



Australian Government  
Australian Public Service Commission

Australian  
Public Service  
Commissioner  
Annual Report

2004-05



Incorporating the Annual Report of the Merit Protection Commissioner

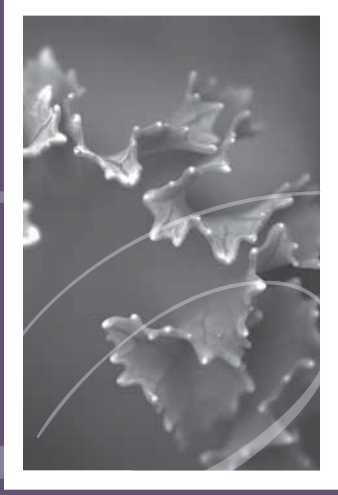
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# Heart

part four





**Australian Government**  
**Australian Public Service Commission**

MERIT PROTECTION COMMISSIONER

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

Dear Prime Minister

I am pleased to present my report for the period 1 July 2004 to 30 June 2005 as part of the Public Service Commissioner's Annual Report as required by section 51 of the *Public Service Act 1999*.

The 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 section 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.

I also have continuing functions under the repealed *Merit Protection (Australian Government Employees) Act 1984* and the *Public Service Act 1922* arising from regulations made under the *Public Employment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*. This report includes activities that may have occurred under the transitional arrangements.

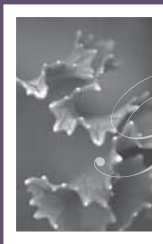
In presenting you with the report on my activities I take this opportunity to express my thanks to the staff of the Australian Public Service Commission for their assistance.

Yours sincerely

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

Jeff Lamond  
October 2005





# R

## ewiew

## MERIT PROTECTION COMMISSIONER'S REVIEW

Under the *Public Service Act 1999* and associated Regulations, a key part of my role as Merit Protection Commissioner is to provide independent external review of actions affecting individual APS employees. Undertaking this role provides support for the APS Value that 'the APS provides a fair system of review of decisions taken in respect of APS employees' (section 10(1)(o) of the Public Service Act).

My role of reviewing actions includes arranging review by a Promotion Review Committee (PRC) of certain engagement and promotion decisions, and reviewing other actions relating to the employment of people who are not members of the Senior Executive Service. When a promotion is reviewed, the PRC decision is binding on an agency head. When other employment actions are reviewed, I cannot compel an agency head to accept a resulting recommendation. However, if I am not satisfied with an agency head's response to a recommendation, the Public Service Act allows me to report the matter to an agency minister, the Prime Minister and the parliament.

Agency heads accepted all but two recommendations arising from reviews during 2004–05. The recommendations not accepted dealt with reviews in the Department of Immigration and Multicultural and Indigenous Affairs, and the Aboriginal and Torres Strait Islander Services. In both cases, discussions with the agencies resolved the matters to my satisfaction.

The number of applications for review continues to fluctuate from year to year. Further information on the nature of reviews, and discussion of trends, is provided under Analysis of Performance.

During the year, a restructure of the Commission, effective from 1 December 2004, resulted in a change to regional arrangements. This change saw creation

of a single regional group, and creation of a new role, Adviser to the Merit Protection Commissioner. The Adviser is now my sole delegate in the more substantive review matters, with responsibility for assuring the quality of review and whistleblowing work which, I envisage, will result in a stronger focus on this work. It is too early to form any conclusions about whether this change has had any impact on achievement of timeliness targets. Performance information for 2004–05 shows that the bulk of reviews were not completed within the expected timeframes. I will continue to monitor review processes and workload factors, including the impact of the new delegate structure, in considering the appropriateness of timeliness targets.

I have noted from the *State of the Service Report 2003–04* that, during that financial year, 48 agencies finalised formal investigations into the behaviour of 1083 employees suspected of breaching the APS Code of Conduct. This data is not directly comparable with the data from 2002–03 since the questions in the two surveys were framed somewhat differently. Nevertheless, the results from the two years are not inconsistent: both indicate that less than 10% of employees who were found to have breached the Code of Conduct subsequently lodged an application for review of that determination and/or the sanction imposed.

The *State of the Service Report 2003–04* also reported on the findings of an evaluation of how agencies are managing suspected breaches of the Code of Conduct. Key overall findings of the evaluation included that agencies that participated took misconduct seriously, and that while some have recently improved their processes and quality

assurance methods or are currently planning improvements, others have had good quality processes and quality assurance methods in place for some time.

The evaluation also found that most cases analysed followed proper processes, and it did not report identifying any systemic issues across the APS. These findings are consistent with the indications I have had from review applications I have received, which do not suggest there are any broad issues with implications for the APS as a whole that need to be addressed.

The evaluation also considered issues of consistency of sanctions, both within agencies and across the APS, and identified some of the factors that contributed to the differences, amongst agencies, in the types of sanctions imposed. The evaluation has led to preparation of a good practice guide on agency management of suspected breaches of the Code of Conduct, due for release in the first half of 2005–06. The guide will provide a detailed discussion of the factors that should be taken into account in determining an appropriate sanction. This will help agencies achieve more consistent decision making with respect to sanctions imposed within agencies, and should also contribute to some consistency of sanctions across the APS.

This year I have continued the practice of incorporating case studies on some of the reviews we conducted during the year in this report. These case studies are a useful source of information on the review process. I reported last year that I was considering including case studies on the Commission's web site—I will investigate dedicating resources to this task this year.

In June 2005, the Commission started reviewing the Public Service Act and associated subordinate legislation. The Public Service Commissioner has indicated that it is to be a low-key review, and I have been involved in discussions about the policy and technical issues to be addressed. I anticipate that I will continue to provide input to the review in 2005–06, as will Commission employees who help me perform my functions.

This year the Regional Director South Australia/Northern Territory and I attended the 11th National Public Sector Appeals Conference in Darwin

from 4 to 6 August 2004. The conference once again provided a valuable opportunity for senior representatives engaged in reviewing employment decisions in Commonwealth, state or territory public sector employment to share their experiences, ideas and views, and included a discussion of the most challenging cases each jurisdiction had faced in the previous 12 months. During the year, I took advantage of a number of opportunities to promote my role and functions. This included presentations at various conferences and other programmes and forums, including at the invitation of several APS agencies, where I spoke about a range of issues of relevance to the APS Values and Code of Conduct.

The annual meeting of all Regional Group Managers, Regional Directors and Regional Advisers, usually held near the end of the financial year, was not held in 2004–05. I decided to change the timing of these meetings, subject to organisational needs, to early in the financial year, following agreement on the budget for that year.

I reported in 2003–04 that progress had been made towards settlement with the Australian Government Solicitor of a number of threshold issues relating to the review function, and noted that a number of activities associated with promoting my role and services were tied to the settlement of these issues. The content of the advice in relation to these issues has been settled with the Australian Government Solicitor and I expect to be able to focus on progressing a number of awareness-raising activities in 2005–06, including the development of new simplified material on the review process.

