

PUBLIC SERVICE
COMMISSIONER
ANNUAL REPORT

2002-03

INCORPORATING
THE ANNUAL
REPORT 2002-03
OF THE MERIT
PROTECTION
COMMISSIONER



Australian Government

Australian Public Service Commission

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PART FOUR

MERIT PROTECTION COMMISSIONER'S ANNUAL REPORT



MERIT PROTECTION COMMISSIONER

The Honourable John Howard MP
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister

I am pleased to present the Merit Protection Commissioner's report for the period 1 July 2002 to 30 June 2003 as part of the Public Service Commissioner's Annual Report as required by section 51 of the *Public Service Act 1999*.

This report is prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit as required by subsection 51(2) of the *Public Service Act 1999*. However, in accordance with the provisions of the *Public Service Act 1999* detailing the administrative arrangements to support the performance of my functions, some of the required information is published within the Public Service Commissioner's Annual Report.

The Merit Protection Commissioner also has continuing functions under the repealed *Merit Protection (Australian Government Employees) Act 1984* and the *Public Service Act 1922* arising from regulations made under the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

In presenting you with the report on the activities of the Merit Protection Commissioner I would like to take this opportunity to express my thanks to the staff of the Australian Public Service Commission for their assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jeff Lamond', written in a cursive style.

Jeff Lamond
October 2003

MERIT PROTECTION COMMISSIONER'S REVIEW

INTRODUCTION

The values based management framework of the PS Act 1999 provides for 'a fair system of review of decisions taken in respect of APS employees' (APS Value section 10(1)(o)). The review processes available under section 33 of the Act, and associated Regulations, enable non-SES employees to apply for the review of a wide range of actions that may have adversely affected them in their employment. In most cases the review of action is undertaken within the relevant agency, with the Merit Protection Commissioner, as occupant of a statutory office under section 49 of the Act, available for an independent and external review where the applicant is not satisfied with the outcome of the initial review or where the Agency Head was involved in the original action under review.



Acting Merit Protection
Commissioner Jeff Lamond

Generally, the Merit Protection Commissioner does not have determinative powers but has recommendatory and reporting powers. Only in the case of a review of a promotion decision by a Promotion Review Committee is such a recommendation binding on an Agency Head. In all other cases Agency Heads are required to advise the relevant employee and Merit Protection Commissioner of their decision on the recommendations and the reasons for that decision. If the Merit Protection Commissioner is not satisfied with the response to the recommendations he may, after consulting with the Public Service Minister, report to an Agency Minister, the Prime Minister and/or the Parliament.

Agency Heads accepted all but two recommendations arising from reviews during 2002–03. Both of the recommendations not accepted dealt with reviews of action in the Australian Taxation Office. In one case the agency noted that an element of one of the relevant recommendations failed to account for, and was inconsistent with, an established internal policy. The agency also indicated that the policy would be applied in a manner that ensured that the employee was not disadvantaged. The Merit Protection Commissioner considers that the agency's decision in the first case was reasonable and is still considering the matters raised in the second case.

The Annual Report for 2001–2002 noted that there were two cases where the relevant Agency had determined not to accept recommendations made by the Merit Protection Commissioner. The report noted that the outcome in those cases were under consideration. In the first case, following an exchange of correspondence, the Agency Head effected changes to their final decision although their determination did not exactly accord with the Merit Protection Commissioner's recommendation. In the second case the Agency maintained their position that a breach of the Code of Conduct had occurred and they confirmed the application of a sanction. The Merit Protection Commissioner considered both cases carefully and reached a view that, in all the circumstances, the actions of the agencies were not unreasonable.

This financial year the following number of reviews of promotion decisions and reviews of action were received:

- **Promotion reviews**—193 requests for the establishment of promotion review committees were received (111 were received in 2001–02). Of these, 131 promotion review cases were reviewed (76 cases were reviewed in 2001–02).
- **Applications concerning breaches of the code of conduct**—43 applications were received, the same number as 2001–02. Of these, 29 applications were reviewed (25 were reviewed in 2001–02).
- **Applications for review other than promotion reviews and those related to the Code of Conduct**—128 other applications were received (166 were received in 2001–02). Of these, 54 were reviewed (69 were reviewed in 2001–02).

While the number of applications for review of promotions was higher this financial year than in the previous year, it should be noted that there was a corresponding increase in the number of promotions in those employment categories where existing employees have the capacity to seek a review of the decision. During 2001–02 there were 6884 promotions while in 2002–03 there were 10,248 promotions gazetted, an increase of almost 50%.

Overall, the figures relating to reviews of action suggest that the number of code of conduct reviews has remained static and that there continues to be a downward trend in the number of other applications for review. While it is difficult to be specific about the reasons for the trends some of the contributing factors could be better management practices and the resolution of issues before there is a need for a formal review.

There is further information on the nature of the reviews under Analysis of Performance.

This report also contains case studies on a number of reviews conducted during the year. The use of case studies was introduced in last year's annual report and provides additional information on the way cases are dealt with and some of the issues that may arise in the conduct of a review. The case studies are based on cases from several regions and illustrate the range of issues dealt with by the Merit Protection Commissioner. It is hoped that the inclusion of case studies will assist agencies and employees who are dealing with similar issues better understand the review process and draw lessons from the way these cases have been resolved.

