

# Public Sector Employment and Management Act 2002 No 43

[2002-43]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Sydney 2009 World Masters Games Organising Committee Act 2005 No 65](#), Sch 3.2 (not commenced — to commence on 30.6.2010)
  - [First State Superannuation Legislation Amendment \(Conversion\) Act 2005 No 91](#) (not commenced)
- **See also**
  - [Public Sector Employment and Management Amendment \(Ethanol Blended Fuel\) Bill 2005](#) [Non-government Bill: Mr A J Stoner, MP]

### Authorisation

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File last modified 1 January 2006

# Public Sector Employment and Management Act 2002 No 43



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# Public Sector Employment and Management Act 2002 No 43



New South Wales

An Act relating to public sector employment and management; to repeal the *Public Sector Management Act 1988*; to amend the *Government and Related Employees Appeal Tribunal Act 1980* and other Acts and regulations; and for other purposes.

## Chapter 1 Preliminary

### 1 Name of Act

This Act is the *Public Sector Employment and Management Act 2002*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

(1) In this Act:

**appropriate Department Head** means:

- (a) where the expression is used in connection with a Department—the Head of the Department, or
- (b) where the expression is used in connection with a member of the staff of a Department—the Head of the Department to which the member of staff belongs.

**casual employee** means a casual employee of the Public Service, as referred to in section 7.

**chief executive position** means a position referred to in section 64 and **chief executive officer** means a person holding such a position.

**Department**—see section 6 and Schedule 1.

**Department Head** or **Head** means a Department Head referred to in section 11.

**exercise** a function includes perform a duty.

**extended leave** includes leave in the nature of extended leave.

**function** includes a power, authority or duty.

**Health Service** means the NSW Health Service referred to in section 16 of the [Health Services Act 1997](#).

**officer** means an officer of the Public Service, as referred to in section 7.

**Police Service** means the Police Service of New South Wales referred to in the [Police Service Act 1990](#).

**Public Employment Office** means the Public Employment Office constituted under Chapter 6.

**Public Sector Notices** means any document titled “Public Sector Notices” published under the authority of the Government.

**public sector service** means:

- (a) the Public Service, or
- (b) the Teaching Service, or
- (c) the Police Service, or
- (d) the Health Service, or
- (e) the service of a statutory body representing the Crown, or
- (f) the service of either House of Parliament, or the President or Speaker, or the President and the Speaker jointly, or
- (g) any other service of the Crown, or
- (h) the service of any other person or body constituted by or under an Act or exercising public functions (such as a State owned corporation), being a person or body that is prescribed, or that is of a class prescribed, for the purposes of this definition.

**Public Service** means the Public Service of New South Wales referred to in section 5.

**senior executive position** means a position referred to in section 65 and **senior executive officer** means a person holding such a position.

**staff** or **member of staff** of a Department means any person employed in the Department (whether as an officer, temporary employee or casual employee).

**temporary employee** means a temporary employee of the Public Service (being a Departmental temporary employee or a special temporary employee), as referred to

in section 7.

(2) Notes included in this Act do not form part of this Act.

**4 Act not to apply to judicial or parliamentary officers** (1988 Act, s 4)

This Act does not apply to any of the following positions or to any person holding such a position (except to the extent that a provision of this Act otherwise expressly provides):

- (a) any position of a judicial officer within the meaning of the *Judicial Officers Act 1986*,
- (b) any position of officer of either House of Parliament or any position under the separate control of the President or Speaker, or under their joint control.

**Note—**

Parliamentary officers comprise a public sector service and, accordingly provisions of this Act relating to staff mobility (Part 3.2) and other provisions (such as sections 100, 102 and 103) apply to those officers.

## **Chapter 2 The Public Service**

### **Part 2.1 General**

**5 The Public Service** (1988 Act, s 5)

- (1) The Public Service of New South Wales consists of the persons who are for the time being employed under this Chapter.
- (2) Those persons are taken to be employed by the Government of New South Wales in the service of the Crown, except as provided by section 129.

**6 Departments** (1988 Act, ss 3 (1), 8 (4))

- (1) The Departments of the Public Service are the Departments specified in Schedule 1.
- (2) A Department is the group of staff with the title specified in Schedule 1 or the group of staff attached to the body or organisation so specified.
- (3) A Department Head may establish, or abolish, or change the name of, any branch or other part of the Department.

**Note—**

See Chapter 4 for other provisions relating to Departments.

**7 Categories of employment**

- (1) Staff may be employed in a Department in the following categories:
  - (a) officers—being persons employed in chief or senior executive positions or other staff positions in the Department,

- (b) temporary employees—being persons employed to carry out work in the Department on a temporary basis,
  - (c) casual employees—being persons employed in the Department on a casual basis.
- (2) Temporary employees may be employed in following subcategories:
- (a) Departmental temporary employees—being persons employed under Part 2.4 to carry out work in a Department,
  - (b) special temporary employees—being persons employed under Part 2.5 to carry out work for a political office holder.
- (3) The usual basis for the employment of staff in a Department is to be the employment of officers.
- (4) Subsection (3) does not apply to the employment of staff for the purpose of carrying out work for a political office holder.

**8 Maximum number of staff of a Department** (1988 Act, s 7)

- (1) The Treasurer may, after obtaining a report from the appropriate Department Head on the matter, determine from time to time the maximum number of staff to be employed in a Department (being the number which the Treasurer considers necessary for the effective, efficient and economical management of the functions and activities of the Department).
- (2) The number of staff employed in a Department is not to exceed the maximum number so determined in respect of the Department.

**9 Staff positions in a Department for officers** (1988 Act, s 8)

- (1) The staff positions in a Department consist of:
- (a) the position of the appropriate Department Head (except where the position is created by some other Act), and
  - (b) such other positions as the appropriate Department Head from time to time determines in accordance with this Act.
- (2) A Department Head may create, abolish or otherwise deal with any staff position in the Department, other than his or her own position.
- (3) A Department Head must classify and grade each position created under subsection (2), but may only do so:
- (a) in the case of a senior executive position—with the approval of the Minister, or
  - (b) in any other case—in accordance with such guidelines as may be issued from time

to time by the Public Employment Office.

- (4) A person does not cease to be an officer merely because the staff position held by the person is abolished.
- (5) Temporary employees and casual employees are members of staff of, but do not hold positions in, a Department.

## **Part 2.2 Department Heads**

### **10 Creation of Department Head positions** (1988 Act, s 9)

- (1) Each position specified in Column 2 of Schedule 1 is taken to be created by virtue of this Act if it is not created by some other Act.
- (2) If the title or other description of a position created by virtue of this Act is omitted from Column 2 of Schedule 1 (or any such title or other description is amended by an amendment of this Act), the position is taken to be abolished (or correspondingly amended) by virtue of this Act.

### **11 Department Heads** (1988 Act, s 10)

- (1) The person holding the position specified in Column 2 of Schedule 1 opposite the title or other description of a department, body, organisation or group is, for the purposes of this Act, the Department Head in relation to the Department concerned.
- (2) For the purposes of this Act, a reference in Schedule 1 to a department, body, organisation or group is taken not to include a reference to any part of the department, body, organisation or group specified separately in that Schedule.

### **12 Appointments to Public Service Department Head positions** (1988 Act, s 10A)

- (1) Appointments to vacant Department Head positions in the Public Service are to be made by the Minister.
- (2) The employment under this Chapter of a Department Head is subject to Part 3.1.

### **13 Acting appointments to Department Head positions** (1988 Act, s 10B)

- (1) The Minister may appoint an officer of the Public Service to act in a Department Head position in the Public Service that is vacant or the holder of which is suspended, sick or absent.
- (2) An officer, while acting in a Department Head position, has all the functions of the holder of the position. However, a person who is not a chief executive officer does not become a chief executive officer for the purposes of Part 3.1 when acting in a Department Head position.
- (3) The Minister may, at any time, terminate the appointment of an officer to act in a

Department Head position.

**14 General responsibility of Department Heads** (1988 Act, s 11)

- (1) A Department Head is responsible to the Minister responsible for the Department for the general conduct and the effective, efficient and economical management of the functions and activities of the Department.
- (2) For the purpose of exercising that responsibility, a Department Head may take such action as the Department Head considers appropriate in the circumstances, but may not take action that is inconsistent with the functions specified in this Act of the Minister administering this Act or the Public Employment Office.
- (3) A Department Head is responsible for the equitable management of staff of the Department.

**15 Delegation by Department Head** (1988 Act, s 12)

- (1) The Department Head of a Department may delegate any of the Department Head's functions under this Act (other than this power of delegation) to a member of staff of that or any other Department.
- (2) If:
  - (a) a function of a Department Head is delegated to a member of staff of a Department in accordance with subsection (1), and
  - (b) the instrument of delegation authorises the sub-delegation of the function,then, subject to any conditions to which the delegation is subject, the person may sub-delegate the function to another member of staff of that or any other Department.
- (3) In this section:
  - (a) a reference to the functions of a Department Head includes a reference to any functions delegated to the Department Head under this Act, and
  - (b) a reference to a member of staff of a Department includes:
    - (i) a reference to a person holding an appointment to or in the Department, and
    - (ii) where the Department is the group of staff attached to a body, organisation or group specified in Schedule 1—a reference to a person holding an appointment to or in that body, organisation or group.

**Part 2.3 Officers (other than Department Heads)**

**16 Officers to whom Part applies** (1988 Act, s 22)

This Part applies to and in respect of appointments to positions in the Public Service, but



does not apply to or in respect of appointments to chief executive positions.

**17 Appointments to positions** (1988 Act, ss 13, 24, 25, 30)

- (1) Appointments to vacant positions in a Department are to be made by the appropriate Department Head.
- (2) It does not matter:
  - (a) whether the person appointed is or is not already an officer of the Public Service, or
  - (b) that the person appointed has previously retired or been removed from the Public Service.
- (3) The employment under this Chapter of a senior executive officer is subject to Part 3.1.
- (4) Subsection (1) is subject to any express provision to the contrary in this or any other Act.

**18 Advertising vacancies** (1988 Act, ss 15, 31)

- (1) If it is proposed to make an appointment under this Part to a vacant position in a Department, the Department Head must advertise the vacancy in the Public Sector Notices and in such other publication (if any) as the Department Head determines.
- (2) The Department Head need not advertise a vacant position if the Public Employment Office so approves.

**19 Merit appointment** (1988 Act ss 15, 26)

- (1) A Department Head is, for the purpose of determining the merit of the persons eligible for appointment to a vacant position under this section, to have regard to:
  - (a) the nature of the duties of the position, and
  - (b) the abilities, qualifications, experience, standard of work performance and personal qualities of those persons that are relevant to the performance of those duties.
- (2) In deciding to appoint a person to a vacant position that has been advertised in accordance with this Part:
  - (a) the appropriate Department Head may only select a person who has duly applied for appointment to the vacant position, and
  - (b) the appropriate Department Head must, from among the applicants eligible for appointment to the vacant position, select the applicant who has, in the opinion of the Department Head, the greatest merit.

- (3) In deciding to appoint a person to a vacant position that has not been advertised in accordance with this Part:
  - (a) the appropriate Department Head may only select an officer holding a position in the Department in which the vacant position exists at the time the decision of the Department Head is made, and
  - (b) the appropriate Department Head must, from among the officers holding positions in that Department, select the officer who has, in the opinion of the Department Head, the greatest merit.
- (4) Despite anything to the contrary in this section, the appropriate Department Head may decide to appoint a person (whether or not an officer) to a vacant position that has not been advertised if:
  - (a) the person has, in accordance with the regulations, passed a competitive examination prescribed for appointment to vacant positions of the class to which that vacant position belongs, or
  - (b) the person is qualified for appointment in accordance with procedures prescribed by the regulations for entry to positions in the Public Service in special cases.
- (5) In the case of a vacant senior executive position, a Department for the purposes of the application of subsection (3) includes all senior executive positions in the Public Service or the Teaching Service and all notional executive positions referred to in section 77 (3) (c) in the Public Service or the Teaching Service.

**20 Eligibility lists** (1988 Act, ss 15, 26A)

- (1) When a vacant position is advertised in accordance with this Part, the appropriate Department Head may, in connection with a determination of the merit of the persons eligible for appointment to the position, create an eligibility list for the position.
- (2) An eligibility list for a position is a list of eligible applicants (namely the persons who duly applied for appointment to the position and who are eligible for appointment but not selected for appointment) arranged in order of merit (with merit determined by the appropriate Department Head in accordance with section 19 (1)).
- (3) An eligibility list for a position remains current:
  - (a) in the case of a list prepared in relation to a base grade or entry level position, for 12 months after the list was created, or
  - (b) in the case of a list prepared in relation to a position that is not a base grade or entry level position, for 6 months after the list was created.
- (4) An eligibility list need not comprise all the eligible applicants so long as the list contains the applicant or applicants of greatest merit.

- (5) An eligibility list is applicable not only to the position in relation to which it was created but also to any other position that the appropriate Department Head determines it should be applicable to on the basis that the position is substantially the same as the position in relation to which the list was created.
- (6) In deciding to appoint a person to a vacant position that has not been advertised in accordance with this Part, the appropriate Department Head may, despite section 19 (3), select from among the persons who are on an eligibility list that is current and applicable to the position (and who are available for appointment) the person with the greatest merit according to the order of merit in the eligibility list.
- (7) In this section:

***base grade or entry level position***, in relation to a Department, means a position to which no officer in the Department, employed in the same classification of work as that to which the position relates, could be promoted.

## **21 Appointments subject to promotion appeal** (1988 Act, ss 26 (4), 32)

- (1) This section applies where a person selected for appointment to a position is an officer and some other officer has a right of appeal to the Government and Related Employees Appeal Tribunal against the appointment.
- (2) The appointment must not be made (except by way of acting appointment under this Act):
  - (a) until the expiration of the time for lodging a notice of such an appeal under the [Government and Related Employees Appeal Tribunal Act 1980](#) against the Department Head's decision to make the appointment, or
  - (b) if such a notice of appeal is lodged within that time, until the Government and Related Employees Appeal Tribunal has determined the appeal or the appeal is withdrawn.
- (3) The appropriate Department Head must cause notice of the proposed appointment to be published in the Public Sector Notices in accordance with section 19 of the [Government and Related Employees Appeal Tribunal Act 1980](#).

