



Public Service Regulations 2023

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 16 March 2023

David Hurley
Governor-General

By His Excellency's Command

Katy Gallagher
Minister for the Public Service

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Part 1—Preliminary

1 Name

This instrument is the *Public Service Regulations 2023*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	30 March 2023

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Public Service Act 1999*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

5 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) Agency Head;
- (b) APS employment;
- (c) Classification Rules;
- (d) Code of Conduct;
- (e) Commissioner's Directions;
- (f) Merit Protection Commissioner.

In this instrument:

Act means the *Public Service Act 1999*.

action has the meaning given by subsection 33(7) of the Act.

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affected employee has the meaning given by subsection 36(1).

affected former employee has the meaning given by subsection 73(1).

APS action has the meaning given by subsection 33(7) of the Act.

Australian Public Service Commissioner means the Australian Public Service Commissioner appointed under the Act.

classification means:

- (a) in relation to an APS employee or APS employment—an approved classification within the meaning of the Classification Rules; or
- (b) in relation to a Parliamentary Service employee—an approved classification within the meaning of the *Parliamentary Service Classification Rules 2010* as in force at the commencement of this instrument.

Classification Rules means the Classification Rules as in force at the commencement of this instrument.

debtor means any of the following who owes a judgment debt:

- (a) a Secretary;
- (b) the Head of an Executive Agency;
- (c) an APS employee.

discloser has the same meaning as in the *Public Interest Disclosure Act 2013*.

employer powers, for an Agency Head, means the rights, duties and powers of the Agency Head under the Act and instruments made under the Act.

employment means APS employment.

employment arrangement means any of the following:

- (a) a fair work instrument;
- (b) a transitional instrument;
- (c) a determination made under subsection 24(1) or (3) of the Act;
- (d) a written contract of employment.

external review body does not include a court or tribunal.

higher classification, in relation to an ongoing Parliamentary service employee, has the meaning given by section 6.

Independent Selection Advisory Committee (or **ISAC**) means an Independent Selection Advisory Committee established under Subdivision B of Division 2 of Part 6.

judgment debt has the meaning given by subsection 75(2) of the Act.

medical practitioner means a person who is registered, or licensed, as a health practitioner under a law of a State or Territory that provides for the registration or licensing of health practitioners.

member of the Fair Work Commission has the same meaning as **FWC Member** has in the *Fair Work Act 2009*.

net salary of a debtor means the debtor's total gross salary, less any amount to be deducted:

- (a) to pay income tax; or
- (b) to pay child support in accordance with the *Child Support (Assessment) Act 1989*; or
- (c) as a contribution that:
 - (i) the debtor is required to make to a superannuation fund relating to the debtor's appointment or engagement as a Secretary, the Head of an Executive Agency or an APS employee; and
 - (ii) is the minimum amount required by law or the rules of the fund.

ongoing Parliamentary Service employee has the same meaning as in the *Parliamentary Service Act 1999*.

Parliamentary Service employee has the same meaning as in the *Parliamentary Service Act 1999*.

paying officer, in relation to a debtor, means a person appointed under section 90 in relation to the debtor.

personal information has the same meaning as in the *Privacy Act 1988*.

promotion, for an ongoing APS employee, has the same meaning as in the Commissioner's Directions.

Promotion Review Committee (or **PRC**) means a Promotion Review Committee appointed under Division 2 of Part 4.

public interest disclosure has the same meaning as in the *Public Interest Disclosure Act 2013*.

Public Service Gazette means the Australian Public Service Gazette published in electronic form.

Note: The Public Service Gazette is accessible through the APSJobs website (<http://www.apsjobs.gov.au>).

relevant Agency Head, for a review of an APS action, means:

- (a) if the action is an action by an Agency Head—the Agency Head; or
- (b) if the action is an action by an APS employee—the Agency Head of the Agency in which the employee was employed at the time of the action.

relevant employment means employment as an ongoing APS employee at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the Classification Rules.

reviewable action has the meaning given by section 37.

statutory office holder has the meaning given by subsection 14(3) of the Act.

total gross salary of a debtor means the total of:

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- (a) the amount of the debtor’s gross salary as a Secretary, the Head of an Executive Agency or an APS employee (not including any payment of compensation under the *Safety, Rehabilitation and Compensation Act 1988*); and
- (b) the amount of the allowances, in the nature of salary, that are paid regularly to the debtor in connection with the debtor’s appointment or engagement as a Secretary, the Head of an Executive Agency or an APS employee; without any reduction for salary sacrifice arrangements or other arrangements with a similar purpose.

transitional instrument has the same meaning as in the transitional Schedules to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

transitional minimum wage instrument has the same meaning as in the transitional Schedules to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

tribunal means a tribunal constituted under an enactment.

work-related qualities, in relation to a person, has the same meaning as in the Commissioner’s Directions.

6 Meaning of higher classification

A person who is an ongoing Parliamentary Service employee is engaged as an ongoing APS employee at a **higher classification** than the person’s classification as an ongoing Parliamentary Service employee immediately before the engagement if:

- (a) the person is engaged as an ongoing APS employee at a classification mentioned in column 1 of an item in the following table; and
- (b) immediately before the engagement, the person was engaged as an ongoing Parliamentary Service employee at the classification mentioned in column 2 of that item.

Meaning of higher classification		
Item	Column 1 APS Group classification	Column 2 Parliamentary Service Group classification
1	2, 3, 4, 5, 6, 7, 8, 9, 10, 11	1
2	3, 4, 5, 6, 7, 8, 9, 10, 11	2
3	4, 5, 6, 7, 8, 9, 10, 11	3
4	5, 6, 7, 8, 9, 10, 11	4
5	6, 7, 8, 9, 10, 11	5
6	7, 8, 9, 10, 11	6
7	8, 9, 10, 11	7
8	9, 10, 11	8
9	10, 11	9
10	11	10

Part 2—The Code of Conduct

7 Duty not to disclose information

- (1) This section is made for the purposes of subsection 13(13) of the Act.
- (2) This section does not affect other restrictions on the disclosure of information.
- (3) An APS employee must not disclose information that the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
- (4) An APS employee must not disclose information that the APS employee obtains or generates in connection with the APS employee's employment if the information:
 - (a) was, or is to be, communicated in confidence within the government; or
 - (b) was received in confidence by the government from a person or persons outside the government;whether or not the disclosure would found an action for breach of confidence.
- (5) Subsections (3) and (4) do not prevent a disclosure of information by an APS employee if:
 - (a) the information is disclosed in the course of the APS employee's duties; or
 - (b) the information is disclosed in accordance with an authorisation given by an Agency Head; or
 - (c) the disclosure is otherwise authorised by law; or
 - (d) the information:
 - (i) is already in the public domain as the result of a disclosure of information that is lawful under this instrument or another law; and
 - (ii) can be disclosed without disclosing, expressly or by implication, other information to which subsection (3) or (4) applies.
- (6) Subsections (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.

8 Statutory office holders bound by Code of Conduct

Extent to which statutory office holders are bound by the Code of Conduct

- (1) For the purposes of subsection 14(2A) of the Act:
 - (a) 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:
 - (i) in a supervisory capacity; or
 - (ii) in another capacity related to the statutory office holder's day-to-day working relationship with APS employees; and

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- (b) the statutory officer holder is not bound by the Code of Conduct to the extent of any inconsistency between the requirements of:
 - (i) the Code of Conduct; and
 - (ii) a law of the Commonwealth, or a State or Territory, that relates to the statutory office holder's office or appointment.

Note: The Code of Conduct requires the upholding of the APS Values and APS Employment Principles, among other things.

- (2) For the purposes of subsection 14(2A) of the Act, a statutory office holder is bound by the Code of Conduct to the extent to which the Code can apply to the statutory office holder if:
 - (a) a reference in the Code to an APS employee were taken to include a reference to a statutory office holder; and
 - (b) a reference in the Code to APS employment were taken to include matters related to the statutory office holder's office or appointment.

*Meaning of **statutory office holder**—offices*

- (3) For the purposes of the definition of **statutory office holder** in subsection 14(3) of the Act, an office is prescribed if:
 - (a) the office is held by a person who is engaged or employed under an Act; and
 - (b) the office is held by a person who is assisted by, or deals with, APS employees:
 - (i) in a supervisory capacity; or
 - (ii) in another capacity related to the person's day-to-day working relationship with APS employees; and
 - (c) the office is not:
 - (i) an office of Agency Head; or
 - (ii) a judicial office.

*Meaning of **statutory office holder**—appointments*

- (4) For the purposes of the definition of **statutory office holder** in subsection 14(3) of the Act, an appointment is prescribed if:
 - (a) the appointment is of a person under an Act; and
 - (b) the appointment is of a person who is assisted by, or deals with, APS employees:
 - (i) in a supervisory capacity; or
 - (ii) in another capacity related to the person's day-to-day working relationship with APS employees; and
 - (c) the appointment is not any of the following:
 - (i) an appointment as an Agency Head;
 - (ii) a judicial appointment;
 - (iii) an appointment as a member of the Administrative Appeals Tribunal;
 - (iv) an appointment as a member of the Australian Defence Force;
 - (v) an appointment as a member of the Fair Work Commission;
 - (vi) an appointment as a member of the National Native Title Tribunal;

(vii) an appointment as a member of the Veterans' Review Board.

9 Limitation on sanctions for breaches of Code of Conduct

- (1) This section applies if:
 - (a) an APS employee in an Agency is found to have breached the Code of Conduct; and
 - (b) under paragraph 15(1)(e) of the Act, the Agency Head imposes on the employee the sanction of deduction from salary, by way of fine.
- (2) For the purposes of subsection 15(2) of the Act, the deduction must not be more than 2% of the APS employee's annual salary.

Part 3—APS employees

Division 1—Employer powers etc. of Agency Heads

10 Condition of engagement—health clearance

- (1) This section applies to an APS employee whose engagement in an Agency is subject, under paragraph 22(6)(e) of the Act, to a condition dealing with health clearances.
- (2) For the purposes of subsection 20(2) of the Act, while the engagement is subject to the condition:
 - (a) the Agency Head may, in writing, direct the employee to do either or both of the following within a specified period:
 - (i) undergo an examination by a medical practitioner nominated by the Agency Head to assess the employee's fitness for duty;
 - (ii) give the Agency Head a report of the examination; and
 - (b) the nominated medical practitioner may give the Agency Head a report of the examination.

Note 1: The *Privacy Act 1988* has rules about keeping records of personal information.

Note 2: Arrangements will be made in Agencies to ensure that employees know the period in which an engagement is subject to a condition dealing with health clearances.

11 Direction to attend medical examination

- (1) This section applies if:
 - (a) an Agency Head believes that the state of health of an APS employee in the Agency:
 - (i) may be affecting the employee's work performance; or
 - (ii) has caused, or may cause, the employee to have an extended absence from work; or
 - (iii) may be a danger to the employee; or
 - (iv) has caused, or may cause, the employee to be a danger to other employees or members of the public; or
 - (v) may be affecting the employee's standard of conduct; or
 - (b) an APS employee is to be assigned new duties and the Agency Head believes the employee's state of health may affect the employee's ability to undertake the duties; or
 - (c) an APS employee is to travel overseas as part of the APS employee's employment.

Note: Examples of extended absences are:

- (a) an absence from work of at least 4 continuous weeks; and
- (b) a combined total of absences from work, within a 13 week period, whether based on a single or separate illness or injury, of at least 4 weeks.

- (2) For the purposes of subsection 20(2) of the Act, the Agency Head may:
 - (a) by written notice, direct the APS employee to undergo an examination, within the period specified in the notice, by a medical practitioner

nominated by the Agency Head to assess the employee's fitness for duty;
and

- (b) if the employee is given a direction under paragraph (a)—by written notice, direct the APS employee to give the Agency Head a report of the examination within the period specified in the notice.
- (3) A direction may be given under paragraph (2)(b) in the same notice as a direction given under paragraph (2)(a) or in a later notice.
- (4) To avoid doubt, subsection (2) does not limit the authority of an Agency Head to give any other lawful and reasonable direction.
- (5) The nominated medical practitioner may give the Agency Head a report of the examination.

Note: The *Privacy Act 1988* has rules about keeping records of personal information.

12 Engagement of SES employees for a specified term

- (1) For the purposes of subsection 22(4) of the Act, this section prescribes circumstances in which an Agency Head may engage a person as an SES employee for a specified term.

Note 1: The usual basis for engagement of an APS employee is as an ongoing APS employee (see paragraph 10A(1)(b) of the Act). An Agency Head is expected to have regard to that paragraph before engaging a person as a non-ongoing APS employee.