The online system for notifying agencies of applications for a PRC review was operational for 2004–05. Feedback indicates it has been well received by agencies. The system has contributed to improved productivity in the Regional Services Group. As well, facilities to enable electronic lodgement of applications for a PRC review have been developed and became operational in February 2005. The facilities have attracted some use since that time and I expect use will increase over time.

In response to an identified need for a better system for recording and tracking the work performed on my behalf, on a fee-for-service basis, we developed and implemented the Timesheet Management System

(TiMS). TiMS is a simple-to-use Internet-accessible system that employees use to record the time they spend on identified tasks. Since its introduction, in January 2005, to the Regional Services Group's ACT Regional Office TiMS has streamlined the processing of this information, including associated payments to employees and client billing. The system is now used more widely within the Regional Services Group, as well as other areas of the Commission, and has resulted in improved productivity.

My statutory functions also include establishing Independent Selection Advisory Committees (ISACs) and other employment-related functions on a fee-for-service basis. The Australian Taxation Office undertook some bulk recruitment exercises this year that resulted in high numbers of applications for PRC review. I have subsequently had discussions with the Australian Taxation Office about the benefits of using ISACs including, in particular, that promotions made on an ISAC recommendation are not subject to review and normally result in more timely selection outcomes. The number of ISACs established in 2004–05 (similar to the number established in 2003–04) reflects a continuing recognition by agencies of the many benefits offered by using these Committees.

The number of other fee-for-service functions undertaken in 2004–05 is higher than in 2003–04 and reflects, in particular, the higher number of Joint Selection Committees established for the Australian Federal Police. The Joint Selection Committees are established under a memorandum of understanding with the Australian Federal Police, and the number undertaken fluctuates each year according to Australian Federal Police needs. There is more information on ISACs and other fee-for-service activities later in this report.

## Outlook for 2005–06

My priorities for 2005–06 include contributing to the review of the Public Service Act and, following resolution of issues about my role and the review function, increasingly focusing on activities associated with education about the review function. In that context, I will continue to promote my role and functions through activities such as speeches and presentations. I also intend to re-evaluate the information currently available on review rights, with a view to updating it where necessary and ensuring information is provided in ways that best meet the needs of both employees and agencies.





# Role

## ROLE, FUNCTION AND STRUCTURE

### Role

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

The Merit Protection Commissioner helps agencies meet the requirements of the APS Values and Code of Conduct through administering the statutory review of actions scheme and performing other statutory functions.

### Functions

The Merit Protection Commissioner's functions are set out in section 50 of the Public Service Act 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 inquiries 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 section 50(1)(e) is concerned, the Public Service Merit Protection Commissioner Regulations enable the to:

- (a) establish Independent Selection Advisory Committees to make 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) perform employment-related functions where the Merit Protection Commissioner is not required by a law of the Commonwealth to perform the function
- (c) review an action of a statutory office holder who is not an agency head that affects an APS employee in their employment
- (d) investigate complaints by former APS employees concerning separation entitlements.

The Merit Protection Commissioner charges a fee for establishing Independent Selection Advisory Committees and for performing 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*. These functions consist of casework arising under regulations made under the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

### Organisational structure

The Public Service Commissioner makes employees available to the Merit Protection Commissioner to undertake his casework through the six Australian Public Service Commission regional offices.

Each regional office maintains a register of appropriately trained and qualified people 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 nominee to PRCs and ISACs.

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. The ACT office, with support from other offices as needed, provides employees for coordination and policy support for the Merit Protection Commissioner.

This report and further information about the Merit Protection Commissioner's role and services are available on the Commission's web site at [www.apsc.gov.au](http://www.apsc.gov.au).



# Accountability

## MANAGEMENT ACCOUNTABILITY



**Jeff Lamond**  
**Merit Protection**  
**Commissioner**

### **Corporate governance**

Mr Jeff Lamond continued his appointment as Merit Protection Commissioner during the reporting period.

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

The Public Service Commissioner makes Commission employees available under section 49(2) of the Public Service Act to help the Merit Protection Commissioner fulfil his role. These employees are accountable to the Merit Protection Commissioner for performing functions he has authorised.

The Merit Protection Commissioner and the Public Service Commissioner have in place a memorandum of understanding for provision of staff necessary to help the Merit Protection Commissioner perform his functions. The Adviser to the Merit Protection Commissioner is the delegate of the Merit Protection Commissioner in the more substantive review matters.





# Review

## REVIEW OF PERFORMANCE

### Outputs and contribution to outcomes 2004–05

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

Performance information, as described in the 2004–05 Portfolio Budget Statement which relates to the Merit Protection Commissioner's functions, can be aggregated, where relevant, from Tables M1 and M2 of this report. Table M1 comprises casework arising from APS agencies and Table M2 includes casework arising from both APS and non-APS agencies.

**Table M1: Reviews of actions—workload, work completed and timeliness, 1 July 2004 to 30 June 2005**

Cases	Promotion Review Committees	Primary review—Code of Conduct	Primary review—other	Secondary review	Review –former employees
On hand at start of year	9	6	0	14	0
Received during the year	185	41	21	87	11
Reviewed	99	26	7	45	6
Not accepted	12	2	6	43	1
Lapsed or withdrawn	49	7	4	2	1
Total finalised during the year	160	35	17	90	8
On hand at end of year	34	12	4	11	3
Target completion time (weeks)	6	10	10	8	10
Average completion time for reviewed cases (weeks)	6.91	18.87	9.98	14.42	6.3
Completed within target time (number)	51	6	2	13	6
Completed within target time (%)	52	24	29	29	100

Table M2: Fee-for-service functions—workload and work completed, 1 July 2004 to 30 June 2005

	Independent Selection Advisory Committees	Other services requested
On hand at start of year	15	28
Received during the year	94	343
Completed	58	289
Lapsed/withdrawn	8	40
Total finalised during the year	66	329
On hand at end of year	43	42



# Analysis

## ANALYSIS OF PERFORMANCE

This Section provides information on reviews of actions the Merit Protection Commissioner undertook during the period 1 July 2004 to 30 June 2005. The review scheme, established by section 33 of the Public Service Act and Part 5 of the Public Service Regulations, enables all APS employees who are not members of the Senior Executive Service to seek redress when they believe an action taken or a decision made about their employment was unfair or unreasonable. Most matters that affect employees personally in the course of their employment can be dealt with in this way, except where the Public Service Regulations specifically exclude that action from review.

The types of reviews the Merit Protection Commissioner undertakes fall into three main categories: review of certain promotion and engagement decisions; review of breaches of the APS Code of Conduct; and other reviews of actions.

Applications for a PRC review are made directly to the Merit Protection Commissioner. PRC reviews are available in certain circumstances for applicants for levels up to and including APS Classification Group 6. A three-member PRC reviews the original decision and makes a decision that is binding on the agency head.

