



Australian Government  
Australian Public Service  
Commission

Australia Public  
Service Commissioner  
Annual Report  
2006–07



incorporating the Annual Report  
of the Merit Protection Commissioner



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Part four  
Annual Report of the  
Merit Protection Commissioner







**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 the Merit Protection Commissioner's report for the period 1 July 2006 to 30 June 2007 as part of the Public Service Commissioner's annual report required by section 51 of the *Public Service Act 1999*.

This report is prepared in accordance with the 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*. In accordance with the provisions of the *Public Service Act 1999* detailing the administrative arrangements to support the performance of the Merit Protection Commissioner's functions, some of the required information is published within the Public Service Commissioner's annual report.

In presenting you with the report on the activities of the Merit Protection Commissioner I would like to pay tribute to Mr Jeff Lamond PSM who occupied the office of the Merit Protection Commissioner for most of the reporting period. I also take this opportunity to express my thanks to the staff of the Australian Public Service Commission for their assistance.

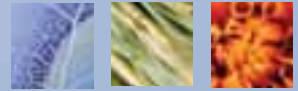
Yours sincerely

A handwritten signature in black ink, appearing to read 'Boris Budak'.

Boris Budak  
Acting Merit Protection Commissioner

October 2007





## MERIT PROTECTION COMMISSIONER'S REVIEW



**Boris Budak**  
**Acting Merit Protection**  
**Commissioner**

The APS Values, articulated in the *Public Service Act 1999* (the Act), provide a framework of enduring principles of good public administration. One of those values is that *the APS provides a fair system of review of decisions taken in respect of APS employees*—paragraph 10(1)(o) of the Act. A key part of the Merit Protection Commissioner's role is to provide support for this value by providing independent external review of actions affecting individual APS employees.

The review system established under section 33 of the Act and the Public Service Regulations enables non-SES APS employees to apply for review of actions that relate to their employment. Except in the case of promotion decisions, where the decision of a Promotion Review Committee (PRC) is binding on the relevant agency head, after reviewing an action or decision the Merit Protection Commissioner will make a recommendation to the agency head who is required to advise of their decision on the recommendation and the reasons for that decision.

As in previous years, in 2006–07 virtually all recommendations made by the Merit Protection Commissioner were accepted in full by the relevant agency heads.

Information on the number of applications for review during the year, their subject matter and discussion of trends is provided under 'Analysis of performance'. Compared with previous years, the numbers of individual cases have decreased in most categories. In particular, there was a significant reduction in the number of PRCs. This may, in part, have been due to more agencies recognising advantages of using Independent Selection Advisory Committees (ISACs), especially in large-scale staff selection exercises. The current active labour market conditions may also have a bearing in this respect.

On the other hand, the number of completed fee-for-service activities, other than ISACs, was higher than in 2005–06. Selection work for the Australian Federal Police, undertaken under a Memorandum of Understanding, continues to be the main fee-for-service activity conducted on behalf of the Merit Protection Commissioner.

Significant work continued throughout the year with the Australian Taxation Office (ATO) in supporting aspects of their *Workforce Availability Initiative*. This included presentations by the Merit Protection Commissioner and Acting Merit Protection Commissioner to the Executive and senior staff of the ATO and to a joint meeting of the ATO and staff associations. ISACs, utilising innovative selection methodologies supported by third party industry providers, were established in the ATO for a number of waves of major national recruitment exercises. Initial indicators are that these processes have saved considerable cost and time and enabled more efficient placement of successful candidates. Work is continuing on these methodologies to continue to improve the candidate experience.

During the year, the Merit Protection Commissioner addressed several APS agencies and other government organisations, including the Department of Foreign Affairs and Trade, the Australian Bureau of Statistics, the Department of Defence, the ATO, the Australian Federal Police and students of the Australian National University. He presented at a number of APS development programmes and conferences, hosted events and provided information to international delegations or officials from Indonesia, Chile, Vietnam, Thailand and the Pacific Islands on his role and that of the Australian Public Service Commission generally.

Recently, the Acting Merit Protection Commissioner addressed the 2007 National Administrative Law Forum. The speech focused on the Merit Protection Commissioner's role in external review of employment-related actions or decisions in the APS as part of the statutory framework designed to uphold values-based management and decision making by APS managers.

The National Public Sector Appeals Conference, held in Adelaide between 20 and 22 September 2006, was attended by the Adviser to the Merit Protection Commissioner and the Regional Director, South Australia. The conference is held annually and provides an opportunity for the exchange of views by senior Commonwealth, State and Territory public sector representatives engaged in external review of employment-related decisions.