Note 2: Paragraph 10A(1)(c) of the Act requires engagement and promotion decisions to be based on merit. Division 1 of Part 4 of the Commissioner's Directions explains how this employment principle is to be applied.

- (2) Subject to subsection (4), an Agency Head may engage a person as an SES employee for a specified term if the term does not exceed 5 years.
- (3) For the purposes of subsection 22(5) of the Act and subject to subsection (4) of this section, if a person has been engaged for a specified term of less than 5 years, the engagement may be extended once or more than once, but only to the extent that the total term does not exceed 5 years.
- (4) An Agency Head may engage a person under a contract of employment as an SES employee for a specified term only if the Agency Head is reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009*.

Note: Subsection 333E(1) of the *Fair Work Act 2009* is about limitations on fixed term contracts.

13 Engagement of non-ongoing non-SES employees

- (1) For the purposes of subsection 22(4) of the Act, this section prescribes circumstances in which an Agency Head may engage a person as a non-SES employee for a specified term or for the duration of a specified task (a ***non-ongoing non-SES employee***).

Note 1: The usual basis for engagement of an APS employee is as an ongoing APS employee (see paragraph 10A(1)(b) of the Act). An Agency Head is expected to have regard to that paragraph before engaging a person as a non-ongoing APS employee.

Part 3 APS employees

Division 1 Employer powers etc. of Agency Heads

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Note 2: Paragraph 10A(1)(c) of the Act requires engagement and promotion decisions to be based on merit. Division 1 of Part 4 of the Commissioner's Directions explains how this employment principle is to be applied.

Engagement for duration of specified task

- (2) An Agency Head may engage a person under a contract of employment as a non-ongoing non-SES employee for the duration of a specified task only if the Agency Head is reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009*.

Note: Subsection 333E(1) of the *Fair Work Act 2009* is about limitations on fixed term contracts.

- (3) If an Agency Head engages a person as a non-ongoing non-SES employee for the duration of a specified task (whether or not under a contract of employment), the Agency Head must, at the time of the engagement:
- (a) be able to reasonably estimate the duration of the task; and
 - (b) be satisfied that the services of the person are unlikely to be required after the task is complete.

Engagement for specified term

- (4) Subject to subsection (8), an Agency Head may engage a person as a non-ongoing non-SES employee for a specified term if:
- (a) 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; or
 - (b) the particular skills, knowledge or experience required to perform the duties of the employment can best be met by employing a person who has recently worked in the industry that corresponds to the employment for which the person is being engaged; or
 - (c) the purpose of the employment is to assist the person to gain:
 - (i) skills and experience, by participating in the workforce under a scheme approved by the Agency Head or the Australian Public Service Commissioner; or
 - (ii) a formal occupational qualification, licence, accreditation or registration; or
 - (d) the person has received a written offer of ongoing APS employment, but prefers to be engaged as a non-ongoing APS employee; or
 - (e) the person is an ongoing Parliamentary Service employee.

Note: For the purposes of paragraph (a), the Agency may, for example:

- (a) have a temporary increase in its workload; or
- (b) have a temporary demand for employees with particular skills; or
- (c) need to replace an ongoing APS employee who is on leave or who is assigned to other duties.

- (5) Subject to subsection (8), if an Agency Head engages a person as a non-ongoing non-SES employee for a specified term as described in subsection (4):
- (a) the period of the engagement must be a period that represents a reasonable estimate of the time required for the performance of the duties; and
 - (b) if the person is engaged:

- (i) because the circumstance mentioned in paragraph (4)(a) or (b) applies; and
 - (ii) before the commencement of Part 10 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*; the period of the engagement must not be more than 18 months, and any extension of the engagement must be for a period that represents a reasonable estimate of the length of time required for the performance of the duties; and
 - (c) subject to subsections (6) and (8), the total period of the engagement, including any extensions of the engagement, must not exceed 3 years.
- (6) Subject to subsection (8), the period of 3 years mentioned in paragraph (5)(c) may be extended, for a period of not more than 12 months, only if:
- (a) the Agency Head considers that the engagement is necessary for the Agency's operations; and
 - (b) the Australian Public Service Commissioner:
 - (i) is satisfied that special circumstances exist; and
 - (ii) authorises the Agency Head to extend the engagement.
- (7) Subject to subsection (8), an Agency Head may engage a person as a non-ongoing non-SES employee for a specified term if:
- (a) the person is an employee of a State or Territory, or an authority of a State or Territory, and the Agency Head has entered into an agreement with the State or Territory, or the authority of the State or Territory, to engage the person as a non-ongoing employee for a specified term; and
 - (b) the period of the engagement mentioned in paragraph (a) is the period decided by the Agency Head.
- (8) An Agency Head may engage a person under a contract of employment as a non-ongoing non-SES employee for a specified term as described in subsection (4) or (7) only if the Agency Head is reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009*.

Note: Subsection 333E(1) of the *Fair Work Act 2009* is about limitations on fixed term contracts.

14 Suspension from duties

- (1) This section is made for the purposes of section 28 of the Act.
- (2) An Agency Head may suspend an APS employee employed in the Agency from duties if the Agency Head believes on reasonable grounds that:
 - (a) the employee has, or may have, breached the Code of Conduct; and
 - (b) the employee's suspension is in the public, or the Agency's, interest.
- (3) The suspension may be with remuneration.
- (4) If the suspension is to be without remuneration, the period without remuneration must not be more than 30 days unless exceptional circumstances apply.
- (5) The Agency Head must review the suspension at reasonable intervals.

Part 3 APS employees

Division 1 Employer powers etc. of Agency Heads

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- (6) The Agency Head must immediately end the suspension if the Agency Head no longer believes on reasonable grounds that:
 - (a) the APS employee has, or may have, breached the Code of Conduct; or
 - (b) the employee's suspension is in the public, or the Agency's, interest.
- (7) The Agency Head must immediately end the suspension if a sanction has been imposed on the APS employee for the relevant breach of the Code of Conduct.
- (8) In exercising powers under this section, the Agency Head must have due regard to procedural fairness unless the Agency Head is satisfied, on reasonable grounds, that this would not be appropriate in the particular circumstances.

15 Termination of employment

- (1) This section is made for the purposes of paragraph 29(3)(h) and subsection 29(4) of the Act.
- (2) It is a ground for the termination of the employment of an ongoing APS employee or a non-ongoing APS employee that an investigation report, within the meaning of the *National Anti-Corruption Commission Act 2022*, includes a recommendation to terminate the employment of the APS employee.

Division 2—Miscellaneous

16 Knowledge of Act, regulations and Commissioner's Directions

APS employees must inform themselves about the Act, this instrument and the Commissioner's Directions.

Part 4—Review of actions

Division 1—Statement of intent and outline

17 General policy about review

- (1) It is government policy that Agencies should achieve and maintain workplaces that encourage productive and harmonious working environments.
- (2) For the purposes of section 33 of the Act, this Part is intended to provide for a fair system of review of certain APS actions.
- (3) Employees' concerns are intended to be dealt with quickly, impartially, and fairly.
- (4) The review processes are intended to be consistent with the use of alternative dispute resolution methods to reach satisfactory outcomes if appropriate.

18 Review of APS actions—certain promotion decisions and engagement decisions

Division 2 provides for applications for review of certain promotion decisions and engagement decisions to be made to the Merit Protection Commissioner for review by a Promotion Review Committee.

19 Review of other APS actions

Division 3 provides for the following:

- (a) applications for primary review of other APS actions to be made to the relevant Agency Head or, in certain circumstances, to the Merit Protection Commissioner;
- (b) applications for secondary review of an APS action if:
 - (i) the relevant Agency Head told the employee under section 40 that the action is not a reviewable action; or
 - (ii) the employee is dissatisfied with the outcome of the relevant Agency Head's review of the action under section 41.

Note: A recommendation made on an application to the Merit Protection Commissioner for primary or secondary review is not binding on an Agency Head (see section 46).

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

20 Application of this Division

- (1) This Division applies if:
 - (a) a decision (a *promotion decision*) is made by an Agency Head to promote an ongoing APS employee to employment at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the Classification Rules; and
 - (b) the promotion decision is not made in accordance with the recommendation of an Independent Selection Advisory Committee; and
 - (c) the promotion decision is not made in accordance with a PRC decision.
- (2) This Division also applies if:
 - (a) an engagement decision is made by an Agency Head to engage an ongoing Parliamentary Service employee to employment at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the Classification Rules; and
 - (b) the engagement decision is not made in accordance with the recommendation of an Independent Selection Advisory Committee; and
 - (c) the engagement decision is not made in accordance with a PRC recommendation.
- (3) In this Division, a decision to engage an ongoing Parliamentary Service employee is an *engagement decision* if the engagement is at a higher classification than the ongoing Parliamentary Service employee's classification as a Parliamentary Service employee.

Note: For *higher classification*, in relation to an ongoing Parliamentary Service employee, see section 6.

21 Entitlement to review—promotion decisions

- (1) If:
 - (a) an ongoing APS employee applies for promotion to relevant employment; and
 - (b) a promotion decision is made in relation to the relevant employment; the ongoing APS employee is entitled to apply to the Merit Protection Commissioner to have the promotion decision reviewed by a Promotion Review Committee.
- (2) If:
 - (a) an ongoing Parliamentary Service employee applies for engagement to relevant employment; and
 - (b) the engagement would be at a higher classification than the Parliamentary Service employee's classification as a Parliamentary Service employee; and
 - (c) a promotion decision is made in relation to the relevant employment;

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the ongoing Parliamentary Service employee is entitled to apply to the Merit Protection Commissioner to have the promotion decision reviewed by a Promotion Review Committee.

Note 1: The Merit Protection Commissioner may appoint a Promotion Review Committee under section 25 to deal with:

- (a) applications from APS employees and Parliamentary Service employees in relation to the same promotion decision; and
- (b) applications relating to promotion decisions and engagement decisions.

Note 2: For *promotion decision* and *engagement decision*, see section 20.

22 Entitlement to review—engagement decisions involving Parliamentary Service employees

(1) If:

- (a) an ongoing APS employee applies for promotion to relevant employment; and
 - (b) an engagement decision is made in relation to the relevant employment;
- the ongoing APS employee is entitled to apply to the Merit Protection Commissioner to have the engagement decision reviewed by a Promotion Review Committee.

(2) If:

- (a) an ongoing Parliamentary Service employee applies for engagement to relevant employment; and
 - (b) the engagement would be at a higher classification than the Parliamentary Service employee's classification as a Parliamentary Service employee; and
 - (c) an engagement decision is made in relation to the relevant employment;
- the ongoing Parliamentary Service employee is entitled to apply to the Merit Protection Commissioner to have the engagement decision reviewed by a Promotion Review Committee.

Note 1: The Merit Protection Commissioner may appoint a Promotion Review Committee under section 25 to deal with:

- (a) applications from APS employees and Parliamentary Service employees in relation to the same engagement decision; and
- (b) applications relating to promotion decisions and engagement decisions.

Note 2: For *promotion decision* and *engagement decision*, see section 20.

23 Grounds for review

A promotion decision or engagement decision may only be reviewed under this Division on the grounds of merit.

Note: It is an APS Employment Principle that engagement and promotion decisions are based on merit (see paragraph 10A(1)(c) of the Act). A decision relating to engagement or promotion is based on merit if the conditions set out in subsection 10A(2) of the Act are complied with.

24 Application for review

- (1) An application for review of a promotion decision, or an engagement decision, under this Division must be in writing.
- (2) An application for review of a promotion decision, or an engagement decision, under this Division must be received by the Merit Protection Commissioner:
 - (a) within:
 - (i) the period specified in the Public Service Gazette as part of notifying the promotion or the engagement; or
 - (ii) if, before the end of the period mentioned in subparagraph (i), the Merit Protection Commissioner extends the period for a class of employees that includes the applicant—the extended period; and
 - (b) at the place specified in the Public Service Gazette.
- (3) The making of an application for review of a promotion decision or an engagement decision under this Division operates to stay the promotion decision or engagement decision until it takes effect in accordance with Part 4 of the Commissioner's Directions.

25 Appointment of PRC

- (1) If the Merit Protection Commissioner receives an application for review of a promotion decision or an engagement decision under this Division, the Merit Protection Commissioner must:
 - (a) consider the circumstances in which the application was made; and
 - (b) if the Merit Protection Commissioner believes that a review of the promotion decision or engagement decision is necessary—appoint a PRC to deal with the application.
- (2) A PRC may be appointed to deal with:
 - (a) applications by ongoing APS employees or ongoing Parliamentary Service employees (or both) for review of a promotion decision; and
 - (b) applications by ongoing APS employees or ongoing Parliamentary Service employees (or both) for review of an engagement decision; and
 - (c) applications in relation to more than one promotion decision or engagement decision.

