

## EXPLANATORY STATEMENT

### **Purpose and operation**

The *Public Service Act 1999* (the ‘Act’) provides for the establishment and management of the Australian Public Service (‘APS’). The primary purpose of the *Public Service Regulations 2023* (‘2023 Regulations’) is to provide further detail on the establishment and management of the APS. The 2023 Regulations prescribe details on the Code of Conduct; employer powers of Agency Heads; review of actions; the functions of the Australian Public Service Commissioner; the functions of the Merit Protection Commissioner; administrative arrangements and re-organisations; attachment of salaries to satisfy judgment debts; and protection of information.

The 2023 Regulations remake the *Public Service Regulations 1999* (‘1999 Regulations’) with minor streamlining, clarification and technical amendments. The amendments are intended to facilitate more efficient administration of the powers and functions in the 1999 Regulations.

- Streamlining amendments – removing explanatory provisions that are better placed in the explanatory statement or other guidance material, and removing unnecessary or otherwise redundant provisions.
- Clarifying amendments – redrafting provisions to deal with unintended interpretation ambiguities arising from the drafting of the 1999 Regulations.
- Technical amendments – applying consequential amendments that may be required because of the enactment or amendment of other legislation, such as the *National Anti-Corruption Commission Act 2022* and the *Fair Work Act 2009*.

The 2023 Regulations amend the definition of ‘outsider’, for the purposes of an Agency Head’s delegation power, to exclude members of the Australian Defence Force. This means that Agency Heads can delegate their functions or powers to members of the Australian Defence Force without first seeking the Australian Public Service Commissioner’s approval to do so. The definition of ‘outsider’ in the 1999 Regulations, in not excluding members of the Australian Defence Force, had created unnecessary administrative burden for Australian Public Service Agencies.

The 2023 Regulations amend the Australian Public Service Commissioner’s power to deliver and charge for the delivery of learning and development programs to non-APS government agencies, States and Territories is expressly dealt with by a new regulation. This is a measure to strengthen the legislative basis for the APS Academy delivering such programs.

The 1999 Regulations were due to sunset on 1 April 2019. The former Attorney-General (the Hon Christian Porter MP) extended the sunset date to 1 April 2021 to facilitate the former Government considering broader reforms to the regulations. The former Assistant Minister to the Attorney-General (Senator the Hon Amanda Stoker) extended the sunset date to 1 April 2023 for the purpose of considering broader reforms to the regulations. The Government does not wish to pursue a further extension of the sunset date. The regulations were due to sunset on 1 April 2023 and were therefore in need of remaking before that date.

The 2023 Regulations are a legislative instrument for the purposes of the *Legislation Act 2023*.

The 2023 Regulations commence on the day after the instrument is registered.

### **Details and Effect**

Details of the 2023 Regulations are set out in [Attachment A](#).

### **Consultation**

The Australian Public Service Commission has consulted extensively with the Merit Protection Commissioner.

The Australian Public Service Commission has consulted with the Department of Defence on the amendment to the definition of ‘outsider’ to carve out members of the Australian Defence Force.

A Regulation Impact Statement is not required because there is no regulatory impact on businesses, community organisations or individuals.

### **Authority**

Subsection 79(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Act contains various provisions setting out matters that are required or permitted by the Act to be prescribed (see e.g. subsection 22(4) and sections 28 and 33).

### **Explanation of the Provisions**

An explanation of the provisions is set out at [Attachment A](#).

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

A Statement of Compatibility with Human Rights for the regulations is at [Attachment B](#).

**Details of the *Public Service Regulations 2023***

**Part 1 – Preliminary**

Section 1 – Name

This section provides that the title of the regulations is the *Public Service Regulations 2023*.

Section 2 – Commencement

This section provides that the regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the instrument is made under the Act.

Section 4 – Schedule 1

This section provides that each instrument that is specified in Schedule 1 to the instrument is amended or repealed as set out in the applicable items in that Schedule, and any other item in that Schedule has effect according to its terms.

Section 5 – Definitions

This section defines the terms used in the regulations.

The definitions in the ‘Dictionary’ to the 1999 Regulations have been streamlined. Unlike in the 1999 Regulations, definitions in the Act are not replicated in these regulations. Paragraph 13(1)(b) of the *Legislation Act 2003* is to the effect that expressions used in a legislative instrument have the same meaning as in the enabling legislation as in force from time to time, unless a contrary intention appears. A legislative note to this section confirms that definitions used in these regulations, which are defined in the Act, are intended to have the same meaning as in the Act. Where a definition takes the meaning it has from another legislative instrument made under the Act, this has been specified – see e.g. the definition of ‘work-related qualities’, which is the same as the definition in the Commissioner’s Directions.

Some definitions in the ‘Dictionary’ of the 1999 Regulations have been removed from the regulations on the basis it is not necessary for the definitions to be included in the regulations.

‘Classification Rules’ has been defined to mean the Classification Rules as in force at the commencement of this instrument. The ‘Classification Rules’ have been defined by reference to specific rules because the regulations cannot incorporate the Classification Rules as in force from time to time. Further, definitions that were in the 1999 Regulations, but not in the ‘Dictionary’, have been moved to this section (see e.g., the definitions of ‘debtor’, ‘net salary’, ‘paying officer’ and ‘gross salary’, which are in this section, but which appeared in regulation 8A.1 of the 1999 Regulations).

## Section 6 – Meaning of *higher classification*

This section provides for how to determine whether an ongoing Parliamentary Service employee who is engaged as an ongoing APS employee has been engaged at a ‘higher classification’. The concept of ‘higher classification’ is relevant to Division 2 of Part 4 of the regulations, which deals with review of certain APS promotion decisions and engagement decisions, including decisions involving Parliamentary Service employees.

## **Part 2 – The Code of Conduct**

### Section 7 – Duty not to disclose information

The section is substantially the same as regulation 2.1 of the 1999 Regulations.

The section provides that an APS employee must not disclose information that the APS employee obtains or generates in connection with the APS employee’s employment except in certain circumstances, such as where the information is disclosed in accordance with an authorisation given by an Agency Head or is otherwise authorised by law.

Regulation 2.1 of the 1999 Regulations was introduced in 2006 to bring the law regulating disclosure of information by public servants into line with community expectations, and to address matters raised by the Federal Court decision in *Bennett v The President, Human Rights and Equal Opportunity Commission* [2003] FCA 143. In that case, the Federal Court held that a regulation prohibiting the disclosure of information by public servants, which was in broad terms, was invalid because it imposed an excessive burden on freedom of political communication. Regulation 2.1, in its form before the commencement of the 2023 Regulations, was drafted to replace the predecessor regulation, with a view to striking a balance between openness and transparency of government, and the public interest in maintaining the confidentiality of information held by government, which is required for government to work effectively. In *R v Tjanara Goreng-Goreng* (2008) 220 FLR 1, the ACT Supreme Court upheld the validity of regulation 2.1.

Minor changes have been made to the 1999 Regulations. The most material amendment is that the legislative note to subregulation 2.1(6) has not been included in the section. That note referred to the offence for the disclosure of information by an APS employee in section 70 of the *Crimes Act 1914*. The offence referred to in the note was repealed in 2018. It was effectively replaced with section 122.4 of the Criminal Code, which sets out an offence for the unauthorised disclosure of information by current and former Commonwealth officers.

This section does not affect the disclosure of information by an APS employee where this is expressly authorised under various Commonwealth laws, such as the *Archives Act 1983*, the *Freedom of Information Act 1982* and the *Public Interest Disclosure Act 2013*.

### Section 8 – Statutory office holders bound by Code of Conduct

This section is substantially the same as regulation 2.2 of the 1999 Regulations.

The purpose of the section is to set out the extent to which statutory office holders are bound by the Code of Conduct and how the Code of Conduct applies to these office holders. The section provides that a ‘statutory office holder’ is bound by the Code of Conduct only to the extent to which the statutory office holder is assisted by, or deals with, APS employees in a

supervisory capacity or another capacity related to the office holder's day-to-day working relationship with APS employees.

Minor changes have been made to the 1999 Regulations for the purposes of clarity. Subsection 8(2) clarifies how the Code of Conduct is to apply to statutory office holders and in particular, how references to 'APS employee' and 'APS employment' are to be read in applying the Code.

This section is made for the purposes of subsections 14(2A) and (3) of the Act. Those subsections are to the effect that the regulations may make provision in relation to the extent to which statutory office holders are bound by the Code of Conduct, and the meaning of 'statutory office holder' in this context.

#### Section 9 – Limitation on sanctions for breaches of Code of Conduct

The section is substantially the same as regulation 2.3 of the 1999 Regulations.

This section limits the value of a fine that an Agency Head may impose on an employee who is found to have breached the Code of Conduct. The limitation is no more than 2% of the APS employee's salary.

The section is made for the purposes of paragraph 15(1)(e) and subsection 15(2) of the Act. These sections are to the effect that the regulations may prescribe limitations on the power of an Agency Head to impose sanctions for a reduction in an employee's salary for an employee found to have breached the Code of Conduct.

### **Part 3 – APS employees**

#### *Division 1 – Employer powers etc. of Agency Heads*

#### Section 10 – Condition of engagement – health clearance

The section is substantially the same as regulation 3.1 of the 1999 Regulations.

The purpose of this section is to set out the powers of an Agency Head in respect of an APS employee whose engagement is subject to a condition dealing with health clearances. This section provides that for such APS employees, the Agency Head may direct the employee to undergo an examination by a medical practitioner and give the Agency Head a report of the examination.

The section is made for the purposes of paragraph 22(6)(e) and subsection 20(2) of the Act. Paragraph 22(6)(e) of the Act provides that the engagement of an APS employee may be subject to health conditions notified to the employee. Subsection 20(2) of the Act provides that an Agency Head has all the rights, duties and powers of an employer in respect of APS employees in the agency as are prescribed by the regulations.

#### Section 11 – Direction to attend medical examination

The section is substantially the same as regulation 3.2 of the 1999 Regulations.

The purpose of this section is to set out the powers of the Agency Head to direct that an APS employee in the Agency attend a medical examination. This section provides that an Agency Head may direct an APS employee to attend a medical examination in various circumstances, such as if the Agency Head believes that the state of health of the APS employee may be affecting the employee's work performance.

Minor changes have been made to the 1999 Regulations for the purposes of clarity. The section expressly provides that a single direction may be given requiring an APS employee to both undergo an examination by a medical practitioner and to provide a report of that examination to the Agency Head (subsection 11(3)). Further, the section also expressly provides that the Agency Head's power in this section to direct an APS employee to attend a medical examination is not intended to limit their authority to give any other lawful or reasonable direction (subsection 11(4)).

This section is made for the purposes of section 20(2) of the Act. Subsection 20(2) of the Act is to the effect that the regulations may prescribe Agency Head rights, duties and powers.

#### Section 12 – Engagement of SES employees for a specified term

The section is substantially the same as regulation 3.4 of the 1999 Regulations.

This section provides that an Agency Head may engage a person as an SES employee for a specified term if the term does not exceed 5 years. This section also provides that an Agency Head who engages a person for the purposes of this section must be reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009* ('FW Act').

Minor changes have been made to the 1999 Regulations. A new legislative note has been added (see Note 2 to subsection 12(1)), which explains that the Commissioner's Directions make provision in relation to engagement and promotion of APS employees). Subsection 12(4) has been added to account for subsection 333E(1) of the FW Act, which was introduced into the FW Act in 2022 (by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*). Section 333E(1) will commence by 6 December 2023. A legislative note provides that subsection 333E(1) of the FW Act is about limitations on fixed term contracts.

This section is made for the purposes of subsections 22(4) and (5) of the Act. These subsections are to the effect that the regulations may prescribe the circumstances in which persons may be engaged as an APS employee for a specified term, for the duration of a specified task, or for duties that are irregular or intermittent, and the circumstances in which such an engagement may be extended.

#### Section 13 – Engagement of non-ongoing non-SES employees

The section is substantially the same as regulation 3.5 of the 1999 Regulations.

The purpose of this section is to set out the circumstances in which a person may be engaged as a non-ongoing non-SES employee for a specified term or for the duration of a specified task. The section provides that where an Agency Head engages a person under a contract of employment as a non-ongoing non-SES employee for the duration of a specified task, the Agency Head must, at the time of the engagement, be able to reasonably estimate the duration of the task and be satisfied that the services of the person are unlikely to be required after the task is complete.