A review of timeliness targets was conducted at the start of the financial year. Among other things, the review analysed the: basis on which previous targets were set; performance against those targets; reasons advanced for not meeting those targets; how review work was performed

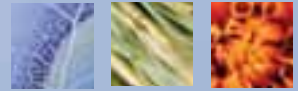
and benchmarks and quality targets of like review agencies. The outcome of the review was agreement on new targets and a new benchmark of 70 per cent of cases to be completed within those targets. In addition there was agreement on the implementation of new business and governance processes to better reflect delays that were outside the control of the Merit Protection Commissioner. Given the new target times and governance processes, it is difficult to benchmark performance against previous years. Nevertheless, it is pleasing to note that there has been an improvement in the average time to complete cases in all review categories (Tables M1 and M1.1).

Late in the year, a decision of the Federal Magistrates Court of Australia in *Walworth v Merit Protection Commissioner & Anor* [2007] FMCA 24 (23 February 2007) had a general impact on the conduct of reviews by the Merit Protection Commissioner of cases involving breaches of the APS Code of Conduct. The case is referred to again later in this report.

I have continued the practice of including case studies to illustrate the more significant issues encountered during the year. The four case studies in question can be found at the end of this report.

### **OUTLOOK**

In 2007–08 there will continue to be a focus on improving the quality of review activities. Also, as mentioned in previous reports, work will continue on providing information on APS employee review rights and the Merit Protection Commissioner will continue to perform activities associated with education about his role and functions.



## ROLE, FUNCTION AND STRUCTURE

The office of the Merit Protection Commissioner, established under section 49 of the *Public Service Act 1999* (the 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.

### FUNCTION

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 review of certain promotion decisions)
- (e) such other functions as are prescribed by the regulations.

In relation to paragraph (e) above, the Public Service Regulations enable the Merit Protection Commissioner 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.

### **ORGANISATIONAL STRUCTURE**

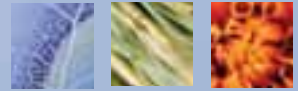
In accordance with section 49 of the Act, the staff necessary to assist the Merit Protection Commissioner are made available by the Public Service Commissioner. They are accountable to the Merit Protection Commissioner for the functions they perform on behalf of the Merit Protection Commissioner.

The staff involved are members of the Commission's Regional Services Group who are located in the Commission's six regional offices and comprise both ongoing and non-ongoing employees. Each regional office maintains a register of appropriately trained and qualified people who are available, as required, for non-ongoing employment. This is in addition to a separate register of APS employees approved to act as members of 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. In addition, the Victorian office deals with cases arising in Tasmania and the South Australian office deals with cases arising in the Northern Territory. With support from other offices as needed, the Australian Capital Territory office also provides coordination and policy support for the Merit Protection Commissioner.

A new strategy to support the focus on improvement of quality has been implemented in July 2007. A dedicated review team, drawing on regional office employees with the appropriate skills and capabilities, has been established to manage the casework. There will be an emphasis on further development of these employees and developing appropriate resources to assist them in performing their roles.

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)



## **MANAGEMENT ACCOUNTABILITY**

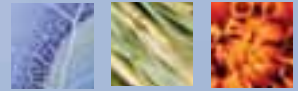
### **CORPORATE GOVERNANCE**

The Merit Protection Commissioner, Mr Jeff Lamond PSM, took up an appointment with the Department of Immigration and Citizenship on 11 May 2007. Mr Boris Budak, Adviser to the Merit Protection Commissioner, has acted as Merit Protection Commissioner for the remainder of the reporting period.

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

The Merit Protection Commissioner and the Public Service Commissioner have in place a memorandum of understanding for provision of staff necessary to assist the Merit Protection Commissioner. The Adviser to the Merit Protection Commissioner acts as the main delegate of the Merit Protection Commissioner.





## REVIEW OF PERFORMANCE

### OUTPUTS AND CONTRIBUTION TO OUTCOMES 2006–07

The Commission is included in the Department of Prime Minister and Cabinet's Portfolio Budget Statements. The Public Service Commissioner, as 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 2006–07 Portfolio Budget Statement that 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 M1.1 compares the timeliness in handling reviews between 2005–06 and 2006–07.

**TABLE M1:**

Review of actions—workload, work completed and timeliness, 1 July 2006–30 June 2007

Cases	Promotion Review Committees	Primary reviews—Code of Conduct	Primary reviews—other	Secondary reviews	Complaints by former employees
On hand at start of year	7	12	4	13	2
Received during the period	77	35	22	68	7
Reviewed	45	28	5	36	7
Not accepted	6	4	17	17	2
Lapsed or withdrawn	20	1	0	9	0
Total finalised during period	71	33	22	62	9
On hand at end	13	14	4	19	0
Target completion time (weeks)	8	14	14	14	14
Average completion time for reviewed cases (weeks)	7.72	19	9.75	15.5	19.59
Completed within target time (number)	31	12	4	16	4
Completed within target time (%)	69	43	80	44	57

