

## EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs, Minister for Immigration and Border Protection

*Australian Federal Police Act 1979*

*Australian Federal Police Regulations 2018*

The *Australian Federal Police Act 1979* (the AFP Act) establishes the Australian Federal Police (AFP), and prescribes the constitution, functions and powers of the AFP.

Section 70 of the AFP Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for securing the discipline and good governance of the AFP, or for otherwise carrying out or giving effect to the Act and, in particular, making provision for and in relation to the matters outlined in section 70.

The AFP Act also provides other regulation-making powers, including the power to make regulations as to:

- the employer powers of the AFP Commissioner (subsection 23(2))
- the prescription of particular forms (subsections 36(1)-(4B))
- the characteristics of persons competent and qualified to be a commissioned police officer (subsection 40D(3))
- the suspension from duties of AFP employees (paragraphs 40J(1)(a) and (aa))
- the alcohol and drug testing of AFP appointees (section 40P), and
- the prescription of awards for bravery (subsection 61(2)).

The *Australian Federal Police Regulations 1979* (the AFP Regulations 1979) are due to sunset on 1 October 2018 and prescribe a number of matters related to the operation of the Act. These matters relate to the employment of persons by the AFP, the review of employment decisions, AFP property matters, and other miscellaneous matters.

The *Australian Federal Police Regulations 2018* (the Regulations) remake the AFP Regulations 1979 in their entirety, with amendments which would ensure that the Regulations remain relevant and fit for purpose, enabling the AFP to perform its legislated functions under the AFP Act.

The Regulations also:

- clarify and improve the process by which the AFP and its appointees pay judgement debts, deal with property under their control, handle employment matters, and carry out drug testing of AFP staff
- incorporate amendments made to the AFP Act by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*

- clarify the regulation-making power underpinning key sections of the proposed Regulations
- update references to legislation and industry standards, and
- include application and savings provisions to allow the AFP Regulations 1979 to continue to operate where appropriate.

Details of the Regulations are set out in the Attachment A.

A Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

The AFP Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations were informed by consultation with the AFP, which supported the proposed changes. The Australian Federal Police Association was also consulted on the Regulations, and the Department of Finance was consulted on references in the Regulations to the *Financial Management and Accountability Act 1997*.

The Regulations commence on the day after they are registered on the Federal Register of Legislation.

Authority: Section 70 of the *Australian Federal Police Act 1979*

**Details of the *Australian Federal Police Regulations 2018***

**Part 1 – Preliminary**

Section 1 – Name

This section provides that the title of this instrument is the *Australian Federal Police Regulations 2018* (the proposed Regulations).

Section 2 – Commencement

This section provides that the whole of the instrument is to commence the day after the instrument is registered.

Section 3 – Authority

This section provides that this instrument is made under the *Australian Federal Police Act 1979* (AFP Act).

Section 4 – Schedule 4

This section states that each instrument specified in Schedule 4 to this instrument is amended or repealed as set out in the applicable items to this Schedule. Schedule 4 repeals the *Australian Federal Police Regulations 1979* (AFP Regulations 1979).

Section 5 – Definitions

The note to this section provides a non-exhaustive list of expressions, defined in the AFP Act, and used for the purposes of the proposed Regulations. The purpose of the note is to facilitate understanding of the terms used throughout the Regulations.

The section also prescribes definitions for the following terms in the Regulations.

*Act*

The term ‘Act’ is defined as meaning the *Australian Federal Police Act 1979*.

*AFP*

The term ‘AFP’ is defined as meaning the Australian Federal Police.

*AFP records*

The term ‘AFP records’ is defined as meaning the records of the Australian Federal Police. This term is used in Schedule 3 to the Regulations.

### *Analyst*

The term ‘analyst’ is defined as meaning a person at an authorised laboratory who performs the quantification of a body sample taken by an authorised person in conducting a test.

### *Approved breath analysis instrument*

The term ‘approved breath analysis instrument’ is defined as meaning an instrument that is approved for the purposes of conducting a breath test. According to this definition, an instrument needs to be approved under the law of the State or Territory in which the breath test was conducted. Alternatively, if the breath test is conducted in an external Territory, the Jervis Bay Territory or a foreign country, an instrument needs to be approved under a law of a State or the Australian Capital Territory.

The note to this definition clarifies that a ‘State’ has the same meaning as the term in subsection 4(1) of the AFP Act, and includes the Northern Territory.

### *Authorised laboratory*

The term ‘authorised laboratory’ is defined as meaning a facility accredited by the National Association of Testing Authorities (Australia), or a facility covered by a determination in force under section 40 of the Regulations.

### *Authorised person*

The term ‘authorised person’ is defined as meaning a person authorised under section 31 of the Regulations (in relation to giving directions for alcohol screening tests, alcohol breath tests or prohibited drug tests under sections 40M and 40N of the AFP Act), or a person authorised under section 32 of the Regulations (in relation to conducting tests and operating equipment mentioned in paragraph 40P(1)(b) of the AFP Act).

### *Claimable property*

A definition of the term ‘claimable property’ is inserted for the purposes of Division 2 of Part 4 of the Regulations. Claimable property means property in the possession of an AFP employee, special member or protective officer that can be claimed by a person entitled to lawful possession of the property under Division 2 of Part 4 of the Regulations. Claimable property does not include property that is owned or held under any right of possession by the AFP, nor does it include property that the AFP Commissioner has directed be disposed of under sections 74 or 76 of the Regulations.

This definition clearly distinguishes between two categories of property. The first category (claimable property) is property that is lawful to possess and able to be returned to its owner. The second category is property that should not be returned as the AFP is entitled to lawful possession of it, the property should be disposed of due to practical issues surrounding storage, or the property poses a risk to health and safety or is offensive in nature.

### *Cost to AFP for use of AFP appointee's time*

A definition of the term 'cost to AFP for use of AFP appointee's time' is inserted for the purposes of Schedule 3 to the Regulations. The definition provides a formula for working out the cost to the AFP for the use of an AFP appointee's time in relation to various matters set out in Schedule 3 to the Regulations.

This term replaces the term 'cost to AFP for use of AFP employee's time' which is used in the AFP Regulations 1979. References to an 'AFP employee' are also be amended to 'AFP appointee'. The intent is to ensure the Regulations apply to a broad range of AFP personnel, including independent contractors and consultants as well as employees and special members. This is consistent with terminology in section 4 of the AFP Act.

### *Debtor*

The term 'debtor' is defined as meaning the Commissioner, a Deputy Commissioner or an AFP employee who owes a judgment debt. This term is used in Division 5 of Part 2 of the proposed Regulations.

### *Engage in conduct*

The term 'engage in conduct' is defined as having the same meaning as the term in the *Criminal Code Act 1995*.

### *Government agency*

The term 'government agency' is defined as meaning a Department of the Commonwealth or of a State or Territory, or a body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth or of a State or Territory.

### *Head of a government agency*

The term 'head' of a government agency is defined as meaning, in relation to a Commonwealth government agency that is a Department of the Commonwealth—the Secretary of the Department, or in relation to any other government agency—the person holding, or performing the duties of, the principal office in respect of the agency.

This definition provides flexibility to ensure that Secretaries of a Department or Chief Executive Officers, whichever the case may be, can exercise appropriate powers and perform their duties effectively in accordance with obligations set out in the AFP Act and the Regulations. In particular, under the Regulations, the AFP may disclose information to the head of a government agency, or the person performing the duties of the head of the agency, in limited circumstances, as detailed in this instrument.

### *Illicit materials*

A definition of the term ‘illicit materials’ is inserted for the purposes of Division 2 of Part 4 of the Regulations. Illicit materials are defined as having the same meaning as the term ‘illicit goods’ in the *Crimes Act 1914*.

### *Illicit-related materials*

A definition of the term ‘illicit-related materials’ is inserted for the purposes of Division 2 of Part 4 of the Regulations. Illicit-related materials mean any materials that were, or the AFP Commissioner is satisfied have been, used in the production, manufacture, transport or concealment of illicit materials.

If these materials are found (but not seized) by the AFP, the AFP Commissioner could direct that these materials be disposed of by appropriate means (other than by sale or gift) under section 74 of the Regulations. Where the AFP discovers illicit drugs, for example, this would allow the AFP to destroy these drugs along with the packaging it is held in. In some circumstances, illicit-related material that is found may become part of an investigation, and would be classified as evidence.

### *Integrity agency*

The definition of the term ‘integrity agency’ prescribes integrity agencies in each of the states.

This term replaces the Police Integrity Commission of New South Wales, which is referred to in the AFP Regulations 1979, with the Law Enforcement Conduct Commission (LECC) of New South Wales. This change reflects the repeal of the *Police Integrity Commission Act 1996* (NSW) and the establishment of the LECC by the *Law Enforcement Conduct Commission Act 2016* (NSW).

### *Judgment creditor*

The term ‘judgment creditor’ is defined as meaning a person who has received a judgment in their favour for a sum of money owed by the debtor. This term is used in Division 5 of Part 2 of the proposed Regulations.

### *Judgment debt*

The term ‘judgment creditor’ is defined as including interest on a judgment debt.

### *Liquid property*

The term ‘liquid property’ is defined as including money and negotiable instruments. This term excludes property with a collectable value — for example, a rare coin, a proof set of coins, a coin collection, a rare currency note or a collection of currency note, the face value of which is less than its market value.

### *Medical practitioner*

The term ‘medical practitioner’ is defined as having the same meaning as the term in the *Health Insurance Act 1973*.

### *Merit Protection Commissioner*

The term ‘Merit Protection Commissioner’ is defined as the Merit Protection Commissioner appointed under the *Public Service Act 1999*. This term is used in Division 2 of Part 3 of the Regulations, which covers review of employment decisions relating to retirement on the grounds of physical or mental incapacity.

### *Net salary*

A definition of the term ‘net salary’, of a debtor, is inserted for the purposes of subsection 24(5) of the Regulations, and its meaning is provided in that subsection.

### *Paying officer*

The term ‘paying officer’, for a debtor, is defined as meaning, if the debtor is the Commissioner—a person appointed under subparagraph 20(2)(d)(ii) of the proposed Regulations, or in any other case—a person appointed under subsection 20(1) of the Regulations. This term is used in Division 5 of Part 2 of the Regulations.

### *Prescribed property*

A definition of the term ‘prescribed property’, of a person, is inserted for the purposes of subsection 62(4) of the Regulations, and its meaning is provided in that subsection.

### *Registered nurse*

The term ‘registered nurse’ is defined as having the same meaning as the term in the *Health Insurance Act 1973*.

### *Remuneration*

The term ‘remuneration’, for an AFP appointee, is defined as meaning the sum of the base salary of the AFP appointee, and any penalties, composites, overtime and other allowances payable.

### *Returnable property*

A definition of the term ‘returnable property’ is inserted for the purposes of subsection 62(3) of the Regulations, and its meaning is provided in that subsection.

### *Superannuation scheme*

The term ‘superannuation scheme’ is defined as having the same meaning as the term in Part VA of the AFP Act.

### *Total gross salary*

A definition of the term ‘total gross salary’, of a debtor, is inserted for the purposes of subsection 24(6) of the proposed Regulations, and its meaning is provided in that subsection.

## **Part 2 – Employment**

### **Division 1 – AFP employment decisions**

#### **Section 6 – Values for AFP employment decisions**

The section outlines the values that govern AFP employment decisions and clarifies that the section is made for the purposes of paragraph 70(k) of the AFP Act. This section would ensure that AFP employment decisions are based on the following values:

- (a) impartiality and professionalism
- (b) merit
- (c) freedom from discrimination
- (d) openness and accountability
- (e) fairness
- (f) equity in employment, and
- (g) effectiveness.

These values ensure that AFP employment decisions are fair, reasonable, and maintain the professionalism and integrity of the service. These values are vital in ensuring the continued confidence of the Australian community and the Government in the AFP.

#### **Section 7 – Competence and qualifications of commissioned police officers**

The section outlines the considerations the AFP Commissioner must take into account in deciding whether a member of the AFP is competent and qualified to be a commissioned police officer. These considerations include that the member is at least 18 years of age, the member has the experience, qualifications and training necessary for the effective performance of an officer’s duties, and, having regard to other relevant factors, the member is suitable to be a commissioned police officer. The section also clarifies that it is made for the purposes of subsection 40D(3) of the AFP Act.

This section removes the requirement currently contained in section 4 of the AFP Regulations 1979 that a commissioned police officer must be an Australian citizen, unless the AFP Commissioner recommends that this requirement not apply to a member who is otherwise competent and qualified to be a commissioner police officer. A person’s status as an



Australian citizen has already been considered during their engagement as an AFP employee under the AFP Act.

In addition, the section clarifies that the experience, qualifications and training required for the effective performance of a commissioned police officer are not confined to those specified by the AFP Commissioner.

This section ensures the AFP Commissioner is empowered to consider all relevant factors, including a person's health, which should be taken into account in deciding whether a person is suitable to be a commissioned police officer. While the Commissioner may have regard to any relevant factors, none of these factors are, in and of themselves, determinative.

These changes grant the AFP Commissioner greater flexibility in determining whether a person is competent and qualified to be a commissioned police officer, allowing the Commissioner to take all relevant factors into account in making this decision. This section also provides a level of assurance to AFP members that the Commissioner will take a holistic view of their circumstances in determining a member's eligibility to perform the role of an officer.

#### Section 8 – Suspension from duties

The section outlines the process for suspending an AFP employee from their duties. The section also clarifies that it is made for the purposes of paragraph 40J(1)(a) of the AFP Act.

This section supports the AFP to maintain the integrity and professionalism of its workforce by allowing the AFP Commissioner to suspend an employee from duties in particular instances.

Under paragraph 8(a) of the Regulations, the AFP Commissioner may, in writing, suspend an AFP employee from their duties if the Commissioner reasonably believes that the employee has, or may have, engaged in conduct that contravenes the AFP professional standards, or has, or may have, engaged in corrupt conduct. Paragraph 8(b) also allows the AFP Commissioner to, in writing, issue a suspension from duties to allow the employee to contest an election to a non-parliamentary body.

