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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

REMUNERATION AND OTHER LEGISLATION AMENDMENT BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of
the Special Minister of State for the Public Service and Integrity,
the Hon Gary Gray AO MP)

REMUNERATION AND OTHER LEGISLATION AMENDMENT BILL 2011

OUTLINE

The amendments made by this Bill will expand the jurisdiction of the Remuneration Tribunal (the Tribunal) to determine the base salary of parliamentarians and the remuneration of Departmental Secretaries and other offices established under the *Public Service Act 1999*.

Schedule 1 of the Bill amends the *Remuneration Tribunal Act 1973* to give the Tribunal responsibility for determining:

- a classification structure for Departmental Secretaries and related matters which may include pay points and guidelines on the operation of the structure. The Tribunal will also be required to determine the classification to which each office of Departmental Secretary will be assigned;
- the remuneration of the Secretary of the Department of the Prime Minister and Cabinet and the Secretary of the Treasury. The Secretary of the Department of the Prime Minister and Cabinet, in consultation with the President of the Remuneration Tribunal and the Public Service Commissioner, will be empowered to assign all other Departmental Secretaries to a level of remuneration. That assignment must be consistent with the classification structure determined by the Remuneration Tribunal; and
- the remuneration and recreation leave entitlements of the Public Service Commissioner, the Merit Protection Commissioner and the heads of Executive Agencies created under the *Public Service Act 1999*.

These determinations will not be disallowable, as is the case at present with determinations of this nature.

Schedule 2 contains amendments that implement a recommendation in the report of the Committee for the Review of Parliamentary Entitlements. Those amendments will restore the ability of the Tribunal to determine parliamentary base salary; require the Tribunal to publish reasons for its decisions in relation to parliamentary remuneration; and remove the Parliament's ability to disallow parliamentary remuneration determinations made by the Tribunal.

FINANCIAL IMPACT STATEMENT

The measures proposed in this Bill have no impact on the budget.

NOTES ON CLAUSES

Clause 1 – Short title

1. Once enacted, the short title of the Act will be the *Remuneration and Other Legislation Amendment Act 2011*.

Clause 2 – Commencement

2. This clause provides for the commencement of the Bill.
 - Clauses 1 to 3 commence on the day the Act receives the Royal Assent (item 1 of the table).
 - The amendments in Schedule 1, which deal with the remuneration of Departmental Secretaries and other offices established under the *Public Service Act 1999*, will commence on a single day to be fixed by Proclamation (item 2 of the table).
 - The amendments in Schedule 2, which deal with deal with the remuneration of parliamentarians, and the associated transitional provisions in Part 4 of Schedule 3, will commence on a single day to be fixed by Proclamation (item 3 of the table).

Clause 3 – Schedule(s)

3. This clause provides that each Act that is specified in the Schedule is amended or repealed as set out in the applicable Schedule.
 - Schedule 1 to the Bill contains amendments to the *Remuneration Tribunal Act 1973* and the *Public Service Act 1999*;
 - Schedule 2 to the Bill contains amendments to the *Remuneration Tribunal Act 1973*, the *Parliamentary Contributory Superannuation Act 1948*, the *Parliamentary Superannuation Act 2004* and the *Remuneration and Allowances Act 1990*.

Schedule 1 – Australian Public Service and Parliamentary Service offices

Schedule 1 contains amendments that empower the Tribunal to determine the remuneration of Departmental Secretaries and other offices established under the *Public Service Act 1999*.

Under the *Public Service Act 1999*, the Prime Minister is responsible for determining the remuneration and other conditions of appointment of Departmental Secretaries, while Agency Ministers are responsible for determining the remuneration and other conditions of appointment of the Public Service Commissioner, the Merit Protection Commissioner and the heads of Executive Agencies. The Prime Minister and Agency Ministers are required to seek, and take into account, the advice of the Tribunal before making determinations.

Part 1 of this Schedule contains amendments to the *Remuneration Tribunal Act 1973* to:

- empower the Tribunal to determine a classification structure for Departmental Secretaries. The Tribunal will also be required to determine the classification to which each office of Departmental Secretary will be assigned;
- enable the Tribunal to determine the remuneration of the Secretary of the Department of the Prime Minister and Cabinet and the Secretary of the Treasury. The Secretary of the Department of the Prime Minister and Cabinet, in consultation with the President of the Remuneration Tribunal and the Public Service Commissioner, will be empowered to assign all other Departmental Secretaries to a level of remuneration; and
- enable the Tribunal to determine the remuneration and recreation leave entitlements of the Public Service Commissioner, the Merit Protection Commissioner and the heads of Executive Agencies established under the *Public Service Act 1999* as ‘public offices’ under subsections 7(3) and 7(3AA) of the *Remuneration Tribunal Act 1973*.

