

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2013 No. 35**

Issued by the authority of the Minister for the Public Service and Integrity

*Public Service Act 1999*

*Public Service Amendment Regulation 2013 (No. 1)*

The *Public Service Act 1999* (the ‘Act’) provides for the establishment and management of the Australian Public Service (‘APS’). Subsection 79(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. The Act, as amended by the *Public Service Amendment Act 2013* (the ‘Amendment Act’), contains other provisions that authorise the making of regulations<sup>1</sup>.

The *Public Service Amendment Regulation 2013 (No. 1)* (the ‘Amendment Regulation’) makes a number of amendments to the *Public Service Regulations 1999* (the ‘Principal Regulations’). These amendments support the reforms to the APS facilitated by the Amendment Act. The Amendment Act received the Royal Assent on 14 February 2013.

#### **Overview of the amendments**

The purpose of the Amendment Regulation is to give effect to provisions of the Amendment Act and to clarify existing provisions of the Principal Regulations.

The Amendment Act makes changes to the Act intended to ensure that the APS is able to continue serving the Australian Government, the Parliament, and the Australian public ethically, efficiently, and effectively. The Amendment Regulation makes a number of amendments to the Principal Regulations that contribute to the achievement of this objective.

The Amendment Regulation also makes amendments that are consequential to the Amendment Act, including repeal of a number of provisions of the Principal Regulations. The content of some of these repealed provisions was incorporated into the Act by the Amendment Act, while others are to be moved to the Australian Public Service Commissioner’s Directions to enable the consolidation of like provisions in a single legislative instrument.

Many of the amendments concern the promotion of the integrity of the APS and public confidence in public administration, including:

- amendments that provide for statutory office holders, as defined by the Principal Regulations, to be bound by the APS Code of Conduct in certain circumstances, and provide for the Australian Public Service Commissioner (the ‘Commissioner’) to investigate alleged breaches and report as appropriate. The amendments aim to align conduct requirements for APS employees and statutory office holders when they work together, and are not intended to limit the independence of statutory office holders;
- amendments that prescribe basic procedural requirements for agency heads, the Commissioner, and the Merit Protection Commissioner in dealing with whistleblower

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<sup>1</sup> For the purposes of the Amendment Regulation, these include sections 16, 41A, 41B, 72, 72A, and 72B, subsections 14(2A), 14(3), 20(2), 22(4), 33(1) and (2), 72E(a), and 73(4), and paragraphs 41(2)(p), 50(1)(e), 50A(2)(a), 72C(2)(c), 72D(2)(b), and 78A(1)(h).

reports, including prescribing circumstances in which an inquiry may be declined or discontinued. The amendments aim to ensure that a whistleblower has information about the protections available; that an inquiry will be conducted unless there are reasonable grounds not to do so; and that procedural fairness requirements are clear;

- amendments that set out basic procedural requirements with which the Commissioner and the Merit Protection Commissioner must comply when inquiring into suspected breaches of the Code of Conduct by APS employees or former APS employees. These provisions are consequential to new provisions in the Amendment Act which confer on the Commissioner and the Merit Protection Commissioner the function of determining, in certain circumstances, whether an APS employee or former employee has breached the APS Code of Conduct;
- amendments relating to inquiries by the Commissioner into alleged breaches of the Code of Conduct by agency heads, which provide for the Commissioner to decline or discontinue an inquiry where it would not be in the public interest to conduct one; and
- amendments that authorise the use and disclosure of personal information in certain circumstances. The amendments are aimed at providing clarity to agencies and employees about the circumstances in which personal information may be shared by agencies or used within an agency. Appropriate information sharing will also promote public confidence in public administration.

Other key amendments include the following:

- amendments that simplify the arrangements for the employment of non-ongoing non-SES employees for a specified term or for the duration of a specified task, including by streamlining the grounds under which agencies can engage persons as non-ongoing employees on a specified term basis;
- amendments that allow an agency head, in certain circumstances, to direct an employee to undergo an examination by a nominated medical practitioner to assess the employee's fitness for duty and to direct the employee to give a report of the examination to the agency head. Amendments also widen the scope of the definition of 'nominated medical practitioner' in the Principal Regulations to cover other health service providers, such as clinical psychologists, which may not be covered by the current provisions;
- amendments that improve the operational efficiency and effectiveness of Independent Selection Advisory Committees (ISACs), as well as providing ISACs with the flexibilities that are available for general APS recruitment, including seeking and using expert opinion (for example assessment centres and technical testing) and use of the resources of the agency, including agency staff, to assist in the assessment of candidates. The amendments maintain appropriate oversight by the Merit Protection Commissioner and continue to support the independence of these committees.
- amendments to the Principal Regulations, as well as new provisions, concerning arrangements under section 33 of the Act, under which APS employees are able to seek independent review of a broad range of employment related actions. These amendments aim to clarify existing provisions and provide for review rights for former employees. Further amendments provide for the Merit Protection Commissioner to conduct a review of a determination by the Commissioner of a breach of the Code of Conduct by a former APS employee; and

- amendments to the operation of Promotion Review Committees (PRCs) intended to reduce the adversarial nature of promotion reviews and support appropriate privacy for an employee who is a party to a review.

Overall, these amendments promote effective management of the APS, and are designed to enable the Principal Regulations to be more easily understood by agencies and APS employees.

### **Regulation Impact Statement**

No regulation impact statement is required for the measures contained in the Amendment Regulation.

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

A Statement of Compatibility with Human Rights has been completed for the Amendment Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***Overview of the Amendment Regulation***

The Amendment Regulation amends the Principal Regulations to give effect to several of the provisions of the Amendment Act and to clarify existing provisions of the Principal Regulations. The Amendment Regulation also makes amendments that are consequential to the Amendment Act.

### ***Human rights implications***

The Amendment Regulation engages the following human rights.

#### ***Right to freedom of expression***

The right to freedom of opinion and expression is contained in articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR).

- (i) Section 16 of the Public Service Act, as amended, provides for APS employees to make whistleblower reports—i.e. reports of breaches or alleged breaches of the Code of Conduct—and prohibits discrimination against or victimisation of whistleblowers. Amendments to the Principal Regulations give effect to the right of APS employees to make whistleblower reports by setting out basic procedural requirements with which agency heads, the Commissioner, and the Merit Protection Commissioner must comply in dealing with whistleblower reports—for example, to provide the whistleblower with information about the protections available to them under the Act, to inquire into the report unless there are good reasons not to do so, and to uphold procedural fairness obligations.

The relevant provisions in the Amendment Regulation include the presumption that a whistleblower report will be inquired into unless the decision maker reasonably believes that there are grounds on which to decline or discontinue inquiry (for example, if the report is frivolous, vexatious, misconceived, or lacking in substance; if the report would be dealt with more appropriately by different means, such as under another Commonwealth law), and a requirement to consider, having regard to all the circumstances, whether to give the person about whom a whistleblower report has been made an opportunity to be heard in relation to the report. In most cases this opportunity would be provided as a matter of course; however, circumstances have arisen in which informing an employee that an allegation has been made against them has not been

appropriate. The new provisions allow discretion to manage situations appropriately where the public interest would not merit the provision of the opportunity to be heard. Situations of this kind might arise, for example, where the safety or wellbeing of an APS employee may be adversely affected in a significant way and their interests are not otherwise likely to be prejudicially affected.

In the event that, as a result of a whistleblowing inquiry, an agency makes a decision to undertake an inquiry into the alleged misconduct of an employee under procedures established under section 15(3) of the Act, the employee must be afforded procedural fairness.

- (ii) Sections 41B and 50A of the Act as amended confer on the Australian Public Service Commissioner (the Commissioner) and the Merit Protection Commissioner respectively the new function of inquiring into, and making determinations in relation to, alleged breaches of the Code of Conduct by APS employees and former APS employees. Such determinations must be made, according to those sections, under written procedures established by the agency head, the Commissioner, or the Merit Protection Commissioner, as appropriate. These provisions provide for the regulations to prescribe basic procedural requirements with which such written procedures must comply, and provide that the procedures must have due regard to procedural fairness. The Amendment Regulation inserts new regulations 6.4 and 7.10, which set out these prescribed requirements for procedures for inquiries conducted by the Australian Public Service Commissioner and the Merit Protection Commissioner respectively. The procedures prescribed by these regulations reflect and promote the central requirements of procedural fairness.

Overall, the Amendment Regulation engages and promotes the right to freedom of opinion and expression.

#### *Right to privacy and reputation*

The right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. Three components of the Amendment Regulation engage the right to privacy.

##### 1. Direction to attend medical examination

Regulations 3.1 and 3.2 of the Principal Regulations allow an agency head to direct an employee to attend a medical examination, either to satisfy a condition of the employee's engagement or to assess the employee's fitness for continued employment. New subregulations 3.1(2) and 3.2(2A) made by the Amendment Regulation make clear that the person conducting the medical examination may give a report of the examination to the agency head, without seeking or confirming the agreement of the employee. The new provisions address a shortcoming in the current provisions.

Although the new provisions will result in personal information being disclosed to the agency without an employee's specific agreement—and thus engage and limit the right to privacy under Article 17—the limitations are not arbitrary, are for a legitimate objective, and are reasonable in the particular circumstances. Where an agency head directs an employee to attend a medical examination for a valid reason, it is necessary for the agency head to receive a report of the examination in order to make an informed assessment of the employee's fitness for engagement or continued employment.

It is expected that the power to direct employees to attend a medical assessment will be exercised responsibly, in good faith, and in a way that is consistent with the APS Values,

Employment principles, and Code of Conduct, the requirements of which include, among other things, that:

- the APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does (section 10(2) of the Act as amended)
- the APS respects all people, including their rights and their heritage (s. 10(3))
- the APS provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplace are valued (s.10A(1)(e))
- an APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment (s.13(3)).

The power to refer employees for a fitness for duty assessment is a significant one, and it exists for good reasons. It provides agencies with a flexible tool that allows them to manage genuine cases of illness, including mental illness, with compassion for both the individual employee and their colleagues. In some circumstances it may be difficult for agencies to meet their duty of care to employees without recourse to such steps; in fact, they might become liable for damages if they did not. In coming to a decision as to whether to refer an employee for a medical assessment, a manager must weigh several concerns, including those of the employee, and the requirement under the *Work Health and Safety Act 2011* to ensure that their 'acts or omissions do not adversely affect the health and safety of other persons', which includes those in the direct team and the wider work environment.

Section 33 of the Public Service Act provides a check on this decision-making power by providing that APS employees have rights of review about matters affecting them in their employment, including in these circumstances.

## 2. Review of Actions

- (i) The Amendment Regulation inserts new regulations 7.2A to 7.2H to extend to former APS employees a right to review of a determination that they had breached the APS Code of Conduct, in circumstances where that determination was made after they had ceased APS employment. The regulations include provisions providing that the review is conducted in private.
- (ii) The Amendment Regulation inserts new Regulation 5.12(5) to clarify that the parties to a review of a promotion decision are not entitled to statements submitted by other parties under regulation 5.12 of the Principal Regulations. The change protects the privacy of personal information.

These provisions promote the right to privacy.

## 3. Use and disclosure of personal information

Section 72E of the Act as amended provides inter alia for the regulations to authorise the use and disclosure of personal information in specific circumstances. Regulation 9.2 of the Principal Regulations currently provides that an agency head may disclose personal information where the disclosure is necessary in a range of employment related circumstances. The Amendment Regulation amends regulation 9.2 to provide for disclosure or use of personal information where it is necessary or relevant in a range of circumstances. This amendment provides greater clarity for APS agencies about the circumstances in which employee information may legitimately be disclosed and used, consistent with the provisions of the *Privacy Act 1988*.

This approach is consistent with several existing sources of authority that permit the disclosure and use of employee information in APS agencies in a wide range of circumstances. For example, the common law duty of loyalty and fidelity owed by an employee to their employer implies an obligation on employees in some circumstances to report to the employer on matters of importance that could impact adversely on an employer's obligations, and under the general law, an employer has the power to inform itself of any information held by it which is relevant to the exercise of any employer related powers.

The amendment may have the effect of limiting the right to privacy in some circumstances. The limitations are not arbitrary, are for a legitimate objective, and are reasonable in the particular circumstances.

There are some circumstances where employee information needs to be disclosed or used to maintain public confidence in public administration and the integrity of the APS; for example, to promote and uphold the APS Values, Employment Principles and Code of Conduct by, for example, passing information between APS agencies to support proper Code of Conduct inquiries..

To support agencies in applying this provision appropriately, the Australian Public Service Commissioner proposes to issue guidance, after consultation with the Australian Information Commissioner, in accordance with amended subregulation 9.2(6).

#### *Right to work and rights in work*

The right to work and rights in work are contained in Articles 6(1), 7, and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Amendment Act includes an Employment Principle that provides that the APS is a career-based public service which makes fair employment decisions with a fair system of review.