Note: For *promotion decision* and *engagement decision*, see section 20.

26 Constitution of PRC

- (1) A PRC must comprise:
 - (a) a Convenor nominated by the Merit Protection Commissioner; and
 - (b) an APS employee nominated by the relevant Agency Head; and
 - (c) an APS employee nominated by the Merit Protection Commissioner.
- (2) The Merit Protection Commissioner must be satisfied that the APS employee nominated under paragraph (1)(c) has the necessary skills and personal qualities to perform the APS employee's duties as a member of the PRC independently and impartially.

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- (3) The APS employee nominated under paragraph (1)(c) must be made available for the purposes of the PRC, subject to the operational efficiency of the Agency in which the APS employee is employed.
- (4) If a member of a PRC ceases to act as a member before the PRC makes its recommendation to the relevant Agency Head, the PRC must be reconstituted by the remaining members and another member nominated in accordance with subsection (1).
- (5) The reconstituted PRC must have regard to matters put before, or decided by, the PRC as previously constituted.
- (6) A person is not subject to direction in performing the person's duties as a member of a PRC, except:
 - (a) by a Court; or
 - (b) in accordance with instructions issued under section 30.

27 Statements by parties

- (1) The Merit Protection Commissioner may, by written notice, invite (as the case requires):
 - (a) an applicant for review of a promotion decision, and the person promoted; or
 - (b) an applicant for review of an engagement decision, and the person engaged;to give the Merit Protection Commissioner a written statement setting out the person's claim for promotion or engagement to the relevant employment.
- (2) A statement under subsection (1) must be given to the Merit Protection Commissioner:
 - (a) within 14 days after the day the notice under subsection (1) was given; or
 - (b) if:
 - (i) within that 14 days, the applicant for review, or the person promoted or engaged, asks the Merit Protection Commissioner for a longer period within which to give the statement; and
 - (ii) the Merit Protection Commissioner agrees to a longer period; within that longer period.
- (3) If the statement is not given within the period required under subsection (2), the PRC may consider and decide the application for review without the statement.
- (4) Subject to paragraph 29(1)(a) (which relates to procedural fairness), neither an applicant for review, nor a person promoted or engaged, as mentioned in paragraph (1)(a) or (b) of this section is entitled to have access to a statement that is given to the Merit Protection Commissioner by someone else under subsection (1) of this section.

28 Frivolous or vexatious applications

A PRC may refuse to consider, or further consider, an application for review if each member of the PRC is satisfied that the application is frivolous or vexatious.

29 PRC procedures—minimum requirements

- (1) The procedures used by a PRC in conducting a review under this Division must meet the following minimum requirements:
 - (a) the procedures must have due regard to procedural fairness;
 - (b) the review must be conducted in private;
 - (c) the review must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.
- (2) A person appearing before a PRC must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

30 PRC procedures—Merit Protection Commissioner’s instructions

- (1) The Merit Protection Commissioner must, as soon as practicable after the commencement of this instrument, issue instructions about the procedures to be followed by a PRC in performing its functions under this Division.
- (2) The instructions must not be inconsistent with the Act, this instrument or the Commissioner’s Directions.
- (3) A PRC must comply with the instructions.

31 Assistance to PRC

The Merit Protection Commissioner must take all reasonable steps to ensure that staff are available to assist a PRC to perform its functions under this Division efficiently and effectively.

32 Requirement to provide information or documents

- (1) A PRC may, by written notice given to an Agency Head, require the Agency Head to give to the PRC stated information or documents relevant to the review.
- (2) The Agency Head must give the information or documents in the way, and at or within the time, stated in the notice.

33 Conduct of review by PRC

Assessment of relative merits

- (1) In conducting a review of a promotion decision or an engagement decision, a PRC must assess the relative merits of the person promoted or engaged, and each applicant for review of the decision, on the basis of:

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- (a) the relative suitability of each person to perform the duties (the *relevant duties*) relating to the relevant employment; and
- (b) the relationship between each person's work-related qualities and the work-related qualities genuinely required for the relevant duties; and
- (c) the relative capacity of each person to achieve outcomes related to the relevant duties.

Decision relating to applicant who is APS employee

- (2) If the applicant for the review is an APS employee, the PRC must:
 - (a) decide, primarily on the basis of the assessment conducted under subsection (1), that:
 - (i) the promotion decision or engagement decision should be upheld; or
 - (ii) the applicant for review should be promoted to the relevant employment; and
 - (b) inform the Agency Head of the responsible Agency, in writing, of its decision.

Note: The decision is binding on the Agency Head (see subsection 35(1)).

Recommendation relating to applicant who is Parliamentary Service employee

- (3) If the applicant for the review is a Parliamentary Service employee, the PRC must:
 - (a) recommend, primarily on the basis of the assessment conducted under subsection (1), that:
 - (i) the promotion decision or engagement decision be upheld; or
 - (ii) the applicant for review be engaged to the relevant employment; and
 - (b) inform the Agency Head of the responsible Agency, in writing, of its recommendation.

Note: The recommendation is not binding on the Agency Head (see subsection 35(4)).

34 Non-agreement on decision or recommendation by PRC

- (1) This section applies if all members of a PRC do not agree on a decision or a recommendation in relation to an application for review of a promotion decision or an engagement decision.

Decision relating to applicant who is APS employee

- (2) If 2 members agree on a decision, the decision is taken to be the decision of the PRC.
- (3) If there is no agreement on a decision between any of the members, the Convenor's decision is taken to be the decision of the PRC.

Recommendation relating to applicant who is Parliamentary Service employee

- (4) If 2 members agree on a recommendation, the recommendation is taken to be the recommendation of the PRC.

- (5) If there is no agreement on a recommendation between any of the members, the Convenor's recommendation is taken to be the recommendation of the PRC.

35 Effect of PRC decision or PRC recommendation

Application for review by APS employee

- (1) If an application for review of a promotion decision or an engagement decision was made by an APS employee and a PRC conducts a review of the decision under section 33, the decision of the PRC under subsection 33(2) is binding on the Agency Head of the responsible Agency.
- (2) The decision of a PRC is not affected by:
- (a) a defect in the nomination of a member of the PRC; or
 - (b) a failure to comply with instructions issued under section 30.
- (3) If the PRC decides that the applicant for review should be promoted to the relevant employment, the applicant is taken to have been promoted to the relevant employment.

Note: See Part 4 of the Commissioner's Directions in relation to the date of effect of a decision to promote an ongoing APS employee if the decision is subject to PRC review.

Application for review by Parliamentary Service employee

- (4) If an application for review of a promotion decision or an engagement decision was made by a Parliamentary Service employee and a PRC conducts a review of the decision under section 33, the recommendation of the PRC under subsection 33(3) is not binding on the Agency Head of the responsible Agency.
- (5) The recommendation of a PRC is not affected by:
- (a) a defect in the nomination of a member of the PRC; or
 - (b) a failure to comply with instructions issued under section 30.
- (6) If the PRC recommends that the applicant for the review should be engaged to the relevant employment, the Agency Head must, as soon as practicable after being informed of the recommendation:
- (a) consider the recommendation; and
 - (b) make a decision about the recommendation; and
 - (c) inform the following persons, in writing, of the decision and the reasons for the decision:
 - (i) the applicant for the review;
 - (ii) the Merit Protection Commissioner;
 - (iii) if the review is of a promotion decision—the person promoted.
- (7) Before the Agency Head decides to act otherwise than in accordance with the recommendation, the Agency Head must seek the views of:
- (a) the applicant for the review; and
 - (b) if the review is of a promotion decision—the person promoted;

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about the decision the Agency Head proposes to make about the recommendation.

Note: See Part 4 of the Commissioner's Directions in relation to the date of effect of a decision to engage an ongoing Parliamentary Service employee as an APS employee at a higher classification than the employee's classification as an ongoing Parliamentary Service employee if the decision is subject to PRC review.

Division 3—Review of other APS actions

Subdivision A—Reviewable actions

36 Entitlement to review

- (1) For the purposes of subsections 33(1) and (2) of the Act, a non-SES employee (an **affected employee**) is entitled to review under this Division of an APS action that relates to the employee's APS employment if the action is:
 - (a) by:
 - (i) an Agency Head; or
 - (ii) an APS employee; or
 - (iii) the Australian Public Service Commissioner under section 41B of the Act; and
 - (b) reviewable action (including the action of finding that the affected employee has breached the Code of Conduct).

Note 1: For **reviewable action**, see section 37.

Note 2: A locally engaged employee is not an APS employee and is therefore not entitled to review of action under this Division.

- (2) If an affected employee makes an application for review under this Division of an APS action, the affected employee ceases to be entitled to review under this Division if, after the application is made:
 - (a) the employee ceases to be employed; or
 - (b) the employee is promoted to an SES position; or
 - (c) the action ceases to be a reviewable action.
- (3) A former APS employee is not entitled to review under this Division.

Note: For rights of former APS employees to review, see Part 6.

37 What APS actions are reviewable actions

- (1) An APS action that relates to an affected employee's APS employment is a **reviewable action** if:
 - (a) under subsection 33(1) of the Act, the affected employee is entitled to review of the action; and
 - (b) the action is not excluded from being, or has not ceased to be, a reviewable action under subsections (2) to (6) of this section.

Note: An APS employee is not entitled to review, under section 33 of the Act, of APS action that consists of the termination of the employee's employment.

- (2) An APS action mentioned in an item in the following table is not, or ceases to be, a **reviewable action**.

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APS actions that are not, or that cease to be, reviewable actions—general

Item Non-reviewable APS actions

General

- | | |
|---|--|
| 1 | Action about the policy, strategy, nature, scope, resources or direction of the APS or an Agency. |
| 2 | Action taken, or not taken, in accordance with a direction or referral given by a Minister under the Act or another Act.

Note: An Agency Head is not subject to direction by any Minister in relation to the exercise of powers by the Agency Head under section 15 of the Act or Division 1 or 2 of Part 4 of the Act in relation to particular individuals (see section 19 of the Act). |
| 3 | The issuing of a Commissioner's Direction. |
| 4 | Action taken, or not taken, for a special inquiry under section 43 of the Act or an inquiry under section 50 of the Act. |
| 5 | A determination made by the Merit Protection Commissioner under section 50A of the Act. |
| 6 | Action taken, or not taken, under section 72 of the Act. |
| 7 | Action arising under any of the following Acts:
(a) the <i>Australian Security Intelligence Organisation Act 1979</i> ;
(b) the <i>Safety, Rehabilitation and Compensation Act 1988</i> ;
(c) the <i>Superannuation Act 1976</i> ;
(d) the <i>Superannuation Act 1990</i> ;
(e) the <i>Superannuation Act 2005</i> . |

APS actions relating to employment and conditions

- | | |
|----|---|
| 8 | Action relating to the engagement of an APS employee. |
| 9 | Action of a PRC. |
| 10 | Action relating to the promotion of an ongoing APS employee as an SES employee (whether or not the employee is already an SES employee). |
| 11 | Action relating to the determination of the duties of an APS employee, unless the action involves:
(a) a reduction in classification; or
(b) a relocation to another place; or
(c) a promotion that meets the following criteria:
(i) the employee was an applicant for the promotion;
(ii) the promotion was to APS employment at a classification in Group 7 or 8 in Schedule 1 to the Classification Rules;
(iii) there were serious defects in the selection process; or
(d) the assignment to the employee of duties that the employee could not reasonably be expected to perform. |
| 12 | Action relating to a decision by an Agency Head, under Division 2 of Part 4 of the Commissioner's Directions, not to include the name of an APS employee in a notice published in the Public Service Gazette. |

- (3) An APS action is not, or ceases to be, a **reviewable action** if:
- (a) the affected employee has applied to have the action reviewed or dealt with by a court or tribunal; and
 - (b) the court or tribunal has jurisdiction to review or deal with the action.

- (4) An APS action is not, or ceases to be, a **reviewable action** if the person who is, or would be, conducting the review considers that the action should not be reviewable for any of the following reasons:
- (a) the application by the affected employee for review of the action is misconceived or lacking in substance;
 - (b) the application by the affected employee for review of the action is frivolous or vexatious;
 - (c) the affected employee has previously applied for review of the action under this Division;
 - (d) the affected employee has applied to have the action reviewed under Division 2 of this Part;
 - (e) the affected employee 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 this Division;
 - (f) the affected employee does not have sufficient direct personal interest in review of the action;
 - (g) review, or further review, of the action is not otherwise justified in all the circumstances.

Note 1: For the purposes of paragraph (e), examples of external review bodies include the Commonwealth Ombudsman, the Australian Information Commissioner and the Australian Human Rights Commission.

