



# Public Service Act 1999

No. 147, 1999 as amended

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**Includes amendments up to:** Act No. 62, 2014

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

### **This compilation**

This is a compilation of the *Public Service Act 1999* as in force on 1 July 2014. It includes any commenced amendment affecting the legislation to that date.

This compilation was prepared on 4 August 2014.

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of each amended provision.

### **Uncommenced amendments**

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in the endnotes.

### **Application, saving and transitional provisions for provisions and amendments**

If the operation of a provision or amendment is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### **Modifications**

If a provision of the compiled law is affected by a modification that is in force, details are included in the endnotes.

### **Provisions ceasing to have effect**

If a provision of the compiled law has expired or otherwise ceased to have effect in accordance with a provision of the law, details are included in the endnotes.

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# **An Act to provide for the establishment and management of the Australian Public Service, and for other purposes**

## **Part 1—Preliminary**

### **1 Short title**

This Act may be cited as the *Public Service Act 1999*.

Note: See also the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

### **2 Commencement**

- (1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
- (2) If this Act does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

### **3 Objects of this Act**

The main objects of this Act are:

- (a) to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public; and
- (b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; and
- (c) to define the powers, functions and responsibilities of Agency Heads, the Australian Public Service Commissioner and the Merit Protection Commissioner; and
- (d) to establish rights and obligations of APS employees.

**4 This Act binds the Crown**

This Act binds the Crown in right of the Commonwealth, but does not make the Crown liable to be prosecuted for an offence.

**5 This Act extends to things outside Australia**

- (1) This Act extends to acts, omissions, matters and things outside Australia (unless the contrary intention appears).
- (2) This Act extends to all the Territories.

**6 Engagement of employees in Department or Executive Agency**

- (1) All persons engaged on behalf of the Commonwealth as employees to perform functions in a Department or Executive Agency must be engaged under this Act, or under the authority of another Act.
- (2) Subsection (1) does not apply to persons engaged on an honorary basis.
- (3) This section does not, by implication, affect any power that an Agency Head might otherwise have to engage persons as independent contractors.

## Part 2—Interpretation

### 7 Interpretation

In this Act, unless the contrary intention appears:

***acting SES employee*** means a non-SES employee who is acting in a position usually occupied by an SES employee.

***Agency*** means:

- (a) a Department; or
- (b) an Executive Agency; or
- (c) a Statutory Agency.

***Agency Head*** means:

- (a) the Secretary of a Department; or
- (b) the Head of an Executive Agency; or
- (c) the Head of a Statutory Agency.

***Agency Minister*** means:

- (a) in relation to a Department—the Minister who administers the Department; or
- (b) in relation to an Executive Agency—the Minister who administers the Agency; or
- (c) in relation to a Statutory Agency—the Minister who administers the provision of the Act that provides for the appointment of the Head of the Agency.

***APS*** means the Australian Public Service established by section 9.

***APS employee*** means:

- (a) a person engaged under section 22; or
- (b) a person who is engaged as an APS employee under section 72.

***APS employment*** means employment as an APS employee.

***APS Employment Principles*** means the principles in section 10A.

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**APS Values** means the values in section 10.

**Australian Fair Pay and Conditions Standard** has the same meaning as in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Note: See Schedules 4 and 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* in relation to the application of the Australian Fair Pay and Conditions Standard.

**category of APS employee** means one of the following categories:

- (a) ongoing APS employees;
- (b) APS employees engaged for a specified term or for the duration of a specified task;
- (c) APS employees engaged for duties that are irregular or intermittent.

**Classification Rules** means rules made under section 23.

**Code of Conduct** means the rules in section 13.

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

**Commissioner's Directions** means directions issued by the Commissioner under section 11, 11A or 15.

**Department** means a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency.

**enterprise agreement** has the same meaning as in the *Fair Work Act 2009*.

**Executive Agency** means an Executive Agency established under section 65.

**fair work instrument** has the same meaning as in the *Fair Work Act 2009*.

**former APS employee** means a person who was, but is no longer, an APS employee.

**Head:**

- (a) in relation to an Executive Agency—means the person appointed as the Head of the Agency under section 67; and
- (b) in relation to a Statutory Agency—means the person declared by an Act to be the Head of the Agency.

**Head of Mission** means the head of:

- (a) an Australian diplomatic mission; or
- (b) an Australian consular mission.

**locally engaged employee** means a person engaged under section 74.

**Merit Protection Commissioner** means the Merit Protection Commissioner appointed under this Act.

**modern award** has the same meaning as in the *Fair Work Act 2009*.

**National Employment Standards** has the same meaning as in the *Fair Work Act 2009*.

**non-ongoing APS employee** means an APS employee who is not an ongoing APS employee.

**non-SES employee** means an APS employee other than an SES employee.

**ongoing APS employee** means a person engaged as an ongoing APS employee, as mentioned in paragraph 22(2)(a).

**overseas** means outside Australia and the Territories.

**Presiding Officer** means the President of the Senate or the Speaker of the House of Representatives.

**Prime Minister's Department** means the Department of the Prime Minister and Cabinet.

**Public Service Minister** means the Minister who administers this Act.

**Secretaries Board** means the Secretaries Board established by section 64.

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**Secretary** means the Secretary of a Department.

**SES** means the Senior Executive Service established by section 35.

**SES employee** has the meaning given by section 34.

**Special Commissioner** means a Special Commissioner appointed under section 48A.

**special review** means a review conducted by the Commissioner under subsection 41D(1).

**Statutory Agency** means a body or group of persons declared by a law of the Commonwealth to be a Statutory Agency for the purposes of this Act.

**systems review** means a review conducted by the Commissioner under subsection 41C(1).

**WR Act collective transitional instrument** means an award, a collective agreement or a pre-reform certified agreement (within the meaning of those terms in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

**WR Act transitional instrument** means an award, a workplace agreement, a pre-reform certified agreement, an AWA or a pre-reform AWA (within the meaning of those terms in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

## 8 Relationship with Fair Work Acts

- (1) This Act has effect subject to the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.
- (2) Subsection (1) is not intended to imply anything about the relationship between this Act and any Act other than the *Fair Work Act 2009* or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

## **Part 3—The Australian Public Service**

### **9 Constitution of the APS**

The Australian Public Service consists of Agency Heads and APS employees.

### **10 APS Values**

#### *Committed to service*

- (1) The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

#### *Ethical*

- (2) The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

#### *Respectful*

- (3) The APS respects all people, including their rights and their heritage.

#### *Accountable*

- (4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

#### *Impartial*

- (5) The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

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**10A APS Employment Principles**

*APS Employment Principles*

- (1) The APS is a career-based public service that:
  - (a) makes fair employment decisions with a fair system of review; and
  - (b) recognises that the usual basis for engagement is as an ongoing APS employee; and
  - (c) makes decisions relating to engagement and promotion that are based on merit; and
  - (d) requires effective performance from each employee; and
  - (e) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued; and
  - (f) provides workplaces that are free from discrimination, patronage and favouritism; and
  - (g) recognises the diversity of the Australian community and fosters diversity in the workplace.

*Decisions based on merit*

- (2) For the purposes of paragraph (1)(c), a decision relating to engagement or promotion is based on merit if:
  - (a) all eligible members of the community were given a reasonable opportunity to apply to perform the relevant duties; and
  - (b) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process; and
  - (c) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties; and
  - (d) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and

- (e) the assessment is the primary consideration in making the decision.

Note: Commissioner's Directions may determine the scope or application of the APS Employment Principles (see subsections 11A(2) and (3)).

## **11 Commissioner's Directions about APS Values**

- (1) The Commissioner may issue directions in writing in relation to any of the APS Values for the purpose of:
  - (a) ensuring that the APS incorporates and upholds the APS Values; and
  - (b) determining where necessary the scope or application of the APS Values.

Note: See section 42 for general provisions relating to Commissioner's Directions.

- (2) For the purposes of this Act other than this section, the APS Values have effect subject to the restrictions (if any) in directions made under subsection (1).

### **11A Commissioner's Directions about employment matters**

#### *General*

- (1) The Commissioner may issue directions in writing about employment matters relating to APS employees, including the following:
  - (a) engagement;
  - (b) promotion;
  - (c) redeployment;
  - (d) mobility;
  - (e) training schemes;
  - (f) termination.

Note: See section 42 for general provisions relating to Commissioner's Directions.

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### *Directions about APS Employment Principles*

- (2) The Commissioner may issue directions in writing in relation to any of the APS Employment Principles for the purpose of:
  - (a) ensuring that the APS incorporates and upholds the APS Employment Principles; and
  - (b) determining where necessary the scope or application of the APS Employment Principles.

Note: See section 42 for general provisions relating to Commissioner's Directions.

- (3) For the purposes of this Act (other than subsection (2)), the APS Employment Principles have effect subject to any restrictions in directions issued under subsection (2).

### *Directions of no effect to the extent of inconsistency with Prime Minister's direction*

- (4) A direction issued under this section has no effect to the extent that it is inconsistent with a direction issued by the Prime Minister under section 21.

## **12 Agency Heads must promote APS Values and APS Employment Principles**

An Agency Head must uphold and promote the APS Values and APS Employment Principles.

## **13 The APS Code of Conduct**

- (1) An APS employee must behave honestly and with integrity in connection with APS employment.
- (2) An APS employee must act with care and diligence in connection with APS employment.
- (3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.

- (4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, ***Australian law*** means:
- (a) any Act (including this Act), or any instrument made under an Act; or
  - (b) any law of a State or Territory, including any instrument made under such a law.
- (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
- (7) An APS employee must:
- (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
  - (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.
- (8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
- (9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
- (10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
- (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
  - (b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
- (11) An APS employee must at all times behave in a way that upholds:
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- (a) the APS Values and APS Employment Principles; and
  - (b) the integrity and good reputation of the employee's Agency and the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

### **14 Agency Heads and statutory office holders bound by Code of Conduct**

- (1) Agency Heads are bound by the Code of Conduct in the same way as APS employees.
- (2) Statutory office holders are bound by the Code of Conduct, subject to any regulations made under subsection (2A).
- (2A) The regulations may make provision in relation to the extent to which statutory office holders are bound by the Code of Conduct.

Note: The regulations may make different provision with respect to different statutory office holders or different classes of statutory office holders (see subsection 33(3A) of the *Acts Interpretation Act 1901*).

- (3) In this section:

***statutory office holder*** means a person who holds any office or appointment under an Act, being an office or appointment that is prescribed by the regulations for the purposes of this definition.

### **15 Breaches of the Code of Conduct**

#### *Sanctions that may be imposed*

- (1) An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection (3) of this section or subsection 41B(3) or 50A(2)) to have breached the Code of Conduct:
- (a) termination of employment;

- (b) reduction in classification;
- (c) re-assignment of duties;
- (d) reduction in salary;
- (e) deductions from salary, by way of fine;
- (f) a reprimand.

Note: See sections 29 and 38 in relation to terminating an APS employee's employment.

- (2) The regulations may prescribe limitations on the power of an Agency Head to impose sanctions under subsection (1).