## Part four

Merit Protection Commissioner's review

**TABLE M1.1:**

Comparison of timeliness in handling reviews' 2005–06 and 2006–07

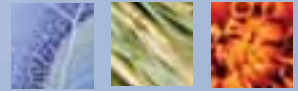
Review type	Average time to complete reviews and percent completed within target times	
	Weeks (%)	
	2005–06	2006–07
Promotion Review Committees	8.1 (35.23)	7.72 (69)
Primary reviews—Code of Conduct	20.74 (23.33)	19 (43)
Primary reviews—other	11.6 (25)	9.75 (80)
Secondary reviews	17.01 (18.9)	15.5 (44)
Former employees	31.57 (0)	19.59 (57)

*Note: Given the new target times and governance processes for this financial year, it is difficult to benchmark performance against previous years. However, this table shows that there was an improvement in the time taken to finalise reviews during 2006–07 compared with 2005–06.*

**TABLE M2:**

Fee-for-service functions—workload and work completed, 1 July 2006–30 June 2007

Workload	Independent Selection Advisory Committees	Other fee-for-service functions
On hand at start of year	30	58
Received during the period	101	317
Completed	84	271
Lapsed/withdrawn	11	31
Total finalised during the period	95	302
On hand at end	36	73



## ANALYSIS OF PERFORMANCE

This part of the report provides information on reviews of action the Merit Protection Commissioner undertook during the period 1 July 2006 to 30 June 2007. The review scheme under section 33 of the *Public Service Act 1999* and Part 5 of the Public Service Regulations provides that an APS employee is entitled to review, in accordance with the Regulations, of an action that relates to their employment. Most matters that affect employees personally in the course of their employment can be dealt with in this way, except where specifically excluded by the Regulations.

There are three main categories of reviews of actions conducted by the Merit Protection Commissioner: review of certain promotion decisions; review of breaches of the APS Code of Conduct; and other reviews. Table M1 provides information on the reviews of actions received and completed and the timeliness of these reviews during the year.

Applications for review of promotion decisions up to and including APS Classification Group 6 jobs can be made by APS employees who were applicants for promotion to those jobs. After assessing the relative merits of the person or persons promoted and of the applicant or applicants for review, a three-member Promotion Review Committee will either confirm or vary the original promotion decision. The Committee's decision is binding but may be subject to judicial review (see Promotion Review Committees in Table M1).

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 may be made directly to the Merit Protection Commissioner (see Primary reviews—Code of Conduct in Table M1).

Certain other applications for review may also be lodged directly with the Merit Protection Commissioner, for example where the relevant agency head was directly involved in the action (see Primary reviews—other in Table M1).

Other applications for review of an action that may be lodged with the Merit Protection Commissioner are where the applicant has been advised by the agency head that the action is not reviewable or where the applicant is dissatisfied with the outcome of the primary review conducted by the agency head (see Secondary reviews in Table M1).

Former APS employees can apply to the Merit Protection Commissioner for review of their entitlements on separation from the APS (see Complaints by former employees in Table M1).

This part of the report also provides information about the Merit Protection Commissioner's other functions including: inquiring into whistleblowing reports; establishing Independent Selection Advisory Committees, (ISACs); and performing certain other employment-related functions on a fee-for-service basis.

As noted earlier, there has been an improvement in the average timeliness of handling reviews of all types. Table M1.1 compares timeliness figures for 2006–07 with those for 2005–06. In 2006–07 the average time taken to complete all the types of reviews improved.

## REVIEW OF CERTAIN PROMOTION AND ENGAGEMENT DECISIONS

Compared with last financial year, there was a significant reduction in the number of both applications for promotion review and of the cases completed this year. In 2006–07, there were 303 individual applications for promotion review (783 in 2005–06) and 45 cases were completed during the year (105 in 2005–06). In this report, a case means an application by one or more APS employees for review of a promotion decision or decisions arising from a discrete agency selection exercise. This decrease went against the general trend of the last few financial years. There was a slight decrease of 1.6 per cent in the number of reviewable promotions and engagements gazetted in 2006–07 compared with 2005–06.

The lower number of applications for promotion reviews during the period is likely to be due to several large national staff selection exercises where ISACs were used. In particular, the Australian Taxation Office and

the Department of Defence have completed or are currently undertaking ISACs to fill vacancies in a number of their offices across Australia, involving significant numbers of employment opportunities.

Table M3 provides information on the agencies involved in promotion reviews as well as a breakdown of the number of 'active' and 'protective' applications. Unsuccessful candidates for a promotion may lodge an 'active' application in which they are applying for review of the promotion decision. Employees who have been promoted and whose promotion may be subject to review may lodge a 'protective' application.

During the year, applications for reviews were received in relation to promotion decisions made in 13 agencies. Four agencies with ten or more applications for review are identified in Table M3. Nine other agencies that had less than ten applications for review are not separately identified.