- (i) Part 4 of the Principal Regulations contains the procedures for the operation of Independent Selection Advisory Committees (ISACs). An ISAC is an independent committee established by the Merit Protection Commissioner at the request of an agency head to make recommendations about the suitability of candidates in a staff recruitment exercise. The amendments to Part 4 provide an ISAC with the flexibility to use modern recruitment methods, and help to ensure that the independence of an ISAC is maintained for the benefit of agencies and APS employees.
- (ii) Part 5 of the Principal Regulations contains the procedures for review of actions in the APS. The amendments to Part 5 aim to improve the operational efficiency and effectiveness of the review of action framework, and to assist APS employees to understand better their review rights.

Section 33 of the Act provides that an APS employee is entitled to review of any APS action that relates to his or her APS employment, subject to exceptions prescribed in the Principal Regulations. The right to review is supported by one of the Employment Principles in section 10A of the Act as amended, which provides that the APS is a career-based public service which makes fair employment decisions with a fair system of review.

- (i) Part 5 and Part 7 of the Principal Regulations contain the procedures for review of actions in the APS. These provisions seek to improve the operational efficiency and effectiveness of the review of actions framework, including in relation to promotion review.
- (ii) The Act, as amended, provides that a determination of a breach of the Code of Conduct may be made after an employee has separated from the APS. The Amendment Regulation

inserts regulations 7.2A to 7.2H to extend to former employees the right to review of a determination that they had breached the Code of Conduct.

The amendments promote APS employees' rights in work.

### ***Conclusions***

The Amendment Regulation is compatible with human rights. It promotes and advances a number of human rights, and, to the extent that it may limit any human rights, those limitations are reasonable, necessary and proportionate.

The Amendment Regulation was prepared following consultation with APS agencies and the Community and Public Sector Union on a broad range of amendments. In addition, the Secretaries Board, the Attorney-General's Department and the Office of the Australian Information Commissioner were consulted on provisions where appropriate. The Amendment Regulation was provided to the Opposition for comment.

Detail of the Regulation is included in the Attachment.

The Act does not specify any conditions that need to be satisfied before exercising the power to make regulations.

The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Amendment Regulation commences on the commencement of Schedules 1 to 4 to the Amendment Act.

Authority: Subsection 79(1) of the *Public Service Act 1999*

## **Details of Public Service Amendment Regulation 2013 (No. 1)**

### **Section 1—Name of Regulation**

This section provides that the title of the Amendment Regulation is the *Public Service Amendment Regulation 2013 (No. 1)*.

### **Section 2—Commencement**

This section provides for the Amendment Regulation to commence on the commencement of Schedules 1 to 4 of *Public Service Amendment Act 2013* (the ‘Amendment Act’).

### **Section 3—Authority**

This section provides that the Amendment Regulation is made under the *Public Service Act 1999*.

### **Section 4—Schedule(s)**

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

### **Schedule 1—Amendments.**

#### **Item [1]—Substitution of regulation 2.2**

This item repeals the existing provisions of regulation 2.2 of the Principal Regulations and replaces these with regulation 2.2, which is titled ‘Statutory office holder bound by Code of Conduct’.

Subregulation 2.2(1) describes certain offices for the purposes of the definition of a statutory office holder in subsection 14(3) of the *Public Service Act 1999* (‘the Act’).

Paragraph 2.2(1)(a) provides that in order for an office to be prescribed, it must be held by a person who is engaged or employed under an Act.

Paragraph 2.2(1)(b) provides that in order for an office to be prescribed, the holder of that office must be assisted by, or have dealings with, APS employees in a supervisory capacity, or in another capacity related to the office holder’s day-to-day working relationship with APS employees.

Paragraph 2.2(1)(c) provides that, in order for an office to be prescribed, it must not be an office of agency head, or a judicial office.

Subregulation 2.2(2) describes certain appointments for the purposes of the definition of ‘statutory office holder’ in subsection 14(3) of the Act.

Paragraph 2.2(2)(a) provides that in order for an appointment to be prescribed, it must be the appointment of a person under an Act.

Paragraph 2.2(2)(b) provides that in order for an appointment to be prescribed, the appointee must be assisted by, or must have dealings with, APS employees in a supervisory capacity, or in another capacity related to the appointee’s day-to-day working relationship with APS employees. It is intended that, where a statutory office holder and an APS employee have a working relationship, similar standards of conduct—including a requirement to act in a respectful and courteous manner—will apply, in the absence of reasons to the contrary.

Paragraph 2.2(2)(c) provides that in order for an appointment to be prescribed, it must not be an appointment as an agency head, or a judicial appointment, or an appointment as a member of the Australian Defence Force, or an appointment as a member of a Tribunal with quasi-judicial functions; in particular, the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal, the National Native Title Tribunal, the Social Security Appeals Tribunal, or the Veterans' Review Board.

Subregulation 2.2(3) provides for the extent to which a statutory office holder is bound by the Code of Conduct.

Paragraph 2.2(3)(a) provides for a statutory office holder to be bound by the Code of Conduct only to the extent to which the statutory office holder is assisted by, or deals with, APS employees in a supervisory capacity or in another capacity related to the statutory office holder's day-to-day working relationship with APS employees.

Paragraph 2.2(3)(b) provides that, in the event of an inconsistency between the requirements of the Code of Conduct and an Australian law that relates to the statutory office holder's office or appointment, the Code of Conduct does not bind the statutory office holder to the extent of the inconsistency.

A note to subregulation 2.2(3) explains that the Code of Conduct requires the upholding of the APS Values and APS Employment Principles, among other things.

Subregulation 2.2(4) provides that, for the purposes of subsection 14(2A) of the Act, a statutory office holder is bound by the Code of Conduct as if the Code of Conduct referred to the statutory office holder's office or appointment and matters related to the office or appointment. The Code of Conduct refers in many places to 'APS employment', and this provision is intended to assist interpretation of the Code as it applies to statutory office holders.

### **Item [2]—Substitution of Division 2.2**

This item repeals the existing provisions of the Principal Regulations, and replaces these with the provisions in Division 2.2. Division 2.2 prescribes:

- basic procedural requirements with which agency heads' procedures for dealing with whistleblower reports must comply;
- basic procedural requirements with which the Australian Public Service Commissioner ('the Commissioner') must comply in dealing with whistleblower reports;
- basic procedural requirements with which the Merit Protection Commissioner must comply in dealing with whistleblower reports; and
- circumstances in which agency heads, the Commissioner, or the Merit Protection Commissioner may decline to conduct an inquiry into a whistleblower report, or may discontinue such an inquiry.

Regulation 2.4 prescribes the basic requirements with which agency heads' procedures for dealing with whistleblower reports must comply.

Subregulation 2.4(1) provides that, for the purposes of subsection 16(3) of the Act, regulation 2.4 prescribes the basic procedural requirements for an agency head's procedures for dealing with a whistleblower report made to the agency head or a person authorised by the agency head for the purposes of section 16 of the Act.

Subregulation 2.4(2) provides that an agency head's procedures for dealing with whistleblower reports must require the agency head, or a person authorised by the agency

head, to accept the whistleblower report and to give the whistleblower information about the protections available under subsection 16(1) of the Act.

Subregulation 2.4(3) provides that an agency head's procedures for dealing with whistleblower reports must require the agency head to commence an inquiry into a whistleblower report unless the agency head reasonably believes that there are grounds on which to decline to conduct an inquiry. A note to the subregulation explains that subregulation 2.7(2) provides the grounds on which an agency head could decline to conduct an inquiry.

Subregulation 2.4(4) provides that an agency head's procedures for dealing with whistleblower reports must require the agency head to complete an inquiry into a whistleblower report unless the agency head believes there are reasonable grounds on which to discontinue the inquiry; to report the outcome of the inquiry to the whistleblower; and to ensure that the outcome of the inquiry is dealt with as soon as practicable. A note to the subregulation explains that subregulation 2.7(2) provides the grounds on which an agency head may discontinue an inquiry.

Subregulation 2.4(5) provides that an agency head's procedures for dealing with whistleblower reports must require the agency head to consider, having regard to all the circumstances, whether to give the person about whom the whistleblower report has been made an opportunity to be heard in relation to the report. This provision is not intended to curtail procedural fairness requirements under the general law.

Subregulation 2.4(6) provides that an agency head's procedures for dealing with whistleblower reports must require the agency head to advise the whistleblower if the agency head decides to decline to conduct an inquiry into a whistleblower report, or commences an inquiry into a whistleblower report and then decides that there are grounds on which the inquiry should be discontinued. A note to the subregulation explains that subregulation 2.7(2) provides the grounds on which an agency head may decline to conduct, or may discontinue, an inquiry.

Regulation 2.5 prescribes the basic procedural requirements with which the Commissioner must comply in dealing with whistleblower reports.

Subregulation 2.5(1) provides that, for the purposes of subsection 16(5)(b) of the Act, regulation 2.5 prescribes basic procedural requirements with which the Commissioner must comply in dealing with a whistleblower report.

Subregulation 2.5(2) prescribes the circumstances in which the Commissioner must accept a whistleblower report.

Paragraph 2.5(2)(a) provides that the Commissioner must accept a whistleblower report if the Commissioner considers that it would be inappropriate for the whistleblower to make their report to the relevant agency head.

Paragraph 2.5(2)(b) provides that the Commissioner must accept a whistleblower report if the whistleblower has already made a whistleblower report to the relevant agency head and the whistleblower is not satisfied with the agency head's decision to decline to conduct an inquiry or to discontinue an inquiry, or is not satisfied with the outcome of the agency head's inquiry into the report.

Subregulation 2.5(3) provides that the Commissioner must commence an inquiry into a whistleblower report unless the Commissioner reasonably believes that there are grounds on which to decline to conduct an inquiry. A note to the subregulation explains that subregulations 2.7(2) and 2.7(3) provide the grounds on which the Commissioner may decline to conduct an inquiry.

Subregulation 2.5(4) provides that the Commissioner must complete an inquiry into a whistleblower report, unless the Commissioner reasonably believes that there are grounds on which to discontinue the inquiry, and must report the outcome of the inquiry to the relevant agency head. A note to the subregulation explains that subregulations 2.7(2) and 2.7(3) provide the grounds on which the Commissioner may discontinue an inquiry.

Subregulation 2.5(5) provides that the Commissioner must consider, having regard to all the circumstances, whether to give the person about whom the whistleblower report has been made an opportunity to be heard in relation to the report. This provision is not intended to curtail procedural fairness requirements under the general law.

Regulation 2.6 prescribes the basic procedural requirements with which the Merit Protection Commissioner must comply when dealing with whistleblower reports.

Subregulation 2.6(1) provides that, for the purposes of subsection 16(5)(b) of the Act, regulation 2.6 prescribes basic procedural requirements with which the Merit Protection Commissioner must comply in dealing with a whistleblower report.

Subregulation 2.6(2) prescribes the circumstances in which the Merit Protection Commissioner must accept a whistleblower report.

Paragraph 2.6(2)(a) provides that the Merit Protection Commissioner must accept a whistleblower report if the Merit Protection Commissioner considers that it would be inappropriate for the whistleblower to make their report to the relevant agency head.

Paragraph 2.6(2)(b) provides that the Merit Protection Commissioner must accept a whistleblower report if the whistleblower has already made a whistleblower report to the relevant agency head and the whistleblower is not satisfied with the agency head's decision to decline to conduct an inquiry or to discontinue an inquiry, or is not satisfied with the outcome of the agency head's inquiry into the report.

Subregulation 2.6(3) provides that the Merit Protection Commissioner must commence an inquiry into a whistleblower report unless the Merit Protection Commissioner reasonably believes that there are grounds on which to decline to conduct an inquiry. A note to the subregulation explains that subregulations 2.7(2) and 2.7(4) provide the grounds on which the Merit Protection Commissioner may decline to conduct an inquiry.

Subregulation 2.6(4) provides that the Merit Protection Commissioner must complete an inquiry into a whistleblower report, unless the Merit Protection Commissioner reasonably believes that there are grounds on which to discontinue the inquiry, and must report the outcome of the inquiry to the relevant agency head. A note to the subregulation explains that subregulations 2.7(2) and 2.7(4) provide the grounds on which the Merit Protection Commissioner may discontinue an inquiry.

Subregulation 2.6(5) provides that the Merit Protection Commissioner must consider, having regard to all the circumstances, whether to give the person about whom the whistleblower report has been made an opportunity to be heard in relation to the report. This provision is not intended to curtail procedural fairness requirements under the general law.

Regulation 2.7 prescribes circumstances in which an agency head, the Commissioner, or the Merit Protection Commissioner may decline to conduct, or may discontinue, a whistleblower inquiry.

Subregulation 2.7(1) provides that, for the purposes of subsection 16(6) of the Act, regulation 2.7 prescribes circumstances in which an agency head, the Commissioner, or the Merit Protection Commissioner may decline to conduct an inquiry into a whistleblower report, or may discontinue an inquiry into a whistleblower report.