*Providing false or misleading information etc. in connection with engagement as an APS employee*

- (2A) A person who is, or was, an APS employee is taken to have breached the Code of Conduct if the person is found (under procedures established under subsection (3) of this section or subsection 41B(3) or 50A(2)) to have, before being engaged as an APS employee:

- (a) knowingly provided false or misleading information to another APS employee, or to a person acting on behalf of the Commonwealth; or
- (b) wilfully failed to disclose to another APS employee, or to a person acting on behalf of the Commonwealth, information that the person knew, or ought reasonably to have known, was relevant; or
- (c) otherwise failed to behave honestly and with integrity;

in connection with the person's engagement as an APS employee.

Note: If the person is an APS employee at the time a finding referred to in paragraph (2A)(a), (b) or (c) is made in relation to the person, the Agency Head of the employee's Agency may impose sanctions on the person as permitted by subsection (1).

*Procedures for determining whether APS employee, or former APS employee, has breached the Code of Conduct etc.*

- (3) An Agency Head must establish written procedures in accordance with this section for determining:

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- (a) whether an APS employee, or a former APS employee, in the Agency has breached the Code of Conduct (including by engaging in conduct referred to in subsection (2A)); and
  - (b) the sanction (if any) that is to be imposed under subsection (1) on an APS employee in the Agency who is found to have breached the Code of Conduct (including by engaging in conduct referred to in subsection (2A)).
- (4) The procedures:
- (a) must comply with basic procedural requirements set out in Commissioner's Directions; and
  - (b) must have due regard to procedural fairness.
- (5) In addition, and without affecting subsection (4), the procedures may be different for:
- (a) different categories of APS employees or former APS employees; or
  - (b) APS employees, or former APS employees, who:
    - (i) have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct; or
    - (ii) have been found to have committed such an offence but no conviction is recorded.
- (6) The Commissioner must issue directions in writing for the purposes of paragraph (4)(a).
- Note: See section 42 for general provisions relating to Commissioner's Directions.
- (7) An Agency Head must ensure that the procedures established under subsection (3) are made publicly available.
- (8) Procedures established under subsection (3) are not legislative instruments.

### **18 Promotion of employment equity**

An Agency Head must establish a workplace diversity program to assist in giving effect to the APS Employment Principles.

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### **19 Limitation on Ministerial directions to Agency Head**

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 or Division 1 or 2 of Part 4 in relation to particular individuals.

## **Part 4—APS employees**

### **Division 1—APS employees generally**

#### **20 Employer powers etc. of Agency Head**

- (1) An Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the Agency.
- (2) Without limiting subsection (1), an Agency Head has, in respect of APS employees in the Agency, the rights, duties and powers that are prescribed by the regulations.

#### **21 Prime Minister's directions to Agency Heads**

- (1) The Prime Minister may issue general directions in writing to Agency Heads relating to the management and leadership of APS employees.
- (2) A direction issued under subsection (1) is a legislative instrument.

Note: Neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the direction (see sections 44 and 54 of that Act).

#### **22 Engagement of APS employees**

- (1) An Agency Head, on behalf of the Commonwealth, may engage persons as employees for the purposes of the Agency.
- (2) The engagement of an APS employee (including an engagement under section 72) must be:
  - (a) as an ongoing APS employee; or
  - (b) for a specified term or for the duration of a specified task; or
  - (c) for duties that are irregular or intermittent.

Note: The usual basis for engagement is as an ongoing APS employee (see paragraph 10A(1)(b)).

- (4) The regulations may prescribe the circumstances in which persons may be engaged as mentioned in paragraph (2)(b) or (c).
- (5) An engagement for a specified term may be extended, subject to any limitations prescribed by the regulations.
- (6) The engagement of an APS employee (including an engagement under section 72) may be made subject to conditions notified to the employee, including conditions dealing with any of the following matters:
  - (a) probation;
  - (b) citizenship;
  - (c) formal qualifications;
  - (d) security and character clearances;
  - (e) health clearances.
- (7) Subsection (6) does not, by implication, limit the conditions that may be applied to the engagement of an APS employee.
- (8) An Agency Head must not engage, as an APS employee, a person who is not an Australian citizen, unless the Agency Head considers it appropriate to do so.

### **23 Classification Rules**

- (1) The Commissioner may, by legislative instrument, make rules about classifications of APS employees.

Note: Neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the Classification Rules (see sections 44 and 54 of that Act).
- (2) The Classification Rules may apply, adopt or incorporate, with or without modification, any of the provisions of:
  - (a) a modern award, as in force at a particular time or as in force from time to time; or
  - (b) a transitional APCS, as in force at a particular time or as in force from time to time.
- (3) Agency Heads must comply with the Classification Rules.

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- (4) An Agency Head may reduce the classification of an APS employee, without the employee's consent, only in the following circumstances:
- (a) as a sanction under section 15;
  - (b) in the case of an SES employee—in accordance with Commissioner's Directions issued under subsection 11A(1);
  - (c) on the ground that the employee is excess to the requirements of the Agency at the higher classification;
  - (d) on the ground that the employee lacks, or has lost, an essential qualification for performing duties at the higher classification;
  - (e) on the ground of non-performance, or unsatisfactory performance, of duties at the higher classification;
  - (f) on the ground that the employee is unable to perform duties at the higher classification because of physical or mental incapacity;
  - (g) in other circumstances prescribed by the regulations.
- (5) If a relevant industrial instrument, determination under this Act or written contract of employment contains procedures to be followed when reducing the classification, then a reduction is of no effect unless those procedures are followed.
- (6) In this section:

***industrial instrument*** means:

- (a) a modern award; or
- (b) an enterprise agreement; or
- (c) a workplace determination; or
- (d) a WR Act transitional instrument; or
- (e) a transitional APCS.

***transitional APCS*** has the meaning given by Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

***workplace determination*** has the same meaning as in the *Fair Work Act 2009*.

## **24 Terms and conditions of employment**

- (1) An Agency Head may from time to time determine in writing the terms and conditions of employment applying to an APS employee or APS employees in the Agency.

Note 1: Certain terms and conditions of employment are applicable to an APS employee under the Australian Fair Pay and Conditions Standard or the National Employment Standards.

Note 2: Other Commonwealth laws deal with matters such as superannuation, compensation, long service leave and maternity leave.

- (1A) A determination under subsection (1) is of no effect to the extent that it would reduce the benefit to an APS employee of an individual term or condition applicable to the employee under:

- (a) a fair work instrument; or
- (b) a WR Act transitional instrument.

Note: A determination under subsection (1) would also be of no effect to the extent that it would reduce the benefit to an APS employee of a term or condition applicable to the employee under the Australian Fair Pay and Conditions Standard or the National Employment Standards.

- (2) A determination under subsection (1) may apply, adopt or incorporate, with or without modification, any of the provisions of:

- (a) a fair work instrument; or
- (b) a WR Act collective transitional instrument;

as in force from time to time.

Note: A determination under subsection (1) may apply, adopt or incorporate, with or without modification, any of the provisions of the Australian Fair Pay and Conditions Standard or the National Employment Standards. However, any modification of the provisions of those Standards by a determination under subsection (1) would be of no effect to the extent that it would reduce the benefit to an APS employee of a term or condition applicable to the employee under those Standards.

- (3) The Public Service Minister may, by legislative instrument, determine the terms and conditions of employment applying to APS employees, if the Public Service Minister is of the opinion that it is desirable to do so because of exceptional circumstances.

**Part 4** APS employees

**Division 1** APS employees generally

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Note: Neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the determination (see sections 44 and 54 of that Act).

- (4) The limitation in subsection (1A) does not apply in relation to a determination under subsection (3).
- (5) A determination under subsection (3) overrides the following, to the extent of any inconsistency:
  - (a) a determination under subsection (1);
  - (b) the Australian Fair Pay and Conditions Standard;
  - (c) the National Employment Standards.

**25 Assignment of duties**

An Agency Head may from time to time determine the duties of an APS employee in the Agency, and the place or places at which the duties are to be performed.

**26 Voluntary moves between Agencies**

- (1) An Agency Head may enter into an agreement in writing with an APS employee for the employee to move to the Agency Head's Agency from another Agency.
- (2) Subject to Commissioner's Directions issued under subsection 11A(1), the agreement has effect according to its terms, by force of this section.

**27 Compulsory moves between Agencies**

- (1) The Commissioner may, by direction in writing, move an excess APS employee to another Agency, without anyone's consent.
- (2) For the purposes of this section, an APS employee is an *excess APS employee* if, and only if, the Agency Head has notified the Commissioner in writing that the employee is excess to the requirements of the Agency.

## 28 Suspension

The regulations may make provision in relation to the suspension from duties of APS employees, with or without remuneration.

## 29 Termination of employment

- (1) An Agency Head may at any time, by notice in writing, terminate the employment of an APS employee in the Agency.

Note 1: The *Fair Work Act 2009* has rules and entitlements that apply to termination of employment.

Note 2: Commissioner's Directions issued under subsection 11A(1) may set out procedures to be followed in terminating the employment of an APS employee.

- (2) For an ongoing APS employee, the notice must specify the ground or grounds that are relied on for the termination.
- (3) For an ongoing APS employee, the following are the only grounds for termination:
- (a) the employee is excess to the requirements of the Agency;
  - (b) the employee lacks, or has lost, an essential qualification for performing his or her duties;
  - (c) non-performance, or unsatisfactory performance, of duties;
  - (d) inability to perform duties because of physical or mental incapacity;
  - (e) failure to satisfactorily complete an entry-level training course;
  - (f) failure to meet a condition imposed under subsection 22(6);
  - (g) breach of the Code of Conduct;
  - (h) any other ground prescribed by the regulations.
- (4) The regulations may prescribe the grounds for the termination of the employment of non-ongoing APS employees.
- (5) Subsection (4) does not, by implication, limit the grounds for termination of the employment of a non-ongoing APS employee.

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### 30 Retirement

- (1) An APS employee who has reached the minimum retiring age is entitled to retire at any time by notice in writing to the Agency Head.
- (2) The *minimum retiring age* is 55 years, or such higher or lower age as is prescribed by the regulations.

### 31 Forfeiture of additional remuneration

- (1) If an APS employee receives any non-Commonwealth remuneration for performing duties as an APS employee, then the Agency Head may give a notice in writing to the employee in relation to the whole, or a specified part, of the remuneration.
- (2) The amount notified by the Agency Head:
  - (a) is taken to have been received by the employee on behalf of the Commonwealth; and
  - (b) may be recovered by the Commonwealth from the employee as a debt in a court of competent jurisdiction.
- (3) If an Agency Head receives any non-Commonwealth remuneration for performing duties as an Agency Head, then the Agency Minister may give a notice in writing to the Agency Head in relation to the whole, or a specified part, of the remuneration.
- (4) The amount notified by the Agency Minister:
  - (a) is taken to have been received by the Agency Head on behalf of the Commonwealth; and
  - (b) may be recovered by the Commonwealth from the Agency Head as a debt in a court of competent jurisdiction.
- (5) In this section:

*non-Commonwealth remuneration* means any remuneration from a person other than the Commonwealth.