Note 2: For the purposes of paragraph (g), a review may not be justified because the applicant did not respond to a request under section 48 for further information about why the review is sought.

- (5) An APS action mentioned in column 1 of an item in the following table is not, or ceases to be, a **reviewable action** if a circumstance mentioned in column 2 of the item applies in relation to the APS action.

APS actions that are not, or that cease to be, reviewable actions in particular circumstances		
Item	Column 1 APS action	Column 2 Circumstance
1	APS action in relation to which an application for primary review was made to the Agency Head of the responsible Agency under subsection 38(1)	The application was not made within 120 days of the APS action occurring
2	APS action in relation to which an application for primary review was made to the Merit Protection Commissioner under paragraph 38(2)(a)	The application was not made within 60 days of the determination that the affected employee has breached the Code of Conduct
3	APS action in relation to which an application for primary review was made to the Merit Protection Commissioner under paragraph 38(2)(b)	The application was not made within 60 days of the sanction for breach of the Code of Conduct being imposed
4	APS action in relation to which an application for primary review was made to the Merit Protection Commissioner under subsection 38(3)	The application was not made within 60 days of the APS action occurring
5	APS action in relation to which an application for secondary review was made to the Merit Protection Commissioner under paragraph 43(1)(a)	The application was not made within 60 days of the affected employee being advised that the APS action is not a reviewable action

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APS actions that are not, or that cease to be, reviewable actions in particular circumstances

Item	Column 1 APS action	Column 2 Circumstance
6	APS action in relation to which an application for secondary review was made to the Merit Protection Commissioner under paragraph 43(1)(b)	The application was not made within 60 days of the affected employee being advised of the Agency Head's decision
7	APS action in relation to which an application for secondary review was made to the Merit Protection Commissioner	The application for primary review of the action was an application referred to in item 1

- (6) However, an APS action mentioned in column 1 of an item in the table in subsection (5) is a **reviewable action** if the person who is, or would be, conducting the review considers that there are exceptional circumstances explaining the failure to make an application for review of the APS action within the period mentioned in column 2 of the item.

Subdivision B—Primary review

38 Application for primary review

- (1) An affected employee may apply, in writing, to the relevant Agency Head for primary review of an APS action.
- (2) However, the application must be made to the Merit Protection Commissioner if the application is for review of:
 - (a) a determination that the affected employee has breached the Code of Conduct; or
 - (b) a sanction imposed for breach of the Code of Conduct.
- (3) Also, the affected employee may apply in writing to the Merit Protection Commissioner for primary review of the action if:
 - (a) the Agency Head was directly involved in the action; or
 - (b) it is not appropriate, because of the seriousness or sensitivity of the action, for the Agency Head to deal with the application; or
 - (c) the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of an APS action.
- (4) The application must state briefly:
 - (a) why the review is sought; and
 - (b) if a particular outcome is sought—the outcome sought.

Note: Examples of outcomes that might be sought include reconsideration of the action and reassignment of duties.

39 Referral to Merit Protection Commissioner

- (1) If an affected employee makes an application for review of an APS action to the relevant Agency Head under subsection 38(1), the Agency Head may, with the Merit Protection Commissioner's agreement, refer the application to the Merit Protection Commissioner.

- (2) The Agency Head may, for example, refer the application to the Merit Protection Commissioner if:
 - (a) the Agency Head was directly involved in the action; or
 - (b) the Agency Head thinks that it is not appropriate, because of the seriousness or sensitivity of the action, for the Agency Head to deal with the application.
- (3) If the Agency Head refers the application to the Merit Protection Commissioner, the Agency Head must tell the affected employee in writing.

Note: Section 42 deals with review of applications referred to the Merit Protection Commissioner by an Agency Head.

40 Notice that APS action is not a reviewable action

If an affected employee makes an application for review of an APS action under section 38 and the action is not a reviewable action under subsections 37(2) to (6), the person who would have conducted the review must tell the employee, in writing:

- (a) that the action is not a reviewable action; and
- (b) the reasons why it is considered that the action is not a reviewable action; and
- (c) if the application was not made or referred to the Merit Protection Commissioner—of the employee's right to apply to the Merit Protection Commissioner under section 43 for secondary review of the action.

41 Conduct of review by relevant Agency Head

- (1) If an affected employee makes an application for review of an APS action to the relevant Agency Head under subsection 38(1) and the Agency Head:
 - (a) does not refer the application to the Merit Protection Commissioner; and
 - (b) considers that the employee is entitled to review under this Division;the Agency Head must review the action and attempt to resolve the employee's concerns about the action.
- (2) Subject to the minimum requirements mentioned in subsection 47(1), the Agency Head may conduct the review in any manner the Agency Head thinks fit.
- (3) The Agency Head may:
 - (a) confirm the action; or
 - (b) vary the action; or
 - (c) set the action aside and substitute a new action.
- (4) Subsection (3) does not limit the employer powers of the Agency Head in relation to the action or the affected employee.

Example: The Agency Head may take other appropriate action to rectify effects of the action or restore the affected employee to the position in which the employee would have been if the action had not been taken.
- (5) The Agency Head must tell the employee, in writing, of:
 - (a) the decision made on the application; and
 - (b) the reasons for the decision; and

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- (c) any action to be taken as a result of the review; and
- (d) the applicant's right to apply to the Merit Protection Commissioner under section 43 for secondary review of the action.

42 Conduct of review by Merit Protection Commissioner

- (1) This section applies if an application by an affected employee for review of an APS action is:
 - (a) made to the Merit Protection Commissioner under subsection 38(2) or (3); or
 - (b) referred to the Merit Protection Commissioner under subsection 39(1).
- (2) If the Merit Protection Commissioner considers that the affected employee is entitled to review of the action under this Division, the Merit Protection Commissioner:
 - (a) must conduct a de novo review of the action; and
 - (b) may, subject to the minimum requirements mentioned in subsection 47(1), conduct the review in any manner the Merit Protection Commissioner thinks fit; and
 - (c) must make a recommendation to the relevant Agency Head, in writing, about the action; and
 - (d) must tell the relevant Agency Head, in writing, the reasons for the recommendation; and
 - (e) must tell the affected employee, in writing, of the recommendation and reasons given to the relevant Agency Head.

Note: The recommendation is not binding on the relevant Agency Head (see section 46).

Subdivision C—Secondary review

43 Application for secondary review

- (1) An affected employee may apply in writing to the Merit Protection Commissioner for secondary review of an APS action if:
 - (a) the relevant Agency Head told the employee under section 40 that the action is not a reviewable action; or
 - (b) the employee is dissatisfied with the outcome of the relevant Agency Head's review of the action under section 41.
- (2) The application must be made through the relevant Agency Head.
- (3) The application must state briefly why the review is sought.

44 Agency Head to give documents to Merit Protection Commissioner

- (1) Within 14 days after receiving an application from an affected employee under section 43 for secondary review of an APS action, the relevant Agency Head must give to the Merit Protection Commissioner:
 - (a) the application; and
 - (b) any relevant documents relating to the primary review of the action.

- (2) The Agency Head must give to the affected employee a copy of any documents given to the Merit Protection Commissioner under paragraph (1)(b).

45 Conduct of review by Merit Protection Commissioner

If the Merit Protection Commissioner receives an application for secondary review of an APS action under section 44 and the Merit Protection Commissioner considers that the affected employee is entitled to review of the action under this Division, the Merit Protection Commissioner:

- (a) must conduct a de novo review of the action; and
- (b) may, subject to the minimum requirements mentioned in subsection 47(1), conduct the review in any manner the Merit Protection Commissioner thinks fit; and
- (c) must make a recommendation to the relevant Agency Head, in writing, about the action; and
- (d) must tell the relevant Agency Head, in writing, the reasons for the recommendation; and
- (e) must tell the affected employee, in writing, of the recommendation and reasons given to the relevant Agency Head.

Note: The recommendation is not binding on the relevant Agency Head (see section 46).

Subdivision D—Action following recommendation to Agency Head

46 Action by Agency Head

- (1) If an Agency Head receives a recommendation under section 42 or 45 following a review of an APS action, the Agency Head must, as soon as reasonably practicable after receiving the recommendation:
 - (a) consider the recommendation; and
 - (b) make a decision about the recommendation.
- (2) For the purposes of paragraph (1)(b), the Agency Head may:
 - (a) confirm the action; or
 - (b) vary the action; or
 - (c) set the action aside and substitute a new action.
- (3) If the Agency Head acts in accordance with the recommendation, the Agency Head is not required to seek the view of the affected employee before acting on the recommendation.

Note: The views of the affected employee should have been sought by the Merit Protection Commissioner during the review in accordance with the principles of procedural fairness.

- (4) Subsection (2) does not limit the employer powers of the Agency Head in relation to the action or the affected employee.

Example: The Agency Head may take other appropriate action to rectify effects of the action or restore the affected employee to the position in which the employee would have been if the action had not been taken.

- (5) If, after considering the recommendation:

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- (a) the Agency Head considers making a finding of a breach of the Code of Conduct; and
 - (b) the Agency Head had not made the finding before the recommendation was made; and
 - (c) the finding was not mentioned in the recommendation;
- the Agency Head must comply with the procedures established under subsection 15(3) of the Act before deciding whether to make the finding.
- (6) If, after considering the recommendation:
 - (a) the Agency Head considers imposing a sanction for breach of the Code of Conduct that the Agency Head had not imposed before the recommendation was made; and
 - (b) the sanction was not mentioned in the recommendation;the Agency Head must comply with the procedures established under subsection 15(3) of the Act before deciding whether to impose the sanction.
 - (7) The Agency Head must tell the affected employee and the Merit Protection Commissioner in writing of:
 - (a) the decision mentioned in paragraph (1)(b); and
 - (b) the reasons for the decision.

Note: Subsection 33(6) of the Act allows for matters to be reported to an Agency Minister, and the Prime Minister or the Presiding Officers for presentation to the Parliament, if the Merit Protection Commissioner is not satisfied with the response to recommendations contained in a report to an Agency Head.

Subdivision E—Other provisions about review

47 Review procedures—minimum requirements

- (1) The procedures used for a review conducted under this Division must meet the following minimum requirements:
 - (a) the procedures must have due regard to procedural fairness;
 - (b) the review must be conducted in private;
 - (c) the review must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.
- (2) A person appearing before the Merit Protection Commissioner must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

48 Requirement to provide information or documents

- (1) The Merit Protection Commissioner may, by written notice given to an Agency Head or an APS employee, require the Agency Head or APS employee to give the person or committee stated information or documents relevant to a review under this Division.
- (2) The Agency Head or APS employee must give the information or documents in the way, and at or within the time, stated in the notice.

49 Making of application does not operate as stay

The making of an application for review of an APS action under this Division does not operate to stay the action.

Part 5—The Australian Public Service Commissioner— functions

Note: Other functions of the Australian Public Service Commissioner are set out in section 13 (engagement of non-ongoing non-SES employees) and section 103 (use and disclosure of personal information).

Division 1—Inquiries into alleged breach of Code of Conduct by Agency Head

50 Report on result of inquiry—prescribed Statutory Agencies

For the purposes of paragraphs 41(2)(m) and 41A(2)(c) of the Act, the following Statutory Agencies are prescribed:

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

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

- (1) For the purposes of paragraphs 41(2)(m) and 41A(3)(a) and (b) of the Act, a circumstance in which the Australian Public Service Commissioner may decide to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an Agency Head is that the Australian Public Service Commissioner concludes that conducting or continuing the inquiry would not be justified in all the circumstances.
- (2) In deciding whether to decline to conduct, or to discontinue, an inquiry under subsection (1), the Australian Public Service Commissioner may have regard to the following:
 - (a) whether the allegation is vexatious, frivolous, misconceived, or lacking in substance;
 - (b) whether sufficient detail about the allegation has been provided;
 - (c) whether the allegation refers to specific decisions or actions by the Agency Head;
 - (d) whether the allegation identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
 - (e) whether the allegation relates to a decision properly taken, or to policy properly adopted, by the Agency Head, with which the person making the allegation disagrees;
 - (f) whether the cost of conducting an inquiry is justified in the circumstances.

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

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

- (1) For the purposes of paragraph 41B(3)(a) of the Act, this section prescribes basic procedural requirements that must be complied with by the Australian Public Service Commissioner’s written procedures for inquiring into and determining whether an APS employee, or a former APS employee, in an Agency has breached the Code of Conduct.

Note: The Australian Public Service Commissioner may inquire into and determine whether an APS employee, or a former APS employee, in an Agency has breached the Code of Conduct (see paragraph 41(2)(n) and section 41B of the Act).