Paragraph 8(c) of the Regulations provide that where an AFP employee is charged with an offence, the AFP Commissioner may, in writing, suspend this employee if they believe that, because of the nature of the offence, the employee should not continue to perform his or her duties until the charge has been determined. Subparagraph 8(c)(ii) clarifies that the Commissioner must have reasonable grounds for holding this belief, ensuring that an irrational or unsubstantiated belief cannot be used as a grounds for suspending an AFP employee from their duties.

This section ensures that the AFP Commissioner has the ability to respond to and manage risks to the integrity and professionalism of the AFP, including corrupt or criminal conduct

engaged in by an AFP employee. This section ensures the AFP maintains the confidence and trust of the Government, national and international partners, and the Australian community.

#### Section 9 – Suspension from duties – remuneration

The section sets out the remuneration arrangements for AFP employees that are suspended from duties under section 8 of the Regulations. The section also clarifies that it is made for the purposes of paragraph 40J(1)(a) of the AFP Act.

Subsection 9(2) of the Regulations enables the AFP Commissioner to issue a written direction that the suspension of an employee is without remuneration. If this direction is made, the AFP employee will not be paid remuneration while suspended (save for annual leave entitlements under subsection 40J(3) of the AFP Act).

Subsection 9(3) of the Regulations also provides that, where an AFP employee is suspended and entitled to be paid, the AFP employee is only entitled to their base salary while suspended. Payment of the base salary is appropriate as suspended employees are not performing any duties for the AFP and financial entitlements related to working hours and arrangements should not be payable.

#### Section 10 – Ending suspension from duties

The section provides the circumstances in which the AFP Commissioner must end an AFP employee's suspension from duties. The section clarifies that it is made for the purposes of paragraph 40J(1)(a) of the AFP Act.

Subsection 10(1) of the Regulations outlines the circumstances in which the AFP Commissioner must, in writing, end the suspension of an AFP employee. Paragraph 10(1)(a) requires the AFP Commissioner to end a suspension if all of the grounds on which the AFP employee was suspended are disposed of in accordance with subsections 10(2)-(5) of the Regulations. Paragraph 10(1)(b) gives the AFP Commissioner greater discretion to end an AFP employee's suspension from duties where the Commissioner is satisfied that it is otherwise appropriate to end the suspension in circumstances which are not provided for under subsections 10(2)-(5) of the Regulations.

Subsection 10(2) of the Regulations stipulates the point at which the grounds for suspending a person under paragraph 8(a) of the Regulations (in relation to conduct contravening AFP professional standards and corrupt conduct) are disposed of.

Under this subsection, these grounds are disposed of if the Commissioner no longer reasonably believes that the AFP employee has or may have engaged in that conduct. Alternatively, the grounds for suspension no longer apply if the AFP conduct issue has been dealt with under Part V of the AFP Act, and action (other than termination action) is to be taken in relation to the conduct issue, or the Commissioner has determined, under section 40TF of the AFP Act, that no further action is to be taken in relation to this issue.

Subsection 10(3) of the Regulations provides that, for an AFP employee suspended under paragraph 8(b) (in relation to contesting an election to a non-parliamentary body), the grounds for suspension are disposed of if the employee fails to be elected to the non-parliamentary body.

Subsection 10(4) of the Regulations provides that, for an AFP employee suspended under paragraph 8(c) (in relation to the commission of an offence), the grounds for suspension are disposed of if the charge is resolved without a finding of guilt being made against the employee. This ensures that a not guilty verdict is not required and a suspension can be ended where a charge is withdrawn, dismissed or otherwise resolved without a finding of guilt. These situations are provided for under subsection 10(5) of the Regulations. Subsection 10(5) also provides that, in relation to an appeal, a charge for an offence is resolved when the period for lodging an appeal ends, or when the appeal lapses or is finally determined.

#### Section 11 – Suspension from duties – directions relating to drug testing

The section outlines the types of directions relating to alcohol and drug testing that may be given to an AFP employee who has been suspended from duties.

Subsection 11(1) of the Regulations stipulates that an authorised person may give a written direction to an AFP employee, who is suspended from duties, to undergo an alcohol screening test, a breath test and/or a body sample for a prohibited drug test. Under subsection 11(2) of the Regulations, the AFP employee is required to comply with this direction.

This section ensures that suspended employees can be drug tested to verify that they are continuing to comply with AFP values and their obligations as AFP members.

This section removes the provision in the AFP Regulations 1979 that allowed an AFP employee to give a blood sample for the purpose of a blood test, in circumstances where a breath test (undertaken in accordance with this section) indicated the presence of alcohol. This provision is no longer necessary as AFP employees can already consent to providing blood.

#### Section 12 – Suspension of declarations under section 40B of the Act

The section states the Commissioner may suspend, in writing and for a specified period of time, a declaration identifying an AFP employee (other than a protective service officer) as a member of the AFP under subsection 40B of the AFP Act. The section would clarify that it is made for the purposes of subsection 23(2) and paragraph 40J(1)(a) of the AFP Act, and provides that the declaration will not be in force during the period the declaration is suspended.

In practice, this suspension prevents a person from exercising particular police powers for a specified period. Suspension could be for, amongst other things, periods of leave (such as maternity or parental leave), during secondment or when the member is performing duties that do not require the exercise of police powers.

## **Division 2 – Undertakings, oaths and affirmations relating to the performance of duties**

### **Section 13 – Prescribed forms – undertakings**

The section prescribes Form 1 of Schedule 1 to the Regulations for the purposes of paragraphs 36(2)(a), (3)(a), (4)(a), (4A)(a) and (4B)(a) of the AFP Act.

These undertakings are required to ensure that all members, special members, protective service officers, or special protective service officers of the AFP are sworn to perform their duties in accordance with and in compliance with the AFP Act and supporting regulations.

These undertakings are important to the discipline and good governance of the AFP and the execution of its functions under the AFP Act.

### **Section 14 – Prescribed forms – oaths and affirmations**

The section prescribes the oaths and affirmations that the Commissioner, Deputy Commissioners, members, special members, protective service officers and special protective service officers may make upon appointment to the AFP for the purposes of section 36 of the AFP Act.

Subsection 14(1) of the Regulations prescribes the oath in Form 2 of Schedule 1 and the affirmation in Form 3 of Schedule 1 to the Regulations for the purposes of subsection 36(1) and paragraphs 36(2)(b), 3(b) and 4(b) of the AFP Act. Subsection 14(2) of the Regulations prescribes the oath in Form 4 of Schedule 1 and the affirmation in Form 5 of Schedule 1 to the Regulations for the purposes of paragraphs 36(4A) and (4B)(b) of the AFP Act.

Subsection 14(3) stipulates that it is not necessary for a religious text to be used in the making and subscribing of an oath upon appointment to the AFP. This is necessary to ensure that the practice of giving oaths remains sensitive to the culturally and linguistically diverse backgrounds of individuals being appointed to the AFP.

The oaths and affirmations that are prescribed by this section are required to ensure that the Commissioner, Deputy Commissioners, members, special members, protective service officers, or special protective service officers of the AFP are sworn to perform their duties in accordance with the AFP Act and supporting regulations. These oaths and affirmations are necessary to maintain the discipline and good governance of the AFP and the execution of its statutory functions.

### **Division 3 – Election candidates**

#### **Section 15 – Resignations to contest elections**

The section allows an AFP employee to resign from the AFP to contest a Commonwealth, State or Territory election. The section clarifies that it is made for the purposes of paragraph 70(g) of the AFP Act.

Subsection 15(1) of the Regulations provides that an AFP employee may resign from the AFP for the purpose of becoming a candidate at an election of a member or members of the Parliament of the Commonwealth or a State, or the Legislative Assembly for the Australian Capital Territory or of the Northern Territory.

Subsection 15(2) of the Regulations stipulates that an AFP employee may not resign for this purpose before the writ for the election is issued, or after nominations for the election close.

Subsection 15(3) of the Regulations requires an AFP employee to give the AFP Commissioner written notice at least 2 weeks in advance of their resignation.

This section ensures that all AFP employees are able to freely participate in and contest a Commonwealth, State or Territory election. It also ensures that AFP employees do not have a conflict of interest in running for election, and that Commonwealth or AFP resources are not used in the conduct of an election on behalf of employees.

#### **Section 16 – Reinstatement of persons who resign to contest elections**

The section allows an AFP employee to be re-engaged for employment with the AFP following their unsuccessful candidacy for election. The section clarifies that it is made for the purposes of paragraph 70(h) of the AFP Act.

According to subsection 16(1) of the Regulations, this section only applies to an AFP employee who has resigned in accordance with section 15 of the Regulations, the employee fails to be nominated or elected at the election, and an application for re-engagement is made within two months of the declaration of the results of the election, or the finalisation of other matters stipulated in paragraph 16(1)(c).

The meaning of 'fails to be elected at the election' in paragraph 16(1)(b) of the Regulations is intended to reflect the formal outcome of an election as expressly provided for in the *Commonwealth Electoral Act 1918*. The meaning of a 'declaration of the result of the election' in paragraph 16(1)(c) of the Regulations is intended to have the same meaning as the act as occurs under sections 283 and 284 of the *Commonwealth Electoral Act 1918*, being the day upon which the Australian Electoral Officer declares the result of the election and the names of the candidates elected.

Subsection 16(2) of the Regulations stipulates that, following an unsuccessful candidacy for election, a person covered by this section must be engaged on the same terms and conditions (for example, pay and level) as would apply if the person had not resigned. Subsection 16(4)

of the Regulations provides that, if any of the declarations specified in subsection 16(3) were in force immediately before the person resigned, these declarations are taken to continue to be in force from the day when the person is again engaged until they would otherwise cease to be in force. Subsection 16(4) of the Regulations does not apply if any of the specified declarations would have ceased to be in force before the person was re-engaged as an AFP employee.

Subsection 16(5) of the Regulations ensures that, in these circumstances, the period between resignation and re-engagement as an AFP employee would be recognised as service for all purposes.

This section ensures that AFP employees are not discouraged from applying for public office by preserving their workplace terms and conditions as they existed immediately before resigning.

#### **Division 4 – Financial statements**

##### **Section 17 – Storage, handling, confidentiality and use of financial statements**

The section provides the requirements for storage, handling, confidentiality and use of financial statements provided by AFP employees and special members under section 40L of the AFP Act. This section clarifies that it is made for the purposes of paragraph 70(j) of the AFP Act.

Financial statements may be requested by the AFP Commissioner under section 40L of the AFP Act for probity and disciplinary reasons. Section 17 of the Regulations ensures that financial statements remain confidential and are appropriately stored. This section also stipulates that financial statements are to be handled only by the AFP Commissioner or a person authorised by the Commissioner to undertake this function, and are only disclosed or used for the purpose for which the information was collected.

The AFP is subject to the Australian Privacy Principles (APPs) at Schedule 1 to the *Privacy Act 1988*. The APPs govern the way the AFP collects, uses, discloses and stores personal information. Further, all AFP records are handled and stored in accordance with the requirements of the *Archives Act 1983*, the AFP Records Authority issued by the National Archives, and the Australian Government Protective Security Policy Framework.

#### **Division 5 – Deductions from salaries to satisfy judgement debts**

##### **Section 18 – Purposes and application of this Division**

This section outlines the purposes and application of Division 5 of Part 2 of the proposed Regulations. Subsection 18(1) of the Regulations clarifies that Division 5 is made for the purposes of paragraph 70(f) of the AFP Act.

Subsection 18(2) of the Regulations provides that Division 5 does not apply to a debtor who has not yet obtained a certificate of discharge and whose estate has been sequestrated, either

voluntarily or compulsorily, for the benefit of creditors. This provision ensures that deductions are not made for judgment debts for which payment is already being managed through a bankruptcy process.

The *Public Governance and Performance Accountability Act 2013* (PGPA Act) places an obligation on the AFP Commissioner to manage the affairs of the AFP in a way that promotes the proper use of Commonwealth resources. The proper use and management of public resources means behaving, taking action and making decisions in a way that is consistent with the policies of the Australian Government.

This Division enables the Commissioner to fulfil his or her obligations under the PGPA Act by providing a clear and detailed process for making deductions from an AFP employee's salary in satisfaction of a judgment debt. This Division also protects the interests of both the judgment creditor and the judgment debtor, and provide certainty for both parties.

#### Section 19 – Application of State or Territory laws

The section provides that State and Territory laws that deal with satisfying a judgment debt will only apply to a debtor's judgment debt for the purpose of the calculation of interest on the debt and will not apply to the judgement debt for any other purpose.

This provision ensures that an AFP debtor whose judgement debt is being recovered is not subject to a parallel process initiated under a State or Territory law. It also takes account of the differing legal provisions for the calculation of interest on a debt in the States and Territories. The term 'judgment debt' is defined in section 5 of the Regulations to include interest on a judgement debt.

#### Section 20 – Paying officers

The section allows the AFP Commissioner, where appropriate and in writing, to appoint a paying officer for the purpose of making deductions from an AFP debtor's salary in satisfaction of a judgment debt. The section also clarifies the process for appointing a paying officer in circumstances where the Commissioner is the debtor.

Subsection 20(1) of the Regulations provides that, if the AFP Commissioner is satisfied on reasonable grounds that deductions from a debtor's salary is required to satisfy a judgment debt, the Commissioner must appoint, in writing one or more persons as paying officers for the purposes of making the deductions.

Subsection 20(2) of the Regulations identifies an alternative process if the AFP Commissioner owes a judgement debt to ensure that no conflict of interest arises. In such circumstances, the Commissioner must delegate his or her power to appoint a paying officer to a senior executive AFP employee, and must do so without prior consideration as to whether a salary deduction is required. The delegated senior executive must decide whether deductions from the Commissioner's salary are required and, where they are, appoint a paying officer for the purpose of making the deductions.

Subsection 20(3) of the Regulations provides that an appointed paying officer may only act as a paying officer in relation to the debtor to whom they were appointed for, and that he or she is responsible for making deductions from the debtor's salary to satisfy the judgement debt. This subsection appropriately limits the power of a paying officer to the debtor in question, and does not permit them to deduct money from other salaries.

Subsection 20(4) of the Regulations provides that a debtor must not be a paying officer for him or herself. The subsection is designed to avoid a conflict of interest in the exercise of a paying officer's responsibilities.

The appointment of paying officers provides certainty as to where responsibility rests for making salary deductions in satisfaction of a judgment debt. The provisions also clarify who exercises the administrative power of deciding whether deductions from a debtor's salary are required to satisfy a judgment debt.