### 32 Right of return for election candidates

- (1) This section applies to a person if:
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- (a) the person resigned as an APS employee in order to contest an election specified in Commissioner's Directions issued under subsection 11A(1); and
  - (b) the resignation took effect not earlier than 6 months before the closing date for nominations; and
  - (c) the person was a candidate in the election but failed to be elected.
- (2) The person is entitled to be again engaged as an APS employee, in accordance with Commissioner's Directions issued under subsection 11A(1) and within the time limits provided by those Directions.

### **33 Review of actions**

- (1) An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment. However, an APS employee is not entitled to review under this section of APS action that consists of the termination of the employee's employment.
- (2) The regulations may prescribe exceptions to the entitlement.
- Note: For example, the regulations might provide that there is not entitlement to review if the application for review is frivolous or vexatious.
- (3) Without limiting subsection (1), regulations made for the purposes of that subsection may provide for the powers available to the Merit Protection Commissioner, or any other person or body, when conducting a review under the regulations.
- (4) Regulations for the purposes of subsection (1):
- (a) may provide for an initial review to be conducted within the responsible Agency; and
  - (b) may provide that applications for review of particular kinds of APS action are to be made directly to the Merit Protection Commissioner; and
  - (c) must provide for an application for review to be referred to the Merit Protection Commissioner if the applicant is not

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- satisfied with the outcome of an initial review within the responsible Agency; and
- (d) in the case of a review following an application or referral to the Merit Protection Commissioner—must provide for the review to be conducted by:
- (i) the Merit Protection Commissioner; or
  - (ii) a person nominated by the Merit Protection Commissioner; or
  - (iii) a 3 member committee constituted in accordance with the regulations.
- (5) A person or body that has conducted a review under this section may make recommendations in a report on the review but does not have power to make any binding decision as a result of the review, except as provided by the regulations.
- (6) If the Merit Protection Commissioner is not satisfied with the response to recommendations contained in a report on a review under this section, the Merit Protection Commissioner may, after consulting the Public Service Minister, give a report on the matter to the Agency Minister of the responsible Agency and to either or both of the following:
- (a) the Prime Minister;
  - (b) the Presiding Officers, for presentation to the Parliament.
- (7) In this section:

**action** includes a refusal or failure to act.

**APS action** means:

- (a) action by a person in the capacity of an Agency Head or APS employee; or
- (b) action by the Commissioner under section 41B (including a finding that an APS employee has breached the Code of Conduct).

**responsible Agency**, in relation to APS action, means the Agency in which the person who did the action was at the time of the action.

## **Division 2—The Senior Executive Service**

### **34 SES employees**

SES employees are those APS employees who are classified as SES employees under the Classification Rules.

### **35 Constitution and role of SES**

- (1) The Senior Executive Service consists of the SES employees.
- (2) The function of the SES is to provide APS-wide strategic leadership of the highest quality that contributes to an effective and cohesive APS.
- (3) For the purpose of carrying out the function of the SES, each SES employee:
  - (a) provides one or more of the following at a high level:
    - (i) professional or specialist expertise;
    - (ii) policy advice;
    - (iii) program or service delivery;
    - (iv) regulatory administration; and
  - (b) promotes cooperation within and between Agencies, including to deliver outcomes across Agency and portfolio boundaries; and
  - (c) by personal example and other appropriate means, promotes the APS Values, the APS Employment Principles and compliance with the Code of Conduct.

### **37 Incentive to retire**

- (1) An Agency Head may give a notice in writing to an SES employee in the Agency, stating that the employee will become entitled to a payment of a specified amount if the employee retires within a period specified in the notice.

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- (1A) A notice may be given to an SES employee under subsection (1) whether or not the employee has reached the minimum retiring age under section 30.
- (2) If the employee retires within the specified period, by notice in writing to the Agency Head:
  - (a) the employee is entitled to be paid the specified amount; and
  - (b) the employee is taken, for all purposes, to have retired involuntarily from the APS.

**38 Commissioner's certificate required for termination of SES employment**

An Agency Head cannot terminate the employment of an SES employee unless the Commissioner has issued a certificate stating that:

- (a) all relevant requirements of Commissioner's Directions made under subsection 11A(1) have been satisfied in respect of the proposed termination; and
- (b) the Commissioner is of the opinion that the termination is in the public interest.

## **Division 3—Heads of Mission**

### **39 Heads of Mission**

- (1) The appointment of a Head of Mission by the Governor-General cannot take effect unless the person is an APS employee.
- (2) An Agency Head must comply with any direction in writing by the Agency Minister:
  - (a) directing the Agency Head to engage a particular person as an APS employee so that the person can become a Head of Mission; or
  - (b) directing the Agency Head to assign particular duties to an APS employee who has been appointed as a Head of Mission.
- (3) The APS Employment Principles do not apply to giving, or carrying out, a direction referred to in subsection (2).

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

### **Division 1—Commissioner's functions etc.**

#### **40 Australian Public Service Commissioner**

- (1) There is to be an Australian Public Service Commissioner.
- (2) The staff necessary to assist the Commissioner must be persons engaged under this Act.
- (3) For the purposes of this Act:
  - (a) the Commissioner and the APS employees assisting the Commissioner together constitute a Statutory Agency; and
  - (b) the Commissioner is the Head of that Statutory Agency.
- (4) The Commissioner may, on behalf of the Commonwealth, engage consultants to assist in the performance of the Commissioner's functions.

#### **41 Commissioner's functions**

- (1) The Commissioner has the following functions:
  - (a) to strengthen the professionalism of the APS and facilitate continuous improvement in workforce management in the APS;
  - (b) to uphold high standards of integrity and conduct in the APS;
  - (c) to monitor, review and report on APS capabilities within and between Agencies to promote high standards of accountability, effectiveness and performance.
- (2) Without limiting subsection (1), the Commissioner's functions include the following:
  - (a) to foster, and contribute to, leadership, high quality learning and development and career management in the APS;

- (b) to lead the thinking about, provide advice on and drive reforms to workforce management policies so that the APS is ready for future demands;
- (c) to develop, review and evaluate APS workforce management policies and practices and maintain appropriate databases;
- (d) to foster an APS workforce that reflects the diversity of the Australian population;
- (e) to promote the APS Values, the APS Employment Principles and the Code of Conduct;
- (f) to evaluate the extent to which Agencies incorporate and uphold the APS Values and the APS Employment Principles;
- (g) to partner with Secretaries in the stewardship of the APS;
- (h) to provide advice and assistance to Agencies on public service matters;
- (i) to work with other governments (including foreign governments) on matters relating to public sector workforce management, leadership and career management;
- (j) to review any matter relating to the APS;
- (k) to review any matter relating to the APS referred to the Commissioner by the Public Service Minister, and report on that matter to the Public Service Minister;
- (l) to evaluate the adequacy of systems and procedures in Agencies for ensuring compliance with the Code of Conduct;
- (m) to inquire, in accordance with section 41A, into alleged breaches of the Code of Conduct by Agency Heads;
- (n) to inquire into and determine, in accordance with section 41B, whether an APS employee, or a former APS employee, has breached the Code of Conduct;
- (o) to inquire, subject to the regulations, into public interest disclosures (within the meaning of the *Public Interest Disclosure Act 2013*), to the extent that the disclosures relate to alleged breaches of the Code of Conduct;
- (p) such other functions as are conferred on the Commissioner by this Act, the regulations or any other law;
- (q) such other functions as the Prime Minister, by legislative instrument, directs the Commissioner to perform;

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- (r) to do anything incidental to or conducive to the performance of any of the Commissioner's functions.

Note: Neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to a direction given under paragraph (2)(q) (see sections 44 and 54 of that Act).

*Reports may include recommendations*

- (3) A report made by the Commissioner in the performance of his or her functions may include recommendations.

*Fees*

- (4) The regulations may authorise the Commissioner to charge fees (on behalf of the Commonwealth) for the performance, on request, of the Commissioner's functions.

**41A Inquiry into alleged breach of Code of Conduct by Agency Head**

- (1) The Commissioner may, for the purposes of paragraph 41(2)(m), inquire into an alleged breach of the Code of Conduct by an Agency Head.
- (2) The Commissioner must report on the results of an inquiry under subsection (1) (including, if relevant, recommendations for sanctions) to:
- (a) if the Agency Head is a Secretary—the Prime Minister; or
  - (b) if the Agency Head is the Head of an Executive Agency—the Agency Minister; or
  - (c) if the Agency Head is the Head of a Statutory Agency that is prescribed by the regulations for the purposes of this paragraph—the Presiding Officers; or
  - (d) if the Agency Head is the Head of a Statutory Agency that is not prescribed by the regulations for the purposes of paragraph (c)—the Agency Minister.
- (3) The regulations may prescribe circumstances in which the Commissioner:
- (a) may decline to conduct an inquiry under subsection (1); or

- (b) may discontinue such an inquiry without making a report under subsection (2).

#### **41B Inquiry into alleged breach of Code of Conduct by APS employee or former APS employee**

##### *Request for inquiry*

- (1) The Commissioner may, for the purposes of paragraph 41(2)(n), inquire into and determine whether an APS employee, or a former APS employee, in an Agency has breached the Code of Conduct if:
  - (a) the Agency Head or the Prime Minister requests the Commissioner to do so; and
  - (b) the Commissioner considers it would be appropriate to do so.
- (2) The Prime Minister may make a request under paragraph (1)(a) in relation to an alleged breach of the Code of Conduct of which the Prime Minister has become aware as a result of, or in the course of, a systems review or a special review.

##### *Procedures for inquiry*

- (3) The Commissioner must establish 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 (including by engaging in conduct referred to in subsection 15(2A)). The procedures:
  - (a) must comply with basic procedural requirements prescribed by the regulations; and
  - (b) must have due regard to procedural fairness.
- (4) In addition, and without affecting subsection (3), the procedures may be different for:
  - (a) different categories of APS employees or former APS employees; or
  - (b) APS employees, or former APS employees, who:
    - (i) have been convicted of an offence against a Commonwealth, State or Territory law in respect of

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conduct that is alleged to constitute a breach of the Code of Conduct; or

- (ii) have been found to have committed such an offence but no conviction is recorded.

- (5) The Commissioner must ensure that the procedures established under subsection (3) are made publicly available.
- (6) Procedures established under subsection (3) are not legislative instruments.

*Commissioner's powers*

- (7) For the purposes of inquiring into and determining whether an APS employee, or a former APS employee, in an Agency has breached the Code of Conduct, the Commissioner may exercise the same powers as the Agency Head may exercise in determining whether an APS employee, or a former APS employee, in the Agency has breached the Code of Conduct.

*Report on results of inquiry*

- (8) The Commissioner must report on the results of an inquiry and determination under this section (including an inquiry that is discontinued) in relation to an APS employee, or a former APS employee, in an Agency to:
  - (a) the Agency Head; and
  - (b) if the Prime Minister requested the inquiry—the Prime Minister.