- (2) The procedures must require the Australian Public Service Commissioner not to make a determination in relation to an alleged breach of the Code of Conduct by an APS employee, or a former APS employee, unless:
- (a) the Australian Public Service Commissioner has taken reasonable steps to tell the APS employee, or former APS employee, the details of the suspected breach (including any variation of those details); and
 - (b) the APS employee, or former APS employee, has been given a reasonable opportunity to make a statement in relation to the alleged breach; and
 - (c) if the alleged breach is by an APS employee—the Australian Public Service Commissioner has taken reasonable steps to inform the employee of the sanctions that may be imposed on the employee under subsection 15(1) of the Act.
- (3) The procedures must require the process for determining whether an APS employee, or a former APS employee, has breached the Code of Conduct to be carried out as quickly and with as little formality as a proper consideration of the matter allows.
- (4) The procedures must require reasonable steps to be taken to ensure that any person authorised under the Australian Public Service Commissioner’s written procedures to determine whether an APS employee, or a former APS employee, has breached the Code of Conduct is, and appears to be, independent and unbiased.
- (5) The procedures must require a written record to be prepared stating whether it has been determined that the APS employee, or former APS employee, has breached the Code of Conduct.

53 Circumstances in which Australian Public Service Commissioner may discontinue inquiry

For the purposes of subsection 41B(10) of the Act, the Australian Public Service Commissioner may discontinue an inquiry into an alleged breach of the Code of Conduct by an APS employee, or a former APS employee, if the Australian

Part 5 The Australian Public Service Commissioner—functions

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

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Public Service Commissioner reasonably believes that to continue the inquiry would not be appropriate in all the circumstances.

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

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

- (1) For the purposes of paragraph 41(2)(o) of the Act, this section relates to the function of the Australian Public Service Commissioner to inquire into a public interest disclosure (the *disclosure*), to the extent that the disclosure relates to one or more alleged breaches of the Code of Conduct.

Inquiry into disclosure

- (2) The Australian Public Service Commissioner may inquire into the disclosure if the Australian Public Service Commissioner is satisfied that it would be inappropriate for the discloser to make the disclosure to an Agency Head.
- (3) The Australian Public Service Commissioner may inquire into the disclosure if:
 - (a) the disclosure was made to an Agency Head; and
 - (b) the Australian Public Service Commissioner reasonably believes that the disclosure was not satisfactorily handled by the Agency Head.

Australian Public Service Commissioner may decline to conduct, or discontinue, inquiry

- (4) The Australian Public Service Commissioner may decide to decline to inquire into the disclosure, or to discontinue an inquiry into the disclosure, if the Australian Public Service Commissioner concludes that conducting, or continuing, the inquiry would not be justified in all the circumstances.
- (5) In deciding whether to decline to conduct, or to discontinue, an inquiry into the disclosure, the Commissioner may have regard to the following:
 - (a) whether the disclosure would be more appropriately dealt with by other means;
 - (b) whether the disclosure is vexatious, frivolous, misconceived or lacking in substance;
 - (c) whether sufficient detail about the alleged breaches to which the disclosure relates has been provided;
 - (d) whether the disclosure refers to specific decisions or actions by an APS employee;
 - (e) whether the disclosure identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
 - (f) whether the disclosure relates to a decision properly taken, or to policy properly followed, by an APS employee, with which the discloser disagrees;
 - (g) whether the cost of conducting an inquiry is justified in the circumstances.

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Process for inquiry

- (6) If the Australian Public Service Commissioner inquires into the disclosure, the Australian Public Service Commissioner must:
- (a) consider, having regard to all the circumstances, whether to give a person about whom the disclosure has been made an opportunity to be heard in relation to the disclosure; and
 - (b) take reasonable steps to report the outcome of the inquiry to the discloser and the relevant Agency Head.

Note: Section 72A of the Act deals with circumstances in which the Australian Public Service Commissioner may make a record of, disclose or otherwise use certain information for the purposes of, or in connection with, the performance of the Australian Public Service Commissioner's functions.

If the Australian Public Service Commissioner gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the Australian Public Service Commissioner may give the person information identifying the discloser to the extent the Australian Public Service Commissioner considers appropriate in the circumstances.

Division 4—Other functions

55 Inquiries into Merit Protection Commissioner’s behaviour

- (1) For the purposes of paragraph 41(2)(p) of the Act, it is a function of the Australian Public Service Commissioner:
 - (a) to inquire into alleged breaches of the Code of Conduct by the Merit Protection Commissioner; and
 - (b) to report to the Presiding Officers on the results of such inquiries (including, if relevant, recommendations for sanctions).

Australian Public Service Commissioner may decline to conduct, or discontinue, inquiry

- (2) If the Commissioner decides that conducting, or continuing, an inquiry under subsection (1) would not be justified in all the circumstances, the Commissioner may:
 - (a) decline to conduct the inquiry; or
 - (b) discontinue the inquiry.
- (3) In deciding whether to decline to conduct, or to discontinue, an inquiry under subsection (1), the Commissioner may have regard to the following:
 - (a) whether the allegation is vexatious, frivolous, misconceived or lacking in substance;
 - (b) whether sufficient detail about the allegation has been provided;
 - (c) whether the allegation refers to specific decisions or actions by the Merit Protection Commissioner;
 - (d) whether the allegation identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
 - (e) whether the allegation relates to a decision properly taken, or to policy properly adopted, by the Merit Protection Commissioner, with which the person making the allegation disagrees;
 - (f) whether the cost of conducting an inquiry is justified in the circumstances.

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

- (1) For the purposes of paragraph 41(2)(p) of the Act, it is a function of the Australian Public Service Commissioner to inquire into an alleged breach of the Code of Conduct by a statutory office holder.

Australian Public Service Commissioner may decline to conduct, or discontinue, inquiry

- (2) The Australian Public Service Commissioner may:
 - (a) decline to conduct an inquiry; or
 - (b) discontinue an inquiry under subsection (1).
- (3) In deciding whether to decline to conduct, or to discontinue, an inquiry, the Australian Public Service Commissioner must have regard to the following:

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- (a) whether the subject matter of the inquiry is addressed in another law relating to the statutory office holder;
- (b) whether the statutory office holder is bound by rules that require behavioural standards similar to those required by the Code of Conduct;
Example: An Act may include provisions for dealing with a conflict of interest relating to a statutory office holder.
- (c) any existing reporting and inquiry mechanisms that apply to the statutory office holder;
- (d) whether sufficient detail about the allegation has been provided;
- (e) whether the allegation refers to specific decisions or actions by the statutory office holder;
- (f) whether the allegation is vexatious, frivolous, misconceived, or lacking in substance.

Process for inquiry

- (4) If the Australian Public Service Commissioner inquires into an alleged breach of the Code of Conduct, the Australian Public Service Commissioner may:
 - (a) determine whether a breach of the Code of Conduct has occurred; and
 - (b) make recommendations.
- (5) A determination or recommendation mentioned in subsection (4) forms part of the results of the inquiry.

Results of inquiry

- (6) The Australian Public Service Commissioner must tell the statutory office holder the results of an inquiry.
- (7) The Australian Public Service Commissioner must tell the relevant Agency Head of the results of an inquiry unless the Australian Public Service Commissioner is satisfied that it would be inappropriate to do so.

Example: It would be inappropriate to do so if the Agency Head is personally involved in the matter.

- (8) If the Australian Public Service Commissioner is satisfied that the results of the inquiry are sufficiently serious, the Australian Public Service Commissioner must tell the Agency Minister or, if applicable, the Presiding Officers the results of the inquiry.
- (9) If the Australian Public Service Commissioner:
 - (a) has not told the Agency Minister or the Presiding Officers the results of the inquiry in accordance with subsection (8); and
 - (b) is not satisfied with the statutory office holder's response (if any) to the Australian Public Service Commissioner;

the Australian Public Service Commissioner may tell the Agency Minister or, if applicable, the Presiding Officers the results of the inquiry and give an explanation of why the Australian Public Service Commissioner is not satisfied with the statutory office holder's response.

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

- (1) For the purposes of paragraph 41(2)(p) of the Act, it is a function of the Australian Public Service Commissioner to deliver learning and development programs to any of the following on request:
- (a) a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*);
 - (b) a State or Territory;
 - (c) a Department of State, or an authority or body, of a State or Territory.

Fees may be charged

- (2) For the purposes of subsection 41(4) of the Act, the Australian Public Service Commissioner is authorised to charge a fee (on behalf of the Commonwealth) for the performance of a function mentioned in subsection (1) of this section.

Part 6—The Merit Protection Commissioner—functions

Division 1—Inquiry functions under the Act

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

- (1) For the purposes of paragraph 50(1)(a) of the Act, this section relates to the function of the Merit Protection Commissioner to inquire into a public interest disclosure (the *disclosure*), to the extent that the disclosure relates to one or more alleged breaches of the Code of Conduct.

Inquiry into disclosure

- (2) The Merit Protection Commissioner may inquire into the disclosure if the Merit Protection Commissioner is satisfied that it would be inappropriate for the discloser to make the disclosure to an Agency Head.
- (3) The Merit Protection Commissioner may inquire into the disclosure if:
 - (a) the disclosure was made to an Agency Head; and
 - (b) the Merit Protection Commissioner reasonably believes that the disclosure was not satisfactorily handled by the Agency Head.

Merit Protection Commissioner may decline to conduct, or discontinue, inquiry

- (4) The Merit Protection Commissioner may decide to decline to inquire into the disclosure, or to discontinue an inquiry into the disclosure, if the Merit Protection Commissioner concludes that conducting or continuing the inquiry would not be justified in all the circumstances.
- (5) In deciding whether to decline to conduct, or to discontinue, an inquiry into a disclosure, the Merit Protection Commissioner may have regard to the following:
 - (a) whether the disclosure would be more appropriately dealt with by other means;
 - (b) whether the disclosure is vexatious, frivolous, misconceived or lacking in substance;
 - (c) whether sufficient detail about the alleged breaches to which the disclosure relates has been provided;
 - (d) whether the disclosure refers to specific decisions or actions by an APS employee;
 - (e) whether the disclosure identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
 - (f) whether the disclosure relates to a decision properly taken, or to policy properly followed, by an APS employee, with which the discloser disagrees;
 - (g) whether the cost of conducting an inquiry is justified in the circumstances.

Process for inquiry

- (6) If the Merit Protection Commissioner inquires into the disclosure, the Merit Protection Commissioner must:
- (a) consider, having regard to all the circumstances, whether to give a person about whom the disclosure has been made an opportunity to be heard in relation to the disclosure; and
 - (b) take reasonable steps to report the outcome of the inquiry to the discloser and the relevant Agency Head.

Note: Section 72B of the Act deals with circumstances in which the Merit Protection Commissioner may make a record of, disclose or otherwise use certain information for the purposes of, or in connection with, the performance of the Merit Protection Commissioner's functions.

If the Merit Protection Commissioner gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the Merit Protection Commissioner may give the person information identifying the discloser to the extent the Merit Protection Commissioner considers appropriate in the circumstances.

Division 2—Other functions

Subdivision A—Purpose of this Division

59 Purpose of this Division

This Division:

- (a) prescribes, for the purposes of paragraph 50(1)(e) of the Act, other functions of the Merit Protection Commissioner; and
- (b) makes other provision in relation to those functions.

Note: The Merit Protection Commissioner also has the functions prescribed by regulations made for the purposes of section 33 of the Act (see paragraph 50(1)(d) of the Act and Part 4 of this instrument).

Subdivision B—Independent Selection Advisory Committees

60 Establishment of ISAC

The Merit Protection Commissioner may establish an ISAC at the request of an Agency Head.

Note: The Merit Protection Commissioner is authorised to charge the Agency Head a fee for performing functions for the Agency Head under this Subdivision (see section 71).

61 Function of ISAC

- (1) The function of an ISAC is to make recommendations to an Agency Head about the suitability of candidates for:
 - (a) engagement connected with employment in the Agency; or
 - (b) promotion to employment in the Agency; or
 - (c) assignment to duties in connection with employment in the Agency.
- (2) The employment must be at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the Classification Rules.

62 Constitution of ISAC

- (1) Each ISAC must consist of the following members:
 - (a) a Convenor, nominated by the Merit Protection Commissioner, who is a member of staff assisting the Merit Protection Commissioner;
 - (b) an APS employee, nominated by the Merit Protection Commissioner, who is a member of staff assisting the Merit Protection Commissioner;
 - (c) a person nominated by the relevant Agency Head.
- (2) The Merit Protection Commissioner must not nominate a member of staff assisting the Merit Protection Commissioner for a role under paragraph (1)(a) or (b) unless the Merit Protection Commissioner is satisfied that the person will undertake the role independently and impartially.
- (3) The APS employee nominated under paragraph (1)(b) must be made available for the purposes of the performance of the ISAC's functions, subject to the

operational requirements of the Agency in which the APS employee is employed.