This section also prevents the AFP Commissioner from taking any other action in relation to the administration of his or her judgment debt, other than delegating the power to appoint a paying officer and assisting the paying officer in satisfying the judgment debt.

#### Section 21 – Authority to make deductions

This section sets out the responsibilities and obligations of the paying officer in relation to commencing and continuing to make deductions from an AFP debtor's salary in satisfaction of a judgment debt.

Subsection 21(1) of the Regulations sets out the conditions that must be satisfied before a paying officer may commence making deductions from a debtor's salary. Specifically, it provides that deductions may only commence if:

- the paying officer has received a statutory declaration, made by a judgment creditor for the debtor, that the judgment debt exists and has not been discharged
- the paying officer has received a court certified copy of the judgment to which the debt relates
- the paying officer has given the debtor a notice in accordance with subsection 21(2) of the proposed Regulations, and
- the debtor has not satisfied the paying officer that the debt has been discharged.

One statutory declaration is sufficient to activate the paying officer's obligations in relation to a debt. Where there are multiple applications for judgment debts, this would be dealt with using the process under section 22 of the proposed Regulations.

Once the paying officer is satisfied that these requirements are met, subsection 21(2) of the Regulations requires the paying officer to notify the debtor in writing, as soon as practicable, that it is proposed to make deductions from the debtor's salary.



The paying officer must also require the debtor to provide written information within the time specified in the notice about whether the judgment debt has been satisfied. The paying officer must require that, if the debt has been satisfied, the debtor is to provide evidence to the paying officer in support of that fact by the time specified in the notice. If the debt has not been satisfied, the debtor must state in writing the amount due at the time the statement is made by the time specified in the notice. This subsection ensures that a debtor from whose salary it is proposed to make deductions is given notice of that intention and the opportunity to provide evidence that the debt has been satisfied.

Subsection 21(3) of the Regulations requires the paying officer to begin making deductions from the debtor's salary on each pay day if the debtor has not provided evidence that the judgment debt has been satisfied. It also provides that deductions made from the debtor's salary are to be of an amount determined under section 24 of the Regulations or a lesser amount that, in the paying officer's opinion, is needed to satisfy the balance of the judgment debt. This subsection ensures that, if the amount required to satisfy a debt is less than the rate of deductions provided for under section 24, the paying officer can reduce the amount to avoid an overpayment being made to the creditor.

Subsection 21(4) of the Regulations provides that, after the first deduction, the paying officer may only continue to make deductions if he or she has no reason to believe that the debt has been discharged. This subsection helps avoid an overpayment being made to the creditor and unnecessary deductions being made from the debtor's salary.

Subsection 21(5) of the Regulations requires the paying officer to ensure that the amount of each deduction is paid to the judgment creditor. This subsection ensures that the deductions made from a debtor's salary are made in satisfaction of the debt. This subsection protects the debtor from a claim by the creditor that the debtor has not paid the debt owed, despite deductions having been made from the debtor's salary.

The section also removes the requirement in the AFP Regulations 1979 that a judgment creditor pay an administration fee and that deductions may be started if a paying officer has received an administration fee.

### Section 22 – More than one judgment debt

The section sets out the process that a paying officer must follow when dealing with more than one judgment debt against a specific debtor.

Subsection 22(1) of the Regulations provides that a paying officer must deal with the judgment debt in the order the requests for payment were received. According to subsection 22(2) of the Regulations, in the instance two or more requests for payment are received at the same time, a paying officer must deal with the judgment debt in accordance with the earliest dates and times each judgment was issued.

This provision ensures that there is a clear order of priority for a paying officer to follow in circumstances where there are multiple judgment debts in relation to a single debtor, and these situations are dealt with in a transparent and consistent way.

### Section 23 – Effect of deductions

The section ensures that the making of deductions from the salary of an AFP debtor does not create any claimable rights against the AFP, the creditor or the debtor.

This section provides that, if a further amount is paid to a judgment creditor for a debtor after a debt deduction has already been taken from their salary, this amount is taken to have been paid by the debtor for the purposes of satisfying the judgment debt. This section provides protection to a debtor by preventing the creditor from claiming that he or she has not paid the debt owed.

### Section 24 – Rate of deductions

The section prescribes the rate at which deductions can be made from an AFP debtor's salary to satisfy a judgment debt. This section prescribes a default rate, while also allowing flexibility for payments to be made at higher rate if requested by the debtor, or at a lower rate if the default rate would contribute to, or exacerbate, serious financial hardship for the debtor.

Subsection 24(1) of the Regulations provides that the default rate at which salary deductions are to be made by the paying officer is 20 per cent of the debtor's net salary. The term 'net salary' is defined at subsection 24(5) of the Regulations. Payments are to be made at this rate unless subsection 24(2), (3) or (4) of the Regulations applies.

Subsection 24(2) of the Regulations allows the rate of deduction to be less than 20 per cent of the debtor's salary if the paying officer is satisfied on reasonable grounds that the debtor is suffering, or would suffer, serious financial hardship if the rate of deduction is not reduced. This flexibility in the application of the deduction rate is an important safeguard to ensure that debtors who struggle to make repayments can have their rate of deduction reduced.

Subsection 24(3) of the Regulations allows for the deduction rate to be greater than 20 per cent if the debtor makes a request, in writing, to increase the rate. This allows the debtor to request that deductions be made at a greater rate, which is useful if he or she wishes to satisfy the judgment debt sooner.

Where the rate of deductions is greater than 20 per cent, subsection 24(4) of the Regulations allows a debtor to make a written request that the rate of reduction be reduced. The paying officer must reduce the rate of deductions as soon as possible, but is not required to reduce the rate to less than 20 per cent on the basis of such a request. However, as identified above, there is flexibility under subsection 24(2) of the Regulations for the paying officer to reduce the rate below 20 per cent where reasonable and appropriate.

Subsection 24(5) of the Regulations defines the term ‘net salary’ as meaning the total gross salary of the debtor, less any income tax payable, child support payments (if applicable), and contributions to a superannuation scheme relating to the debtor’s engagement with the AFP that is required by law or by the rules of the fund.

Subsection 24(6) of the Regulations defines the term ‘total gross salary’ according to whether the debtor is the AFP Commissioner or an AFP appointee. If the debtor is the Commissioner, his or her total gross salary is the sum of the debtor’s gross salary and any allowances. If the debtor is an AFP appointee, his or her total gross salary is the debtor’s remuneration as an AFP appointee. Total gross salary does not include any payment under Commonwealth, State or Australian Capital Territory law that is about workers’ compensation, and is not reduced on the basis of salary sacrifice arrangements or other arrangements for a similar purpose.

### Section 25 – Administration of deductions

The section ensures the proper administration of salary deductions made to satisfy a judgment debt.

Subsection 25(1) of the Regulations allows the paying officer to request confirmation from the judgment creditor that the debt has not been discharged. The paying officer may suspend salary deductions until confirmation is received. This subsection enables the paying officer to check the status of a debt at any time, including at the request of the debtor. This assists to ensure that payments are made only until the debt is satisfied and are not continued where there is uncertainty about whether the debt has already been discharged.

Subsection 25(2) of the Regulations requires the paying officer to advise a judgment creditor in the event the debtor’s employment with the AFP ceases, or is terminated. This subsection ensures that the judgment creditor is kept informed about the status of the debtor’s employment with the AFP. If the judgment creditor is no longer receiving payments from the debtor’s salary, he or she may wish to pursue alternative means of recovering the debt.

### Section 26 – Recovery of overpayments

The section provides for the repayment of excess monies received by the judgment creditor in the event of an overpayment. It seeks to protect the debtor’s interests by requiring a judgment creditor to repay any amount received against a judgment debt that exceeds the debt amount due.

## **Division 6 – Conduct of AFP appointees**

### **Section 27 – Intentionally prejudicing police services or protective service functions**

The section provides that an AFP appointee must not fail to give prompt attention to his or her duties or be absent from duty without authority with the intention of prejudicing police services or protective service functions. This section reflects the values and professional standards that AFP appointees must adhere to in performing their duties.

### **Section 28 – Unauthorised disclosures**

The section precludes an AFP appointee from disclosing or taking any action that brings, or is intended to bring, information relating to internal conduct inquiries to the attention of the subject of the inquiry, or any other person.

This section prohibits unauthorised disclosures of certain types of information, including matters relating to professional standards and AFP conduct and practices issues, corruption issues, and Ministerially directed inquiries into conduct engaged in by an AFP appointee or any other matter relating to the AFP (such as the practices and procedures of the agency).

This provision ensures that internal conduct inquiries are not frustrated by the subject of the investigation.

### **Section 29 – Information – unauthorised use or access**

The section prohibits unauthorised use of, or access to, information acquired by reason of being an AFP appointee.

Subsection 29(1) of the Regulations precludes an AFP appointee from using or communicating information that came to their knowledge or possession by reason of being an AFP appointee, or obtaining access to information by reason of being an AFP appointee, unless this is done in the performance of his or her duties.

Subsection 29(2) of the Regulations clarifies that an AFP appointee is taken to have obtained access to information for the purposes of subsection 29(1) of the Regulations even if the information is not in the possession, or under the control, of the AFP. Under this provision, an AFP appointee is taken to have obtained access to information in circumstances where the information consists of a computer program (or part of a computer program), or is otherwise stored in, or entered or copied into, a computer.

The AFP is subject to the Australian Privacy Principles at Schedule 1 to the *Privacy Act 1988*. The AFP collects and holds a range of information, which is often highly sensitive and confidential, in connection with its functions, including:

- licensing records
- administrative records

- records that assist in the enforcement of the criminal law, preservation of peace, the prevention, detection and investigation of criminal incidents, the protection of life, safety and property
- investigation records
- intelligence records
- court records
- criminal records
- professional standards records
- traffic records
- illicit drug testing records
- records relating to forensic procedures
- personnel records, and
- coronial investigation records.

All records are handled and stored in accordance with the requirements of the *Archives Act 1983*, the AFP Records Authority issued by the National Archives and the Australian Government Protective Security Policy Framework. The AFP only uses and discloses personal information for:

- the purposes for which it was collected
- purposes permitted by legislation
- for purposes which are directly related to the AFP's functions as contained in the AFP Act and the Ministerial Direction, and
- in accordance with the provisions contained in section 60A of the AFP Act and this instrument.

The AFP does not provide personal information to other Australian or foreign law enforcement, intelligence, security or government agencies, organisations or individuals unless the disclosure is authorised by the AFP Act and the Privacy Act, or is otherwise required or authorised by law.

This section gives effect to the AFP obligations relating to the access and disclosure of information provided for under Australian law, and ensures AFP appointees are prevented from disclosing information they are aware of due to their status as an AFP appointee, or obtaining access to information due to this status, unless authorised by law. This provision is

critical to ensuring the integrity of the AFP organisation including operations, intelligence collection, investigations and the privacy of persons whose information is held.

### Section 30 – Bankrupt AFP appointees

The section imposes an obligation on an AFP appointee who has become bankrupt to advise the AFP Commissioner as soon as practical in writing, and give the Commissioner any information about the AFP appointee's bankruptcy as required by the Commissioner.

It is essential that the AFP maintain the confidence of the Australian Government and the community, both in terms of the integrity of individual employees and the ability of the organisation to prevent and counter internal corruption and misconduct.

If an AFP appointee becomes bankrupt, this may impede their ability to perform their duties, and this provision ensures that the AFP Commissioner is aware of this and can take any necessary steps to support the appointee and reduce any underlying risks.

### **Division 7 – Drug and alcohol testing**

All references to 'AFP employee or special member' in Division 7 of Part 2 of the Regulations are replaced with references to 'AFP appointee'.

These amendments give effect to Part 1 of Schedule 8 to the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2016* and provide consistency of terms across the Regulations. Part 1 of Schedule 8 to the Act provides for alcohol and drug testing for the entire AFP workforce by substituting references to 'AFP employee or special member' with 'AFP appointees' in sections 40LA, 40M, 40N, 40P and 40Q of the AFP Act.

Under section 40P of the AFP Act, and for the purposes of sections 40LA, 40M and 40N, the Regulations may make provisions in relation to a number of drug and alcohol testing purposes, including the provision of samples, the conduct of testing and the procedures followed. The regulation making power at section 40P of the AFP Act enables regulations to be made to cover AFP appointees, a term which encompasses a broad range of AFP employment arrangements, including contractors.

### **Subdivision A – General provisions**

#### Section 31 – Persons authorised to give directions in relation to drug and alcohol testing

The section allows the AFP Commissioner to authorise a person to give a direction to an AFP appointee on duty, or who may be suspended from duty, to undergo a drug or alcohol test.

Subsection 31(1) of the Regulations clarifies that it is made for the purposes of paragraph 40P(1)(a) of the AFP Act.

Subsection 31(2) of the Regulations enables the AFP Commissioner to, in writing, authorise a person to give a direction to an AFP appointee to undergo a drug or alcohol test while on

duty, or as soon as practicable after certain critical incidents where a person has been killed or seriously injured (regardless of whether or not the AFP appointee is still on duty). This subsection also allows the Commissioner to authorise a person to give a direction (under section 11 of the Regulations) to an AFP employee, who is suspended from duties, to undergo an alcohol or drug test.

Subsection 31(3) of the Regulations specifies that the AFP Commissioner may authorise a person by reference to their name, or the holder of a particular position by reference to their title.

Subsection 31(4) requires the AFP Commissioner to give a certificate to a person authorised under this section. The certificate is evidence that the person is an authorised person to issue directions in relation to drug and alcohol testing.

Subsection 31(5) of the Regulations includes protections for the person who is the subject of the direction, requiring an authorised person to provide a certificate to an AFP appointee to prove that they have the authority to issue such a direction.

The authority to make such a direction is required as it would ensure that appropriate persons can require AFP appointees or AFP employees to take a drug or alcohol test while on duty, following their involvement in certain critical incidents where a person has been killed or seriously injured, or while suspended from duties.

The delegation of this authority to an authorised person ensures that drug and alcohol testing can be carried out quickly where the need arises. If this direction power was not delegated to an authorised person, the AFP Commissioner would not have the capacity to carry out the number of tests required to ensure that the AFP's drug and alcohol compliance regime remains effective.