*Recommendation of sanctions*

- (9) If:
  - (a) the Commissioner finds that an APS employee in an Agency has breached the Code of Conduct; and
  - (b) the Commissioner is requested to recommend sanctions in respect of the breach by:
    - (i) the Agency Head; or
    - (ii) if the Prime Minister requested the inquiry—the Prime Minister;

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the Commissioner may recommend any of the sanctions referred to in subsection 15(1).

Note: A sanction referred to in subsection 15(1) would be imposed on the APS employee by the Agency Head, not by the Commissioner.

*Discontinuation of inquiry*

- (10) The regulations may prescribe circumstances in which the Commissioner may discontinue an inquiry under this section.

**41C Systems reviews**

- (1) The Prime Minister may direct the Commissioner to conduct a review (a *systems review*) of any matter relating to an Agency, including:
- (a) the management and organisational systems, structures or processes in an Agency; and
  - (b) the functional relationships between 2 or more Agencies.
- (2) An Agency Minister may request the Prime Minister to make a direction under subsection (1) that relates to an Agency.
- (3) The Secretary of a Department may request the Prime Minister to make a direction under subsection (1) that relates to the Department or any other Agency in the same portfolio as the Department.
- (4) The Commissioner must give a report on the review to:
- (a) the Prime Minister; and
  - (b) if the review was conducted because of a request by an Agency Minister or a Secretary—the Agency Minister or the Secretary.
- (5) If a direction under subsection (1) is given in writing, the direction is not a legislative instrument.

**41D Special reviews**

- (1) The Prime Minister may direct the Commissioner to conduct a review (a *special review*) of:
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- (a) any matter relating to an Agency; or
  - (b) the functional relationships between 2 or more Agencies.
- (2) The Commissioner must give a report on the review to:
- (a) the Prime Minister; and
  - (b) the Agency Minister of each Agency to which the review relates.
- (3) If a direction under subsection (1) is given in writing, the direction is not a legislative instrument.

**42 Commissioner's Directions**

- (1) Commissioner's Directions cannot create offences or impose penalties.
- (2) Agency Heads and APS employees must comply with Commissioner's Directions.
- (3) Commissioner's Directions may apply, adopt or incorporate (with or without modifications) any matter contained in the Classification Rules or a direction issued by the Prime Minister under section 21, either:
  - (a) as in force or existing at a particular time; or
  - (b) as in force or existing from time to time.
- (4) Commissioner's Directions are legislative instruments.

**43 Commissioner's inquiry powers**

- (1) Each of the following is a *special inquiry* for the purpose of this section:
    - (a) an inquiry that is conducted by the Commissioner for the purpose of paragraph 41(2)(c), (f) or (l) and is notified by the Commissioner in the *Gazette*;
    - (b) an inquiry that is conducted by the Commissioner for the purpose of paragraph 41(2)(m) or (o);
    - (c) an inquiry on a matter referred to the Commissioner under paragraph 41(2)(k) by the Public Service Minister, by notice in the *Gazette*;
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- (d) an inquiry that is conducted by the Commissioner for the purposes of a special review.
- (2) The following provisions apply in relation to a special inquiry (with references to the Auditor-General being replaced by references to the Commissioner):
  - (a) sections 32, 33 and 35 of the *Auditor-General Act 1997*;
  - (b) any other provisions of the *Auditor-General Act 1997*, or of regulations under that Act, that are relevant to the operation of section 32, 33 or 35 of that Act.

#### **44 Annual report**

- (1) After the end of each financial year, the Commissioner must give a report to the Agency Minister, for presentation to the Parliament, on the activities of the Commissioner's Agency during the year.
- (2) The report must include a report on the state of the APS during the year.
- (3) An Agency Head must give the Commissioner whatever information the Commissioner requires for the purpose of preparing the report referred to in subsection (2).
- (4) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

## **Division 2—Commissioner's appointment, conditions etc.**

### **45 Appointment of Commissioner**

The Commissioner is to be appointed by the Governor-General on a full-time basis for a period of up to 5 years specified in the instrument of appointment.

### **46 Remuneration and other terms and conditions of appointment**

#### *Remuneration and allowances*

- (1) The Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Commissioner is to be paid the remuneration that is prescribed by the regulations.
- (2) The Commissioner is to be paid the allowances that are prescribed by the regulations.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

#### *Leave of absence*

- (4) The Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (5) The Agency Minister may grant the Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Agency Minister determines.

#### *Other terms and conditions*

- (6) The Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Agency Minister.

#### **47 Removal from office**

- (1) The Governor-General may remove the Commissioner from office if each House of the Parliament, in the same session of the Parliament, presents an address to the Governor-General praying for the removal of the Commissioner on the ground of misbehaviour or physical or mental incapacity.
- (2) The Governor-General must remove the Commissioner from office if the Commissioner does any of the following:
  - (a) becomes bankrupt;
  - (b) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
  - (c) compounds with his or her creditors;
  - (d) assigns his or her remuneration for the benefit of his or her creditors.

#### **48 Acting Commissioner**

The Agency Minister may appoint a person to act as Commissioner:

- (a) if there is a vacancy in the office of Commissioner, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Commissioner is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

## Division 3—Special Commissioners

### 48A Appointment of Special Commissioners

- (1) The Governor-General may, by written instrument, on the recommendation of the Prime Minister, appoint one or more Special Commissioners to assist the Commissioner in conducting a specified systems review or special review, or a part of such a review.
- (2) The Prime Minister must not recommend that a person be appointed as a Special Commissioner unless the Prime Minister has consulted the Commissioner about the appointment.
- (3) A Special Commissioner may be appointed on a full-time basis or a part-time basis.
- (4) A Special Commissioner holds office for the period specified in the instrument of appointment.

### 48B Remuneration and other terms and conditions of appointment

#### *Remuneration and allowances*

- (1) A Special Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, a Special Commissioner is to be paid the remuneration that is prescribed by the regulations.
- (2) A Special Commissioner is to be paid the allowances that are prescribed by the regulations.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

#### *Leave of absence*

- (4) A full-time Special Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.

- (5) The Prime Minister may grant a full-time Special Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Prime Minister determines.
- (6) The Prime Minister may grant leave of absence to a part-time Special Commissioner on the terms and conditions that the Prime Minister determines.

*Other terms and conditions*

- (7) A Special Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Prime Minister.

**48C Termination of appointment**

- (1) The Governor-General may, by notice in writing, on the recommendation of the Prime Minister, terminate the appointment of a Special Commissioner at any time.
- (2) The Prime Minister must not recommend that the appointment of a Special Commissioner be terminated unless the Prime Minister has consulted the Commissioner about the termination.

## **Part 6—The Merit Protection Commissioner**

### **Division 1—Merit Protection Commissioner's functions etc.**

#### **49 Merit Protection Commissioner**

- (1) There is to be a Merit Protection Commissioner.
- (2) The staff necessary to assist the Merit Protection Commissioner must be persons engaged under this Act and made available by the Australian Public Service Commissioner.
- (3) The Merit Protection Commissioner may, on behalf of the Commonwealth, engage consultants to assist in the performance of the Merit Protection Commissioner's functions.

#### **50 Merit Protection Commissioner's functions**

- (1) The Merit Protection Commissioner's functions include the following functions:
  - (a) to inquire, subject to the regulations, into public interest disclosures (within the meaning of the *Public Interest Disclosure Act 2013*), to the extent that the disclosures relate to alleged breaches of the Code of Conduct;
  - (b) to inquire into alleged breaches of the Code of Conduct by the Commissioner and report to the Presiding Officers on the results of such enquiries (including, where relevant, recommendations for sanctions);
  - (c) to inquire into an APS action, at the request of the Public Service Minister, and to report to the Public Service Minister on the results of the inquiry;
  - (ca) to inquire into and determine, in accordance with section 50A, whether an APS employee, or a former APS employee, has breached the Code of Conduct;
  - (d) such functions as are prescribed by regulations made for the purposes of section 33;

- (e) such other functions as are prescribed by the regulations.
- (2) The following provisions apply in relation to an inquiry under paragraph (1)(a) or (c) (with references to the Auditor-General being replaced by references to the Merit Protection Commissioner):
- (a) sections 32, 33 and 35 of the *Auditor-General Act 1997*;
  - (b) any other provisions of the *Auditor-General Act 1997*, or of regulations under that Act, that are relevant to the operation of section 32, 33 or 35 of that Act.
- (3) The regulations may authorise the Merit Protection Commissioner to charge fees (on behalf of the Commonwealth) for the performance of functions prescribed under paragraph (1)(e).
- (4) In this section:

**action** includes a refusal or failure to act.

**APS action** means an action in relation to the employment of an APS employee, being an action by another APS employee or by an Agency Head.

#### **50A Inquiry into alleged breach of Code of Conduct by APS employee or former APS employee**

##### *Request for inquiry*

- (1) The Merit Protection Commissioner may, for the purposes of paragraph 50(1)(ca), inquire into and determine whether an APS employee, or a former APS employee, has breached the Code of Conduct if:
- (a) the Agency Head requests the Merit Protection Commissioner to do so; and
  - (b) the Merit Protection Commissioner considers it would be appropriate to do so; and
  - (c) the APS employee, or former APS employee, agrees, in writing, to the Merit Protection Commissioner doing so.

**Part 6** The Merit Protection Commissioner

**Division 1** Merit Protection Commissioner's functions etc.

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Note: A finding by the Merit Protection Commissioner under this section is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

*Procedures for inquiry*

- (2) The Merit Protection Commissioner must establish written procedures for inquiring into and determining whether an APS employee, or a former APS employee, has breached the Code of Conduct (including by engaging in conduct referred to in subsection 15(2A)). The procedures:
- (a) must comply with basic procedural requirements prescribed by the regulations; and
  - (b) must have due regard to procedural fairness.

Note: The procedures may make different provision for different classes of APS employees or former APS employees (see subsection 33(3A) of the *Acts Interpretation Act 1901*).

- (3) In addition, and without affecting subsection (2), the procedures may be different for:
- (a) different categories of APS employees or former APS employees; or
  - (b) APS employees, or former APS employees, who:
    - (i) have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct; or
    - (ii) have been found to have committed such an offence but no conviction is recorded.
- (4) The Merit Protection Commissioner must ensure that the procedures established under subsection (2) are made publicly available.
- (5) Procedures established under subsection (2) are not legislative instruments.

*Merit Protection Commissioner's powers*

- (6) For the purposes of inquiring into and determining whether an APS employee, or a former APS employee, in an Agency has breached
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the Code of Conduct, the Merit Protection Commissioner may exercise the same powers as the Agency Head may exercise in determining whether an APS employee, or a former APS employee, in the Agency has breached the Code of Conduct.

*Report on results of inquiry*

- (7) The Merit Protection Commissioner must report on the results of an inquiry and determination under this section to the Agency Head who requested the inquiry.

Note: If the Merit Protection Commissioner finds that an APS employee in an Agency has breached the Code of Conduct, the Agency Head may impose a sanction on the APS employee under subsection 15(1).