## **22 Legal proceedings not to be brought in respect of appointments etc** (1988 Act, s 27)

- (1) The appointment or failure to appoint a person to a vacant position in the Public Service, or any matter, question or dispute relating to such an appointment or failure, is not an industrial matter for the purposes of the [Industrial Relations Act 1996](#).
- (2) Subsection (1) applies whether or not any person has been appointed to the vacant position.
- (3) No proceedings, whether for an order in the nature of prohibition, certiorari or

mandamus or for a declaration or injunction or for any other relief, lie in respect of the appointment or failure to appoint a person to a position in the Public Service, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment.

- (4) Subsection (3) does not affect the operation of the *Government and Related Employees Appeal Tribunal Act 1980*.

**23 Appointments on probation** (1988 Act, ss 28, 29, 30)

- (1) Subject to this Part, every person admitted to the Public Service as an officer must, in the first instance, be appointed to a position on probation for a period of 6 months or such longer period as the appropriate Department Head directs.
- (2) A person may be appointed to a position in the Public Service without being required to serve such a period of probation if the person has previously been an officer or the Department Head thinks it appropriate in the particular case.
- (3) The period for which a person is appointed on probation may not exceed 2 years without the approval of the Public Employment Office.
- (4) If a person is appointed to a position on probation, the appropriate Department Head may:
  - (a) after the period of probation—confirm the appointment, or
  - (b) during or after the period of probation—annul the appointment.
- (5) If a person's appointment is so annulled, the person ceases to be an officer, unless appointed to another position as an officer.
- (6) Part 2.7 does not prevent a Department Head from exercising at any time the power to annul an appointment under this section.
- (7) This section does not apply to a chief or senior executive position.

**24 Acting appointments to positions** (1988 Act, ss 14, 33)

- (1) The appropriate Department Head may appoint to act in a position in the Department that is vacant or the holder of which is suspended, sick or absent:
  - (a) a member of staff the Department, or
  - (b) a member of staff of another Department.
- (2) A person, while acting in a position under this section, has all the functions of the holder of the position. However, a person who is not a senior executive officer does not become a senior executive officer for the purposes of Part 3.1 when acting in a senior executive position.

- (3) The appropriate Department Head may, at any time, terminate the appointment of a person to act in a position under this section.
- (4) This section does not prevent the payment of an allowance to a member of staff of a Department for exercising all or any of the functions of a position if a person is not appointed to act in the position under this section.

**25 Incapable officer may be retired** (1988 Act, s 36)

If:

- (a) an officer is found to be unfit to discharge or incapable of discharging the duties of the officer's position, and
- (b) the officer's unfitness or incapacity:
  - (i) appears likely to be of a permanent nature, and
  - (ii) has not arisen from actual misconduct on the part of the officer, or from causes within the officer's control,

the appropriate Department Head may cause the officer to be retired.

**26 Vacation of position** (1988 Act, s 37)

- (1) An officer's position becomes vacant if the officer:
  - (a) dies, or
  - (b) is removed from the position, or retires or is retired from the position, under this or any other Act, or
  - (c) resigns the position in writing addressed and delivered to the appropriate Department Head and that Department Head accepts the resignation, or
  - (d) abandons his or her employment in the Public Service.
- (2) This section does not affect any other provision by or under which an officer's position becomes vacant.
- (3) This section does not apply to officers holding chief or senior executive positions.

**Note—**

Section 76 makes provision for the vacation of chief or senior executive positions.

**Part 2.4 Departmental temporary employees**

**27 Employment of Departmental temporary employees** (1988 Act, s 38 (1)–(2))

- (1) The appropriate Department Head may employ a person who has appropriate

qualifications to carry out work in the Department for a particular period.

(2) Persons employed under this Part are **Departmental temporary employees**.

(3) A person may be employed as a Departmental temporary employee:

- (a) for the duration of a specified task or project, or
- (b) to carry out the duties of a position that is temporarily vacant, or
- (c) to provide additional assistance in a particular work area, or
- (d) in connection with the secondment or exchange of staff, or
- (e) to undertake a traineeship or cadetship, or
- (f) for any other temporary purpose.

(4) The employment of persons under this Part is subject to:

- (a) section 7 (3), and
- (b) any other provision of this Act or the regulations concerning the employment of Departmental temporary employees.

#### **28 Period of employment** (1988 Act, s 38 (3), (4))

- (1) The maximum period for which a Departmental temporary employee may be employed under this Part at any one time is 3 years.
- (2) The re-employment of a Departmental temporary employee is to be in accordance with such guidelines as are issued by the Public Employment Office from time to time.

#### **29 Employment after selection on merit**

- (1) In this section, the **selection on merit** of a Departmental temporary employee means employment after some form of open competition involving the selection of the employee as the person who, in the opinion of the appropriate Department Head, has the greatest merit among candidates for employment.
- (2) A Departmental temporary employee may only be employed for a period exceeding 12 months at any one time if the employee is selected on merit.
- (3) The Public Employment Office may exempt the employment of a person from subsection (2) if it determines that the special circumstances of the case justify the exemption.

#### **30 Termination of employment** (1988 Act, s 38 (5))

The appropriate Department Head may dispense with the services of a Departmental

temporary employee at any time.

**31 Appointment of long-term employees to officer positions** (1988 Act, s 38A)

- (1) For the purposes of this section, a **long-term employee** is a Departmental temporary employee whose employment as such an employee falls within a continuous employment period of at least 2 years.
- (2) A long-term employee may, with the approval of the Public Employment Office, be appointed to an officer's position (other than a senior executive position) in a Department if the appropriate Department Head has made a recommendation in accordance with this section for the appointment of the employee to the position.
- (3) A recommendation for the appointment of a long-term employee to an officer's position may be made only if each of the following requirements is satisfied:
  - (a) the duties of the position concerned must be substantially the same as the duties performed by the employee at the time of the employee's initial employment on merit (that is, the employment referred to in paragraph (e)),
  - (b) the rate of salary or wages proposed to be payable to the holder of the position concerned at the time of appointment must not exceed the maximum rate payable for Grade 12, Administrative and Clerical Division, of the Public Service,
  - (c) the appropriate Department Head must be satisfied that ongoing work is available in respect of the employee in the Department,
  - (d) the appropriate Department Head must be satisfied that the employee has the relevant skills, qualifications, experience, work performance standards and personal qualities to enable the employee to perform the duties of the position concerned,
  - (e) the employee must (initially or at some later stage) have been employed as a temporary employee in some form of open competition involving the selection of the employee as the person who, in the opinion of the then relevant Department Head, had the greatest merit among candidates for appointment.
- (4) An appointment under this section is not an appointment to which section 19 applies.
- (5) Section 23 does not apply to an appointment under this section unless the Department Head otherwise directs in a particular case.

**Part 2.5 Special temporary employees**

**32 Meaning of "political office holder"** (1988 Act, s 38B)

In this Part:

**political office holder** means:

- (a) a Minister, or
- (b) a Parliamentary Secretary, or
- (c) the Leader of the Opposition in the Legislative Assembly.

**33 Employment of special temporary employees** (1988 Act, ss 38C, 38H)

- (1) The Director-General of the Premier's Department may, if of the opinion that it is necessary to do so, employ a person who has appropriate qualifications to carry out work for a political office holder.
- (2) Persons employed under this Part are **special temporary employees**.
- (3) The employment of persons under this Part is subject to any provisions of this Act or the regulations concerning the employment of special temporary employees.
- (4) The instrument of employment of a special temporary employee must specify the name of the political office holder concerned.
- (5) This section does not prevent the appointment or employment of staff to or in an office of a political office holder in any other manner.

**34 Period of employment of special temporary employees** (1988 Act, s 38D)

- (1) A person may be employed as a special temporary employee for an indefinite term or for a term specified in the instrument of employment.
- (2) However, the employment of a special temporary employee terminates:
  - (a) if the political office holder concerned dies, or
  - (b) if the political office holder concerned ceases to hold the office by reason of which he or she was a political office holder (even if he or she immediately or subsequently becomes a political office holder after ceasing to hold that office), or
  - (c) on the day appointed for the taking of the poll for the next general election, or
  - (d) if the employee resigns by letter addressed to the Director-General of the Premier's Department, or
  - (e) if the services of the employee are dispensed with.
- (3) The Director-General of the Premier's Department may direct in a particular case that the employment of a special temporary employee that would otherwise terminate because of the operation of subsection (2) (a), (b) or (c) does not terminate.
- (4) The Director-General of the Premier's Department may dispense with the services of a



special temporary employee at any time.

**35 Industrial arbitration or legal proceedings excluded** (1988 Act, s 38E)

- (1) In this section, a reference to the employment of a special temporary employee is a reference to:
  - (a) the employment of, or failure to employ, a person as a special temporary employee, or
  - (b) dispensing with the services of, or other termination of the employment of, a special temporary employee, or
  - (c) any disciplinary proceedings or disciplinary action taken against a special temporary employee, or
  - (d) the remuneration or conditions of employment of a special temporary employee.
- (2) The employment of a special temporary employee, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the *Industrial Relations Act 1996*. This subsection applies whether or not any person has been appointed to a vacant position of special temporary employee.
- (3) Part 6 (Unfair dismissals) and Part 9 (Unfair contracts) of Chapter 2 of the *Industrial Relations Act 1996* do not apply to or in respect of the employment of a special temporary employee.
- (4) Any State industrial instrument (whether made before or after the commencement of this section) does not have effect in so far as it relates to the employment of special temporary employees.
- (5) Subsection (4) does not prevent the regulations or other statutory instruments under this Act from applying the provisions of a State industrial instrument to the employment of a special temporary employee.
- (6) This section does not affect the operation of any determination under section 130 or agreement under section 131, in its application to special temporary employees.
- (7) An appeal does not lie to the Government and Related Employees Appeal Tribunal in relation to the employment of a special temporary employee.
- (8) No proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, lie in respect of the employment of or failure to employ a person as a special temporary employee, the entitlement or non-entitlement of a person to be so employed or the validity or invalidity of any such employment.

**36 Delegation by Director-General** (1988 Act, s 38F)

- (1) The Director-General of the Premier's Department may delegate any function of the Director-General under this Part (other than this power of delegation) to any other Department Head.
- (2) The power of delegation conferred by this section is in addition to and does not limit the power conferred by section 15.

**37 Status of special temporary employees** (1988 Act, s 38G)

- (1) All special temporary employees are taken to constitute a branch of the Premier's Department, except any who are employed by a Department Head as delegate of the Director-General of the Premier's Department.
- (2) Special temporary employees employed by a Department Head as delegate of the Director-General of the Premier's Department are taken to constitute a branch of the Department concerned.
- (3) Accordingly, the Director-General of the Premier's Department has the functions of Department Head in relation to those special temporary employees who constitute a branch of the Premier's Department, and the relevant Department Head has the functions of Department Head in relation to those special temporary employees who constitute a branch of the Department concerned.

## **Part 2.6 Casual employees**

**38 Employment of casual employees**

- (1) The appropriate Department Head may, in accordance with such guidelines as are issued from time to time by the Public Employment Office, employ persons to carry out work in the Department on a casual basis.
- (2) Persons employed under this Part are **casual employees**.
- (3) A person may be employed as a casual employee:
  - (a) to carry out work that is irregular or intermittent, or
  - (b) to carry out work, on a short-term basis, in an area of the Department with a flexible workload, or
  - (c) to carry out the work of a position for a short period pending the completion of the selection process for the position, or
  - (d) to carry out urgent work or to deal with an emergency.
- (4) The employment of persons under this Part is subject to:

- (a) section 7 (3), and
- (b) any other provisions of this Act or the regulations concerning the employment of casual employees.

### **39 Termination of employment**

The appropriate Department Head may dispense with the services of a casual employee at any time.

## **Part 2.7 Management of conduct and performance**

### **Division 1 Preliminary**

#### **40 Part applies to officers (except chief executive officers) (1988 Act, s 65A)**

This Part applies to officers in the Public Service but (unless otherwise expressly provided by this Act) does not apply to chief executive officers in the Public Service.

#### **41 Objects of Part**

The objects of this Part are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance in the Public Service,
- (b) to protect and enhance the integrity and reputation of the Public Service,
- (c) to ensure that the public interest is protected.

#### **42 Definitions**

(1) In this Part:

***disciplinary action***, in relation to an officer, means any one or more of the following:

- (a) dismissal from the Public Service,
- (b) directing the officer to resign, or to be allowed to resign, from the Public Service within a specified time,
- (c) if the officer is on probation—annulment of the officer's appointment,
- (d) except in the case of a senior executive officer—reduction of the officer's salary or demotion to a lower position in the Public Service,
- (e) the imposition of a fine,
- (f) a caution or reprimand.

***misconduct***—see section 43.

**procedural guidelines** means the guidelines in force from time to time under section 44.

**remedial action**, in relation to an officer, means any one or more of the following:

- (a) counselling,
- (b) training and development,
- (c) monitoring the officer's conduct or performance,
- (d) implementing a performance improvement plan,
- (e) the issuing of a warning to the officer that certain conduct is unacceptable or that the officer's performance is not satisfactory,
- (f) transferring the officer to another position in the Public Service that does not involve a reduction of salary or demotion to a lower position,
- (g) any other action of a similar nature.

- (2) In this Part, a reference to an allegation that an officer may have engaged in misconduct includes a reference to the appropriate Department Head being made aware, or becoming aware, by any means that the officer may have engaged in misconduct.

#### **43 Meaning of "misconduct"** (1988 Act, s 66)

- (1) For the purposes of this Part, **misconduct** includes, but is not limited to, any of the following:
- (a) a contravention of any provision of this Act or the regulations,
  - (b) performance of duties in such a manner as to justify the taking of disciplinary action,
  - (c) taking any detrimental action (within the meaning of the [Protected Disclosures Act 1994](#)) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act,
  - (d) taking any action against another officer that is substantially in reprisal for an internal disclosure made by that officer.
- (2) For the purposes of this Part, the subject-matter of an allegation of misconduct may relate to an incident or conduct that happened:
- (a) while the officer concerned was not on duty, or
  - (b) before the officer was appointed to his or her position.

- (3) In this section, **internal disclosure** means a disclosure made by an officer regarding the alleged misconduct of another officer belonging to the same Department as that to which the officer belongs.

## **Division 2 Dealing with misconduct**

### **44 Issuing of procedural guidelines**

- (1) The Public Employment Office may, from time to time, issue guidelines for the purposes of:
- (a) dealing with allegations of misconduct as a disciplinary matter, and
  - (b) the taking of disciplinary action with respect to officers under this Division.
- (2) The Public Employment Office may from time to time amend, revoke or replace the procedural guidelines.
- (3) The procedural guidelines as in force from time to time must be made publicly available in such manner as the Public Employment Office thinks appropriate.
- (4) The regulations may make provision for or with respect to any matter for which the procedural guidelines can provide. In the event of any inconsistency between a provision contained in the procedural guidelines and a provision in the regulations, the latter is to prevail.