The Merit Protection Commissioner met with all Regional Group Managers, Regional

Directors and Regional Advisers in April 2003 in Canberra. The aim of this year's meeting was to discuss both legislation and policy related issues, current administrative law cases that may affect the Commissioner's work, fee-for-service activities, and current and future promotional activities. The meeting included a discussion with a panel of clients from the Department of Defence and Centrelink. Outcomes of the meeting included an increased understanding of the needs of client agencies, agreement on the nature of future promotional activities and closer liaison with the Office of the Australian Government Solicitor on administrative law matters. There was also agreement that the target times for the completion of primary and secondary reviews of action be changed. The existing target times were set over 15 years ago under the previous appeal provisions of the now repealed *Public Service Act 1922* and were no longer relevant to the review of action provisions of the *Public Service Act 1999*. Effective from 1 July 2003, target times for the completion of primary reviews will be 10 weeks from receipt of the application (extended from 8 weeks) and the target time for the completion of secondary reviews will be 8 weeks from receipt of the application (extended from 6 weeks). The target time for the completion of reviews of promotion decisions will remain at 6 weeks.

The Merit Protection Commissioner and the Group Manager of Regional Services (South/West) attended the 9th National Public Sector Appeals Conference. The conference was held in Hobart from 4 to 6 September 2002. The annual conference provides a regular forum for senior representatives who are engaged in the review of employment decisions in Commonwealth, State or Territory public

sector employment to share their experiences, ideas and views.

There has been an increasing need for the automation of data collection of all review matters handled by the Merit Protection Commissioner. This financial year the Commissioner has coordinated the development of a national database of all review of action cases. The database is designed so that case managers can enter all relevant data on the review they are conducting. The database will be used to produce monthly and annual statistics and to analyse the types of matters that are being referred to the Merit Protection Commissioner.

Other statutory functions of the Merit Protection Commissioner include the establishment of Independent Selection Advisory Committees (ISACs) and a range of employment related functions undertaken at the request of agencies on a fee-for-service basis.

Agencies are becoming increasingly aware of the benefits of ISACs including their cost effectiveness and independence. More than twice the number of ISACs were established this financial year than in the previous financial year (93 completed in 2002–03 compared to 43 that were completed in 2001–02). Over 12,500 applications were considered by ISACs in recommending nearly 2400 applicants for placement. The increase was largely due to the Australian Taxation Office undertaking a number of major national recruitment exercises. Of the 93 ISACs established this financial year, 69 of these were for the Australian Taxation Office.

Other fee-for-service work undertaken on behalf of the Merit Protection Commissioner included Joint Selection Committees

established under a Memorandum of Understanding with the Australian Federal Police (AFP) and some ACT Government agencies. There was an increase in the number of Joint Selection Committees for the AFP from 232 in 2001–02 to 277 in 2002–03. Additionally, training for AFP employees on selection processes was provided to ensure that there was a trained pool of staff available for future selection committees.

OUTLOOK FOR 2003–04

The Merit Protection Commissioner will continue to promote his role and the range of services to all agencies around Australia. The aim will be to exchange ideas on, and improve an understanding of the review of action arrangements; assist Agency Heads in their obligation to promote and uphold the APS Values; and promote other services such as ISACs to assist in merit based selections.

The Merit Protection Commissioner will continue to engage in activities such as speeches and presentations that describe his statutory functions with the aim of building awareness of his role and to further partnerships with agencies.

ROLE, FUNCTIONS AND STRUCTURE

ROLE

The office of the Merit Protection Commissioner, established under section 49 of the PS Act, is an independent office located with the APS Commission.

The Merit Protection Commissioner assists agencies to meet the requirements of the APS Values and the APS Code of Conduct through the administration of the statutory review of actions scheme and the performance of other statutory functions.

FUNCTIONS

The Merit Protection Commissioner's functions under the PS Act 1999 are set out in section 50 and include:

- (a) inquiring into reports alleging breaches of the APS Code of Conduct made to the Merit Protection Commissioner, or to a person authorised by the Merit Protection Commissioner (whistleblowing reports)
- (b) inquiring into alleged breaches of the Code of Conduct by the Public Service Commissioner and reporting to the Presiding Officers on the results of such enquiries including, where relevant, recommendations for sanctions
- (c) inquiring into an APS action at the request of the Public Service Minister and to report to the Public Service Minister on the results of the inquiry

- (d) such functions as are prescribed by regulations made for the purposes of section 33 (review of actions, including the review of certain promotion decisions)

- (e) such other functions as are prescribed by the regulations.

So far as subsection 50(1)(e) is concerned, the PS Regulations enable the Merit Protection Commissioner:

- (a) to establish Independent Selection Advisory Committees for the purposes of making recommendations to an Agency Head about the suitability of candidates for engagement, promotion or assignment to duties included in APS Classification Groups 1–6
- (b) to perform employment-related functions where the Merit Protection Commissioner is not required by a law of the Commonwealth to perform the function
- (c) to review an action of a statutory office holder who is not an Agency Head that affects an APS employee in their employment
- (d) to investigate complaints by former APS employees concerning separation entitlements.

A fee is charged for the establishment of Independent Selection Advisory Committees and for the performance of employment-related functions.

The Merit Protection Commissioner also has continuing functions under the repealed *Merit Protection (Australian Government Employees) Act 1984* and the *Public Service Act 1922*. This consists of casework arising under regulations made under the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

ORGANISATIONAL STRUCTURE

The Merit Protection Commissioner's casework is undertaken through the six regional offices of the APS Commission by APS Commission employees who are made available by the Public Service Commissioner.

Each regional office also maintains a register of appropriately trained and qualified persons who are available, as required from time to time, for employment as non-ongoing employees. The Merit Protection Commissioner maintains a separate register of APS employees to perform the role of nominees to Promotion Review Committees and Independent Selection Advisory Committees.

Applications for review are generally lodged and dealt with in the office of the State or Territory in which the applicant resides. The Victorian office also deals with casework arising in Tasmania, and the South Australian office also deals with casework arising in the Northern Territory. Co-ordination and policy support for the Merit Protection Commissioner is provided by employees of the ACT office.

This report and further information about the Merit Protection Commissioner's role and services are available on the APS Commission website at www.apsc.gov.au.



Jeff Lamond, the Merit Commissioner with a member of the Samoan delegation.