## **51 Annual report**

- (1) After the end of each financial year, the Merit Protection Commissioner must give a report to the Public Service Minister, for presentation to the Parliament, on the activities of the Merit Protection Commissioner during the year.
- (2) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.
- (3) The report must be included in the Australian Public Service Commissioner's report under subsection 44(1).

## **Division 2—Merit Protection Commissioner's appointment, conditions etc.**

### **52 Appointment of Merit Protection Commissioner**

The Merit Protection Commissioner is to be appointed by the Governor-General on a full-time basis for a period of up to 5 years specified in the instrument of appointment.

### **53 Remuneration and other terms and conditions of appointment**

#### *Remuneration and allowances*

- (1) The Merit Protection Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Merit Protection Commissioner is to be paid the remuneration that is prescribed by the regulations.
- (2) The Merit Protection Commissioner is to be paid the allowances that are prescribed by the regulations.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

#### *Leave of absence*

- (4) The Merit Protection Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (5) The Public Service Minister may grant the Merit Protection Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Public Service Minister determines.

#### *Other terms and conditions*

- (6) The Merit Protection Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Public Service Minister.

#### **54 Removal from office**

- (1) The Governor-General may remove the Merit Protection Commissioner from office if each House of the Parliament, in the same session of the Parliament, presents an address to the Governor-General praying for the removal of the Merit Protection Commissioner on the ground of misbehaviour or physical or mental incapacity.
- (2) The Governor-General must remove the Merit Protection Commissioner from office if the Merit Protection Commissioner does any of the following:
  - (a) becomes bankrupt;
  - (b) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
  - (c) compounds with his or her creditors;
  - (d) assigns his or her remuneration for the benefit of his or her creditors.

#### **55 Acting Merit Protection Commissioner**

The Public Service Minister may appoint a person to act as Merit Protection Commissioner:

- (a) if there is a vacancy in the office of Merit Protection Commissioner, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Merit Protection Commissioner is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

## Part 7—Secretaries of Departments

### 56 Creation of offices of Secretary

- (1) On the establishment of a Department, an office of Secretary of that Department is established by force of this subsection.
- (2) On the abolition of a Department, the office of Secretary of that Department is abolished by force of this subsection.
- (3) The Prime Minister may allocate a name to any office of Secretary, and may change the name from time to time.
- (4) Subject to subsection (3), the name of the office of Secretary of a Department is “Secretary of the [*name of Department*]”.

### 57 Roles and responsibilities of Secretaries

#### *Roles of Secretaries*

- (1) The roles of the Secretary of a Department include, but are not limited to, the following:
  - (a) principal official policy adviser to the Agency Minister;
  - (b) manager, ensuring delivery of government programs and collaboration to achieve outcomes within the Agency Minister’s portfolio and, with other Secretaries, across the whole of Government;
  - (c) leader, providing stewardship within the Department and, in partnership with the Secretaries Board, across the APS;
  - (d) any other role prescribed by the regulations.

#### *Responsibilities of Secretaries*

- (2) The responsibilities of the Secretary of a Department are as follows:
  - (a) to manage the affairs of the Department efficiently, effectively, economically and ethically;

- (b) to advise the Agency Minister about matters relating to the Department;
  - (c) to implement measures directed at ensuring that the Department complies with the law;
  - (d) to provide leadership, strategic direction and a focus on results for the Department;
  - (e) to maintain clear lines of communication within the Agency Minister's portfolio, as negotiated between the Secretary and the other Agency Heads in the portfolio;
  - (f) to engage with stakeholders, particularly in relation to the core activities of the Department;
  - (g) to manage the affairs of the Department in a way that is not inconsistent with the policies of the Commonwealth and the interests of the APS as a whole;
  - (h) to ensure that the Agency Minister's portfolio has a strong strategic policy capability that can consider complex, whole-of-government issues;
  - (i) to assist the Agency Minister to fulfil the Agency Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department;
  - (j) such other responsibilities as are prescribed by the regulations.
- (3) Subsection (2) does not affect a Secretary's responsibilities under any other law.

Note: See, for example, the *Public Governance, Performance and Accountability Act 2013*.

## **58 Appointment**

- (1) The Secretary of a Department is to be appointed by the Governor-General, by written instrument, on the recommendation of the Prime Minister.

Note: The Secretary of a Department is eligible for reappointment as the Secretary of that Department (see section 33AA of the *Acts Interpretation Act 1901*).

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- (2) The Secretary of a Department holds office for the period specified in the instrument of appointment.
- (3) The period of a person's appointment as the Secretary of a Department must be:
  - (a) 5 years; or
  - (b) if the person has requested a shorter period—that shorter period.
- (4) Subsection (3) does not apply in relation to a person who is reappointed as the Secretary of a Department. In this case, the person's appointment may be for any period not exceeding 5 years.
- (5) The Secretary of a Department holds office on a full-time basis.
- (6) Before recommending to the Governor-General that a person be appointed as the Secretary of the Prime Minister's Department, the Prime Minister must have received a report about the appointment prepared by the Commissioner.
- (7) Before recommending to the Governor-General that a person be appointed as the Secretary of a Department other than the Prime Minister's Department, the Prime Minister must have received a report about the appointment from the Secretary of the Prime Minister's Department.
- (8) The report from the Secretary of the Prime Minister's Department about the appointment of the Secretary of another Department must:
  - (a) be prepared after consultation with:
    - (i) the Commissioner; and
    - (ii) the person who is expected to be the Agency Minister of the other Department at the time the appointment is made; and
  - (b) if the Secretary of the Prime Minister's Department and the Commissioner disagree in relation to the proposed appointment—explain the substance of the disagreement.

**59 Termination of appointment**

- (1) The Governor-General may, on the recommendation of the Prime Minister and by notice in writing, terminate the appointment of a Secretary.

Note: In *Barratt v Howard* [1999] FCA 1132, the Federal Court of Australia described the basis on which requirements of procedural fairness applied to the termination of an appointment of Secretary under section 37 of the *Public Service Act 1922*.

- (2) Before recommending to the Governor-General that the appointment of the Secretary of the Prime Minister's Department be terminated, the Prime Minister must have received a report about the proposed termination from the Commissioner.
- (3) Before recommending to the Governor-General that the appointment of the Secretary of a Department other than the Prime Minister's Department be terminated, the Prime Minister must have received a report about the proposed termination from the Secretary of the Prime Minister's Department.
- (4) The report from the Secretary of the Prime Minister's Department about the proposed termination of the appointment of the Secretary of another Department must:
  - (a) be prepared after consultation with the Commissioner; and
  - (b) if the Secretary of the Prime Minister's Department and the Commissioner disagree in relation to the proposed termination—explain the substance of the disagreement.

**60 Engagement of former Secretaries**

At any time after the appointment of a Secretary is terminated under section 56 or 59, the Prime Minister, on behalf of the Commonwealth, may engage the former Secretary to perform specified duties (otherwise than as an APS employee), on terms and conditions determined by the Prime Minister.

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**61 Remuneration and other terms and conditions of appointment**

*Remuneration and allowances*

- (1) The remuneration of a Secretary is as provided by Division 4 of Part II of the *Remuneration Tribunal Act 1973*.

*Other terms and conditions*

- (2) The other terms and conditions applying to the appointment of a Secretary are as determined by the Remuneration Tribunal under Division 4 of Part II of the *Remuneration Tribunal Act 1973*.

**61A Annual performance review**

An annual review of the performance of a Secretary must be carried out in accordance with a framework established by the Secretary of the Prime Minister's Department and the Commissioner.

**62 Acting Secretary**

The Prime Minister may appoint a person to act as the Secretary of a Department:

- (a) if there is a vacancy in the office of Secretary, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Secretary is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

**63 Annual report**

- (1) After the end of each financial year, the Secretary of a Department must give a report to the Agency Minister, for presentation to the Parliament, on the Department's activities during the year.

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- (2) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

## Part 8—Secretaries Board

### 64 Secretaries Board

- (1) The Secretaries Board is established by this section.
- (2) The Secretaries Board consists of the following members:
  - (a) the Secretary of the Prime Minister's Department, as Chair;
  - (b) the Secretary of each other Department;
  - (c) the Commissioner;
  - (d) such other persons as are nominated in writing by the Secretary of the Prime Minister's Department.
- (3) The Secretaries Board has the following functions:
  - (a) to take responsibility for the stewardship of the APS and for developing and implementing strategies to improve the APS;
  - (b) to identify strategic priorities for the APS and consider issues that affect the APS;
  - (c) to set an annual work program, and direct subcommittees to develop strategies to address APS-wide issues and make recommendations to the Secretaries Board;
  - (d) to draw together advice from senior leaders in government, business and the community;
  - (e) to work collaboratively and model leadership behaviours.
- (4) The Secretaries Board may establish one or more senior leadership groups, consisting of members determined by the Secretaries Board, to assist the Secretaries Board in performing its functions.

## **Part 9—Executive Agencies**

### **65 Establishment etc. of Executive Agencies**

- (1) The Governor-General may do any of the following, by order in the *Gazette*:
  - (a) establish or abolish an Executive Agency;
  - (b) allocate a name to an Executive Agency or the Head of an Executive Agency;
  - (c) identify the Minister who is responsible for an Executive Agency;
  - (d) specify the functions of an Executive Agency.
- (2) For the purposes of this Act, an Executive Agency consists of the Head of the Agency, together with the APS employees assisting the Head.
- (3) When an Executive Agency is established, an office of Head of the Agency is established by force of this subsection. The name of the office is “Head of the [*name of Agency*]”, unless the office of Head has a different name because of an order under subsection (1).
- (4) When an Executive Agency is abolished, the office of Head of the Agency is abolished by force of this subsection.

### **66 Responsibilities of Heads of Executive Agencies**

- (1) The Head of an Executive Agency, under the Agency Minister, is responsible for managing the Agency.
- (2) The Head of an Executive Agency must assist the Agency Minister to fulfil the Agency Minister’s accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Agency.

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- (3) The Head of an Executive Agency is accountable to the government, the Parliament and the public in the same way as the Secretary of a Department.

**67 Appointment etc. of Head**

- (1) The Agency Minister of an Executive Agency may appoint a person to be the Head of the Agency for a period of up to 5 years specified in the instrument of appointment.
- (2) Before making the appointment, the Agency Minister must have received a report about the vacancy from a relevant Secretary.
- (3) The Agency Minister may, by notice in writing, terminate the appointment at any time.
- (4) Before terminating the appointment, the Agency Minister must have received a report about the proposed termination from a relevant Secretary.
- (5) In this section:

*relevant Secretary* means the Secretary of any Department that is administered by the same Minister who is the Agency Minister of the Executive Agency.

**68 Remuneration and other terms and conditions of appointment**

*Remuneration and allowances*

- (1) The Head of an Executive Agency is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Head of the Executive Agency is to be paid the remuneration that is prescribed by the regulations.
- (2) The Head of an Executive Agency is to be paid the allowances that are prescribed by the regulations.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

*Leave of absence*

- (4) The Head of an Executive Agency has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (5) The Agency Minister may grant the Head of an Executive Agency leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Agency Minister determines.

*Other terms and conditions*

- (6) The Head of an Executive Agency holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Agency Minister.