#### Section 32 – Persons authorised to conduct tests and to operate equipment for that purpose

The section specifies the persons authorised to conduct breath, blood or prohibited drug tests, and to operate the equipment required to do so.

Item 1 of the table in this section provides that the following individuals may conduct a breath test in accordance with section 37 of the Regulations:

- an AFP appointee who has completed a training course, in conducting breath tests, approved by the AFP Commissioner under section 38 of the Regulations
- a member of a police force or police service of a State or Territory who is authorised to conduct a breath test using a breath analysis instrument, and
- a person who has completed a training course, in collecting body samples other than urine, approved by the Commissioner under section 42 of the Regulations.

Item 2 provides that a medical practitioner, a registered nurse and any other person who is qualified to take blood samples may conduct a blood test in accordance with section 43 of the Regulations.

Item 3 provides that a medical practitioner, a registered nurse, an appropriately trained employee of a facility approved under section 43, and a person who has completed a training course in collecting body samples other than urine under section 41 may take a body sample for the purposes of a prohibited drug test in accordance with section 42 of the Regulations.

Item 4 provides that the following persons are ‘authorised persons’ who may conduct a prohibited drug test in accordance with section 47 of the Regulations:

- a medical practitioner
- a registered nurse
- a person who has completed a training course in supervising the provision of urine samples approved under section 48
- an appropriately trained employee of a facility approved under section 41 to collect body samples other than urine, and
- a person who has completed a training course, in collecting samples other than urine, under section 42.

The section permits only suitably qualified individuals to conduct drug and alcohol testing. This ensures that testing is conducted pursuant to best practice and increase certainty in the results produced.

### Section 33 – Conduct of tests – general

The section outlines requirements that an authorised person must comply with in conducting drug or alcohol tests under sections 40M and 40N of the AFP Act, or under a direction given under section 11 of the Regulations.

Subsection 33(1) of the Regulations clarifies that it is made for the purposes of paragraphs 40J(1)(aa) and 40P(1)(e) of the AFP Act.

Subsection 33(2) of the Regulations requires an authorised person to conduct a drug or alcohol test in a respectful manner and in circumstances affording reasonable privacy to the AFP appointee directed to undergo the test.

Subsection 33(3) of the Regulations stipulates that a drug or alcohol test is not to be conducted in the presence or view of a person whose presence is not necessary for the purposes of the test, and must not involve the removal of more clothing or more visual inspection than is necessary to conduct the test.



Subsection 33(4) of the Regulations states that, where practical, a drug or alcohol test must be conducted by a person of the same sex as the AFP appointee subject to the test.

Subsection 33(5) of the Regulations requires an authorised person collecting a hair sample to use the least painful technique known and available. This subsection also stipulates that a sample may be collected from specified areas of the body and only the amount of hair necessary for the conduct of the test.

This section ensures that the conduct of drug or alcohol tests remains reasonable and proportionate to the legitimate aim of ensuring that AFP appointees maintain the highest levels of integrity and professionalism.

### Section 34 – Security and destruction of body samples

This section provides for the procedures that must be followed for the security and destruction of body samples.

Subsection 34(1) of the Regulations clarifies that it is made for the purposes of paragraph 40P(1)(h) of the AFP Act and only applies to the handling of body samples provided by an AFP appointee in connection with blood tests and prohibited drug tests under sections 40M or 40N of the AFP Act and a body sample provided by an AFP employee under section 11 of the Regulations.

Subsection 34(2) of the Regulations ensures that a body sample provided is kept in a secure location until such time as it is destroyed in accordance with subsections 34(3)-(6) of the Regulations. This ensures the security of body samples and provide protections for an AFP appointee's privacy.

Subsection 34(3) of the Regulations provides that a body sample must be destroyed:

- if the body sample indicates the presence of alcohol or prohibited drugs – before the end of three years after the test was conducted, or
- in any other case – as soon as practicable, but no later than six months after the test was conducted.

The three year time period afforded to the AFP to retain a body sample indicating a positive result allows the evidence of a positive test to be retained until an investigation is complete. This timeframe supports ongoing investigations that may rely on the retention of positive body samples. Explicitly requiring the AFP to destroy body samples indicating a negative result within six months ensures all other body samples are destroyed within a reasonable period of time.

Subsection 34(4) of the Regulations provides further protection for long-term investigations by allowing the AFP Commissioner to determine if a sample needs to be retained for longer than the three year period for particular purposes – for example, determining whether an AFP appointee has committed an offence or failed to comply with AFP professional standards, or

assessing ongoing suitability for employment, appointment, engagement or determination as an AFP appointee.

This allows any evidence to be retained where it supports an ongoing investigation or legal proceeding for both the AFP (in investigating and taking action in relation to tests) and its appointees (should an appointee challenge a decision made under the AFP Act). It also ensures that the AFP upholds community standards and expectations, particularly around finalising cases and ensuring the integrity and professionalism of the AFP.

Subsection 34(5) of the Regulations provides that, if the AFP Commissioner determines the body sample should be retained for a longer period, the sample must be destroyed at the end of the longer period. This ensures that the AFP does not have to retain body samples indefinitely, and is consistent with the AFP's obligations under the *Privacy Act 1988*.

Subsection 34(6) of the Regulations provides that unanalysed samples may be destroyed within six months. Unanalysed samples are kept as a safeguard so that appointees can take the sample to be analysed by another laboratory if they do not agree with the result of an analysed sample. If an AFP appointee does not collect the unanalysed sample within six months after being informed of the results of the analysis, subsection 34(6) enables the AFP to destroy the sample. This gives AFP appointees and AFP employees a reasonable amount of time to collect the sample, while ensuring that AFP does not have to store unanalysed samples indefinitely.

#### Section 35 – Security and destruction of test results etc. relating to body samples

The proposed section governs the security and destruction of records relevant to a drug or alcohol test conducted on a body sample. This section enables the AFP to retain records of positive test results indefinitely, to support ongoing investigations and inquiries.

Subsection 35(1) of the Regulations clarifies that it is made for the purposes of paragraph 40P(1)(j) of the AFP Act, and only applies to a record that is relevant to a test conducted on a body sample under sections 40LA, 40M or 40N of the AFP Act, or section 11 of the Regulations.

Subsection 35(2) of the Regulations provides that the record created from the tests referred to in subsection 35(1) of the Regulations must be kept in a secure location until such time as it is destroyed in accordance with the regulation. This ensures the security of records and appropriate protections for the privacy of AFP appointees. The AFP will also continue to comply with the *Privacy Act 1988* in the way it handles and secures this information.

Subsection 35(3) of the Regulations states that the AFP must destroy a negative test record as soon as reasonably practicable after the person who provided the body samples ceases, for any reason, to be an AFP appointee.

Subsection 35(4) of the Regulations ensures that a relevant de-identified record of particular information can be securely kept where it is used for compiling a statistical database. This database assists the AFP to monitor and improve its integrity and security measures.

### Section 36 – Disclosure of information

The section provides that a person who is bound by secrecy obligations under section 60A of the AFP Act or the AFP Commissioner may only disclose test results relating to an AFP appointee in particular circumstances.

Subsection 36(1) of the Regulations would clarify that it is made for the purposes of paragraph 40P(1)(j) of the AFP Act in relation to results revealed by a test on an AFP appointee conducted for the purposes of section 40LA, 40M or 40N of the AFP Act.

Subsection 36(2) of the Regulations provides that a person to whom section 60A of the Act applies may only disclose test results relating to an AFP appointee in particular circumstances, including (but not limited to) situations where the results are already publicly known, for the investigation of an offence, or for the AFP appointee's medical treatment. Subsection 36(2) also clarifies that an AFP appointee may disclose their own test results.

Subsection 36(3) of the Regulations provides that the AFP Commissioner may disclose test results of a current or former AFP appointee to certain persons as mentioned in subsection 36(4) of the Regulations if, having regard to the functions of the agency or police force concerned, it is appropriate to do so for particular purposes. These purposes include (but are not limited to) assessing the suitability of a person who is, or was, an AFP appointee for employment, or conducting a security or character clearance.

The note at subsection 36(3) of the Regulations outlines additional privacy protections, stating that it may be an offence to make a record of any prescribed information or to divulge or communicate any prescribed information to another person other than for the purposes of the AFP Act or the Regulations.

Subsection 36(4) of the Regulations identifies persons to whom the Commissioner may disclose test results under subsection 36(3) of the Regulations, including the head of a Commonwealth, State or Territory government agency, or the head of a State or Territory police force or integrity agency.

This ability for the AFP to disclose test results to other government, police or integrity agencies is vital to ensuring that an individual's history of alcohol consumption or prohibited drug taking (and potential associated relationship with organised crime) may be considered by any agency that considers employing that individual. This is critical to mitigate integrity and security risks, particularly given the breadth of government agencies that are involved in combating organised crime. It also helps to promote broader Commonwealth resilience to the 'insider threat' associated with prohibited drug use within government agencies.

## **Subdivision B – Breath tests**

### **Section 37 – Procedures to be followed in conducting breath tests**

The section outlines the procedures to be followed when conducting a breath test.

Subsection 37(1) of the Regulations would clarify that it is made for the purposes of paragraphs 40P(1)(e) and (i) of the AFP Act in relation to the conduct of a breath test under section 40M or 40N of the AFP Act.

Subsection 37(2) of the Regulations specifies that an approved breath analysis instrument must be used to conduct a breath test.

Subsections 37(3) of the Regulations allows a person subject to a breath test to request a blood test in addition to the breath test.

This is supported by subsection 37(4) of the Regulations, which would place an obligation on an authorised person conducting the breath test to take all reasonable steps to contact a person authorised to conduct a blood test. This ensures that the subject of a breath test can seek a blood test as soon as possible to challenge the results of a breath test.

Subsection 37(5) of the Regulations stipulates that an authorised person must give a certificate to a person subject to a breath test which evidences the result of the test and sets out a range of other matters, including (but not limited to) the type and serial number of the approved breath analysis instrument, the sample number of the test, and the date and time that the test was conducted.

### **Section 38 – Approval by Commissioner of training courses**

The section allows the AFP Commissioner to, in writing, approve a training course in conducting breath tests. The section clarifies that it is made for the purposes of paragraphs 40P(1)(b) and (e) of the AFP Act.

This section enables AFP testing procedures to remain current if a new course is developed or collection technology advances, without requiring further amendments to the proposed Regulations.

This section also ensures that persons who undertake conduct breath tests on AFP appointees are appropriately trained, qualified and accredited.

## **Subdivision C – Blood tests and prohibited drug tests of body samples other than urine**

### Section 39 – Purposes of this Subdivision

This section provides that Subdivision C of Division 7 of Part 2 of the proposed Regulations applies to blood tests and prohibited drug tests of body samples other than urine. The section clarifies that Subdivision C is made for the purposes of paragraphs 40P(1)(b), (e), (g) and (h) of the AFP Act.

### Section 40 – Commissioner may determine that a facility is an authorised facility

The section outlines the process for the AFP Commissioner to determine that a facility is an authorised laboratory.

Subsection 40(1) of the Regulations allows the AFP Commissioner to determine, in writing, that a suitable facility is an authorised laboratory. The Commissioner's power is limited to facilities that are not accredited by the National Association of Testing Authorities (NATA) Australia – those facilities are already covered by the definition of 'authorised laboratory' in subsection 5(1) of the Regulations. This subsection provides the AFP with the flexibility to operate offshore and in locations where suitable NATA accredited testing laboratories are not available.

Subsection 40(2) of the Regulations states that the AFP Commissioner must provide the facility with a certificate as evidence of its status as an authorised laboratory, and that an employee of the facility must, if requested to do so, show the certificate to an AFP appointee who is directed to undergo a test to collect body samples other than urine.

Subsection 40(3) of the Regulations states that an analyst at an authorised laboratory is accredited to conduct analyses in connection with blood tests and prohibited drug tests of body samples other than urine.

This section allows the AFP to conduct drug testing on AFP appointees deployed overseas and ensures that the Regulations remain current as technology, accreditation standards and the AFP's prohibited drug and alcohol testing programs evolve over time.

### Section 41 – Approval of facility to collect body samples

The section outlines the process for the AFP Commissioner to approve a facility to collect body samples other than urine. Subsection 41(1) of the Regulations allows the Commissioner to determine, in writing, that a facility, other than a facility already accredited by NATA, is suitable to collect body samples other than urine.

Subsection 41(2) of the Regulations provides that the AFP Commissioner must provide the facility with a certificate stating it is approved to collect samples, and that an AFP appointee may request to see the certificate if they are directed to undertake a test at the facility.

This section allows a facility approved by the AFP Commissioner to collect the samples required for testing, even if that facility does not have NATA accreditation, and is intended to support section 40 of the Regulations.

#### Section 42 – Approval of courses – collecting body samples

The section authorises the AFP Commissioner to approve a training course in collecting body samples other than urine.

This enables AFP testing procedures to remain current if a new course is developed or collection technology advances, without requiring further amendment to the proposed Regulations. This section also ensures that only trained, qualified and accredited persons may conduct a breath test on AFP appointees.

#### Section 43 – Taking of body samples

The section sets out the procedural requirements for an authorised person collecting a body sample other than urine, including the process for apportioning, labelling and sealing the sample in containers and sending the sample to an authorised laboratory.

In particular, this section prescribes for two equal quantities of a sample to be collected to ensure the AFP appointee who provided the sample is provided the opportunity to have the unanalysed sample analysed by another laboratory, if they do not agree with the result of the analysed sample.

The section is intended to prescribe the procedure and minimum safeguards for the collection of body samples other than urine to ensure the integrity, consistency and reliability of samples taken, particularly as there are no other applicable standards. This ensures the discipline and good governance of the AFP through its prohibited drug and alcohol testing regime and the conduct of authorised persons in implementing that regime.

#### Section 44 – Analysis

The section outlines the process for analysing a body sample other than urine.

Subsection 44(1) of the Regulations requires an analyst to first conduct an analysis of a portion of the body sample to test for the concentration of alcohol or presence of prohibited drugs.

Under subsections 44(2) and 44(3) of the Regulations, an analyst must then analyse a second portion of the sample (from the same container) if the first test is positive.

This provides a safeguard to ensure that any potential false positive results are identified, by making it mandatory to conduct a second test to verify the findings of the first.

