommendation. As amended, this regulation requires an agency head to follow their published mandatory procedures made under subsection 15(3) of the PS Act if they were minded to make a breach determination or sanction decision following MPC review that was different from their original decision or from the MPC recommendation.

For these reasons, the amendment to regulation 5.32 would promote APS employees' rights in work.

Conclusions

The Amendment Regulation is compatible with human rights. It promotes a number of human rights, and, to the extent that it may limit any human rights, those limitations are reasonable, necessary and proportionate.

Details of the *Public Service Amendment (Public Interest Disclosure and Other Matters) Regulation 2013* ('the Amendment Regulation')

Section 1—Name of Regulation

This section provides that the title of the Amendment Regulation is the *Public Service Amendment (Public Interest Disclosure and Other Matters) Regulation 2013*.

Section 2—Commencement

This section provides for the Amendment Regulation to commence in accordance with the commencement information set out in the table in section 2, as follows:

- item 1 in the table provides that sections 1 to 4 and anything in the Amendment Regulation not elsewhere covered by the table commence on the day after the Amendment Regulation is registered;
- item 2 in the table provides that Schedule 1 to the Amendment Regulation commences on the day after the Amendment Regulation is registered;
- item 3 in the table provides that Schedule 2 to the Amendment Regulation commences at the same time as sections 3 to 83 of the *Public Interest Disclosure Act 2013* commence;
- item 4 in the table provides that Schedule 3 to the Amendment Regulation commences on 12 March 2014, being the date that the amendments to the *Privacy Act 1988* come into effect.

Section 3—Authority

This section provides that the Amendment Regulation is made under the *Public Service Act 1999*.

Section 4—Schedule(s)

This section provides that each instrument that is specified in a Schedule to the Amendment Regulation is amended or repealed as set out in the applicable items in the relevant Schedule, and any other item in a Schedule to the Amendment Regulation has effect according to its terms.

Schedule 1—Amendments commencing on the day after registration

Item [1]—Insertion of subregulations 5.32(3A) and (3B)

Subsection 15(3) of the *Public Service Act 1999* ('PS Act') requires an agency head to establish written procedures for determining whether an APS employee (or a former APS employee, in certain circumstances) has breached the APS Code of Conduct ('Code'), and for determining any sanction that is imposed following a determination of a breach.

Subsection 33(1) of the PS Act provides an APS employee with an entitlement to review, in accordance with the regulations, of any APS action that relates to his or her employment.

Under the Principal Regulations an employee may make an application for review by the Merit Protection Commissioner ('MPC') on a range of matters, including a determination made in an agency in respect of a breach of the Code and/or a sanction. Such reviews are lodged under subregulation 5.24(2). On receipt of an application for review, the MPC may review the application and make written recommendations to the agency head.

Regulation 5.32 of the Principal Regulations requires an agency head, on receipt of a recommendation from the MPC, to consider the recommendation and to make a decision.

Subregulations 5.32(3A) and (3B) clarify how an agency head is to respond to a recommendation of the MPC that relates to a breach of the Code or a sanction.

Subregulation 5.32(3A) provides that if, after receiving a recommendation from the MPC with respect to a review conducted under paragraph 5.24(2)(a) of the Principal Regulations, the agency head was considering making a finding of a breach of the Code that was different from:

- the original finding made by the agency head, or
- a finding recommended by the MPC,

then the agency head must follow their procedures for determining suspected breaches of the Code before making that finding.

Subregulation 5.32(3B) provides that if, after receiving a recommendation from the MPC with respect to a review conducted under paragraph 5.24(2)(b) of the Principal Regulations, the agency head was considering imposing a sanction for a breach of the Code that is different from:

- the sanction(s) originally imposed by the agency head, or
- a sanction recommended by the MPC,

then the agency head must follow their agency procedures for determining sanctions for breaches of the Code before imposing that sanction.

The purpose of the amendment is to ensure that an agency follows its procedures made under subsection 15(3) of the PS Act when making determinations of breaches of the Code and/or imposing sanctions. This is to ensure transparency and certainty for APS employees (and former APS employees in certain circumstances) about the way such decisions will be made and the procedures that must be followed in making them.

Schedule 2—Amendments commencing at the same time as sections 3 to 83 of the *Public Interest Disclosure Act 2013* commence

Item [1]—Repeal of Division 2.2

This item repeals Division 2.2 of Part 2 of the Principal Regulations, which relates to whistleblower reports made under section 16 of the PS Act. These provisions will become inoperative after the commencement on 15 January 2014 of the *Public Interest Disclosure (Consequential Amendments) Act 2013* ('PID Consequential Act'), which repeals section 16 of the PS Act.

Item [2]—Part 6 (note to heading)

This item amends the note below the heading to Part 6 of the Principal Regulations, which refers to parts of the Principal Regulations in which functions of the Australian Public Service Commissioner ('Commissioner') not dealt with in Part 6 are set out. The amendment removes reference to regulations in the Principal Regulations that deal with whistleblower reports.