Part 2 of Schedule 1 includes consequential amendments to the *Public Service Act 1999* and the *Remuneration Tribunal Act 1973*.

Part 3 contains savings and transitional provisions arising from the amendments in Parts 1 and 2.

Part 1 – Main amendments

Remuneration Tribunal Act 1973

Clause 1 – Subsection 3(1)

This clause inserts a definition of ‘Departmental Secretary’.

Clause 2 – Subsection 3(1)

This clause inserts a definition of ‘Public Service Commissioner’.

Clause 3 – Paragraph 3(4)(k)

This clause amends the definition of ‘public office’ in subsection 3(4) of the *Remuneration Tribunal Act 1973* by substituting a new paragraph 3(4)(k).

Paragraph 3(4)(a) provides that a ‘public office’ includes ‘an office established by, or an appointment made under, a law of the Commonwealth (other than this Act)’. Paragraph 3(4)(k) currently excludes ‘an office or appointment in the Australian Public Service or the Commonwealth Teaching Service’. The effect of the amendment will be to:

- allow the Public Service Commissioner, the Merit Protection Commissioner and the heads of Executive Agencies appointed under the *Public Service Act 1999* to be treated as ‘public offices’ for the purposes of the definition of that term in paragraph 3(4)(a) of the *Remuneration Tribunal Act 1973*. This will enable the Tribunal to determine remuneration and recreation leave entitlements of these offices; and
- exclude Departmental Secretaries from being treated as ‘public offices’ as defined in paragraph 3(4)(a). The Tribunal will determine the remuneration and other terms and conditions of Departmental Secretaries under new Division 4 of the *Remuneration Tribunal Act 1973* (see clause 6).

This clause also repeals the reference to the Commonwealth Teaching Service, which no longer exists.

Clause 4 – Subsection 5(2B)

This clause amends section 5 of the *Remuneration Tribunal Act 1973* by substituting a new subsection 5(2B) to provide that the Tribunal’s functions include inquiring into and determining the remuneration and terms and conditions of Departmental Secretaries under new Division 4 of the *Remuneration Tribunal Act 1973*.

This new function will replace the Tribunal’s current function of providing advice in relation to the terms and conditions of the Public Service Commissioner, Merit Protection Commissioner, Departmental Secretaries and heads of Executive Agencies. The Tribunal will in future determine the terms and conditions of these officers under subsections 7(3), 7(3AA) and Division 4 of the *Remuneration Tribunal Act 1973*.

Clause 5 – Subsection 7(7)

This clause amends subsection 7(7) of the *Remuneration Tribunal Act 1973* to exempt determinations made under new Division 4, relating to Departmental Secretaries, from the requirement that determinations made by the Tribunal be tabled in both Houses of the Parliament.

As is currently the case with determinations made by the Prime Minister under the *Public Service Act 1999*, determinations made by the Tribunal relating to Departmental Secretaries will not be legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Clause 6 – At the end of Part II

This clause inserts a new Division 4 into Part II of the *Remuneration Tribunal Act 1973*.

Division 4 – Remuneration etc. for Departmental Secretaries

New section 13 – Determination of classification structure etc

New section 13 would require the Tribunal to determine a classification structure for Departmental Secretaries and to determine the classification to which each office of Departmental Secretary is assigned. In determining the classification structure for Departmental Secretaries, the Tribunal may also determine related matters, such as pay points and guidelines for the operation of the structure.

The Tribunal may hold inquiries for the purpose of determining these matters.

New subsection 13(5) would allow the Secretary of the Department of the Prime Minister and Cabinet to make recommendations to the Tribunal about the assignment of a particular office of Departmental Secretary to a particular classification, for example following a change in the Administrative Arrangements Order.

Determinations made under this section would not be legislative instruments as they are covered by in clause 11 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004, which exempts instruments determining terms and conditions of appointment or employment.