**TABLE M3:**

Review of promotion decisions, by agency 1 July 2006–30 June 2007

Agency	Total applications received	'Active' applications received	'Protective' applications received	Promotion decisions considered	Promotion decisions varied
Department of Immigration and Citizenship	196	48	148	202	3
Centrelink	41	9	32	51	0
Australian Customs Service	35	17	18	21	1
Department of Defence	14	14	0	14	2
9 other agencies	17	13	4	19	2
<b>Total</b>	<b>303</b>	<b>101</b>	<b>202</b>	<b>307</b>	<b>8</b>

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

Promotion Review Committees (PRCs) varied 8 (2.6%) of the 307 promotion decisions reviewed. This compares to variation rates of about 5% of decisions reviewed in previous years. The largest PRCs were those involving promotion decisions in the Department of Immigration and Citizenship, two with over 30 applications and two with over 20 applications. Most other PRCs involved fewer than 10 applications each.

### BREACHES OF THE CODE OF CONDUCT AND OTHER REVIEWS

During 2006–07, 132 applications for review, other than for review of promotion decisions, were received. In addition, 31 applications were carried over from the previous reporting period. During the year, the Merit Protection Commissioner completed 76 reviews in this category (one more than in 2005–06).

The types of issues raised in the applications are shown in Figure M1 below. Breaches of the Code of Conduct accounted for 28 (37%) of the total. This was a slightly lower percentage than in 2005–06 (40%). Other matters reviewed related to conditions of employment, including salary, allowances, leave and other entitlements, 18 (24%); workplace environment, including bullying and harassment, management practices and training and development, 14 (18%); performance management, including performance appraisal and pay, 4 (5%); issues about duties, including assignment of duties, selection processes and job reclassification, 4 (5%); entitlements on separation, 6 (8%) and misconduct procedures, 2 (3%).

**FIGURE M1:**  
Cases reviewed by subject

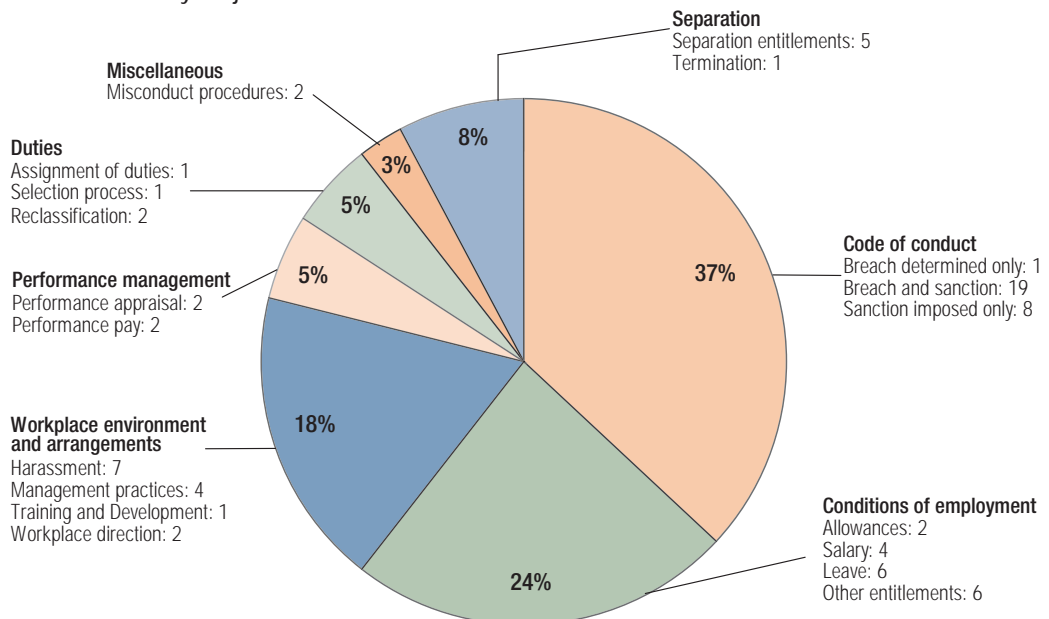


Table M4 provides a breakdown of the number of reviews by agency. As has been the case for the last three years, the agencies with the highest number of applications for review were Centrelink, the Australian Taxation Office and the Department of Defence.

### Breaches of the Code of Conduct

This year, there was a decrease in the number of applications received that related to breaches of the Code of Conduct, 35 in 2006–07 compared with 42 in 2005–06 (and 41 in 2004–05).

During the year, 28 reviews were completed. They included: inappropriate use of email or internet; failure to comply with lawful and reasonable directions; unauthorised accessing of client information ('browsing'); failure to show courtesy and respect; misuse of travel

card; incorrect time keeping; unauthorised use of Commonwealth vehicles; and mishandling of classified material.

Of these reviews, 19 involved review of both the determination that the applicant breached the Code of Conduct and the sanction imposed for the breach. Eight applicants sought review only of the sanctions that were imposed on them and one applicant sought review only of the determination that they breached the Code of Conduct.

In each of the 28 completed reviews, the Merit Protection Commissioner made a formal recommendation to the relevant agency that the decision under review be either confirmed (15), varied (10) or set aside (3).