Applications for review of a determination that an employee has breached the Code of Conduct or of a sanction imposed for a breach of the Code of Conduct must be made directly to the Merit Protection Commissioner. An employee may lodge an application directly with the Merit Protection Commissioner in some other specified circumstances, including where the relevant agency head was directly involved in the action. An application may also be lodged with the Merit Protection Commissioner for a secondary review of an action where an employee is dissatisfied with the

outcome of a primary review conducted by an agency head, or has been advised by the agency head that 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 2004 to 30 June 2005.

This Section also provides information on the Merit Protection Commissioner's other responsibilities including that of inquiring into whistleblowing reports, establishing ISACs, and performing other employment-related functions on a fee-for-service basis.

### **Review of certain promotion and engagement decisions**

During 2004–05, 658 individual applications for PRC review were considered relating to 99 cases reviewed. This compared with 443 individual applications in 2003–04 relating to 73 cases reviewed. In this report, a case means an application by one or more APS employee for a PRC review of a decision or decisions arising from a discrete agency selection exercise. No applications for PRC review of engagement in the APS of a Parliamentary Service employee were received this year.

The number of PRCs established increased in 2004–05 compared with 2003–04: 99 in 2004–05, 73 in 2003–04, an increase of 26 (36%). The number of PRCs has fluctuated over recent years; this appears, to some extent, to be a reflection of volatility in recruitment patterns. For example, an increase in the number of PRCs in 2004–05 coincides with an increase of about 25% in the number of reviewable promotions and engagements gazetted, compared with 2003–04.

Table M3 provides information on the agencies involved in promotion reviews as well as a breakdown of the number of 'active' and 'protective' applications. Employees who were not promoted in a selection process would make an active application in which they are applying for review of the promotion decision. Employees who have been promoted and may be subject to review or be part of the active applicant promotion review process would make a protective application.

Applications for a PRC review were received in relation to selection decisions made in 13 agencies. Bulk recruitment exercises in the Australian Customs Service and the Australian Taxation Office that resulted in high numbers of promotions to reviewable classifications contributed significantly to the number of applications for review lodged during this reporting period. Those agencies, along with the three other agencies that had 20 or more applications for review, are identified in Table M3. Eight other agencies that had less than 20 applications for review are not separately identified. PRC reviews overturned 42 (5%) of the 840 promotion decisions reviewed. This compares to 24 (5.9%) of 404 promotion decisions in 2003–04, 30 (2.8%) of 1071 promotion decisions in 2002–03, and 15 (5.4%) of 277 promotion decisions in 2001–02.

The average time taken to complete PRC reviews was 6.9 weeks; 51 reviews (52%) were completed within the target time of six weeks. The large number of applications lodged relating to the promotions

made as a result of the bulk selection rounds in the Australian Taxation Office and Customs, and the complexity of determining those applications, given the numbers involved, impacted on timeliness outcomes for 2004–05. For example, three of the PRC cases for Australian Taxation Office positions each involved more than 80 parties while another case involved more than 50 parties. Three of the PRC cases for Customs each involved between 38 and 74 parties.

## Breaches of the Code of Conduct and other reviews

During 2004–05, 160 applications for review, other than for review of promotions decisions, were received. In addition, 20 applications were carried over from the previous reporting period. Of the total applications on hand in 2004–05, 84 were reviewed.

The types of matters raised in the applications are shown in Figure M1. Reviews of actions relating to the Code of Conduct accounted for 26 (31%) of the applications reviewed, the same percentage of total applications reviewed in 2003–04. Other matters reviewed related to conditions of employment, including leave and other entitlements, 17 (20%); the workplace environment and arrangements, including harassment, 16 (19%); duties, including selection processes, nine (11%); performance management, including performance appraisal, eight (10%); separation, six (7%); failure to act on review of action request, one (1%); and misconduct procedures, one or (1%).

**Table M3: Applications for review of promotion decisions and promotions overturned between 1 July 2004 and 30 June 2005, by agency**

Agency	Total no. of applications for review	No. of active applications	No. of protective applications	No. of promotions considered*	No. of promotions overturned*
Australian Taxation Office	334	213	121	416	25
Australian Customs Service	157	61	96	166	7
Department of Immigration and Multicultural and Indigenous Affairs	87	20	67	145	5
Centrelink	30	14	16	54	1
Australian Bureau of Statistics	20	5	15	28	2
8 other agencies	30	23	7	31	2
<b>Total</b>	<b>658</b>	<b>336</b>	<b>322</b>	<b>840</b>	<b>42</b>

\* 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.