The section also provides that an Agency Head may engage a person as a non-ongoing non-SES employee for a specified term in certain circumstances, including where the duties of the employment are to be performed by the person only for a limited period and the performance of those duties by the person is unlikely to be required after that period. Subparagraph 13(5)(b)(ii) provides that if the person is engaged for prescribed reasons before

the commencement of the FW Act amendments, the period of engagement must not be more than 18 months.

The section provides that where an Agency Head engages a person for the duration of a specified task or for a specified term, the Agency Head must be reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the FW Act.

This section, like section 12, is made for the purposes of subsection 22(4) of the Act.

#### Section 14 – Suspension from duties

The section is substantially the same as regulation 3.10 of the 1999 Regulations.

The purpose of this section is to set out the circumstances in which an Agency Head may suspend an APS employee and when a suspension may be without remuneration. It provides that an Agency Head may suspend an APS employee if the Agency Head believes on reasonable grounds that the employee has, or may have, breached the Code of Conduct; and the employee's suspension is in the public, or the Agency's, interest.

This section is made for the purposes of section 28 of the Act. Section 28 of the Act is to the effect that the regulations may deal with suspension from duties for APS employees, with or without remuneration.

#### Section 15 – Termination of employment

There was no equivalent to this section in the 1999 Regulations.

The purpose of this section is to provide that a ground for termination of an APS employee's employment is that an investigation report for the purposes of the *National Anti-Corruption Commission Act 2022* recommends termination of the employee.

This section is made for the purposes of paragraph 29(3)(h) and subsection 29(4) of the Act. Paragraph 29(3)(h) and subsection 29(4) are to the effect that an ongoing or non-ongoing APS employee may be terminated for a ground prescribed by the regulations.

#### *Division 2 – Miscellaneous*

#### Section 16 – Knowledge of Act, regulations and Commissioner's Directions

The section is substantially the same as regulation 3.16 of the 1999 Regulations. The section provides that APS employees must inform themselves about the Act, the regulations and the Commissioner's Directions.

### **Part 4 – Review of actions**

#### *Division 1 – Statement of intent and outline*

#### Section 17 – General policy about review

The section is substantially the same as regulation 5.1 of the 1999 Regulations.

The purpose of the section is to set out the general policy about review of actions. The section provides, among other things, that it is government policy that agencies should achieve and maintain workplaces that encourage productive and harmonious working environments, and that employees' concerns are to be dealt with quickly, impartially and fairly.

Minor changes have been made to the 1999 Regulations. Subregulation 5.1(5) has not been retained in this section. That subregulation provided that nothing in the relevant Part is intended to prevent an application for review from being resolved by conciliation or other means. An equivalent subregulation has not been retained on the basis this is not necessary. It is clear that review processes may involve alternative dispute resolution processes, such as resolution by conciliation (see subsection 17(4)).

#### Section 18 – Review of APS actions – certain promotion decisions and engagement decisions

The section is substantially the same as regulation 5.3 of the 1999 Regulations.

This section provides that Division 2 of Part 4 deals with review of certain promotion and engagement decisions to be made to the Merit Protection Commissioner, for review by a Promotion Review Committee ('PRC').

The legislative note to regulation 5.3 has not been retained in this section. A decision by a PRC continues to be binding on an Agency Head (see subsection 35(1)).

#### Section 19 – Review of other APS actions

The section is substantially the same as regulation 5.4 of the 1999 Regulations.

This section provides that Division 3 of Part 4 deals with applications for primary and secondary review of APS actions.

Minor changes have been made to the 1999 Regulations. Paragraph 18(b) of the section clarifies the scope of APS actions that may be the subject of an application for secondary review as capturing applications where the relevant Agency Head told an employee under section 40 that the action is not a reviewable action.

*Division 2 – Review of certain APS promotion decisions and engagement decisions (including decisions involving Parliamentary Service employees)*

#### Section 20 – Application of this Division

The section is substantially the same as regulation 5.6 of the 1999 Regulations.

This section provides that Division 2 of this Part applies to certain APS promotion decisions and engagement decisions, including decisions involving Parliamentary Service employees. Generally speaking, this section provides that a promotion decision is made where the Agency Head promotes an ongoing APS employee, and an engagement decision is made where the Agency Head engages an ongoing Parliamentary Service employee.

The application of Division 2 of Part 4 to an 'engagement decision' is intended to encourage mobility between Parliamentary Service employees and APS employees. Subsection 26(1) of the *Parliamentary Service Act 1999* has the same purpose.

#### Section 21 – Entitlement to review – promotion decisions

The section is substantially the same as regulation 5.7 of the 1999 Regulations.

This section provides for the promotion decisions for which an ongoing APS employee or ongoing Parliamentary service employee is entitled to apply, to the Merit Protection Commissioner, for review by a PRC. Generally speaking, these are decisions in relation to an application by an ongoing APS or Parliamentary Service employee to be employed at a



higher classification in the APS, where the Agency Head has decided to promote an ongoing APS employee. Section 6 sets out the meaning of higher classification for ongoing Parliamentary Service employees.

#### Section 22 – Entitlement to review – engagement decisions involving Parliamentary Service employees

The section is substantially the same as regulation 5.7A of the 1999 Regulations.

This section provides for the engagement decisions to which an ongoing APS employee or ongoing Parliamentary Service employee are entitled to apply to the Merit Protection Commissioner, for review by a PRC. Generally speaking, these are decisions in relation to an application by an ongoing APS or Parliamentary Service employee to be employed at a higher classification in the APS, where the Agency Head has decided to engage an ongoing Parliamentary Service employee at a higher classification (see section 20).

#### Section 23 – Grounds for review

The section is substantially the same as regulation 5.8 of the 1999 Regulations.

This section provides that a promotion decision or engagement decision may only be reviewed under this Division on the grounds of merit. A legislative note provides that this is consistent with the APS Employment Principle that engagement and promotion decisions are based on merit.

#### Section 24 – Application for review

The section is substantially the same as regulation 5.9 of the 1999 Regulations.

The purpose of this section is to provide for how an application for review of a promotion or engagement decision to the Merit Protection Commissioner is to be made, and the effect of such a decision. The section provides that an application must be in writing and received by the Merit Protection Commissioner within a specified time period. The section also provides that making an application for review of a promotion or engagement decision operates as a stay on the decision.

Minor changes have been made to simplify the drafting. The section deals with promotion and engagement decisions together.

#### Section 25 – Appointment of PRC

The section is substantially the same as regulation 5.10 of the 1999 Regulations.

The purpose of this section is to provide for when a PRC is to be appointed to deal with an application for review of a promotion or engagement decision. The section provides, among other things, that the Merit Protection Commissioner is to consider applications for review and, if necessary, appoint a PRC to deal with them. Minor changes have been made to the 1999 Regulations to clarify that it is not necessary for separate PRCs to be appointed to deal with applications by ongoing APS employees, and applications by ongoing Parliamentary Service employees. The one PRC may deal with applications from both kinds of employees for review of the same promotion decision or engagement decision.

#### Section 26 – Constitution of PRC

The section is substantially the same as regulation 5.11 of the 1999 Regulations.

The purpose of this section is to provide for how a PRC is to be constituted. The section provides, among other things, that a PRC must comprise: a Convenor and an APS employee nominated by the Merit Protection Commissioner; and one APS employee nominated by the relevant Agency Head. It also provides for how a PRC is to be reconstituted if a member ceases to act as a member.

#### Section 27 – Statements by parties

The section is substantially the same as regulation 5.12 of the 1999 Regulations.

This section provides that the Merit Commissioner may invite an applicant for review of a promotion or engagement decision and the person promoted or engaged to give the Merit Protection Commissioner a statement setting out their claim. The section also provides for the timeframe for providing a statement, and that where a statement is not provided within the relevant time period, the PRC may consider the application without the statement.

Minor changes have been made to the 1999 Regulations. The most material amendment is that subregulation 5.12(1) provided that an applicant for review and the person promoted or engaged *must* give the Merit Protection Commissioner a statement in writing. This section confers a discretion on the Merit Protection Commissioner to invite persons to give a statement.

#### Section 28 – Frivolous or vexatious applications

The section is substantially the same as regulation 5.13 of the 1999 Regulations.

This section provides that the PRC may refuse to consider an application for review on the basis it is frivolous or vexatious.

#### Section 29 – PRC procedures – minimum requirements

The section is substantially the same as regulation 5.14 of the 1999 Regulations.

This section provides for the minimum procedural requirements that a PRC must meet in conducting a review, including that the review must have regard to procedural fairness, and be conducted in private and quickly, and with as little formality as a proper consideration of the matter allows. This section also provides that a person appearing before a PRC must do so without representation, unless the Merit Protection Commissioner decides otherwise.

#### Section 30 – PRC procedures – Merit Protection Commissioner’s instructions

The section is substantially the same as regulation 5.15 of the 1999 Regulations.

This section provides that the Merit Protection Commissioner must issue instructions about the procedures to be followed by a PRC in performing its functions, with which a PRC must comply.

#### Section 31 – Assistance to PRC

The section is substantially the same as regulation 5.16 of the 1999 Regulations.

This section provides that the Merit Protection Commissioner must take all reasonable steps to ensure that staff are available to assist a PRC.

### Section 32 – Requirement to provide information or documents

The section is substantially the same as regulation 5.17 of the 1999 Regulations.

This section provides that a PRC may require an Agency Head to give the PRC stated information or documents relevant to the review at or within the time stated by the PRC.

### Section 33 – Conduct of review by PRC

The section is substantially the same as regulation 5.18 of the 1999 Regulations.

The purpose of this section is to provide for how a PRC is to assess the relative merits of the person promoted or engaged and each applicant for review, and the PRC's powers in relation to the application for review.

The decision is to be made *primarily* on the basis of an assessment of the relevant merits of the person promoted or engaged and each applicant for review, but this is not the *sole* basis on which the decision may be made. The PRC may also consider other relevant matters such as an applicant's availability, or adverse information related to integrity. This is consistent with the Commissioner's Directions, which provide that when making a merit-based decision using a selection process, if any eligible applicants are otherwise equal on merit, secondary considerations may be taken into account.

Minor changes have been made to the 1999 Regulations to deal with applicants for review that are APS employees separately from applicants for review that are Parliamentary Service employees because decisions in respect of applicants who are Parliamentary Service employees are not intended to be binding on the Agency Head (by contrast to decisions in relation to APS employees) – see section 35.

### Section 34 – Non-agreement on decision or recommendation by PRC

The section is substantially the same as regulation 5.19 of the 1999 Regulations.

The purpose of this section is to provide for how a PRC is to deal with the circumstance where not all members of the PRC agree on a decision or recommendation in relation to an application for review. This section provides that where 2 members agree on a decision, the decision is taken to be the decision of the PRC, and where there is no agreement between the members, the Convenor's decision is taken to be the decision.

Minor changes have been made to the 1999 Regulations to deal with decisions of a PRC separately from recommendations of a PRC.

### Section 35 – Effect of PRC decision or PRC recommendation

The section is substantially the same as regulation 5.20 of the 1999 Regulations.

The purpose of the section is to provide for the effect of a PRC decision or recommendation. The section provides that where an application for review is made by an APS employee and the PRC conducts a review, the PRC may make a decision that is binding on the Agency Head of the responsible Agency. By contrast, where an application for review is made by a Parliamentary Service employee, the PRC may only make a *recommendation* that is not binding on the Agency Head. Section 33 of the Act is to the effect that the regulations may only provide for binding decisions to be made in respect of APS employees who apply for review of an action that relates to their APS employment.

### *Division 3 – Review of other APS actions*

#### Subdivision A – Reviewable actions

##### Section 36 – Entitlement to review

The section is substantially the same as regulation 5.22 of the 1999 Regulations.

This section sets out the circumstances in which a non-SES employee is entitled to review of an APS action that relates to their APS employment, including where the action is by an Agency Head or an APS employee and is a ‘reviewable action’ for the purposes of section 36. Minor changes have been made to the 1999 Regulations to clarify that an affected employee ceases to be entitled to review after an application is made where the action ceases to be a reviewable action (for the purposes of section 36).

This section is made for the purposes of subsections 33(1) and (2) of the Act. These subsections are to the effect that the regulations may provide for the circumstances in which an APS employee is entitled to review of any APS action that relates to their employment.