## Section 45 – Certificates

The section outlines the requirement for an analyst to give an authorised person a certificate evidencing the results of an analysis of a body sample other than urine provided by an AFP appointee for a blood test or prohibited drug test. This section also imposes a requirement on an authorised person to notify, in writing, an AFP appointee of the results of their test and other relevant information.

Subsection 45(1) of the Regulations states that, after conducting an analysis of a body sample other than urine provided for the purposes of a blood test or prohibited drug test, the analyst must give a certificate to the authorised person who directed the AFP appointee to undergo the test.

Subsection 45(2) of the Regulations provides that the certificate must include particular information, such as (but not limited to) the identification number for the sample, the date of the sample, and the date and results of the analysis.

Following receipt of this certificate, subsection 45(3) of the Regulations obliges an authorised person to give the AFP appointee subject to the test a written notice informing them of the results of the test and that:

- the appointee may collect the unanalysed sample, and the result of the analysis from the analysed sample, from the authorised laboratory within 56 days of the notice being given
- the appointee may have the unanalysed sample independently tested by another authorised laboratory in accordance with section 46 of the proposed regulations, and
- the unanalysed sample may be destroyed if it is not collected within 6 months of the notice being given.

The requirement to issue a written notice provides AFP appointees with procedural fairness while ensuring that samples do not need to be held indefinitely.

## Section 46 – Disputed results

The section provides a process for retesting a body sample other than urine in circumstances where an AFP appointee disputes the results of an analysis. Subsection 46(1) of the Regulations provides that, if the results of an analysis of a body sample other than urine are disputed by the AFP appointee who provided the sample, the unanalysed sample must be made available for independent testing and all records of the original test must be made available for re-examination.

Subsection 46(2) of the Regulations provides that, because of the possible degradation of the body sample over time, retesting need only detect the presence of alcohol or a prohibited drug. This effectively ensures that a positive, but lower, result in a subsequent test cannot be used to call into dispute the original test result.

This process provides an AFP appointee with procedural fairness, ensuring that they are afforded the right to dispute the results of a particular test.

### **Subdivision D – Prohibited drug tests using urine samples**

#### **Section 47 – Procedures to be followed**

The section outlines the procedures to be followed in relation to providing and analysing a urine sample for the purposes of a prohibited drug test.

Subsection 47(1) of the Regulations clarifies that it is made for the purposes of subparagraph 40P(1)(h)(ii) of the AFP Act, and applies to the conduct of a prohibited drug test, using a urine sample, under section 40M or 40N of the AFP Act.

Subsection 47(2) of the Regulations ensures that a urine sample provided for the purposes of a prohibited drug test, is provided, and analysed, in accordance with the Australian/New Zealand Standard AS/NZS 4308 – 2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*, as existing from time to time.

By referring to this Standard, the section ensures that the AFP's testing procedures reflect best practice and remain current to new developments or advances in technology without requiring further amendment to the Regulations. This Standard will be made available to all AFP appointees that are subject to the conduct of these tests.

#### **Section 48 – Approval by Commissioner of training courses**

The section authorises the AFP Commissioner to approve a training course in supervising the provision of urine samples.

This section enables AFP testing procedures to remain current if a new course is developed or collection technology advances, without requiring further amendment to the Regulations.

### **Division 8 – Miscellaneous**

#### **Section 49 – Certificates**

The section provides that a certificate issued under subsection 31(4), 37(5) or section 45 of the Regulations is prima facie evidence of the matters stated in the certificate. This section clarifies that it is made for the purposes of paragraphs 40(1)(b), (e) and (i) of the AFP Act.

These matters stated in the certificate may include:

- that a person is an authorised person for the purposes of drug and alcohol testing (subsection 31(4) of the Regulations)



- technical details about a breath test, including (but not limited to) the name of the test subject, the result of the breath test as shown by the instrument, and the time and result of the breath test (subsection 37(5) of the Regulations), and
- technical details about an analysis of a body sample other than urine provided for a blood test or prohibited drug test, including (but not limited to) the date the sample was taken, the results of the analysis, and the name of the analyst who conducted the analysis (section 45 of the Regulations).

This section is justified on the basis that, pursuant to Part 5.3 of the Guide to Framing Commonwealth Offences (the Guide), these are technical or formal matters that are not likely to be in dispute and would be difficult to prove under normal evidential rules.

As outlined above, there are also safeguards which ensure that an AFP appointee can effectively dispute the results of a test. If a breath test is found to be positive, the AFP appointee may request that a blood test be taken and, if this blood test is also positive, the AFP appointee could seek to have an untested blood sample analysed to verify the results or challenge the results of this test under section 46 of the Regulations. The results of an analysis of any other body sample can be challenged in the same manner.

The Guide (at page 55) notes that these kinds of procedural safeguards have generally been included with provisions for evidentiary certificates directed to a technical/scientific context, and this is the case here.

It is also pertinent to note that, in compliance with the Guide, the section only states that the evidentiary certificate is prima facie evidence of the matters stated within, not conclusive evidence of these matters. This is a change from the AFP Regulations 1979, which only stated that the certificates were ‘evidence’ of the matters contained within.

#### Section 50 – Awards for bravery, other conspicuous conduct and diligent service

The section refers to the prescribed awards and criteria at clause 1 of Schedule 2 to the proposed Regulations. While subsections 61(1) and 61(1A) of the AFP Act enables the AFP Commissioner to confer an award for bravery or other conspicuous conduct, this section, along with clause 1 of Schedule 2, clarifies what award may be granted in particular circumstances.

#### Section 51 – Voluntary retirement

The section sets out the process for an AFP employee to give notice of voluntary retirement.

Subsection 51(1) of the Regulations provides that a notice under subsection 31(1) of the AFP Act of the retirement of an AFP employee who has reached the minimum retiring age must specify a day on which the retirement is to take effect.

Subsection 51(2) of the Regulations states that the day specified in the notice must not be earlier than 14 days after the day on which the notice is given (unless the AFP Commissioner

approves a shorter period), or be later than 4 months after the day on which the notice is given.

This section ensures that an AFP employee who retires leaves sufficient time to allow their colleagues to reassign their duties.

### **Part 3 – Review of employment decisions**

#### **Division 1 – Purpose of this Part**

##### Section 52 – Purposes of this Part

The section specifies that Part 3 of the proposed Regulations is made for the purposes of paragraph 70(1) of the AFP Act.

#### **Division 2 – Retirement due to physical or mental incapacity**

##### Section 53 – Application for review

The section sets out the process for applying to review a decision by the AFP Commissioner to retire an AFP employee due to physical or mental incapacity.

Subsection 53(1) of the Regulations provides that an AFP employee who has been retired because of physical or mental incapacity by the AFP Commissioner under subsection 32(1) of the AFP Act may apply, in writing, to the Merit Protection Commissioner for a review of the decision.

Under subsection 53(2) of the Regulations, an application must be made through the AFP Commissioner within 28 days after the employee is notified of the decision and must state briefly why the review is sought.

Subsection 53(3) of the Regulations states that the application does not operate to stay the decision.

This section ensures that an AFP employee is afforded procedural fairness, while the 28 day limitation on applications ensures that any review of the decision can take place expeditiously.

##### Section 54 – Notification of review

The section outlines the process for notifying the Merit Protection Commissioner that a review has been initiated, and ensure all relevant documents are shared with the Merit Protection Commissioner and the applicant.

Subsection 54(1) of the Regulations requires the AFP Commissioner to give an application from an AFP employee, and any documents relating to the making of a decision under subsection 32(1) of the AFP Act, to the Merit Protection Commissioner within 14 days of receiving the application from an AFP employee.

Under subsection 54(2) of the Regulations, the AFP Commissioner must give the AFP a copy of any documents given to the Merit Protection Commissioner under paragraph 54(1)(b) of the Regulations.

This section ensures that the applicant is notified of documents that may influence the Merit Protection Commissioner's independent review of a particular employment decision, and is therefore given adequate time to respond to issues that may be raised in light of these documents.

#### Section 55 – Minimum requirements for conducting review

The section stipulates the minimum requirements for conduct of a review by the Merit Protection Commissioner.

Subsection 55(1) of the Regulations ensures that the Merit Protection Commissioner meets minimum requirements of procedural fairness, privacy and concludes the review as quickly as possible, while allowing for proper consideration of the matter. This ensures that reviews are conducted in a fair and expeditious manner.

Subsection 55(2) of the Regulations provides that a person appearing before the Merit Protection Commissioner must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented. This subsection replicates regulation 5.14(2) of the *Public Service Regulations 1999*.

This section seeks to streamline the review process to ensure it is efficient and effective. This section does not exclude the right of a person to appear with representation entirely, as it is open to the Merit Protection Commissioner to consider that it is reasonable to allow the applicant to be represented.

The broader requirements of section 55(1) of the Regulations, which include that a review must be conducted with due regard to procedural fairness, safeguards the right to a fair hearing in civil proceedings while balancing the objectives of dealing with the matter efficiently.

#### Section 56 – Requirement to provide information or documents

The section imposes a requirement to provide information or documents relevant to the review, as requested by the Merit Protection Commissioner.

Subsection 56(1) of the Regulations provides that the Merit Protection Commissioner may, by written notice, require the AFP Commissioner or applicant to give the Merit Protection Commissioner specified information or documents relevant to the review.

Subsection 56(2) of the Regulations requires the AFP Commissioner or applicant to give the information or documents in the way, or at the time, specified in the notice.

The exercise of this power is governed by the minimum requirements outlined in subsection 55(1) of the Regulations, including the requirement that the review must be conducted with due regard to procedural fairness.

#### Section 57 – Conduct of review

The section outlines the functions the Merit Protection Commissioner may perform in conducting a review.

This section provides that the Merit Protection Commissioner may review the decision, make a recommendation to the AFP Commissioner, in writing, about the review, give the AFP Commissioner, written reasons for the recommendation, and give a copy of the recommendation and reasons to the applicant. This provision ensures that the recommendation, and supporting reasons, are made available to both parties to the review.

#### Section 58 – Exclusion of information by Merit Protection Commissioner

The section sets out the circumstances in which the Merit Protection Commissioner may exclude information from the recommendation and reasons to be given to the applicant. The section also specifies the requirements for notifying the applicant that information has been excluded and, where appropriate, passing on this information to a nominated medical practitioner.

Subsection 58(1) of the Regulations allows the Merit Protection Commissioner to exclude information from a copy of the recommendation and reasons that is to be given to an applicant if the information is of a medical or psychiatric nature and the Merit Protection Commissioner thinks that the information may be prejudicial to the physical or mental health or well-being of the applicant.

This prevents the Merit Protection Commissioner disclosing information that may inadvertently cause harm to an applicant, such as information that may re-trigger symptoms of Post-Traumatic Stress Disorder.

Under subsection 58(2) of the Regulations, the Merit Protection Commissioner must notify the applicant that information has been excluded, and, if the applicant consents, that information will be given to his or her nominated medical practitioner. In many cases, a medical practitioner will be in a better position to determine whether it is appropriate to release the information to the applicant.

Subsection 58(3) of the Regulations requires the Merit Protection Commissioner to give this information to the nominated medical practitioner as soon as practicable.

#### Section 59 – Action by the Commissioner of Police

The section specifies action that must be taken by the AFP Commissioner after receiving a recommendation from the Merit Protection Commissioner under paragraph 57(b) of the Regulations. Subsection 59(1) of the Regulations requires the AFP Commissioner to consider

the Merit Protection Commissioner's recommendation, and confirm or revoke his or her original decision made under subsection 32(1) of the AFP Act.

Under subsection 59(2) of the Regulations, the AFP Commissioner must, in writing, notify the applicant and the Merit Protection Commissioner of the decision and the reasons for it. Notification of the decision is in accordance with natural justice requirements and ensures that applicants have the ability to gather the necessary information required to potentially support a further legal review of the retirement decision due to physical or mental incapacity.

#### Section 60 – Exclusion of information by Commissioner of Police

The section sets out the circumstances in which the AFP Commissioner may exclude information from the decision, and reasons for it, given to an applicant under subsection 59(2) of the Regulations. The section also specifies the requirements for notifying the applicant that information has been excluded and, where appropriate, passing on this information to a nominated medical practitioner.

Subsection 60(1) of the Regulations allows the AFP Commissioner to exclude information from a copy of the decision and reasons if the information is of a medical or psychiatric nature, and the Commissioner thinks that the information may be prejudicial to the physical or mental health or well-being of the applicant.

This prevents the AFP Commissioner disclosing information that may inadvertently cause harm to an applicant, such as information that may re-trigger symptoms of Post-Traumatic Stress Disorder.

Under subsection 60(2) of the Regulations, the AFP Commissioner must notify the applicant that information has been excluded, and, if the applicant consents, that information will be given to his or her nominated medical practitioner. In many cases, a medical practitioner will be in a better position to determine whether it is appropriate to release the information to the applicant.

Subsection 60(3) of the Regulations requires the AFP Commissioner to give this information to the nominated medical practitioner as soon as practicable.

### **Division 3 – Process for review of AFP employment decisions**

#### Section 61 – Process for review must exist

The section states that a process for review of AFP employment decisions must exist.

Subsection 61(1) of the Regulations places a positive obligation on the AFP Commissioner to ensure that a process for reviewing AFP employment decisions exists at all times.

Under subsection 61(2) of the Regulations, this process must be at least as favourable to AFP employees and special members as the process that was prescribed in the Australian Federal Police Certified Agreement 1999-2000 as at 1 July 2000.

Fair and equitable access to review is a critical part of maintaining regulatory accountability and is an important quality control mechanism for identifying and correcting possible errors within employment decisions. This section ensures that a process for review must continue to exist for all employment decisions.

#### **Part 4 – AFP property matters**

##### **Division 1 – Return of property**

The Division introduces new provisions regarding ‘returnable property’ which, simply put, is property that must be passed to the AFP when a person ceases to be engaged by the AFP. This may include, for example, an AFP officer’s uniform, accoutrements and standard issue firearm.

This Division strengthens the warrant provisions that existed in the AFP Regulations 1979 by including a number of standard provisions found in the *Regulatory Powers (Standard Provisions) Act 2014*. This ensures that the AFP has the powers it requires to ensure that the returnable property of AFP appointees is obtained by the AFP as soon as practicable after the appointee’s engagement with the AFP ceases.