As noted earlier, the Federal Magistrates Court decision in *Walworth v Merit Protection*

**TABLE M4:**

Reviews completed, by agency 1 July 2006–30 June 2007

Agency	Primary reviews —Code of Conduct	Primary reviews —other	Secondary reviews	Complaints by former employees	Total
Centrelink	7	1	11	0	19
Australian Taxation Office	5	0	9	2	16
Department of Defence	7	0	4	1	12
Department of Health and Ageing	1	0	2	1	4
Australian Customs Service	2	0	1	1	4
Department of Immigration and Citizenship	0	1	1	0	2
Department of Tourism and Resources	1	0	1	0	2
Department of Veterans' Affairs	1	0	1	0	2
CRS Australia	0	0	2	0	2
Australian Bureau of Statistics	1	0	1	0	2
11 other agencies	3	3	3	2	11
<b>Total</b>	<b>28</b>	<b>5</b>	<b>36</b>	<b>7</b>	<b>76</b>

*Note: 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.*

*Commissioner & Anor* [2007] *FMCA 24* (23 February 2007) impacted on the way in which the Merit Protection Commissioner conducts reviews of action in Code of Conduct cases. Previously, where there was a breach of the agency procedures in dealing with such cases, the Merit Protection Commissioner sought to alleviate the breach by, for example, providing additional opportunity for the applicant to be heard where this might not have been adequately provided by the agency. Now, if the relevant agency procedures have not been substantially complied with, the Merit Protection Commissioner is required to recommend that the decision under review be set aside and that consideration be given to the process being redone by a different decision maker.

For this reason, when reviewing a Code of Conduct decision, the Merit Protection Commissioner will be able to consider the merits of the case only after any compliance issues have been addressed by the agency, including if necessary a fresh consideration.

### **Other reviews**

This year, 97 applications for review involving matters other than promotion decisions or breaches of the Code of Conduct were received. Of the 48 cases reviewed, the Merit Protection Commissioner made recommendations to set aside or vary the decision in 14 (29%) cases. In all other cases the original actions of the agencies were confirmed.

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

In certain circumstances, the Regulations provide for applications for primary review to be made directly to the Merit Protection Commissioner.

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; or 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. Also, regulation 5.25(1) allows the agency head, with the agreement of the Merit Protection Commissioner, to refer an application to the Merit Protection Commissioner in similar circumstances.

During the year, 18 employees made direct application to the Merit Protection Commissioner under regulation 5.24(3) and four applications were made under regulation 5.25(1). Only 5 cases met the specified criteria and were reviewed under these provisions during the year.

Matters covered in the review of these applications included: changes to conditions of employment including changes to the private use of a work vehicle and not granting extension of leave without pay arrangements; and management practices including financial assistance for legal advice sought in other reviews of action.

#### ***Secondary reviews***

Regulation 5.29(1)(a) enables the Merit Protection Commissioner to undertake a secondary review where the agency head has told the employee an action is not a reviewable action. Also, regulation 5.29(1)(b) enables an APS 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.

During 2006–07, 68 applications for secondary review were received. Compared with 2005–06, this was a decrease of 11 per cent. Thirty-six cases were completed during the period.

Matters covered in the review of these applications included: issues relating to conditions of employment such as leave arrangements, salary and allowances; bullying and harassment; performance management and performance pay; attendance on training and development courses; and the way duties were assigned and reclassifications were managed.

### *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. During 2006–07, seven complaints were investigated. Matters covered in the review of these applications included recognition of and payment in lieu for long service leave and other leave, recovery by the agency of Higher Education Contribution payments made and non-payment of performance pay.

### **INDEPENDENT SELECTION ADVISORY COMMITTEES**

An Independent Selection Advisory Committee is an independent three-member committee that makes recommendations to an agency head about the suitability of candidates for employment opportunities at classifications in APS Classification Groups 1 to 6.

At an agency head's request, the Merit Protection Commissioner may establish an ISAC, usually on a fee-for-service basis. An ISAC consists of a convenor nominated by the Merit Protection Commissioner and two members, one

nominated by the Merit Protection Commissioner and one nominated by the agency head. While the Merit Protection Commissioner has issued binding instructions about the procedures to be followed by ISACs, they are otherwise not subject to direction in carrying out their duties except by a court.

The ISACs process is a streamlined, cost-effective, merit-based selection process which offers flexibility to accommodate a range of selection assessment techniques. While ISACs can be used for selection exercises of any size, given that a promotion decision made on the recommendation of an ISAC is not subject to promotion review and that ISACs are independent and impartial, they are particularly suitable for large or sensitive selection processes. An order of merit established by an ISAC can be used to fill future similar vacancies for 12 months from the initial notification of the employment opportunity.

Table M5 provides information on the number of ISACs established, by agency, and the number of candidates considered and recommendations made. The number of ISACs that were established and that completed their selection exercises during 2006–07 was 84 (compared to 99 in 2005–06). However, in 2006–07 there were 101 requests for new ISACs (87 in 2005–06). This continues the trend over the last few years of increased use and acceptability of ISACs. During the year, ISACs considered 6756 job applications and made recommendations in respect of 1265 candidates.