**69 Acting Head**

The Agency Minister of an Executive Agency may appoint a person to act as Head of the Agency:

- (a) if there is a vacancy in the office of Head, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Head is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

**70 Annual report**

- (1) After the end of each financial year, the Head of an Executive Agency must give a report to the Agency Minister, for presentation to the Parliament, on the Agency's activities during the year.
- (2) The report must be prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

## **Part 10—Administrative arrangements and re-organisations**

### **71 Arrangements with States and Territories**

- (1) The Prime Minister may arrange with an appropriate authority of a State:
  - (a) for an APS employee to perform services for the State as an APS employee; or
  - (b) for a State employee to perform services in an Agency as a State employee.
- (2) In this section:

*State* means a State or Territory or an authority of a State or Territory.

### **72 Machinery of government changes**

- (1) The Commissioner may do any of the following, if the Commissioner is satisfied that it is necessary or desirable in order to give effect to an administrative re-arrangement:
  - (a) move APS employees to another Agency (without anyone's consent), by a determination in writing;
  - (b) determine in writing that APS employees cease to be APS employees and become non-APS employees of a specified Commonwealth body or Commonwealth authority;
  - (c) determine in writing that non-APS employees cease to be employed as non-APS employees and become engaged as APS employees in a specified Agency;
  - (d) on behalf of the Commonwealth, engage any person as an APS employee in a specified Agency.
- (2) A determination by the Commissioner has effect according to its terms, by force of this section.

- (3) If an APS employee (the *transferred employee*) becomes a non-APS employee of a Commonwealth body or Commonwealth authority under paragraph (1)(b), the employee is entitled to remuneration and other conditions of employment that are not less favourable than the terms and conditions to which the employee was entitled as an APS employee, immediately before ceasing to be an APS employee, under:
- (a) a fair work instrument; or
  - (b) a WR Act transitional instrument; or
  - (c) a determination under this Act; or
  - (d) a written contract of employment.
- (4) Subsection (3) ceases to have effect on the next occasion when there is a relevant change in the terms and conditions of employment applicable to the transferred employee or a class of employees that includes the transferred employee. For this purpose, *relevant change* means a change that results from:
- (a) the making, variation or termination of a modern award, an enterprise agreement, a workplace determination or a written contract of employment; or
  - (b) the variation, termination or replacement of a WR Act transitional instrument.
- (5) The regulations may prescribe arrangements for determining any variation of the terms and conditions of employment applicable to:
- (a) APS employees who are moved to another Agency under paragraph (1)(a); and
  - (b) persons who become APS employees under paragraph (1)(c).
- (5A) If:
- (a) an APS employee is moved from an Agency (the *former Agency*) to another Agency (the *new Agency*) under paragraph (1)(a); and
  - (b) prescribed circumstances existed in relation to the employee's employment in the former Agency before the employee moved to the new Agency;
- the Commissioner may determine the measures (if any) that are to be taken in relation to those circumstances after the employee has moved to the new Agency.
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(6) In this section:

***administrative re-arrangement*** means any increase, reduction or re-organisation in Commonwealth functions, including one that results from an order by the Governor-General.

***Commonwealth authority*** includes a company in which the Commonwealth has a controlling interest.

***non-APS employee*** means a person who is employed by the Commonwealth or by a Commonwealth authority, but does not include an APS employee.

***workplace determination*** has the same meaning as in the *Fair Work Act 2009*.

## **Part 10A—Protection of information**

### **72A Protection of information—Commissioner’s functions etc.**

#### *Definitions*

- (1) In this section:

***entrusted person*** means any of the following:

- (a) the Commissioner;
- (b) a delegate of the Commissioner;
- (c) a person acting under the direction or authority of the Commissioner;
- (d) a Special Commissioner;
- (e) a member of staff assisting the Commissioner or a Special Commissioner.

***protected information*** means information that was obtained by an entrusted person in connection with the performance of functions or duties, or the exercise of powers, under:

- (a) paragraph 41(2)(j), (k), (m), (n) or (o); or
- (b) section 41A, 41B, 41C, 41D or 43; or
- (c) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

#### *Prohibition on disclosure or other use of protected information*

- (2) Except as authorised by this section or the regulations, a person who is, or was, an entrusted person must not, directly or indirectly, make a record of, disclose or otherwise use protected information.

Note: Section 70 of the *Crimes Act 1914* creates offences in relation to the disclosure of information by Commonwealth officers.

#### *Authorised disclosure or other use of protected information*

- (3) An entrusted person may make a record of, disclose or otherwise use protected information for the purposes of, or in connection

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with, the performance of functions or duties, or the exercise of powers, under this Act or the regulations.

*Authorised disclosure of protected information by the Commissioner*

- (4) The Commissioner may disclose protected information in a report prepared for purposes connected with the performance of the functions, or the exercise of the powers, of the Commissioner under this Act or the regulations, if the Commissioner is satisfied that the disclosure is necessary for the purpose of setting out the grounds for the conclusions and recommendations contained in the report.
- (5) Subject to subsection (6), the Commissioner may disclose protected information to a person, or to the public or a section of the public, if the Commissioner is satisfied that:
  - (a) the disclosure:
    - (i) is in the interests of an Agency or a person; or
    - (ii) is in the public interest; and
  - (b) the disclosure is not likely to interfere with a review or inquiry under this Act or the regulations.
- (6) The Commissioner must not disclose the name of an individual, or any other material that would enable an individual to be identified, in protected information that is disclosed under subsection (5), unless the Commissioner is satisfied that the disclosure is fair and reasonable in all the circumstances.

*Compellability of entrusted persons to give evidence*

- (7) A person who is, or was, an entrusted person is not compellable in any proceeding:
  - (a) before a court (whether exercising federal jurisdiction or not); or
  - (b) before a person authorised by a law of the Commonwealth or a State or Territory, or by consent of the parties, to hear, receive and examine evidence;

to disclose protected information that was obtained in connection with the performance of functions or duties, or the exercise of powers, under:

- (c) paragraph 41(2)(j), (k), (m) or (o); or
- (d) section 41A, 41C, 41D or 43; or
- (e) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

## **72B Protection of information—Merit Protection Commissioner’s functions etc.**

### *Definitions*

- (1) In this section:

***entrusted person*** means any of the following:

- (a) the Merit Protection Commissioner;
- (b) a delegate of the Merit Protection Commissioner;
- (c) a person acting under the direction or authority of the Merit Protection Commissioner;
- (d) a member of staff assisting the Merit Protection Commissioner;
- (e) a member of a committee established or appointed by the Merit Protection Commissioner under the regulations;
- (f) any other person prescribed by the regulations for the purposes of this paragraph.

***prescribed entrusted person*** means an entrusted person of a kind prescribed by regulations for the purposes of this definition.

***protected information*** means information that was obtained by an entrusted person in connection with the performance of functions or duties, or the exercise of powers, under:

- (a) subsection 50(1) or (2); or
- (b) section 50A; or
- (c) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

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*Prohibition on disclosure or other use of protected information*

- (2) Except as authorised by this section or the regulations, a person who is, or was, an entrusted person must not, directly or indirectly, make a record of, disclose or otherwise use protected information.

Note: Section 70 of the *Crimes Act 1914* creates offences in relation to the disclosure of information by Commonwealth officers.

*Authorised disclosure or other use of protected information*

- (3) An entrusted person may make a record of, disclose or otherwise use protected information for the purposes of, or in connection with, the performance of functions or duties, or the exercise of powers, under this Act or the regulations.

*Authorised disclosure of protected information by the Merit Protection Commissioner*

- (4) The Merit Protection Commissioner may disclose protected information in a report prepared for purposes connected with the performance of the functions, or the exercise of the powers, of the Merit Protection Commissioner under this Act or the regulations, if the Merit Protection Commissioner is satisfied that the disclosure is necessary for the purpose of setting out the grounds for the conclusions and recommendations contained in the report.
- (5) Subject to subsection (6), the Merit Protection Commissioner may disclose protected information to a person, or to the public or a section of the public, if the Merit Protection Commissioner is satisfied that:
- (a) the disclosure:
    - (i) is in the interests of an Agency or a person; or
    - (ii) is in the public interest; and
  - (b) the disclosure is not likely to interfere with a review or inquiry under this Act or the regulations.
- (6) The Merit Protection Commissioner must not disclose the name of an individual, or any other material that would enable an individual to be identified, in protected information that is disclosed under subsection (5), unless the Merit Protection Commissioner is

satisfied that the disclosure is fair and reasonable in all the circumstances.

*Compellability of entrusted persons to give evidence*

- (7) A person who is, or was, an entrusted person (other than a prescribed entrusted person) is not compellable in any proceeding:
- (a) before a court (whether exercising federal jurisdiction or not); or
  - (b) before a person authorised by a law of the Commonwealth or a State or Territory, or by consent of the parties, to hear, receive and examine evidence;
- to disclose protected information that was obtained in connection with the performance of functions or duties, or the exercise of powers, under:
- (c) paragraph 50(1)(a), (b), (c), (d) or (e); or
  - (d) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

Note: **Prescribed entrusted person** is defined in subsection (1) of this section.

*Competence of certain entrusted persons to give evidence*

- (8) A person who is, or was, a prescribed entrusted person is not competent, and cannot be compelled, to disclose protected information in any proceeding:
- (a) before a court (whether exercising federal jurisdiction or not); or
  - (b) before a person authorised by a law of the Commonwealth or a State or Territory, or by consent of the parties, to hear, receive and examine evidence.

Note: **Prescribed entrusted person** is defined in subsection (1) of this section.

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**72C Giving information or producing documents to Commissioner not admissible in evidence etc.**

*Application*

- (1) This section applies if:
  - (a) either:
    - (i) the Commissioner requests a person to give information (including an answer to a question) or produce a document to the Commissioner for purposes connected with the performance of functions or duties, or the exercise of powers, under a provision referred to in subsection (2); or
    - (ii) a person reasonably believes that information or a document is relevant for purposes connected with the performance of functions or duties, or the exercise of powers, under a provision referred to in subsection (2); and
  - (b) the person obtained the information or document lawfully; and
  - (c) the person gives the information or produces the document to the Commissioner.
- (2) For the purposes of subparagraphs (1)(a)(i) and (ii), the provisions are:
  - (a) paragraphs 41(2)(j), (k), (m), (n) and (o); and
  - (b) sections 41A, 41B, 41C, 41D and 43; and
  - (c) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

*Giving information or producing document not admissible in evidence in certain proceedings*

- (3) If, by giving the information or producing the document to the Commissioner, the person:
    - (a) contravenes any other law; or
    - (b) might tend to incriminate the person or make the person liable to a penalty; or
    - (c) discloses legal advice given to a Minister or an Agency; or
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(d) discloses a communication between a person performing functions or duties, or exercising powers, in an Agency and another person or body, being a communication protected against disclosure by legal professional privilege; or

(e) otherwise acts contrary to the public interest;

the giving of the information or the production of the document is not admissible in evidence against the person in proceedings (other than proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Act).

*Person not liable to penalty*

- (4) The person is not liable to any penalty under the provisions of any other law by reason of his or her giving the information or producing the document to the Commissioner.