##### Section 37 – What APS actions are reviewable actions

The section is substantially the same as regulation 5.23 of the 1999 Regulations.

The purpose of this section is to set out the circumstances in which an APS action is a reviewable action. ‘Reviewable action’ effectively means any APS action that is not excluded from being a reviewable action. Subsection 37(2) includes a table of actions that are not, or that cease to be, reviewable actions. The table reflects the items that were listed in Sch 1 to the 1999 Regulations. Subsections 37(3) and (4) provides for various additional APS actions that are not or may cease to be reviewable actions, such as where the affected employee has applied to a court or tribunal for review of the action, or where the application made by the affected employee is misconceived or lacking in substance. Subsection 37(5) provides for APS actions that are not or cease to be reviewable actions in particular circumstances, such as where an application for primary review under subsection 38(1) is not made within 120 days of the APS action occurring.

Minor changes have been made to the 1999 Regulations to streamline the drafting. This section is made for the purposes of subsection 33(1) of the Act, which has the effect summarised above.

Broadly, the nature and scope of the exceptions in subsection 37(4) is to ensure the effective allocation of government resources for:

- matters involving decisions where there is no appropriate remedy involving extensive inquiry processes and
- decisions that have such a limited impact that the costs of review cannot be justified.

These are situations where the availability of merits review may not be appropriate, consistent with clauses 4.49 to 4.57 of the ARC guidance document *What decisions should be subject to merit review?*

Each of the following exceptions contribute to the above objective.

*The application is misconceived, lacking in substance, frivolous, or vexatious (ss 37(4)(a)–(b)):*

‘Misconceived’ refers to those situations where an applicant is mistaken in their views, have misinterpreted or failed to understand a matter or have put a false construction on a matter. ‘Lacking in substance’ refers to applications for review that lack essential elements for example do not identify an action or decision. ‘Frivolous’ is generally taken to mean that the case is ‘obviously unsustainable’. ‘Vexatious’ means an application made for a collateral purpose, as a means of obtaining some advantage for which the Review of Actions scheme was not designed. In other words this means an application made for some other purpose (for example, as a bargaining chip). Applications that meet one of these criteria may involve decisions where there is no appropriate remedy, or have such limited impact that the costs of review cannot be justified.

*The affected employee (ss 37(4)(c)-(e)):*

- has previously applied for review of the action under Division 3 (Review of other APS actions) (s 37(4)(c)). This provision relates only to applications made seeking review of an action that has already been subject of review.
- has applied to have the action reviewed under Division 2 (Review of certain APS promotion decisions and engagement decisions) (s 37(4)(d)). This provision excludes from review, under Division 3 of the 2023 Regulations, those actions that comprise a promotion decision where the applicant has applied for a promotion review by a promotion review committee under Division 2 of the 2023 Regulations.
- has applied, or could apply, to have the action reviewed by an external review body, and review by the external review body would be more appropriate than review under Division 3 (Review of other APS actions) (s 37(4)(e)). This relates to applications for review of actions where the subject matter of the application falls within the jurisdiction of a specialist and expert review body that exists to consider such complaints. This can include actions about privacy (the Privacy Commissioner) and discrimination on a number of grounds, including sex, race and disability (the Australian Human Rights Commission).

It would be an ineffective use of Government resources to duplicate a review process that has already occurred or is ongoing. For example, if the affected employee has already applied for review of the action, including under the Act, or by another review body. The Review of Actions scheme should not provide employees with multiple opportunities to appeal the same action. Further, if the affected employee has already applied for review of the action, reviewing the action again may not be an appropriate route to remedy.

Subsection 37(4)(c) uses the words ‘the action’ and it cannot prevent an APS employee from making an application for review in relation to a different action. In this regard note subsection 38(3)(c) provides for a direct application for primary review to be made to the Merit Protection Commissioner where the applicant is claiming the action for which review is

sought is victimisation or harassment for having made a previous application for review of a different action.

*The affected employee does not have sufficient direct personal interest in review of the action or review, or further review, of the action is not otherwise justified in all the circumstances (ss 37(4)(f)–(g)):*

Subsection 37(4)(f) relates to complaints about an action or decision taken in relation to another APS employee that has marginal or no effect on the APS employee who has made the complaint.

Subsection 37(4)(f) is necessary to ensure the objective of the effective allocation of government resources, as expressed above. Section 33(1) of the Act is too broad to achieve this objective. A decision to transfer another employee into an employee's team may be interpreted to 'relate' to the second employee's employment, by virtue of the employees being employed now within the same team.

Subsection 37(4)(f) is necessary to create a closer nexus between the employee applying for review, and the action under review. The Review of Actions scheme is not intended to provide open standing to employees to appeal decisions made about other employees, which may not directly affect them but may be broadly interpreted to 'relate' to their employment, within the meaning of section 33(1) of the Act. A provision such as subsection 37(4)(f) of the Regulations is required to provide further clarity that the review applicant needs to be seeking review of something in which they have a direct personal interest, rather than for example seeking a review of an action about how an agency handled allegations that a colleague was harassed, or where the applicant is not affected by an agency's decision that another employee did not breach the APS Code of Conduct.

In relation to subsection 37(4)(g), the Merit Protection Commissioner published and made available on its website, a Policy on the exercise of the discretion in subsection 37(4)(g) and its predecessor in the 1999 Regulations 5.23(3)(g), prior to 2017. The drafting of 37(4)(g) and 5.23(3)(g) is the same. The Policy sets out a number of factors to which delegates of the Merit Protection Commissioner and agency decision makers may have regard when they consider and use the discretion.

Circumstances in which this provision could apply include: the matter has already been reviewed but the review applicant is dissatisfied and has re-phrased their old complaint as if it were a new and different complaint, the applicant does not respond to a request for further information about why the review is sought, the outcome sought by the review applicant has already been achieved or has been overtaken by another event or decision or that event or decision nullifies the original decision.

It is generally not appropriate to exercise this discretion for the following reasons: the delegate has formed a preliminary view, without reviewing the action, that the merits of the review applicant's case are weak; the decision for which review is being sought was consistent with the agency's policy (for example, a manager's discretion to refuse a leave without pay application).

If an agency decision maker makes a decision under subsection 37(4)(g) then the affected employee is entitled by virtue of section 43 of the 2023 Regulations and its predecessor in the

1999 Regulations to apply to the Merit Protection Commissioner for secondary review of the action.

A review applicant who is dissatisfied with the outcome of their review may seek relief from the Federal Courts under the *Administrative Decisions (Judicial Review) Act 1977*.

Applications that meet one of these criteria may involve decisions where there is no appropriate remedy or that have such limited impact that the costs of review cannot be justified.

#### Subdivision B – Primary review

##### Section 38 – Application for primary review

The section is substantially the same as regulation 5.24 of the 1999 Regulations.

The purpose of this section is to set out the circumstances in which, and how, an affected employee may apply for primary review of an APS action. The section provides, among other things, that an affected employee may apply to the relevant Agency Head, and that the application must briefly state why the review is sought and the outcome sought, if any.

##### Section 39 – Referral to Merit Protection Commissioner

The section is substantially the same as regulation 5.25 of the 1999 Regulations.

The purpose of this section is to set out the circumstances in which an Agency Head may refer an application for primary review to the Merit Protection Commissioner. The section provides examples of where an Agency Head may refer an application to the Merit Protection Commissioner, such as where the Agency Head was involved in the action.

##### Section 40 – Notice that APS action is not a reviewable action

The section is substantially the same as regulation 5.26 of the 1999 Regulations.

This section provides that where the view is formed that an affected employee has made an application for review of an APS action that is not a reviewable action, the person who would have conducted the review must give the employee notice of their view that the action is not a reviewable action.

##### Section 41 – Conduct of review by relevant Agency Head

The section is substantially the same as regulation 5.27 of the 1999 Regulations.

The purpose of this section is to provide for how an Agency Head may deal with an application for primary review of an APS action made to them. This section provides, among other things, that an Agency Head may confirm or vary the APS action, or set aside the action and substitute a new action. The section also provides that the Agency Head must provide the employee with reasons for the decision on the application.

##### Section 42 – Conduct of review by Merit Protection Commissioner

The section is substantially the same as regulation 5.28 of the 1999 Regulations.

The purpose of this section is to provide for how the Merit Protection Commissioner may deal with an application for primary review of an APS action made to the Merit Protection Commissioner or referred to them. The section provides, among other things, that the Merit

Protection Commissioner must conduct a de novo review of the action, make a recommendation to the Agency Head about the action, provide reasons for that recommendation and tell the affected employee of the recommendation and reasons for it.

A new legislative note in this section provides that a recommendation of the Merit Protection Commissioner is not binding on the Agency Head.

Minor changes have been made to the 1999 Regulations. Regulation 42(2)(a) provides that the Merit Protection Commissioner must conduct a de novo review of the action. Regulation 5.28 did not expressly provide for de novo review.

The nature of a review conducted by the Merit Protection Commissioner was considered by the Federal Magistrates Court in *Brian Walworth v Merit Protection Commissioner & Anor (No 2)* [2007] FMCA 530. The amendment to regulation 5.28 is to confirm, if necessary, that the Merit Protection Commissioner is to deal with an application for review by conducting a de novo review. That is, the Merit Protection Commissioner may conduct their own investigations into matters of fact and reconsider the merits and appropriateness of the action.

Consistent with the above approach, changes have been made throughout the regulations to clarify that the review of actions and determinations provided for by the regulations is generally to be de novo review (see e.g. sections 45, 73, 76 and 81).

#### Subdivision C – Secondary review

##### Section 43 – Application for secondary review

The section is substantially the same as regulation 5.29 of the 1999 Regulations.

The purpose of this section is to set out the circumstances in which, and how, an affected employee may apply for secondary review of an APS action. The section provides, among other things, that an application for secondary review must be made through the relevant Agency Head and state briefly why the review is sought.

##### Section 44 – Agency Head to give documents to Merit Protection Commissioner

The section is substantially the same as regulation 5.30 of the 1999 Regulations.

This section provides that where an application is made for secondary review of an APS action, that the Agency Head must give the Merit Protection Commissioner the application, and must give the Merit Protection Commissioner and the relevant employee any relevant documents relating to the primary review of the action.

##### Section 45 – Conduct of review by Merit Protection Commissioner

The section is substantially the same as regulation 5.31 of the 1999 Regulations.

The purpose of this section is to provide for how the Merit Protection Commissioner may deal with an application for secondary review of an APS action made or referred to them. The section provides, among other things, that the Merit Protection Commissioner must conduct a de novo review of the action, make a recommendation to the Agency Head about the action, provide reasons for that recommendation and tell the affected employee of the recommendation and reasons for it.

Minor changes have been made to the 1999 Regulations to expressly provide that the Merit Protection Commissioner's review is to be de novo – see discussion in relation to section 42.



## Subdivision D – Action following recommendation to Agency Head

### Section 46 – Action by Agency Head

The section is substantially the same as regulation 5.32 of the 1999 Regulations.

The purpose of this section is to provide for how an Agency Head is to deal with a recommendation of the Merit Protection Commissioner that results from a review of an APS action under sections 42 or 45. The section provides, among other things, that an Agency Head who receives a recommendation resulting from a primary or secondary review by the Merit Protection Commissioner may confirm or vary the action, or set aside the action and substitute a new action. The section also provides that the Agency Head must tell the affected employee and the Merit Protection Commissioner in writing of their decision and their reasons for making that decision.

Minor changes have been made to the 1999 Regulations. Subregulation 5.32(1) had provided that an Agency Head that receives a recommendation must, ‘as soon as possible’, consider the recommendation and make a decision about the recommendation. The change in language from ‘as soon as possible’ to ‘as soon as reasonably practicable’ is intended to provide a greater degree of latitude to Agency Heads. That said, recommendations are still to be dealt with appropriately and expediently. It is expected that recommendations will generally be dealt with within 21 days, but this period may be longer, depending on matters such as the Christmas shutdown period or the need to seek legal advice for a more complex recommendation.

## Subdivision E – Other provisions about review

### Section 47 – Review procedures – minimum requirements

The section is substantially the same as regulation 5.33 of the 1999 Regulations.

The purpose of this section is to provide for the minimum procedural requirements for a primary or secondary review of an APS action. The section provides that a review under Division 3 (Review of other APS actions) must, among other things, have regard to procedural fairness, and be conducted in private and quickly. This section also provides that a person appearing before the Merit Protection Commissioner must do so without representation, unless the Merit Protection Commissioner decides otherwise. This section is not intended to preclude a person from seeking legal or other assistance in preparing documents for the review.