##### **Section 62 – Return of property etc.**

The section introduces the concept of ‘returnable property’ and stipulates the circumstances in which property must be returned, as well as the consequences for not doing so.

Subsection 62(1) of the Regulations creates a positive obligation on various persons engaged by the AFP to return returnable property in their possession to the AFP Commissioner as soon as it is reasonably practicable to do so.

This obligation is supported by subsection 62(2) of the Regulations, which makes it an offence for particular persons who cease to be engaged by the AFP to fail to return returnable property that is in the person’s possession as soon as possible. This offence is punishable by a maximum sentence of 5 penalty units.

This subsection specifies that a person will only commit an offence of failing to return returnable property where this property is in this person’s possession. This ensures that a person is not punished for failing to return property that they no longer have control over.

Subsection 62(3) of the Regulations defines returnable property as property that is either supplied to the person for the purposes of the person’s service in the AFP, or is in the person’s custody because of this service, but is not ‘prescribed property’.

Subsection 62(4) of the Regulations defines prescribed property as property that the AFP Commissioner has determined, in writing, is not required to be returned to the Commissioner by the person, or a class of persons that includes the person, or all persons to whom the duty under subsection 62(1) of the Regulations applies.

This section is intended to start with the presumption that property that a person gains because of their service should be returned when this service concludes, but allows for the person to keep this property on a case-by-case basis where this is judged as appropriate.

### Section 63 – Application for warrant

The section outlines the process for applying for a warrant to enter and search premises or a place and seize any returnable property found therein.

Subsection 63(1) of the Regulations provides that the AFP Commissioner, or a member of the AFP who is authorised for the purposes of the section (the officer), may apply to a Magistrate for a warrant authorising the officer to enter and search premises or a place for the purpose of ascertaining whether returnable property is to be found on those premises or at that place.

A magistrate may grant this warrant under subsection 63(2) of the Regulations if they are satisfied by information on oath or affirmation that there are reasonable grounds for believing that:

- returnable property referred to in the information is to be found on the premises or at the place, and
- the issue of a warrant is reasonably required for the recovery of that property.

This provision ensures that a warrant will not be issued where this would be unnecessary or ineffective.

Subsection 63(3) of the Regulations provides that the officer can undertake the following functions for the purpose referred to in subsection 63(1) of the Regulations:

- enter and search the premises or place during the hours of the day or night specified by the warrant or, if the warrant specified, at any time
- use any assistance the officer thinks appropriate and if necessary, use reasonable force against persons or things, and/or
- seize any returnable property that the officer may find in the premises or place.

These powers are narrowly confined to ensure that officers are only permitted to engage in conduct that is necessary to search for, identify and seize returnable property found in the premises or place. The section also introduces additional safeguards by clarifying that only ‘reasonable’ force can be used, not just ‘force’ as outlined in the AFP Regulations 1979.

### Section 64 – Announcement before entry under warrant

The section replicates the standard protections under section 56 of the *Regulatory Powers (Standard Provisions) Act 2014*.

Where an officer has a warrant, subsection 64(1) of the Regulations requires an officer to identify him or herself by presenting their identity card and announcing that he or she is

authorised to enter the premises before entering if the occupier of the premises or that person's apparent representative is present. This ensures that an occupier of premises who is present is made aware and given the opportunity to allow entry before the authorised person exercises investigation powers under warrant.

In some situations, the requirement to identify and announce the purpose of the visit could result in serious detriment. Subsection 64(2) of the Regulations therefore permits an officer to enter without identifying himself or herself or announcing their purpose where they believe on reasonable grounds that immediate entry is necessary to ensure human safety or effective execution of the warrant. This allows flexibility in serious situations but does not undermine the importance of identification.

The authorised person is still obliged under subsection 64(3) of the Regulations to provide identification as soon as practicable after entry, if an occupier or their representative is present.

#### Section 65 – Possession of a warrant

The section replicates the standard protections under section 57 of the *Regulatory Powers (Standard Provisions) Act 2014*.

This section requires an officer executing the warrant to be in possession of the warrant or a copy of the warrant issued by the magistrate, or the form of warrant so issued.

#### Section 66 – Details of warrant etc. to be given to occupier

The new section replicates the standard protections under section 58 of the *Regulatory Powers (Standard Provisions) Act 2014*.

Subsection 66(1) of the Regulations requires an officer executing a warrant to comply with subsection 66(2) of the Regulations if the occupier of the premises, or an occupier's apparent representative, is present at the premises.

Subsection 66(2) of the Regulations requires the officer to provide a copy of the warrant to the occupier of premises, or an occupier's apparent representative, and to inform the person of their rights and responsibilities under sections 67 and 68 of the Regulations.

This obligation ensures that occupiers and representatives who are present when a warrant is executed are granted an opportunity to examine the warrant and are explicitly informed about their rights and responsibilities.

#### Section 67 – Right to observe execution of warrant

The section replicates the standard protections under section 62 of the *Regulatory Powers (Standard Provisions) Act 2014*.



Subsection 67(1) of the Regulations provides the right for the occupier of premises or their apparent representative, who is present when a warrant is executed, to observe the execution of the warrant on their premises. This right does not limit how the warrant may be executed or require an occupier to witness all of an executing officer's activities, but it recognises that a person should not be excluded during the execution of a warrant unless they attempt to obstruct the inspection.

Subsection 67(2) of the Regulations stipulates that the right to observe the execution of the warrant ceases if the occupier or other person impedes that execution.

Subsection 67(3) of the Regulations clarifies that this section does not prevent the execution of the warrant in two or more areas of the premises simultaneously.

An occupier or representative who is present when a warrant is executed must be made aware of their rights under this section.

#### Section 68 – Responsibility to provide facilities and assistance

The section replicates the standard protections under section 63 of the *Regulatory Powers (Standard Provisions) Act 2014*.

Subsection 68(1) of the Regulations imposes an obligation on an occupier of premises, or their apparent representative, to provide reasonable facilities and assistance to the executing officer and any person assisting, required to effectively carry out the warrant powers. This obligation recognises that investigation powers are authorised by issuing officers for the purpose of determining whether laws are being complied with and should not be obstructed.

Under subsection 68(2) of the Regulations, the failure of an occupier or their representative to provide reasonable facilities and assistance carries a penalty of 5 penalty units.

An occupier or representative who is present when a warrant is executed must be made aware of their obligations under this section.

#### Section 69 – Powers of Magistrates

The section clarifies the powers of Magistrates as conferred by Division 1 of Part 4 of the Regulations.

Subsection 69(1) of the Regulations specifies that the power to issue a warrant under this Division is conferred on Magistrates in their personal capacity and not as a court or a member of a court.

Subsection 69(2) of the Regulations stipulates that the Magistrate need not accept the power conferred.

Subsection 69(3) of the Regulations states that a Magistrate exercising a power conferred by this Division has analogous protection and immunity as if the Magistrate was exercising the power as the court or as a member of the court of which the Magistrate is a member.

This accords with the Guide to Framing Commonwealth Offences, which relevantly provides at Part 8.4 that warrants should be issued by Magistrates in their personal capacity. The greater independence of Magistrates and the fact that they are not responsible for enforcement outcomes ensures rigour in the warrant issuing process. Having a Magistrate act in a personal capacity also ensures that there is no prospect for conflict between judicial and non-judicial functions.

### **Division 2 – Disposal and retention of unclaimed property**

The Division outlines the provisions governing the AFP's handling of 'claimable property'.

As previously outlined, section 5 essentially defines 'claimable property' as property in the possession of an AFP employee, special member or protective officer that can be claimed by a person entitled to lawful possession of the property under this Division. Claimable property does not include property that is owned or held under any right of possession by the AFP, nor does it include property that the Commissioner has directed be disposed of under sections 74 or 76 of the Regulations.

This Division clearly distinguishes between two categories of property. The first category (claimable property) is property that is lawful to possess and able to be returned to its owner, while the second category is property that should not be returned as the AFP is entitled to lawful possession of it, the property should be disposed of due to practical issues surrounding storage, or the property poses a risk to health and safety or is offensive in nature.

### Section 70 – Purpose of this Division

The section clarifies that Division 2 of Part 4 of the Regulations is made for the purposes of paragraph 70(aa) of the AFP Act.

### Section 71 – Return of claimable property that has been found

The section outlines the process for the return of ‘claimable property’ that has been found. This section allows the release of claimable property if the AFP Commissioner is satisfied a person has a valid entitlement to the property, the property is lawful for the person to possess, and the property does not present a danger to public health and safety and is not offensive in nature.

Subsection 71(1) of the Regulations identifies that this section only applies to claimable property that has been found and is not held for evidentiary use.

Subsection 71(2) of the Regulations states that claimable property may, before it is presented for sale or otherwise disposed of, be claimed by a person entitled to lawful possession of the property, or a person who found the property if the person who is entitled to lawful possession has not claimed it within 3 months after the day it came into the custody of the AFP.

Subsection 71(3) of the Regulations states that, before releasing the property to a person claiming entitlement, the AFP Commissioner must be satisfied that the person has a valid entitlement to the lawful possession of the property.

Subsection 71(4) of the Regulations addresses operational issues that arise where competing claims are made. Where this is the case, the matter must be appropriately determined by the courts and the AFP must respond to a claim that is supported by a court order.

Subsection 71(5) of the Regulations clarifies that no person has any right of action against the AFP in relation to an interest in property that is released to a person in accordance with this section.

Subsection 71(6) of the Regulations provides that the AFP Commissioner must notify the person of the Commissioner’s decision not to release the property where:

- the Commissioner is satisfied of a matter relevant to section 74 of the Regulations (which deals with disposal of property), or
- the Commissioner is not satisfied the person has a lawful right to the possession of the property, and
- the property is not to be dealt with under section 76 of the Regulations (which deals with immediate disposal of property on the grounds of public health and safety or offensive nature).

Subsection 71(7) of the Regulations specifies the types of information that a notice given under subsection 71(6) of the Regulations must include, such as the reasons for the decision, information about how the property will be dealt with, and information about how the person can claim compensation in relation to the property.

This section repeals a provision in the AFP Regulations 1979, which related to unclaimed money becoming ‘public money’ under the *Financial Management and Accountability Act 1997*, following advice from the Department of Finance that this provision is unnecessary.

#### Section 72 – Disposal and retention of claimable property that has been found

This section enables the AFP Commissioner to dispose of relevant claimable property by any appropriate means or methods (including by sale or gift), or retain the property for the purposes of law enforcement, if:

- the Commissioner is satisfied that reasonable action has been taken to tell the person entitled to lawful possession of the property that the AFP has custody of the property and intends to dispose of it if it is not claimed under section 71 of the Regulations, and
- the property has not been claimed under section 71 of the Regulations by the person entitled to lawful possession, or by the finder within 4 months after the day it came into the custody of the AFP, or
- the property has been claimed under section 71 of the Regulations but the Commissioner has decided under subsection 71(3) of the Regulations not to return the property to that person.

#### Section 73 – Return or disposal of claimable property held for evidentiary use

The section outlines the process for return or disposal of claimable property held for evidentiary use.

Subsection 73(1) of the Regulations specifies that this section applies to claimable property that has been held for evidentiary use in legal proceedings.

Subsection 73(2) of the Regulations provides that the AFP Commissioner must, subject to any other law of the Commonwealth or a court order, ensure claimable property held for evidentiary use in legal proceedings is returned to a person with lawful possession when the reason for its detention has no further effect.

Subsection 73(3) of the Regulations makes provision for competing claims, ensuring that these competing claims can be settled by a court on the application of a person.

Subsection 73(4) of the Regulations allows the AFP Commissioner to dispose of the property, as appropriate, where reasonably satisfied that the person entitled to lawful possession of the property cannot be located or does not want the property. This ensures that the property does not need to be held indefinitely by the AFP.

## Section 74 – Disposal of other property that has been found

The section enables the AFP Commissioner to direct the disposal of particular types of found property by appropriate means or methods (including by sale or gift).

Subsection 74(1) of the Regulations allows the AFP Commissioner to direct that live animals, perishable goods or property that is difficult to store may be disposed of by appropriate means (including by sale or gift).

Where goods or property are disposed of by sale, the AFP Commissioner is required to publish a notice of proposed sale under section 75 of the Regulations and, if the sale goes ahead, the person entitled to lawful possession of the property may later claim the proceeds of the sale from the Commonwealth under section 78 of the Regulations.

Subsection 74(2) of the Regulations allows the AFP Commissioner to direct that illicit materials or illicit-related materials or goods that are dangerous, noxious or illegal to possess may be disposed of by any appropriate means (except by sale or gift).

Subsection 74(2) eliminates previous uncertainty surrounding the AFP's disposal powers which had resulted in the accumulation of large quantities of illicit and dangerous materials, storage of which presented serious logistical and workplace health and safety concerns.

Subsection 74(2) provides greater clarity around the AFP's ability to dispose of illicit or dangerous material where:

- there is no likelihood of an investigation or prosecution
- there is no public interest in the material being returned to an individual, possession may constitute an offence, the material could be used as a component or ingredient in an offence, or the material is yet to be listed as an illicit substance (for example, a substance with a psychoactive effect)
- there is no statutorily defined disposal power relating to the item (for example, disposal of the material is not covered by the Customs Act), and
- there is no public interest in the materials being retained any longer than necessary for law enforcement and accountability purposes.

Subsection 74(2) does not allow for goods or materials to be disposed of by sale or gift, as this would not be an appropriate way to dispose of illicit goods or inherently dangerous goods held by the AFP.

This section is based on sections 206 and 207 of the *Customs Act 1901*, which authorise the Commissioner to dispose of narcotic goods and narcotic-related goods expeditiously, and allow for the immediate disposal of perishable goods, dangerous goods and live animals.

The section puts beyond doubt the AFP Commissioner's authority to dispose of illicit material not specifically dealt with in either the *Customs Act* or the *Crimes Act 1914* and

improve the AFP's capacity to efficiently dispose of dangerous and illicit materials where their retention has no further purpose.

#### Section 75 – Notice, and proceeds, of sale of property

The section specifies obligations of the AFP Commissioner that must be fulfilled prior to any proposed sale of unclaimed property under section 72, 73 or 74 of the Regulations.