The Department of Defence and the Australian Taxation Office were the highest users of ISACs during the year. The Department of Immigration and Citizenship also used ISACs to consider a large number of candidates.

**TABLE M5:**

Independent Selection Advisory Committees convened, 1 July 2006–30 June 2007

Agency	Committees established	Candidates considered	Candidates recommended
Department of Defence	38	458	93
Australian Taxation Office	14	3958	551
Department of Immigration and Citizenship	7	941	190
Department of Education, Science and Training	7	119	42
Australian Customs Service	6	345	63
Australian Quarantine & Inspection Service	4	167	15
Department of Agriculture, Fisheries and Forestry	3	176	93
Department of Foreign Affairs & Trade	2	441	177
Department of Families, Community Services and Indigenous Affairs	1	51	6
Centrelink	1	73	22
Australian Communications and Media Authority	1	27	13
<b>Total</b>	<b>84</b>	<b>6756</b>	<b>1265</b>

## WHISTLEBLOWING

The *Public Service Act 1999* (the Act) and Regulations provide a scheme for APS employees to report alleged breaches of the Code of Conduct (such reports are known as whistleblowing reports). Agency heads are responsible for establishing procedures for dealing with whistleblower reports. In the first instance, such reports are expected to be made to, and investigated by, the relevant agency head. 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, a whistleblowing report may be referred to the

Public Service Commissioner or the Merit Protection Commissioner. Information on whistleblowing reports made to the Public Service Commissioner is contained in her annual report.

At the start of 2006-07, there were two whistleblowing reports on hand. During the year, ten reports were received, five more than in 2005-06. Six of those reports were out of jurisdiction, four were not accepted as the Merit Protection Commissioner considered that the relevant matters could more appropriately be considered by the relevant agency head, at least in the first instance, and one did not provide evidence in support of the allegations made to justify an inquiry.

Issues raised included alleged conflict of interest and bullying and harassment. There was one report on hand at the end of the reporting period.

**OTHER FUNCTIONS**

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

The Act also provides for the Merit Protection Commissioner to inquire into alleged breaches of the Code of Conduct by the Public Service Commissioner and to report to the Presiding Officers on the results of such inquiries. No such allegations were received during the reporting period.

**EMPLOYMENT-RELATED SERVICES (FEE-FOR-SERVICE)**

The Regulations provide that the Merit Protection Commissioner may, but is not required to carry out a range of employment-related functions on behalf of various non-APS bodies such as Commonwealth authorities to which the Act does not apply. The Merit Protection Commissioner may charge a fee for such services.

Some of the services are provided on an ongoing basis under a standing memorandum of understanding. For example, the Merit Protection Commissioner has had for some time an arrangement with the Australian Federal Police (AFP) to provide convenors for selection panels for vacancies that arise in that organisation. These are known as Independent Selection Advisory Panels (ISAPs). The Merit Protection Commissioner also provides selection training to AFP employees.

Table M6 reports on the employment-related services provided during 2006–07. Table M7 provides details in relation to the AFP ISAPs established during the same period.

Other fee-for-service work undertaken on behalf of the Merit Protection Commissioner included various training and staff selection services for a number of non-APS agencies.

**TABLE M6:**

Employment-related services, 1 July 2006–30 June 2007

Nature of service	Number completed
AFP Independent Selection Advisory Panels	257
Training	7
Scribing services for Selection Advisory Committees	5
Convenor of Selection Advisory Committee	1
Member of Selection Advisory Committee	1
Total	271

**TABLE M7:**

Independent Selection Advisory Panels convened, 1 July 2006–30 June 2007

Organisation	Number of panels established	Candidates considered	Candidates recommended
Australian Federal Police	257	4421	1129

## REVIEW OF ACTIONS CASE STUDIES

The following four review case studies highlight some of the more significant issues encountered during the year by the Merit Protection Commissioner, including that:

- Staff selection processes in the Australian Public Service must comply with the merit principle and administrative law and must not only be fair but also be seen as fair.
- Administrative law requires decision makers to be free from both actual bias and any reasonable apprehension of bias.
- This means that it is not enough for the decision maker making a promotion decision to be unbiased—it is equally important that a fair-minded onlooker should not reasonably suspect or apprehend that the decision maker might not have brought an impartial mind to the decision.
- If a reasonable suspicion of bias exists in a case, the decision in the case should be made by another authorised decision maker.
- Next, in relation to determining breaches of the APS Code of Conduct, it is generally desirable to strictly adhere to agency procedures issued under subsection 15(3) of the Act.
- Chapter 5 of the *Public Service Commissioner's Directions 1999* includes as a minimum requirement that—before a determination is made in relation to a suspected breach, the affected employee must be informed of the details of that suspected breach and given a reasonable opportunity to make a statement in relation to the suspected breach.
- In this context, it is not acceptable to tell the employee that a 'draft', 'in principle' or 'preliminary' decision has been made yet suspended pending any submission or response they might wish to make—the

opportunity to be heard must precede the formation of the decision.