Subregulation 2.7(2) prescribes circumstances in which an agency head, the Commissioner, or the Merit Protection Commissioner may decline to conduct, or may discontinue, an inquiry into a whistleblower report. The circumstances are where an agency head, the Commissioner, or the Merit Protection Commissioner reasonably believes that the whistleblower report would be dealt with more appropriately by different means (for example, when other action is being undertaken under the Act or another Commonwealth law); or that the whistleblower report is vexatious, frivolous, misconceived, or lacking in substance; or that insufficient detail has been provided; or that undertaking the inquiry would not otherwise be justified in all the circumstances.

Subregulation 2.7(3) prescribes additional circumstances in which the Commissioner may decline or discontinue inquiry into a whistleblower report. These circumstances are if the report has not already been considered by the relevant agency head, or is being, or has already been, considered by the Merit Protection Commissioner.

Subregulation 2.7(4) prescribes additional circumstances in which the Merit Protection Commissioner may decline or discontinue inquiry into a whistleblower report. These circumstances are if the report has not already been considered by the relevant agency head, or is being, or has already been, considered by the Commissioner.

**Item [3]—Substitution of subregulation 3.1(2) and (3), excluding the notes**

Regulation 3.1 of the Principal Regulations provides that where an APS employee whose engagement in an agency is subject to a condition of engagement imposed under paragraph 22(6)(e) of the Act dealing with health clearances, the employee's agency head may direct the employee to attend a medical examination by a nominated medical practitioner for an assessment of the employee's fitness for duty, and give the agency head a report of the examination.

The term 'nominated medical practitioner' is also defined in this regulation.

This item repeals subregulations 3.1(2) and (3) of the Principal Regulations (excluding the notes) and substitutes subregulations 3.1(2) and (3).

Paragraph 3.1(2)(a) provides that while an employee's engagement is subject to the condition mentioned in subregulation 3.1(1), the agency head may, in writing, direct the employee to undergo an examination by a nominated medical practitioner to assess the employee's fitness for duty within a specified period, and may direct the employee to give a report of the examination to the agency head within a specified period.

Paragraph 3.1(2)(b) provides that while an employee's engagement is subject to the condition mentioned in subregulation 3.1(1), the nominated medical practitioner may give the agency head a report of the examination.

The amendment to subregulation 3.1(2) addresses situations that have arisen under existing regulation 3.1 of the Principal Regulations, in which employees have asserted that a medical practitioner cannot provide a report of the medical examination directly to the employing agency without the consent of the employee. The amendments to regulation 3.1 are intended to provide agencies and employees with greater certainty concerning the disclosure of such reports, as well as clarifying that an agency head may specify a timeframe within which the employee must attend the examination.

Subregulation 3.1(3) defines a 'nominated medical practitioner' to mean a person who is registered, or licensed, as a health practitioner under a law of a State or Territory that provides for the registration or licencing of health practitioners, and who is nominated by an agency head to assess the fitness for duty of an APS employee in the agency.

Subregulation 3.1(3) widens the scope of the definition of ‘nominated medical practitioner’ in the Principal Regulations so that it covers other health service providers such as clinical psychologists, which may not be covered by the current provision. The definition of a ‘nominated medical practitioner’ is to be used for regulation 3.1 of the Principal Regulations and p

roposed regulation 3.2.

**Item [4]—Substitution of subregulation 3.2(1), excluding the note**

Regulation 3.2 of the Principal Regulations allows an agency head to direct an employee to attend a medical examination by a nominated medical practitioner in a range of circumstances. The agency head may also direct the employee to give to the agency head a report of the examination.

This item repeals subregulation 3.2(1) of the Principal Regulations (excluding the note), and substitutes new subregulation 3.2(1).

Subregulation 3.2(1) broadens the circumstances in which an employee may be directed to attend a medical examination to include situations where the employee is to be assigned new duties and the agency head is concerned that the employee’s state of health may impact on the employee’s ability to perform the duties, or where the employee is to travel overseas as part of the employee’s employment. The intention is to support agency heads to meet their duty of care obligations to employees more effectively, and to support employees to perform their duties.

Paragraph 3.2(1)(a) provides that regulation 3.2 (as amended) applies in circumstances where an agency head believes the state of health of an APS employee in the agency may be affecting the employee’s work performance; or has caused, or may have caused, the employee to have an extended absence from work; or may be a danger to the employee; or has caused, or may have caused, the employee to be a danger to other employees or members of the public; or may be affecting the employee’s standard of conduct.

Paragraph 3.2(1)(b) provides that regulation 3.2 (as amended) applies in circumstances where an APS employee is to be assigned new duties and the agency head believes the employee’s state of health may affect the employee’s ability to undertake the duties.

Paragraph 3.2(1)(c) applies regulation 3.2 (as amended) in circumstances where an APS employee is to travel overseas as part of the employee’s employment.

**Item [5]—Substitution of subregulation 3.2(2)**

This item repeals subregulation 3.2(2) of the Principal Regulations, and substitutes new subregulation 3.2(2).

Subregulation 3.2(2) provides that, where subregulation 3.2(1) applies, an agency head may, in writing, direct an APS employee to undergo an examination by a nominated medical practitioner for an assessment of the employee’s fitness for duty, and/or give the agency head a report of the examination.

Subregulation 3.2(2A) provides that the nominated medical practitioner may give the agency head a report of the examination.

**Item [6]—Substitution of subregulation 3.3(2)**

Subregulation 3.3 of the Principal Regulations allows an agency head to approve an employment scheme that can operate in the agency to allow persons to be engaged as non-ongoing employees for a specified term or task to gain skills and experience for the purpose

of assisting them to participate in the workforce. The establishment of such a scheme is required to be notified in the APS Employment *Gazette* within 14 days of it being approved.

As a result of a move to the electronic publication of the Public Service *Gazette* in 2007, amendments were made to various provisions of the Public Service Regulations to recognise that matters notified before 8 August 2007 were notified in a hard copy version of the *Gazette*, while matters notified on or after that date were to be notified in the new electronic APS Employment *Gazette*.

As it is now over five years since the move to the electronic version of the *Gazette*, transitional issues arising from matters notified before 8 August 2007 have been resolved.

Accordingly, this item repeals subregulation 3.3(2) of the Principal Regulations and substitutes new subregulation 3.3(2).

Subregulation 3.3(2) provides that the approval of a scheme must be notified in the Public Service *Gazette* within 14 days after the day the scheme is approved.

The term ‘Public Service *Gazette*’ is defined in the Dictionary to the Regulations (as amended by the Amendment Regulation) to mean the *Gazette* published in electronic form.

#### **Item [7]—Regulation 3.4, note**

This item amends the note below regulation 3.4 of the Principal Regulations to replace the reference to ‘subsection 22(3)’ of the Act with a reference to ‘paragraph 10A(1)(b)’ of the Act. This amendment is consequential to amendments to the Act made by the Amendment Act.

#### **Item [8]—Substitution of regulations 3.5 and 3.6**

This item repeals regulations 3.5 and 3.6 of the Principal Regulations and substitutes new regulation 3.5.

Regulation 3.5 will continue to deal with the engagements of persons as non-ongoing employees (at classification levels below the Senior Executive Service (SES)) for a specified term or the duration of a specified task and includes provisions dealing with extensions of specified terms of engagement of certain non-SES employees, currently provided for in regulation 3.6 of the Principal Regulations.

Subregulation 3.5(1) provides that regulation 3.5 prescribes the circumstances in which an agency head may engage a person as a non-SES employee for a specified term, or for the duration of a specified task, for the purposes of subsection 22(4) of the Act.

There are two notes to the subregulation. Note 1 explains that paragraph 10A(1)(c) of the Act requires engagement and promotion decisions to be based on merit and that Chapter 2 of the Australian Public Service Commissioner’s Directions (the ‘Commissioner’s Directions’) explains how this employment principle is to be applied. Note 2 explains that the usual basis for engagement of an APS employee is as an ongoing APS employee and refers to paragraph 10A(1)(b) of the Act. Note 2 also explains that an agency head is expected to have regard to that paragraph before engaging a person as a non-ongoing APS employee.

Subregulation 3.5(2) provides, under the heading ‘Specified task’, that where an agency head engages a person as a non-ongoing employee for a specified task, the agency head must, at the time of the engagement, be able to estimate reasonably the duration of the task, and be satisfied that the services of the person are unlikely to be required after the task is complete.

Subregulations 3.5(3) to 3.5(6) have a heading of ‘Specified term’.

Paragraph 3.5(3)(a) provides that an agency head may engage a person as a non-ongoing employee for a specified term if the duties of the employment are to be performed by the

person only for a limited period, and the performance of those duties by that person is unlikely to be required after that period; for example, if the agency has a temporary increase in its workload, or has a temporary demand for employees with particular skills, or needs to replace an ongoing employee who is on leave or who is assigned to other duties.

Paragraph 3.5(3)(b) provides that an agency head may engage a person as a non-ongoing employee for a specified term if the particular skills, knowledge or experience required to perform the duties of the employment can best be met by employing a person who has recently worked in the industry that corresponds to the employment for which the person is being engaged.

Paragraph 3.5(3)(c) provides that an agency head may engage a person as a non-ongoing employee for a specified term if the purpose of the employment is to assist the person to gain skills and experience, by participating in the workforce under a scheme approved by the agency head or by the Commissioner, or to gain a formal occupational qualification, licence, accreditation or registration.

Paragraph 3.5(3)(d) provides that an agency head may engage a person as a non-ongoing employee for a specified term if the person has received a written offer of ongoing employment, but prefers to be engaged as a non-ongoing employee.

Paragraph 3.5(3)(e) provides that an agency head may engage a person as a non-ongoing employee for a specified term if the person is an ongoing Parliamentary Service employee.

Paragraph 3.5(4)(a) provides that if an agency head engages a person as a non-ongoing employee for a specified term, as described in subregulation 3.5(3) of the Principal Regulations as amended, the period of the engagement must be a period that represents a reasonable estimate of the time required for the performance of the duties and, for a person engaged in accordance with paragraph 3.5(3)(a) or (b), must not be more than 18 months.

Paragraph 3.5(4)(b) provides that if an agency head engages a person as a non-ongoing employee for a specified term, as described in 3.5(3)(a) or (b) of the Principal Regulations as amended, any extension of the engagement must be for a period that represents a reasonable estimate of the length of time required for the performance of the duties.

Paragraph 3.5(4)(c) provides that if an agency head engages a person as a non-ongoing employee for a specified term, as described in subregulation 3.5(3) of the Principal Regulations as amended, subject to subregulation 3.5(5), the total period of the engagement, including any extensions of the engagement, must not exceed three years.

Subregulation 3.5(5) provides that the period of three years mentioned in paragraph 3.4(c) may be extended, for a period of not more than 12 months, only if the agency head considers that the engagement is necessary for the agency's operations; and the Commissioner is satisfied that special circumstances exist and authorises the agency head to extend the engagement.

Subregulation 3.6(4) provides that in addition to subregulations 3.5(3), (4) and (5) an agency head may engage a person as a non-ongoing employee for a specified term if the person is an employee of a State or Territory, or an authority of a State or Territory, and the agency head has entered into an agreement with a State or Territory, or an authority of a State or Territory, to engage the person as a non-ongoing employee for a specified term, and the period of the engagement is the period decided by the agency head.

The amendments to the Principal Regulations in this item are intended to simplify the arrangements for the employment of non-ongoing non-SES employees for a specified term or for the duration of a specified task, including by:

- streamlining the grounds under which agencies can engage persons as non-ongoing employees on a specified term basis;
- removing existing requirements in regulation 3.5 of the Principal Regulations relating to an agency having to provide an opportunity to ongoing employees to be considered for certain non-ongoing opportunities for both a specified term and for the duration of a specified task (the existing requirement in the Commissioner's Directions that all specified term/task opportunities that are to extend beyond 12 months must be notified in the *Public Service Gazette* and a competitive merit selection process undertaken will be retained);
- including a standard three-year time limit for non-ongoing specified term employment to replace the variety of time limits now in the Regulations (although a maximum initial period of engagement of 18 months would apply in certain circumstances);
- removing the specific requirement that an agency head may only extend the employment of a specified term employee in certain circumstances if the agency head certifies that the extension is in the public interest;
- giving the Commissioner the power to extend non-SES specified term employment beyond the three years in special circumstances (for up to a further 12 months);
- introducing new provisions which specifically relate to the engagement of State/Territory public servants as non-ongoing APS employees for a specified term.

The Act, as amended, will continue to provide that the usual basis for engagement is as an ongoing APS employee (subsection 10A(1)(b)).

**Item [9]—Repeal of regulations 3.8, 3.8A, 3.9, 3.9A, 3.9B, 3.11, 3.12 and 3.12A**

This item repeals regulations 3.8, 3.8A, 3.9, 3.9A, 3.9B, 3.11, 3.12 and 3.12A of the Principal Regulations.