Figure M1: Cases reviewed by subject, 2004–05

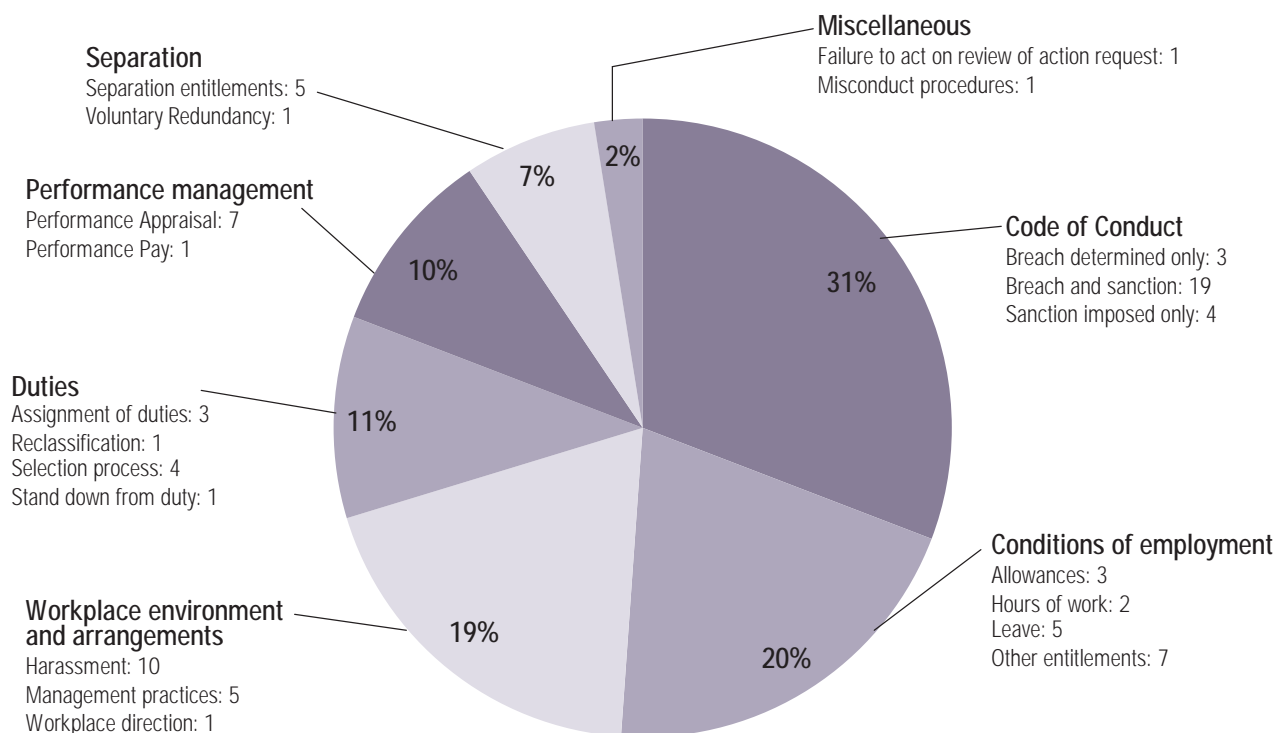


Table M4 provides a breakdown of the number of reviews by agency. As has been the case for the last two years, the agency with the highest number of reviews was the Australian Taxation Office, followed

by Centrelink and the Department of Defence. It is not surprising that these three agencies consistently have the highest number of reviews in view of the fact that, between them, they comprise around 50% of total APS staff.

Table M4: Applications reviewed 1 July 2004 to 30 June 2005 by agency

Agency*	Primary review – Code of Conduct	Primary review – Other	Secondary Review	Complaints by former employees	Total
Australian Taxation Office	7	1	11	1	20
Centrelink	3	0	11	0	14
Defence	1	0	11	2	14
Immigration and Multicultural and Indigenous Affairs	9	0	2	0	11
Australian Customs Service	1	0	2	1	4
Australian Bureau of Statistics	2	0	1	0	3
Finance and Administration	0	3	0	0	3
Australian Electoral Commission	1	1	0	0	2
Health and Ageing	0	0	1	1	2
National Native Title Tribunal	0	0	2	0	2
Director of Public Prosecutions	1	0	1	0	2
Seven other agencies	1	2	3	1	7
<b>Total</b>	<b>26</b>	<b>7</b>	<b>45</b>	<b>6</b>	<b>84</b>

\* 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.

## Breaches of the Code of Conduct

This year saw a decrease in the number of applications the Merit Protection Commissioner received that related to breaches of the Code of Conduct by APS employees, with 41 applications received in comparison with 58 in 2003–04. In addition, we carried over six applications from 2003–04. The number of applications we received this year is more consistent with the number of applications we received in previous years (43 applications were received in both 2001–02 and 2002–03).

The number of reviews we completed decreased this year: we completed 26 compared with 46 in 2003–04. However, this number is similar to the number completed in previous years: 25 were completed in 2001–02, 29 were completed in 2002–03. Of the applications on hand this year, two were not accepted, seven lapsed or were withdrawn, and 12 were carried over to 2005–06.

Matters considered in reviews of breaches of the Code of Conduct during 2004–05 included: inappropriate browsing of information on clients; sexual harassment; inappropriate use of emails or the Internet; use of inappropriate language; disrespect to clients and work colleagues; use of another employee's identification to enter the workplace after hours; misuse of Australian Government Credit Card and Cabcharge Card; incorrect time keeping; and misuse of resources.

Of the 26 applications we reviewed, 19 were for review of both a determination of a breach of the Code of Conduct, and the sanction imposed for the breach. Three applications sought review of the determination of a breach of the Code of Conduct only, and four were for review of the sanction imposed. 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 each of the 26 completed reviews. Of these, 12 recommended confirming the agency decision (compared with 20 in 2003–04 and 10 in 2002–03), 12 recommended varying the decision (compared with 17 in 2003–04 and 14 in 2002–03) and two recommended setting aside the decision (compared with nine in 2003–04 and five in 2002–03). Three reviews included a recommendation to vary the sanction imposed.

The average time we took to complete a review of a breach of the Code of Conduct was just under 19 weeks. In 2003–04 the average time we took was just under 15 weeks. The increase is in part reflective of the complexity of the reviews we undertook this year. Two of the more complex reviews were particularly time consuming, each taking close to a year to finalise. It should also be noted that the time taken includes the total time to complete a review including, for example, the time taken for an agency to provide information and the time that elapses due to unavailability of applicants and other employees.

## Other applications for review

This year we received 119 applications for reviews other than promotion reviews and those related to the Code of Conduct. This was a decrease of 48 (29%) applications for review compared to 2003–04. Fourteen cases were carried over from 2003–04 and 58 (44%) of the total cases on hand were reviewed during 2004–05: during 2003–04, 104 (54%) of the total cases on hand were reviewed; 50 cases were not accepted, seven lapsed or were withdrawn and 18 were on hand at the end of 2004–05.

There has been a downward trend in the number of applications we received and reviewed in recent years. Last financial year, when the numbers were particularly high, was an exception to this trend and was largely due to a bulk recruitment exercise in the Australian Taxation Office that resulted in a high number of applications for review. The figures for applications received and reviewed 2004–05 are similar to those for 2002–03, when we received 128 applications for review, and we reviewed 54 applications.

Of the 58 cases we reviewed, a response about issues raised during the review was requested from agencies in 12 (21%) cases. The number of applications received in 2004–05 that were not accepted, as a proportion of all applications received, was the same as for 2003–04, and similar to 2002–03 (38% in both 2004–05 and 2003–04 and 36% in 2002–03). The most common reasons for not accepting applications continued to be that the agency head had not yet undertaken the primary review, or that no right of review existed.

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

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

Regulation 5.24(3) allows employees to apply directly to the Merit Protection Commissioner where the agency head has been directly involved in the action; it is not appropriate, because of the seriousness or sensitivity of the action, for the agency head to deal with the application; or where the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action.

Regulation 5.25 allows the agency head, with the agreement of the Merit Protection Commissioner, to refer an application directly to the Merit Protection Commissioner. Examples of situations where this might occur include where the agency head has been directly involved in the action or it is not appropriate, because of the seriousness or sensitivity of the action, for the agency head to deal with the application.

During the year, 18 APS employees made direct application to the Merit Protection Commissioner under regulation 5.24(3). No applications were on hand at the start of the year. Four cases were not accepted, four lapsed or were withdrawn, and six were reviewed. Four cases were on hand at the end of 2004–05.

The Merit Protection Commissioner received two applications for review under regulation 5.25(1) during the year. No applications were on hand at the start of the year. One case was not accepted and one was reviewed.

Review of the seven cases under regulations 5.24(3) and 5.25(1) took an average of 9.98 weeks to finalise.

### ***Applications for secondary review***

The Regulations also provide for an APS employee, other than a Senior Executive Service employee, to apply to the Merit Protection Commissioner for a secondary review where the 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 has told the employee the action is not a reviewable action (regulation 5.29(1)(a)).