### **45 Requirements relating to procedural guidelines**

- (1) The procedural guidelines must be consistent with the rules for procedural fairness.
- (2) Without limiting subsection (1), the procedural guidelines are to ensure that:
- (a) the officer to whom an allegation of misconduct relates is advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken with respect to the officer, and
  - (b) the officer is given an opportunity to respond to the allegation.
- (3) A formal hearing involving the legal representation of parties and the calling and cross-examination of witness is not to be held in relation to an allegation of misconduct and the taking of disciplinary action with respect to an officer.
- (4) However, subsection (3) does not prevent the appropriate Department Head from:
- (a) conducting such investigations into an allegation of misconduct as the Department Head considers necessary, or
  - (b) conducting interviews with the officer to whom the allegation relates or with any other person in connection with the matter concerned, or

- (c) taking signed statements from the officer or any such person.

#### **46 Dealing with allegations of misconduct**

- (1) If an allegation is made to the appropriate Department Head that an officer may have engaged in any misconduct, the appropriate Department Head may:
  - (a) decide to deal with the allegation as a disciplinary matter in accordance with the procedural guidelines, or
  - (b) decide that it is appropriate to take remedial action with respect to the officer.
- (2) After dealing with an allegation of misconduct as a disciplinary matter in accordance with the procedural guidelines, the appropriate Department Head may, if the Department Head is of the opinion that the officer has engaged in any misconduct, decide to take disciplinary action with respect to the officer.
- (3) Before any disciplinary action is taken with respect to an officer under this section, the officer must be given an opportunity to make a submission in relation to the disciplinary action that the Department Head is considering taking.
- (4) Even though the appropriate Department Head decides to deal with an allegation of misconduct as a disciplinary matter in accordance with the procedural guidelines, the Department Head may, at any stage of the process:
  - (a) decide to take remedial action with respect to the officer concerned, or
  - (b) decide to dismiss the allegation, or decide that no further action is to be taken in relation to the matter, or both.
- (5) A decision under this section by the appropriate Department Head to take remedial action with respect to an officer does not, if it appears to the Department Head that the officer may have engaged in any misconduct while the remedial action is being taken, prevent the Department Head from dealing with the alleged misconduct as a disciplinary matter under this section.

### **Division 3 Dealing with unsatisfactory performance and other matters**

#### **47 Dealing with unsatisfactory performance**

- (1) If the appropriate Department Head is of the opinion that an officer is not performing the officer's duties in a satisfactory manner, the Department Head may decide to take remedial action with respect to the officer.
- (2) If:
  - (a) remedial action is taken with respect to an officer, and
  - (b) the appropriate Department Head is, after the officer has been given a reasonable

opportunity in which to improve his or her performance, of the opinion that the officer's performance is still unsatisfactory,

the Department Head may notify the officer in writing that the officer's performance is still unsatisfactory and that the officer's performance may lead to disciplinary action being taken with respect to the officer. The officer must be given an opportunity to respond to the Department Head's opinion about the officer's performance.

- (3) The Department Head may, after considering any response by the officer, decide to take disciplinary action with respect to the officer.
- (4) Before any disciplinary action is taken with respect to an officer under this section, the officer must be given an opportunity to make a submission in relation to the disciplinary action that the Department Head is considering taking.

**48 Disciplinary action may be taken if officer is convicted of serious offence** (1988 Act, s 76)

- (1) If an officer is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more, or is convicted elsewhere than in New South Wales of an offence that, if it were committed in New South Wales, would be an offence so punishable, the appropriate Department Head may:
  - (a) decide to take disciplinary action with respect to the officer, or
  - (b) decide to take remedial action with respect to the officer.
- (2) Before any disciplinary action is taken with respect to an officer under this section, the officer must be given an opportunity to make a submission in relation to the disciplinary action that the Department Head is considering taking.
- (3) A reference in subsection (1) to the conviction of an officer for an offence punishable by imprisonment for 12 months or more includes a reference to the officer having been found guilty by a court of such an offence but where no conviction is recorded.

## **Division 4 Miscellaneous provisions**

**49 Suspension of officers from duty pending decision in relation to misconduct or criminal conviction** (1988 Act, s 77)

- (1) If:
  - (a) an allegation that an officer has engaged in misconduct is being dealt with as a disciplinary matter in accordance with the procedural guidelines, or
  - (b) an officer is charged with having committed an offence referred to in section 48,the appropriate Department Head may suspend the officer from duty until the allegation of misconduct or the criminal charge has been dealt with.

- (2) Any salary payable to a person as an officer while the person is suspended from duty under this section is (if the appropriate Department Head so directs) to be withheld.
- (3) If:
  - (a) it is decided to take disciplinary action with respect to the person for the misconduct, or
  - (b) the person is convicted of the offence concerned,the salary withheld under subsection (2) is forfeited to the State unless the appropriate Department Head otherwise directs or that salary was due to the person in respect of a period before the suspension was imposed.
- (4) If the appropriate Department Head has suspended an officer from duty under this section, that Department Head may at any time remove the suspension.

#### **50 Implementation of decisions under this Part**

A decision of the appropriate Department Head to take disciplinary action or remedial action under this Part with respect to an officer may be carried into effect at any time.

#### **51 Effect of dismissal of senior executive officers** (1988 Act, s 77A)

If a senior executive officer is dismissed from the Public Service under this Part:

- (a) the term for which the officer was appointed is to be regarded as having come to an end, and
- (b) no compensation is payable in respect of the dismissal.

#### **52 Provisions relating to certain forms of disciplinary action** (1988 Act, s 75 (7), (8))

- (1) Any appointment required as the result of the taking of disciplinary action comprising demotion to a lower position in a Department is to be made by the appropriate Department Head.
- (2) If a fine is imposed under this Part on an officer, the person responsible for paying the officer's salary is, on receiving notice of the imposition of the fine, to deduct the amount of the fine from the salary payable to the officer in such manner as the appropriate Department Head directs.

#### **53 Officers retiring or resigning before disciplinary action is taken** (1988 Act, s 81)

- (1) An allegation that an officer has engaged in misconduct may be dealt with under this Part, and disciplinary action may be taken with respect to the officer, even though the officer has retired or resigned.
- (2) The taking of disciplinary action (other than a fine) with respect to the former officer



does not affect the former officer's retirement or resignation or the benefits, rights and liabilities arising from the retirement or resignation.

- (3) A fine imposed under any such disciplinary action may be recovered from the former officer as a debt due to the Crown in any court of competent jurisdiction, or out of any money payable to or in respect of the former officer by the Crown, or both.
- (4) Nothing in this section affects any power under this Act to refuse to accept the resignation of an officer.

## **Part 2.8 Miscellaneous provisions relating to the Public Service**

### **54 Requirements as to citizenship or permanent residency** (1988 Act, s 39)

- (1) A person is eligible to be appointed as an officer in the Public Service only if the person is:
  - (a) an Australian citizen, or
  - (b) a person resident in Australia whose continued presence in Australia is not subject to any limitation as to time imposed by or in accordance with law.
- (2) An officer who is not an Australian citizen and who ceases to satisfy or does not satisfy the requirements of subsection (1) (b) is no longer eligible to continue in employment as an officer in the Public Service and is to be dismissed from that employment by the appropriate Department Head.

### **55 Extended leave for Departmental staff** (1988 Act, s 100)

Schedule 3 has effect in relation to officers and temporary employees of a Department.

### **56 Excess officers of Department** (1988 Act, s 51 (3))

- (1) This section applies where:
  - (a) the appropriate Department Head is satisfied that the number of officers employed in the Department exceeds the number that appears to be necessary for the effective, efficient and economical management of the Department's functions and activities, and
  - (b) the appropriate Department Head has taken all practicable steps to secure the transfer of the excess officers to the service of another Department or in any other public sector service.
- (2) The appropriate Department Head may, with the approval of the Public Employment Office, dispense with the services of any such excess officers who cannot be found useful work in another Department or in any other public sector service.

**57 Excessive salaries of officers of Department** (1988 Act, s 52)

- (1) This section applies where:
  - (a) the appropriate Department Head is satisfied that an officer of the Department is in receipt of a greater salary than the maximum fairly appropriate to the work performed by the officer, and
  - (b) the Department Head has taken all practicable steps to secure work in the Department, or in another Department or in any other public sector service, that is appropriate to the salary of the officer.
- (2) The appropriate Department Head may, with the approval of the Public Employment Office, reduce the salary of any such officer who is not performing work appropriate to his or her salary to the maximum determined by that Department Head to be appropriate to the work performed by the officer.
- (3) An officer whose salary is reduced under this section:
  - (a) remains eligible for promotion as if the officer's salary had not been reduced, and
  - (b) is entitled to obtain work in the Department at the previous salary of the officer as soon as such work becomes available in preference to any other officer whose salary has not been reduced.

**58 Officer to report bankruptcy etc** (1988 Act, s 79)

- (1) If an officer becomes bankrupt or makes a composition, arrangement or assignment for the benefit of the officer's creditors, the officer must:
  - (a) immediately give to the appropriate Department Head notice of the bankruptcy, composition, arrangement or assignment, and
  - (b) within such period as the Department Head specifies, provide that Department Head with such further information with respect to the cause of the bankruptcy or of the making of the composition, arrangement or assignment as that Department Head requires.
- (2) If any such officer is the Department Head, subsection (1) applies as if references to the appropriate Department Head were references to the Minister responsible for the Department.

**59 Departmental staff not to undertake other paid work without permission** (1988 Act, s 80)

- (1) A person employed in the Public Service is not to undertake any other paid work without the permission of the appropriate Department Head.
- (2) This section does not apply:

(a) to a casual employee, or

(b) to a person working part-time,

during the period that the person is not required to discharge duties in the Public Service, but only if the discharge of those duties is not adversely affected and no conflict of interest arises.

**60 Right of the Crown to dispense with person's services not affected by the Act** (1988 Act, s 54)

The right or power of the Crown to dispense with the services of any person employed in the Public Service, as it existed immediately before the commencement of this section, is not abrogated or restricted by any of the provisions of this Act.

**61 No compensation to be paid where person's services dispensed with or salary reduced** (1988 Act, s 55)

A person employed in the Public Service is not, except as provided by this or any other Act, entitled to any compensation as a result of the person's services being dispensed with or the person's remuneration being reduced.

**62 Regulations with respect to Public Service** (1988 Act, s 102)

The regulations may make provision for or with respect to regulating the employment of officers, temporary employees or casual employees, including provision for or with respect to the following:

- (a) providing for the medical assessment and standards of medical fitness for the appointment of persons to positions in the Public Service,
- (b) prescribing the educational qualifications for appointments to positions in the Public Service,
- (c) prescribing the procedure to be adopted for selecting an appointee from among candidates for a vacant position (other than a chief executive position),
- (d) determining the eligibility of persons for appointment as temporary employees or casual employees,
- (e) providing for the hours of attendance of staff,
- (f) prescribing the leave which may be granted to staff,
- (g) providing for the payment of travelling and subsistence allowances for staff, allowances for the increased cost of living in remote areas, and other allowances for staff,
- (h) prescribing the procedures to be adopted consequent on the appointment of a person

to a position,

- (i) providing for the exercise of the functions of suspended, sick or absent staff by other staff, and the exercise by staff of the functions attaching to vacant positions,
- (j) providing for entry to positions in the Public Service in special cases.

## Chapter 3 Public sector staff

### Part 3.1 Public sector executives

#### Division 1 Preliminary

##### 63 Definitions (1988 Act, s 42A)

(1) In this Part:

**contract of employment** means a contract of employment under this Part between an executive officer and the officer's employer.

**executive officer** means a chief executive officer or a senior executive officer.

**executive position** means a chief executive position or a senior executive position.

**public authority** means an authority which is established by or under an Act and which is (or whose governing body is) constituted by persons appointed by the Governor or a Minister, but does not include the Teaching Service, the Health Service or the Police Service.

**remuneration package** means the remuneration package for an executive officer determined for the time being under the [Statutory and Other Offices Remuneration Act 1975](#).

(2) In this Part, a reference to the employer of an executive officer is a reference to:

- (a) in the case of a chief executive officer—the Minister, or
- (b) in the case of a senior executive officer in the Public Service—the appropriate Department Head, or
- (c) in the case of a senior executive officer in the Teaching Service—the Director-General of the Department of Education and Training, or
- (d) in the case of a senior executive officer in the service of a public authority—the public authority or a person nominated by the public authority, or
- (e) in any other case—the Minister or a person nominated for the time being by the Minister.

- (3) In this Part, a reference to the remuneration package for an executive officer is, if a range of amounts has been determined by the Statutory and Other Offices Remuneration Tribunal, a reference to:
- (a) the amount within that range nominated in the officer's contract of employment, or
  - (b) in any other case—the minimum amount within that range.

## **Division 2 Composition of executive services**

### **64 Composition of Chief Executive Service** (1988 Act, s 42B)

The Chief Executive Service comprises the persons holding the positions referred to in Parts 1 and 2 of Schedule 2.

### **65 Composition of Senior Executive Service** (1988 Act, s 42C)

- (1) The Senior Executive Service comprises:
- (a) the persons holding positions for the time being determined by the Minister to be senior executive positions, being positions in the Public Service, on the staff of a public authority or in the Teaching Service (other than positions referred to in Part 3 of Schedule 2), and
  - (b) the persons holding the positions referred in Part 3 of Schedule 2.
- (2) A list of the positions determined under subsection (1) (a) is to be made publicly available on the website of the Premier's Department.

### **66 Amendment or substitution of Schedule 2** (1988 Act, s 42D)

- (1) The Governor may, by order published in the Gazette, amend Schedule 2 by inserting the description of any position, or by omitting or amending any such description.
- (2) The Governor may, by order published in the Gazette, omit Schedule 2 and insert instead a Schedule containing descriptions of positions.

### **67 Positions which may be included in Schedule 2** (1988 Act, s 42E)

The description of a position may be included in Schedule 2 by order under this Division only if the position is:

- (a) a position in the Public Service, or
- (b) a statutory office (being an office that is established by or under an Act and to which appointments are made by the Governor or a Minister), but only if the employment of a person in the office is declared by or under that Act to be subject to this Part, or
- (c) a position on the staff of a public authority, or

- (d) a position in the Teaching Service.

### **Division 3 Employment of executive officers**

#### **68 Term appointments** (1988 Act, s 42F)

- (1) Subject to this Act, an executive officer holds office for such period (not exceeding 5 years) as is specified in the officer's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.
- (2) An executive officer may, with the approval of the Director-General of the Premier's Department, be re-appointed with effect before the expiry of the officer's term of office. In that case, the officer's existing term of office expires.