MANAGEMENT ACCOUNTABILITY

CORPORATE GOVERNANCE

Mr Jeff Lamond has acted as Merit Protection Commissioner during the period covered by this Report.

The Public Service Commissioner, as the head of the APS Commission, is responsible for its corporate governance practices. The Merit Protection Commissioner is a member of the APS Commission Executive, a senior management group chaired by the Public Service Commissioner.

The Commission employees who assist the Merit Protection Commissioner are made available by the Public Service Commissioner under section 49(2) of the PS Act 1999. These employees are accountable to the Merit Protection Commissioner for the performance of functions authorised by him.

The Merit Protection Commissioner and the Public Service Commissioner have in place a Memorandum of Understanding for the provision of staff necessary to assist the Merit Protection Commissioner in the performance of his functions.

The Group Manager of Regional Services (North/East), covering regional offices in Canberra, Sydney and Brisbane, and the Group Manager of Regional Services (South/West), covering regional offices in Melbourne (which also deals with cases from Tasmania), Adelaide, (which also deals with

cases from the Northern Territory), and Perth, are delegates of the Merit Protection Commissioner in review matters.

REVIEW OF PERFORMANCE

OUTPUTS AND CONTRIBUTION TO OUTCOMES 2002–03

The APS Commission is included in the Portfolio Budget Statements of the Department of Prime Minister and Cabinet. The Public Service Commissioner, as the head of the APS Commission, is responsible for the financial and human resources of the APS Commission and for assessing the level of the APS Commission's achievements against its output structure.

Performance information, as described in the 2002–03 Portfolio Budget Statement which relates to the functions of the Merit Protection Commissioner, can be aggregated, where relevant, from Tables M1 and M2 of this Report. Table M1 comprises casework arising from APS agencies. Table M2 includes casework arising from both APS and non-APS agencies.

Table M1: Reviews of actions: workload, work completed and timeliness 1 July 2002–30 June 2003

Cases	PRCs*	Primary review–Code of Conduct	Primary review –other	Secondary review	Review –Former employees
On hand at start of year	4	10	3	6	0
Received during the period	193	43	19	101	8
Reviewed	131	29	2	48	4
Not accepted	5	4	10	34	2
Lapsed or withdrawn	55	8	3	6	1
Total finalised during period	191	41	15	88	7
On hand at end	6	12	7	19	1
Target completion time (weeks)	6	8	8	6	8
Average completion time for reviewed cases (weeks)	6.6	12.59	9.9	11.17	6.15
Completed within target time (number)	75	4	0	14	2
Completed within target time (percentage)	57	14	0	29	50
Average age of carryover (weeks)	3.19	8.18	5	8.62	17.43
Cases carried over exceeding target time (number)	1	4	0	10	1
Cases carried over exceeding target time (percentage)	16.66	33.33	0	52.63	100

Table M2: Fee-for-service functions: workload and work completed 1 July 2002–30 June 2003

	Independent Selection Advisory Committees	Other services requested
On hand at start of year	26	72
Received during the period	87	322
Completed	93	299
Lapsed/withdrawn	1	32
Total finalised during the period	94	331
On hand at end	19	63

REVIEW OF ACTIONS

Part 5 of the PS Regulations outlines the policy of the Australian Government that APS agencies should achieve and maintain workplaces that encourage productive and harmonious working relationships. It is expected that employees' concerns about their workplace and conditions should be dealt with quickly, impartially and fairly. The review process, provided for under section 33 of the PS Act 1999, entitles APS employees to a review of any APS action that relates to their employment, other than action that consists of a termination of employment. The PS Regulations prescribe a range of other actions that are excluded from review under the review process. In most cases, an employee must first apply to their Agency Head for a review of action.

The review process provides agencies with significant flexibility to deal with individual situations as they arise. The PS regulations provide for the use of alternative dispute resolution methods by agencies in dealing with the concerns of employees. The Merit Protection Commissioner's Instructions advise that 'a person or committee conducting a review must consider which method for resolution of the employee's concerns, including methods of alternative dispute resolution such as counselling, conciliation and mediation, is most appropriate to achieve a productive and harmonious working environment.'

There are basically three types of reviews performed by the Merit Protection Commissioner under the provisions of the PS Act 1999 and regulations: review of promotion decisions; reviews in relation to breaches of the APS Code of Conduct; and other reviews of actions.

Reviews of promotion decisions are available for all levels up to and including APS Classification Group 6. Employees apply directly to the Merit Protection Commissioner for a review to be undertaken. The Commissioner appoints a three member Promotion Review Committee (PRC) to review the original decision and make a recommendation to the Agency Head. Unlike recommendations on other review matters, a PRC's recommendation is binding.

The Merit Protection Commissioner may undertake a primary review where an employee applies for a review of a determination that they have breached the Code of Conduct and/or the sanction imposed for a breach. In such cases the employee must apply directly to the Merit Protection Commissioner for review.

An employee may also apply to the Merit Protection Commissioner for a secondary review of an action where an Agency Head has conducted a primary review and the employee is dissatisfied with the outcome of that review. In certain circumstances, an employee may also apply for a review where

their Agency Head has decided an action is not reviewable.

Table M1 provides information on the reviews of actions received and completed and the timeliness of these reviews during the period 1 July 2002 to 30 June 2003.

The number of promotion review committees established increased this financial year compared with 2001–02 (131 established in 2002–03, 76 established in 2001–02 an increase of 55 or 72%). The increase in the number of promotion review committees established goes against the previous trend of a reduction in the number of similar committees. However, when comparing figures it should be noted that there was an increase of about 50% in the number of promotions that were gazetted during 2002–03 (10,248 promotions gazetted in 2002–03 compared with 6884 in 2001–02).