During 2004–05, we received 87 applications for secondary review: eight under regulation 5.29(1)(a) and 79 under regulation 5.29(1)(b). This is a decrease of 57 (40%) applications compared with 2003–04. In addition, 14 applications were on hand at the start of the year: one received under regulation 5.29(1)(a) and 13 received under regulation 5.29(1)(b). Of the total applications on hand in 2004–05, 43 were not accepted and two lapsed or were withdrawn. Forty-five cases were reviewed during the period, compared with 94 in 2003–04. This difference in cases reviewed over the two reporting periods is primarily due to the unusually high number of cases in 2003–04 as a result of a bulk selection exercise in the Australian Taxation Office that resulted in a high number of applications for review. The number reviewed in 2004–05 is similar to the number reviewed in 2002–03, when 48 cases were reviewed.

Of the nine applications on hand in 2004–05 under regulation 5.29(1)(a), five were not accepted since the Merit Protection Commissioner concurred with the views of the agency heads that the actions were not reviewable actions. One was on hand at the end of the reporting period. We reviewed three cases to determine whether the action was a reviewable action. In each case, the Merit Protection Commissioner determined that the actions were not reviewable actions.

### ***Investigation of complaints by former employees***

Regulation 7.2 provides that the Merit Protection Commissioner may investigate a complaint by a former APS employee that relates to the employee's entitlements on separation from the APS. We received 11 applications under regulation 7.2 during 2004–05, and carried no applications over from 2003–04. We reviewed six applications, one was not accepted, one was withdrawn, and three were on hand at the end of the reporting period.

## Independent Selection Advisory Committees

The Merit Protection Commissioner may establish an ISAC at an agency head's request. An ISAC is an independent three-member committee that considers applications for employment opportunities at classifications in APS Classification Groups 1 to 6, and makes recommendations to the agency head on the suitability of the applicants. The Merit Protection Commissioner will usually establish an ISAC on a fee-for-service basis.

An ISAC consists of a convenor and APS employee, both nominated by the Merit Protection Commissioner, and an agency nominee. The Merit Protection Commissioner has issued binding instructions on the procedures and functions of an ISAC, but the members of an ISAC are otherwise not subject to direction in carrying out their duties, except by a Court.

Use of an ISAC facilitates and supports good practice in strategic people management and organisational performance. Such good practice is due to the professionalism, independence and impartiality of the committee, the flexibility of the process which can accommodate a range of selection assessment techniques, the fact that promotions made on the recommendation of an ISAC 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 Commission's web site at [www.apsc.gov.au/merit/isac.htm](http://www.apsc.gov.au/merit/isac.htm).

Table M5 provides information on the number of ISACs established by agency, the number of candidates considered, and the number of recommendations made. During 2004–05, 58 committees were established in 11 agencies. In 2003–04, 53 committees were established in 15 agencies. Fewer candidates were considered and recommended this year compared with last year, with 2210 candidates considered and 559 candidates recommended in 2004–05, compared with 3338 candidates considered and 648 candidates recommended in 2003–04. The number of committees established and recommendations made has tended to fluctuate from year to year, reflecting volatility in agency recruitment patterns. Overall, however, use of ISACs continues to be steady and indicates that many agencies recognise the numerous benefits the committees offer.

During 2004–05, the Australian Taxation Office was once again the highest user of ISACs, using 22 committees to assess 997 candidates, from which 183 placements were recommended. The second highest user was the Department of Health and Ageing, which used eight committees to assess 166 candidates, from which 51 were recommended. A number of agencies, including the Australian Quarantine and Inspection Service, the Department of Immigration and Multicultural and Indigenous Affairs and the Department of Foreign Affairs and Trade, employed strategic approaches towards using ISACs, with high numbers of candidates recommended from small numbers of ISACs.

**Table M5: Independent Selection Advisory Committees Convened 1 July 2004 to 30 June 2005**

Agency	Committees established and completed	Candidates considered	Candidates recommended
Australian Taxation Office	22	997	183
Department of Health and Ageing	8	166	51
Department of Defence	6	51	16
Australian Quarantine and Inspection Service	4	237	98
Centrelink	4	153	57
Department of Education, Science and Training	4	70	20
Department of Immigration and Multicultural and Indigenous Affairs	3	229	77
Social Security Appeals Tribunal	2	23	2
Department of Foreign Affairs and Trade	2	234	48
Insolvency and Trustee Service Australia	2	37	3
Australian Public Service Commission	1	13	4
<b>Total</b>	<b>58</b>	<b>2210</b>	<b>559</b>

## Whistleblowing

The Public Service Act and regulations provide a scheme for APS employees to report alleged breaches of the Code of Conduct (known as whistleblowing). Agency heads are responsible for establishing procedures for dealing with whistleblower reports. In the first instance, it is expected that such reports will be made to, and investigated by, the relevant agency head. A report may be referred to the Public Service Commissioner or the Merit Protection Commissioner where the APS employee is not satisfied with the findings of the 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 reports made to the Public Service Commissioner is contained in her annual report.

The Merit Protection Commissioner received four reports during 2004–05, two less than he received in 2003–04. In addition, three reports were on hand at the start of the year. Of the seven reports on hand during the year, five did not meet the criteria for investigation by the Merit Protection Commissioner, the most common reason being that the agency head had not yet conducted an initial investigation. The Merit Protection Commissioner investigated two reports. Issues raised included mismanagement of a range of personnel matters, including leave entitlements and probation; misuse of Commonwealth funds; and harassment.

## Other functions

Under the Public Service Act, the Public Service Minister can ask 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 Public Service Act 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 were no allegations of breaches during the reporting period.

## Employment-related services (fee-for-service)

The Regulations provide for the Merit Protection Commissioner to carry out a range of employment-related functions for non-APS people or bodies where the Merit Protection Commissioner is not required by a law of the Commonwealth to perform the function. The Merit Protection Commissioner may charge a fee for carrying out the function.

Some of the services are provided under a standing memorandum of understanding on an ongoing basis. For example, the Merit Protection Commissioner currently has arrangements in place with the Australian Federal Police to provide convenors for Joint Selection Committees for vacancies that arise in that organisation. We also provide related selection training to Australian Federal Police employees. The Merit Protection Commissioner also has agreements in place with other non-APS bodies to provide a range of selection, appeal and review functions.

Table M6 reports on the services we provided during 2004–05. Table M7 provides details of the number of Joint Selection Committees established during the same period.

During 2004–05, 243 Joint Selection Committees were conducted, 239 were for the Australian Federal Police. The number of Australian Federal Police Joint Selection Committees increased in 2004–05 in comparison with 2003–04, when only 166 were conducted. Other fee-for-service work undertaken on behalf of the Merit Protection Commissioner included staff selection training for the Australian Federal Police; grievance investigations; and participation as a convenor or panel member on selection advisory committees.