#### **69 Employment of executive officers to be governed by contract of employment** (1988 Act, s 42G)

- (1) The employment of an executive officer is to be governed by a contract of employment between the officer and his or her employer.
- (2) A contract of employment may be made before or after the appointment of the executive officer concerned.
- (3) An executive officer is not appointed by, nor is an executive officer's term of office fixed by, the contract of employment.
- (4) However, a contract of employment may constitute the instrument of appointment if the person authorised to make the appointment is also the person who signs the contract with the executive officer.
- (5) A contract of employment may be varied at any time by a further contract between the parties.
- (6) A contract of employment may not vary or exclude a provision of this Act or of any other Act under which the executive officer concerned is appointed or a provision of the regulations under this Act or any such other Act.
- (7) The employer of an executive officer (being an officer in the service of the Crown) acts for and on behalf of the Crown in any contract of employment between the officer and the employer.

#### **70 Matters regulated by contract of employment** (1988 Act, s 42H)

- (1) The matters to be dealt with in a contract of employment between an executive officer and his or her employer include the following:
  - (a) the duties of the executive officer's position (including performance criteria for the purpose of reviews of the officer's performance),

(b) the monetary remuneration and employment benefits for the executive officer as referred to in Division 4 (including the nomination of the amount of the remuneration package if a range of amounts has been determined for the remuneration package).

(2) A contract of employment may provide for any matter to be determined:

(a) by further agreement between the parties, or

(b) by further agreement between the executive officer and some other person specified in the contract, or

(c) by the Minister or other person or body specified in the contract.

**71 Performance reviews** (1988 Act, s 42I)

(1) An executive officer's performance must be reviewed, at least annually, by the officer's employer or by some other person nominated by that employer.

(2) Any such review is to have regard to the agreed performance criteria for the position and any other relevant matter.

**72 Industrial arbitration or legal proceedings excluded** (1988 Act, s 42J)

(1) In this section, a reference to the employment of an executive officer is a reference to:

(a) the appointment of, or failure to appoint, a person to a vacant executive position, or

(b) the removal, retirement, termination of employment or other cessation of office of an executive officer, or

(c) any disciplinary proceedings or disciplinary action taken against an executive officer, or

(d) the remuneration or conditions of employment of an executive officer.

(2) The employment of an executive officer, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the *Industrial Relations Act 1996*.

(3) Subsection (2) applies whether or not any person has been appointed to a vacant executive position.

(4) Part 6 (Unfair dismissals) and Part 9 (Unfair contracts) of Chapter 2 of the *Industrial Relations Act 1996* do not apply to or in respect of the employment of an executive officer.

(5) Any State industrial instrument (whether made before or after the commencement of

this section) does not have effect in so far as it relates to the employment of executive officers.

- (6) Subsection (5) does not prevent the regulations or other statutory instruments under this Act (or any other Act under which the executive officer concerned is appointed) from applying the provisions of an award or industrial agreement to the employment of an executive officer.
- (7) An appeal does not lie to the Government and Related Employees Appeal Tribunal in relation to the employment of an executive officer.
- (8) No proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, lie in respect of the appointment of or failure to appoint a person to an executive position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment.
- (9) In this section, **industrial agreement** includes any determination under section 130.

## **Division 4 Remuneration of executive officers**

### **73 Definitions** (1988 Act, s 42K)

- (1) In this Division:

**approved** means approved for the time being for the purposes of this Division by the Minister in writing, either generally or in relation to any executive officer or class of executive officers.

**employment benefit** means:

- (a) contributions payable to a superannuation scheme by an executive officer's employer in respect of the officer, including any liability of that employer to make any such contributions or to pay approved costs associated with that scheme, or
- (b) the provision by an executive officer's employer of a motor vehicle for private use by the officer, or
- (c) any other approved benefit provided to an executive officer at the cost of the officer's employer (being a benefit of a private nature).

**monetary remuneration** includes allowances paid in money, but does not include:

- (a) travelling or subsistence allowances, or
- (b) allowances in relation to relocation expenses, or
- (c) any other allowances in relation to expenses incurred in the discharge of an executive officer's duties.



**superannuation scheme** means a superannuation scheme established by or under an Act or approved for the purposes of this definition.

- (2) A reference in the definition of **employment benefit** to an executive officer's employer is a reference to the person in whose service the officer is employed.

**74 Monetary remuneration and employment benefits for executive officers** (1988 Act, s 42L)

- (1) Executive officers are entitled to monetary remuneration at such rate, and employment benefits of such kinds, as are provided in their contract of employment.
- (2) Contributions payable to a superannuation scheme by an executive officer's employer in respect of the officer that are required to be made by the employer under a law of the State relating to superannuation are, until provided for by the officer's contract of employment, taken to be an employment benefit provided in the contract.
- (3) The total amount of:
- (a) the annual rate of monetary remuneration for an executive officer, and
  - (b) the annual cost of employment benefits provided for the executive officer under the contract of employment,
- is to be equal to the amount of the remuneration package for the executive officer.
- (4) The cost of an employment benefit is the approved amount or an amount calculated in the approved manner.
- (5) This section does not affect:
- (a) any approved performance-related incentive payments made to an executive officer, or
  - (b) any remuneration or benefits to which an executive officer is otherwise entitled by law (such as statutory or agreed fees for attendance at meetings or the like).
- (6) A contract of employment may provide for the payment of part of the monetary remuneration under the contract to be made in the form of a periodic leave loading.
- (7) An executive officer is entitled to be paid an amount equivalent to the approved cost of a part of any entitlement to take annual or extended leave with pay if the officer forgoes (with the approval of the officer's employer) the right to take that part of that leave. This subsection has effect despite anything to the contrary in the [Annual Holidays Act 1944](#) or any other Act.
- (8) During any period when the monetary remuneration and employment benefits for an executive officer cannot be determined under subsection (1), the officer is entitled to monetary remuneration at the rate of the amount of the remuneration package for the officer, subject to any subsequent adjustment of payments in accordance with the

officer's contract of employment.

- (9) If the remuneration package for an executive officer is varied, the officer is entitled to monetary remuneration and employment benefits in accordance with the officer's contract of employment pending any necessary variation of the contract and adjustment of payments to comply with this section with effect from the date of the variation.

**75 Travelling and subsistence allowances etc** (1988 Act, s 42M)

- (1) An executive officer is entitled to be paid:
- (a) such travelling and subsistence allowances, and
  - (b) such allowances in relation to relocation expenses, and
  - (c) such other allowances in relation to expenses incurred in the discharge of the officer's duties,
- as the officer's employer may from time to time determine in respect of the officer.
- (2) An executive officer's contract of employment:
- (a) may provide for the payment to the officer of allowances of the kind referred to in this section, and
  - (b) may regulate the payment of allowances to the officer under this section.

**Division 5 Removal, retirement etc of executive officers**

**76 Vacation of executive positions** (1988 Act, s 42O)

- (1) The position of an executive officer becomes vacant if the officer:
- (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) is removed from office, or retires or is retired from office, under this or any other Act, or
  - (d) resigns his or her position in writing addressed to the officer's employer and that employer accepts the resignation.
- (2) This section does not affect any other provision by or under which an executive officer vacates his or her position.

**77 Removal of executive officers from office** (1988 Act, ss 42Q, 100D)

- (1) The employer of an executive officer may remove the executive officer from an

executive position at any time for any or no reason and without notice.

(2) The employer:

(a) may declare an executive officer who is removed from an executive position by the employer under subsection (1) to be an unattached officer, and

(b) may revoke any such declaration.

(3) While a declaration under subsection (2) remains in force, the person to whom the declaration relates:

(a) is to be regarded as an executive officer, although not holding an executive position, and

(b) is entitled to monetary remuneration and employment benefits as if the person had not been removed from his or her position, and

(c) is, for the purposes of sections 19 (1), (2), (3) and (5) and 87, to be regarded as holding an equivalent (though notional) executive position in the Department or organisation from which he or she was removed.

(4) If the person referred to in subsection (3) was removed from a chief executive position, then for the purposes of sections 19 (1), (2), (3) and (5) and 87:

(a) the person is to be regarded as a senior executive officer, and

(b) the person's notional executive position referred to in subsection (3) (c) is to be regarded as a senior executive position.

(5) If:

(a) an executive officer is removed from an executive position under subsection (1) and a declaration is not made in relation to the officer under subsection (2), or

(b) a declaration under subsection (2) made in relation to an executive officer is revoked,

the officer ceases to be an executive officer, unless appointed to an executive position.

(6) An officer in the Public Service, the Teaching Service, another service of the Crown or the service of a public authority who ceases to be an executive officer because of subsection (5) ceases to be an officer in that service, unless appointed to a position in that service.

(7) The making of a declaration under subsection (2) in relation to an executive officer does not prevent the officer from ceasing to be an executive officer because of the completion of the officer's term of office.

- (8) This section does not prevent an executive officer being removed from office apart from this section.
- (9) If a Department or organisation referred to in subsection (3) (c) ceases to exist or to be identifiable, the Public Employment Office may determine that the executive position concerned is to be regarded for the purposes of that paragraph as being in some other specified Department or organisation.

**78 Compensation etc where executive officer has no right to return to public sector** (1988 Act, ss 42N, 42S)

- (1) This section applies to:
  - (a) an executive officer who is removed from office under section 77 and who ceases to be an executive officer as referred to in section 77 (5), or
  - (b) an executive officer who is otherwise removed from office (except for misbehaviour after due inquiry), or
  - (c) an executive officer who was employed in the public sector when first appointed as an executive officer, whose term of office as an executive officer expires and who is not re-appointed.

However, this section does not apply to an executive officer who consents to a transfer at a lower level of remuneration.

**Note—**

Clause 11 (10) and (11) of Schedule 4 provide that the person is not entitled to compensation if the person is entitled to an engagement in the public sector in the exercise of a right of return, unless the person elects to take the compensation instead of the engagement.

- (2) A person to whom this section applies is entitled to such compensation (if any) as the Statutory and Other Offices Remuneration Tribunal determines.
- (3) The Statutory and Other Offices Remuneration Tribunal:
  - (a) may determine that compensation is payable for the failure to re-appoint an executive officer only if the Tribunal is satisfied that the person had a reasonable expectation of being re-appointed, and
  - (b) must have regard to any general directions given to the Tribunal by the Minister as to the matters to be taken into consideration when it makes determinations under this section.
- (4) The maximum compensation payable is an amount equal to the person's remuneration package for the period of 38 weeks.
- (5) The person is not entitled to any other compensation for the removal or retirement

from office or for the failure to re-appoint the person or to any remuneration in respect of the office for any period afterwards (except remuneration in respect of a subsequent re-appointment to the office).

- (6) An executive officer who is removed from office or not re-appointed is not entitled to compensation under this section if:
  - (a) the person is appointed on that removal or expiry of the term of office to another executive position, and
  - (b) the remuneration package for the holder of that position is not less than the remuneration package for the holder of the former position.
- (7) If the Statutory and Other Offices Remuneration Tribunal determines that compensation is payable under this section, it must, in its determination, specify the period to which the compensation relates.
- (8) The person may not be engaged in the public sector or employed in the service of a State owned corporation or a subsidiary of such a State owned corporation during the period so specified, unless arrangements are made for a refund of the proportionate amount of the compensation.
- (9) A reference in this section to:
  - (a) employment in the public sector is a reference to employment as an officer in the Public Service, the Health Service or the Teaching Service, as a member of the Police Service or as an officer in the service of a public authority, and
  - (b) engagement in the public sector is a reference to employment in the public sector or to the holding of a statutory office.

## **Division 6 General**

### **79 Appointment of incumbent officers to senior executive positions** (1988 Act, s 42U)

- (1) When a position becomes a senior executive position, the person (if any) holding the position is to continue to hold that position until the person or some other person is duly appointed to the position.
- (2) While the person continues to hold the position, the conditions of employment (including remuneration) of the person are to be the same as those which applied to the person immediately before the position became a senior executive position.
- (3) The person who continues to hold the position may be appointed to the position without the vacancy being advertised.
- (4) If the person who continues to hold the position is not appointed to the position or to any other executive position, clause 11 of Schedule 4 applies to the person as if he or

she had elected to retain a right of return to the public sector.

- (5) This section does not apply to a senior executive position referred to in Part 3 of Schedule 2.

**80 Incumbent officers—accrued leave** (1988 Act, s 42V)

- (1) A person who:
- (a) was engaged in the public sector when appointed to an executive position, and
  - (b) had a right to accrued extended or annual leave with pay immediately before that appointment, and
  - (c) has not taken that leave before taking up duties in the executive position,
- is entitled, on taking up those duties, to be paid instead of that leave (or any part of that leave) the money value of that leave (or part) as a gratuity if the person so elects.
- (2) An election under this section is to be made within the time and in the manner determined by the Minister.
- (3) The money value of leave is to be calculated at the rate of pay of the person immediately before appointment to the executive position.
- (4) A person who was engaged in the public sector when appointed to an executive position retains any right to extended, annual, sick or other leave accrued or accruing to the person immediately before the appointment (except any accrued leave which is paid out by a gratuity under subsection (1)).
- (5) A reference in this section to an engagement in the public sector has the same meaning as it has for the purposes of section 78.

**81 Change in status of positions** (1988 Act, s 42W)

- (1) If a chief executive position becomes a senior executive position or a senior executive position becomes a chief executive position, the existing contract of employment continues in force until a new contract is made under this Part.
- (2) If a position ceases to be designated as an executive position by order or determination under this Part:
- (a) the position is not thereby abolished, and
  - (b) any person holding the position is to be taken to have been appointed to the position in accordance with the relevant provisions.
- (3) However, the order or determination by which a position is omitted may direct that

the person holding the position is to cease to hold the position, but only if the person was not employed in the public sector (as referred to in section 78) immediately before last becoming an executive officer.

- (4) The person to whom any such direction relates ceases to hold the position concerned and has the same rights and obligations as if the person had ceased to be an executive officer as referred to in section 77 (5).
- (5) An order or determination that omits or adds an executive position may contain other provisions of a savings or transitional nature consequent on a position becoming or ceasing to be an executive position or becoming a different kind of executive position.

## **82 Change in title of positions** (Act 1988, s 42X)

A position referred to in Schedule 2 or in a determination of the Minister under this Part does not cease to be an executive position merely because of a change in the title of the position.

## **83 Approval to undertake other paid work** (1988 Act, s 42Y)

An executive officer is not to undertake any paid work outside the duties of the executive position without the consent of the officer's employer.