Subsection 75(1) of the Regulations provides that the AFP Commissioner must publish a notice of proposed sale of unclaimed property at least 7 days before the expected date of the sale and either in a daily newspaper circulating generally in the State or Territory in which the sale is held or on a website or a social media service.

This subsection expands on the AFP Regulations 1979 by permitting the sale of unclaimed property via a website or social media service and removing the requirement that a sale occur by public auction, ensuring that selling practices can be catered to the behaviour of potential buyers.

Subsection 75(2) of the Regulations provides that no person who has an interest in property before the disposal of the property has a right of action against the Commonwealth in relation to the interest after the property is disposed of under section 72, 73 or 74 of the Regulations.

This section also repeals outdated references to the *Financial Management and Accountability Act 1997*, following advice from the Department of Finance that these references are unnecessary.

#### Section 76 – Immediate disposal of property on the grounds of public health and safety or offensive nature

The section specifies the process for immediate disposal of property on the grounds of public health and safety or offensive nature.

Subsection 76(1) of the Regulations allows for the immediate disposal of any property (except by sale or gift) where the AFP Commissioner is reasonably satisfied that it represents a danger to public health and safety or is offensive in nature. Property that is offensive in nature is not defined in the Regulations but may include, for example, racist materials, pornography in various formats, or material that depicts violent or sexual activity.

Under subsection 76(2) of the Regulations, the AFP Commissioner must give or publish a notice regarding the disposal of the property within 7 days.

Subsection 76(3) of the Regulations provides that the notice must be served personally, or by post, on the owner of the property or, if the owner of the property cannot be identified after reasonable inquiry and the property was seized, on the person in whose possession or under whose control the property was when it was seized. If the owner of the property or the person with possession or control of the property cannot be identified, the AFP must publish a copy

of the notice on the AFP website or in a newspaper circulating in the location where the property came into the possession of the AFP or was seized.

Under subsection 76(4) of the Regulations, a notice does not need to be issued where this could prejudice an ongoing investigation.

Subsection 76(5) of the Regulations stipulates that a person has no right of action against the Commonwealth in relation to the disposal of the property.

This section makes it clear that the AFP Commissioner has the authority to dispose of illicit-related material and seized material of an offensive nature, storage of which is not required for investigative or evidentiary purposes. As with dangerous or illicit goods under section 74 of the Regulations, the dangerous or offensive property under section 76 of the Regulations cannot be disposed by sale or gift, and will ordinarily be destroyed.

#### Section 77 – Return of market value of property

The section enables a court to order that the Commonwealth pay a person an amount equal to the market value of the claimable property if the property was disposed of but should not have been.

Subsection 77(1) of the Regulations allows the court of a State or Territory, which has jurisdiction in relation to claimable property, to order that the Commonwealth pay a person an amount equal to the market value of the claimable property if the court is satisfied that the person is the owner of the property, the property has been disposed of purportedly under section 72, 73, 74 or 76 of the Regulations, and the circumstances for disposing of the property do not exist.

Subsection 77(2) of the Regulations provides that the market value of the property is the market value at the time the property was disposed of.

This section is a key protection which ensures that, despite a person not having a right of action against a Commonwealth in relation to their interest after property is disposed of under section 72, 73, 74 or 76 of the Regulations, this person can nevertheless claim compensation where property was improperly disposed of under these sections.

This provision is drawn from compensation principles in the Customs Act, and expands on the AFP Regulations 1979 which did not provide owners with the ability to seek compensation for property that was erroneously or otherwise destroyed.

#### Section 78 – Person entitled to lawful possession may obtain sale proceeds

This section outlines the process by which a person entitled to lawful possession of property, or a person who found the property, may obtain the sale proceeds for the property if it was sold under sections 72, 73 or 74 of the Regulations.

Subsection 78(1) of the Regulations specifies that this section applies if property has been sold under sections 72, 73 or 74 of the Regulations, and the person entitled to lawful possession of property, or a person who found the property, makes a claim on the Commonwealth in respect of the property.

Subsection 78(2) of the Regulations provides that the Commonwealth must pay this amount to the person who was entitled to lawful possession of the property, over the person who found the property.

Subsection 78(3) of the Regulations states that the amount to be paid is equal to the amount for which the property was sold, less the total of any amounts reasonably spent by the Commonwealth for the storage, maintenance or disposal of the property. This subsection recognises that the Commonwealth has incurred costs in handling the property that should be fairly compensated by the person claiming this property. Only reasonable costs can be compensated, meaning that the Commonwealth cannot claim unnecessary or frivolous costs.

Subsection 78(4) of the Regulations provides that only one amount may be paid under this section in relation to the property.

Where two or more persons have claims on the property that are deserving of compensation, the distribution of compensation between these persons is a matter properly determined by a court. The Regulations do not prevent these persons from bringing their own claims against the person who is ultimately awarded the sale proceeds by the AFP.

## **Part 5 – Miscellaneous**

### **Section 79 – Delegations**

The section enables the AFP Commissioner to delegate any of their powers, functions and duties under this instrument to a Deputy Commissioner, AFP employee or a special member. The purpose of the section is to provide sufficient flexibility to ensure the Commissioner can delegate powers, where appropriate, in order for the AFP to fulfil its statutory functions efficiently and effectively.



## Section 80 – Police services rendered to the public or to an authority of the Commonwealth

The section prescribes the various fees for police services rendered to the public or an authority of the Commonwealth. The term ‘authority of the Commonwealth’ is defined in section 4 of the AFP Act.

Subsection 80(1) of the Regulations clarifies that it is made for the purposes of paragraphs 70(c) and (d) of the AFP Act.

Subsection 80(2) of the Regulations provides that the fee for a police service referred to in column 2 of an item in the table in clause 1 of Schedule 3 to the Regulations may be charged for the police service that is set out in column 1 of that item.

Subsection 80(3) of the Regulations provides that, for items 1, 2 and 4 of that table, the fee is the sum of the amount mentioned in the item and any amount payable by the AFP in the course of providing the service, rounded up to the nearest dollar.

Subsection 80(4) of the Regulations provides that, to avoid doubt, each authority of the Commonwealth is prescribed for the purposes of paragraph 70(d) of the AFP Act.

## Section 81 – Waiver and exemption of fees

The section sets out the circumstances in which the AFP Commissioner could grant a waiver or exemption of fees payable under section 80 of the Regulations.

Subsection 81(1) of the Regulations enables the AFP Commissioner to waive the whole or part of a payment of a fee payable under section 80 of the Regulations where this would cause financial hardship or the Commissioner otherwise considers it appropriate to do so.

Subsection 81(2) of the Regulations also states that a fee is not payable under section 80 of the Regulations if it relates to an activity conducted for a charitable purpose.

## **Part 6 – Transitional, savings and application provisions**

### **Division 1 – Australian Federal Police Regulations 2018**

#### Section 82 – Definitions

The section states that, in this Division, ‘old regulations’ means the *Australian Federal Police Regulations 1979*.

#### Section 83 – Things done under old regulations

The section inserts an application provision relating to things done under the old regulations. This section ensures that decisions made under the old regulations continue to have effect.

Subsection 83(1) of the Regulations provides that, if a thing that was done for a particular purpose under the old regulations as in force immediately before those regulations were

repealed, and the thing could be done for that purpose under this instrument, the thing has effect for the purposes of this instrument as if it had been done for that particular purpose under this instrument.

Subsection 83(2) of the Regulations clarifies that a reference to a thing being done includes a reference to a notice, approval or other instrument being given or made.

Section 83 only validates decisions made for a particular purpose under the old regulations, and does not retrospectively validate decisions made outside the limits of the old regulations or not made in accordance with a particular purpose contained in the old regulations.

#### Section 84 – Conduct, event, circumstances occurring before commencement

The section inserts an application provision relating to conduct, events and circumstances occurring before the commencement of the Regulations.

Subsection 84(1) of the Regulations states that, to avoid doubt, a function or duty may be performed, or a power exercised, under this instrument in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before this section commences.

Subsection 84(2) of the Regulations provides that this section does not limit section 83 of the Regulations or section 7 of the *Acts Interpretation Act 1901* (as that Act applies in relation to this instrument because of paragraph 13(1)(a) of the *Legislation Act 2003*).

This section ensures that the powers, functions or duties under the Regulations can be performed or exercised in relation to past events.

#### Section 85 – Saving forms

The section inserts a savings provision in relation to Forms 4, 5 and 6 of Schedule 1 to the old regulations.

This section ensures that, despite the repeal of Forms 4, 5 and 6 of Schedule 1 to the old regulations, those forms continue to apply after this section commences for the purposes of Division 2 of Part II of the Act as it continues to apply under item 3 of Schedule 1 to the *Surveillance Devices Act 2004*.

#### **Schedule 1 – Forms for undertakings, oaths and affirmations relating to the performance of duties**

This Schedule provides for forms outlining the oaths, affirmations and undertakings for AFP personnel. These forms ensure that, in undertaking their work, these personnel acknowledge the AFP Act and associated instruments as the law providing their duties and powers.

Upon appointment to the AFP, the Commissioner, Deputy Commissioners, members, special members, protective service officers and special protective service officers are required under

section 36 of the AFP Act to make and subscribe an oath or affirmation in the format prescribed in the Regulations.

The Schedule removes existing forms 4, 5 and 6 in Schedule 1 of the AFP Regulations 1979, as these forms were made under listening device warrant provisions of the AFP Act which have since been repealed and moved to the *Surveillance Devices Act 2004*.

The Schedule also removes the tables in the Schedule 1A of the AFP Regulations 1979, as the Regulations incorporate their content into the provisions to which they refer to assist readability of the Regulations.

### **Schedule 2 – Awards and criteria**

This Schedule prescribes thirteen awards which may be conferred under subsections 61(1) and 61(1A) of the AFP Act and outlines the criteria by which the awards may be conferred for the purposes of subsection 61(2) of the AFP Act.

The second column of the Schedule prescribes the following awards:

- Commissioner’s Commendation for Bravery
- Commissioner’s Commendation for Conspicuous Conduct
- Commissioner’s Commendation for Excellence in Overseas Service
- Commissioner’s Commendation for Hazardous Overseas Service
- Commissioner’s Group Citation for Bravery
- Commissioner’s Group Citation for Conspicuous Conduct
- Commissioner’s Group Citation for Excellence in Overseas Service
- Commissioner’s Group Citation for Hazardous Overseas Service
- Commissioner’s Medal for Excellence
- Commissioner’s Medal for Innovation
- Australian Federal Police Operations Medal
- Australian Federal Police Service Medal, and
- Australian Protective Service Medal.

The third column prescribes the criteria by which each award may be conferred.

### **Schedule 3 – Fees**

The Schedule sets out police services that may be rendered and fees for those services. This Schedule is made under section 70 of the AFP Act, which provides that fees payable to the AFP for police services may be prescribed in regulations. Section 80 of the Regulations provides that such fees are set out in this Schedule.

This Schedule amends column 1, items 18-24, 26 and 28 in the AFP Regulations 1979 to reflect changes in relation to the definition of ‘cost to AFP for use of AFP employee’s time’, to ensure consistency of terms across the proposed Regulations. The Schedule replaces references to ‘AFP employee’ with references to ‘AFP appointee’ in column 1.

### **Schedule 4 – Repeals**

The Schedule repeals the AFP Regulations 1979, which are replaced by the Regulations.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Australian Federal Police Regulations 2018*

1. This legislative instrument 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 Legislative Instrument**

2. The Australian Federal Police Regulations 2018 (the Regulations) remake the Australian Federal Police Regulations 1979 (AFP Regulations 1979) in their current form, with minor amendments.

3. The Regulations preserve existing arrangements in the AFP Regulations 1979, with amendments to ensure the proper and appropriate administration of the *Australian Federal Police Act 1979* (AFP Act) and enable the Australian Federal Police (AFP) to perform its legislated functions pursuant to section 8 of the AFP Act.

4. **Part 1 of the Regulations** defines key terms used throughout the Regulations, inserting new definitions of ‘claimable property’, ‘illicit material’, ‘illicit-related material’ and ‘returnable material’, while updating existing terms such as ‘cost to AFP for use of AFP employee’s time’, ‘superannuation scheme’ and ‘integrity agency’ to reflect recent legislative changes.

5. **Part 2 of the Regulations** includes provisions relating to AFP employment conditions, including the rules governing AFP employment decisions, undertakings, oaths and affirmations, the resignation and reinstatement process for AFP employees who contest elections, financial statements, deductions from salaries to satisfy judgment debts, and the conduct of AFP appointees. These rules largely replicate the existing framework in the AFP Regulations 1979, with minor changes to ensure that the AFP Commissioner can take a greater range of facts into account when appointing commissioned police officers or dealing with the suspension of AFP employees.

6. Part 2 also extends the drug and alcohol testing regime, which applied to AFP employees under the AFP Regulations 1979, to a wider group of ‘AFP appointees’, a term which encompasses the entire AFP workforce, including contractors.

7. This accords with the changes to the AFP Act made by item 9 of the table in subsection 2(1) of the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*, which came into force with the registration of the Crimes

Legislation Amendment (International Crime Cooperation and Other Measures – Part 1 of Schedule 8) Commencement Proclamation 2018.

8. **Part 3 of the Regulations** provides a process for the review of employment decisions, including the process for challenging the AFP Commissioner’s decision to retire an AFP employee on the grounds of physical or mental incapacity. This part remakes the corresponding provisions in the AFP Regulations 1979 with minor changes to ensure that an AFP employee receives all documents given to the Merit Protection Commissioner that relate to the AFP Commissioner’s decision about retirement of an AFP employee due to physical or mental incapacity.

9. **Part 4 of the Regulations** outlines the process by which the AFP deals with particular property, including property that is in the possession of AFP staff because of their service and should be returned (‘returnable property’) and property that can be claimed by members of the public (‘claimable property’).

10. The Regulations expand on the AFP Regulations 1979 by including additional protections for persons subject to the ‘returnable property’ regime, including safeguards on the use of warrants to seize returnable property which are drawn from the standard warrant provisions in the *Regulatory Powers (Standard Provisions) Act 2014*.

11. The Regulations also enhance the existing ‘claimable property’ provisions by ensuring that individuals with an interest in property are appropriately compensated for property that is disposed of by the AFP, and that competing claims to property can be settled by the courts. The Regulations also clarify that property can immediately be disposed of by the AFP in particular situations, including (but not limited to) where property is illicit, perishable goods or represents a danger to public health and safety.