**Table M6: Employment-related services,  
1 July 2004 to 30 June 2005**

Nature of service	Number completed
Joint Selection Committees	243
Training	27
Scribing Service for Selection Advisory Committees	7
Grievance Investigations	4
Other	3
Panel Member on Selection Advisory Committees	3
Convenor on Selection Advisory Committees	2
<b>Total</b>	<b>289</b>

**Table M7: Joint Selection Committees  
convened, 1 July 2004 to 30 June 2005**

Organisation	Separate Committees established	Applicants	Placements recommended
Australian Federal Police	239	2730	775
Non-APS governing bodies	4	128	81
<b>Total</b>	<b>243</b>	<b>2858</b>	<b>856</b>

## CASE STUDY 1

### Review of actions under the Public Service Regulations—Credibility of primary or internal review process

#### Application

An APS employee applied for secondary review, by the Merit Protection Commissioner, of the decision not to approve her undertaking a particular training course. When that decision was first reviewed within the relevant agency, the primary or internal review delegate:

- found that the decision was made on invalid grounds, essentially because it was made for reasons unrelated to the applicant's training needs
- said that, given that the primary reason for the decision was invalid, it was inappropriate to seek to rely on secondary reasons to prevent the applicant from training
- strongly recommended that the applicant be permitted to undertake the next available course.

The applicant applied for secondary review by the Merit Protection Commissioner because her line management was unwilling to acknowledge the findings of the primary review and implement its recommendation.

#### Review

The Merit Protection Commissioner was concerned that the procedures for reviewing actions in the agency should operate generally in a manner consistent with section 33 of the Public Service Act and, in particular, Public Service Regulation 5.1 (General policy about review), namely:

- (1) It is the policy of the Australian Government that APS Agencies should achieve and maintain workplaces that encourage productive and harmonious working environments.
- (2) It is intended that this Part should provide for a fair system of review of APS actions.
- (3) Employees' concerns are intended to be dealt with quickly, impartially, and fairly.

In this context, according to the Australian Standard on prevention, handling and resolution of disputes (AS 4608–1999, p.8) and the Australian Standard on complaints handling (AS 4269–1995, p.6), respectively:

- You need to have a clear policy on dispute prevention, handling and resolution which is understood by all your employees and associates.
- A complaints handling process shall have the capacity to determine and implement remedies.

Consequently, the Merit Protection Commissioner advised the agency's national office that in an effective, credible internal or primary review system:

- applicants would not be advised of the outcome of a review until after the matter was decided by a competent delegate of the agency head, that is one delegated under the Public Service Regulations to make such decisions
- other people would not be able to overrule the review delegate, particularly after the applicant for review has been advised of the outcome of the review.

#### Outcome

On 31 May 2005, noting the passage of time and the possibility that the particular course in question may not be available in the foreseeable future, the Merit Protection Commissioner recommended to the agency that, as far as practicable, the primary review delegate's finding and recommendations be implemented and appropriate support and advice be given to the applicant and her line management.

## CASE STUDY 2

### Breach of the APS Code of Conduct—Issues relating to retention of records and disclosure

#### Application

An APS employee applied for review of a decision that he had breached the APS Code of Conduct and of the sanctions imposed on him for that breach—a reprimand and re-assignment of duties to another job of the same classification but at another location. In addition, the relevant agency told the applicant that:

- a copy of the record of the reprimand would be placed upon his 'personnel file' and retained for the period of two years
- even after that period, he would be obliged to disclose that he had an 'Official Conduct Record' (for example, in connection with a job application or security clearance).

#### Review

Having reviewed the matter, the Merit Protection Commissioner was reasonably satisfied that the applicant had breached the APS Code of Conduct and that the sanctions imposed on him were not unreasonable. However, the Merit Protection Commissioner was concerned about the agency's record-keeping practices and the advice given to the applicant about his purported obligation, seemingly for an indefinite period, to disclose that he had an 'Official Conduct Record'.

In relation to the first issue:

- as set out on page 17 of *Managing Breaches of the APS Code of Conduct* (re-published by the Public Service Commissioner in August 2002), records relating to misconduct should not be placed on the employee's personal file, but rather on a separate misconduct action file or, where appropriate, an investigation file (the existence of a separate misconduct file should, however, be made apparent on the personal file, for example, by cross-reference)
- the Administrative Functions Disposal Authority (published by the National Archives of Australia in February 2000) provides that all records documenting investigations of misconduct which result in a disciplinary action being taken are to be retained for five years.

As for the second issue, the advice given to the applicant was in conflict with the general principle that individuals who have been subject to disciplinary action should not have their previous misconduct held against them indefinitely. At the expiration of the relevant period, providing there have been no new breaches of the Code of Conduct during that period, the record of the action taken against an employee should be destroyed and the employee concerned should no longer be taken to have a misconduct record. As set out in paragraph D.6.20 of the *Commonwealth Protective Security Manual* (October 2000), the same general principle also applies, under the *Commonwealth Spent Convictions Scheme*, to convictions for criminal offences—and most of these are usually more serious than most disciplinary breaches and must be proved beyond reasonable doubt.

#### Outcome

The applicant's agency has amended its practice of holding misconduct information on personnel files and now keeps separate records of misconduct investigations for case management and reporting purposes. The agency has also reviewed its recruitment and security procedures in relation to requiring staff to disclose prior misconduct and they are now consistent with the principles of the *Commonwealth Spent Convictions Scheme*.

## CASE STUDY 3

### Breach of the APS Code of Conduct—Sending an offensive email

#### Application

An APS employee applied for review of a decision that, by sending a rather offensive email, he breached the APS Code of Conduct and of the sanctions imposed on him for that breach—a reprimand and reduction in classification from APS level 3 to APS level 2. While he later accepted that he had breached the Code, he originally argued that he could not have breached section 13(3) of the Public Service Act, which provides that:

An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.

This was, he said, because he did not send the email to the person described in it and she may not even have become aware of the email. In effect, as she was not a party to that exchange, it could not be said that he ‘treated’ her without respect and courtesy, and without harassment, as required by section 13(3).

#### Review

As far as it went, this was not an unarguable proposition. In fact, a somewhat similar view was expressed by the Australian Industrial Relations Commission (AIRC) in a case decided in February 2003. However, in a later case, in November 2004, a differently constituted AIRC said that sending disrespectful emails about another APS employee amounted to a *prima facie* breach of the Code of Conduct. In any event, the email in question was highly offensive and probably defamatory.

Generally, to make, without lawful justification, a derogatory statement about a person, lowering that person’s reputation in the eyes of reasonable members of the community, or leading people to avoid, ridicule or despise that person, or which has a tendency to injure that person’s reputation in office, profession, business or trade, is to defame them. To defame a person is to breach the laws of defamation which, in Australia, are a mixture of common law and state or territory law. Not to comply with an applicable Australian law when acting in the course of APS employment is to breach section 13(4) of the Public Service Act, which states that:

An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:

- (a) any Act (including this Act), or any instrument made under an Act; or
- (b) any law of a State or Territory, including any instrument made under such a law.