These regulations currently deal with:

- the date of effect of a promotion of an ongoing APS employees (regulation 3.8);
- the date of effect of engagement in the APS of ongoing Parliamentary Service employee at a higher classification (regulation 3.8A);
- the date of effect of ongoing moves between agencies (regulation 3.9);
- the date of effect of other moves between agencies including the variation of such moves (regulations 3.9A and 3.9B)
- procedures applicable to the termination of employment of non-ongoing APS employees (regulation 3.11);
- the requirement to notify certain employment decisions (and the cancellation of certain employment decisions) in the *Gazette* (regulations 3.12 and 3.12A).

The Amendment Act provides the Commissioner with a new power (under section 11A) to make directions about APS employment matters. Matters formerly contained in these regulations are now set out in the Commissioner's Directions.

**Item [10]—Repeal of Division 3.2**

This item repeals Division 3.2 of the Principal Regulations, which deals with the right of return of election candidates. The Amendment Act provides the Commissioner with a new power (under section 11A) to make directions about APS employment matters. Matters previously contained in Division 3.2 are now set out in the Commissioner's Directions.

**Item [11]—Insertion of subregulation 4.5(1A)**

Part 4 of the Principal Regulations provides for the establishment of Independent Selection Advisory Committees ('ISACs'). An ISAC is an independent committee established by the Merit Protection Commissioner that makes recommendations to agencies about the suitability of candidates in recruitment exercises.

Regulation 4.5 of the Principal Regulations requires the Merit Protection Commissioner to issue instructions about the procedures to be followed by an ISAC in performing its function under Part 4 of the Principal Regulations.

Subregulation 4.5(1A) of the Principal Regulations as amended provides that the Merit Protection Commissioner may issue instructions, in writing, about the procedures to be followed by an agency head who is appointed under subregulation 4.7(1B) to act on behalf of an ISAC in performing the functions of an ISAC under Part 4.

The amendment to regulation 4.5 is consequential to an amendment to regulation 4.7.

**Item [12]—Subregulation 4.5(3)**

Subregulation 4.5(3) provides for an ISAC, or an agency head appointed under subregulation 4.7(1B) to act on behalf of an ISAC, to comply with instructions issued by the Merit Protection Commissioner under subregulation 4.5(1).

**Item [13]—Insertion of subregulation 4.7(1A), (1B) and (1C)**

Regulation 4.7 of the Principal Regulations specifies the action which must be taken by an ISAC in assessing the relative merits of candidates for an employment opportunity. This assessment is based on the relative suitability of each candidate for the duties, their work-related qualities and the relative capacity of each candidate to achieve outcomes related to the duties.

Subregulation 4.7(1A) provides that in conducting an assessment under subregulation 4.7(1), the ISAC may seek and accept expert opinion about the work-related qualities and capabilities of candidates.

Subregulation 4.7(1B) provides that the ISAC may appoint the relevant agency head to act on behalf of the ISAC in conducting some or all of an assessment under subregulation 4.7(1).

Subregulation 4.7(1C) provides that the agency head must act in accordance with instructions given to the agency head by the ISAC, and must act in accordance with instructions from the Merit Protection Commissioner only to the extent that the agency head is appointed as an agent to the ISAC under subregulation 4.7(1B)

These amendments provide an ISAC with the flexibilities that are available for general APS recruitment, including seeking and using expert opinion (for example assessment centres, technical testing).

The amendments are aimed at improving the operational efficiency and effectiveness of ISACs.

**Item [14]—Substitution of subregulation 4.10(2)**

This item repeals subregulation 4.10(2) of the Principal Regulations, substitutes subregulation 4.10(2), and adds a note.

Subregulation 4.10(2) provides that the engagement, promotion, or assignment of duties must be notified in the Public Service *Gazette* as having been made in accordance with an ISAC recommendation.

A note to the subregulation explains that subregulation 4.10(2) also applies to any subsequent engagement, promotion or assignment of duties made by an agency head in accordance with an ISAC recommendation.

As indicated in Item [9] above, the authority for the requirement to notify certain employment matters in the Public Service *Gazette* is contained in the Commissioner's Directions rather than the regulations.

This therefore requires a consequential amendment to subregulation 4.10(2) to remove the reference to Principal Regulation 3.12 as the authority for the requirement to notify an employment decision made on the recommendation of an ISAC in the *Gazette*.

Item [6] above makes reference to the change in title of the *Gazette* from the APS Employment *Gazette* to the Public Service *Gazette*. This also requires a consequential amendment to the title of the *Gazette* in subregulation 4.10(2).

**Item [15]—Subregulation 4.11(1)**

Item 15 amends subregulation 4.11(1) to add 'of a candidate' after 'recommendation'.

The amendment is intended to clarify the nature of the recommendation by the ISAC to the agency head.

**Item [16]—Subregulation 4.11(2)**

This item repeals subregulation 4.11(2) of the Principal Regulations and substitutes new subregulations 4.11(1A) and (2).

Subregulation 4.11(1A) provides that subregulation 4.11(1) applies if, after an ISAC has made its recommendation, the candidate is found to have breached the Code of Conduct and the agency head believes that the candidate is no longer suitable for the employment opportunity, or the candidate has lost a qualification that is essential for his or her suitability for the employment opportunity (for example, a security clearance), and the agency head has consulted the Merit Protection Commissioner about the candidate, and the agency head acts in accordance with the ISAC's recommendation in relation to the next suitable candidate.

Subregulation 4.11(2) provides for the promotion to be notified in the Public Service *Gazette* as a promotion decision that is subject to review under Division 5.2 of the Principal Regulations. This amendment is consequential to the amendments in item [6].

**Item [17]—Subregulation 4.12(1)**

This item amends subregulation 4.12(1) of the Principal Regulations to omit 'must not obstruct' and substitute 'commits an offence if the person obstructs'.

**Item [18]—Paragraph 5.5(c)**

This item amends paragraph 5.5(c) of the Principal Regulations to insert 'and the APS Employment Principles' after 'Values'. This amendment is consequential to amendments to the APS Values and the introduction of APS Employment Principles in the Amendment Act.

**Item [19]—Substitution of regulation 5.8, note**

This item repeals the existing note to regulation 5.8 of the Principal Regulations and substitutes an amended note.

The note to regulation 5.8 of the Principal Regulations as amended explains that it is an APS Employment Principle that engagement and promotion decisions are based on merit. The note refers to paragraph 10A(1)(c) of the Act, as amended, and explains that a decision relation to engagement or promotion is based on merit if the matters set out in subsection 10A(2) of the Act are satisfied.

This amendment is consequential to amendments to the APS Values and the introduction of APS Employment Principles in the Amendment Act.

**Item [20]–[23]—Sub-subparagraph 5.9(1)(b)(i)(A); subparagraph 5.9(1)(b)(ii); sub-subparagraph 5.9(1A)(b)(i)(A); sub-subparagraph 5.9(1A)(b)(ii)**

These items amend subparagraphs and sub-subparagraphs 5.9(1)(b)(i)(A), 5.9(1)(b)(ii), 5.9(1A)(b)(i)(A) and 5.9(1A)(b)(ii) of the Principal Regulations by replacing the references to the Gazette or the Electronic APS Employment Gazette with a reference to the *Public Service Gazette* (see item [6] above).

**Item [24]—Subregulation 5.9(2)**

This item amends subregulation 5.9(2) by replacing the reference to Division 3.1 of the Principal Regulations with a reference to Chapter 2 of the Australian Public Commissioner’s Directions. This change is consequential to item 9.

**Item [25]—Regulation 5.12**

This item adds new subregulation 5.12(5) to regulation 5.12 of the Principal Regulations.

Subregulation 5.12(5) provides that, subject to paragraph 5.33(1)(a), a person mentioned in subregulation 5.12(1) is not entitled to have access to a statement mentioned in subregulation 5.12(1) or subregulation 5.12(1A) that is given to the Merit Protection Commissioner by another person mentioned in those subregulations, and that a person mentioned in subregulation 5.12(1A) is not entitled to have access to a statement mentioned in subregulations 5.12(1) or (1A) that was given to the Merit Protection Commission by another person mentioned in those subregulations.

This amendment is aimed at reducing the adversarial nature of promotion reviews and maintaining appropriate privacy for employees who are a party to a review.

The amendment does not affect the obligations of a Promotion Review Committee (‘PRC’) to afford procedural fairness, in accordance with subregulation 5.33(1)(a) of the Principal Regulations. This requirement is reinforced by binding instructions issued by the Merit Protection Commissioner under regulation 5.15 of the Principal Regulations. In the event that a party to a promotion review made a claim in their written statement about a second party, relevant to the second party’s claim to promotion, the PRC would be required to inform the first party of the substance of the claim and give them an opportunity to comment, in accordance with subregulation 5.33(1)(a) of the Principal Regulations.

**Item [26]—Subregulation 5.20(1) (note); Item [27]—subregulation 5.20(4) (Note 1); Item [28]—subregulation 5.20(4) (Note 2)**

These items amend the notes to subregulations 5.20(1) and 5.20(4) so that references to regulations 3.8 and 3.8A in regulation 5.20 of the Principal Regulations are omitted and replaced with a reference to Chapter 2 of the Commissioner’s Directions. This change is consequential to item [9], which repeals regulations 3.8 and 3.8A. The repealed provisions are included in Chapter 2 of the Commissioner’s Directions.

**Item [29]—Subregulation 5.21(1)**

Regulation 5.21 of the Principal Regulations prohibits a person from obstructing a PRC in carrying out its functions, and imposes a penalty for an offence.

This item substitutes ‘commits an offence if the person obstructs’ for ‘must not obstruct’ in subregulation 5.21(1). It reflects modern drafting principles for provisions relating to offences. There is no amendment to the penalty of 10 penalty units.

**Item [30]—Substitution of Division 5.3 heading**

Item [54] below inserts Division 7.3 into Part 7 of the Principal Regulations, which provides review rights to eligible former APS employees in certain circumstances.

This item amends the heading of Division 5.3 to clarify that the division only applies to current APS employees.

**Item [31]—Substitution of regulation 5.22**

This item repeals regulation 5.22 of the Principal Regulations, which provides for the entitlement to review for current APS employees, and substitutes new regulation 5.22.

Subregulation 5.22(1) provides for a non-SES employee (the affected employee) to be entitled to review of an APS action under Division 5.3 of the Principal Regulations if the action is action by an agency head, or an APS employee, or the Commissioner under section 41B of the Act, and the action is a reviewable action (including the action of finding that the affected employee has breached the Code of Conduct).

A note to regulation 5.22(1) explains that a locally engaged employee is not an APS employee and, therefore, is not entitled to review of action under Division 5.3 of the Principal Regulations.

Section 41B of the Act is a new provision inserted by the Amendment Act and provides, among other things, the Commissioner with the power to inquire into and determine whether an APS employee (or a former APS employee) has breached the APS Code of Conduct.

Subregulation 5.22(2) provides that if the affected employee makes an application for review under Division 5.3 of the Principal Regulations, the affected employee ceases to be entitled to review under Division 5.3 if, after the application is made the employee ceases to be employed; or the employee is promoted to an SES position.

Subregulation 5.22(3) provides that a former APS employee is not entitled to review under Division 5.3 of the Principal Regulations.

A note to subregulation 5.22(3) explains that Part 7 of the Principal Regulations sets out the rights of former APS employees to review.

**Item [32]—Subregulation 5.23(3)**

This item amends subregulation 5.23(3) to omit ‘or committee that’ and substitute ‘who’. This amendment is consequential to amendments made by the Amendment Act to section 33 of the Act.

**Item [33]—Substitution of paragraph 5.23(3)(a)**

Item 33 repeals paragraph 5.23(3)(a) and substitutes paragraph 5.23(3)(a).

Paragraph 5.23(3)(a) provides that an action is not, or ceases to be, reviewable action if the person conducting the review considers that the action should not be reviewable if the application by the affected employee for review of the action is misconceived or lacking in substance.

**Item [34]—Insertion of subregulations 5.23(4) and (5)**

Item 34 adds subregulations 5.23(4) and (5) to the end of regulation 5.23 of the Principal Regulations.

Subregulation 5.23(4) provides that an action mentioned in an item of the table in the subregulation is not, or ceases to be, reviewable action if a circumstance mentioned in the item applies.

A table contained in subregulation 5.23(4) sets out certain actions and the circumstances in which they are not, or cease to be, reviewable actions.

Item 1 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application for primary review of an APS action to an affected employee's agency head under subregulation 5.24(1) and the application is not made within 120 days of the APS action.

Item 2 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application for primary review of an APS action made to the Merit Protection Commissioner under paragraph 5.24(2)(a) and the application is not made within 60 days of the determination that the affected employee has breached the Code of Conduct.

Item 3 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application for primary review of an APS action made to the Merit Protection Commissioner under paragraph 5.24(2)(b) and the application is not made within 60 days of the sanction for breach of the Code of Conduct being imposed.

Item 4 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application for primary review of an APS action made to the Merit Protection Commissioner under subregulation 5.24(3) and the application is not made within 60 days of the APS action.