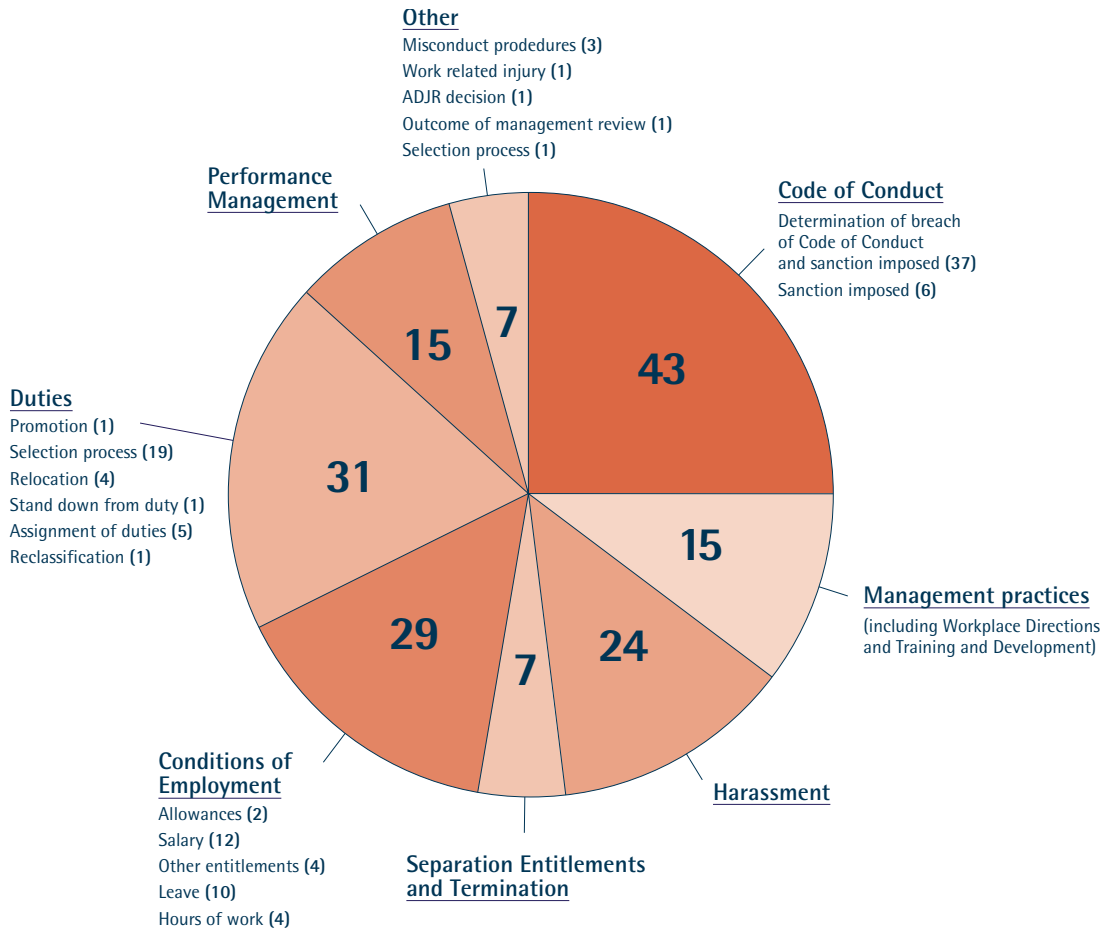
The number of reviews received that related to breaches of the Code of Conduct did not increase this year compared with 2001–02 (43 were received in both periods), although the number of reviews completed increased slightly this year (29 were finalised during 2002–03, 25 were finalised during 2001–02).

This year there was a decrease in the number of other reviews received, that is other than promotion reviews and those related to the Code of Conduct (a decrease of 38 applications for review or 23% compared to 2001–02). There continues to be a large number of applications received that are not able to be reviewed by the Merit Protection Commissioner. There were 46 applications received that were not able to be accepted as reviews and 10 that lapsed or were withdrawn. During 2001–02, 97 applications were not reviewed because the application was not accepted as it

related to a matter for which there is no right of review, or, where the Merit Protection Commissioner considered the application should first have been lodged with the relevant Agency Head. As with previous years, the main reason for not undertaking reviews continues to be that the Agency Head had not yet undertaken the primary review, reflecting a lack of understanding by a number of employees of the review processes. The Merit Protection Commissioner is putting in place strategies to address this issue with changes to the web pages in each region, the introduction of simplified pamphlets on the review process, and by offering further training to agencies and employees generally. The Merit Protection Commissioner also regularly provides advice on review provisions contained in Agency Certified Agreements.

The types of matters raised in the applications for review received, other than reviews of promotion decisions, are shown in Figure M1. As with previous years, reviews are continuing to raise complex workplace relationship issues arising from interpersonal conflicts. Reviews of actions relating to the Code of Conduct accounted for 43 or 25% of the applications received. Issues relating to the workplace environment, including harassment in the workplace, were the next most frequent reasons for applications for review being 39 or 23% of all reviews received. Duties (including relocation, assignment of duties and general issues relating to selection processes) accounted for 31 or 18% of reviews received and conditions of employment (salaries, other entitlements and leave) accounted for 29 or 17% of all reviews received. Other issues raised in reviews included performance management and performance appraisals (15 or 9%), entitlements on separation or termination of employment (7 or 4%) and miscellaneous

Figure M1: Review of action applications received July 2002–June 2003



issues such as an outcome of a management review, a decision relating to a work related injury and issues relating to an administrative matter (7 or 4%).

Table M3 provides a breakdown of the number of reviews by agency. Similar to last year, the Australian Taxation Office and Centrelink account for over 50% of these reviews, reflective of the proportion of APS employees in these agencies. There was an increase in the number of reviews undertaken for former employee. These reviews dealt mainly with issues relating to the payment of severance benefits and entitlements.