In the Merit Protection Commissioner’s opinion, the suggestions the applicant made in his email about another APS employee were defamatory in that they ridiculed that person, were likely to make others think less of them, and might also have injured them in their employment. Consequently, even if, by sending that email, he did not breach section 13(3) of the Public Service Act, he breached section 13(4). In this context, in *Department of Health and Human Services v Beveridge* (23 February 2004, M330/2003, at 16-18), the court held that, for the purposes of disciplinary proceedings, the Tasmanian State Service Commissioner could determine whether an employee failed to comply with an Australian law, regardless of whether any prior decision-making had taken place in relation to the same question.

Moreover, when the applicant sent that email, he also breached section 13(8) of the Act, by failing to use Commonwealth resources in a proper manner.

As for the sanctions imposed on the applicant, they were, in the Merit Protection Commissioner’s opinion, well within the range of sanctions one could reasonably expect for such a serious breach of the APS Code of Conduct and were not inappropriate.

#### Outcome

As recommended by the Merit Protection Commissioner, the applicant’s agency confirmed the decisions under review.

## CASE STUDY 4

### Breach of the APS Code of Conduct—Multiple breaches and several sanctions

#### Application

An APS employee applied for review of a decision that, in six different ways, he breached two elements of the APS Code of Conduct and of the three sanctions imposed on him for those breaches. The six alleged breaches were that the applicant:

- told a client that he too had no confidence 'in the system'
- spoke inappropriately [loudly] to a client
- displayed inappropriate behaviour towards a client by being abrupt and cutting the client off
- transferred inappropriately clients' calls within his topic boundary and calls which should have gone to another business line
- failed to apply the 'relationship management model'
- was frequently late for work.

#### Review

The decision declared that, by committing the abovementioned six acts, the applicant breached the following elements of the APS Code of Conduct:

13(1) An APS employee must behave honestly and with integrity in the course of APS employment.

13(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.

However, the decision failed to explain which of the applicant's acts breached which of these elements of the Code or how. Also, to find that a person has failed to act honestly and with integrity is a serious matter not to be done lightly, especially in a case where there was no proof of intention to act dishonestly. In this context, there is a difference between:

- section 13(1) of the Public Service Act which requires APS employees to behave 'honestly and with integrity' in the course of their employment
- section 13(11) of the Public Service Act which requires them to behave at all times in a way that upholds 'the integrity and good reputation' of the APS.

On review, while the Merit Protection Commissioner was reasonably satisfied that the applicant had committed the alleged acts, none of them amounted to a breach of section 13(1) of the Public Service Act. In the opinion of the Merit Protection Commissioner, to say to a client that he too had no confidence 'in the system' would tend to bring the agency into disrepute and would therefore be a breach of section 13(11) of the Act rather than of section 13(1) or 13(5).

Next, as the applicant had previously been specifically directed to treat clients with respect and courtesy—see sections 13(3) and (5), when he spoke inappropriately to a client he breached these two sections but not section 13(1) as this did not involve an obvious lack of honesty or integrity. For the same reason, when he displayed inappropriate behaviour towards a client by being abrupt and cutting them off, this too was a breach of sections 13(3) and 13(5), and not of section 13(1).

In relation to inappropriately transferring clients' calls, there was no evidence that the applicant was previously directed about how to transfer or not transfer clients' calls. Also, there was no obvious connection between 'failing to apply the relationship management model' and lacking honesty or integrity, or evidence that the applicant was previously directed to apply that model. In *Phillips v Disciplinary Appeal Committee* (1994) 34 ALD 758, the Federal Court said that if an agency wanted to issue a binding instruction or direction this could not be done by issuing a circular described as 'policies, procedures or guidelines'. For a document to be a binding direction, it must be expressed as such:

The word 'instruction' ... should be confined to such commands as are unequivocally intended to create new legal obligations ... [An instruction] should be tightly drafted, using the language of command throughout, and specifying exactly what actions officers should, and should not, take.

However, section 13(2) requires APS employees to act with care and diligence in the course of their employment. Consequently, to act contrary to the relevant procedures may be a breach of section 13(2), rather than of section 13(1) or 13(5). Similarly, while there is no obvious connection between being late for work and being dishonest or lacking integrity, frequent lateness for work may be incompatible with acting with care and diligence in the course of one's employment and, in the applicant's case, was also directly contrary to a direction given to him on 19 November 2002. In other words, the applicant's frequent lateness for work amounted to breaches of sections 13(2) and 13(5) of the Act, but not of section 13(1). For the above six breaches, the agency imposed the following three sanctions on the applicant—a reprimand; deduction from salary, by way of fine, of \$300 (or \$50 for each breach); and reduction in salary, to the first salary point of the APS 3 classification (\$38,743 a year). The full rationale for these sanctions was:

The determination and sanction that follows are intended to protect the public and to maintain proper standards of conduct by members of the Australian Public Service and to protect the reputation of the Australian Public Service. Given that the breaches occurred over a period of approximately 3 months, I believe a cumulative sanctioning approach should be taken as a deterrent for future breaches occurring.

While there may be no legal impediment to imposing more than one sanction in a case of proven misconduct, the person imposing the sanction must be satisfied that more than one sanction is appropriate in the circumstances of the case and give proper reasons for their decision. Secondly, where sanctions for more than one breach are being imposed concurrently, the decision-maker should, after deciding what sanction is warranted in relation to each breach, consider whether the total effect is not disproportionate to the seriousness of the breaches considered as a whole—in other words, apply what the courts call the totality principle.

In this case, there was no indication of why the agency considered that, in addition to the reprimand, the applicant's breaches warranted both a fine and a reduction in salary or whether they considered the total effect of the three sanctions on the applicant (apparently about \$4,000 over three years). In the circumstances of the case, including that the allegation that the applicant had not behaved 'honestly and with integrity' had not been substantiated, monetary sanctions exceeding \$4,000 seemed excessive. Instead, the maximum fine allowed under Public Service Regulation 2.3 (2% of his annual salary) was recommended as being more appropriate.

## **Outcome**

The applicant's agency varied the decisions as recommended by the Merit Protection Commissioner, both in relation to the breaches and in relation to the sanctions.

## CASE STUDY 5

### Travelling allowance—What is a ‘dependant’?

#### Application

An APS employee applied for secondary review by the Merit Protection Commissioner of the decision that she was not eligible for an allowance to cover meals and incidentals while undertaking a training course interstate for about three months, on the basis that she was an employee without dependants. Her dissatisfaction with the decision appeared to centre on the definition of the term ‘dependant’ in the relevant certified agreement. The definition included ‘the employee’s partner’ but, unlike the previous certified agreement in the same agency, did not specifically require that person to ordinarily reside with the employee. However, a related policy document contained more comprehensive definitions of the relevant terms including:

- ‘dependant’ as including (that is, in addition to certain children and parents of the employee) the partner of the employee who ordinarily resides with them
- ‘employee with dependants’ as meaning an employee who has one or more dependants, one or more of whom is, or are, residing with the employee.