Item [3]—Insertion of regulation 6.1B

This item inserts a new regulation after regulation 6.1A of the Principal Regulations.

Regulation 6.1B provides for certain matters related to the Commissioner's new function to inquire into '*public interest disclosures*' that relate to alleged breaches of the Code of Conduct.

This inquiry function operates independently of the *Public Interest Disclosure Act 2013* ('PID Act'). Under the PID Act certain bodies are deemed '*investigative agencies*'. It is proposed that the Commissioner will be prescribed by the PID Rules to be an investigative agency. Under section 49 of the PID Act, an investigative agency that has a separate investigative power may decide to investigate a public interest disclosure under its separate investigative powers rather than under the PID Act. Accordingly, the Commissioner could inquire into certain public interest disclosures in accordance with the provisions of new paragraph 41(2)(o) of the PS Act and new regulation 6.1B, rather than in accordance with Part 3 of the PID Act, after deciding for the purposes of section 49 of the PID Act to investigate the disclosure under this separate investigative power.

The insertion of the new inquiry power for the Commissioner in paragraph 41(2)(o) by the PID Consequential Act seeks to ensure that the Commissioner will continue to have functions, after the repeal of section 16 of the PS Act, to inquire into public interest disclosures to the extent that these relate to alleged breaches of the Code. This is to ensure that the PID Act and PID Consequential Act do not curtail the existing jurisdiction of the Commissioner, and to provide an avenue for the consideration of disclosures relating to the Code by the Commissioner as an independent, expert authority on Code matters.

It is envisaged that if the Commissioner receives a disclosure that does not fall within the subregulations 6.1B(2) or 6.1B(3) he would allocate the disclosure to the appropriate agency in accordance with the PID Act.

Subregulation 6.1B(1) provides in respect of the general application of regulation 6.1B. It restates the Commissioner's inquiry power in paragraph 41(2)(o) and provides that the term '*the disclosure*' is adopted throughout the regulation.

Subregulation 6.1B(2) provides that the Commissioner may inquire into the disclosure if the Commissioner is satisfied that it would be inappropriate for the discloser to make the disclosure to an agency head.

Subregulation 6.1B(3) provides that the Commissioner may inquire into a disclosure if the discloser had made the disclosure to an agency head and was not satisfied with its outcome.

These two subregulations essentially replicate the circumstances in which the Commissioner would consider inquiring into a whistleblower report under the PS Act whistleblowing framework.

Subregulation 6.1B(4) provides that the Commissioner may decide not to inquire into a disclosure, or inquire further into a disclosure, if he or she concludes that conducting or continuing the inquiry would not be justified in all the circumstances.

The note under subregulation 6.1B(4) provides a number of circumstances that could arise which may be considered relevant to an assessment of whether to decline to inquire or to inquire further into a disclosure. The examples given are:

- where the disclosure had been, or was being, considered by the Merit Protection Commissioner;
- where the disclosure would be dealt with more appropriately by another means;
- where the disclosure was frivolous, vexatious, misconceived, or lacking in substance;
- where the discloser has provided insufficient detail;
- where the disclosure does not to any extent concern serious disclosable conduct;
- where it would not be practical to inquire, or inquire further, because the discloser has not consented to the use or disclosure of identifying information about the discloser.

Subregulation 6.1B(5) sets out the requirements for the Commissioner when he or she inquires into a disclosure.

Paragraph 6.1B(5)(a) provides that the Commissioner must consider, having regard to all the circumstances, whether to give a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure.

Paragraph 6.1B(5)(b) provides that the Commissioner must take reasonable steps to report the outcome of the inquiry to the discloser and to the relevant agency head. This requirement applies in addition to the requirement in subsection 49(3) of the PID Act, which requires an investigative agency, on completion of an investigation of a disclosure under its separate investigative powers, to inform the discloser and the principal officer of each agency to which the suspected disclosable conduct relates that the investigation is complete.

A note under paragraph 6.1B(5)(b) provides that the Commissioner is authorised (in accordance with section 72A of the PS Act) to make a record of, disclose, or otherwise use certain information for the purposes of, or in connection with, the performance of his or her functions, and that inquiring into disclosures is a function of the Commissioner. The note also provides that if the Commissioner gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the Commissioner may give the person information identifying the discloser to the extent the Commissioner considers appropriate in the circumstances. This acknowledges the fact that it is not always possible to afford the right to be heard to a person against whom allegations have been made without disclosing or otherwise making known the identity of the person who has made the disclosure. The note is also intended to provide assurance that the disclosure is ‘for the purposes of a law of the Commonwealth’, for subparagraph 20(3)(d)(i) of the PID Act.

Item [4]—Repeal of note under subregulation 7.1(3)

This item repeals the note under subregulation 7.1(3) of the Principal Regulations. The note relates to the MPC’s functions in relation to whistleblower reports and will be obsolete given the repeal of the APS whistleblower framework.

Item [5]—Insertion of regulation 7.1A

This item inserts a new regulation after regulation 7.1 of the Principal Regulations.