New section 14 – Amount of remuneration

New subsection 14(1) would require the Tribunal to determine the amount of remuneration that is to be paid to the Secretary of the Department of the Prime Minister and Cabinet and the Secretary of the Treasury. New subsection 14(2) would provide that the amount of remuneration determined must be consistent with the classification structure determined by the Tribunal under new section 13.

New subsection 14(3) would require the Secretary of the Department of the Prime Minister and Cabinet to assign the amount of remuneration to be paid to all other Departmental Secretaries, in consultation with the President of the Tribunal and the Public Service Commissioner. The amount of remuneration specified for a Departmental Secretary must be consistent with the classification structure (new subsection 14(4)). A decision made by the Secretary of the Department of the Prime Minister and Cabinet must be in writing and would come into operation on the date specified in the instrument (new subsection 14(5)).

The Secretary of the Department of the Prime Minister and Cabinet is required to give a copy of each assignment made under new subsection 14(3) to the Minister that administers the *Remuneration Tribunal Act 1973*.

New subsection 14 (7) provides that, for the purposes of the *Superannuation Act 1976*, an assignment under subsection (3) of a Departmental Secretary to an amount of remuneration is taken to be a determination made under the *Remuneration Tribunal Act 1973* in respect of the remuneration of the Departmental Secretary. This would ensure the continued application of the *Superannuation Act 1976* to Secretaries covered by that Act.

As with determinations made by the Tribunal relating to Departmental Secretaries, a decision made by the Secretary of the Department of the Prime Minister and Cabinet as to the amount of remuneration payable to Secretaries will fall within the exemption in clause 11 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004.

New section 15 – Determination of other terms and conditions

New section 15 would require the Tribunal to inquire into, and determine, other terms and conditions (that are not remuneration) that are to apply to Departmental Secretaries. This will allow the Tribunal to determine all terms and conditions for Departmental Secretaries, as is currently the case with the determination made by the Prime Minister under the *Public Service Act 1999*.

New section 16 – Publication of determinations made by the Tribunal under this Division

As is currently the case with determinations made by the Prime Minister under the *Public Service Act 1999*, determinations made by the Tribunal relating to Departmental Secretaries will

be required to be published in the *Gazette* within 14 days of being made. They will also be required to be published on the Tribunal's website.

In addition, subsection 7(5) of the *Remuneration Tribunal Act 1973* requires that determinations made by the Tribunal must be in writing and come into operation on the date specified in the determination made by the Tribunal. The Tribunal must give the Minister a copy of each determination made by the Tribunal relating to Departmental Secretaries.

Part 2 – Related amendments

This Part contains consequential amendments to the *Public Service Act 1999* and the *Remuneration Tribunal Act 1973*.

Public Service Act 1999

Clause 7 – Section 46

This clause repeals section 46 of the *Public Service Act 1999* and substitutes a new section to provide that the Tribunal is responsible for determining the remuneration and recreation leave entitlements of the Public Service Commissioner.

In the absence of a Tribunal determination about remuneration, the regulations can prescribe the remuneration to be paid to the Public Service Commissioner.

The regulations can also prescribe the allowances payable to the Public Service Commissioner.

In addition, the Agency Minister can:

- grant leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise that he or she determines; and
- determine other terms and conditions in relation to matters not otherwise covered.

Clause 8 – Section 53

This clause repeals section 53 of the *Public Service Act 1999* and substitutes a new section to provide that the Tribunal is responsible for determining the remuneration and recreation leave entitlements of the Merit Protection Commissioner.

In the absence of a Tribunal determination about remuneration, the regulations can prescribe the remuneration to be paid to the Merit Protection Commissioner.

The regulations can also prescribe the allowances payable to the Merit Protection Commissioner.

In addition, the Public Service Minister can:

- grant leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise that he or she determines; and
- determine other terms and conditions in relation to matters not otherwise covered.

The Public Service Minister is responsible for decisions relating to the Merit Protection Commissioner as the concept of Agency Minister is not applicable to the Merit Protection Commissioner. The Merit Protection Commissioner is not the head of an Agency as defined in the *Public Service Act 1999*.

Clause 9 – Section 61

This clause repeals section 61 of the *Public Service Act 1999* which currently provides that the remuneration and other terms and conditions of appointment of a Secretary are as determined by the Prime Minister following advice from the Tribunal. New section 61 would make it clear that the remuneration and other terms and conditions of appointment of a Secretary would in future be determined by the Tribunal.