- (4) The Merit Protection Commissioner may, in writing, reject an Agency Head's nomination under paragraph (1)(c) if the Merit Protection Commissioner is not satisfied that the person nominated will undertake the role independently and impartially.
- (5) If a member of an ISAC (including the Convenor) ceases to act as a member before the ISAC makes its recommendation to the relevant Agency Head, the ISAC is to be reconstituted by:
 - (a) the remaining members; and
 - (b) another member nominated in accordance with subsection (1).
- (6) The reconstituted ISAC must have regard to matters put before, or decided by, the ISAC as previously constituted.
- (7) A person is not subject to direction in performing the person's duties as a member of an ISAC, except:
 - (a) by a court; or
 - (b) in accordance with instructions issued under section 64.

63 ISAC procedures—minimum requirements

- (1) The procedures used by an ISAC in performing its functions under this Subdivision must meet the following minimum requirements:
 - (a) the procedures must have due regard to procedural fairness;
 - (b) the functions must be performed in private;
 - (c) the functions of the ISAC must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.
- (2) A person appearing before an ISAC must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

64 ISAC procedures—Merit Protection Commissioner's instructions

- (1) The Merit Protection Commissioner must, as soon as practicable after the commencement of this section, issue instructions about the procedures to be followed by an ISAC in performing its functions under this Subdivision.
- (2) The Merit Protection Commissioner may issue instructions, in writing, about the procedures to be followed by an Agency Head who is appointed, under subsection 66(3), to act on behalf of an ISAC in performing the functions of the ISAC under this Subdivision.
- (3) The instructions must not be inconsistent with the Act, this instrument or the Commissioner's Directions.
- (4) An ISAC, or an Agency Head appointed under subsection 66(3) to act on behalf of an ISAC, must comply with the instructions.

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65 Assistance to ISAC

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.

66 Assessment and recommendation by ISAC

- (1) If an ISAC is established in respect of an employment opportunity, the ISAC must:
 - (a) assess the relative merits of the candidates for the employment on the basis of:
 - (i) the relative suitability of the candidates for the duties; and
 - (ii) the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and
 - (iii) the relative capacity of the candidates to achieve outcomes related to the duties; and
 - (b) report on the assessment to the relevant Agency Head; and
 - (c) 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.
- (2) In conducting an assessment under subsection (1), the ISAC may seek and accept expert opinion about the work-related qualities and capabilities of candidates.
- (3) The ISAC may appoint the relevant Agency Head to act on behalf of the ISAC in conducting some or all of an assessment under subsection (1).
- (4) An Agency Head who is appointed to act on behalf of the ISAC under subsection (3) must:
 - (a) act in accordance with instructions given to the Agency Head by the ISAC; and
 - (b) act in accordance with instructions from the Merit Protection Commissioner only to the extent that the Agency Head is appointed to act on behalf of the ISAC under subsection (3).
- (5) If the ISAC considers that none of the candidates is suitable for the relevant employment, the ISAC must make a recommendation to the Agency Head to that effect.

67 Non-agreement on recommendation by ISAC

- (1) This section applies if all members of an ISAC do not agree on a recommendation.
- (2) If 2 members agree on a recommendation, that recommendation is taken to be the recommendation of the ISAC.
- (3) If there is no agreement between any of the members, the Convenor's recommendation is taken to be the recommendation of the ISAC.

68 ISAC recommendation not binding

The recommendation of an ISAC is not binding on an Agency Head.

69 Effect of acting in accordance with ISAC recommendation

- (1) A promotion, engagement or assignment of duties made in accordance with an ISAC recommendation is not subject to review under Part 4.
- (2) The notice of a promotion or engagement published in the Public Service Gazette must state that the promotion or engagement was made in accordance with an ISAC recommendation.

Note: This subsection also applies to any later promotion or engagement made by an Agency Head in accordance with an ISAC recommendation.

- (3) The promotion, engagement or assignment of duties is not affected by:
 - (a) a defect in the nomination of a member of the ISAC; or
 - (b) a failure to comply with instructions issued under section 64.

Note: For *promotion decision* and *engagement decision*, see section 20.

70 Effect of not acting in accordance with ISAC recommendation

- (1) If, instead of acting in accordance with an ISAC recommendation of a candidate in respect of an employment opportunity, an Agency Head promotes an ongoing APS employee, or engages a Parliamentary Service employee, to the relevant employment, the promotion decision or engagement decision is subject to review under Division 2 of Part 4 of this instrument.
- (2) However, subsection (1) does not apply if:
 - (a) after the ISAC has made its recommendation:
 - (i) the candidate is found to have breached the Code of Conduct, and the Agency Head believes that the candidate is no longer suitable for the employment opportunity; or
 - (ii) the candidate has lost a qualification that is essential for the candidate's suitability for the employment opportunity; and
 - (b) the Agency Head has consulted with the Merit Protection Commissioner about the candidate; and
 - (c) the Agency Head acts in accordance with the recommendation of the ISAC in relation to the next suitable candidate.

Note: For the purposes of subparagraph (a)(ii), an example is the loss of a security clearance.

- (3) The notice of the promotion or engagement published in the Public Service Gazette must state that the promotion decision or engagement decision is subject to review under Division 2 of Part 4.

71 Merit Protection Commissioner authorised to charge fees

For the purposes of subsection 50(3) of the Act, the Merit Protection Commissioner is authorised to charge the Agency Head a fee (on behalf of the

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Commonwealth) for performing functions for the Agency Head under this Subdivision.

Subdivision C—Investigation of complaints by former employees

72 Investigation of complaints by former employees

- (1) The Merit Protection Commissioner may:
 - (a) investigate a complaint by a former APS employee that relates to the employee's entitlements on separation from the APS; and
 - (b) make a recommendation to the employee's former Agency Head in relation to the complaint.
- (2) If an Agency Head receives a recommendation under subsection (1), the Agency Head must, as soon as reasonably practicable after receiving the recommendation:
 - (a) consider the recommendation; and
 - (b) make a decision about the recommendation.

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

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

- (1) This section applies in relation to a person (the *affected former employee*) if:
 - (a) a person is a former APS employee; and
 - (b) at the time the person's APS employment ceased, the person was not an SES employee; and
 - (c) after the person's APS employment ceased, an Agency Head determined that the person breached the Code of Conduct.
- (2) The Merit Protection Commissioner may conduct a de novo review of the Agency Head's determination if the affected former employee is entitled to review of the determination under this section.
- (3) The affected former employee is not, or ceases to be, entitled to review of the determination if:
 - (a) the affected former employee has applied to have the determination reviewed or dealt with by a court or tribunal, and the court or tribunal has jurisdiction to review or deal with the determination; or
 - (b) the Merit Protection Commissioner considers that the determination should not be reviewable for any of the following reasons:
 - (i) the affected former employee has previously applied for review of the determination under this Subdivision;
 - (ii) the affected former employee has applied, or could apply, to have the determination reviewed by an external review body and review by the external review body would be more appropriate than review under this Subdivision;

- (iii) review, or further review, of the determination is not otherwise justified in all the circumstances.

Note: For the purposes of subparagraph (b)(ii), examples of external review bodies include the Commonwealth Ombudsman, the Australian Information Commissioner and the Australian Human Rights Commission.

- (4) The affected former employee is not, or ceases to be, entitled to review of the determination if an application for review of the determination is not made under section 74 within 60 days after the determination was made.
- (5) However, an affected former employee is entitled to review of the determination if the Merit Protection Commissioner considers that there are exceptional circumstances explaining the failure to make an application within the period mentioned in subsection (4).

74 Application for review

- (1) An affected former employee may apply, in writing, to the Merit Protection Commissioner for review of a determination mentioned in paragraph 73(1)(c).
- (2) The application must state briefly:
- (a) why the review is sought; and
 - (b) if a particular outcome is sought—the outcome sought.

75 Notice that action not reviewable

If an affected former employee makes an application under section 74 for review of a determination, and the determination is not reviewable under paragraph 73(3)(b) or subsection 73(4), the Merit Protection Commissioner must tell the affected former employee, in writing:

- (a) that the determination is not reviewable; and
- (b) the reasons why the determination is not reviewable.

76 Conduct of review

If the Merit Protection Commissioner considers that an affected former employee is entitled to review of a determination under this Subdivision, the Merit Protection Commissioner:

- (a) must conduct a de novo review of the determination; and
- (b) may, subject to the minimum requirements mentioned in subsection 78(1), conduct the review in any manner the Merit Protection Commissioner thinks fit; and
- (c) must make a recommendation to the relevant Agency Head, in writing, about the determination; and
- (d) must tell the Agency Head, in writing, the reasons for the recommendation; and
- (e) must tell the affected former employee, in writing, of the recommendation and reasons given to the Agency Head.

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77 Action by Agency Head

- (1) If an Agency Head receives a recommendation in relation to a determination under section 76, the Agency Head must, as soon as reasonably practicable after receiving the recommendation:
 - (a) consider the recommendation; and
 - (b) make a decision about the recommendation.
- (2) For the purposes of paragraph (1)(b), the Agency Head may:
 - (a) confirm the determination; or
 - (b) vary the determination; or
 - (c) set the determination aside and substitute a new determination.
- (3) If the Agency Head acts in accordance with the recommendation, the Agency Head is not required to seek the view of the affected former employee before acting on the recommendation.

Note: The views of the affected former employee should have been sought by the Merit Protection Commissioner during the review in accordance with the principles of procedural fairness.

- (4) Subsection (2) does not limit the employer powers of the Agency Head in relation to the determination or the affected former employee.

Example: The Agency Head may take other appropriate action to rectify effects of the determination or restore the affected former employee to the position in which the affected former employee would have been if the determination had not been made.

- (5) If, after considering the recommendation:
 - (a) the Agency Head considers making a finding of a breach of the Code of Conduct; and
 - (b) the Agency Head had not made the finding before the recommendation was made; and
 - (c) the finding was not mentioned in the recommendation;the Agency Head must comply with the procedures established under subsection 15(3) of the Act before deciding whether to make the finding.
- (6) The Agency Head must tell the affected former employee and the Merit Protection Commissioner in writing of:
 - (a) the decision mentioned in paragraph (1)(b); and
 - (b) the reasons for the decision.

78 Review procedures—minimum requirements

- (1) The procedures used for a review conducted under this Subdivision must meet the following minimum requirements:
 - (a) the procedures must have due regard to procedural fairness;
 - (b) the review must be conducted in private;
 - (c) the review must be finished as quickly and with as little formality as a proper consideration of the matter allows.
- (2) A person appearing before the Merit Protection Commissioner must do so without representation unless the Merit Protection Commissioner decides that, in

all the circumstances, it would be reasonable to allow the person to be represented.

79 Requirement to provide information or documents

- (1) The Merit Protection Commissioner may, by written notice given to an Agency Head or APS employee, require the Agency Head or APS employee to give the Merit Protection Commissioner stated information or documents relevant to a review under this Subdivision.
- (2) The Agency Head or APS employee must give the information or documents in the way, and at or within the time, stated in the notice.

80 Making application does not operate as stay

Making an application for review of a determination under this Subdivision does not operate to stay the determination.

Subdivision E—Review of actions of statutory office holders

81 Review of actions of statutory office holders other than Agency Heads

- (1) A non-SES employee may apply to the Merit Protection Commissioner for review of an action of a statutory office holder (other than an Agency Head) that:
 - (a) relates to the employee's APS employment; and
 - (b) is not termination of the employee's employment; and
 - (c) if the statutory office holder were an Agency Head, would be a reviewable action.
- (2) The Merit Protection Commissioner may, by written notice given to the statutory office holder, require the statutory office holder to give the Merit Protection Commissioner:
 - (a) a report about the action; and
 - (b) other stated information or documents relevant to the review.
- (3) The statutory office holder must give the report and other information or documents in the way, and at or within the time, stated in the notice.
- (4) The Merit Protection Commissioner must:
 - (a) conduct a de novo review of the action; and
 - (b) make a recommendation to the statutory office holder in writing about the action; and
 - (c) tell the statutory office holder, in writing, the reasons for the recommendation; and
 - (d) tell the employee in writing of the recommendation and reasons given to the statutory office holder.
- (5) If the Merit Protection Commissioner is not satisfied with the statutory office holder's response to the Merit Protection Commissioner's recommendation, the Merit Protection Commissioner may give a report on the matter to the relevant Agency Minister.