Item 5 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application to the Merit Protection Commissioner for secondary review of an APS action if the agency head has told the affected employee under regulation 5.26 that the action is not reviewable and the application is not made within 60 days of the affected employee being told that the APS action is not reviewable.

Item 6 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application to the Merit Protection Commissioner for secondary review of an APS action if: the agency head has told the affected employee of the agency head's decision under subregulation 5.27(5); and the affected employee is not satisfied with the decision; and the application is not made within 60 days of the affected employee being told of the agency head's decision.

Item 7 of the table in subregulation 5.23(4) provides that an action is not reviewable, or ceases to be reviewable, if the action is an application to the Merit Protection Commissioner for secondary review of an APS action and the application for primary review of the action was an application referred to in item 1 of the table in subregulation 5.23(4) of the Principal Regulations as amended.

Subregulation 5.23(5) provides that an action mentioned in an item of the table in subregulation 5.23(4) is reviewable action if the person who is, or would be, conducting the review considers that there are exceptional circumstances explaining the failure to make an application within the period in the item.

Subsection 33(1) of the Act provides an APS employee with an entitlement to review, in accordance with the Regulations, of any APS action that relates to his or her employment. Subsection 33(2) of the Act provides that the regulations may prescribe exceptions to the entitlement set out in subsection 33(1).

Regulation 5.23 of the Principal Regulations prescribes what is a reviewable action under section 33 of the Act and regulation 5.23A of the Principal Regulations prescribes when an application for review should be made. The amendments to the Principal Regulation include amendments aimed at clarifying the actions that are reviewable, as well as the timeframes for lodging an application for review.

**Item [35]—Repeal of regulation 5.23A**

This item repeals regulation 5.23A of the Principal Regulations, which prescribes when an application for review should be made. As a result of other amendments—see item [34] above—the provisions of regulation 5.23A are included in regulation 5.23 of the Principal Regulations as subregulations 5.23(4) and 5.23(5). There are no changes to the timeframes for lodging a review.

**Item [36]—Regulation 5.26**

This item deletes reference to ‘subregulation 5.23(3)’ and inserts reference to ‘subregulations 5.23(3) and (4)’.

This item is a consequential amendment arising from amendments to regulation 5.23 and the repeal of regulation 5.23A of the Principal Regulations.

**Item [37]—Substitution of subregulation 5.27(1)**

This item repeals subregulation 5.27(1) of the Principal Regulations and inserts new subregulation 5.27(1), which provide that, if an agency head does not refer an application for review to the Merit Protection Commissioner, and considers that the relevant APS employee is entitled to review under Division 5.3 of the Principal Regulations, then the agency head must review the action and attempt to resolve the employee’s concerns about the action.

This item is intended to put beyond doubt that an agency head is not required to review an action if the agency head considers that the employee is not entitled to review.

**Item [38]—Substitution of subregulations 5.28(2), (3), (4) and (5)**

This item repeals subregulations 5.28(2), (3), (4) and (5) and replaces them with provisions that provide for the Merit Protection Commissioner to conduct primary reviews of actions.

Subregulation 5.28(2) provides that if the Merit Protection Commissioner considers that an APS employee is entitled to review under Division 5.3 of the Principal Regulations, the Merit Protection Commissioner must review the action in any manner the Merit Protection Commissioner thinks fit (subject to the minimum requirements mentioned in subregulation 5.33(1) of the Principal Regulations); must make a recommendation about the action; must tell the agency head, in writing, the recommendation and reasons for the recommendation; and must tell the employee, in writing, of the recommendation and reasons given to the agency head.

This item simplifies the provisions prescribing the conduct of a review by the Merit Protection Commissioner by omitting the provisions in subregulation 5.31(1) of the Principal Regulations relating to the requirement for the Merit Protection Commissioner to nominate himself or herself to conduct a review, and omitting the provisions in subregulations 5.31(3) of the Principal Regulations relating to the use of a nominated person or a committee. The amendments are consequential to amendments to section 33 of the Act made by the Amendment Act.

Paragraph 5.28(2)(b) introduces a new provision that enables the Merit Protection Commissioner to conduct a secondary review in any manner he or she thinks fit, similar to the discretion available to an agency head in subregulation 5.27(2) of the Principal Regulations.

**Item [39]—Substitution of regulation 5.31**

This item repeals regulation 5.31 of the Principal Regulations and replaces it with regulation new 5.31, which prescribes the way in which the Merit Protection Commissioner is to conduct secondary reviews of actions.

Regulation 5.31 provides that if the Merit Protection Commissioner considers that an APS employee is entitled to review under Division 5.3 of the Principal Regulations, the Merit Protection Commissioner must review the action in any manner the Merit Protection Commissioner thinks fit (subject to the minimum requirements mentioned in subregulation 5.33(1) of the Principal Regulations); must make a recommendation about the action; must tell the agency head, in writing, the recommendation and reasons for the recommendation; and must tell the employee, in writing, of the recommendation and reasons given to the agency head.

This item simplifies the provisions prescribing the conduct of a review by the Merit Protection Commissioner by omitting the provisions in subregulation 5.31(1) of the Principal Regulations relating to the requirement for the Merit Protection Commissioner to nominate himself or herself to conduct a review, and omitting the provisions in subregulations 5.31(3) of the Principal Regulations relating to the use of a nominated person or a committee. The amendments are consequential to amendments to section 33 of the Act made by the Amendment Act.

Subregulation 5.31(b) introduces a new provision that enables the Merit Protection Commissioner to conduct a secondary review in any manner he or she thinks fit, similar to the discretion available to an agency head in subregulation 5.27(2) of the Principal Regulations.

**Item [40]—Insertion of subregulation 5.32(2A)**

This item inserts subregulation 5.32(2A), which provides that if an agency head acts in accordance with a recommendation made under regulation 5.28 or 5.31 of the Principal Regulations, the agency head is not required to seek the view of the relevant employee before acting on the recommendation.

A note to subregulation 5.32(2) explains that the views of the APS employee have already been sought by the Merit Protection Commissioner during the review in accordance with the principles of procedural fairness.

The purpose of this amendment is to remove uncertainty about whether agency heads need to take an additional procedural step once they receive a recommendation from the Merit Protection Commissioner.

**Item [41]—Subregulation 5.33(2)**

This item omits the reference to a person or committee from subregulation 5.33(2) of the Principal Regulations and replaces this with a reference to the Merit Protection Commissioner. This is a consequential amendment resulting from the amendments to regulation 5.28 and regulation 5.31—see items [38] and [39] above.

**Item [42]—Repeal of regulation 5.34**

This item repeals regulation 5.34 of the Principal Regulations, which requires the Merit Protection Commissioner to issue instructions about the procedures to be followed by a person or committee conducting a review under regulation 5.28 or 5.31 of the Principal Regulations. This amendment is consequential to amendments to section 33 of the Act made by the Amendment Act.

**Item [43]—Subregulation 5.35(1)**

This item omits the reference to a person or committee from subregulation 5.35(1) of the Principal Regulations, and inserts a reference to the Merit Protection Commissioner. This amendment is consequential to amendments to section 33 of the Act made by the Amendment Act.

**Item [44]—Subregulation 5.37(1)**

This item omits ‘must not obstruct a person or committee conducting a review in carrying out its’ from subregulation 5.37(1) and substitutes ‘commits an offence if the person obstructs a person conducting a review carrying out his or her’. The amendment reflects modern drafting principles for provisions relating to offences. This amendment is also consequential to amendments to section 33 of the Act made by the Amendment Act.

Regulation 5.37 of the Principal Regulations prohibits a person from obstructing a person or committee carrying out a review of action under Division 5.3 of the Regulations and imposes a penalty for an offence. This item makes no change to the penalty of 10 penalty units.

**Item [45]—Subregulation 5.37(2)**

This item omits the reference to a committee from subregulations 5.37(1) and 5.37(2) of the Principal Regulations. This amendment is consequential to amendments to section 33 of the Act made by the Amendment Act.

**Item [46]—Part 6 (heading, excluding the note)**

This item amends the heading of Part 6 of the Principal Regulations from ‘The Public Service Commissioner’ to ‘The Australian Public Service Commissioner’.

**Item [47]—Part 6 (note to heading)**

This item amends the note below the heading of Part 6 of the Principal Regulations to refer to parts of the Regulations as amended in which functions of the Commissioner not dealt with in Part 6 are set out.

**Item [48]—Regulation 6.1**

This item amends regulation 6.1 of the Principal Regulations to replace the head of power under which the regulation is made (paragraph 41(1)(l) of the Act) with the new head of power under the Act as amended (paragraph 41(2)(p)), and to provide that the Commissioner has discretion to inquire into alleged breaches of the Code of Conduct by the Merit Protection Commissioner.

**Item [49]—Insertion of regulation 6.1A**

This item inserts a new regulation after regulation 6.1 of the Principal Regulations.

Regulation 6.1A provides for the Commissioner to inquire into alleged breaches of the Code of Conduct by statutory office holders.

Subregulation 6.1A(1) provides, for paragraph 41(2)(p) of the Act, that a function of the Commissioner is to inquire into alleged breaches of the Code of Conduct by a statutory office holder.

Subregulation 6.1A(2) provides that the Commissioner may decline to conduct, or may discontinue, an inquiry under subregulation 6.1A(1).

Subregulation 6.1A(3) prescribes matters to which the Commissioner must have regard in deciding whether to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by a statutory office holder. These matters are whether the subject matter of the inquiry is addressed in another law relating to the statutory office holder; whether the statutory office holder is bound by rules that require behavioural standards similar to those required by the Code of Conduct (for example, an Act may include provisions for dealing with a conflict of interest relating to a statutory office holder); any existing reporting and inquiry mechanisms that relate to the statutory office holder; whether sufficient detail about the allegation has been provided; whether the allegation refers to specific decisions or actions

by the statutory office holder; and whether the allegation is frivolous, vexatious, misconceived, or lacking in substance.

Subregulation 6.1A(4) provides that, if the Commissioner inquires into an alleged breach of the Code of Conduct by a statutory office holder, the Commissioner may determine whether a breach of the Code of Conduct has occurred, and may make recommendations.

Subregulation 6.1A(5) provides that a determination or recommendation mentioned in subregulation 6.1A(4) forms part of the results of the Commissioner's inquiry.

Subregulation 6.1A(6) provides that, where the Commissioner conducts an inquiry into an alleged breach of the Code of Conduct by a statutory office holder, the Commissioner must tell the statutory office holder the results of the inquiry.

Subregulation 6.1A(7) provides that, where the Commissioner conducts an inquiry into an alleged breach of the Code of Conduct by a statutory office holder, the Commissioner must tell the Secretary of the relevant portfolio department, or another relevant agency head, the results of the inquiry, unless the Commissioner is satisfied that it would be inappropriate to do so (for example, if the relevant agency head were personally involved in the matter).

Subregulation 6.1A(8) provides that if the Commissioner is satisfied that the results of an inquiry are sufficiently serious, the Commissioner must tell the Agency Minister, or, if applicable, the Presiding Officers, the results of the inquiry.

Subregulation 6.1A(9) provides that, if the Commissioner has not told the results of an inquiry to the Agency Minister, or to the Presiding Officers, in accordance with subregulation 6.1A(8), and is not satisfied with the statutory office holder's response to the Commissioner, the Commissioner may tell the Agency Minister, or, if applicable, the Presiding Officers, the results of the inquiry, and give an explanation of why the Commissioner is not satisfied with the statutory office holder's response.

**Item [50]—Regulation 6.2 (heading)**

This item amends the heading of Regulation 6.2 of the Principal Regulations from 'Commissioner's functions—inquiries into alleged breaches of Code of Conduct by agency heads (Act s 41 (3))' to 'Australian Public Service Commissioner's functions—inquiries into alleged breaches of Code of Conduct by agency heads (Act s 41A)'.

**Item [51]—Regulation 6.2**

This item replaces the head of power under which regulation 6.2 is made (paragraph 41(3)(c) of the Act) with the new head of power under the Act as amended (paragraph 41A(2)(c)).

**Item [52]—Substitution of regulations 6.3 and 6.4**

This item repeals regulations 6.3 and 6.4 of the Principal Regulations, and substitutes regulations 6.3 to 6.9, which make provision in relation to several of the Commissioner's review or inquiry functions. Regulations 6.3 and 6.4 of the Principal Regulations deal respectively with non-disclosure of information by the Public Service Commissioner and the Public Service Commissioner's immunity from civil proceedings. Both of these provisions have been incorporated into the Act as amended, at section 72A and subsection 78A(1) respectively.

Regulation 6.3 prescribes the circumstances in which the Commissioner may decline to conduct, or may discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head.

Subregulation 6.3(1) provides, for the purposes of paragraphs 41A(3)(a) and (b) of the Act, that the Commissioner may decide to decline to conduct, or may discontinue, an inquiry into

an alleged breach of the Code of Conduct by an agency head if the Commissioner has concluded that conducting or continuing the inquiry would not be in the public interest.