### Section 48 – Requirement to provide information or documents

The section is substantially the same as regulation 5.35 of the 1999 Regulations.

This section gives the Merit Protection Commissioner the power to obtain information or documents relevant to a review of an APS action from an Agency Head or an APS employee.

### Section 49 – Making of application does not operate as a stay

The section is substantially the same as regulation 5.36 of the 1999 Regulations.

This section provides that the making of an application for review of an APS action does not operate to stay the APS action (unlike the position with an application for review of a promotion or engagement decision – see subsection 24(3)).

## **Part 5 – The Australian Public Service Commissioner – functions**

### *Division 1 – Inquiries into alleged breach of Code of Conduct by Agency Head*

#### Section 50 – Report on result of inquiry – prescribed Statutory Agencies

The section is substantially the same as regulation 6.2 of the 1999 Regulations.

This section is made for the purposes of paragraph 41(2)(m) and paragraph 41A(2)(c) of the Act. Paragraph 41(2)(m) of the Act provides that the Commissioner’s functions include inquiring into alleged breaches of the Code of Conduct by Agency Heads in accordance with section 41A of the Act. Paragraph 41A(2)(k) of the Act provides that if an Agency is prescribed by the regulations, the Commissioner must provide a report to Presiding Officers (i.e. the President of the Senate and the Speaker of the House of Representatives).

This section prescribes four Statutory Agencies for the purposes of the Australian Public Service Commissioner’s powers to inquire into alleged breaches of the Code of Conduct by an Agency Head. These statutory agencies are:

- the Statutory Agency declared by paragraph 40(1A)(a) of the *Auditor-General Act 1997*;
- the Statutory Agency declared by paragraph 16(4)(a) of the *Australian Bureau of Statistics Act 1975*;
- the Statutory Agency declared by paragraph 31(2)(a) of the *Ombudsman Act 1976*;
- the Statutory Agency declared by paragraph 4A(2)(a) of the *Taxation Administration Act 1953*.

#### Section 51 – Circumstances in which Australian Public Service Commissioner may decline to conduct, or discontinue, inquiry

The section is substantially the same as regulation 6.3 of the 1999 Regulations.

This section provides that the Australian Public Service Commissioner may decide to decline to conduct or discontinue an inquiry on the basis that doing so is not ‘justified in all the circumstances’. The section sets out the matters to which regard may be had in assessing whether conducting the inquiry is ‘justified in all the circumstances’. These matters are: whether the allegation is vexatious, frivolous, misconceived or lacking in substance; whether sufficient detail has been provided about the allegation; whether the allegation refers to specific decisions or actions by the Agency Head; whether the allegation identifies conduct which could constitute a breach of the Code of Conduct; whether the allegation relates to a decision properly taken or to policy properly adopted by the Agency Head and whether the cost of conducting an inquiry is justified in the circumstances.

Minor changes have been made to the 1999 Regulations. Subregulation 6.3(1) provided that the Australian Public Service Commissioner could decline to conduct or discontinue an inquiry where doing so is ‘not in the public interest’. Amending the language from ‘not in the public interest’ to ‘would not be justified in all the circumstances’ is not intended to affect the standard of satisfaction required of the Commissioner. Rather, this is a streamlining amendment to align the language used throughout this Part 5. In the 1999 Regulations, ‘would not be justified in all the circumstances’ and ‘not in the public interest’ were used variously in regulations dealing with deciding to decline to conduct or continue an inquiry, despite the intention being that the decision-maker would be subject to the same standard in

making these decisions (compare, e.g., subregulation 6.1B(4) of the 1999 Regulations with subregulation 6.3(1)).

This section is made for the purposes of paragraphs 41A(3)(a) and (b) of the Act. Those paragraphs provide that the regulations may prescribe the circumstances in which the Commissioner may decline to conduct an inquiry into an alleged breach of the Code of Conduct by an Agency Head, or discontinue such an inquiry without making a report.

*Division 2 – Inquiries into alleged breach of Code of Conduct by APS employee or former APS employee*

Section 52 – Basic requirements for procedures for determining alleged breach of Code of Conduct by APS employee or former APS employee

The section is substantially the same as regulation 6.4 of the 1999 Regulations.

This section sets out the basic procedural requirements that must be complied with by the Australian Public Service Commissioner in promulgating written procedures for inquiring and determining whether an APS employee or former APS employee has breached the Code of Conduct. This section provides that the written procedures must deal with various things, including requiring that the relevant employee is given a reasonable opportunity to make a statement in relation to the alleged breach, and requiring a written record to be prepared stating whether it has been determined that the employee has breached the Code of Conduct.

This section is made for the purposes of paragraph 41B(3)(a) of the Act. That paragraph provides that the Commissioner must establish written procedures for inquiring into and determining whether an APS employee or former APS employee has breached the Code of Conduct and that these procedures must comply with the requirements prescribed by the regulations.

Section 53 – Circumstances in which Australian Public Service Commissioner may discontinue inquiry

The section is substantially the same as regulation 6.5 of the 1999 Regulations.

This section provides that the Australian Public Service Commissioner may discontinue an inquiry into an alleged breach of the Code of Conduct if the Commissioner reasonably believes that to continue the inquiry would not be appropriate in all the circumstances.

This section is made for the purposes of subsection 41B(10) of the Act. That subsection provides that the regulations may prescribe the circumstances in which the Commissioner may discontinue an inquiry into an alleged breach of the Code of Conduct by an APS employee or former APS employee.

*Division 3 – Inquiries into public interest disclosures relating to alleged breaches of Code of Conduct*

Section 54 – Inquiries into public interest disclosures relating to alleged breaches of the Code of Conduct

The section is substantially the same as regulation 6.1B of the 1999 Regulations.

This section provides for the circumstances in which the Australian Public Service Commissioner may inquire into a public interest disclosure and decline to conduct or

discontinue such an inquiry. The Commissioner may inquire into a disclosure if the Commissioner is satisfied that it would be ‘inappropriate’ for the disclosure to be made to the Agency Head, or if the disclosure was made to the Agency Head and ‘not satisfactorily handled by the Agency Head’. The Commissioner may decide to decline to inquire or discontinue an inquiry if the Commissioner concludes that the inquiry would ‘not be justified in all the circumstances’. This section sets out a range of matters to which the Commissioner may have regard in determining this such as whether the disclosure would be more appropriately dealt with by other means and other matters similar to those set out in section 51.

Minor changes have been made to the 1999 Regulations. Subregulation 6.1B(3) provided that the Commissioner could inquire into the disclosure if the disclosure was made to an Agency Head and the discloser was ‘not satisfied with the outcome that followed the disclosure’. This has been amended to require that the Commissioner believes that the disclosure ‘was not satisfactorily handled’. This amendment has been made to avoid the Commissioner having to deal with disclosures where the discloser does not have reasonable grounds for their dissatisfaction with the outcome.

This section is made for the purposes of paragraph 41(2)(o) of the Act. That section provides that the Australian Public Service Commissioner’s functions include inquiring, subject to the regulations, into public interest disclosures to the extent those disclosures relate to alleged breaches of the Code of Conduct.

#### *Division 4 – Other functions*

##### Section 55 – Inquiries into Merit Protection Commissioner’s behaviour

The section is substantially the same as regulation 6.1 of the 1999 Regulations.

This section provides for the circumstances in which the Australian Public Service Commissioner may inquire into alleged breaches of the Code of Conduct by the Merit Protection Commissioner, and the circumstances in which the Commissioner may decline to conduct, or discontinue, an inquiry. The Commissioner is able to decline to conduct or discontinue an inquiry where the Commissioner considers that conducting or continuing the inquiry would not be ‘justified in all the circumstances’. In making this assessment, the Commissioner may have regard to various matters, which are the substantially the same as the matters set out in section 51.

This section provides that where the Australian Public Service Commissioner inquires into an alleged breach of the Code of Conduct by the Merit Protection Commissioner, the Australian Public Service Commissioner must report to the Presiding Officers on the results of the inquiry. The only sanction available in response to an alleged breach by the Merit Protection Commissioner is removal from office. Requiring that the report be provided to the Presiding Officers is consistent with the independence of the Merit Protection Commissioner and the fact that the Merit Protection Commissioner may only be removed by the Governor-General after an address from both Houses of Parliament (see subsection 54(1) of the Act).

Minor changes have been made to the 1999 Regulations. Regulation 6.1 did not set out the circumstances in which the Commissioner may decline to conduct or discontinue an inquiry in relation to alleged breaches of the Code by the Merit Protection Commissioner. This is

inconsistent with the other powers in relation to conducting an inquiry, which all include a power to decline to conduct or to discontinue an inquiry (see eg subregulations 6.1A(2)-(3), 6.1B(4), 6.3(1)-(2), 6.5). The section therefore, consistent with the other similar powers, specifies that the Commissioner may decline to conduct an inquiry or discontinue an inquiry into the Merit Protection Commissioner's behaviour, and the matters to which the Commissioner may have regard in making this decision.

This section is made for the purposes of paragraph 41(2)(p) of the Act. That paragraph relevantly provides that the Commissioner has such other functions as are conferred on them by the regulations.

#### Section 56 – Inquiries into alleged breaches of Code of Conduct by statutory office holders

The section is substantially the same as regulation 6.1A of the 1999 Regulations.

This section confers on the Australian Public Service Commissioner the function to inquire into alleged breaches of the Code of Conduct by a statutory office holder. The section also provides for the circumstances in which the Australian Public Service Commissioner may decline to conduct or discontinue an inquiry into an alleged breach of the Code of Conduct by a statutory office holder. The section sets out various matters to which the Commissioner must have regard for this purpose, including whether the subject matter of the inquiry is addressed in another law and existing reporting and inquiry mechanisms that apply to the statutory office holder. These mandatory relevant considerations are intended to reflect the fact that statutory office holders should generally be dealt with under their specific enabling legislation.

The section also provides for matters in relation to the process for an inquiry into alleged breaches of the Code of Conduct by statutory office holders, including the persons to whom the Commissioner must tell the results of the inquiry. For example, if the Australian Public Service Commissioner is satisfied that the results of the inquiry are sufficiently serious, the Commissioner must tell the Agency Minister or, if applicable, the Presiding Officers, the results of the inquiry.

This section is made for the purposes of paragraph 41(2)(p) of the Act. That section relevantly provides that the Commissioner's functions include such other functions as are conferred on the Commissioner by the regulations.

#### Section 57 – Delivery of learning and development programs on request to Commonwealth entities and State or Territory authorities or bodies

This section has no equivalent in the 1999 Regulations.

The section provides that it is a function of the Australian Public Service Commissioner to deliver learning and development programs, upon request, to a Commonwealth entity, State or Territory, Department of State, or authority or body of a State or Territory. This section also provides that the Australian Public Service Commissioner is authorised to charge a fee for the performance of their function to deliver learning and development programs.

The section clarifies the legislative basis for the APS Academy delivering its programs to a range of entities and bodies for a fee. The APS Academy was established in July 2021 as a division of the Australian Public Service Commission. The Academy was established in light of various government reviews and recommendations. A 2019 Independent Review of the

APS suggested that there is little guidance as to what is essential or core to being a great public servant. The former Government's APS reform agenda 'Delivering for Australians' recommended the development of an APS Learning and Development Strategy to deepen the capability and expertise of the APS. In July 2020, the Australian Public Service Commissioner initiated a review to consider the future role of the Centre for Leadership and Learning, which was the Australian Public Service Commission's learning offering at that time. Following this, the APS Academy was established as a division of the Australian Public Service Commission.

This section is made for the purposes of paragraph 41(2)(p) and subsection 41(4) of the Act. Subsection 41(4) provides that the regulations may authorise the Commissioner to charge fees for the performance, on request, of the Commissioner's functions.

## **Part 6 – The Merit Protection Commissioner – functions**

### *Division 1 – Inquiry functions under the Act*

#### Section 58 – Inquiries into public interest disclosures that relate to alleged breaches of the Code of Conduct

This section is substantially the same as regulation 7.1A of the 1999 Regulations.