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Subdivision F—Functions on request by relevant employer

82 Functions of Merit Protection Commissioner on request by relevant employer

- (1) The Merit Protection Commissioner may, on request by a relevant employer, do any of the following:
 - (a) review action that relates to the employment of a person by the relevant employer;
 - (b) investigate action that relates to the employment of a person by the relevant employer;
 - (c) provide advice that relates to the employment of a person by the relevant employer;
 - (d) provide services in connection with selection committees used by the relevant employer for the selection or employment of a person;
 - (e) provide other services that relate to the employment of a person by the relevant employer.

Meaning of relevant employer

- (2) A **relevant employer** is:
 - (a) a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
 - (b) a Commonwealth company (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
 - (c) a corporation to which paragraph 51(xx) of the Constitution applies; or
 - (d) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
 - (e) a Department of State, or an authority or body, of a State; or
 - (f) a Department of State, or an authority or body, of a Territory; or
 - (g) a foreign government, an authority or body of a foreign government, or an international organisation.

Discretion of Merit Protection Commissioner

- (3) The functions mentioned in subsection (1) may be performed at the discretion of the Merit Protection Commissioner.

Fees may be charged

- (4) For the purposes of subsection 50(3) of the Act, the Merit Protection Commissioner is authorised to charge a fee (on behalf of the Commonwealth) for the performance of a function mentioned in subsection (1) of this section.

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

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

- (1) For the purposes of paragraph 50A(2)(a) of the Act, this section prescribes 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 a former APS employee, has breached the Code of Conduct.
- (2) The procedures must require that the Merit Protection Commissioner not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee, or a former APS employee, unless:
 - (a) the Merit Protection Commissioner has taken reasonable steps to tell the APS employee, or former APS employee, the details of the suspected breach (including any variation of those details); and
 - (b) the APS employee, or former APS employee, has been given a reasonable opportunity to make a statement in relation to the alleged breach; and
 - (c) if the alleged breach is by an APS employee—the Merit Protection Commissioner has taken reasonable steps to inform the employee of the sanctions that may be imposed on the employee under subsection 15(1) of the Act.
- (3) The procedures must require that the process for determining whether an APS employee or a former APS employee has breached the Code of Conduct be carried out as quickly and with as little formality as a proper consideration of the matter allows.
- (4) The procedures must require that reasonable steps be taken to ensure that any person authorised under the Merit Protection Commissioner's written procedures to determine whether an APS employee or a former APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased.
- (5) The procedures must require that a written record be prepared stating whether it has been determined that the APS employee or the former APS employee has breached the Code of Conduct.

Division 4—Other provisions

84 Independence of Merit Protection Commissioner

The Merit Protection Commissioner is not subject to direction, except by a Court, in performing the Merit Protection Commissioner’s duties under Part 4 (review of actions) or Subdivision B of Division 2 of this Part (Independent Selection Advisory Committees).

Part 7—Administrative arrangements and re-organisations

85 Employment conditions after machinery of government changes—movement of APS employees

- (1) For the purposes of paragraph 72(5)(a) of the Act, 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.
- (2) The annual salary that applies to the APS employee on the day the move occurs is the greater of:
 - (a) the annual salary that applied to the APS employee immediately before the move; and
 - (b) the annual salary that would, apart from this section, apply to the APS employee after the move.

Note: Subsections (4) and (5) deal with the variation of other terms and conditions of employment, such as leave, allowances (including allowances that may normally be paid in an employee's fortnightly pay), travel and other expenses, bonuses etc.

- (3) The annual salary worked out under subsection (2) ceases to apply when the salary of the APS employee is increased by an employment arrangement.
- (4) Before or after the move to the other Agency, the other terms and conditions of employment of the APS employee may be varied:
 - (a) after consultation by the Agency Head of the other Agency with:
 - (i) the APS employee; or
 - (ii) the APS employee and any other APS employees who are to be, or who have, moved to the other Agency; or
 - (iii) a class of APS employees who are to be, or who have, moved to the other Agency that includes the APS employee; and
 - (b) in accordance with a determination under subsection 24(1) of the Act to the effect that some or all of the terms and conditions of employment are to be the same as those that applied to the APS employee immediately before the move; and
 - (c) to have effect no sooner than the day the move occurs.

Note: A determination by an Agency Head under subsection 24(1) of the Act is of no effect to the extent that it would reduce the benefit to an APS employee of a term or condition of employment applicable to the employee under:

- (a) a fair work instrument; or
- (b) a transitional instrument; or
- (c) a transitional minimum wage instrument; or
- (d) the National Employment Standards.

See subsection 24(1A) of the Act.

- (5) However, if:
 - (a) a determination mentioned in paragraph (4)(b) applies to the APS employee; and
 - (b) an employment arrangement:

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- (i) commences on or after the day the APS employee moves to the other Agency; and
- (ii) applies on its face to the APS employee or a class of APS employees that includes the APS employee;

the determination mentioned in paragraph (4)(b) ceases to apply to the APS employee, and the terms and conditions of employment under the employment arrangement apply to the APS employee.

**86 Employment conditions after machinery of government changes—
engagement of non-APS employees**

- (1) For the purposes of paragraph 72(5)(b) of the Act, this section prescribes arrangements for determining variations of the terms and conditions of employment applicable to a person who ceases to be employed as a non-APS employee and becomes engaged as an APS employee in accordance with a determination under paragraph 72(1)(c) of the Act.
- (2) Before or after the engagement, the terms and conditions of employment of the person may be varied:
 - (a) after consultation by the Agency Head with:
 - (i) the person; or
 - (ii) the person and any other persons who are to be, or who have become, engaged as APS employees; or
 - (iii) a class of persons who are to be, or who have become, engaged as APS employees that includes the person; and
 - (b) in accordance with a determination under subsection 24(1) of the Act to the effect that some or all of the terms and conditions of employment are to be the same as those that applied to the person immediately before the person ceased to be employed as a non-APS employee; and
 - (c) to have effect no sooner than the day the person becomes engaged as an APS employee.

Note: A determination by an Agency Head under subsection 24(1) of the Act is of no effect to the extent that it would reduce the benefit to an APS employee of a term or condition of employment applicable to the employee under:

- (a) a fair work instrument; or
- (b) a transitional instrument; or
- (c) a transitional minimum wage instrument; or
- (d) the National Employment Standards.

See subsection 24(1A) of the Act.

- (3) However, if:
 - (a) a determination mentioned in paragraph (2)(b) applies to the APS employee; and
 - (b) an employment arrangement:
 - (i) commences on or after the day the person becomes engaged as an APS employee; and
 - (ii) applies on its face to the person as an APS employee or a class of APS employees that includes the person;

the determination mentioned in paragraph (2)(b) ceases to apply to the APS employee, and the terms and conditions of employment under the employment arrangement apply to the APS employee.

87 Prescribed circumstances in relation to employment in former Agency

For the purposes of subsection 72(5A) of the Act, each of the following is a circumstance in relation to an APS employee's employment in a former Agency before the employee moved to a new Agency:

- (a) the employee's engagement in the former Agency was subject to a condition imposed by the Agency Head of that Agency under subsection 22(6) of the Act;
- (b) the employee's employment in the former Agency was subject to a condition imposed by the Agency Head of that Agency under section 20 of the Act;
- (c) an inquiry into an alleged breach of the Code of Conduct was taking place;
- (d) a sanction had been imposed on the employee in relation to a breach of the Code of Conduct (including a sanction that may have ongoing effect);
- (e) the employee had been suspended from duties under section 14 of this instrument in relation to a suspected breach of the Code of Conduct;
- (f) a process (however described) was taking place in relation to any of the following:
 - (i) performance management (including the non-performance of duties);
 - (ii) management of excess staff;
 - (iii) assessment of physical or mental fitness for duty;
 - (iv) loss, or lack, of an essential qualification.

Note: For the purposes of paragraph (d), examples of sanctions include:

- (a) a reduction in classification that has not yet taken effect; and
- (b) periodic deductions from salary.

Part 8—Attachment of salaries to satisfy judgment debts

88 Application of this Part

- (1) This Part is made for the purposes of section 75 of the Act.
- (2) This Part does not apply in relation to a debtor:
 - (a) whose estate has been sequestrated, either voluntarily or compulsorily, for the benefit of creditors; and
 - (b) who has not yet obtained a certificate of discharge.

Note: For *debtor*, see section 5.

89 Application of State and Territory law

A law of a State or a Territory that deals with satisfying a judgment debt:

- (a) applies to a debtor's judgment debt to the extent that the law deals with the calculation of interest on the debt; and
- (b) does not apply to the judgment debt for any other purpose.

90 Paying officer

- (1) If an Agency Head believes that it is necessary to make deductions from the salary of a debtor in the Agency, the Agency Head must appoint one or more persons as paying officers for the purpose of making those deductions.
- (2) However, if the Agency Head is the debtor:
 - (a) the Agency Head must not appoint a paying officer under subsection (1); and
 - (b) the Agency Head must act under this subsection without considering whether the making of deductions from the Agency Head's salary is required; and
 - (c) the Agency Head must, in writing, delegate the function under subsection (1) to appoint a paying officer to an SES employee in the Agency; and
 - (d) the SES employee mentioned in paragraph (c) must:
 - (i) decide whether the making of deductions from the Agency Head's salary is required; and
 - (ii) if the SES employee decides that the making of the deductions is required—appoint a person as a paying officer for the purpose of making those deductions; and
 - (e) the Agency Head must not take any action, or make any arrangement, in relation to the administration under this Part of the Agency Head's debt, other than:
 - (i) making the delegation mentioned in paragraph (c); and
 - (ii) if a paying officer is appointed—assisting the paying officer in the repayment of the debt.
- (3) If a person is appointed as a paying officer:

- (a) the appointment authorises the person to act as a paying officer only in relation to the debtor to whom the appointment relates; and
 - (b) the person is responsible for making deductions from the debtor's salary to satisfy the judgment debt against the debtor.
- (4) A debtor is not authorised to be the debtor's paying officer.

91 Authority to make deductions

- (1) A paying officer may make deductions from a debtor's salary to satisfy a judgment debt only if:
- (a) the paying officer has received a statutory declaration, made by the judgment creditor, that the judgment debt exists and has not been discharged; and
 - (b) the paying officer has received a copy of the judgment to which the judgment debt relates, certified by the Registrar or other appropriate officer of the relevant court; and
 - (c) the paying officer has received the fee (if any) required under section 92; and
 - (d) the paying officer has given the debtor a notice in accordance with subsection (2); and
 - (e) the debtor does not, within the time specified in the notice given under subsection (2), satisfy the paying officer that the judgment debt has been satisfied.

Note: Section 93 deals with cases where there are 2 or more judgment debts against a debtor.

- (2) The paying officer must:
- (a) notify the debtor, in writing, as soon as practicable after receiving the documents mentioned in paragraphs (1)(a) and (b) and the fee (if any) referred to in paragraph (1)(c) that it is proposed to make the deductions to satisfy a judgment debt; and
 - (b) require the debtor to state, in writing, by a time specified in the notice, whether the judgment debt has been satisfied; and
 - (c) either:
 - (i) if the judgment debt has been satisfied—require the debtor to give the paying officer evidence, in writing by the time specified in the notice, to support that fact; or
 - (ii) if the judgment debt has not been satisfied—require the debtor to notify the paying officer, in writing, of the amount due under the judgment at the time the notification is given.
- (3) If the debtor does not give the paying officer evidence that the judgment debt has been satisfied by the time specified in the notice under subsection (2), the paying officer must deduct from the debtor's salary on each pay day for the debtor an amount equal to:
- (a) the deduction required under section 95; or
 - (b) a lesser amount that, in the paying officer's opinion, is needed to satisfy the balance of the judgment debt.

Section 92

- (4) After making the first deduction, the paying officer is authorised to continue to make deductions only if the paying officer has no reason to believe that the judgment debt has been discharged.
- (5) The paying officer must ensure that the amount of each deduction is paid to the judgment creditor.

92 Administration fee

- (1) A judgment creditor (other than the Commonwealth) who requests the payment of a judgment debt must pay a fee of \$38 for the making of the deductions.
- (2) The fee is the price of the supply of a service for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999*.
- (3) If a judgment creditor (other than the Commonwealth) requests the payment of a judgment debt, but does not pay the fee when making the request, the paying officer must notify the judgment creditor that:
 - (a) the fee is payable for making the deductions; and
 - (b) no deductions will be made unless the fee is paid.

93 More than one judgment debt

- (1) If more than one judgment debt exists against a debtor, the paying officer:
 - (a) must deal with the judgment debts in the order in which requests for deductions were received; and
 - (b) must not make a deduction for the purposes of a particular judgment debt until all judgment debts for which earlier requests were made have been satisfied.
- (2) If the paying officer receives 2 or more requests at the same time for the payment of judgment debts against a debtor, the paying officer must deal with the judgment debts in the order of the dates and times at which judgment was given for each debt, starting with the earliest judgment.