Clause 10 – Section 68

Section 68 of the *Public Service Act 1999* makes the relevant Agency Minister responsible for determining the terms and conditions of the Heads of Executive Agencies.

This clause would repeal section 68 and substitute a new section to provide that the Tribunal is responsible for determining the remuneration and recreation leave entitlements of the Heads of Executive Agencies established under the *Public Service Act 1999*.

In the absence of a Tribunal determination about remuneration, the regulations can prescribe the remuneration to be paid to the Head of an Executive Agency established under the *Public Service Act 1999*.

The regulations can also prescribe the allowances payable to the Head of an Executive Agency established under the *Public Service Act 1999*.

In addition, an Agency Minister can:

- grant leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise that he or she determines; and
- determine other terms and conditions in relation to matters not otherwise covered.

Part 3 – Transitional

Clause 12 – Continuation of existing remuneration determination for Public Service Commissioner

Clause 13 – Continuation of existing remuneration determination for Merit Protection Commissioner

Clause 14 – Continuation of existing remuneration determination for Departmental Secretaries

Clause 15 – Continuation of existing remuneration determinations for Heads of Executive Agencies

These clauses save the operation of existing remuneration determinations made by the relevant Minister under the *Public Service Act 1999* until such time as the Tribunal's first determinations in respect of the various offices come into effect.

Clause 16 – Regulations under the *Remuneration Tribunal Act 1973*

This clause provides that regulations made under the former section 13 of the *Remuneration Tribunal Act 1973* continue to have effect, after the commencement of this Schedule, under section 17 of the *Remuneration Tribunal Act 1973*.

Schedule 2 – Members of Parliament

The remuneration of Senators and Members of the House of Representatives is currently set, under Schedule 3 to the *Remuneration and Allowances Act 1990* and Regulations under that Act, by reference to an amount specified in the Tribunal's determination of the classification structure for Principal Executive Offices.

Schedule 2 contains amendments that give effect to the Government's decision to implement the recommendation in the report of the Committee for the Review of Parliamentary Entitlements to:

- restore the ability of the Tribunal to determine parliamentary base salary;
- require the Tribunal to publish reasons for its decisions in relation to parliamentary remuneration; and
- remove the Parliament's ability to disallow parliamentary remuneration determinations made by the Tribunal.

Schedule 2 also contains transitional provisions arising from the amendments in this Schedule.

Parliamentary Contributory Superannuation Act 1948 (the 1948 Act)

Clause 1 – Subsection 4(1) (paragraph (c) of the definition of *parliamentary allowance*)

This clause substitutes a new definition of 'parliamentary allowance'. New paragraph (c) provides that an 'allowance by way of salary' under clause 1 of Schedule 3 of the *Remuneration and Allowances Act 1990* will continue to be 'parliamentary allowance' for the purposes of the 1948 Act until an 'allowance by way of salary' is determined by the Tribunal under paragraph 7(1) of the *Remuneration Tribunal Act 1973*.

Once a determination is made under paragraph 7(1) of the *Remuneration Tribunal Act 1973*, new paragraph (d) provides that for the purpose of the 1948 Act 'parliamentary allowance' will mean the amount of allowance by way of salary determined by the Tribunal under subsection 7(1).

Clause 2 – Subsection 18(12)

Clause 3 – Subsection 21B(3B)

Clause 4 – Subsection 22T(1A)

Clause 5 – Subclause 4(3) of Schedule 1

These clauses update references in the 1948 Act to the provisions about the salary sacrifice of parliamentary allowances as a consequence of the amendments to the *Remuneration and Allowances Act 1990* which would be made by clauses 8 to 16 below.

Parliamentary Superannuation Act 2004 (the 2004 Act)

Clause 6 – Section 3 (definition of *parliamentary allowance*)

This clause substitutes a new definition of 'parliamentary allowance' in the 2004 Act consistent with the changes being made to the definition in the 1948 Act (see clause 1 above).

Clause 7 – Subsection 8(3)

This clause updates the reference in subsection 8(3) of the 2004 Act to the provisions about the salary sacrifice of parliamentary allowances as a consequence of the amendments to the *Remuneration and Allowances Act 1990* which would be made by clauses 8 to 16 below.