The section provides for the circumstances in which the Merit Protection Commissioner may inquire into a public interest disclosure that relates to one or more alleged breaches of the Code of Conduct and the process for conducting such an inquiry. The Merit Protection Commissioner is able to inquire into the disclosure if it would be inappropriate for the Agency Head to deal with the disclosure, or if the disclosure was made to the Agency Head and the Merit Protection Commissioner reasonably believes that the disclosure was not satisfactorily handled by the Agency Head. As with section 54, the language in the equivalent provision in the 1999 Regulations has been amended to narrow the scope of disclosures into which the Merit Protection Commissioner may inquire.

The section also sets out the matters to which the Merit Protection Commissioner may have regard in declining to conduct or discontinuing an inquiry, which are substantially the same as the matters in section 51. In the 1999 Regulations, these matters were largely set out in a legislative note to subregulation 7.1A(4). The matters have been set out in the section for consistency with other provisions dealing with the power to decline to conduct or discontinue an inquiry. A new matter has also been added: whether the cost of conducting an inquiry is justified in the circumstances.

The section is made for the purposes of paragraph 50(1)(a) of the Act. Section 50(1)(a) provides that subject to the regulations the Merit Protection Commissioner's functions include inquiring into public interest disclosures to the extent those disclosures relate to alleged breaches of the Code of Conduct.

### *Division 2 – Other functions*

#### Subdivision A – Purpose of this Division

#### Section 59 – Purpose of this Division

This section is relevantly the same as subregulation 7.1(2) of the 1999 Regulations.

This section provides that the purpose of this Division is to prescribe other functions of the Merit Protection Commissioner and to make provision in relation to those functions.

The section refers to paragraph 50(1)(e) of the Act. That paragraph provides that the Merit Protection Commissioner's functions include such other functions as are prescribed by the regulations.

#### Subdivision B – Independent Selection Advisory Committees

##### Section 60 – Establishment of ISAC

This section is relevantly the same as regulation 4.2 of the 1999 Regulations.

The section provides that the Merit Protection Commissioner may establish an Independent Selection Advisory Committee ('ISAC') at the request of an Agency Head.

##### Section 61 – Function of ISAC

This section is substantially the same as regulation 4.1 of the 1999 Regulations.

The section provides that the function of an ISAC is to make recommendations to an Agency Head about the suitability of candidates for engagement connected with employment in the Agency, assignment to duties connected with employment in the Agency and promotion to employment in the Agency.

##### Section 62 – Constitution of ISAC

This section is substantially the same as regulation 4.3 of the 1999 Regulations.

The section provides that each ISAC must consist of 3 members: a Convenor nominated by the Merit Protection Commissioner, an APS employee nominated by the Merit Protection Commissioner and a person nominated by the relevant Agency Head.

The person nominated by the Agency Head must be made available for the performance of the ISAC's functions, subject to the operational requirements of the Agency in which the employee is employed. This is intended to allow a nominated employee to decline to be part of an ISAC if their Agency requires them to do so to meet operational requirements.

Minor changes have been made to the 1999 Regulations. Under regulation 4.3 of the 1999 Regulations, the requirement that the Merit Protection Commissioner be satisfied that their nominee will undertake the role independently and impartially only applied to the APS employee nominated by the Merit Protection Commissioner. Under subsections 62(2) and (4), the Merit Protection Commissioner must be satisfied that all persons comprising the ISAC will undertake the role independently and impartially. Subsection 62(4) gives the Merit Protection Commissioner the power, in writing, to reject an Agency Head's nomination if the Merit Protection Commissioner is not satisfied that the person nominated will undertake the role independently and impartially.

The section also provides for how an ISAC is to be reconstituted if a member ceases to act as a member of the ISAC. Further, the section provides that a person is not subject to direction in performing their duties as a member of an ISAC except by a court or in accordance with the Merit Protection Commissioner's instructions made for the purposes of section 64.

##### Section 63 – ISAC procedures – minimum requirements

This section is substantially the same as regulation 4.4 of the 1999 Regulations.

This section provides for the minimum requirements which must be met by the procedures used by an ISAC in performing its functions. These include that the procedures must have due regard to procedural fairness and must be performed in private. The section provides that a person appearing before an ISAC must do without representation, unless decided otherwise by the Merit Protection Commissioner. This is not intended to preclude a person from seeking legal or other assistance in preparing documents for the review.

#### Section 64 – ISAC procedures – Merit Protection Commissioner’s instructions

This section is substantially the same as regulation 4.5 of the 1999 Regulations.

The section provides that the Merit Protection Commissioner must issue instructions about the procedures to be followed by an ISAC in performing its functions, and may issue instructions about the procedures to be followed by an Agency Head who is appointed to act on behalf of an ISAC. The section requires an ISAC or an Agency Head to comply with the instructions.

#### Section 65 – Assistance to ISAC

This section is substantially the same as regulation 4.6 of the 1999 Regulations.

The section provides that the Merit Protection Commissioner must take all reasonable steps to ensure that staff and other resources are available to assist an ISAC to perform its functions efficiently and effectively.

#### Section 66 – Assessment and recommendation by ISAC

This section is substantially the same as regulation 4.7 of the 1999 Regulations.

The section provides that if an ISAC is established in respect of an employment opportunity, the ISAC must assess the relative merits of the candidates, report on the assessment to the relevant Agency Head and make a recommendation to the Agency Head, primarily on the basis of the assessment, as to which candidate it considers to be the most suitable for the relevant employment. The section provides that the ISAC may appoint the relevant Agency Head to act on behalf of the ISAC in conducting some or all of an assessment of the relative merits of the candidates.

The decision is to be made primarily on the basis of merit, including a comparative assessment of the relevant merits of each applicant, but this is not the sole basis on which the decision may be made. The ISAC may also take into account other matters such as adverse information relating to integrity. This is consistent with the Commissioner’s Directions.

#### Section 67 – Non-agreement on recommendation by ISAC

This section is substantially the same as regulation 4.8 of the 1999 Regulations.

The section provides that if all members of an ISAC do not agree on a recommendation, the recommendation of two members who agree is taken to be the recommendation of the ISAC, and the recommendation of the Convenor is taken to be recommendation of the ISAC where there is no agreement between any of the members.

#### Section 68 – ISAC recommendations not binding



This section is substantially the same as regulation 4.9 of the 1999 Regulations.

The section provides that the recommendation of an ISAC is not binding on an Agency Head.

#### Section 69 – Effect of acting in accordance with ISAC recommendations

This section is substantially the same as regulation 4.10 of the 1999 Regulations.

The section provides that a promotion, engagement or assignment of duties made in accordance with an ISAC recommendation is not subject to review under Part 4, and is not affected by a defect in the nomination of a member of the ISAC or a failure to comply with instructions issued under section 64. This section also provides that the notice of a promotion or engagement in the Public Service Gazette must state that the promotion or engagement was made in accordance with an ISAC recommendation.

#### Section 70 – Effect of not acting in accordance with ISAC recommendation

This section is substantially the same as regulation 4.11 of the 1999 Regulations.

The section provides that a promotion or engagement decision made by an Agency Head that is not in accordance with an ISAC recommendation is subject to review, unless the recommended candidate is no longer suitable for the relevant employment, the Agency Head has consulted with the Merit Protection Commissioner about the candidate and acts in accordance with the ISAC recommendation in relation to the next suitable candidate. The section provides that notice of the promotion or engagement decision (that is not made in accordance with an ISAC recommendation) published in the Public Service Gazette must state that the decision is subject to review under Division 2 of Part 4.

#### Section 71 – Merit Protection Commissioner authorised to charge fees

This section is relevantly the same as subregulation 4.2(2) of the 1999 Regulations.

This section provides that the Merit Protection Commissioner is authorised to charge the Agency Head a fee for performing functions in relation to ISACs.

This section is made for the purposes of subsection 50(3) of the Act. Subsection 50(3) of the Act provides that the regulations may authorise the Merit Protection Commissioner to charge fees for the performance of functions prescribed by the regulations.

#### Subdivision C – Investigation of complaints by former employees

#### Section 72 – Investigation of complaints by former employees

This section is substantially the same as regulation 7.2 of the 1999 Regulations.

This section provides that the Merit Protection Commissioner may investigate a complaint by a former APS employee that relates to the employee's entitlements on separation from the APS and make a recommendation to the employee's former Agency Head in relation to the complaint. This section also provides for how the Agency Head is to respond upon receiving such a recommendation.

Minor changes have been made to regulation 7.2. Subsection 72(2) requires that the Agency Head must make a decision on a recommendation made by the Merit Protection Commissioner as soon as reasonably practicable. The Commission's view is that this would generally be 21 days.

Subdivision D – Review of determination of breach of Code of Conduct by former APS employee

Section 73 – Review by Merit Protection Commissioner if former APS employee is entitled to review

This section is substantially the same as regulation 7.2A of the 1999 Regulations.

This section provides for the circumstances in which a former APS employee who was not an SES employee at the time their APS employment ended is entitled to review by the Merit Protection Commissioner of a determination by an Agency Head that the person breached the Code of Conduct.

This section provides that the affected former employee is not entitled, or ceases to be entitled, to review by the Merit Protection Commissioner if, among other things, the affected former employee has applied to have the determination dealt with by a court or tribunal which has jurisdiction to deal with the determination, the Merit Protection Commissioner considers that review by an external review body is more appropriate, or the application for review is not made within 60 days after the determination (subject to exceptional circumstances).

Minor clarifying changes have been made to regulation 7.2A of the 1999 Regulations. Subsection 73(2) provides that the Merit Protection Commissioner may conduct a ‘de novo’ review. Regulation 7.2A did not specify the nature of the review to be undertaken. There is also no equivalent to subregulation 7.2A(5) in the regulation – this is a streamlining amendment.

Section 74 – Application for review

This section is substantially the same as regulation 7.2B of the 1999 Regulations.

This section provides for how an affected former employee is to apply to the Merit Protection Commissioner for review of a determination for the purposes of section 73. This section provides that the application must be in writing and state why the review is sought and if relevant, the particular outcome sought.

Section 75 – Notice that action is not reviewable

This section is substantially the same as regulation 7.2C of the 1999 Regulations.

This section provides that if a former employee makes an application for review for the purposes of section 74, and the Merit Protection Commissioner decides that the determination is not reviewable, the Merit Protection Commissioner must tell the affected employee in writing that the determination is not reviewable, and the reasons why it is not reviewable.

Section 76 – Conduct of review

The section is substantially the same as regulation 7.2D of the 1999 Regulations.

This section provides for how the Merit Protection Commissioner is to conduct a review of a determination that a former APS employee breached the Code of Conduct (for the purposes of this Subdivision). This section provides, among other things, that the Merit Protection Commissioner must conduct a de novo review of the determination, make a recommendation

to the relevant Agency Head in writing about the determination and tell the Agency Head and affected former employee of their recommendation and reasons.

Minor clarifying changes have been made to regulation 7.2D. For example, the section specifies that the Merit Protection Commissioner's review must be 'de novo'.

#### Section 77 – Action by Agency Head

The section is substantially the same as regulation 7.2DA of the 1999 Regulations.

This section provides for how an Agency Head who receives a recommendation under section 76 is to respond. The section provides, among other things, that the Agency Head must consider the recommendation and decide whether to confirm, vary or set aside the determination that the former employee has breached the Code of Conduct. The section also provides for the circumstances in which the Agency Head is required to seek the views of the affected former employee. The section also requires the Agency Head to tell the affected former employee and the Merit Protection Commissioner in writing of their decision, about the recommendation, and the reasons for the decision.

#### Section 78 – Review procedures – minimum requirements

The section is substantially the same as regulation 7.2E of the 1999 Regulations.

This section provides for the procedures that must be used for a review of a determination that a former APS employee breached the Code of Conduct. The procedures must meet various minimum requirements, including having due regard to procedural fairness, being conducted in private and finished as quickly as a proper consideration of the matter allows.

The section also provides that a person appearing before the Merit Protection Commissioner must generally do so without representation. This is not intended to preclude a person from seeking legal or other assistance in preparing documents for the review.

#### Section 79 – Requirement to provide information or documents

The section is substantially the same as regulation 7.2F of the 1999 Regulations.

This section provides that the Merit Protection Commissioner may require an Agency Head or APS employee to give them stated information or documents relevant to a review of a determination that a former APS employee breached the Code of Conduct.

#### Section 80 – Making application does not operate as a stay

The section is substantially the same as regulation 7.2G of the 1999 Regulations.

This section provides that making an application for review of a determination that a former APS employee breached the Code of Conduct does not operate to stay the determination.