*Disclosure of personal information is authorised for purposes of Privacy Act*

- (5) To the extent that the giving of the information or the production of the document to the Commissioner involves a disclosure of personal information, the disclosure is taken to be authorised by this Act for the purposes of the *Privacy Act 1988*.

*Legal professional privilege not affected*

- (6) Subsection (3) does not otherwise affect a claim of legal professional privilege that anyone may make in relation to the information or document.

**72D Giving information or producing documents to Merit Protection Commissioner not admissible in evidence etc.**

*Application*

- (1) This section applies if:
- (a) either:
- (i) the Merit Protection Commissioner requests a person to give information (including an answer to a question) or produce a document to the Merit Protection

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Commissioner for purposes connected with the performance of functions or duties, or the exercise of powers, under a provision referred to in subsection (2); or

- (ii) a person reasonably believes that information or a document is relevant for purposes connected with the performance of functions or duties, or the exercise of powers, under a provision referred to in subsection (2); and
  - (b) the person obtained the information or document lawfully; and
  - (c) the person gives the information or produces the document to the Merit Protection Commissioner.
- (2) For the purposes of subparagraphs (1)(a)(i) and (ii), the provisions are:
- (a) sections 50 and 50A; and
  - (b) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

*Giving information or producing document not admissible in evidence in certain proceedings*

- (3) If, by giving the information or producing the document to the Merit Protection Commissioner, the person:
- (a) contravenes any other law; or
  - (b) might tend to incriminate the person or make the person liable to a penalty; or
  - (c) discloses legal advice given to a Minister or an Agency; or
  - (d) discloses a communication between a person performing functions or duties, or exercising powers, in an Agency and another person or body, being a communication protected against disclosure by legal professional privilege; or
  - (e) otherwise acts contrary to the public interest;
- the giving of the information or the production of the document is not admissible in evidence against the person in proceedings (other than proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Act).

*Person not liable to penalty*

- (4) The person is not liable to any penalty under the provisions of any other law by reason of his or her giving the information or producing the document to the Merit Protection Commissioner.

*Disclosure of personal information is authorised for purposes of Privacy Act*

- (5) To the extent that the giving of the information or the production of the document to the Merit Protection Commissioner involves a disclosure of personal information, the disclosure is taken to be authorised by this Act for the purposes of the *Privacy Act 1988*.

*Legal professional privilege not affected*

- (6) Subsection (3) does not otherwise affect a claim of legal professional privilege that anyone may make in relation to the information or document.

**72E Release of personal information**

The regulations:

- (a) may authorise the use or disclosure, in specific circumstances, of personal information (within the meaning of the *Privacy Act 1988*); and
- (b) may impose restrictions on the collection, storage, access, further use or further disclosure of personal information used or disclosed under regulations made for the purposes of paragraph (a).

Note: The *Freedom of Information Act 1982* and the *Privacy Act 1988* have rules about the use and disclosure of personal information.

## Part 11—Miscellaneous

### 73 Payments in special circumstances

- (1) The Public Service Minister may authorise the making of payments to a person under subsection (2) if the Public Service Minister considers it appropriate to do so because of special circumstances that relate to, or arise out of:
  - (a) the payee's employment by the Commonwealth; or
  - (b) another person's employment by the Commonwealth.
- (2) The Public Service Minister may authorise the making of any of the following payments:
  - (a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);
  - (b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).
- (3) Payments may be authorised under this section even though the payments would not otherwise be authorised by law or required to meet a legal liability.
- (4) An authorisation cannot be made under this section if it would involve, or be likely to involve, a total amount exceeding the amount prescribed by the regulations.
- (5) Conditions may be attached to payments under this section. If a condition is breached, the payment may be recovered by the Commonwealth as a debt in a court of competent jurisdiction.

Note: Payments under this section must be made from money appropriated by the Parliament. Generally, a payment can be debited against an Agency's annual appropriation, providing that it relates to some matter that has arisen in the course of its administration.

**74 Locally engaged employees**

- (1) An Agency Head, on behalf of the Commonwealth, may engage persons overseas to perform duties overseas as employees.
- (2) Subject to this Act, an Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of locally engaged employees in the Agency.
- (3) An Agency Head is not subject to direction by any Minister in relation to the exercise of powers by the Agency Head under this section in relation to particular individuals.
- (4) This section does not, by implication, limit any other power of an Agency Head to engage persons to work overseas.

**75 Attachment of salaries to satisfy judgment debts**

- (1) The regulations:
  - (a) may provide for deductions to be made from the salary of a Secretary, the Head of an Executive Agency or an APS employee in order to satisfy a judgment debt; and
  - (b) may prescribe fees payable in connection with such deductions.
- (2) In this section:

*judgment debt* includes interest on a judgment debt.

**77 Positions**

- (1) An Agency Head may, in writing, create positions in the Agency.
- (2) An Agency Head may from time to time nominate any APS employee in the Agency to occupy a position in the Agency, but does not have to do so for all APS employees in the Agency.
- (3) A provision of any Act that applies to APS employees who are nominated under this section to occupy a position applies in the same way to APS employees who are not nominated under this section to occupy a position.

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**78 Delegations**

- (1) The Prime Minister may, in writing, delegate to another Minister any of the Prime Minister's powers or functions under this Act (other than this section).
- (2) The Public Service Minister may, in writing, delegate to another Minister any of the Public Service Minister's powers or functions under this Act (other than this section or section 24).
- (3) The Public Service Minister may, in writing, delegate to a senior official any of the Public Service Minister's powers or functions under section 73.
- (4) An Agency Minister may, in writing, delegate to a senior official any of the Agency Minister's powers or functions under this Act (other than this section).
- (5) The Commissioner may, in writing, delegate to a senior official any of the Commissioner's powers or functions under this Act (other than this section).
- (5A) The Commissioner may, in writing, delegate to a former senior official any of the Commissioner's powers or functions under section 38 or paragraph 41(2)(m), (n) or (o).
- (6) The Merit Protection Commissioner may, in writing, delegate to an APS employee any of the Merit Protection Commissioner's powers or functions under this Act (other than this section).
- (7) An Agency Head may, in writing, delegate to another person any of the Agency Head's powers or functions under this Act (other than this section).
- (8) An Agency Head cannot, under subsection (7), delegate powers or functions to an outsider without the prior written consent of the Commissioner. For this purpose, *outsider* means a person other than:
  - (a) an APS employee; or
  - (b) a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

- (9) A person (the ***first delegate***) to whom powers or functions are delegated under subsection (5), (6) or (7) may, in writing, delegate any of those powers or functions to another person (the ***second delegate***). However, if the first delegate is subject to directions in relation to the exercise of a power or function delegated under this subsection, the first delegate must give corresponding directions to the second delegate.
- (10) A power or function that is exercised or performed by a person under a delegation under subsection (9) is taken, for the purposes of this Act, to have been exercised or performed by the person who originally delegated the corresponding power or function under subsection (5), (6) or (7).
- (11) 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.
- (12) In this section:
- former senior official*** means:
- (a) a person who held, but no longer holds, an office or appointment under an Act; or
  - (b) a person who was, but is no longer, an SES employee, and who does not hold an office or appointment under an Act.
- senior official*** means:
- (a) a person who holds any office or appointment under an Act; or
  - (b) an SES employee or acting SES employee.

## **78A Immunity from civil proceedings**

### *Commissioner's functions*

- (1) No civil action, suit or proceeding lies against the following persons:
- (a) the Commissioner;
  - (b) a delegate of the Commissioner;

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- (c) a person acting under the direction or authority of the Commissioner;
- (d) a Special Commissioner;
- (e) a member of staff assisting the Commissioner or a Special Commissioner;

in relation to anything done, or omitted to be done, in good faith by the person in connection with the performance or purported performance of functions or duties, or the exercise or purported exercise of powers, conferred by:

- (f) paragraph 41(2)(j), (k), (m), (n) or (o); or
- (g) section 41A, 41B, 41C or 41D; or
- (h) any other provision of this Act or the regulations prescribed by the regulations for the purposes of this paragraph.

*Merit Protection Commissioner's functions*

- (2) No civil action, suit or proceeding lies against the following persons:
  - (a) the Merit Protection Commissioner;
  - (b) a delegate of the Merit Protection Commissioner;
  - (c) a person acting under the direction or authority of the Merit Protection Commissioner;
  - (d) a member of staff assisting the Merit Protection Commissioner;
  - (e) a member of a committee established or appointed by the Merit Protection Commissioner under the regulations;
  - (f) any other person prescribed by the regulations for the purposes of this paragraph;

in relation to anything done, or omitted to be done, in good faith by the person in connection with the performance or purported performance of functions or duties, or the exercise or purported exercise of powers, conferred by this Act or the regulations.

## 79 Regulations

- (1) The Governor-General may make regulations prescribing matters:
  - (a) required or permitted by this Act to be prescribed; or

- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) The regulations may prescribe penalties of not more than 50 penalty units for offences against the regulations.

## **Endnotes**

Endnote 1—About the endnotes

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## **Endnotes**

### **Endnote 1—About the endnotes**

The endnotes provide details of the history of this legislation and its provisions. The following endnotes are included in each compilation:

- Endnote 1—About the endnotes
- Endnote 2—Abbreviation key
- Endnote 3—Legislation history
- Endnote 4—Amendment history
- Endnote 5—Uncommenced amendments
- Endnote 6—Modifications
- Endnote 7—Misdescribed amendments
- Endnote 8—Miscellaneous

If there is no information under a particular endnote, the word “none” will appear in square brackets after the endnote heading.

### **Abbreviation key—Endnote 2**

The abbreviation key in this endnote sets out abbreviations that may be used in the endnotes.

### **Legislation history and amendment history—Endnotes 3 and 4**

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended the compiled law. The information includes commencement information for amending laws and details of application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision level. It also includes information about any provisions that have expired or otherwise ceased to have effect in accordance with a provision of the compiled law.

### **Uncommenced amendments—Endnote 5**

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in endnote 5.

**Modifications—Endnote 6**

If the compiled law is affected by a modification that is in force, details of the modification are included in endnote 6.

**Misdescribed amendments—Endnote 7**

An amendment is a misdescribed amendment if the effect of the amendment cannot be incorporated into the text of the compilation. Any misdescribed amendment is included in endnote 7.

**Miscellaneous—Endnote 8**

Endnote 8 includes any additional information that may be helpful for a reader of the compilation.