- Clear legal authority (usually evidenced by a written instrument of delegation or authorisation) must exist for an administrative decision that adversely affects an APS employee.
- An agency cannot rely upon or ratify a decision that was invalidly made by an unauthorised person (in some cases, however, the decision might be able to be re-made by an authorised decision maker).

## CASE STUDY ONE

### STAFF SELECTION—CONFLICT OF INTEREST AND REASONABLE APPREHENSION OF BIAS—FAILURE TO COMPLY WITH AGENCY PROCEDURES

#### Application

In this case an APS employee applied for review of a promotion decision to an Executive Level 1 (EL) job in their agency. The applicant was an unsuccessful candidate for the vacancy. Here it should be mentioned that in cases involving promotion to an EL 1 or 2 job, the Merit Protection Commissioner cannot conduct a merit review but can review the relevant process.

#### Review

Public confidence in the integrity of the APS is vital to the proper operation of the Australian government. This confidence may be jeopardised if the Australian community perceives a conflict of interest. Consequently, APS employees need to be aware that their private interests, whether personal or financial, could conflict with their official duties. Also, general administrative law principles about procedural fairness require among other things that decision-makers be and be seen to be, unbiased or disinterested in the matter to be decided.

In this context, in relation to staff selection, the Australian Public Service Commission said the following in its publication APS Values and Code of Conduct in practice:

*Members of selection teams will often know one or more applicants. Where a selection team member has a relationship with an applicant that might give rise to a conflict of interest, it should be declared to the chair and any other selection team members (or to the delegate and*

*other selection team members if the chair is making the declaration). It should then be decided whether the selection team member should stand aside from the process or the consideration of the particular candidate.*

However, when investigating this case, the Merit Protection Commissioner found that the chair of the selection committee was also the delegate who made the relevant promotion decision and a referee for both the applicant for review and the successful candidate, and was also claimed to be a close friend of the successful candidate (that claim was not denied). Notwithstanding the additional requirement in the relevant agency's staff selection procedures that where the delegate is a member of the selection advisory committee, the committee's final report should be referred to the next level up for consideration and approval, this was not done and the delegate said:

*On the issue about being 'judge, jury and executioner'...I have been down this path before and thought the issue would not have been controversial.*

#### Outcome

To comply properly with the merit principle, APS staff selection processes must not only be fair but must also be perceived to be fair. That said, the relevant promotion decision had already taken effect and could not in any event be revoked by the Merit Protection Commissioner. In the circumstances, the Commissioner recommended that the agency review its staff selection practices to ensure that their future staff selection exercises are consistent with the Commission's guidelines for avoiding and managing conflict of interest and administrative law principles relating to procedural fairness.

## CASE STUDY TWO

### BREACH OF THE APS CODE OF CONDUCT—FAILURE TO COMPLY WITH PROCEDURAL FAIRNESS AND AGENCY PROCEDURES

#### Application

An APS employee applied for review of a decision that, by threatening other staff, they breached subsections 13(3) and (11) of the *Public Service Act 1999* (the Act) and of the sanction imposed on them for the breaches in question—reduction in classification from APS 5/6 to APS 3/4.

In their application, the applicant argued that they were denied procedural fairness in that, contrary to the requirements of the relevant agency procedures, they were not given adequate opportunity—before the agency delegate decided that they had breached the Code—to present their case in reply to the allegations.

#### Review

Subsection 15(3) of the Act provides that agency heads must establish procedures for determining whether an APS employee in the agency has breached the Code of Conduct. Chapter 5 of the *Public Service Commissioner's Directions 1999* sets out the basic requirements that such procedures must comply with.

When reviewing a decision that an APS employee has breached the Code, the Merit Protection Commissioner is required to consider, as a threshold matter, whether the agency's Code of Conduct procedures comply with the Public Service Commissioner's Directions and, if so, whether in the case in question there was substantial compliance with those procedures—see generally *Walworth v Merit Protection Commissioner & Anor* [2007] FMCA 24 (23 February 2007).

In this case, after investigating, the Merit Protection Commissioner was satisfied that the agency failed to comply with its own Code of Conduct procedures and accord procedural fairness to the applicant because it failed to take adequate steps to contact them before deciding that they had breached the Code. Then, after contact was established, the agency claimed that the decision in question was only a 'preliminary decision' and that a 'final decision' would be made after considering any comments from the applicant. However, when those comments were received, the agency delegate wrote to the applicant's representative along the following lines:

*At your request, I granted [the applicant] the opportunity to provide me with further information... A submission from [the applicant] dated 16 June 2006 was supplied by you on 19 June 2006. It is not clear what you expected me to do with that submission, as I had already made a decision about [the applicant's] case [emphasis added].*

#### Outcome

In the circumstances, the Merit Protection Commissioner was unable to consider the substantive merits of the case and recommended instead that the decisions under review be set aside and that consideration be given to whether the process should be re-done, in accordance with the procedures, by a different decision maker.