## **84 Operation of Part** (1988 Act, s 42Z)

- (1) This Part prevails over any inconsistent provision of any other Act or law or of the terms of appointment of or contract with a person.
- (2) The provisions of this Part apply to a person appointed to an executive position under any Act even though the Act excludes the application of this Act, unless it expressly excludes the application of those provisions.

# **Part 3.2 Staff mobility**

## **Division 1 Movement of staff within and between public sector agencies**

### **85 Definitions**

In this Division:

**head** of a public sector agency means:

- (a) (subject to paragraph (b)) the person who is the chief executive officer, or who exercises the functions of chief executive officer, of the agency, or
- (b) the person prescribed by the regulations.

**public sector agency** means:

- (a) the whole or a part of a public sector service or an employer constituting, or within, a public sector service, or
  - (b) (without limiting paragraph (a)) a State owned corporation,
- and includes a Department.

#### **86 Temporary staff transfers (secondments)**

- (1) A member of staff of a public sector agency may transfer temporarily to the service of another public sector agency with the approval of the heads of the home agency and the host agency.
- (2) A member of staff of a public sector agency may transfer temporarily to another position or other employment within the agency with the approval of the head of the agency.
- (3) A temporary transfer under this section may be:
  - (a) at the request, or with the consent, of the member of staff concerned (***an employee-initiated temporary transfer***), or
  - (b) at the direction of the head of the home agency (***an employer-initiated temporary transfer***).
- (4) A person may be temporarily transferred under this section at the person's existing level of remuneration or at a different level of remuneration. However, an employer-initiated temporary transfer cannot be made at a lower level of remuneration.
- (5) A person who transfers to the service of another public sector agency under this section remains an employee of the home agency.
- (6) However, in the case of an employee-initiated temporary transfer, the person ceases to be an employee of the home agency and becomes an employee of the host agency if:
  - (a) the transfer has continued for at least 2 years, and
  - (b) the head of the home agency notifies the person of the proposed cessation of employment, and
  - (c) the person decides to remain with the host agency with the consent of the head of that agency.
- (7) In the case of an employee-initiated temporary transfer, a permanent appointment may be made to the original position of the person (and without the person ceasing to be employed by the agency) if:
  - (a) the transfer has continued or is likely to continue for more than 12 months, and



- (b) the person is advised of the proposed appointment, and
  - (c) the person is given a reasonable opportunity to terminate the transfer and return to his or her original position.
- (8) In the case of an employer-initiated temporary transfer, a permanent appointment cannot be made to the person's original position except with the consent of the person.
- (9) The following is to be determined in accordance with such guidelines as are issued from time to time by the Director-General of the Premier's Department:
- (a) the procedures for obtaining the consent of an employee under this section,
  - (b) the circumstances in which an employer-initiated temporary transfer to a different workplace location in the State may be made.
- (10) In this section:

**home agency** means the public sector agency from which the transfer of a member of staff is made under this section.

**host agency** means the public sector agency to which the transfer of a member of staff of another agency is made under this section.

**public sector agency** does not include a State owned corporation.

**Note—**

See also section 24 for acting appointments to vacant public service positions or where the holder of the position is suspended, sick or absent.

**87 Employer-sponsored permanent transfers** (1988 Act, ss 50, 51, 53A, 100A)

- (1) The head of a public sector agency may, subject to this section, transfer a member of staff of the agency to the service of another public sector agency:
- (a) with the approval of the head of the other agency and of the Public Employment Office, and
  - (b) following consultation with the member of staff.
- (2) The head of a public sector agency may, subject to this section, transfer a member of staff of the agency to another position or other employment within the agency, following consultation with the member of staff.
- (3) The following provisions apply to the transfer of a person under this section:
- (a) the transfer is to be made at the person's existing level of remuneration, unless the person consents to the transfer at a lower level of remuneration,

- (b) if the person is employed in a staff position or on a temporary basis, the person is to be transferred to another staff position or to other temporary employment, respectively,
- (c) the person must possess the qualifications required for the position or employment to which the person is transferred or have the capacity to perform the work after a reasonable period of time in the position or in that employment.

#### **88 Temporary assignment of public sector staff to other agencies**

- (1) A person who is employed in or by a public sector agency may be temporarily assigned to carry out work for another public sector agency in accordance with:
  - (a) the arrangements that are made between the heads of those agencies, and
  - (b) such guidelines as are issued from time to time by the Director-General of the Premier's Department.
- (2) Without limiting subsection (1), any such assignment may be made for the purposes of utilising the person's services in connection with a special project or event.
- (3) A person may be temporarily assigned to carry out work for another public sector agency on a full-time or part-time basis.
- (4) The person's employment in or by a public sector agency (including the continuity of that employment) is not affected by the temporary assignment of the person to carry out work for another public sector agency.
- (5) In this section, **public sector agency** includes a local council or other local authority.

#### **89 Variations in remuneration on transfer** (1988 Act, s 100C)

- (1) For the purposes of this Division, an officer's existing salary or an officer's existing level of remuneration is that salary or level of remuneration as varied in accordance with the guidelines issued by the Public Employment Office in connection with the transfer of public sector staff.
- (2) A person is not entitled to appeal under section 20 of the [Government and Related Employees Appeal Tribunal Act 1980](#) in respect of a decision relating to a vacant office, where the maximum salary applicable to the vacant office is greater than the salary paid to an employee, because of the application of the guidelines.
- (3) An officer is not entitled to any compensation in respect of any reduction of remuneration because of the application of the guidelines.
- (4) For the purposes of this Division, the transfer of a senior executive officer at a level of remuneration that is lower than the officer's existing level of remuneration includes a reference to the transfer of the officer to a position without a remuneration package

(within the meaning of Part 3.1) and with a salary and other benefits that are lower in value than the officer's existing remuneration package (within the meaning of that Part). The relative values are to be determined in accordance with any relevant principles in the guidelines.

**90 Dismissal of staff refusing transfer** (1988 Act, s 53)

- (1) If a member of staff of a public sector agency refuses a transfer that the head of the agency is authorised to make under section 87, the head of the agency may, if satisfied that the member of staff had no valid reason for refusing the transfer:
  - (a) dismiss the member from the service of the agency, or
  - (b) in the case of a member of staff of a Department—dismiss the member from the Public Service.
- (2) A member of staff of a Department may be dismissed only with the approval of the Public Employment Office.
- (3) Subsection (1) does not affect the power of removal under section 77 or any similar statutory provision.
- (4) Nothing in this section prevents the taking of disciplinary action against a member of staff of a public sector agency for refusing a transfer that the head of the agency is authorised to make under this Division.

**91 Miscellaneous provisions**

- (1) This Division does not affect any other method (statutory or otherwise) by which members of staff of public sector agencies can transfer or be transferred.
- (2) This Division does not affect any provisions of any other Act to the extent that they specifically deal with the transfer of any members of staff from or within a public sector agency.
- (3) The approval of the Public Employment Office under this Division may be given unconditionally or subject to conditions, including conditions that provide for the retention of accrued or accruing rights or benefits where they are not otherwise preserved by a statutory or other provision.
- (4) The approval of the head of a public sector agency to the transfer of a person to a protected position in the agency (that is, a position that is subject to the requirements of some other Act or law with respect to appointments to such a position) is effective only after substantial compliance with:
  - (a) such of those requirements as relate to probity or integrity, and
  - (b) such of those requirements as are specified in any conditions subject to which an

approval of the Public Employment Office is given, and

(c) such of those requirements as are prescribed by the regulations.

For the purposes of this subsection, the relevant provisions of the other Act or law imposing any such requirement apply with any necessary modifications.

**Note—**

An example of a protected position is a “key official” within the meaning of the *Liquor Act 1982*, which includes certain officers in the Department of Gaming and Racing who are required to undergo criminal record checks and probity assessments in connection with their appointment.

## **Division 2 Cross-public sector leave arrangements**

### **92 Definitions**

In this Division:

**employee** means a person who is employed in any public sector service.

**cessation** of employment includes cessation of employment by resignation, retirement or otherwise.

### **93 Division applies despite State industrial instruments** (1988 Act, cl 2 Sch 5A)

This Division has effect despite any provision of any State industrial instrument.

### **94 Recognition of prior government service for purpose of calculating extended leave**

Schedule 3A has effect in relation to employees.

### **95 Annual leave** (1988 Act, cl 4 Sch 5A)

(1) An employee who ceases to be employed in a public sector service and immediately commences employment in another public sector service may elect:

- (a) to be paid the money value of the employee’s accrued annual leave, or
- (b) to retain the entitlement to that accrued annual leave.

**Note—**

For example, such an election may not be made by an officer who merely moves between different Departments of the Public Service.

(2) An employee who elects to retain the entitlement to accrued annual leave is taken to have, on commencing employment in the other public sector service, the amount of accrued annual leave to which the employee was entitled immediately before the end of his or her previous employment. This leave is in addition to any annual leave which accrues after that commencement.

(3) For the purpose of calculating an entitlement under this section, the money value of accrued annual leave owing to a chief executive officer or senior executive officer is to be determined on the basis of the officer's notional salary.

(4) In this section:

**accrued annual leave** means annual leave owing to an employee (but not taken), and includes any such leave accrued because of the operation of this section.

**notional salary**, in relation to a chief executive officer or a senior executive officer, means the total amount of the remuneration package for the officer as last determined before the time of payment, less the superannuation guarantee amount payable in respect of the officer.

**superannuation guarantee amount** means the minimum amount payable to a superannuation fund or scheme in respect of an officer that is sufficient to avoid an individual superannuation guarantee shortfall, within the meaning of the [Superannuation Guarantee \(Administration\) Act 1992](#) of the Commonwealth, in respect of the officer.

(5) This section is taken to have applied on and from 3 May 1993.

**96 Sick leave** (1988 Act, cl 5 Sch 5A)

(1) An employee who ceases to be employed in a public sector service and immediately commences employment in another public sector service is taken to have, on commencing that employment, the amount of accrued sick leave to which the employee was entitled before that commencement. This leave is in addition to any sick leave which accrues after that commencement.

(2) The eligibility of an employee for sick leave that includes any period of accrued sick leave is to be determined in accordance with the conditions relating to the granting of sick leave in the employee's current employment.

(3) In this section:

**accrued sick leave** means the amount of sick leave to which the employee would have been entitled in the event of illness, and includes any such leave accrued because of the operation of this section.

(4) This section is taken to have applied on and from 3 May 1993.

**97 Maternity leave etc** (1988 Act cl 6 Sch 5A)

(1) This section applies for the purposes of determining whether an employee who ceases to be employed in a public sector service and immediately commences employment in another public sector service is entitled to maternity leave, paternity leave, adoption leave or any other leave (other than extended leave) for which a condition of eligibility

is a minimum period of service.

- (2) For the purposes of determining an employee's entitlement to leave referred to in this section:
  - (a) service with the employee's previous employer is taken to be service with the employee's current employer, if the previous employment was in another public sector service and if that period of service was continuous with the employee's current employment, and
  - (b) service with any other former employers is taken to be service with the person's current employer, if the service was in other public sector services and the periods of service with those bodies were continuous with each other and the employee's previous employment in a public sector service.
- (3) Except as provided by this section, the eligibility of an employee for leave referred to in this section is to be determined in accordance with the conditions applying to that leave in the employee's current employment.
- (4) A reference in this section to service with a previous or former employer extends to include a reference to any such service before the commencement of this section.
- (5) This section is taken to have applied on and from 3 May 1993.

**98 Access to forfeited sick leave—transitional arrangements** (1988 Act, cl 7 Sch 5A)

- (1) If an employee is eligible for sick leave for any absence from duty but has exhausted his or her sick leave entitlement, the employee's employer may grant to the employee any of the employee's forfeited sick leave as sick leave for the absence.
- (2) An employee's **forfeited sick leave** is the total amount of sick leave that the employee ceased to be entitled to up to 13 October 1995 (the date of commencement of Schedule 5A to the *Public Sector Management Act 1988*), being sick leave that he or she would presently be entitled to had section 96 been in force from when the employee was first employed in a public sector service.
- (3) Once any period of an employee's forfeited sick leave has been granted as sick leave under this section, it is no longer regarded as forfeited sick leave for the purposes of any further grant of sick leave to the employee under this section (whether by the same or a different employer).
- (4) For the purposes of this section, the employer of an employee is the person who exercises the functions of chief executive officer in relation to the public sector service in which the employee is employed (being the appropriate Department Head in the case of a member of the Public Service for example).
- (5) In determining whether or not an employee is entitled to sick leave, all the

employee's entitlements to sick leave are to be taken into account, including special sick leave and sick leave to which the employee is entitled by operation of section 96.

- (6) The Public Employment Office may issue guidelines to employers of employees as to the circumstances in which, and the matters to be taken into account in determining whether, forfeited sick leave should or should not be granted as sick leave under this section.

#### **99 Funding of leave entitlements** (1988 Act, cl 8 Sch 5A)

The Treasurer may give directions and issue guidelines requiring the transfer of funds between public sector employers for the purpose of making due allowance and appropriate adjustments for liabilities incurred by reason of the operation of this Division and Schedule 3, or liabilities with respect to extended or long service leave.

### **Part 3.3 Miscellaneous provisions relating to public sector staff**

#### **100 Cross-agency employment**

- (1) A person may be employed (as an officer or on any other basis):
  - (a) in 2 or more Departments, or
  - (b) in the Public Service and in any other public sector service.
- (2) If the person is employed in 2 or more Departments, the relevant Department Heads may determine that the person is to be regarded as employed in one of those Departments for the purposes of the conditions of employment of the person.
- (3) If the person is employed in the Public Service and in any other public sector service, the relevant Department Head and the chief executive officer of that other service may determine that the person is to be regarded as employed in the relevant Department or that other service for the purposes of the conditions of employment of the person.
- (4) Any such determination:
  - (a) may be limited to particular conditions of employment, and
  - (b) may make different provision for different conditions of employment, and
  - (c) is to be made in accordance with such guidelines as are issued from time to time by the Director-General of the Premier's Department.
- (5) For the purposes of this section, conditions of employment include the provisions of or made under this Act or any other Act under which a public sector service is established.

**101 Arrangements for use of Teaching Service staff by Departments** (1988 Act, s 41)

- (1) The appropriate Department Head may, with the approval of the Director-General of the Department of Education and Training, on such terms and conditions as may be arranged, make use of the services of any member of the Teaching Service.
- (2) The services of a person may not be made use of under subsection (1) for:
  - (a) a continuous period exceeding 12 months, or
  - (b) 2 or more periods that together exceed 12 months in any period of 2 years, except with the approval of the Public Employment Office.