Regulation 7.1A provides for certain matters related to the MPC’s new function to inquire into ‘*public interest disclosures*’ that relate to alleged breaches of the Code of Conduct. The MPC’s function in paragraph 50(1)(a) of the PS Act is in identical terms to that of the Commissioner in paragraph 41(2)(o) and regulation 7.1A is in similar terms as regulation 6.1B.

The MPC’s inquiry function operates independently of the PID Act. It is proposed that the MPC will be prescribed by the PID Rules to be an ‘investigative agency’. Under section 49 of the PID Act, an investigative agency that has a separate investigative power may decide to investigate a public interest disclosure under its separate investigative powers rather than under the PID Act. Accordingly, the MPC may inquire into certain public interest disclosures in accordance with the provisions of new paragraph 50(1)(a) of the PS Act and new regulation 7.1A, rather than in accordance with Part 3 of the PID Act, after deciding for the purposes of section 49 of the PID Act to investigate the disclosure under this separate investigative power.

The insertion of the new inquiry power for the MPC in paragraph 50(1)(a) of the PS Act by the PID Consequential Act seeks to ensure that the MPC continues to have functions, after the repeal of section 16 of the PS Act, to inquire into public interest disclosures to the extent that these relate to alleged breaches of the Code. This is to ensure that the PID Act and PID Consequential Act do not curtail the existing jurisdiction of the MPC, and to provide an

avenue for the consideration of disclosures relating to the Code by the MPC as an independent, expert authority on Code matters.

Subregulation 7.1A(1) provides in respect of the general application of regulation 7.1A. It restates the MPC's inquiry power in the PS Act and provides that the term '*the disclosure*' is adopted throughout the regulation.

Subregulation 7.1A(2) provides that the MPC may inquire into the disclosure if the MPC is satisfied that it would be inappropriate for the discloser to make the disclosure to an agency head.

Subregulation 7.1A(3) provides that the MPC may inquire into a disclosure if the discloser has made the disclosure to an agency head and is not satisfied with its outcome.

These two subregulations essentially replicate the circumstances in which the MPC would consider inquiring into a whistleblower report under the PS Act whistleblowing framework.

Subregulation 7.1A(4) provides that the MPC may decide not to inquire into a disclosure, or inquire further into a disclosure, if he or she concludes that conducting or continuing the inquiry would not be justified in all the circumstances.

The note under subregulation 7.1A(4) is in similar terms to the note under subregulation 6.1B(4).

Subregulation 7.1A(5) sets out the requirements for the MPC when he or she inquires into a disclosure.

Paragraph 7.1A(5)(a) provides that the MPC must consider, having regard to all the circumstances, whether to give a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure.

Paragraph 7.1A(5)(b) provides that the MPC must take reasonable steps to report the outcome of the inquiry to the discloser and to the relevant agency head. This requirement applies in addition to the requirement in subsection 49(3) of the PID Act, which requires an investigative agency, on completion of an investigation of a disclosure under its separate investigative powers, to inform the discloser and the principal officer of each agency to which the suspected disclosable conduct relates that the investigation is complete.

A note under paragraph 7.1A(5)(b) provides that the MPC is authorised (in accordance with section 72B of the PS Act) to make a record of, disclose, or otherwise use certain information for the purposes of, or in connection with, the performance of his or her functions, and that inquiring into disclosures is a function of the MPC. The note also provides that if the MPC gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the MPC may give the person information identifying the discloser to the extent the MPC considers appropriate in the circumstances. This acknowledges the fact that it is not always possible to afford the right to be heard to a person against whom allegations have been made without disclosing or otherwise making known the identity of the person who has made the disclosure. The note is also intended to provide assurance that the disclosure is 'for the purposes of a law of the Commonwealth', for subparagraph 20(3)(d)(i) of the PID Act.

Item [6]—Dictionary (definitions of *discloser*, *public interest disclosure*)

This item inserts the definition of '*discloser*' as a new item in the Dictionary. The term is defined to have the same meaning as in the PID Act.

This item also inserts the definition of '*public interest disclosure*' as a new item in the Dictionary. The term is defined to have the same meaning as in the PID Act.

Item [7]—Dictionary (definition of *whistleblower*)

This item repeals the definition of ‘*whistleblower*’ in the Principal Regulations.

Item [8]—Dictionary (definition of *whistleblower report*)

This item repeals the definition of ‘*whistleblower report*’ in the Principal Regulations.

Schedule 3—Amendments commencing on 12 March 2014**Item [1]—Subregulations 9.2(7) and 9.2(8)**

This item repeals subregulations 9.2(7) and 9.2(8) and substitutes subregulation 9.2(7).

Subregulation 9.2(7) is consequential to the amendments to the *Privacy Act 1988*, which come into effect on 12 March 2014, and provides that use and disclosure of personal information under regulation 9.2 of the Principal Regulations is authorised for the purposes of Australian Privacy Principle 6.2(b) under the *Privacy Act 1988*.