#### Subdivision E – Review of actions of statutory office holders

#### Section 81 – Review of actions of statutory office holders other than Agency Heads

The section is substantially the same as regulation 7.3 of the 1999 Regulations.

This section provides that a non-SES employee may apply to the Merit Protection Commissioner for review of an action of a statutory office holder that relates to their APS employment, is not termination of the employee's employment and is a reviewable action if

the statutory office holder were an Agency Head. The section also provides that the Merit Protection Commissioner may require information and documents from the statutory office holder for the purposes of the review. The section also sets out how the review is to be conducted, including that the Merit Protection Commissioner is to make a recommendation to the statutory office holder in writing about the action. If the Merit Protection Commissioner is not satisfied by the statutory office holder's response, the Commissioner may give a report on the matter to the relevant Agency Minister.

Subdivision F – Functions on request by relevant employer

#### Section 82 – Functions of Merit Protection Commissioner on request by relevant employer

The section is substantially the same as regulation 7.4 of the 1999 Regulations.

This section provides for certain things that the Merit Protection Commissioner may do on request of a relevant employer. These things include reviewing, investigating or providing advice in relation to the employment of a person by a 'relevant employer'. 'Relevant employer' is defined to include Commonwealth entities and companies; constitutional corporations; Aboriginal and Torres Strait Islander corporations; State and Territory Departments, authorities and bodies; foreign governments, authorities and bodies; and international organisations.

Minor changes have been made to regulation 7.4 of the 1999 Regulations to strengthen the constitutional basis for the section. The definition of 'relevant employer' is designed to invoke various constitutional powers, including the executive power, corporations power, races power and external affairs power.

The section refers to subsection 50(3) of the Act. That subsection provides that the regulations may authorise the Merit Protection Commissioner to charge fees for the performance of additional functions prescribed in the regulations.

*Division 3 – Basic requirements for procedures for determining alleged breach of Code of Conduct by APS employee or former APS employee*

#### Section 83 – Basic requirements for procedures for determining breach of Code of Conduct by APS employee or former APS employee

The section is substantially the same as regulation 7.10 of the 1999 Regulations.

This section provides for basic requirements that must be complied with by the Merit Protection Commissioner's written procedures for inquiring into and determining whether an APS employee or former APS employee has breached the Code of Conduct. The basic requirements include that the procedures must involve a process that is quick and involves little formality as a proper consideration of the matter allows and is, and appears to be, independent and unbiased. The section also provides that the procedures must require that a written record be prepared stating whether it has been determined that the relevant employee has breached the Code of Conduct.

The section is made for the purposes of paragraph 50A(2)(a) of the Act. That paragraph is to the effect that the regulations may prescribe basic procedural requirements that the Merit Protection Commissioner's written procedures must comply with.

*Division 4 – Other provisions*

## Section 84 – Independence of the Merit Protection Commissioner

The section is substantially the same as regulation 7.5 of the 1999 Regulations.

This section provides that the Merit Protection Commissioner is not subject to direction, except by a Court, in performing their duties in relation to the review of actions and ISACs.

## **Part 7 – Administrative arrangements and re-organisations**

### Section 85 – Employment conditions after machinery of government changes – movement of APS employees

The section is substantially the same as regulation 8.1 of the 1999 Regulations.

This section prescribes arrangements for determining variations of the terms and conditions of employment applicable to an APS employee who is moved to another Agency in accordance with a determination under paragraph 72(1)(a) of the Act. The section provides for the annual salary that applies to the affected APS employee to be maintained and the circumstances in which the terms and conditions of the APS employee's employment may be varied.

The section is made for the purposes of paragraph 72(5)(a) of the Act. That paragraph provides that the regulations may prescribe arrangements for determining any variation of the terms and conditions of employment applicable to APS employees who are moved to another Agency in order to give effect to a machinery of government change.

### Section 86 – Employment conditions after machinery of government changes – engagement of non-APS employees

The section is substantially the same as regulation 8.2 of the 1999 Regulations.

This section prescribes arrangements for determining variations of the terms and conditions of employment applicable to a non-APS employee who becomes an APS employee as a result of a machinery of government change. The circumstances in which the terms and conditions of the employee's employment may be varied parallel those in section 85. However, section 86 does not provide for salary maintenance.

The section is made for the purposes of paragraph 72(5)(b) of the Act.

### Section 87 – Prescribed circumstances in relation to employment in former Agency

The section is substantially the same as regulation 8.3 of the 1999 Regulations.

This section prescribes circumstances for the purposes of paragraph 72(5A) of the Act. That section provides that if an APS employee is moved from an Agency to another Agency, and prescribed circumstances existed in relation to the employee's employment before they were moved, the Commissioner may determine the measures that are to be taken in relation to those circumstances. The circumstances that are prescribed include, for example, that an inquiry into an alleged breach of the Code of Conduct was taking place or a process was taking place in relation to performance management or management of excess staff.

## **Part 8 – Attachment of salaries to satisfy judgment debts**

### Section 88 – Application of this Part

The section is substantially the same as regulation 8A.2 of the 1999 Regulations.

This section provides that this Part does not apply in relation to a debtor whose estate has been sequestrated for the benefit of creditors and who has not yet obtained a certificate of discharge. This section also provides that Part 8 is made for the purposes of section 75 of the Act. That section provides that the regulations may provide for deductions to be made from the salary of certain persons in order to satisfy a judgment debt.

#### Section 89 – Application of State and Territory law

The section is substantially the same as regulation 8A.3 of the 1999 Regulations.

This section provides that a law of a State or Territory that deals with satisfying a judgment debt applies to a debtor's judgment debt only to the extent that the law deals with the calculation of interest on the debt.

#### Section 90 – Paying officer

The section is substantially the same as regulation 8A.4 of the 1999 Regulations.

This section provides that if an Agency Head believes it is necessary to make deductions from the salary of a debtor, the Agency Head must appoint persons as paying officers for the purposes of making those deductions. The section sets out various criteria as to who may be the paying officer where the Agency Head is the debtor, such as that the paying officer must not be appointed by the Agency Head. This section also provides that if a person is appointed as a paying officer, the appointment authorises the person to act as a paying officer only in relation to the debtor to whom the appointment relates.

#### Section 91 – Authority to make deductions

The section is substantially the same as regulation 8A.5 of the 1999 Regulations.

This section provides for five criteria which must be satisfied before the paying officer may make deductions from a debtor's salary to satisfy a judgment debt. These criteria include that the paying officer must have received a statutory declaration that the judgment debt exists, and a copy of the judgment to which the judgment debt relates. This section also provides for the process the paying officer must follow in making deductions, including that the paying officer must notify the debtor and require them to state whether the judgment debt has been satisfied. This section also provides that the paying officer must ensure that the amount of each deduction is paid to the judgment creditor.

#### Section 92 – Administration fee

The section is substantially the same as regulation 8A.6 of the 1999 Regulations.

This section imposes a payment obligation on judgment creditors who request payment of a judgment debt. The fee is \$38 and is the price for a 'supply of a service' for the purposes of the *A New Tax System (Goods and Services) Act 1999*.

#### Section 93 – More than one judgment debt

The section is substantially the same as regulation 8A.7 of the 1999 Regulations.

This section provides that where there is more than one judgment debt, the paying officer must deal with the judgment debts in the order in which requests for deductions were received or, where the requests are received at the same time, in order of the dates for judgment.

### Section 94 – Effect of deductions

The section is substantially the same as regulation 8A.8 of the 1999 Regulations.

The section provides that if an amount is paid to a judgment creditor after a deduction is made from the debtor's salary on a pay day for the debtor, an amount equal to that amount is taken to have been paid by the debtor to the judgment creditor for the purposes of the debt.

### Section 95 – Rate of deductions

The section is substantially the same as regulation 8A.9 of the 1999 Regulations.

The section provides for the rate at which the paying officer may make deductions from a debtor's net salary. The section provides that the standard rate is 20% of the debtor's salary. The section provides that the paying officer may reduce the rate if satisfied that the debtor is suffering or would suffer serious financial hardship if the rate is not reduced. The debtor may also request that the rate be higher than 20%.

### Section 96 – Move to another Agency

The section is substantially the same as regulation 8A.10 of the 1999 Regulations.

The section provides for how to deal with a judgment debt where the debtor moves from one agency to another. Generally speaking, this section provides that the paying officer of the old agency must notify the new agency and a paying officer in the new agency would then deal with the debt. This section sets out the documents that the paying officer in the old agency must transfer to the paying officer in the new agency.

### Section 97 – Administration of deductions

The section is substantially the same as regulation 8A.11 of the 1999 Regulations.

The section provides that a paying officer in relation to a debtor may require the judgment creditor to confirm that the judgment debt has not been discharged and suspend the making of deductions until this confirmation is received. The section also provides that if a debtor's employment ceases, or is terminated, the paying officer must notify the judgment creditor of this as soon as practicable.

### Section 98 – Recovery of overpayment

The section is substantially the same as regulation 8A.12 of the 1999 Regulations.

The section provides that if an overpayment is made to the judgment creditor, the excess is repayable to the debtor.

## **Part 9 – Protection of information**

### Section 99 – Australian Public Service Commissioner's functions etc

The section has the same effect as regulations 6.6 and 6.7 of the 1999 Regulations.

The section is made for the purposes of subsection 72A(1) of the Act and paragraph 72A(7)(e) of the Act. It has the effect that the Australian Public Service Commissioner cannot be compelled to give evidence in relation to an inquiry into the Merit Protection Commissioner's behaviour or inquiries into alleged breaches of the Code of Conduct by statutory office holders.

Subsection 72A(1) provides that ‘protected information’ for the purposes of the Australian Public Service Commissioner’s functions includes information that was obtained in connection with the performance of specified functions and duties or the exercise of powers under the Act and prescribed regulations. This section prescribes information obtained in connection with the performance of the Australian Public Service Commissioner’s functions to inquire into the Merit Protection Commissioner’s behaviour (under section 55) and to inquire into alleged breaches of the Code of Conduct by statutory office holders (under section 56).

Paragraph 72(7)(e) of the Act provides that a person who is or was an entrusted person is not compellable in any proceeding to disclose protected information that was obtained in connection with the performance of specified functions, duties or the exercise of powers under the Act and prescribed regulations. This section prescribes sections 55 and 56 of the regulations for this purpose.

#### Section 100 – Merit Protection Commissioner’s functions etc

The section has the same effect as regulations 7.6, 7.7 and 7.8 of the 1999 Regulations.

The section is made for the purposes of subsection 72B(1) and paragraph 72B(7)(b) of the Act. This section has the effect that the Merit Protection Commissioner cannot be compelled to give evidence in relation to a review of an action of a statutory office holder other than an Agency Head.

Subsection 72B(1) of the Act provides that an entrusted person for the purposes of the Merit Protection Commissioner’s functions includes any person prescribed by the regulations. The section prescribes a person who is a member of a committee established or appointed by the Merit Protection Commissioner.

Section 72B(1) of the Act also provides that ‘protected information’ means information obtained in connection with the performance or functions or exercise of powers under, among other things, prescribed regulations. This section prescribes information obtained for the purposes of the exercise of the Merit Protection Commissioner’s power to review actions of statutory office holders other than Agency Heads.

Paragraph 72B(7)(d) of the Act provides that a person who is or was an entrusted person is not compellable in any proceeding to disclose protected information that was obtained in connection with the performance of specified functions, duties or the exercise of powers under the Act and prescribed regulations. This section prescribes section 81 of the regulations for this purpose.

#### Section 101 – Giving information or producing documents to Australian Public Service Commissioner not admissible in evidence etc

The section has the same effect as regulation 6.8 of the 1999 Regulations.

The section is made for the purposes of paragraph 72C(2)(c) of the Act. That paragraph is to the effect that where the Australian Public Service Commissioner requests a person to give information or produce a document for purposes connected with a prescribed regulation, section 72C of the Act applies. Information given and documents produced to the Commissioner for the purposes of inquiries into the Merit Protection Commissioner’s behaviour (under section 55) and inquiries into alleged breaches of the Code of Conduct by



statutory office holders (under section 56) are prescribed. This means that this information and documents may not be admissible in evidence in certain proceedings (see section 72C of the Act).

#### Section 102 – Giving information or producing documents to Merit Protection Commissioner not admissible in evidence etc.

The section has the same effect as regulation 7.9 of the 1999 Regulations.