#### Review

Originally, the applicant did not list any dependants on her claim form and the agency processed her travelling allowance as an employee without dependants. When she later claimed that another employee in the same agency was her partner, the fact that each of them was maintaining separate residences was taken into account in deciding that his circumstances did not satisfy the definition of ‘dependant’. Later, the applicant said that exchanging house keys and sharing holiday costs (as also good friends might do) were consistent with a marriage-like relationship between her and the other person and, also, that the *Family Law Act 1975* defines a de facto relationship as:

the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other.

Having considered the matter, the Merit Protection Commissioner concluded that the reported nature of the relationship in question did not support a case for the applicant being paid an additional allowance to cover meals and incidentals, based on the other person being her ‘dependant’. Briefly put, the reasons for his conclusion were that:

- consistent with general community practice and the common law, the definition of ‘dependant’ in the certified agreement at least implicitly referred to marriage partners, de facto or de jure, who usually resided with each other
- consistent with that interpretation, the relevant clause said:

[The agency] is committed to providing a range of entitlements to assist in meeting reasonable associated costs to employees who are required to travel within Australia and perform duty away from their usual place of work;

and that employees with ‘dependants’ will be entitled to an allowance to assist in the cost of meals and incidentals

- while such assistance is generally provided to offset some of the costs that may be incurred because of joint household commitments, it had not been demonstrated that, at the relevant time, the applicant and the other person were sharing such costs and commitments on an ongoing basis, particularly in the light of their maintaining separate residences
- consequently, assuming that was relevant, there was also insufficient evidence that she and he were ‘living with each other as spouses on a genuine domestic basis’ within the meaning of the definition of a de facto relationship in the *Family Law Act 1975*.

#### Outcome

As recommended by the Merit Protection Commissioner, the applicant’s agency confirmed the decision under review.

## CASE STUDY 6

### Break in employment—Salary on re-engagement after three months

#### Application

An APS employee applied for secondary review by the Merit Protection Commissioner of the decision relating to her commencing salary when, after an interval of about three months, she was re-employed by her agency.

#### Review

The applicant commenced work with the agency in March 1997. Until July 2002 when she left the agency, she was employed at Band 2, pay point 8 (B208).

After about three months, in October 2002, the applicant was re-employed by the agency, first as a non-ongoing employee, at Band 2, pay point 1 (B201). Then, in December 2002, her salary was increased to pay point 3 (B203). The Merit Protection Commissioner was advised that this decision was based on the need to pay more to be able to attract and retain people for short periods in jobs with little or no job security, rather than on the applicant's level of performance.

Subsequently, in January 2003, the applicant was re-employed as an ongoing employee; going back to Band 2, pay point 1 (B201). By that time, a new certified agreement was in place. The new certified agreement required employees to obtain a Certificate IV to be able to advance to and beyond Band 2, pay point 6 (B206).

As at the time of the review, the applicant was on pay point 5 (B205), having re-negotiated that salary level from May 2003. The outcome the applicant sought from the secondary review was to renegotiate her salary, from October 2002, at her old July 2002 salary (B208) on the grounds that:

- she was out of the agency for only about three months before coming back as a non-ongoing employee—this was not long enough for her to lose her skills
- her skills and experience were again not appropriately recognised when she was later re-engaged, at the bottom of the relevant salary range, as an ongoing employee
- it would take at least three years to work her way up to her former pay level, including about a year to complete Certificate IV and this would probably take the rest of her working life.

In the opinion of the Merit Protection Commissioner, the main issue for consideration in this case was whether it would have been appropriate for the agency to authorise a higher salary for the applicant when she returned to the agency in October 2002 or at a later date. The relevant certified agreement provided that:

When an APS employee commences with [the agency] from outside the APS, salary will be payable at the minimum point in the salary range applicable to the classification of the job unless the CEO or Delegate authorises a higher pay point, having regard to experience, qualifications and skills of the employee.

Also, noting that the agency was able to re-negotiate an employee's salary at any time following their commencement, to warrant such reconsideration regard needed to be had to experience, qualifications and skills of the employee—in this case, the applicant's experience and skills as at October 2002 when she was re-employed by the agency. As at that date, she had been absent from the agency for some three months only. She had significant prior experience of working at a higher level and this experience was similar in nature to her new duties. Her performance had been rated as either excelling in many areas or meeting expectations for someone employed at Band 2, pay point 8 (B208).

In all the circumstances of the case, considering the applicant's skills and experience and that there was no evidence that these had materially degraded during the three months of her absence from the workplace—and that she does not hold a Certificate IV, the Merit Protection Commissioner concluded that the preferable decision when she was re-employed in October 2002 would have been to pay her neither at her old salary level (B208), nor at the bottom of the relevant salary range (B201), but at pay point 5 (B205) which does not require that certificate.

#### Outcome

For these reasons, the Merit Protection Commissioner recommended on 20 July 2005 that the applicant's salary for the period October 2002 to May 2003 be varied to Band 2, pay point 5 (B205).

## CASE STUDY 7

### **Excess employee—Reduction in classification—decision of no effect because mandatory procedures not followed**

#### **Application**

An APS employee applied for secondary review by the Merit Protection Commissioner of a decision relating to his classification. He was an excess APS 4 employee who declined an offer of voluntary redundancy from his agency. Subsequently, the agency found him an APS 3 job and reduced his classification from APS 4 to APS 3.

#### **Review**

On review, it was established that:

- before making the abovementioned decision, the agency did not appear to have complied with all relevant provisions of its certified agreement—in particular, on or after 18 June 2004, with clause 250 of the agreement the effect of which was to require the agency to provide the applicant with a ‘skilled, suitable mentor’, preferably after conferring with the applicant as to suitable candidates
- under the certified agreement, such mentors were required to ‘be an advocate for the employee and ensure fair treatment from [the agency]’
- the mentor ostensibly, retrospectively provided by the agency (without the applicant’s consent or knowledge) could not be said to have been ‘suitable’ (he represented the agency’s management, drafted the voluntary redundancy letter and was involved in the decision to reclassify the applicant)
- consequently, given section 23(5) of the Public Service Act:

If a relevant award, certified agreement or AWA contains procedures to be followed when reducing the classification, then a reduction is of no effect unless those procedures are followed;

the decision under review seemed to have been of no effect.

For these reasons, the Merit Protection Commissioner formally recommended that the decision in question be set aside and substituted by a new action; for example, the relevant process could be recommenced from where it was on 18 June 2004. In the meantime, the applicant’s classification continued to be APS 4 until and unless a new, valid decision was made to reduce it.

#### **Outcome**

The agency accepted the Merit Protection Commissioner’s recommendation.