BREACHES OF THE APS CODE OF CONDUCT

The Merit Protection Commissioner received 43 applications for review that related to breaches of the Code of Conduct by APS employees. This was the same number as received in the financial year 2001–02. In addition to the 43 received this financial year there was a carry over of 11 from last financial year.

Twenty-nine of the applications for review were completed during 2002–03, 4 were not accepted, 8 lapsed or were withdrawn. There were 12 reviews carried over to the next financial year.

Matters considered in reviews of breaches of the Code of Conduct during this financial year included: inappropriate browsing of information on clients; inappropriate use of resources including departmental vehicles; behaviour outside work hours at social functions; sexual harassment of other employees; inappropriate use of emails or the internet; disrespect to clients, other

employees, supervisors and others; and drug taking during work hours.

The Merit Protection Commissioner made a formal recommendation to confirm, vary or set aside an agency decision to the relevant Agency Head in relation to the 29 completed s the agency decision, 14 recommended varying the decision and 5 recommended setting aside the decision.

The average time taken to complete a review of a breach of the code of conduct was just under 13 weeks. In 2001–02 the average time taken was just under 10 weeks. The difference is reflective of the complexity of the reviews undertaken this financial year.

OTHER APPLICATIONS FOR REVIEW

There were 128 other applications for review received from employees. A total of 54 or 42% of the cases on hand were reviewed during 2002–03 (during 2001–02, 69 or 42% of the 166 applications received were reviewed), 46 cases were not accepted and 10 cases lapsed or were withdrawn.

While there were fewer cases reviewed by the Merit Protection Commissioner this year than during 2001–02, the same percent of total applications received were reviewed. The reduction in the total number of reviews for employment related matters is consistent with trends of years prior to last year. There was an increase in the number of applications received during 2001–02 compared to previous years but since 1995–96 there has been a downward trend in the number of applications received.

The number of cases not accepted this financial year (46) was far fewer than last year where 97 applications were not accepted. This reduction may be due to a

Table M3: Applications reviewed 1 July 2002–30 June 2003 by agency

Agency*	Primary– review Code of Conduct	Primary review– other	Secondary review	Complaints by former employees	Total
Australian Taxation Office	6	0	17	0	23
Centrelink	13	0	8	0	21
Defence	1	0	5	1	7
Australian Customs Service	3	0	3	0	6
Immigration and Multicultural and Indigenous Affairs	1	0	2	0	3
Australian Electoral Commission	0	0	2	1	3
Health and Ageing	0	1	1	0	2
ABS	0	0	2	0	2
BOM	0	0	1	1	2
14 Other Agencies	5	1	7	1	14
Total	29	2	48	4	83

*The agency taking the action or, if the action is action by an APS employee, the agency in which the employee was employed at the time of the action.

better understanding by employees of what actions are reviewable.

Other applications for primary review made directly to the Merit Protection Commissioner

The Regulations provide for primary reviews by the Merit Protection Commissioner in certain circumstances.

Regulation 5.24(3) allows employees to apply directly to the Commissioner if the Agency Head was directly involved in the action, or because of the seriousness or sensitivity of the action, or because the action is related to victimisation or harassment of the employee for having made a previous application for review.

Regulation 5.25 allows the Agency Head, with the agreement of the Merit Protection Commission, to refer an application to the Merit Protection Commissioner for review. Examples of situations where this may occur include where the Agency Head has been directly involved in the action or because of the seriousness or sensitivity of the action.

There were 15 applications made under regulation 5.24(3). Of these, 11 were not accepted, lapsed or were withdrawn and 1 was reviewed.

Under regulation 5.25(1), 4 applications for review were received. Of these, 2 were not accepted, lapsed or were withdrawn and 1 was reviewed.

The reviews of the two applications made under regulation 5.24(3) and 5.25(1) took an average of 10 weeks to resolve.

Applications for secondary review

The regulations also provide for a secondary review to be undertaken by the Merit Protection Commissioner where an APS employee, other than an SES employee, is dissatisfied with the outcome of the primary review conducted by the Agency Head (Regulation 5.29(1)(b)). The Merit Protection Commissioner may also undertake a secondary review where the Agency Head did not accept the application because they formed the view that the action was not reviewable under the reasons set out in the legislation (Regulation 5.29(1)(a)).

During 2002–03, 101 applications for secondary review were received. This is comparable with the 100 cases received in 2001–02. Of the cases received in 2002–03, 34 were not accepted and 6 lapsed or were withdrawn. A total of 48 cases were reviewed during the period.

The average time taken to resolve the cases was just over 11 weeks.

In two cases the Agency Head did not accept the recommendations made by the Merit Protection Commissioner's delegate. Both cases were in the Australian Taxation Office. In one case the Agency Head accepted the principal recommendations but declined to accept a recommendation suggesting, for consideration, a phased approach by which outstanding monies might be recovered from an employee. Following further consideration of the Agency's response—regarding the existence and application of a long established internal policy for debt recovery and how that was to be applied—the Merit Protection Commissioner was satisfied that the action taken by the agency was reasonable. The second case remains under consideration.



IMPLEMENTATION OF NEGOTIATED AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SETTLEMENT

APPLICATION

An employee applied for review of determinations that they had breached the Code of Conduct (two incidents) and the sanctions of a re-assignment of duties and a reprimand.

The original sanction imposed was termination of employment for the breach and the employee subsequently took action against this decision in the Australian Industrial Relations Committee (AIRC). An agreement was reached between the employer and the employee in the AIRC. The agreement provided that the employee be reinstated, subject to several conditions. One of the conditions was that on returning to work they would accept a re-assignment of duties to another location.

The employee received a formal reprimand regarding the breach immediately after reinstatement and subsequently signed the reprimand. The employee lodged an application for review several months after receiving the sanction, arguing that as the original sanction of termination was lifted as part of the negotiated agreement in the AIRC it was therefore not possible for the employer to impose a revised sanction.