12. **Part 5 of the Regulations** remakes provisions in the AFP Regulations 1979 that allow for the delegation of powers contained in the Regulations, which permit the AFP to charge a fee for the provision of services to the public or an authority of the Commonwealth, and allow the AFP Commissioner to waive payment of the whole or part of this fee.

13. **Part 6 of the Regulations** includes new transitional, savings and application provisions. These provisions allow decisions made under the AFP Regulations 1979 to continue to function where appropriate, and explicitly provides that the Regulations apply to events that occurred before they came into force.

14. **The Schedules to the Regulations** contain forms for undertakings, oaths and affirmations relating to the performance of duties. The Schedules also prescribe the criteria for awards that may be granted to AFP staff members, and fees for police services that may be rendered.

15. These Schedules have been remade with minor amendments to reflect recent legislative changes. Previous forms 4, 5 and 6 of Schedule 1 to the AFP Regulations 1979

have been removed, as these forms have since been moved to the *Surveillance Devices Act 2004*. To streamline the Regulations, the table in previous Schedule 1A to the AFP Regulations 1979 (persons authorised to conduct tests and operate equipment under the drug and alcohol testing regime) has also been removed and their contents have been incorporated into the provisions of the Regulations to which they refer.

## **Human Rights Implications**

16. The Regulations engage Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Engaged rights include the right to an effective remedy, the right to a fair hearing in civil proceedings, the right to privacy, the right to take part in public affairs and elections, and the right to work and rights in work.

### ***Article 2(3) ICCPR – Right to an effective remedy***

17. Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by a competent judicial, administrative or legislative authority or by any other competent authority provided for by the legal system of the state. The right to an effective remedy applies notwithstanding that a violation has been committed by persons acting in an official capacity.

18. The Regulations engage the right to an effective remedy at subsections 75(2) and 76(5), which provide that a person has no right of action against the Commonwealth in relation to an interest disposed of under sections 72, 73, 74 or 76.

19. This is necessary to ensure that the AFP is not civilly liable for disposing of property where:

- it has taken all reasonable steps to inform the person entitled to lawful possession that it intends to dispose of the property and the person has not claimed this property (section 72)
- the AFP Commissioner is reasonably satisfied that the person cannot be located or does not want the property (subsection 73(4))
- the property must be disposed of as it is a live animal, perishable good, difficult to store, illicit materials or illicit-related materials or it is dangerous, noxious or illegal to possess (section 74), or
- the property is offensive in nature or represents a danger to public health or safety (section 76).

20. If the AFP was found to be civilly liable in these situations, this would incentivise the AFP to indefinitely retain potentially dangerous, illegal or offensive items until an owner

could be found, undermining the safety of individual officers and placing an unreasonable financial impost on law enforcement.

21. It is pertinent to note here that a person will still be able to claim the market value of the property where the circumstances for disposing of the property do not exist (section 77) and is entitled to claim the sale proceeds where the property is sold (section 78). The Regulations also do not prevent the person from bringing a private action for compensation against parties other than the Commonwealth.

22. Therefore, where the Regulations limit the right to an effective remedy, this limitation is reasonable, necessary and proportionate.

***Article 14(1) ICCPR – Right to a fair hearing in civil proceedings***

23. Article 14(1) of the ICCPR guarantees equality before courts and tribunals, and the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

24. The right to a fair hearing is engaged by Part 3 of the Regulations, which governs the process by which AFP employment decisions are reviewed.

25. Division 2 of Part 3 outlines the review process relating to a decision made by the AFP Commissioner to retire an AFP appointee due to physical or mental incapacity under subsection 32(1) of the AFP Act. This includes the process and requirements for applying for review of a decision, notifying the Merit Protection Commissioner of a review, conducting a review, excluding information from the recommendations and reasons for a decision, and subsequent action that may be taken by the AFP Commissioner.

26. This instrument promotes the right to a fair trial and fair hearing as it contains a number of protections.

- A fair process exists to apply for and conduct a review of employment decisions in circumstances where an AFP employee has been retired by the AFP Commissioner.
- Checks and balances are in place insofar as the AFP Commissioner must provide a review application to the Merit Protection Commissioner. The Merit Protection Commissioner's merit review functions are set out in sections 50 and 50A of the *Public Service Act 1999*, if the AFP employee has requested a review (section 53).
- The Regulations contain minimum requirements for conducting a review, which give due regard to procedural fairness, privacy and timeliness of the review process (section 55).
- If information is excluded from the recommendations or reasons that is to be given to an applicant, in response to an application for review, the Merit Protection Commissioner must provide written confirmation that information has been excluded,



and as appropriate, provide information to the applicant's nominated medical practitioner as soon as practicable (section 58). Further, the AFP Commissioner must confirm or revoke the Merit Protection Commissioner's recommendation, and notify the applicant of his or her decision and the reasons for it (section 60).

- The Merit Protection Commissioner may decide that, in all the circumstances, it is reasonable to allow a person appearing before the Commissioner to be represented by legal counsel (subsection 55(2)). This provision balances the right to legal counsel against streamlining of the review process and timely decision-making.

27. Division 3 of Part 3 maintains the AFP's existing requirement to have processes for the review of employment decisions, which gives the AFP Commissioner sufficient flexibility to make decisions about roles, transfers, working patterns and deployments quickly in order for the AFP to respond to critical incidents and threats.

28. The provisions in Part 3 also do not limit a person's ability to seek administrative review by the Commonwealth Ombudsman or judicial review of a particular employment decision (if available).

29. Part 3 therefore engages and promotes the right to a fair hearing in civil proceedings.

#### ***Article 17 ICCPR – Right to privacy***

30. Article 17 of the ICCPR affords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. This includes the right to protection from interferences with a person's personal information and property, particularly where it is a family home. Interferences are permissible so long as they are authorised by law and are not arbitrary.

31. The term 'unlawful' in Article 17 means no interference can take place except in cases authorised by law. What is 'arbitrary' will be determined by the circumstances of each case. In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in particular circumstances. The United Nations Human Rights Committee has interpreted reasonableness in this context to imply that any interference with privacy must be proportionate to the end sought and be necessary in the circumstances of any given case.

#### ***Interference with personal information***

32. The Regulations engage the right to privacy because their provisions deal with the dissemination of information relating to financial statements (section 17), bankruptcies (section 30), drug and alcohol testing results (section 36), and information relating to a person's personal property (sections 75 and 76).

33. Insofar as the Regulations limit a person's right to privacy, however, this limitation is clearly authorised by law and is not arbitrary in that it is necessary, reasonable and proportionate as outlined below.
34. Section 17 promotes this right by ensuring that a financial statement, which is provided pursuant to section 40L of the AFP Act, is treated as confidential, is stored in a way that ensures confidentiality is maintained, is only handled by the AFP Commissioner or a person authorised by the Commissioner, is only handled for the purpose for which it was collected, and is not disclosed or used except for this purpose.
35. Section 30 requires an AFP appointee to declare their bankrupt status to the AFP Commissioner as soon as practicable. This is necessary as the AFP appointee's financial situation may make them susceptible to improper influence and may necessitate further support from the AFP (including assistance in paying judgment debts).
36. Section 36 allows a person, to whom section 60A of the AFP Act applies, to disclose an AFP appointee's drug and alcohol test results only in specific necessary and reasonable circumstances, including (but not limited to) for the investigation of offences, in dealing with an AFP conduct issue, or for the AFP appointee's medical treatment. Similarly, the AFP Commissioner may also disclose test results to the head of a Commonwealth Government agency or State or Territory police force or integrity agency.
37. This ability for the AFP to disclose test results to other government, police or integrity agencies is vital to ensuring that an individual's history of alcohol consumption or prohibited drug taking (and potential associated relationship with organised crime) may be considered by any agency that considers employing that individual. This is critical to mitigate integrity and security risks, particularly given the breadth of government agencies that are involved in combating organised crime. It also helps to promote broader Commonwealth resilience to the 'insider threat' associated with prohibited drug use within government agencies.
38. Sections 75 and 76 allow the AFP to disclose information relating to a person's personal property in order to inform the public of a proposed sale of unclaimed property, or to inform a person that their property is to be disposed of. This is necessary to ensure persons with a right to lawful possession of the property have an opportunity to prevent the sale of their property or seek a remedy for the destruction of their property.
39. It is also pertinent to note that AFP staff members are bound by secrecy obligations under section 60A of the AFP Act which prevent them from dealing with information in an inappropriate manner. AFP staff members are also obliged to comply with the *Privacy Act 1988* in the way they handle and secure personal information.
40. Where the Regulations permit the AFP to deal with personal information, any limitation on the right to privacy is authorised by law and not arbitrary, as it is proportionate to the end sought and necessary in the circumstances of any given case.

### *Interference with personal property*

41. The provisions relating to ‘returnable property’ under Division 1 of Part 4 of the Regulations do not engage the right to protection from interference with personal property.

42. This is because ‘returnable property’ vests in the AFP under subsections 62(3) and (4) of the Regulations by default, and is not regarded as the personal property of the person who uses it in the course of their employment. It is appropriate that an AFP staff member return ‘returnable property’ to the AFP after leaving their employment, as this property was either supplied to this person for their service in the AFP or came into that person’s custody because of that service.

43. While the AFP Commissioner has the power to prescribe property that is outside the definition of ‘returnable property’, this will, in effect, allow the AFP to gift property that properly vests in the organisation to an individual former employee in certain circumstances. Where property is prescribed as not being ‘returnable property’, no interference with this property is authorised under Division 1 of Part 4.

44. Provisions relating to ‘claimable property’ under Division 2 of Part 4 may engage the right to protection from interference with personal property. If this Division limits this right, it does so in a way that is authorised by law and is not arbitrary in that it is necessary, reasonable and proportionate.

45. As outlined above, under the Regulations, the AFP can only dispose of property in the following circumstances.

- The AFP has taken all reasonable steps to inform the person entitled to lawful possession that they intend to dispose of the property and the person has not claimed this property (section 72).
- The AFP Commissioner is reasonably satisfied that the person cannot be located or does not want the property (subsection 73(4)).
- The property must be disposed of as it is a live animal, perishable good, difficult to store, illicit materials or illicit-related materials, or it is dangerous, noxious or illegal to possess (section 74).
- The property is offensive in nature or represents a danger to public health or safety (section 76).

46. If not permitted to dispose of this property, the AFP would be required to indefinitely retain potentially dangerous, illegal or offensive items until an owner could be found, undermining the safety of individual officers and placing an unreasonable financial impost on law enforcement.

47. A person with a legitimate claim will still be able to claim the market value of the property where the circumstances for disposing of the property do not exist (section 77) and is entitled to claim the sale proceeds where property is sold (section 78).

### *Conclusion*

48. Where the Regulations limit the right to protection from interference with personal property, they do so in a way that is authorised by law and is not arbitrary in that it is necessary, reasonable and proportionate.

### ***Article 25 ICCPR – Right to take part in public affairs and elections***

49. The right to take part in public affairs and elections extends to a citizen's right to stand for public office. Division 3 of Part 2 of the Regulations engages this right as it governs the resignation and reinstatement process for AFP employees who become a candidate at an election of a member or members of the Parliament of the Commonwealth or a State, or the Legislative Assembly of the Australian Capital Territory or the Northern Territory.

50. Division 3 of Part 2 promotes this right as it encourages employees to run for public office by allowing them to be reinstated as an AFP employee on the same terms and conditions should they resign to run for election and fail to be nominated or elected at the election.

51. In order to be reinstated, an AFP employee must give at least 2 weeks' notice before they propose to resign and must apply to be re-engaged within 2 months of the declaration of the election result. These requirements ensure that the AFP Commissioner is adequately notified, and allows the AFP to take appropriate action to countenance the employee's absence in the organisation.

52. Division 3 of Part 2 therefore promotes the right to take part in public affairs and elections.

### ***Articles 6, 7 and 8(1)(a) ICESCR – Right to work and the rights in work***

53. Articles 6, 7 and 8(1)(a) of the ICESCR, which require State Parties to recognise the right to work, the right to just and favorable conditions of work, and the right to form trade unions. The right to work extends to the right not to be unjustly deprived of work, requiring security against unfair dismissal.

54. Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

55. The Regulations do not restrict a person's right to form a trade union. The Regulations do allow AFP staff to be deprived of work and may impact on the right to

favourable conditions at work, but only where this is just in particular circumstances as outlined below.

- Members of the AFP are appointed based upon specified values, competencies and qualifications as necessary to undertake the work of the AFP, with reasonable limitations imposed upon eligibility requirements such as age, health and experience levels. The AFP Commissioner can also approve an otherwise qualified person to undertake this work if appropriate (sections 6 and 7).
- AFP appointees may be suspended from duties on reasonable grounds only, in circumstances that prohibit the appointee from conducting their employment in line with the aforementioned values, competencies and qualifications (sections 8-12).
- Deductions may be taken from a debtor's salary to satisfy a judgment debt with authority by a judgment creditor. The Regulations stipulate that the AFP Commissioner must be satisfied 'on reasonable grounds' that deductions are required, and provide protections for the debtor if they are unable to make repayments (Division 5 of Part 2).
- AFP appointees may be required to undergo screening tests for alcohol and prohibited drugs, insofar as this ensures compliance with AFP values, competencies, qualifications and professional standards (Division 7 of Part 2).
- Drug testing of AFP appointees affords reasonable privacy and is conducted in a respectful manner by authorised persons, with all reasonable measures taken to ensure security and appropriate destruction of body samples. Procedures and testing are to be conducted in laboratories that are authorised by the AFP Commissioner. AFP appointees are also able to dispute the results of a drug test and to request re-examination of their sample (Division 7 of Part 2).
- AFP appointees who have been retired by the AFP Commissioner due to physical or mental incapacity may apply to have the decision reviewed (Division 2 of Part 3).
- AFP employees are appropriately required to return 'returnable property' to the AFP when they cease to work for the AFP (Division 1 of Part 4).

56. Any limitations placed on the right to work and rights in work are for the purpose of promoting the discipline and good governance of the AFP, and otherwise give effect to the AFP Act. Limitations are proportionate and the least restrictive means available.

## **Conclusion**

57. The Regulations are compatible with human rights as they promote a number of human rights and, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.