**102 Employees contesting State elections** (Act No 45 of 1916)

- (1) If a person who is employed in any public sector service is nominated for election to the Legislative Assembly or Legislative Council, the person is to be granted leave of absence until the day on which the result of the election is declared.
- (2) If the person is elected, the person is required to resign from the public sector service concerned.
- (3) Unless the person is entitled to leave with pay (and duly applies for such leave), any leave of absence under this section is to be leave without pay.

**103 Re-appointment of employees resigning to contest Commonwealth elections** (Act No 12 of 1943)

- (1) If a person who is employed in any public sector service:
  - (a) resigns in writing from the public sector service and the resignation takes effect not earlier than 3 months before the date appointed for the taking of the poll at an election of a member or members of either House of Parliament of the Commonwealth and before the day fixed for nominations for the election, and
  - (b) includes in the resignation notice of the person's intention to become a candidate at that election, and
  - (c) becomes a candidate at that election, and
  - (d) fails to be elected at that election, and
  - (e) makes written application for re-appointment to a position or other employment in the public sector service concerned within 2 months after the declaration of the result of the poll at that election,

the person is entitled to be re-appointed to a position or other employment in the public sector service not lower in remuneration than the current remuneration for the



position or employment of the person at the date of the person's resignation (or a similar position or employment).

- (2) A person, on being re-appointed under this section, is taken:
- (a) to have never resigned from the public sector service concerned, and
  - (b) to have been on leave without pay during the period between resignation and re-appointment.

## Chapter 4 Administrative changes

### Part 4.1 Orders concerning departments of the Public Service

#### 104 Creation and change in relation to Departments (1988 Act, ss 8 (5), 55A)

- (1) The Governor may by order:
- (a) establish, abolish or change the name or other description of any Department of the Public Service or any branch of any Department of the Public Service, or
  - (b) remove a branch from any Department of the Public Service, or
  - (c) add a branch to any Department of the Public Service.

**Note—**

Any other Act may establish, abolish or change the name or other description of a Department of the Public Service by amendment of Schedule 1 to insert, omit or change the name or other description of the Department, respectively.

- (2) If the Governor removes a branch from any Department of the Public Service and adds it to another Department:
- (a) so much of the staff of the first-mentioned Department as relates to the branch becomes correspondingly part of the staff of the other Department, and
  - (b) the staff of the branch continue to occupy their positions in the branch but as members of the staff of that other Department.
- (3) In this section, **branch** means a branch or other part of a Department.

#### 105 Orders amending or replacing Schedule 1 (1988 Act, s 55B)

The Governor may by order:

- (a) amend Column 1 of Schedule 1 by inserting, omitting or changing the name or other description of a Department of the Public Service, or
- (b) amend Column 2 of Schedule 1 by inserting the title or other description of an office or position opposite an entry in Column 1 of that Schedule, or by omitting or

amending a title or other description in Column 2 of that Schedule, or

- (c) omit Schedule 1 and insert in its place a Schedule containing in Column 1 the names or other descriptions of Departments of the Public Service and containing in Column 2 the titles or other descriptions of offices or positions.

**106 Orders specifying responsible Minister** (1988 Act, s 55C)

The Governor may by order specify the Minister who is to be responsible for a Department of the Public Service.

**Part 4.2 Other administrative changes orders**

**107 Definitions** (1988 Act, s 55D)

In this Part:

**administrative change** means:

- (a) the fact of there ceasing to be a Minister, Department or officer of a particular description, or
- (b) the transfer of the administration of an Act, or a part of an Act, from a Minister to another Minister, or
- (c) the transfer of a function from a Minister, Department or officer to another Minister, Department or officer, respectively.

**Department** includes any branch or other part of a Department.

**description** includes title.

**officer** means a member of staff of a Department.

**reference**, in relation to a Minister, Department or officer, includes a reference that (whether by or under this or any other Act) is to be read or construed as, or taken to be, or deemed to be, or otherwise treated as, a reference to that Minister, Department or officer.

**statutory instrument** means an instrument made under an Act or under an instrument made under an Act, and includes a regulation, rule, by-law or ordinance made under an Act.

**108 Orders to change references in Acts** (1988 Act, s 55E)

- (1) The Governor may make orders containing provisions requiring a reference in any Act or statutory instrument, or in any other instrument, or in any contract or agreement, to a Minister, Department or officer by a specified description to be construed as a reference to a Minister, Department or officer, respectively, by another specified

description.

- (2) Such a provision does not apply to or in respect of any Act or statutory instrument, or any other instrument, or any contract or agreement, enacted, made or entered into after the date of publication in the Gazette of the order in which the provision is contained, or the date on which the provision takes effect, whichever is the later.
- (3) An order under this section need not be consequential on or incidental to administrative change.

**109 Orders re administrative change and other matters** (1988 Act, s 55F)

- (1) The Governor may make orders containing such provisions as in the opinion of the Governor are necessary or convenient to be made for the purpose of dealing with matters that are incidental to or consequential on administrative change, the making of an order under this Part or a requirement imposed by an order under this Part.
- (2) The provisions that may be made by an order under this section include provisions for the transfer of any property, rights and liabilities held, enjoyed or incurred by a superseded authority, and provisions of a transitional or savings nature, including any of the following provisions:
  - (a) provisions for the carrying on or completion of anything commenced by, or under the authority of, or in relation to, a superseded authority,
  - (b) provisions for the continuity of any body constituted by, or having amongst its members, a superseded authority,
  - (c) provisions for the substitution, in any legal proceedings, of a Minister or officer for a superseded authority.
- (3) In this section:

***superseded authority*** means a Minister, Department or officer who is, or whose description is, the subject of an order under this Part.

### **Part 4.3 Requirements concerning orders**

**110 Publication and commencement of orders** (1988 Act, s 55G)

- (1) An order under this Chapter is to be published in the Gazette.
- (2) The order takes effect on the date of its publication in the Gazette, or on such other date as may be specified in the order. The commencement date can be a date that is earlier than the date of publication of the order in the Gazette (including earlier than the commencement of this Chapter).

**111 Limited, general and differential application of orders** (1988 Act, s 55H)

An order under this Chapter may be made so as:

- (a) to apply generally or be limited in its application by reference to specified exceptions or factors, or
- (b) to apply differently according to different factors of a specified kind.

**112 Operation of orders** (1988 Act, s 55I)

- (1) An order under this Chapter does not invalidate anything done or omitted to be done before the date of its publication in the Gazette.
- (2) To the extent to which an order under this Chapter takes effect from a date that is earlier than the date of its publication in the Gazette, the order does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

**113 Combination orders** (1988 Act, s 55J)

An order may be made under this Chapter combining any 2 or more of the provisions authorised by this Chapter, including provisions authorised under different sections.

## **Chapter 5 Statutory officers**

**114 Definitions** (1988 Act, s 89)

- (1) In this Chapter:

***term appointee*** means a person appointed by the Governor or a Minister to a statutory office where the Act concerned provides that the holder of the office holds it for a term specified in the Act, in the instrument of appointment or in another instrument.

- (2) For the purposes of this Chapter, a person is not a term appointee merely because an Act provides that the person ceases to hold office on reaching a particular age.
- (3) A reference in this Chapter to:
  - (a) employment in the public sector is a reference to employment as an officer of the Public Service or the Teaching Service, as a member of the Police Service or as an officer in the service of a public authority established by or under an Act, and

(b) engagement in the public sector is a reference to employment in the public sector or to holding a statutory office.

(4) The positions of director or chief executive officer of a statutory State owned corporation are statutory offices for the purposes of this Chapter.

**115 Chapter not to apply to executive officers** (1988 Act, s 89A)

This Chapter does not apply to a person in the person's capacity as a chief executive officer or a senior executive officer.

**116 Removal of term appointee from office** (1988 Act, s 90)

(1) The Governor may remove a term appointee from office at any time for any or no reason and without notice.

(2) This section does not prevent a term appointee from being removed from office apart from this Act.

(3) This section applies whether the term appointee holds office on a full-time or part-time basis.

(4) This section does not apply to a person in the person's capacity as:

(a) the holder of an office under an Act that provides that the holder may or must be removed from office following an address, declaration, resolution or other involvement of either or both of the Houses of Parliament, or

(b) the Crown Advocate, or

(c) an Assistant Commissioner for the Independent Commission Against Corruption or any other officer of the Commission.

**117 Re-appointment to public sector following removal of term appointee** (1988 Act, s 91)

(1) This section applies to a person who is removed from office under section 116.

(2) A person to whom this section applies is entitled to engagement in the public sector, if:

(a) for a continuous period ending immediately before appointment to the office the person was at all times engaged in the public sector on a full-time basis, and

(b) for at least some part of that engagement the person was an employee in the public sector.

(3) The engagement to which the person is entitled under this section is to be an engagement:

(a) at a salary not lower than the current salary for the previous engagement of the

person as such an employee, and

(b) with duties appropriate to that salary.

(4) The person is not entitled to any compensation for the removal from office or to any remuneration in respect of the office for any period afterwards.

**118 Compensation for office holder following removal** (1988 Act, s 92)

(1) This section applies to a person who (being a term appointee):

(a) is removed from an office under section 116, and

(b) is not entitled to be engaged in the public sector under section 117,

but does not apply to a person who held the office concerned on a part-time basis.

(2) A person to whom this section applies is entitled to such compensation (if any) for loss of remuneration as the Statutory and Other Offices Remuneration Tribunal determines.

(3) The maximum compensation payable is an amount equal to the person's gross remuneration for:

(a) the period of 38 weeks, or

(b) if the person was appointed for a term—the period starting from the person's removal from office and ending when the person's term of office would have expired,

at the rate at which it was payable immediately before the person's removal from office.

(4) If more than one such period is applicable, the maximum compensation is to be calculated by reference to the shorter or shortest period.

(5) The person is not entitled to any other compensation for the removal from office or to any other remuneration in respect of the office for any period afterwards.

(6) If the Statutory and Other Offices Remuneration Tribunal determines that compensation is payable under this section, it must, in its determination, specify the period to which the compensation for loss of remuneration relates.

(7) The person may not be engaged in the public sector or employed in the service of a State owned corporation or a subsidiary of a State owned corporation during the period so specified, unless arrangements are made for a refund of the proportionate amount of the compensation.

**119 Election by term officer to take compensation** (1988 Act, s 93)

A person to whom section 117 applies may, before being engaged in the public sector

under that section, elect in writing to take compensation referred to in section 118, and on the election taking effect the person ceases to be entitled to engagement in the public sector under section 117.

**120 Operation of this Chapter** (1988 Act, s 94)

- (1) This Chapter prevails over any inconsistent provision of any other Act or law or of the terms of appointment of or contract with a person.
- (2) Part 6 (Unfair dismissals) and Part 9 (Unfair contracts) of Chapter 2 of the *Industrial Relations Act 1996* do not apply to or in respect of the removal of a term appointee from office under this Chapter.
- (3) This Chapter applies to a person appointed to a statutory office even though the Act concerned excludes the application of this Act, unless it expressly excludes the application of this Chapter.
- (4) This Chapter applies to persons holding office at the commencement of this Chapter, as well as to persons appointed to an office afterwards.
- (5) Disentitlement under this Chapter to salary of an office does not apply as regards a subsequent re-appointment to the office.
- (6) This Chapter does not apply to a person in the person's capacity as:
  - (a) the Governor, the Lieutenant-Governor or other officer administering the Government, or
  - (b) a member of the Executive Council, a Minister of the Crown, a member of either House of Parliament or the holder of any other political office, or
  - (c) the holder of a judicial office, or
  - (d) the Parliamentary Remuneration Tribunal, or
  - (e) a member of the Police Service.

## **Chapter 6 Public Employment Office**

### **Part 6.1 Constitution and management**

**121 Public Employment Office** (1988 Act, s 49A)

- (1) There is constituted by this Act a body corporate with the corporate name of the Public Employment Office.
- (2) The Public Employment Office is, for the purposes of any Act, a statutory body representing the Crown.

**122 Director-General of Premier's Department to manage affairs of Office** (1988 Act, s 49B)

- (1) The affairs of the Public Employment Office are to be managed by the Director-General of the Premier's Department.
- (2) Any act, matter or thing done in the name of, or on behalf of, the Public Employment Office by the Director-General of the Premier's Department, or with the authority of the Director-General, is taken to have been done by the Public Employment Office.

**123 Ministerial control** (1988 Act, s 49C)

The Public Employment Office is subject to the control and direction of the Minister, except in relation to the following:

- (a) salaries, wages or other remuneration, and other conditions of employment,
- (b) a dispute relating to an industrial matter.

**124 Delegation by Public Employment Office** (1988 Act, s 49F)

- (1) The Public Employment Office may delegate to a Department Head or any other member of staff of a Department any of the functions of the Public Employment Office, other than this power of delegation.
- (2) Any delegation of a function with respect to the making of a determination fixing salaries, wages or other remuneration of staff is subject to the condition that any such determination must be at a level that is lower than the lowest amount of the remuneration packages for executive officers determined for the time being under the [Statutory and Other Offices Remuneration Act 1975](#).
- (3) In this section:
  - (a) a reference to the functions of the Public Employment Office includes a reference to any functions delegated to the Public Employment Office under this Act, and
  - (b) a reference to a member of staff of a Department includes:
    - (i) a reference to a person holding an appointment to or in the Department, and
    - (ii) where the Department is the group of staff attached to a body, organisation or group specified in Schedule 1—a reference to a person holding an appointment to or in that body, organisation or group.

## **Part 6.2 General functions**

**125 Principal functions of the Public Employment Office** (1988 Act, s 49D)

The Public Employment Office has the following functions:

- (a) advising the Government on appropriate policies in relation to personnel management



and industrial relations in the public sector and, in particular, appropriate policies in relation to the use of consultants by the public sector, standards of conduct for public sector employees and management-staff consultation,

- (b) monitoring the implementation of Government policies in those areas and assisting the implementation of those policies (including the issuing of implementation guidelines),
- (c) monitoring recruitment, appointment and promotion practices in the public sector and, in particular, compliance with requirements relating to appointment and promotion on merit,
- (d) co-ordinating and assisting in the redeployment of excess staff in the public sector,
- (e) advising the Minister on the creation, classification and grading of chief and senior executive officer positions within the public sector,
- (f) assisting in the recruitment, deployment and redeployment of executive officers within the public sector,
- (g) advising the Government on appropriate policies and practices in relation to such other public sector matters as the Minister may direct from time to time, and monitoring, co-ordinating and assisting the implementation of Government policies and practices in such other areas as the Minister may direct from time to time,
- (h) such other functions as are conferred or imposed on it by or under this Act or any other law.