REVIEW

The delegate for the Merit Protection Commissioner concluded that:

- The employer had established comprehensive procedures for the investigation of breaches which complied with the Public Service Commissioner's Directions

- There had been substantial compliance with these procedures during the investigation and assessment of the matter
- There was evidence that the employee had breached the Code of Conduct in relation to one incident
- There was insufficient evidence that the employee had breached the Code of Conduct in relation to a second incident
- The re-assignment of duties to another location was the result of a negotiated agreement between the employer and employee in the AIRC and was therefore not a sanction directly imposed as a result of the breach
- The sanction of a reprimand was not unreasonable under the circumstances.

The delegate concluded that a written advice provided by the employer to the employee, following the negotiated agreement, advising that revised sanctions of a transfer to another workplace and formal reprimand had been imposed was not correct.

The delegate also concluded that the employee was fully aware that they had signed a binding legal agreement that they would accept a transfer to another workplace.

OUTCOME

The agency accepted the delegate's recommendations that the agency set aside the decision that the employee breached the Code and review its procedures for dealing with suspected breaches of the APS Code of Conduct.

REVIEW OF PROMOTION DECISIONS

APS employees who are applicants for promotion, in a selection exercise involving promotion to Classification Groups 2–6, are entitled to apply to the Merit Protection Commissioner for review of a promotion decision by a Promotion Review Committee.

During 2002–03, 193 promotion review committees were established. Table M4 provides information on the agencies involved in the promotion review as well as a breakdown of the nature of the applications for review.

Active applications are made by employees who were not promoted in the selection exercise and are applying for a review of the decision. Protective applications are made by employees who have been promoted and may be subject to review or be a part of the promotion review process that has active applications for review.

The Australian Taxation Office (ATO) undertook a large number of selection exercises during the financial year 2002–03. During the last financial year, the ATO had a freeze in recruitment from May 2001 to February 2002. The agency began advancing employees and recruiting additional employees to meet organisational requirements. The MPC assisted the ATO with this by establishing Independent Selection Advisory Committees, as reported below. However, not all employment opportunities were filled using Independent Selection Advisory Committees and some of these selection exercises attracted active and protective reviews.

In addition to the ATO, review of promotion applications came from 21 other agencies.

Those agencies that had more than 20 applications for review are identified in Table M4. There were 15 other agencies that had less than 20 applications for review that are not separately identified. A total of 30 of the 1071 promotion decisions reviewed were overturned by a PRC (or 2.8%). In relation to the review of promotions arising from the ATO selection exercises, 20 of the 680 promotion decisions made by the ATO were overturned or 2.9%. During the 2001–02 financial year 5.4% of the promotion decisions reviewed by PRCs were overturned.

The average time taken to complete the review of promotion decisions was 6.6 weeks and 75 or 57% were completed within the target time of 6 weeks.

INDEPENDENT SELECTION ADVISORY COMMITTEES

An agency may request the Merit Protection Commissioner to establish an Independent Selection Advisory Committee (ISAC) to consider applications for current and future employment opportunities at the APS Classification Groups 1 to 6. The Committee will make recommendations to the agency on the suitability of the applicants. A promotion decision made by the agency on the recommendation of an ISAC is not subject to review by a PRC. The Merit Protection Commissioner will usually establish an ISAC on a fee-for-service basis.

The Merit Protection Commissioner has issued instructions outlining the procedures and functions of an ISAC. The ISAC consists of a Convenor and APS employee both nominated by the Merit Protection Commissioner and an agency nominee. Where an order of merit is accepted by



USE OF CIRCUMSTANTIAL EVIDENCE

APPLICATION

An agency determined that an employee had breached the Code of Conduct by releasing sensitive agency information to a third party who was employed outside of the agency. The employee received a reduction in classification and a re-assignment of duties for the breach and applied for review of those decisions.

REVIEW

The investigation identified a range of circumstantial evidence such as telephone records and access to the information, which led the reviewer to believe the employee was the source of the information. No direct evidence was found by the investigation. The agency delegate on the balance of probabilities was satisfied that the employee was the source of the information and decided that the employee had breached section 13(13) of the PS Act 1999 and specifically Public Service Regulation 2.1.

For the purposes of subsection 13(13) of the Act, an APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, to any person any information about public business or anything of which the employee has official knowledge.

The delegate of the Merit Protection Commissioner acknowledged that the evidence on which the decision was made was circumstantial but a reasonable person could conclude that on the balance of probabilities, that evidence supports the finding.

OUTCOME

The delegate of the Merit Protection Commissioner concluded that on the available evidence it was reasonably open to the agency delegate to conclude that the employee was the source of the information and had breached the APS Code of Conduct, and that the sanction was within the range of reasonable sanctions that could be applied for a serious breach of the Code of Conduct.

The delegate also noted that while the Merit Protection Commissioner conducts an independent review of cases involving breaches of the APS Code of Conduct, it is not the role of the Commissioner to make a new decision on behalf of the agency.

Table M4 Applications for review of promotions overturned 1 July 2002–30 June 2003 by agency

Agency*	Total number of applications for review	Number of active applications	Number of protective applications	Number of promotions considered*	Number of promotions overturned*
Australian Taxation Office	3121	441	2680	680	20
Immigration and Multicultural and Indigenous Affairs	200	60	140	178	3
Australian Bureau of Statistics	110	21	89	81	0
Centrelink	78	16	62	51	2
Defence	32	22	10	20	1
Australian Customs Service	27	10	17	19	0
Veterans' Affairs	26	21	5	6	0
15 Other Agencies	48	24	24	36	4
Total	3642	615	3027	1071	30

* An APS employee may make an application for review of one or more promotion decisions. Not all applications made are considered by a PRC. Some applications are withdrawn, invalid or, in the case of protective applications, may not be activated.

the agency, that order of merit can be used to fill relevant employment opportunities for twelve months from the date of the original advertising of the vacancies. Agencies generally use ISACs because of the impartiality of the committees, their cost effectiveness, the fact that promotions made on the recommendations of a committee are not subject to review, and the ability to use the order of merit to fill future vacancies.