The section is made for the purposes of paragraph 72D(2)(b) of the Act. That paragraph is to the effect that where the Merit Protection Commissioner requests a person to give information or produce a document for purposes connected with a prescribed regulation, section 72D of the Act applies. Section 72D of the Act concerns where giving information or producing documents to the Merit Protection Commissioner is not admissible in evidence. Information given, and documents produced, to the Commissioner for the purposes of review of actions of statutory office holders other than Agency Heads is prescribed.

#### Section 103 – Use and disclosure of personal information

The section is substantially the same as regulation 9.2 of the 1999 Regulations.

This section is made for the purposes of paragraph 72E(a) of the Act. That paragraph provides that the regulations may authorise the use or disclose of personal information in specific circumstances. The section in substances provide for circumstances where information may be used and disclosed for the purposes of the *Privacy Act 1988* and other laws, including the common law.

The section deals with use and disclosure by an Agency Head, the Australian Public Service Commissioner and the Merit Protection Commissioner.

The section provides that an Agency Head may use personal information where the use is necessary or relevant to the Agency Head's exercise of their employer powers.

The section has the effect that the Australian Public Service Commissioner may use personal information where the information was obtained as part of the Australian Public Service Commissioner's review or inquiry functions, and the use is necessary for or relevant to an inquiry relating to the Code of Conduct conducted by the Commissioner. The Australian Public Service Commissioner is also able to disclose personal information where that disclosure is necessary for or relevant to the Agency Head's consideration of alleged misconduct by an APS employee.

The Merit Protection Commissioner is also able to disclose personal information where the information was obtained during a review of action conducted for the purposes of the regulations or in the performance of the Commissioner's inquiry functions and the disclosure would be necessary for or relevant to the Agency Head's consideration of misconduct by an APS employee.

The legislative note to the section clarifies that the section is intended to constitute an authorisation for the *Privacy Act 1988* and all other relevant laws, including the common law.

### **Part 10 – Miscellaneous**

#### Section 104 – Maximum amount of payments in special circumstances

The section is substantially the same as regulation 9.4 of the 1999 Regulations.

The section is made for the purposes of subsection 73(4) of the Act. That subsection provides that an authorisation cannot be made under section 73 if it would involve, or be likely to involve, a total amount exceeding the amount prescribed by the regulations. Section 73 confers power on the Public Service Minister to authorise the making of payments if the Minister considers it appropriate to do so because of special circumstances that relate to or arise from a person's employment by the Commonwealth. This section prescribes \$250,000 as the maximum amount.

#### Section 105 – Delegations

The section is substantially the same as regulation 9.3 of the 1999 Regulations.

This section provides for the Australian Public Service Commissioner, Merit Protection Commissioner and Agency Heads' powers to delegate their powers or functions under the regulations to other persons.

The section provides that the Australian Public Service Commissioner may delegate their powers or functions to any person. The Merit Protection Commissioner may delegate their powers or functions to any APS employee. In this regard, the section differs from the 1999 Regulations. In the 1999 Regulations, the Merit Protection Commissioner has the power to delegate to any person. A note to subsection 105(2) provides that the Merit Protection Commissioner may also, on behalf of the Commonwealth, engage consultants to assist in the performance of the Merit Protection Commissioner's functions.

The section provides that the Agency Head may in writing delegate their powers or functions to a person who is not an 'outsider'. For an 'outsider', the Agency Head must seek the Australian Public Service Commissioner's written consent to delegate their powers. The definition of outsider is a person other than an APS employee, member of the Australian Defence Force or a person appointed to an office by the Governor-General or a Minister under a law of the Commonwealth.

Unlike regulation 9.3, subsection 105(9) excludes a member of the Australian Defence Force from the definition of 'outsider'. This means that an Agency Head can delegate their functions or powers to members of the Australian Defence Force without first seeking the Australian Public Service Commissioner's approval to do so. The definition of 'outsider' in the 1999 Regulations, in not excluding members of the Australian Defence Force, created unnecessary administrative burden for the Department of Defence and the Australian Public Service Commission.

The delegation powers prescribed are administratively necessary and provide sufficient flexibility to enable Agency Heads, the APS Commissioner and the Merit Protection Commissioner to carry out their functions.

In particular, the delegation power for Agency Heads reflects that the APS consists of many agencies of different sizes and differing operational requirements. The relevant Agency Head is best placed to determine who may exercise their employer powers or functions, and to which level their powers and functions are appropriate to delegate. It is in the interest of each Agency Head to ensure that the persons to whom their employer powers or functions have

been delegated have the appropriate skills, qualifications, and experience to exercise the powers or functions.

#### Section 106 – Immunity from civil proceedings in relation to Australian Public Service Commissioner’s functions

The section is substantially the same as regulation 6.9 of the 1999 Regulations.

The effect of the section is that the Australian Public Service Commissioner is not liable for the good faith performance of their functions under sections 55 and 56 of the regulations.

The section is made for the purposes of paragraph 78A(1)(h) of the Act. That paragraph relevantly provides that no civil action, suit or proceeding lies against the Australian Public Service Commissioner for something done or omitted to be done in good faith in connection with the performance of prescribed functions or duties or exercise of powers. The Australian Public Service Commissioner’s functions to inquire into the Merit Protection Commissioner’s behaviour (section 55) and into alleged breaches of the Code of Conduct by statutory office holders (section 56) are prescribed.

### **Part 11 – Transitional arrangements**

#### *Division 1 – Transitional arrangements in relation to the commencement of this instrument*

##### Section 107 – Definitions

The section provides for the definition of ‘commencement day’ and ‘old regulations’ for the purposes of this Division.

##### Section 108 – Conduct, event, circumstances occurring before commencement

The section provides that a function or duty may be performed or a power exercised in relation to conduct engaged in, an event that occurred, or a circumstance that arose before the commencement day. This is an avoidance of doubt provision. It is not intended to limit anything in this Division or section 7 of the *Acts Interpretation Act 1901*. Section 7 of that Act provides for the effect or repeal or amendment of an Act or the regulations (see paragraph 13(1)(a) of the *Legislation Act 2003*).

##### Section 109 – Review of actions where application for review made before commencement day

Subsection 109(1) provides that the section applies if, before the commencement day, an APS employee had applied under the old regulations for review of an APS action, and the review had not been completed before the commencement day. Subsection 109(2) provides that the old regulations continue to apply, on or after the commencement day, in relation to the review.

##### Section 110 – Inquiry in progress into alleged breach of Code of Conduct by Merit Protection Commissioner

The section provides that the 1999 Regulations continue to apply after the commencement day to an inquiry by the Australian Public Service Commissioner in relation to an alleged breach of the Code of Conduct by the Merit Protection Commissioner that had commenced before the commencement day.

### Section 111 – Conduct of ISAC and recommendation by ISAC

The section provides that where an ISAC had been established before the commencement day but, before the commencement day, the ISAC is still in existence and has not made a recommendation, or a recommendation made by the ISAC within 12 months of the employment opportunity being notified is still in force, the new regulations apply on or after the commencement day.

There is an exception to this where the employment opportunity was advertised or notified before the commencement day on the basis the 1999 Regulations would apply, or official information was otherwise provided to this effect.

### Section 112 – Review of promotion notified before commencement day

The section provides that the 1999 Regulations continue to apply in relation to a promotion or any entitlement to have access to a statement given as part of a review of a promotion if, before the commencement day, the promotion was notified in accordance with the regulations.

## **SCHEDULE 1 – Repeals**

### ***Public Service Regulations 1999***

#### Item 1 – The whole of the instrument

This Schedule repeals the whole of the 1999 Regulations.

**Statement of Compatibility with Human Rights**

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

***Public Service Regulations 2023***

The *Public Service Regulations 2023* (2023 Regulations) are 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**

The 2023 Regulations are made under the *Public Service Act 1999* (the Act) and are necessary for its effective operation.

The 2023 Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. They provide for, among other things, the employer powers of Agency Heads; the review of APS promotion and engagement decisions, and APS actions; the functions of the Australian Public Service Commissioner and the Merit Protection Commissioner; entitlements on administrative arrangements and reorganisations; attachment of salaries to satisfy judgment debts and the protection of information.

The 2023 Regulations commence on the day after they are registered on the Federal Register of Legislation.

The 2023 Regulations replace and largely remake the 1999 Regulations, with minor streamlining, clarification and technical amendments. Respectively, these remove unnecessary explanatory provisions, redraft ambiguous provisions, and apply consequential amendments that are required due to the enactment or amendment of other legislation (e.g. the enactment of the *National Anti-Corruption Commission Act 2022*).

The 2023 Regulations are substantively different to the 1999 Regulations in 2 minor ways.

- The definition of ‘outsider’ has been amended to exclude members of the Australian Defence Force, to allow an Agency Head to delegate their functions or powers to members of the Australian Defence Force without first being required to obtain the Australian Public Service Commissioner’s approval.
- The Australian Public Service Commissioner’s power to deliver and charge for the delivery of learning and development programs to non-APS government agencies and States and Territories is expressly dealt with by a new regulation. This is a measure to strengthen the legislative basis for the APS Academy delivering such programs.

## **Human rights implications**

The 2023 Regulations engage the following rights:

- The right to work and rights at work – as recognised by article 6(1) and article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and, for specific groups:
  - Article 27 of the *Convention on the Rights of Persons with Disabilities* (CRPD).
- The right to equal access to public service of a person’s country, recognised generally by article 25(c) of the International Covenant on Civil and Political Rights (ICCPR).
- The right to privacy and reputation, recognised generally in article 17 of the ICCPR.

### ***The right to work and rights at work***

Article 6(1) of ICESCR provides that everyone should have the opportunity to gain their living by work which they freely choose or accept. Article 7 of the ICESCR recognises the right of everyone to just and favourable conditions of work which ensures an equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than seniority and competence.

### ***Section 15 – Termination of employment***

Section 15 has been included in the 2023 Regulations as a result of the enactment of the NACC Act. The section provides that it is a ground for termination of the employment of an ongoing APS employee or a non-ongoing APS employee that an investigation report, within the meaning of the NACC Act, includes a recommendation to terminate the person’s employment. This limits the right to work, in that it adds an additional basis on which an APS employee may be terminated. However, this limitation on the right to work is reasonable, necessary and proportionate. Only in very serious circumstances would an investigation report under the NACC Act recommend the termination of the employment of an APS employee. This would require, at a minimum, that the employee has engaged in corrupt conduct.

The general right to work and rights at work are promoted by Parts 4–6 of the 2023 Regulations, as discussed below.

### ***Part 4—Review of actions***

This Part provides for review of APS actions. Division 2 of Part 4 provides for review of engagement and promotion decisions by a Promotion Review Committee after an application to the Merit Protection Commissioner. Division 3 of Part 4 provides for review by the Agency Head or Merit Protection Commissioner of other reviewable actions. This Part is aimed at providing a fair system of review of APS actions given the government’s policy that APS agencies should achieve and maintain workplaces that encourage productive and harmonious working environments (see section 17).

### ***Part 5—The Australian Public Service Commissioner—functions***

Part 5 provides for the functions of the Australian Public Service Commissioner, which includes the power to conduct, decline to conduct, or discontinue, an inquiry into an alleged breach of the APS Code of Conduct (see section 13 of the Act). Notably, Division 4 of Part 5 provides that the Australian Public Service Commissioner may conduct such inquiries in relation to the Merit Protection Commissioner and statutory office holders. Inquiries into alleged breaches of the Code of Conduct protect the right to work as breaches of the APS Code of Conduct may result in the imposition of sanctions.

### *Subdivision B of Division 2 of Part 6*

Subdivision B of Division 2 of Part 6 provides for the establishment and functions of an Independent Selection Advisory Committee (ISAC). Section 61 provides that an ISAC may make recommendations to an Agency Head on the suitability of candidates for engagement, promotion and assignment of duties within the Agency. Division 2 of Part 6 promotes the right to work by furthering the objective of merit-based selection (see especially section 66).

### *Subdivisions C and D of Division 2 of Part 6*

Subdivisions C and D provide for a system of independent review by the Merit Protection Commissioner of applications by former APS employees in relation a determination that they breached the APS Code of Conduct. These subdivisions also promote the right to work by furthering the objective of merit-based selection.

### ***The right to work and rights at work for specific groups***

Article 27 of the CRPD prohibits discrimination on the basis of disability with regard to employment and for the promotion of employment opportunities for persons with disability.