**126 Reports on personnel practices and policies in public sector services** (1988 Act, s 49E)

- (1) The Public Employment Office may require the head of a public sector service to provide the Public Employment Office with a report on such matters relating to the personnel policies and practices of the service as the Public Employment Office requires.
- (2) In particular, the Public Employment Office may require inclusion in the report of information of a kind specified by the Public Employment Office as to:
  - (a) the personnel policies and practices concerning the recruitment, selection, appointment, transfer, promotion or discipline of the staff of the public sector service and the means by which the job satisfaction and opportunities for personal development of the staff are promoted, and
  - (b) the application of any such policies and practices to different groups of members of the staff.
- (3) The head of the public sector service concerned must comply with a requirement under this section within such time and in such manner as the Public Employment

Office directs.

**127 Regulations relating to functions of Public Employment Office** (1988 Act, s 49G)

- (1) The regulations may make provision for or with respect to the principles, practices and procedures to be observed in connection with the exercise of the functions of the Public Employment Office.
- (2) In particular, the regulations may:
  - (a) prescribe the circumstances in which an approval by the Public Employment Office under this or any other Act may be regarded as having been given, or
  - (b) prescribe the procedure for obtaining any such approval.

**128 Approvals or directions given by the Public Employment Office** (1988 Act, s 49H)

An approval or direction given by the Public Employment Office under this Act may be given so as to apply to a particular case, or to all cases within a class of cases or generally.

## **Part 6.3 Public Service industrial relations functions**

**129 Role of the Public Employment Office in industrial proceedings** (1988 Act, s 62)

The Public Employment Office is, for the purposes of any proceedings relating to officers, temporary employees or casual employees held before a competent tribunal having jurisdiction to deal with industrial matters, taken to be the employer of the staff of the Public Service.

**130 Public Employment Office may determine employment conditions** (1988 Act, s 63)

- (1) The Public Employment Office may from time to time make determinations fixing the conditions and benefits of employment of officers, temporary employees or casual employees (or any group or class of officers, temporary employees or casual employees) and their salary, wages and other remuneration. Such a determination can provide for redundancy and severance payments and for remuneration packaging.
- (2) The conditions, benefits, salary, wages and other remuneration of an officer, temporary employee or casual employee is, except in so far as provision is otherwise made by law, such as may be fixed by a determination made under this section.
- (3) This section does not prevent the appropriate Department Head from determining conditions of employment of officers, temporary employees and casual employees under section 14 or under any other law. However, a determination by the Public Employment Office under this section prevails to the extent of any inconsistency with a determination of a Department Head, unless the Public Employment Office approves of the Department Head's determination.

- (4) An officer, temporary employee or casual employee may sue for and recover the amount of remuneration of the officer or employee that is determined under this section. For that purpose, the determination is taken to be a State industrial instrument.
- (5) This section does not apply in relation to remuneration or allowances fixed under Part 3.1 or under the *Statutory and Other Offices Remuneration Act 1975*.

**131 Public Employment Office may enter into agreements** (1988 Act, s 64)

- (1) The Public Employment Office may enter into an agreement with any association or organisation representing a group or class of officers, temporary employees or casual employees with respect to industrial matters.
- (2) Any such agreement binds all officers, temporary employees and casual employees in the class or group affected by the agreement, and no such officer or employee (whether a member of the association or organisation with which the agreement was entered into or not) has any right of appeal against the terms of the agreement.
- (3) This section does not apply in relation to remuneration or allowances fixed under Part 3.1 or under the *Statutory and Other Offices Remuneration Act 1975*.
- (4) An agreement under this section is not an enterprise agreement within the meaning of the *Industrial Relations Act 1996*. However, the Public Employment Office (or any delegate of that Office) may enter into such an enterprise agreement as the employer of the officers, temporary employees or casual employees concerned.

**132 Power of Public Employment Office to enter Department's premises etc** (1988 Act, s 65)

The Public Employment Office may, by its authorised officers or delegates:

- (a) enter the premises of any Department, and
  - (b) require the production of and examine any documents in the custody of any member of the staff of any Department, and
  - (c) require any member of the staff of any Department to answer questions,
- for the purposes of enabling the Public Employment Office to exercise its functions.

**Part 6.4 Declared authorities industrial relations functions**

**133 Declared authorities to which Part applies** (1988 Act, s 86)

- (1) The authorities listed in the Table to this section are declared authorities to which this Part applies.
- (2) The Governor may, by order published in the Gazette, amend the Table to this section:

- (a) by inserting the name of any statutory body that is, or whose governing body is, constituted by one or more persons appointed by the Governor or a Minister, or
- (b) by omitting or amending the name of any authority.

**Table**

Cobar Water Board

FSS Trustee Corporation

Greyhound and Harness Racing Regulatory Authority

Home Care Service of New South Wales

Roads and Traffic Authority of New South Wales

SAS Trustee Corporation

State Rail Authority of New South Wales

State Transit Authority of New South Wales

TAFE Commission

Waterways Authority

Zoological Parks Board of New South Wales

**134 Declared authorities to comply with directions of Public Employment Office on industrial matters** (1988 Act, s 88)

- (1) The Public Employment Office may, with the approval of the Minister and by notice in writing to a declared authority, require the authority:
  - (a) to notify the Public Employment Office of such industrial matters affecting the authority as may be specified in the notice, and
  - (b) to exercise the authority's functions in respect of any such industrial matter in such manner as may be specified in the notice.
- (2) A notice may specify the manner and the time within which industrial matters must be notified.
- (3) A declared authority must comply with a requirement under this section.

## **Chapter 7 Goods and services**

### **Part 7.1 State Contracts Control Board**

#### **135 Establishment of Board**

- (1) There is established by this Act a State Contracts Control Board (referred to in this Part as **the Board**).
- (2) The Board represents, and is an agency of, the Crown.

#### **136 Functions of Board**

- (1) The Board has the functions conferred or imposed on it by this Act and the regulations under this Act, or by or under any other Act.
- (2) The Board has power to do all things necessary or convenient to be done for, or in connection with, the exercise of its functions.

#### **137 Membership and procedure of Board**

- (1) The Board is to consist of the following members:
  - (a) the Department Head of the Department under the Act responsible to the Minister for the purposes of the administration of this Chapter, who is to be the Chairperson of the Board,
  - (b) members appointed by the Minister, at least 5 of whom are appointed to represent public sector agencies that use goods and services supplied in accordance with this Chapter and the regulations made under it.
- (2) The regulations may make provision for or with respect to the membership and procedure of the Board.

#### **138 Ministerial control**

- (1) The Minister may give the members of the Board written directions as to the exercise of the Board's functions.
- (2) Any such direction may apply generally or to a particular matter and, without limiting subsection (1), may set out a particular policy to be carried out by the Board.
- (3) The Board must ensure that it complies with any such direction.
- (4) A copy of any direction given by the Minister under this section is to be included in the Board's annual report.

#### **139 Subcommittees of Board**

- (1) The Board may establish subcommittees to assist the Board in connection with the

exercise of any of its functions.

- (2) It does not matter that some or all of the members of a subcommittee are not members of the Board.
- (3) The procedure for calling meetings of a subcommittee and for the conduct of those meetings is to be as determined by the Board or (subject to any determination of the Board) by the subcommittee.

#### **140 Staff and consultants**

- (1) The Chairperson of the Board may arrange for the use of Public Service or other public sector staff and facilities to assist the Board in the exercise of its functions.
- (2) The Chairperson of the Board may engage consultants for the purpose of getting expert advice for the Board in connection with the supply or disposal of goods and services.

#### **141 Delegation of functions of Board**

- (1) The Board may delegate to an authorised person any of the functions of the Board, other than this power of delegation.
- (2) In this section, **authorised person** means a member of the Board, a subcommittee of the Board, a member of staff of a Department, a statutory body, a statutory officer or any other person or body of persons approved by the Minister.

#### **142 Annual report of Board**

- (1) The Board must, on or before 31 October in each year, prepare and present to the Minister a report of its work and activities for the year ending on the preceding 30 June.
- (2) The report may be included in any annual report of the Department for which the Minister is responsible.

### **Part 7.2 Acquisition and disposal of goods and services**

#### **143 Regulations**

The regulations may make provision for or with respect to the acquisition or disposal of goods or services for the Public Service.

## Part 7.3 Competitive neutrality in tendering

### Division 1 Preliminary

#### 144 Purpose and application of Part (1988 Act, s 107)

- (1) The purpose of this Part is to provide the Board with a role under the State's complaints mechanism, in connection with competitive neutrality principles, as contemplated by the Competition Principles Agreement, so far as they are applicable to public authorities. Other bodies (including the Independent Pricing and Regulatory Tribunal and the Department of Local Government) may also have roles under the complaints mechanism.
- (2) This Part applies only to a complaint that a public authority has failed to comply with competitive neutrality principles in relation to a tender bid made by the authority in response to an invitation for tenders.
- (3) However, this Part does not apply to a complaint so far as it is the subject of a direction under section 24G (3) of the *Independent Pricing and Regulatory Tribunal Act 1992*.

#### 145 Definitions (1988 Act, s 108)

In this Part:

**Board** means the State Contracts Control Board established under Part 7.1.

**Chairperson** means the Chairperson of the Board.

**Competition Principles Agreement** means the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the Territories and the States, as in force for the time being.

**competitive neutrality principles** means:

- (a) the competitive neutrality principles referred to in the Competition Principles Agreement, and
- (b) any policies adopted by the State for the purpose of complying with or giving effect to those principles.

**complaint** includes any part or aspect of a complaint.

**portfolio Minister** has the same meaning as in the *Independent Pricing and Regulatory Tribunal Act 1992*.

**public authority** means a public authority of the State.

**public trading activities** of a public authority means significant business activities

relating to goods or services in which the authority is engaged.

**public trading agency** means a public authority that is engaged in public trading activities, and includes a public authority prescribed by the regulations as a public trading agency, but does not include a local council or any other local authority or a public authority prescribed by the regulations as not being a public trading agency.

**State** includes the Government or a Minister.

## Division 2 Complaints

### 146 Complaints about competitive neutrality (1988 Act, s 109)

- (1) The Minister may refer to the Board, for investigation and report, a complaint about a public trading agency with respect to:
  - (a) a failure of the agency to comply with competitive neutrality principles in relation to any or all of its public trading activities, or
  - (b) the inappropriate manner in which competitive neutrality principles are applied by or to the agency in relation to any or all of its public trading activities,so far as the complaint relates to a tender bid made by the agency in response to an invitation for tenders.
- (2) The Minister is not to refer a complaint to the Board unless satisfied:
  - (a) that the complaint relates to any or all of the public trading activities of the agency, and
  - (b) that the complainant is able to demonstrate that a person (the **competitor**) competes, or seeks to compete, in a particular market with the agency and is hindered or is likely to be hindered from or in doing so by the matters complained of, and
  - (c) that the competitor is materially affected by the matters complained of or is likely to be so affected, and
  - (d) that the complaint has been made by the competitor or by a person or body authorised by the competitor to make the complaint on behalf of the competitor, and
  - (e) that the subject-matter of the complaint has been raised with the agency and the complainant has reasonable grounds for not being satisfied with the response to the complaint.
- (3) The Board is required to notify the complainant, the agency, the agency's portfolio Minister and the Treasurer of the reference and that an investigation will be conducted



into the complaint.

- (4) If the Minister has referred a complaint to the Board for investigation and report, the Minister may withdraw or amend the reference at any time before the Minister has received the report from the Board.
- (5) The regulations may make provision for or with respect to the manner of making complaints for the purposes of this Part.

**147 Investigation and report** (1988 Act, s 110)

- (1) The Board is to conduct an investigation into and make a report on any complaint referred to it and not withdrawn by the Minister.
- (2) The Board is, as far as possible, to use its best endeavours to complete the investigation and report within 10 weeks after receiving the complaint or such other period as the Minister may approve from time to time.

**148 Reports** (1988 Act, s 111)

- (1) The report of the Board with respect to a complaint is to contain a statement of its findings and recommendations about the complaint.
- (2) If the Board finds that the complaint has been wholly or partly substantiated, the report is to contain a statement about:
  - (a) any need for changes to the conduct of the public trading agency to ensure future compliance with competitive neutrality principles with regard to tendering bids made by it in response to invitations for tenders, and
  - (b) any policy changes that should be considered by the State.
- (3) Copies of the report are to be furnished to the complainant, the agency, the agency's portfolio Minister, the Treasurer, and the Minister.
- (4) The Board is to arrange for the report to be publicly available.

**149 Portfolio Minister's response to report** (1988 Act, s 112)

- (1) Within 8 weeks after a report about a public trading agency has been furnished to the agency's portfolio Minister, the portfolio Minister is to prepare a written response to the report. This requirement does not apply where the report states that the investigation concerned was terminated because the complainant did not comply or did not fully comply with a request under section 153.
- (2) The response must include a statement as to whether or not the recommendations have been adopted or are proposed to be adopted and must include a statement of the reasons why any recommendation will not be adopted (whether wholly or partly).

(3) Copies of the response are to be furnished to the complainant, the agency, the Treasurer, the Minister, and the Board.

(4) The Board is to arrange for the response to be publicly available.

### **Division 3 Investigations**

#### **150 Definition** (1988 Act, s 113)

In this Division:

**investigation** means an investigation by the Board for the purposes of this Part.

#### **151 Conduct of investigations** (1988 Act, s 114)

(1) Subject to this Part, in an investigation, the Board:

- (a) is to act with as little formality as possible, and
- (b) may inform itself on any matter in any way it thinks fit and is not bound by the rules of evidence, and
- (c) may receive information or submissions in the form of oral or written statements, and
- (d) may consult with such persons as it thinks fit.

(2) The investigation is to be conducted in private as far as possible, and accordingly the Board is not to conduct public hearings, public seminars and public workshops except with the approval of the Minister.

(3) Nothing in this section prevents the Board from holding one or more meetings for the purposes of the investigation, but all such meetings are to be held privately.

(4) The Board is required to seek and consider submissions from the public trading agency that is the subject of the complaint to which the investigation relates and the Treasurer, but is not required to seek or consider submissions from any other person.

(5) The regulations may make provision for or with respect to the conduct of investigations.

#### **152 Public trading agency to provide information, documents and evidence** (1988 Act, s 115)

(1) For the purposes of an investigation, the Chairperson may, by notice in writing served on an officer of the public trading agency that is the subject of the complaint to which the investigation relates, require the officer to do any one or more of the following:

- (a) to send to the Board, on or before a day specified in the notice, a statement setting out such information as is so specified,

(b) to send to the Board, on or before a day specified in the notice, such documents as are so specified,

(c) to attend a meeting of the Board to give evidence.