There is further information on ISACs on the APSC web page at www.apsc.gov.au/merit/indesac.htm.

Table M5 provides information on the number of ISACs established by agency and the number of candidates considered and recommendations made. During 2002–03, 93 committees were established in 9 agencies. There were more than twice as many ISACs compared to 2001–02 (43 established last financial year). This is primarily due to a large number of ISACs used by the Australian Taxation Office across Australia. There were also a number of new agencies using ISACs this year (Australian Quarantine and Inspection Service, the



NOT ALL AFTER WORK HOURS CONDUCT CONSTITUTES A BREACH

APPLICATION

An agency determined that an employee had breached the Code of Conduct by not at all times behaving in a way that upholds the APS Values and the integrity and good reputation of the APS. The employee received a fine for the breach.

REVIEW

The delegate of the Merit Protection Commissioner considered whether subsection 13(11) of the PS Act 1999 was relevant in this case.

The main issue raised by the case is the extent to which subsection 13(11) can apply to an incident which, although involving employees on an interstate business trip, was not witnessed by members of the public but only by another employee and occurring late at night while the employees were off-duty.

Subsection 13(11) consists of three elements—an APS employee must at all times:

- behave in a way that upholds the APS Values
- behave in a way that upholds the integrity of the APS
- behave in a way that upholds the good reputation of the APS.

To breach this subsection, it is not necessary for all three elements to be involved. In this case the delegate concluded that the behaviour was difficult to connect with failing to uphold any particular APS Value as set out in section 10 of the PS Act 1999. It was not clear how the incident between off-duty APS employees would have affected the integrity or soundness of the whole APS. As for any likely effect on the good reputation of the APS, it is noted that the incident was not witnessed by anyone outside the APS.

In this matter the relevant case law suggested that caution should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee.

OUTCOME

The delegate recommended that the agency set aside the breach of the code of conduct and the sanction as it appeared that the weight of authority was in favour of a conclusion that subsection 13(11) did not apply in the circumstances of the case.

Table M5: Independent Selection Advisory Committees Convened 1 July 2002–30 June 2003
by agency 2002–03

Agency	Committees established	Candidates Considered	Candidates recommended
Australian Taxation Office	69	10,305	1759
Australian Quarantine and Inspection Service	8	1779	438
Department of Immigration and Multicultural and Indigenous Affairs	2	182	60
Defence	5	188	51
IP Australia	3	127	20
Australian Radiation Service and Nuclear Safety Agency	2	12	8
Department of Health and Ageing (OATSIH)	2	32	2
Department of Foreign Affairs and Trade	1	121	45
Insolvency and Trustee Services Australia	1	9	1
Total	93	12,755	2429

Australian Radiation Protection and Nuclear Safety Agency and the Insolvency and Trustee Services Australia).

The 93 ISACs established considered 12,755 applications and made recommendations to fill 2429 employment opportunities. Of these, 69 ISACs were established in the Australian Taxation Office and considered 10,305 applications, making 1759 recommendations. The size of the selection exercises varied between the remaining agencies. The Australian Quarantine and Inspection Service had 8 ISACs that considered 1779 applicants and made 438 recommendations. The Department of Defence used 5 committees to consider 188 applications and made

51 recommendations. The remainder of the agencies established 1 to 3 committees to consider between 9 and 127 applications and make between 1 and 45 recommendations.

It is expected that the number of ISACs for 2003–04 will decrease, as the large exercises undertaken in ATO are almost all completed. The Merit Protection Commissioner will continue to promote the value of ISACs to agencies.

WHISTLEBLOWING

The Public Service Act 1999 and regulations provide a scheme for the reporting of alleged breaches of the Code of Conduct (known as whistleblowing).



REVIEW OF ACTION CONCERNING JOB CLASSIFICATION AND NEED TO ABIDE BY THE TERMS OF A CERTIFIED AGREEMENT

APPLICATION

Changes had been made to an applicant's position which he claimed made the job more closely aligned to the professional, rather than the executive, stream. The professional category would entitle the applicant to an additional salary increment. He was in possession of the required qualification, which had been made mandatory. The agency had a similar position in another State which had been converted to the professional designation.

The applicant applied for a change in the designation and this was rejected. He applied for internal review, and the agency engaged an independent specialist to investigate and report. The reviewer compared the jobs in both States, and examined the history of changes to the positions, but did not interview anyone. His report affirmed the agency decision, and the applicant sought secondary review under regulation 5.29(1)(b).

OUTCOME

The MPC found that the decision maker had failed to take into account relevant considerations in that the method for determining position classification was prescribed by the applicable Agency Agreement, but had not been followed. Furthermore, the applicant was able to provide evidence of the similarity of duties between the positions under review which the primary reviewer had not taken into account. The MPC recommended that the agency set aside the decision and undertake a further review. This subsequently occurred, with the result that the designation of the position was changed to the professional category.

Agency Heads are responsible for establishing procedures for dealing with a report made by an APS employee under whistleblowing provisions of the PS Act 1999. In the first instance, it is expected that disclosures be made to, and investigated by, the relevant Agency Head. A disclosure may be referred to the Public Service Commissioner or Merit Protection Commissioner where the APS employee is not satisfied with the findings of an agency based investigation, or in other specified circumstances, such as where it is not appropriate for the Agency Head to deal with the matter. Information on cases sent to the Public Service Commissioner is contained in his Annual Report.

The Merit Protection Commissioner received two whistleblowing reports during 2002–03, the same as for 2001–02. He also received a letter from an employee requesting information on how to raise issues that related to an employee's conduct and that may constitute a breach of the Code of Conduct.