94 Effect of deductions

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:

- (a) an amount equal to that amount is taken to have been paid by the Commonwealth to the debtor on account of salary payable to the debtor on that pay day; and
- (b) an amount equal to that amount is taken to have been paid by the debtor to the judgment creditor for the purposes of the judgment debt.

95 Rate of deductions

- (1) For the purposes of paragraph 91(3)(a), the rate at which a deduction is to be made from the debtor's net salary on a pay day for the debtor is 20% unless subsection (2), (3) or (4) of this section applies.

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- (2) The paying officer may reduce the rate at which deductions are to be made if the paying officer is satisfied that the debtor:
 - (a) is suffering serious financial hardship; or
 - (b) would suffer serious financial hardship if the rate of deduction is not reduced.
 - (3) If the debtor asks the paying officer, in writing, to make deductions at a rate greater than 20% of the debtor's net salary, the paying officer must comply with the request as soon as practicable after receiving the request.
 - (4) If:
 - (a) deductions are being made at a rate greater than 20% of the debtor's net salary; and
 - (b) the debtor asks the paying officer, in writing, to reduce the rate of the deductions;
 the paying officer must reduce the rate as soon as practicable after receiving the request, but is not required to reduce the rate to less than 20%.

96 Move to another Agency

- (1) If a debtor moves from an Agency (**Agency 1**) to another Agency (**Agency 2**), the debtor's paying officer in Agency 1 must notify the Agency Head of Agency 2 of:
 - (a) the existence of each judgment debt against the debtor; and
 - (b) the arrangements in Agency 1 for making deductions from the debtor's salary; and
 - (c) any deductions already made for the purposes of each of those judgment debts.
- (2) If more than one judgment debt exists against the debtor:
 - (a) the debtor's paying officer in Agency 1 must advise the Agency Head of the order in which the judgment debts were to have been dealt with in accordance with section 93; and
 - (b) the paying officer who is appointed in Agency 2 in relation to the debtor must deal with the judgment debts in that order.
- (3) The debtor's paying officer in Agency 1 must transfer the following to the paying officer in Agency 2:
 - (a) the statutory declaration mentioned in paragraph 91(1)(a);
 - (b) a copy of the judgment mentioned in paragraph 91(1)(b);
 - (c) each notice in respect of the debtor that was given to the debtor's paying officer in Agency 1 by a paying officer in another Agency.
- (4) The paying officer in Agency 2 is taken:
 - (a) to have received the fee (if any) required under section 92; and
 - (b) to have given to the debtor any notice that was given, in respect of the debtor, by a paying officer in another Agency.
- (5) The paying officer in Agency 2 must notify the judgment creditor of the move, and the deductions that the paying officer will make.

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- (6) The judgment creditor is not required to pay another fee for the making of deductions.

97 Administration of deductions

- (1) A paying officer in relation to a debtor may:
- (a) require the judgment creditor to confirm that the judgment debt has not been discharged; and
 - (b) suspend the making of deductions until the paying officer receives the confirmation.
- (2) If a debtor's employment ceases, or is terminated, for any reason (including the debtor's death) the paying officer must notify the judgment creditor of the cessation or termination as soon as practicable.

98 Recovery of overpayment

If a payment made to a judgment creditor for the purposes of a judgment debt exceeds the amount due under the judgment, the excess is repayable by the judgment creditor to the debtor.

Part 9—Protection of information

99 Australian Public Service Commissioner’s functions etc.

Protected information

- (1) For the purposes of paragraph (c) of the definition of **protected information** in subsection 72A(1) of the Act, the following provisions of this instrument are prescribed:
 - (a) section 55 (inquiries into Merit Protection Commissioner’s behaviour);
 - (b) section 56 (inquiries into alleged breaches of Code of Conduct by statutory office holders).

Compellability of entrusted persons to give evidence

- (2) For the purposes of paragraph 72A(7)(e) of the Act, the following provisions of this instrument are prescribed:
 - (a) section 55 (inquiries into Merit Protection Commissioner’s behaviour);
 - (b) section 56 (inquiries into alleged breaches of Code of Conduct by statutory office holders).

100 Merit Protection Commissioner’s functions etc.

Prescribed entrusted person

- (1) For the purposes of the definition of **prescribed entrusted person** in subsection 72B(1) of the Act, an entrusted person who is a member of a committee established or appointed by the Merit Protection Commissioner under this instrument is prescribed.

Protected information

- (2) For the purposes of paragraph (c) of the definition of **protected information** in subsection 72B(1) of the Act, section 81 of this instrument (review of actions of statutory office holders other than Agency Heads) is prescribed.

Compellability of entrusted persons to give evidence

- (3) For the purposes of paragraph 72B(7)(d) of the Act, section 81 of this instrument (review of actions of statutory office holders other than Agency Heads) is prescribed.

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

For the purposes of paragraph 72C(2)(c) of the Act, the following provisions of this instrument are prescribed:

- (a) section 55 (inquiries into Merit Protection Commissioner’s behaviour);
- (b) section 56 (inquiries into alleged breaches of Code of Conduct by statutory office holders).

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

For the purposes of paragraph 72D(2)(b) of the Act, section 81 of this instrument (review of actions of statutory office holders other than Agency Heads) is prescribed.

103 Use and disclosure of personal information

- (1) This section is made for the purposes of paragraph 72E(a) of the Act.

Use or disclosure by Agency Head

- (2) An Agency Head may use personal information that is in the possession, or under the control, of the Agency Head in circumstances where the use is necessary for, or relevant to, the exercise of the employer powers of the Agency Head.
- (3) An Agency Head may disclose personal information that is in the possession, or under the control, of the Agency Head in circumstances where the disclosure is necessary for, or relevant to:
- (a) the exercise of the employer powers of the Agency Head or another Agency Head; or
 - (b) the exercise of a power or performance of a function of the Commissioner; or
 - (c) the exercise of a power or performance of a function of the Merit Protection Commissioner; or
 - (d) the performance of a function of an ISAC.

Use or disclosure by Australian Public Service Commissioner

- (4) The Australian Public Service Commissioner may use personal information that is in the possession, or under the control, of the Australian Public Service Commissioner in circumstances where:
- (a) the information was obtained as part of the Australian Public Service Commissioner's review or inquiry functions; and
 - (b) the use is necessary for, or relevant to, an inquiry relating to the Code of Conduct conducted by the Australian Public Service Commissioner.
- (5) The Australian Public Service Commissioner may disclose personal information that is in the possession, or under the control, of the Australian Public Service Commissioner in circumstances where:
- (a) the information was obtained as part of the Australian Public Service Commissioner's review or inquiry functions; and
 - (b) the disclosure is necessary for, or relevant to, an Agency Head's consideration of alleged misconduct by an APS employee.

Disclosure by Merit Protection Commissioner

- (6) The Merit Protection Commissioner may disclose personal information that is in the possession, or under the control, of the Merit Protection Commissioner in circumstances where:

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- (a) the information was obtained by the Merit Protection Commissioner:
 - (i) during a review of an action conducted by a PRC or the Merit Protection Commissioner under this instrument; or
 - (ii) in the performance of the Merit Protection Commissioner's inquiry functions; and
- (b) the disclosure is necessary for, or relevant to, an Agency Head's consideration of alleged misconduct by an APS employee.

Note: This section constitutes an authorisation for the purposes of the *Privacy Act 1988* and other laws (including the common law).

Part 10—Miscellaneous

104 Maximum amount of payments in special circumstances

For the purposes of subsection 73(4) of the Act, the maximum amount in relation to a payment to a person under subsection 73(2) of the Act is \$250,000.

Note: Under subsection 73(4) of the Act, a payment cannot be authorised if it would involve, or be likely to involve, a total amount exceeding the amount prescribed by the regulations.

105 Delegations

Australian Public Service Commissioner

- (1) The Australian Public Service Commissioner may, in writing, delegate to a person any of the Australian Public Service Commissioner's powers or functions under this instrument (other than this section).

Merit Protection Commissioner

- (2) The Merit Protection Commissioner may, in writing, delegate to an APS employee any of the Merit Protection Commissioner's powers or functions under this instrument (other than this section).

Note: 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 (see subsection 49(3) of the Act).

Agency Heads

- (3) An Agency Head may, in writing, delegate to a person any of the Agency Head's powers or functions under this instrument (other than this section).
- (4) However, an Agency Head must not delegate powers or functions to an outsider without the prior written consent of the Australian Public Service Commissioner.

Note: For *outsider*, see subsection (9).

- (5) A person (the *first delegate*) to whom powers or functions are delegated under subsection (3) may, in writing, delegate any of the powers or functions to another person (the *second delegate*).
- (6) However, if the first delegate is subject to directions about the exercise of a power or function delegated under subsection (5), the first delegate must give corresponding directions to the second delegate.
- (7) A power or function that is exercised or performed by a person under a delegation under subsection (5) is taken, for the purposes of this instrument, to have been exercised or performed by the person who originally delegated the corresponding power or function under subsection (3).

Delegate must comply with directions of delegator

- (8) A person exercising powers or functions under a delegation under this section must comply with any directions of the person who delegated the power or function.

Meaning of outsider

- (9) In this section:

outsider means a person other than:

- (a) an APS employee; or
- (b) a member of the Australian Defence Force; or
- (c) a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

106 Immunity from civil proceedings in relation to Australian Public Service Commissioner's functions

For the purposes of paragraph 78A(1)(h) of the Act, the following provisions of this instrument are prescribed:

- (a) section 55 (inquiries into Merit Protection Commissioner's behaviour);
- (b) section 56 (inquiries into alleged breaches of Code of Conduct by statutory office holders).

Part 11—Transitional arrangements

Division 1—Transitional arrangements in relation to the commencement of this instrument

107 Definitions

In this Division:

commencement day means the day this instrument commences.

old regulations means the *Public Service Regulations 1999*, as in force immediately before the commencement of this instrument.

108 Conduct, event, circumstances occurring before commencement

- (1) To avoid doubt, a function or duty may be performed, or a power exercised, under this instrument in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before the commencement day.
- (2) This section does not limit anything in this Division or section 7 of the *Acts Interpretation Act 1901* (as that Act applies in relation to this instrument because of paragraph 13(1)(a) of the *Legislation Act 2003*).

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

- (1) This section applies if:
 - (a) before the commencement day, an APS employee applied under Division 5.3 of the old regulations for review of APS action; and
 - (b) the review had not been completed in accordance with that Division before the commencement day.

Note: The application may have been made to an Agency Head or the Merit Protection Commissioner. Also, the application may have been referred to the Merit Protection Commissioner by the Agency Head.

- (2) Despite the repeal of the old regulations by this instrument, the old regulations continue to apply, on and after the commencement day, in relation to the review, as if the repeal had not happened.

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

- (1) This section applies if, before the commencement day, the Public Service Commissioner had begun an inquiry into an alleged breach of the Code of Conduct by the Merit Protection Commissioner in accordance with regulation 6.1 of the old regulations, but had not reported on the results of the inquiry.

- (2) Despite the repeal of the old regulations by this instrument, the old regulations continue to apply, on and after the commencement day, in relation to the inquiry, as if the repeal had not happened.

111 Conduct of ISAC and recommendation by ISAC

- (1) Subsection (2) applies if:
- (a) before the commencement day, an ISAC was established; and
 - (b) immediately before the commencement day:
 - (i) the ISAC was still in existence and had not made a recommendation; or
 - (ii) a recommendation by the ISAC, made within 12 months after the date of notification of the employment opportunity, was in force.
- (2) This instrument applies, on and after the commencement day, in relation to the ISAC and the recommendation.
- (3) However, if:
- (a) the employment opportunity was advertised or notified before the commencement day on the basis that the old regulations would apply on and after the commencement day; or
 - (b) official information provided before the commencement day in relation to the advertisement or notification of the employment opportunity stated that the old regulations would apply on and after the commencement day;
- then, despite the repeal of the old regulations by this instrument, the old regulations continue to apply, on and after the commencement day, in relation to the ISAC and the recommendation, as if the repeal had not happened.

Example: Official information provided in relation to the advertisement or notification of the employment opportunity would include a statement in an application pack or information provided by a contact person identified in the advertisement or notification.

112 Review of promotion notified before commencement day

- (1) Subsection (2) applies if, before the commencement day, a promotion was notified in accordance with the old regulations.
- (2) Despite the repeal of the old regulations by this instrument, the old regulations continue to apply, on and after the commencement day, in relation to:
- (a) the promotion; and
 - (b) any entitlement to have access to a statement given as part of a review of the promotion;
- as if the repeal had not happened.

Schedule 1—Repeals

Public Service Regulations 1999

1 The whole of the instrument

Repeal the instrument.