Remuneration and Allowances Act 1990

Clause 8 – Subsection 3(2)

This clause omits the reference to clause 1 of Schedule 3 as that clause would be repealed by clause 11.

Clause 9 – Section 6

This clause repeals section 6 of the *Remuneration and Allowances Act 1990*, which currently provides that the remuneration and allowances payable to Senators and Members are as set out in Schedule 3 of that Act. This clause is a technical amendment that is consequential upon the amendments to give the Tribunal responsibility for determining the annual salary of parliamentarians.

Clause 10 – Part 1 of Schedule 3 (heading)

This clause repeals the existing heading of Part 1 of Schedule 3 (“Amount of Annual Salary”) and substitutes a new heading (“Salary Sacrifice”). The amendment is a consequence of the Tribunal being given responsibility for determining parliamentarians’ remuneration.

Clause 11 – Division 1 of Part 1 of Schedule 3

Division 1 of Part 1 of Schedule 3 to the *Remuneration and Allowances Act 1990* currently contains the mechanism for setting parliamentarians’ remuneration. At present the salary of parliamentarians is determined by reference to certain office holders in the Principal Executive Office (PEO) classification structure whose remuneration is determined by the Tribunal.

This clause repeals the Division as it would no longer be required as a consequence of the Tribunal being given responsibility for determining parliamentarians’ remuneration.

Clause 12 – Division 2 of Part 1 of Schedule 3 (heading)

Clause 13 – Clause 1A of Schedule 1

These clauses are consequential upon the repeal of Division 1.

Clause 14 – Clause 1A of Schedule 3 (definition of *parliamentary allowance*)

This clause substitutes a new definition of parliamentary allowance consistent with the new arrangements whereby the Remuneration Tribunal would determine the remuneration of parliamentarians.

Clause 15 – Subclause 1B(1) of Schedule 3

Clause 16 – Paragraph 1F(a) of Schedule 3

These clauses are consequential upon the repeal of Division 1.

Remuneration Tribunal Act 1973

Clause 17 – Subsection 5(2C)

This clause repeals subsection 5(2C), which provides that the Tribunal is responsible for providing advice for the purpose of subclause 1(3) in Division 1 of Schedule 3 to the *Remuneration and Allowances Act 1990* about parliamentarians’ remuneration. Subsection 5(2C) is no longer required as a consequence of the repeal of Division 1 of Schedule 3 (see Clause 11 above).

Clause 18 – Subsection 7(7)

This clause inserts a reference to proposed new subsection 7(8AA) of the *Remuneration Tribunal Act 1973* which would be inserted by clause 19 below.

Clause 19 – After subsection 7(8)

This clause would insert new subsection 7(8AA) into the *Remuneration Tribunal Act 1973* to provide that the determinations of the Tribunal under subsections 7(1), 7(2) and 7(4) of the Act would not be subject to the disallowance mechanism in subsection 7(8) of the *Remuneration Tribunal Act 1973*.

New subsection 7(8AA) would reinforce the independence of the Tribunal and ensure the integrity of the scheme for determining the remuneration of parliamentarians by removing, to the extent possible, opportunities for intervention in the implementation of the Tribunal's determinations by the individuals who are the subject of those determinations, as has occurred in the past.

Determinations made by the Tribunal would be legislative instruments. As such, they will be published in accordance with provisions in the *Legislative Instruments Act 2003*.

Clause 20 – After section 7

This clause would require the Tribunal to publish reasons for determinations made relating to the amounts payable to members of Parliament, or significantly related matters, on the Tribunal's website and notified to the Minister. The Government agrees with the Committee for the Review of Parliamentary Entitlements that the process of setting parliamentary remuneration would be more accountable if the Tribunal published the reasons for its decisions.

The requirement to provide a copy of any determinations to the Minister is consistent with the requirements that apply to other determinations of the Tribunal under subsection 7(6) of the *Remuneration Tribunal Act 1973*.

Clause 21 – Transitional – temporary saving of old law allowances

This clause contains transitional provisions arising from the amendments in Schedule 2. It saves the operation of existing legislative provisions and regulations setting the allowances payable to parliamentarians, until the first determination of the Tribunal made under subsection 7(1) of the *Remuneration Tribunal Act 1973* relating to the annual allowance payable to members of the Parliament for the purpose of section 48 of the Constitution come into operation.