The two whistleblowing reports were investigated by the Merit Protection Commissioner. Issues raised included inappropriate use of taxpayers' money, lack of probity in selections and inequities in access to training and development opportunities. The Commissioner concluded in both cases that there was insufficient evidence to substantiate the claims.

OTHER FUNCTIONS

Under the PS Act 1999 the Public Service Minister can request the Merit Protection Commissioner to inquire into an APS action and report to the Public Service Minister on the results of the inquiry. No requests were received during the reporting period. The

PS Act 1999 also provides for the Merit Protection Commissioner to inquire into alleged breaches of the Code of Conduct by the Public Service Commissioner and report to the Presiding Officers on the results of such enquiries. There have been no allegations of breaches during the reporting period.

EMPLOYMENT-RELATED SERVICES (FEE FOR SERVICE)

Non-APS agencies may request the Merit Protection Commissioner to perform employment-related services that are provided on a fee-for-service basis. The Merit Protection Commissioner can only provide these services in circumstances where the Commissioner is not required by a law of the Commonwealth to perform the function. Some of these services are provided under a standing Memorandum of Understanding and are provided on an ongoing basis. For example, the Merit Protection Commissioner successfully negotiated arrangements with the Australian Federal Police to provide convenors for Joint Selection Committees for vacancies that arise in that organisation. Related selection training to AFP employees is also provided.

The Merit Protection Commissioner also has agreements with the ACT Government Service, the Civil Aviation Safety Authority and the Health Insurance Commission to provide a range of selection, appeal and review functions.

Table M6 reports on the services that were provided during the financial year. Table M7 provides details on the number of JSCs established during the same period.

During the financial year there were 277 JSCs conducted, 276 of these for the Australian



MANAGING THE PROCESS

APPLICATION

An employee objected to a decision taken by their agency to direct them to attend a medical appointment, and to suspend them from duty until they attended. The agency head was involved in the action.

REVIEW

Due to the involvement of the Agency Head, the Merit Protection Commissioner agreed to accept the matter for review consistent with the provisions of Regulation 5.25(1). The agency had become concerned for the welfare of the employee after becoming aware of several letters the employee had written in a private capacity to external bodies, which included confidential information gained through their employment. This behaviour was viewed within the agency as very out of character for the employee, as there had not previously been any concerns with the employee's performance.

The review noted that the agency had given the employee several opportunities to be heard before the decision to suspend was taken, and that the suspension was ultimately lifted when the employee agreed to attend the medical assessment on a voluntary basis.

OUTCOME

The review concluded that the agency acted reasonably in directing the employee to attend the assessment, on the basis of concerns both for the employee and the employee's professional responsibilities, and taking account of professional advice obtained by the agency. The review noted that during the process there were a series of documented discussions between representatives of the agency and the employee indicating the employee was notified of the decision being considered and given an opportunity to respond before the decision was taken. The review concluded that no further action needed to be taken by the agency.

Federal Police. As in previous years, the Joint Selection Committee work provided a substantial amount of the fee-for-service work undertaken on behalf of the Merit Protection Commissioner. Other fee-for-service activities consisted of: training in staff selection issues for the Australian

Federal Police, the Health Insurance Commission and the Civil Aviation Safety Authority; provision of panel members for staff selections; grievance investigations; promotion reviews; and a few one off activities such as scribing and facilitating on people management issues.

Table M6 Employment-related services, 1 July 2002–30 June 2003

Nature of service	Number completed
Joint Selection Committees	277
Staff Selection Training	11
Panel Member—staff selection	4
Promotion Review Committees	2
Grievance Investigations	2
Scribing Service for Selection Advisory Committee	1
Internal Appeal Process	1
Facilitation—people management issue	1

Table M7 Joint Selection Committees convened, 1 July 2002–30 June 2003

Organisation	Separate Committees Established	Applicants	Placements recommended
Australian Federal Police	276	3803	629
ACT Government Service	1	55	15
Total	277	3858	644



ASSIGNMENT OF DUTIES– RELOCATION TO ANOTHER PLACE

APPLICATION

An employee applied to the Merit Protection Commissioner for review of a decision confirming her assignment of duties and the relocation of her previous duties from a remote locality to the nearest capital city.

REVIEW

On initial receipt this matter appeared to relate only to an assignment of duties decision, but on deeper analysis the Merit Protection Commissioner found that the decision under review was a decision to approve the employee's Leave Without Pay (LWOP) request, subject to their acceptance of an assignment of duties in the capital city on return from leave. The employee asserted that agreement to this condition was given under duress.

A fair construction of the agreement, which was made during the time of the changeover from the PS Act 1922 to the 1999 Act, is that to access LWOP the employee agreed to unattachment (i.e. being removed from the duties of a particular job in a particular location), and accepted that on the employee's return, the assigned duties would be located in the specified capital city.

To the extent the action under review related to an assignment decision, the Merit Protection Commissioner said it was arguable as to whether this decision was about the assignment of duties, which would not be reviewable (under paragraph 10 of Schedule 1 of the Regulations), or whether it was about the relocation of the employee and/or their duties, which was a reviewable action (under paragraph 10(b) of Schedule 1 of the Regulations). On balance, the Merit Protection Commissioner accepted the matter could be conceived of as being the latter. It was also noted that, as the object of the review of action regulations is to facilitate 'harmonious and productive working environments', taking the former approach would not be helpful and would go against the spirit of the Act and Regulations.

OUTCOME

Given that understanding of the action, the weight of the evidence lead strongly to a view that the employee understood the nature of the agreement entered into, and that the Agency Delegate exercised his delegated powers prudently and fairly for all concerned. In these circumstances, the decision was seen as a proper one, and the employee was advised that the Agency decision was supported.