Subregulation 6.3(2) prescribes matters to which the Commissioner may have regard in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head.

Paragraph 6.3(2)(a) provides that in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head, the Commissioner may have regard to whether the allegation is frivolous, vexatious, misconceived, or lacking in substance.

Paragraph 6.3(2)(b) provides that in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head, the Commissioner may have regard to whether sufficient detail about the allegation has been provided.

Paragraph 6.3(2)(c) provides that in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head, the Commissioner may have regard to whether the allegation refers to specific decisions or actions by the agency head.

Paragraph 6.3(2)(d) provides that, in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head, the Commissioner may have regard to whether the allegation identifies conduct which, if proven, would constitute a breach of the Code of Conduct.

Paragraph 6.3(2)(e) provides that in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head, the Commissioner may have regard to whether the allegation relates to a decision properly taken, or to policy properly adopted, by the agency head, with which the person making the allegation disagrees.

Paragraph 6.3(2)(f) provides that in deciding to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an agency head, the Commissioner may have regard to whether the cost of conducting an inquiry is justified in all the circumstances.

Regulation 6.4 prescribes the basic procedural requirements with which procedures established by the Commissioner for determining breaches of the Code of Conduct by APS employees must comply.

Subregulation 6.4(1) provides that, for the purposes of paragraph 41B(3)(a) of the Act, regulation 6.4 prescribes basic procedural requirements with which the Commissioner's written procedures must comply.

Subregulation 6.4(2) provides that procedures established by the Commissioner for determining breaches of the Code of Conduct by APS employees must require the Commissioner not to make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or a former APS employee unless certain conditions are met, and sets out these conditions.

Paragraph 6.4(2)(a) provides that the Commissioner must not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or former APS employee unless the Commissioner has taken reasonable steps to notify the APS employee or former APS employee of the details of the suspected breach, including any variation of those details.

Paragraph 6.4(2)(b) provides that the Commissioner must not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or former APS

employee unless the Commissioner has taken reasonable steps to notify the APS employee of the sanctions that may be imposed on the employee under subsection 15(1) of the Act.

Paragraph 6.4(2)(c) provides that the Commissioner must not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or former APS employee unless the APS employee or former APS employee has been given a reasonable opportunity to make a statement in relation to the alleged breach.

Subregulation 6.4(3) provides that the Commissioner's procedures must require that the process for determining whether an APS employee or a former APS employee has breached the Code of Conduct be carried out as quickly, and with as little formality, as a proper consideration of the matter allows.

Subregulation 6.4(4) provides that the Commissioner's procedures must require that reasonable steps be taken to ensure that any person authorised under the Commissioner's written procedures to determine whether an APS employee or former APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

Subregulation 6.4(5) provides that the Commissioner's procedures must require a written record to be prepared stating whether it has been determined that the APS employee or former APS employee has breached the Code of Conduct.

Regulation 6.5 provides that the Commissioner may discontinue an inquiry into an alleged breach of the Code of Conduct by an APS employee or a former APS employee if the Commissioner reasonably believes that it would not be appropriate in all the circumstances to continue the inquiry. Discretion to decline to inquire into an alleged breach of the Code of Conduct by an APS employee or former APS employee is provided in the Act.

Regulation 6.6 prescribes, for the purposes of paragraph (c) of the definition of 'protected information' in subsection 72A(1) of the Act, information obtained by an entrusted person in connection with the performance of functions or duties, or the exercise of powers, under regulation 6.1 of the Principal Regulations.

Regulation 6.7 prescribes, for the purposes of paragraph 72A(7)(e) of the Act, information obtained by an entrusted person in connection with the performance of functions or duties, or the exercise of powers, under regulation 6.1 of the Principal Regulations.

Regulation 6.8 prescribes regulation 6.1 of the Principal Regulations for the purposes of paragraph 72C(2)(c) of the Act.

Regulation 6.9 prescribes, for the purposes of paragraph 78A(1)(h), anything done, or omitted to be done, in good faith by a person in connection with the performance or purported performance of functions or duties, or the exercise or purported exercise of powers, mentioned in regulation 6.1 of the Principal Regulations.

**Item [53]—Insertion of Division 7.1**

This item inserts Division 7.1, titled 'Prescribed functions', in the Principal Regulations. Part 7 of the Principal Regulations is amended to insert a divisional structure to identify the different functions of the Merit Protection Commissioner that are prescribed under Part 7.

**Item [54]—Substitution of subregulation 7.1(2)**

This item repeals subregulation 7.1(2) of the Principal Regulations, and inserts new subregulations 7.1(2) and 7.1(3).

Subregulation 7.1(2) prescribes, for the purposes of paragraph 50(1)(e) of the Act, the Merit Protection Commissioner's functions set out in Divisions 7.2, 7.3, 7.4 and 7.5 of the regulations as amended.

Subregulation 7.1(3) prescribes, for the purposes of paragraph 50A(2)(a) of the Act, the Merit Protection Commissioner's functions set out in Division 7.6.

A note below subregulation 7.1(3) states that functions of the Merit Protection Commissioner in relation to whistleblower reports are set out in regulations 2.6 and 2.7.

**Item [55]—Insertion of Division 7.2**

This item inserts Division 7.2, titled 'Complaints of former employees', in the Principal Regulations. The new Division prescribes the Merit Protection Commissioner's function of reviewing complaints by former employees relating to their entitlements on separation from the APS. Subregulations 7.2(1) and (2) remain unchanged.

**Item [56]—Insertion of Division 7.3**

This item inserts Division 7.3, titled 'Review of determination of breach of Code of Conduct by former APS employee', in the Principal Regulations. The new Division provides for review rights for former employees, and provides for the Merit Protection Commissioner to conduct a review of a determination of a breach of the Code of Conduct by a former APS employee.

Regulation 7.2A provides for a former APS employee's entitlement to review of a determination by an agency head that the former APS employee had breached the Code of Conduct.

Subregulation 7.2A(1) provides that a former APS employee who was not an SES employee at the time their employment ceased (termed the 'affected former employee') is entitled to review of a determination by an agency head, made after their employment ceased, that they had breached the Code of Conduct (including by engaging in conduct referred to in subsection 15(2A) of the Act as amended).

Subregulation 7.2A(2) provides that the affected former employee is not, or ceases to be, entitled to a review of the determination mentioned in subregulation 7.2A(1) if the affected former employee has applied to have the determination reviewed by a Court or Tribunal, and the determination is reviewable by that Court or Tribunal; or if the Merit Protection Commissioner considers that the determination should not be reviewable because the affected former employee has previously applied for review of the determination under Division 7.3, or has applied, or could apply, to have the determination reviewed by an external review body and review by that body would be more appropriate than review under division 7.3, or review or further review of the determination is not otherwise justified in the circumstances.

Note 1 under subregulation 7.2A(2) explains that examples of review bodies are the Commonwealth Ombudsman, the Australian Information Commissioner, and the Australian Human Rights Commission.

Note 2 under subregulation 7.2A(2) explains that review may not be justified because the affected former employee does not respond to a request under regulation 7.2G for further information about why the review is sought.

Subregulation 7.2A(3) provides that the affected former employee is not, or ceases to be, entitled to review of the determination mentioned in subregulation 7.2(1) if an application for review of the determination is not made within 60 days of the determination.

Subregulation 7.2A(4) provides that an affected former employee is entitled to review of the determination if the Merit Protection Commissioner considers that there are exceptional circumstances explaining the failure to make an application within the period mentioned in subregulation 7.2(3); for example, if the affected former employee could demonstrate that they had not received notification of the determination.

Subregulation 7.2A(5) provides that the affected former employee is also entitled to review as mentioned in regulation 7.2 of the Principal Regulations, and is not entitled to any other review.

Regulation 7.2B ('Application for review') provides that an affected former employee mentioned in regulation 7.2A may apply in writing to the Merit Protection Commissioner for review of the determination, and that the application must state briefly why the review is sought, and, if a particular outcome is sought, the outcome sought.

Regulation 7.2C ('Notice that action is not reviewable') provides that if an application for review of a determination is made, and the determination is not reviewable under paragraph 7.2A(2)(b) and subregulation 7.2A(3), the Merit Protection Commissioner must tell the affected former employee in writing that the determination is not reviewable, and the reasons why the determination is not reviewable.

Regulation 7.2D ('Conduct of review') provides that if the Merit Protection Commissioner considers that the affected former employee is entitled to review under Division 7.3, the Merit Protection Commissioner must review the determination in any manner the Merit Protection Commissioner thinks fit (subject to the minimum requirements mentioned in regulation 7.2E); must make a recommendation to the agency head, in writing, about the determination; must tell the agency head, in writing, the reasons for the recommendation; and must tell the affected former employee, in writing, of the recommendations and reasons given to the agency head.

Regulation 7.2E ('Review procedures—minimum requirements') deals with the minimum requirements for reviews conducted under Division 7.3.

Subregulation 7.2E(1) provides that the procedures used for a review under Division 7.3 must meet minimum requirements—namely, that the procedures must have due regard to procedural fairness; that the review must be conducted in private; and that the review must be completed as quickly, and with as little formality, as a proper consideration of the matter allows.

Subregulation 7.2E(2) provides that a person appearing before the Merit Protection Commissioner must do so without representation unless the Merit Protection Commissioner decides that it would be reasonable in all the circumstances to allow the person to be represented.

Regulation 7.2F ('Requirement to provide information or documents') provides that the Merit Protection Commissioner may, by written notice given to an agency head or APS employee, require the agency head or APS employee to give the Merit Protection Commissioner stated information or documents relevant to the review, and that the agency head or APS employee must provide the information or documents in the way, and at or within the time, stated in the notice.

Regulation 7.2G ('Making application does not operate as stay') provides that making an application for a review of a determination under Division 7.3 does not operate to stay the determination.

Regulation 7.2H ('Offence') creates an offence provision in relation to Division 7.3.

Subregulation 7.2H(1) provides that a person commits an offence if they obstruct the Merit Protection Commissioner carrying out the Merit Protection Commissioner's functions under Division 7.3, and provides that a penalty of 10 penalty units applies.

Subregulation 7.2H(2) provides that strict liability applies to the physical element of the offence created by regulation 7.2H that the functions being carried out by the Merit Protection Commissioner were functions under Division 7.3.

Regulations 7.2A to 7.2H reflect amendments made to the Act by the Amendment Act. The Act has been amended to:

- enable an agency head to determine, in accordance with written procedures, whether a former APS employee has breached the APS Code of Conduct (subsection 15(3));
- enable the Commissioner, at the request of the agency head or the Prime Minister or if the Commissioner considers it appropriate, to determine in accordance with written procedures, whether a former APS employee has breached the APS Code of Conduct (section 41B).

A determination made with respect to a former APS employee is a reviewable action under section 33 of the Act.

To the extent possible, the provisions in regulations 7.2A to 7.2H are the same as those applying to a review of a determination of a breach of the Code of Conduct by an APS employee; however, the grounds for determining that a matter is not reviewable are narrower. For example, an application for review by a former employee of a determination of a breach of the Code of Conduct could not be refused on the basis that the application is frivolous or vexatious or because the employee lacks sufficient personal interest. This is because the action that being reviewed—the determination decision—is by definition a serious matter and one in which the former employee has sufficient personal interest.

**Item [57]—Insertion of Division 7.4**

This item inserts a heading of ‘Division 7.4—Review of actions of statutory office holders’ in the Principal Regulations. The new Division deals with the functions of the Merit Protection Commissioner in respect of reviews of actions of non-agency head statutory office holders. This is currently dealt with in regulation 7.3 of the Principal Regulations, and remains unchanged.

**Item [58]—Insertion of Division 7.5**

This item inserts a heading of ‘Division 7.5—Miscellaneous’ after regulation 7.4 in the Principal Regulations. The new Division deals with other functions of the Merit Protection Commissioner.

**Item [59]—Substitution of regulations 7.6 and 7.7**

This item repeals regulations 7.6 and 7.7 of the Principal Regulations, and substitutes new regulations 7.6 to 7.9, which make provision in relation to several of the Merit Protection Commissioner’s functions. Regulations 7.6 and 7.7 of the Principal Regulations deal respectively with non-disclosure of information by the Merit Protection Commissioner and the Merit Protection Commissioner’s immunity from civil proceedings. Both of these provisions have been incorporated into the Act as amended, at section 72B and subsection 78A(2) respectively.

Regulation 7.6 (‘Prescribed entrusted person’) prescribes, for the purposes of the definition of ‘prescribed entrusted person’ in subsection 72B(1) of the Act as amended, a member of a committee established or appointed by the Merit Protection Commissioner under the Regulations. This includes a member of a PRC or an ISAC.

Regulation 7.7 (‘Protected information’) prescribes, for the purposes of paragraph (c) of the definition of ‘protected information’ in subsection 72B(1) of the Act as amended, information

obtained by an entrusted person in connection with the performance of functions or duties, or the exercise of powers, under regulation 7.3 of the Principal Regulations.