## Endnotes

### Endnote 2—Abbreviation key

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#### Endnote 2—Abbreviation key

ad = added or inserted	pres = present
am = amended	prev = previous
c = clause(s)	(prev) = previously
Ch = Chapter(s)	Pt = Part(s)
def = definition(s)	r = regulation(s)/rule(s)
Dict = Dictionary	Reg = Regulation/Regulations
disallowed = disallowed by Parliament	reloc = relocated
Div = Division(s)	renum = renumbered
exp = expired or ceased to have effect	rep = repealed
hdg = heading(s)	rs = repealed and substituted
LI = Legislative Instrument	s = section(s)
LIA = <i>Legislative Instruments Act 2003</i>	Sch = Schedule(s)
mod = modified/modification	Sdiv = Subdivision(s)
No = Number(s)	SLI = Select Legislative Instrument
o = order(s)	SR = Statutory Rules
Ord = Ordinance	Sub-Ch = Sub-Chapter(s)
orig = original	SubPt = Subpart(s)
par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)	

## Endnote 3—Legislation history

## Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Public Service Act 1999	147, 1999	11 Nov 1999	5 Dec 1999 ( <i>see Gazette</i> 1999, No. S584)	
Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000	137, 2000	24 Nov 2000	ss. 1–3 and Schedule 1 (items 1, 4, 6, 7, 9–11, 32): Royal Assent Remainder: 24 May 2001	Sch. 2 (items 418, 419)
Statute Law Revision Act 2002	63, 2002	3 July 2002	Schedule 1 (items 26, 27): (a)	—
Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003	140, 2003	17 Dec 2003	s. 4 and Schedule 1 (item 32): (b)	s. 4
Financial Framework Legislation Amendment Act (No. 1) 2006	30, 2006	6 Apr 2006	Schedule 3 (items 35, 36): 7 Apr 2006	—
Australian Trade Commission Legislation Amendment Act 2006	56, 2006	21 June 2006	Schedule 3 (item 6): 1 July 2006	—
Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008	8, 2008	20 Mar 2008	Schedules 1–7: 28 Mar 2008 ( <i>see</i> F2008L00959) Remainder: Royal Assent	—
Financial Framework Legislation Amendment Act 2008	90, 2008	20 Sept 2008	Sch 1 (item 62): 20 Mar 2009 (s 2(1) item 3)	—
Fair Work (State Referral and Consequential and Other Amendments) Act 2009	54, 2009	25 June 2009	Sch 16 (items 4–28): 1 July 2009 (s 2(1) item 39)	Sch 16 (item 28)

## Endnotes

### Endnote 3—Legislation history

<b>Act</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>	<b>Application, saving and transitional provisions</b>
Acts Interpretation Amendment Act 2011	46, 2011	27 June 2011	Sch 2 (items 953–964) and Sch 3 (items 10, 11): 27 Dec 2011 (s 2(1) items 7, 12)	Sch 3 (items 10, 11)
Remuneration and Other Legislation Amendment Act 2011	75, 2011	25 July 2011	Sch 1 (items 7–10, 12–15): 5 Aug 2011 (s 2(1) item 2 and F2011L01603)	Sch 1 (items 12–15)
Public Service Amendment Act 2013	2, 2013	14 Feb 2013	Sch 1: 1 July 2013 (s 2(1) item 2 and F2013L00484)	—
Public Interest Disclosure (Consequential Amendments) Act 2013	134, 2013	15 July 2013	Sch 1 (items 22–25) and Sch 2 (items 3, 4): 15 Jan 2014 (s 2(1) items 5, 6)	Sch 2 (items 3, 4)
Statute Law Revision Act (No. 1) 2014	31, 2014	27 May 2014	Sch 1 (item 58): 24 June 2014 (s 2(1) item 2)	—
Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014	62, 2014	30 June 2014	Sch 11 (items 92–97) and Sch 14 (items 1–4): 1 July 2014 (s 2(1) items 6, 14)	Sch 11 (item 96) and Sch 14 (items 1–4)

  

<b>Number and year</b>	<b>FRLI registration</b>	<b>Commencement</b>	<b>Application, saving and transitional provisions</b>
2006 No. 50	17 Mar 2006 ( <i>see</i> F2006L00820)	Schedule 27: 27 Mar 2006 ( <i>see</i> r. 2(b))	—

- (a) Subsection 2(1) (item 21) of the *Statute Law Revision Act 2002*, which provides as follows:
- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

## Endnote 3—Legislation history

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
21. Schedule 1, items 26 and 27	Immediately after item 1 of Schedule 2 to the <i>Ministers of State and Other Legislation Amendment Act 2000</i> commenced	10 March 2000
<p>(b) Subsection 2(1) (items 2 and 3) of the <i>Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003</i> provides as follows:</p> <p>(1) Each provision of this Act specified in column 1 of the table commences on the day or at the time specified in column 2 of the table.</p>		
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
2. Sections 4 and 5	Immediately after the commencement of sections 3 to 62 of the <i>Legislative Instruments Act 2003</i>	1 January 2005
3. Schedule 1	Immediately after the commencement of sections 3 to 62 of the <i>Legislative Instruments Act 2003</i>	1 January 2005

## Endnotes

### Endnote 4—Amendment history

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### Endnote 4—Amendment history

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<b>Provision affected</b>	<b>How affected</b>
<b>Part 1</b>	
s. 3 .....	am. No. 2, 2013
s. 6 .....	am. No. 2, 2013
<b>Part 2</b>	
s. 7 .....	am. SLI 2006 No. 50; No. 8, 2008; No. 54, 2009; No. 2, 2013; No 62, 2014
Heading to s. 8 .....	rs. No. 54, 2009
s. 8 .....	am. No. 54, 2009
<b>Part 3</b>	
s. 10 .....	rs. No. 2, 2013
s. 10A.....	ad. No. 2, 2013
s. 11 .....	am. No. 2, 2013
Note to s. 11(1).....	ad. No. 2, 2013
s. 11A.....	ad. No. 2, 2013
s. 12 .....	rs. No. 2, 2013
s. 13 .....	am. No. 2, 2013; No 62, 2014
Heading to s. 14.....	rs. No. 2, 2013
s. 14 .....	am. No. 2, 2013
Subhead. to s. 15(1).....	ad. No. 2, 2013
s. 15 .....	am. No. 2, 2013
Note to s. 15(1).....	ad. No. 2, 2013
Heading to s. 16.....	rs. No. 2, 2013
	rep No 134, 2013
Subhead. to s. 16(1).....	ad. No. 2, 2013
	rep No 134, 2013
s. 16 .....	am. No. 2, 2013
	rep No 134, 2013
s. 17 .....	rep. No. 2, 2013
s. 18 .....	am. No. 2, 2013
s. 19 .....	am No 2 and 134, 2013
<b>Part 4</b>	

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## Endnote 4—Amendment history

<b>Provision affected</b>	<b>How affected</b>
<b>Division 1</b>	
s. 21 .....	am. No. 2, 2013
s. 22 .....	am. No. 2, 2013
Note to s. 22(2) .....	ad. No. 2, 2013
s. 23 .....	am. SLI 2006 No. 50; No. 8, 2008; No. 54, 2009; No. 2, 2013
Heading to s. 24 .....	rs. No. 2, 2013
s. 24 .....	am. SLI 2006 No. 50; No. 8, 2008; No. 54, 2009; No. 2, 2013
Note to s. 24(3) .....	ad. No. 2, 2013
s. 26 .....	am. No. 2, 2013
s. 29 .....	am. No. 2, 2013
Note to s. 29(1) .....	am. No. 54, 2009
Renumbered Note 1 .....	No. 2, 2013
Note 2 to s. 29(1) .....	ad. No. 2, 2013
s. 32 .....	am. No. 2, 2013
s. 33 .....	am. No. 2, 2013
<b>Division 2</b>	
s. 35 .....	am. No. 2, 2013
s. 36 .....	rep. No. 2, 2013
s. 37 .....	am. No. 2, 2013
s. 38 .....	am. No. 2, 2013
<b>Division 3</b>	
s. 39 .....	am. No. 56, 2006; No. 2, 2013
<b>Part 5</b>	
Heading to Part 5 .....	rs. No. 2, 2013
<b>Division 1</b>	
Heading to s. 40 .....	rs. No. 2, 2013
s. 40 .....	am. No. 2, 2013
s. 41 .....	rs. No. 2, 2013
	am No 134, 2013
s. 41A.....	ad. No. 2, 2013
s. 41B.....	ad. No. 2, 2013
s. 41C.....	ad. No. 2, 2013
s. 41D.....	ad. No. 2, 2013

## Endnotes

### Endnote 4—Amendment history

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<b>Provision affected</b>	<b>How affected</b>
s. 42 .....	am. No. 140, 2003; No. 2, 2013
s. 43 .....	am. No. 137, 2000; No. 2, 2013
<b>Division 2</b>	
s. 46 .....	rs. No. 75, 2011
s. 48 .....	am. No. 46, 2011
Note to s. 48.....	ad. No. 46, 2011
<b>Division 3</b>	
Div. 3 of Part 5.....	ad. No. 2, 2013
s. 48A.....	ad. No. 2, 2013
s. 48B.....	ad. No. 2, 2013
s. 48C.....	ad. No. 2, 2013
<b>Part 6</b>	
<b>Division 1</b>	
s. 49 .....	am. No. 2, 2013
s. 50 .....	am. No. 137, 2000; No 2 and 134, 2013
s. 50A.....	ad. No. 2, 2013
s. 51 .....	am. No. 2, 2013
<b>Division 2</b>	
s. 53 .....	rs. No. 75, 2011
s. 55 .....	am. No. 46, 2011
Note to s. 55.....	ad. No. 46, 2011
<b>Part 7</b>	
s. 57 .....	rs. No. 2, 2013
Note to s 57(3) .....	am No 62, 2014
s. 58 .....	rs. No. 2, 2013
s. 59 .....	rs. No. 2, 2013
s. 61 .....	rs. No. 75, 2011
s. 61A.....	ad. No. 2, 2013
s. 62 .....	am. No. 46, 2011
Note to s. 62.....	ad. No. 46, 2011
<b>Part 8</b>	
Part 8.....	rs. No. 2, 2013

## Endnote 4—Amendment history

<b>Provision affected</b>	<b>How affected</b>
s. 64 .....	rs. No. 2, 2013
<b>Part 9</b>	
s. 68 .....	rs. No. 75, 2011
s. 69 .....	am. No. 46, 2011
Note to s. 69.....	ad. No. 46, 2011
<b>Part 10</b>	
s. 72 .....	am. SLI 2006 No. 50; No. 8, 2008; No. 54, 2009; No. 2, 2013
<b>Part 10A</b>	
Part 10A.....	ad. No. 2, 2013
s. 72A.....	ad. No. 2, 2013
s. 72B.....	ad. No. 2, 2013
s. 72C.....	ad. No. 2, 2013
s. 72D.....	ad. No. 2, 2013
s. 72E.....	ad. No. 2, 2013
<b>Part 11</b>	
s. 73 .....	am. No. 30, 2006; No. 2, 2013
Note to s. 73.....	ad. No. 30, 2006
	am. No. 90, 2008
s. 76 .....	rep. No. 2, 2013
s. 78 .....	am. No. 63, 2002; No. 2, 2013; No 31, 2014
s. 78A.....	ad. No. 2, 2013
s. 79 .....	am. No. 2, 2013

## Endnotes

Endnote 5—Uncommenced amendments [none]

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**Endnote 5—Uncommenced amendments [none]**

**Endnote 6—Modifications [none]**

**Endnote 7—Misdescribed amendments [none]**

**Endnote 8—Miscellaneous [none]**