### *Section 10 – Condition of engagement – health clearance*

Section 10 empowers the Agency Head to direct an employee whose employment is subject to a health clearance to undertake a medical examination. Article 27 of the CRPD is not limited by this section. Section 10 only applies in relation to an APS employee whose employment is subject to a health clearance under paragraph 22(6)(e) of the Act. That section confers a discretion on the Agency Head to make an employee's employment subject to a health clearance condition, and provides that the exercise of that discretion may be a reviewable decision for the purposes of the 2023 Regulations. An Agency Head may only subject an employee's employment to a health clearance condition if this is reasonable having regard to the nature of the employee's role. An Agency Head could not validly subject an individual to a health clearance condition on the basis they are a person with a disability.

### *Section 11 – Direction to attend medical examination*

Section 11 empowers an Agency Head to direct an employee in writing to undergo an examination to assess the employee's fitness for duty if the Agency Head believes that the employee's state of health may, among other things, be affecting the employee's performance. This section may be said to limit article 27 of the CPRD, where an Agency Head is concerned about how the state of health of a person with a disability is affecting their performance (e.g., where the employee has a mental health condition). But to the extent article 27 is limited by this section, the limitation is reasonable, necessary and proportionate. The purpose of the limitation is to provide the Agency Head with information in relation to the employee's state of health. Any direction made by the Agency Head as a result of a medical examination must be lawful and reasonable. This would preclude an Agency Head from sanctioning an employee because of their disability. A direction based on concern about an employee's state of health is also a reviewable APS action.

Agency Heads have a duty of care under the *Work Health and Safety Act 2011* (WHS Act) towards their employees and must comply with the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). The power to direct an employee to attend a medical examination is necessary to give effect to the duties and obligations under both Acts.

Some of the circumstances where it is necessary to provide an Agency Head with information in relation to an employee's state of health include:

- if the employee presents with a severe injury and/or the employee has limitations for work capacity;
- if clarification is required about the employee's physical/mental capabilities and any activities that must be avoided;
- if there is medical evidence suggesting a possibility of re-injury at work;
- where there is conflicting medical information particularly in relation to an employee's work capacity and treatment;
- factors in the work environment, including any perceived or actual adverse relationships with supervisors or co-workers;
- if the injury is slow onset and the symptoms have developed over a period of time;
- if there is a significant change in the employee's certified capacity for work or participation in rehabilitation;
- uncertainty on diagnosis of the employee's condition;
- there is insufficient or conflicting medical evidence;
- the treatment being received does not appear to be clinically justified and/or an opinion on treatment needs is required;
- an employee has developed a new or secondary condition (that may, or may not be, related to their work environment);
- an employee has submitted a claim, including for permanent impairment (subject to the use and application of powers in the SRC Act with respect to the claim);
- concerns about the current medical evidence;
- the condition seems to have stabilised; or
- recovery has stalled.

For example, an Agency Head may direct an employee to attend a medical examination following an extended absence from the workplace. The medical examination will provide the Agency Head with information to develop a return to work plan that may include recommendations on modified duties or a modified work pattern. The information from the medical examination assists the Agency Head to address the pressing or substantial concern to meet their duty of care and ensure the employee is able to return to the workplace successfully.

An Agency Head may also direct an employee to attend a medical examination where the employee has notified the Agency Head that they have a medical condition influencing their ability to undertake their duties. In this situation, the Agency Head may direct the employee to attend a medical examination to ensure the employee remains safe in the workplace. The medical examination will ensure the Agency Head has the necessary information to understand the type of support required, or any changes required to the employee's role and address the pressing or substantial concern to make reasonable accommodation for the employee. This may include providing the employee with modified duties or, in consultation with the employee, moving them to an alternative role that is more suited to their current needs. This can be particularly pertinent in dangerous work environments, noting the public service undertakes a diverse range of roles across a breadth of work environments and workplaces, for example, abattoirs, national parks, the Antarctic, ports, wharfs, ships and vessels, and so forth.



The examples described above on the use of the power to attend a medical examination serve a legitimate objective, to assist Agency Heads to meet their duty of care towards employees under the WHS Act. They are rationally connected to that objective, and are a proportionate means of achieving that objective. Likewise, the ability to direct an employee to attend a medical examination is instrumental to supporting the effective operation of the SRC Act in parallel to the powers in the Regulations.

In determining whether an employee's health may be affecting their work performance or standard of conduct, an Agency Head will usually make this determination following information received from the employee. An employee may volunteer this information with the aim of seeking support or assistance, or following a performance or conduct discussion, an employee may provide a health concern as the explanation for their behaviour. Where an employee raises their health as the explanation for a performance concern, a medical examination will assist an Agency Head to ensure any action taken is reasonable. For example, if a medical examination demonstrated an employee's underperformance may be attributable to, or the result of, a medical condition.

All ongoing, non-ongoing and casual APS employees (other than SES employees) can seek review of certain decisions or actions that relate to their employment. This right to seek a review is an entitlement built into section 33 of the Act.

A written notice under section 11 must be a lawful and reasonable direction. Procedural fairness necessitates that where an Agency Head provides written notice to an employee to attend a medical examination they must include a reason for the decision.

However, should an Agency Head not provide sufficient detail in the written notice, this would not limit the employee's ability to seek a review in accordance with the review provisions in the 2023 Regulations.

The ability to nominate the medical practitioner who will undertake a medical examination does not limit an Agency Head from nominating a practitioner of the employee's preference. However, there are circumstances where an Agency Head may wish to nominate an alternative practitioner.

The Regulations do not limit an employee from providing a shadow medical report to the Agency Head. A shadow report would form part of the materials for consideration by an Agency Head prior to undertaking any action.

The information in the medical report will inform the Agency Head in decisions made relating to the employee. For example in the development of a return to work plan or a return to full time duties plan. The information could determine whether alternative duties or workplace support is necessary. While termination is possible, to terminate an employee on the ground of inability to perform duties because of physical or mental incapacity, the Agency Head would also need to ensure they have met their obligations under all relevant laws, including for example the *Disability Discrimination Act 1992* and SRC Act. This includes taking all reasonable steps to provide the injured employee with suitable employment or to assist the injured employee to find such employment. Therefore, information contained in the medical report would not be sufficient in isolation to terminate an employee's employment.

### ***The right to take part in public affairs***

Article 25 of the ICCPR provides that every citizen shall have the opportunity to take part in the conduct of public affairs and to have access to the public service in their country.

Parts 4–6 of the 2023 Regulations (discussed above) generally promote this right by creating a system for the review of certain APS actions, including engagement and promotion decisions, to further the objective of merit-based selection.

### ***The right to privacy***

Article 17 of the ICCPR relevantly states that no one shall be subjected to arbitrary or unlawful interference with their privacy.

#### *Section 103 – Use and disclosure of personal information*

Section 103 provides that an Agency Head, the Public Service Commissioner or the Merit Protection Commissioner may use or disclose personal information in limited circumstances. The disclosure authorised by section 103 is not ‘arbitrary or unlawful’. To the extent that the right to privacy in article 17 may be limited, any limitation is reasonable, necessary and proportionate.

The Agency Head, Public Service Commissioner and Merit Protection Commissioner are not authorised to disclose personal information to the public. They are authorised to disclose personal information collected for a specific purpose, for a broadly related purpose.

An Agency Head is authorised to disclose personal information where this is necessary or relevant to the Agency Head’s exercise of their employer powers. The Australian Public Service Commissioner is authorised to use personal information obtained as part of their review or inquiry functions, for an inquiry into the Code of Conduct, or for the Agency Head’s consideration of alleged misconduct by an APS employee. The Merit Protection Commissioner is authorised to use personal information where this is necessary for or relevant to their consideration of misconduct by an APS employee.

The Commonwealth is the sole employer of Australian Public Service employees regardless of which agency engages them. Under section 20 of the Act, Agency Heads have all the rights, duties and powers of an employer in respect of employees in their agency. However, the *Privacy Act 1988* treats each APS agency as a wholly separate entity for the purposes of handling personal information. This means that sharing personal information about APS employees between Commonwealth agencies—for example, when a staff member moves between agencies, or when a person applies for a job in another agency— would be a disclosure for the purposes of the *Privacy Act 1988*. Historically this created significant administrative difficulty for Agency Heads to perform and give full effect to their employer powers for the benefit of both their employees, and the Commonwealth.

As a result, the Act and 2023 Regulations provide for authorised disclosures in certain circumstances between APS agencies under section 103. This ensures a common understanding of employment-related personal information disclosure across the APS. This expanded in 2013 to enable Agency Heads to use or disclose personal information necessary or relevant to any of their employer powers under the Act.

Section 103 is therefore an authorising provision for the purposes of the *Privacy Act 1988*, to enable sharing of personal information where appropriate between and within agencies.

The personal information records of employees can transfer with the employee from one agency to another for a range of ordinary employer purposes:

- recruitment, including promotion decisions;
- movements within agencies under a Machinery of Government process pursuant to section 72 of the Act;
- permanent or temporary transfers pursuant to section 26 of the Act;
- case management and provision of rehabilitation services to ill or injured employees;
- remuneration, tax, superannuation and other financial administration purposes; and
- where Code of Conduct or other personnel management processes might require appropriate disclosure to and use by non-employing agencies.

All APS employees must comply with common standards of behaviour through the APS Values, Employment Principles, and Code of Conduct, which reflect the expectations the Commonwealth has of APS employees in respect of their performance and behaviour, and ultimately maintain public confidence in the integrity of the APS.

Public confidence is likely to be undermined if Agency Heads are not able to manage APS employees in a practical, sensible way and consistent with the common standards set by Parliament in the Act. Should information about employee behaviour calling into question their adherence to the common standards come to the attention of the Commonwealth, it is appropriate that the agency responsible for managing that employee consider and address it. Employees should have a reasonable expectation that this will occur, and the broader community would expect that public servants be treated fairly and not be protected by technical procedural requirements.

The provision also has the effect of providing clarity for employees seeking to report suspected misconduct, including suspected corruption. There is an expectation across the APS that employees will report behaviour suspected of breaching the Code of Conduct, or suspected breaches of other legislation, such as work health and safety or anti-discrimination law. Staff and agencies need assurance that making such a report within an agency, or to another agency, constitutes a disclosure or use of information that is ‘required or authorised’ by law.

An Agency Head, the APS Commissioner, and the Merit Protection Commissioner may disclose information both within and outside the Commonwealth. In practice, this includes their delegates and authorised employees who may exercise their relevant powers, functions or duties. In some circumstances, Agency Heads may need to consider disclosing personal information to a member of the public, for example to a non-APS complainant regarding the outcome of their complaint. The Commission has provided guidance to agencies on disclosing information to complainants (Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants: currently under review).

Authorised use and disclosure of personal information under section 103 must still be consistent with the *Privacy Act 1988* in all other respects. This includes notification to employees upon engagement of how their agency may disclose and use their personal information, in accordance with Australian Privacy Principle 5.

The Commission has issued guidance, after consultation with the Office of the Australian Information Commissioner, on the application of section 103 of the 2023 Regulations (which is unchanged in substance from regulation 9.2 of the 1999 Regulations). That guidance is in Circular 2016/2: Use and disclosure of employee information. The guidance sets out principles underpinning appropriate use and disclosure of information under section 103 of the Regulations:

*4. Section 103 provides agencies with significant flexibility in the use and disclosure of personal information, including very sensitive personal information, of their employees. The personal information of employees should be used or disclosed carefully. Generally, personal information should not be used or disclosed for a reason other than that for which it was collected.*

[...]

*6. The use and disclosure of employees' personal information requires careful, balanced consideration in each case. On one hand, employees have a right to expect that their personal information is held in confidence and only used or disclosed for proper, defensible reasons. On the other, APS agencies need to be able to:*

- a. use information they hold about their employees to make employment decisions that are lawful, sensible and based on the available evidence, and*
- b. disclose employee information to other APS agencies to support their decision-making.*

The further information and safeguards explained above recognise that the use and disclosure of personal information provided for by section 103 is not arbitrary, pursues a legitimate objective, and is effective and proportionate to achieving that objective.

## **Conclusion**

The regulations are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it promotes the protection of human rights (in particular, the right to work and rights to work and the right take part in public affairs). To the extent that a provision operates to limit a right or freedom, those limitations are reasonable, necessary and proportionate.