Regulation 7.8 ('Compellability of entrusted persons to give evidence') prescribes, for the purposes of 72B(7)(d) of the Act as amended, information obtained by an entrusted person in connection with the performance of functions or duties, or the exercise of powers, under regulation 7.3 of the Principal Regulations.

Regulation 7.9 ('Giving information or producing documents') prescribes regulation 7.3 of the Principal Regulations for the purposes of paragraph 72D(2)(b) of the Act as amended.

**Item [60]—Insertion of Division 7.6**

This item inserts new Division 7.6 in the Principal Regulations, which deals with basic requirements for procedures established by the Merit Protection Commissioner for determining alleged breaches of the Code of Conduct by APS employees or former APS employees.

Regulation 7.10 prescribes basic procedural requirements with which procedures established by the Merit Protection Commissioner for determining breaches of the Code of Conduct by APS employees or former APS employees must comply.

Subregulation 7.10(1) provides that, for the purposes of paragraph 50A(2)(a) of the Act, regulation 7.10 prescribes basic procedural requirements with which the Merit Protection Commissioner's written procedures must comply.

Subregulation 7.10(2) provides that procedures established by the Merit Protection Commissioner for determining breaches of the Code of Conduct by an APS employee, or former APS employee, must require the Merit Protection Commissioner not to make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or a former APS employee unless certain conditions are met, and sets out these conditions.

Paragraph 7.10(2)(a) provides that the Merit Protection Commissioner may not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or a former APS employee unless the Merit Protection Commissioner has taken reasonable steps to notify the APS employee or former APS employee of the details of the suspected breach, including any variation of those details.

Paragraph 7.10(2)(b) provides that the Merit Protection Commissioner may not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee unless the Merit Protection Commissioner has taken reasonable steps to notify the APS employee of the sanctions that may be imposed on the employee under subsection 15(1) of the Act.

Paragraph 7.10(2)(c) provides that the Merit Protection Commissioner may not make a determination in relation to an alleged breach of the Code of Conduct by an APS employee or a former APS employee unless the APS employee or former APS employee has been given a reasonable opportunity to make a statement in relation to the alleged breach.

Subregulation 7.10(3) provides that the Merit Protection Commissioner's procedures must require that the process for determining whether an APS employee or a former APS employee has breached the Code of Conduct be carried out as quickly, and with as little formality, as a proper consideration of the matter allows.

Subregulation 7.10(4) provides that the Merit Protection Commissioner's procedures must require that reasonable steps be taken to ensure that any person authorised under the Merit Protection Commissioner's written procedures to determine whether an APS employee or a

former APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

Subregulation 7.10(5) provides that the Merit Protection Commissioner's procedures must require a written record to be prepared stating whether it has been determined that the APS employee or the former APS employee has breached the Code of Conduct.

**Item [61] Subregulation 8.1(1)**

This item replaces the words 'remuneration and conditions' with the words 'terms and conditions' in subregulation 8.1(1) of the Principal Regulations. The opportunity is being taken in these amendments to standardise the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements. The language used in the Principal Regulations as amended will reflect amendments made to the relevant provisions of the Act that deal with machinery of government changes and the determination of terms and conditions of employment.

**Item [62]—Subregulation 8.1(2)**

This item inserts a note after subregulation 8.1(2) of the Principal Regulations that provides that subregulations 8.1(3) and (4) of the Principal Regulations deal with the variation of other terms and conditions of employment, such as leave, allowances (including allowances that may normally be paid in an employee's fortnightly pay), travel and other expenses, and other matters.

This item also inserts subregulation 8.1(2A), which provides that the annual salary worked out under subregulation 8.1(2) of the Principal Regulations ceases to apply when the salary of the APS employee is increased by an employment arrangement. The term 'employment arrangement' is defined in the Dictionary to the Principal Regulations.

Subregulation 8.1(2) of the Principal Regulations currently provides that the annual salary of a person who is moved between APS agencies as a result of a machinery of government change is the greater of the annual salary that applied to the APS employee immediately before the move, and the annual salary that would, apart from regulation 8.1 of the Principal Regulations, apply to the APS employee after the move.

There has been some confusion about what is meant by 'annual salary' in this regulation and the extent of the salary protection that it affords employees affected by a machinery of government change. The purpose of the amendment is to clarify that the protection afforded by this regulation applies to an employee's base salary—i.e. the salary point as set out in, or ascertained under, an enterprise agreement or other industrial instrument (or common law contract) for the particular classification that the employee held before the machinery of government change—and not to other terms and conditions of employment, which are dealt with in subregulations 8.1(3) and 8.1(4) of the Principal Regulations.

**Item [63]—Subregulation 8.1(3)**

This item replaces the words 'other conditions' with the words 'other terms and conditions' in subregulation 8.1(3) of the Principal Regulations. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [64]—Paragraph 8.1(3)(b)**

This item replaces the words 'the conditions' with the words 'the terms and conditions' in paragraph 8.1(3)(b) of the Principal Regulations. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [65]—Subregulation 8.1(3), note**

This item replaces the words ‘a condition’ with the words ‘a term or condition’ in the note below subregulation 8.1(3) of the Principal Regulations. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [66]—Subregulation 8.1(4)**

This item replaces the words ‘the conditions’ with the words ‘the terms and conditions’ in subregulation 8.1(4) of the Principal Regulations. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [67]—Subregulations 8.2(1) and 8.2(2)**

This item replaces each mention of the words ‘remuneration and other conditions’ in subregulations 8.2(1) and 8.2(2) of the Principal Regulations with the words ‘terms and conditions’. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [68]—Subregulation 8.2(2), note**

This item replaces the words ‘a condition’ with the words ‘a term or condition’ in the note below subregulation 8.2(2) of the Principal Regulations. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [69]—Subregulation 8.2(3)**

This item replaces the word ‘conditions’ with the words ‘terms and conditions’ in subregulation 8.2(3) of the Principal Regulations. This amendment is aimed at standardising the terminology used in regulations 8.1 and 8.2 of the Principal Regulations when referring to employee entitlements.

**Item [70]—Regulation 8.3**

The Act has been amended to include a new provision (subsection 72(5A)), which provides the Commissioner with discretion to determine whether employment-related matters can continue if the employee has moved between APS agencies following a machinery of government change (as outlined in paragraph 72(1)(a) of the Act).

This item inserts regulation 8.3 in the Principal Regulations. Regulation 8.3 prescribes, for the purposes of subsection 72(5A) of the Act, circumstances in relation to an APS employee’s employment in a former agency before the APS employee moved to a new agency.

Paragraph 8.3(a) provides that a circumstance is that the employee’s engagement in the former agency is subject to a condition imposed by the agency head of that agency under subsection 22(6) of the Act.

Paragraph 8.3(b) provides that a circumstance is that the employee’s employment in the former agency is subject to a condition imposed by the agency head of that agency under section 20 of the Act.

Paragraph 8.3(c) provides that a circumstance is that an inquiry into an alleged breach of the Code of Conduct is taking place.

Paragraph 8.3(d) provides that a circumstance is that a sanction is imposed in relation to an inquiry into an alleged breach of the Code of Conduct, including a sanction that may have

ongoing effect. Examples given are a reduction in classification which has not yet taken effect, and periodic deductions from salary.

Paragraph 8.3(e) provides that a circumstance is that the employee is suspended from duties under regulation 3.10 of the Principal Regulations in relation to a suspected breach of the Code of Conduct.

Paragraph 8.3(f) provides that a circumstance is that a process (however described) is taking place in relation to performance management (including the non-performance of duties); or the management of excess staff; or the assessment of physical or mental fitness for duty; or the loss, or lack, of an essential qualification.

The purpose of this amendment is to enable these matters to be dealt with more effectively and with a greater degree of certainty when they are affected by a machinery of government change.

It is envisaged that in some cases the Commissioner will issue general policy about how some issues are to be handled (e.g. where an employee is serving a period of probation in the losing agency at the time of the machinery of government change, the probation may be continued in the gaining agency for the unexpired period and may be extended by the gaining agency if that possibility was advised to the employee in their letter of engagement). However, it is likely that the Commissioner may need to determine other matters on a case by case basis, having regard to the individual circumstances of a particular case (e.g. a Code of Conduct investigation that is underway in the losing agency at the time of the machinery of government change).

#### **Item [71]—Regulation 9.2**

This item repeals the existing provisions of the Principal Regulations that deal with release of personal information, and inserts a new regulation 9.2, which make provision for the use and disclosure of personal information for the purposes of section 72E of the Act.

Subregulation 9.2(1) provides that, for the purposes of paragraph 72E(a) of the Act, an agency head may use personal information in the possession, or under the control, of the agency head, if the use of the personal information is necessary for, or relevant to, the performance or exercise of the employer powers of the agency head.

Subregulation 9.2(2) provides that, for the purposes of paragraph 72E(a) of the Act, an agency head may disclose personal information in the possession, or under the control, of the agency head, if the disclosure of the personal information is necessary for, or relevant to, the performance or exercise of the employer powers of the agency head or another agency head; or the exercise of a power or performance of a function of the Commissioner or the Merit Protection Commissioner; or the performance or function of an ISAC.

Subregulation 9.2(3) provides that, for the purposes of paragraph 72E(a) of the Act, the Merit Protection Commissioner may disclose personal information in the possession, or under the control, of the Merit Protection Commissioner if the information was obtained by the Merit Protection Commissioner during the course of a PRC or a review of action, and the disclosure is necessary for, or relevant to, an agency head's consideration of alleged misconduct by an APS employee.

Subregulation 9.2(4) provides that, for the purposes of paragraph 72E(a) of the Act, the Commissioner may use personal information in the possession, or under the control, of the Commissioner if the information was obtained as part of the Commissioner's review or inquiry functions, and the use is necessary for, or relevant to, an inquiry relating to the Code of Conduct conducted by the Commissioner.

Subregulation 9.2(5) provides that, for the purposes of paragraph 72E(a) of the Act, the Commissioner may disclose personal information in the possession, or under the control, of the Commissioner if the information was obtained as part of the Commissioner's review or inquiry functions, and the disclosure is necessary for, or relevant to, an agency head's consideration of alleged misconduct by an APS employee.

Subregulation 9.2(6) provides that use or disclosure of personal information under regulation 9.2 must be consistent with any guidelines issued by the Commissioner after consultation with the Australian Information Commissioner performing the privacy functions.

A note to subsection 9.2(6) states that 'privacy functions' has the meaning given by section 9 of the *Australian Information Commissioner Act 2010*.

Subregulation 9.2(7) provides that use of personal information under regulation 9.2 is an authorised use for the purposes of paragraph 1(c) of Information Privacy Principle 10 set out in section 14 of the *Privacy Act 1988*.

Subregulation 9.2(8) provides that disclosure of personal information under regulation 9.2 is an authorised disclosure for the purposes of paragraph 1(d) of Information Privacy Principle 11 set out in section 14 of the *Privacy Act 1988*.

A note to subregulation 9.2(8) states that the *Freedom of Information Act 1982* and the *Privacy Act 1988* have rules about the disclosure of personal information.

#### **Item [72]—Payments in special circumstances**

This item inserts regulation 9.4 in the Principal Regulations, which provides that, for the purposes of subsection 73(4) of the Act, the maximum amount in relation to a payment to a person under subsection 73(2) of the Act is \$250,000.

A note to the regulation explains that under subsection 73(4) of the Act, a payment cannot be authorised if it would involve, or would be likely to involve, a total amount exceeding the amount by the regulations.

Section 73 of the Act deals with payments in exceptional circumstances relating to matters arising out of Commonwealth employment. Subsection 73(4) of the Act has been amended by the Amendment Act to remove the \$100,000 financial limit on such payments and allow the maximum amount to be prescribed by the regulations.

This item includes a new subregulation 9.4, which provides that the maximum amount that can be paid to a person in relation to a payment made under subsection 73(2) of the Act is \$250,000. This will make the Act provisions broadly consistent with the amount available under an equivalent provision in the *Financial Management and Accountability Act 1997* (FMA Act) that enables payments under this amount to be authorised without reference to an advisory committee. By moving the monetary limit on payments under section 73 from the Act to the Regulations, it will be easier for the Parliament to consider adjustments to this amount in line with any adjustments to the amount available under the FMA Act.

#### **Item [73]—Insertion of Part 10**

This item inserts Part 10 in the Principal Regulations, which deals with transitional arrangements arising from amendments to the Act.

Division 10.1 contains provisions for transitional arrangements made by the Amendment Regulation.

Regulation 10.1 provides definitions of relevant terms for the purposes of Division 10.1. 'Commencement day' is defined to mean the day on which Schedules 1 to 4 to the *Public Service Amendment Act 2013* commence. 'New Public Service Regulations' is defined to

mean the Public Service Regulations 1999 as in force after the commencement day. ‘Old Code of Conduct’ is defined to mean the Code of Conduct in the old Public Service Act, including any regulations in force for the purposes of subsection 13(13) of the old Public Service Act. ‘Old Public Service Act’ is defined to mean the *Public Service Act 1999* as in force immediately before the commencement day. ‘Old Public Service Regulations’ is defined to mean the Public Service Regulations 1999 as in force immediately before the commencement day.