## CASE STUDY THREE

### COMPLAINT ABOUT ALLEGED BREACH OF THE APS CODE OF CONDUCT BY ANOTHER PERSON—POWER TO DETERMINE BREACH—FAILURE TO COMPLY WITH AGENCY PROCEDURES

#### Application

An APS employee applied for secondary review by the Merit Protection Commissioner of a decision made in relation to their complaint about an alleged breach of the APS Code of Conduct by another person. In short, after separate investigations by two different consultants, the relevant agency decided not to take any action in the matter.

#### Review

As the Australian Government Solicitor said in its publication *Misconduct in the Australian Public Service* (Legal Briefing No 80 of 24 October 2006), the purpose of the misconduct regime in the APS is to protect the public, maintain proper standards of conduct by APS employees and protect the reputation of the APS. In relation to lawful selection of decision makers to deal with cases of alleged misconduct, the Australian Government Solicitor said:

*A person who determines whether or not there has been a breach of the Code must be selected in accordance with relevant provisions in the procedures of the agency under section 15(3) of the PS Act. The procedures will generally determine who makes the selection and how the selection is made...*

*Section 15(3) procedures commonly permit any person to be selected as the decision maker in relation to breach. In this case, it is not necessary*

*that the person be an APS employee within the agency or elsewhere. They can for example be a consultant who is not employed in the APS.*

In this case, the first consultant who investigated the alleged incident found that there was no basis on which to conclude that the person in question had breached the Code of Conduct.

However, when the complainant pointed out that the consultant had failed to take into account certain material evidence, the agency agreed to reopen the matter and selected another consultant to determine under its section 15(3) procedures whether that APS employee had breached the Code. Having reviewed the first consultant's report and taken additional evidence, the second consultant determined that the APS employee in question had in fact breached the Code. Nevertheless, the agency subsequently decided that it preferred the first report and that it would not take any further action in the matter.

On review, the Merit Protection Commissioner established that while the second consultant was properly appointed under the agency's section 15(3) procedures, the HR manager who decided that the second consultant's report should not be acted upon had no formal authority under those procedures to override that consultant's determination.

#### Outcome

In the circumstances, the Merit Protection Commissioner advised the agency that:

- (a) the HR manager's decision was invalid; and
- (b) what the agency should do next was to consider what if any sanction should be imposed on the APS employee in question for their breach of the Code.

## CASE STUDY FOUR

### BREACH OF THE APS CODE OF CONDUCT—GATHERING EVIDENCE—RECORDING MEETINGS

#### Application

In this case the applicant was found to have breached subsection 13(3) of the *Public Service Act 1999* (the Act) which requires APS employees, when acting in the course of APS employment, to treat everyone with respect and courtesy, and without harassment:

- (a) because of certain inappropriate behaviour towards another APS employee in their agency; and
- (b) because they attempted to openly record a meeting with management, despite being told that they had no permission to do so.

#### Review

After investigating, the Merit Protection Commissioner was reasonably satisfied that there was sufficient evidence that, on more than one occasion, the applicant failed to treat another APS employee with respect and courtesy and without harassment, as required by subsection 13(3) of the Act.

On the other hand, in relation to the applicant's attempt to openly record a meeting, both the Australian Public Service Commission and the Australian Industrial Relations Commission have said that in certain circumstances recording a meeting, if done openly, may not only be not inappropriate but may in fact be desirable. For example, in *Curr and Australian Taxation Office* (U2004/3067 of 8 November 2004), the Australian Industrial Relations Commission found that there was nothing improper arising from the applicant's desire to

openly record a meeting. Also, in its recent publication *Handling Misconduct*, the Australian Public Service Commission said that, before interviewing an APS employee in relation to alleged misconduct, it would be good practice to decide whether the interview is to be audio-recorded (in which case a copy of the recording should be made available to the interviewee) or whether a written record of interview is to be prepared (in which case it may be convenient to use a note-taker).

In the applicant's case, they were asked to attend a meeting with management on the day they returned from sick leave. Given the short notice of that meeting, they were unable to arrange a support person and felt ambushed and threatened. As the agency did not offer to record or minute the meeting as they requested, they announced that they would themselves record it and, despite oral and written instructions that they had no permission to do so, openly attempted it.

Given the relative complexity of issues in the case, it would have been reasonable to expect that the applicant would wish to be supported in their discussions with management, or to have the meeting minuted or recorded. This suggested that the instruction to the applicant that the meeting was not to be recorded, while lawful, was not reasonable and that it would have been preferable to arrange for the meeting to be recorded or minuted by the agency.

#### Outcome

Consequently, the Merit Protection Commissioner recommended that the decision that the applicant breached the Code of Conduct be amended to clarify that this did not include their attempt to record the meeting with management to discuss their case.