Regulation 10.2 provides that the old Public Service Regulations continue to apply on, and after, the commencement day in relation to an inquiry into an alleged breach of the Code of Conduct by the Merit Protection Commissioner if, before the commencement day, the Public Service Commissioner had begun an inquiry in accordance with regulation 6.1 of the old Public Service Regulations but had not reported on the results of the inquiry, or had decided to conduct an inquiry for paragraph 41(1)(l) of the old Public Service Act, but had not begun the inquiry.

Regulation 10.3 provides that if, before the commencement day, an allegation had been made of a breach of the Code of Conduct by the Merit Protection Commissioner and the Public Service Commissioner had not decided whether to conduct an inquiry into the alleged breach, or if, on or after the commencement day, an allegation is made of a breach of the Code of Conduct by the Merit Protection Commissioner that is alleged to have occurred before the commencement day, then the new Public Service Regulations apply to the alleged breach as if a reference to the Code of Conduct in the relevant provisions were a reference to the old Code of Conduct and the application of the Code of Conduct to the Merit Protection Commissioner were the same as it was before the commencement day.

Regulation 10.4 provides for the continuation of certain provisions of the *Public Service Act 1922* and the *Public Service Regulations 1935* that were retained following the implementation of the *Public Service Act 1999*, through the *Public Employment (Consequential and Transitional) Amendment Act 1999* and the *Public Employment (Consequential and Transitional) Amendment Regulations 1999*. The Amendment Act repeals the *Public Employment (Consequential and Transitional) Amendment Act* and provides for necessary provisions to be preserved through regulations.

Subregulation 10.4(1) provides that regulation 10.4 applies if, immediately before 5 December 1999 an employee or officer under the *Public Service Act 1922* had been charged with misconduct in accordance with Subdivision C, D, or E of Division 6 of Part III of the *Public Service Act 1922*, and, immediately before the commencement day, the charge had not been finally determined.

Subregulation 10.4(2) provides that the *Public Service Act 1922* and Divisions 1, 2 and 3 of Part 1A; Part IX; and Part X of the *Public Service Regulations 1935* continue to apply in relation to the charge of misconduct.

Subregulation 10.4(3) provides that, for paragraph 10.4(1)(b) of the Principal Regulations as amended, a charge is finally determined if a decision, direction (including a disciplinary direction), finding, or recommendation that has been made, or an action that has been taken, under the *Public Service Act 1922* or the *Merit Protection (Australian Government Employees) Act 1984* in respect of the charge, is not, or is no longer, subject to any form of appeal or review under either of those Acts, or was subject to some form of appeal or review under either of those Acts, but the period within which the appeal or review could be instituted has ended without an appeal or review having been instituted.

A note to regulation 10.4 provides that regulation 10.4 has the same effect as regulation 2.19 of the *Public Employment (Consequential and Transitional) Amendment Regulations 1999*.

Regulation 10.5 provides that the *Merit Protection (Australian Government Employees) Act 1984* and the *Merit Protection (Australian Government Employees) Regulations 1985* continue to apply for certain purposes.

Subregulation 10.5(1) provides that the *Merit Protection (Australian Government Employees) Act 1984* is taken to continue in force to allow for the determinations of any appeals or reviews, instituted under Division 6 of Part III of the *Public Service Act 1922*, in relation to disciplinary matters to which Subdivision C, D, or E of Division 6 of Part III of the *Public Service Act 1922* continues to apply.

Subregulation 10.5(2) provides that the *Merit Protection (Australian Government Employees) Regulations 1985* are taken to continue in force to the extent necessary for the continued operation of the *Merit Protection (Australian Government Employees) Act 1984* under subregulation 10.5(1).

Subregulation 10.5(3) provides that the functions of the Merit Protection and Review Agency under the *Merit Protection (Australian Government Employees) Act 1984*, as continued in force, are taken to be functions performed by the Merit Protection Commissioner appointed, or taken to be appointed, under the old Public Service Act, or by a delegate of the Merit Protection Commissioner.

A note to regulation 10.5 explains that regulation 10.5 has the same effect as regulations 4.2 and 4.4 of the *Public Employment (Consequential and Transitional) Amendment Regulations 1999*.

Regulation 10.6 provides that no application for review or appeal under the *Public Service Act 1922* or the *Merit Protection (Australian Government Employees) Act 1984* could be made on or after the commencement day.

Regulation 10.7 provides that, if a determination of special terms or conditions of employment under subsection 81B(5) or 81C(3) of the *Public Service Act 1922* was in force immediately before the commencement day, then the determination continues in force, and that the relevant subsection of the *Public Service Act 1922* continues in force in relation to the determination.

A note to regulation 10.7 explains that regulation 10.7 has the same effect as regulation 2.31 of the *Public Employment (Consequential and Transitional) Amendment Regulations 1999*, except that it extends the operation of any relevant determinations beyond the commencement day.

#### **Item [74]—Substitution of Schedule 1, item 3**

Schedule 1 to the Principal Regulations prescribes actions that are not reviewable for the purposes of subregulation 5.23(2) of the Principal Regulations.

This item amends item 3 of Schedule 1 to the Principal Regulations, which provides that the giving of a direction by the Public Service Commissioner under specified sections of the Act, is not a reviewable action. This item omits ‘Public Service Commissioner under section 11, 15 or 36’, and inserts ‘Australian Public Service Commissioner under section 11, 11A or 15’.

#### **Item [75]—Insertion of Schedule 1, item 4A**

This item provides that a determination made by the Merit Protection Commissioner under section 50A of the Act is a non-reviewable action.

Section 50A of the Act as amended provides for the Merit Protection Commissioner to conduct an inquiry into alleged breaches of the Code of Conduct by APS employees or former APS employees at the request of an agency head and with the agreement of the employee or former employee.

The employee's consent must be given before the Merit Protection Commissioner may undertake the inquiry, in light of the fact that the affected employee would lose a review right of the determination under subsection 50A(1)(c)—though not of any subsequent sanction imposed by the agency head.

**Item [76]—Substitution of Schedule 1, item 6**

This item amends item 6 of Schedule 1 to the Principal Regulations to include the *Superannuation Act 2005*.

**Item [77]—Schedule 1, item 10**

This item amends item 10 of Schedule 1 to the Principal Regulations.

Item 10 of Schedule 1 of the Principal Regulations provides that actions that determine the duties of an APS employee and the place where those duties are to be performed are not reviewable, subject to some exceptions. The intention of this provision is to provide agency heads with the flexibility available to employers more generally to task employees and to deploy them in accordance with operational requirements, without these decisions being subject to challenge and review.

This item also clarifies the rights of review of promotion decisions to Groups 7 and 8 in Schedule 1 of the Classification Rules (namely promotions to Executive Level 1 and Executive Level 2 classifications). Promotions to the APS 1 to 6 classifications are reviewable by PRCs established by the Merit Protection Commissioner under Division 5.2 of the Principal Regulations.

Item 10 is amended to substitute 'actions relating to the determination of duties of an APS employee' for 'actions that determine'. This provides consistency in wording across items relating to employment and conditions in Schedule 1. The right to review, in the circumstances listed in items 10(a) to (d) (namely a reduction in classification, a relocation to another place, a promotion to the Executive Levels where there were serious defects in the selection process and the assignment of duties that an employee could not reasonably be expected to perform) are unchanged.

**Item [78]—Insertion of Schedule 1, item 11**

This item adds a new item, item 11, to Schedule 1 of the Principal Regulations, and provides that an action relating to a decision by an agency head, under Chapter 2 of the Commissioner's Directions, not to include the name of an employee in the *Public Service Gazette*, is a non-reviewable action. Chapter 2 of the Commissioner's Directions provides that employment decisions notified in the *Public Service Gazette* must include the employee's name unless the agency head decides that the name should not be included.

Before deciding to withhold an employee's name from publication, an agency head is required first to obtain the approval of the Commissioner, who would consult the Merit Protection Commissioner regarding non-SES employment decisions.

**Item [79]—Dictionary (definitions of *APS Employment Principles*, *Australian Public Service Commissioner*)**

This item inserts a new definition of 'APS Employment Principles' in the Dictionary to the Principal Regulations. The term is defined to mean the principles in subsection 10A(1) of the

Act. This amendment is consequential to amendments to the Act made by the Amendment Act.

This item also inserts a definition of ‘Australian Public Service Commissioner’ in the Dictionary to the Principal Regulations. The term ‘Australian Public Service Commissioner’ is defined to mean the Australian Public Service Commissioner appointed under the Act. This amendment is consequential to amendments to the Act made by the Amendment Act.

**Item [80]—Dictionary (definition of *Classification Rules*)**

This item replaces the definition of ‘Classification Rules’ in the Dictionary to the Principal Regulations with a new definition that provides that the term ‘Classification Rules’ means the *Public Service Classification Rules* as in force at the commencement of Schedules 1 to 4 to the *Public Service Amendment Act 2013*.

**Item [81]—Dictionary (definition of \**Commissioner*)**

This item replaces the definition of ‘Commissioner’ in the Dictionary to the Principal Regulations with a new definition that refers to the Australian Public Service Commissioner. The term ‘Commissioner’ is defined to mean the Australian Public Service Commissioner appointed under the Act. This amendment is consequential to amendments to the Act made by the Amendment Act.

**Item [82]—Dictionary (definition of \**Commissioner’s Directions*)**

This item replaces the definition of ‘Commissioner’s Directions’ in the Dictionary to the Principal Regulations with a new definition that reflects the change in title of the Commissioner and the heads of power under the Act as amended under which the Commissioner may make Directions. The term ‘Commissioner’s Directions’ is defined to mean directions issued by the Commissioner under sections 11, 11A, and 15 of the Act.

**Item [83]—Dictionary (definition of *electronic APS Employment Gazette*)**

This item repeals the definition of ‘electronic APS Employment *Gazette*’ in the Dictionary to the Principal Regulations. The term ‘Public Service *Gazette*’ is defined in the Dictionary (see item [84] below).

**Item [84]—Dictionary (definition of *employer powers*)**

This item repeals the definition of ‘employer powers’ in the Dictionary to the Principal Regulations and replaces it with a new definition. The term ‘employer powers’ is defined to mean the rights, duties and powers of the agency head under the Act.

**Item [85]—Dictionary (definitions of *post-move Agency, post-move Agency Head, pre-move Agency, pre-move Agency Head and prohibited content*)**

This item repeals the definitions of the terms ‘post-move Agency’, ‘post-move Agency Head’, ‘pre-move Agency’, ‘pre-move Agency Head’ and ‘prohibited content’ because, as a result of the Amendment Regulation, these terms are no longer used in the Principal Regulations.

**Item [86]—Dictionary (definition of *promotion*)**

This item repeals the definition of ‘promotion’ in the Dictionary to the Principal Regulations and replaces it with a new definition. This item provides that the term ‘promotion’, for an ongoing employee, has the meaning given in Chapter 2 of the Commissioner’s Directions.

**Item [87]—Dictionary (definition of *Public Service Gazette*)**

This item inserts a new item in the Dictionary to the Principal Regulations, ‘Public Service *Gazette*’, to replace the current item, ‘APS Employment *Gazette*’. This amendment is necessary because of other amendments to the Principal Regulations (see, for example, item

[6]). ‘Public Service *Gazette*’ is defined to mean the *Gazette* published in electronic form. A note to the definition provides that the Public Service *Gazette* may be accessed at [www.APSjobs.gov.au](http://www.APSjobs.gov.au).

**Item [88]—Dictionary (definitions of *Public Service Commissioner*, *senior official*, and *unlawful term*)**

This item repeals the definition of ‘Public Service Commissioner’ in the Dictionary to the Principal Regulations. This amendment is consequential to amendments to the Act, made by the Amendment Act, which have changed the title of the Public Service Commissioner to the Australian Public Service Commissioner.

This item also repeals the definitions of the terms ‘senior official’ and ‘unlawful term’ in the Dictionary to the Principal Regulations because, as a result of the Amendment Regulation, these terms are no longer used in the Principal Regulations.

**Item [89]—Dictionary (definition of *whistleblower* and *whistleblower report*)**

This item inserts definitions for the terms ‘whistleblower’ and ‘whistleblower report’ in the Dictionary to the Principal Regulations. ‘Whistleblower’ is defined to mean an APS employee who reports breaches, or alleged breaches, of the Code of Conduct, as described in subsection 16(1) of the Act. ‘Whistleblower report’ is defined to mean a report made by a person under subsection 16(1) of the Act.

**Item [90]—Dictionary (definition of *workplace agreement*)**

This item repeals the definition of ‘workplace agreement’ in the Dictionary to the Principal Regulations because, as a result of the Amendment Regulation, the terms are no longer used in the Principal Regulations.