(2) If documents are given to the Board under this section, the Board:

(a) may take possession of, and make copies of or take extracts from, the documents, and

(b) may keep possession of the documents for such period as is necessary for the purposes of the investigation to which they relate, and

(c) during that period must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Board.

**153 Complainant may be requested to provide information, documents and evidence** (1988 Act, s 116)

(1) For the purposes of an investigation, the Chairperson may, by notice in writing served on the complainant, request the complainant to do any one or more of the following:

(a) to send to the Board, on or before a day specified in the notice, a statement setting out such information as is so specified,

(b) to send to the Board, on or before a day specified in the notice, such documents as are so specified,

(c) to attend a meeting of the Board to give evidence.

(2) If documents are given to the Board under this section, the Board:

(a) may take possession of, and make copies of or take extracts from, the documents, and

(b) may keep possession of the documents for such period as is necessary for the purposes of the investigation to which they relate, and

(c) during that period must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Board.

(3) If the complainant does not comply or fully comply with a request under this section, the Board may terminate the investigation, and the Board's report may be limited to a statement that the investigation was terminated for that reason.

**154 Confidential information** (1988 Act, s 117)

(1) If a person provides information (***protected information***) to the Board on the

understanding that the information is confidential and will not be divulged, the Board is required to ensure that the information is not divulged by it to any person, except:

- (a) with the consent of the person who provided the information, or
- (b) to the extent that the Board is satisfied that the information is not confidential in nature, or
- (c) to a member of the Board or an officer working for the Board.

(2) If:

- (a) the Board is satisfied that protected information provided to the Board by a complainant needs to be divulged to a person in order that the complaint can be properly dealt with, and
- (b) the exceptions in subsection (1) (a)–(c) are not applicable,

the Board may notify the complainant that the Board proposes to divulge the information to a specified person, or in its report, after a specified period.

- (3) After the specified period, and despite subsection (1), the Board may divulge the information to the specified person or in its report, unless the complainant withdraws the complaint.
- (4) If the Board is satisfied that it is desirable to do so because of the confidential nature of any information provided to the Board for the purposes of an investigation, it may give directions prohibiting or restricting the divulging of the information.
- (5) A person must not contravene a direction given under subsection (4).

Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.

- (6) A reference in this section to information includes information contained in any evidence given at a meeting of or hearing before the Board and information contained in any documents given to the Board.

### **155 Offences** (1988 Act, s 118)

(1) A person must not, without reasonable excuse:

- (a) refuse or fail to comply with a notice served under this Division, or
- (b) refuse or fail to answer a question that the person is required to answer by the Chairperson at any meeting of or hearing before the Board under this Division.

(2) It is a reasonable excuse for the purposes of subsection (1) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.

- (3) A person must not:
- (a) give to the Board, whether orally or in writing, information that the person knows to be false or misleading in a material particular (unless the person informs the Board of that fact), or
  - (b) at a meeting of or hearing before the Board, give evidence that the person knows to be false or misleading in a material particular.
- (4) A person must not hinder, obstruct or interfere with the Chairperson or any other member of the Board in the exercise of functions for the purposes of this Division as Chairperson or other member.
- (5) A person must not take any action that detrimentally affects the employment of another person, or threaten to do so, because that other person has assisted the Board in any investigation.
- (6) Subsection (1) does not apply to a complainant in relation to a notice served on the complainant under section 153.

Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.

**156 Cabinet documents and proceedings** (1988 Act, s 120)

- (1) This Part does not enable the Board:
- (a) to require any person to give any statement of information or answer any question that relates to confidential proceedings of Cabinet, or
  - (b) to require any person to produce a Cabinet document, or
  - (c) to inspect a Cabinet document.
- (2) For the purposes of this section, a certificate of the head of the Cabinet Office that any information or question relates to the confidential proceedings of Cabinet or that a document is a Cabinet document is conclusive of the matter certified.

- (3) In this section:

**Cabinet** includes a committee of Cabinet or a subcommittee of such a committee.

**Cabinet document** means a document that is a restricted document by virtue of clause 1 of Part 1 of Schedule 1 to the [Freedom of Information Act 1989](#).

**157 Report of complaints** (1988 Act, s 121)

The Board, or the Department whose annual report covers the Board, is required to include in its annual report a statistical summary of complaints received by the Board, investigations conducted by the Board, and complaints disposed of by the Board, during

the period covered by the annual report.

## Chapter 8 Miscellaneous

### 158 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

### 159 Special inquiries (1988 Act, ss 82–85)

- (1) The Minister may, in the case of any matter relating to a Department or statutory body representing the Crown, direct such person as the Minister specifies in the direction to conduct a special inquiry into the matter.
- (2) A special inquiry may be conducted under this section into a matter involving the conduct or performance of a chief executive officer or a senior executive officer (whether or not the person has ceased to be such an officer).
- (3) A person conducting a special inquiry may enter the premises of any Department or statutory body representing the Crown in connection with the inquiry.
- (4) A person conducting a special inquiry has, for the purposes of the inquiry, the functions, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923*. If 2 or more persons are conducting a special inquiry, the person appointed to preside at the inquiry has, for the purposes of the inquiry, the functions conferred on the chairman of a commission by the *Royal Commissions Act 1923*.
- (5) The provisions of the *Royal Commissions Act 1923* (except section 13 and Division 2 of Part 2) with necessary modifications apply:
  - (a) to a special inquiry, and
  - (b) to any witness or person summoned by or appearing before the inquiry.
- (6) If the person conducting a special inquiry agrees, an agent (including a legal practitioner) may represent a person, Department or other body at the inquiry.
- (7) The person conducting a special inquiry is not bound by the rules of evidence and may be informed on any matter in issue at the inquiry in such manner as the person considers appropriate.
- (8) The person conducting a special inquiry may, in respect of a matter not dealt with by or under this Act, give directions as to the procedure to be followed at or in connection with the inquiry.
- (9) The person conducting a special inquiry must:

(a) within such period as the Minister requires, prepare a report on the conduct and findings, and any recommendations, of the inquiry, and

(b) immediately after preparing the report, provide the Minister with a copy of the report.

(10) The Minister must cause a copy of the report, together with information as to any action taken or proposed to be taken in relation to the subject of the report, to be laid before each House of Parliament within 30 sitting days of that House after the day on which the Minister was provided with a copy of the report.

**160 Certain other Acts not to be affected** (1988 Act, s 95)

(1) This Act does not affect the operation of the following Acts:

(a) the *Industrial Relations Act 1996*,

(b) the *Superannuation Act 1916* or any other superannuation legislation that applies to employees to whom this Act applies.

(2) Subsection (1) does not limit the operation of section 22, 35 or 72.

**161 Minister's powers to control staff and work of Department not affected** (1988 Act, s 96)

The ordinary and necessary departmental authority of a Minister with respect to the control and direction of staff and work is not limited by anything in this Act.

**162 Delegation by Minister** (1988 Act, s 96A)

The Minister may delegate to any person any of the Minister's functions under this Act, other than this power of delegation.

**163 Proceedings for offences** (1988 Act, s 119)

Proceedings for an offence under this Act may be dealt with summarily before a Local Court.

**164 Regulations**

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation may create an offence punishable by a penalty not exceeding 10 penalty units.

**165 Repeals**

(1) The following Acts are repealed:

*Public Sector Management Act 1988 No 33*

*Public Service (Commonwealth Elections) Act 1943 No 12*

*Constitution (Public Service) Amendment Act 1916 No 45*

- (2) Different days may be appointed for the commencement of subsection (1) for the purpose of repealing, on different days, different provisions of the *Public Sector Management Act 1988*.

### **166 Savings, transitional and other provisions**

Schedule 4 has effect.

### **167-169 (Repealed)**

### **170 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## **Schedule 1 Departments**

(Sections 6, 10 and 105)

<b>Column 1</b>	<b>Column 2</b>
<b>Department</b>	<b>Department Head</b>
Department of Aboriginal Affairs	Director-General of the Department
Aboriginal Housing Office	Chief Executive Officer of the Office
Department of Ageing, Disability and Home Care	Director-General of the Department
Ministry for the Arts	Director-General of the Ministry
Attorney General's Department	Director-General of the Department
Office of the Board of Studies	General Manager of the Office
Cabinet Office	Director-General of the Office
Commission for Children and Young People	Commissioner for the Commission for Children and Young People
Office of the Children's Guardian	* Children's Guardian



Department of Commerce	Director-General of the Department
Office of Co-ordinator General of Rail	Co-ordinator General of Rail
Department of Corrective Services	Commissioner of Corrective Services
New South Wales Crime Commission	* Commissioner for the New South Wales Crime Commission
Department of Community Services	Director-General of the Department
Office of the Director of Public Prosecutions	* Director of Public Prosecutions
Department of Education and Training	Director-General of the Department
Department of Energy, Utilities and Sustainability	Director-General of the Department
Department of Environment and Conservation	Director-General of the Department
Community Relations Commission	Chairperson of the Commission
NSW Food Authority	Director-General of the Authority
Department of Gaming and Racing	Director-General of the Department
Department of Health	Director-General of the Department
Health Care Complaints Commission	* Commissioner of the Health Care Complaints Commission
Heritage Office	Director of the Office
Department of Housing	Director-General of the Department
Institute of Teachers	Chief Executive of the Institute
Department of Juvenile Justice	Director-General of the Department
Department of Lands	Director-General of the Department
Legal Aid Commission	* Chief Executive Officer of the Commission
Department of Local Government	Director-General of the Department
Motor Accidents Authority	General Manager of the Authority
Department of Natural Resources	Director-General of the Department
New South Wales Fire Brigades	Commissioner of New South Wales Fire Brigades
NSWbusinesslink	Managing Director, NSWbusinesslink
Ombudsman's Office	* Ombudsman
Parliamentary Counsel's Office	Director-General of the Cabinet Office
Department of Planning	Director-General of the Department
Ministry for Police	Director-General of the Ministry
Police Integrity Commission	* Commissioner for the Police Integrity Commission

Premier's Department	Director-General of the Department
Department of Primary Industries	Director-General of the Department
Redfern-Waterloo Authority	Chief Executive Officer
Rural Assistance Authority	* Chief Executive of the Authority
Department of Rural Fire Service	Commissioner of the NSW Rural Fire Service
Ministry for Science and Medical Research	Director-General of the Ministry
Department of State and Regional Development	Director-General of the Department
State Electoral Office	* Electoral Commissioner
State Emergency Service	Director-General of the Service
Sydney Harbour Foreshore Authority	Chief Executive Officer of the Authority
Sydney Olympic Park Authority	Chief Executive Officer of the Authority
Sydney 2009 World Masters Games Organising Committee	Chief Executive Officer of the Committee
Department of Tourism, Sport and Recreation	Director-General of the Department
Ministry of Transport	Director-General of the Ministry
The Treasury	Secretary of the Treasury
WorkCover Authority	Chief Executive Officer of the Authority

**Note—**

The positions above marked with an asterisk are positions that are created by another Act and are not Public Service positions. The other positions are created by this Act (see section 10) and are Public Service positions.

## **Schedule 2 Executive positions (other than non-statutory SES positions)**

(Sections 64 and 65)

### **Part 1 Chief executive positions (Department Heads)**

Positions specified in Column 2 of Schedule 1, other than the positions of Director of Public Prosecutions, Ombudsman, Commissioner of the New South Wales Crime Commission and Electoral Commissioner.

### **Part 2 Chief executive positions (heads of public authorities)**

Chief Executive of the Casino Control Authority

Chief Executive of the FSS Trustee Corporation

Chief Executive of the Greyhound and Harness Racing Regulatory Authority

Chief Executive of the Independent Transport Safety and Reliability Regulator

Chief Executive of the Internal Audit Bureau of New South Wales

Chief Executive of the Roads and Traffic Authority

Chief Executive of the SAS Trustee Corporation

Chief Executive of the State Rail Authority

Chief Executive of the State Transit Authority

Chief Executive of the Sydney Catchment Authority

Managing Director of the TAFE Commission

General Manager of Tourism New South Wales

Chief Executive of the Waterways Authority

Director of the Zoological Parks Board

Full-time member of a Water Supply Authority

### **Part 3 Statutory senior executive positions**

President of the Board of Studies

Chairman of Commissioners of Inquiry (under the [Environmental Planning and Assessment Act 1979](#))

Deputy Chairman of Commissioners of Inquiry (under the [Environmental Planning and Assessment Act 1979](#))

Commissioner of Inquiry (under the [Environmental Planning and Assessment Act 1979](#)) (2 positions)

Commissioner for Corporate Affairs

Director of Equal Opportunity in Public Employment

Assistant Commissioner under the [Forestry Act 1916](#)

Deputy Managing Director of the Hunter Water Board

Managing Director of the New South Wales Government Telecommunications Authority

Commissioner of the Soil Conservation Service

A Deputy Ombudsman

An Assistant Ombudsman

Chief Executive Officer of the Ambulance Service Board

Legal Services Commissioner

Chief Investigator of the Office of Transport Safety Investigations

## **Schedule 3 Extended leave entitlements for officers and temporary employees**

(Section 55)

### **1 Definition of “service”**

(1) For the purposes of this Schedule, **service** includes:

- (a) in the case of an officer or temporary employee who has completed at least 10 years’ service—any period of leave without pay, not exceeding 6 months, taken after 13 December 1963, and
- (b) service occurring before the commencement of this Schedule, including service of the kind referred to in paragraph (a).

**Note—**

See also Schedule 3A as to the recognition of former service with certain Government agencies.

- (2) Subject to clauses 2 (3) and 3 (3), for the purpose of determining whether or not an officer or temporary employee has completed at least 10 years’ service, as referred to in subclause (1) (a), the officer’s or temporary employee’s period of service is taken:
- (a) to include any period of leave without pay taken before 13 December 1963, and
  - (b) to exclude any period of leave without pay taken after 13 December 1963.

**Note—**

13 December 1963 was the date of assent to the [Public Service and Other Statutory Bodies \(Extended Leave\) Amendment Act 1963](#).

### **2 Leave entitlements generally**

- (1) After service for 7 years or more but not more than 10 years, an officer or temporary employee is entitled to extended leave, proportionate to his or her length of service, calculated at the rate of:
- (a) 2 months on full pay, or
  - (b) 4 months on half pay, or
  - (c) one month on double pay,
- for 10 years served.
- (2) After service for more than 10 years, an officer or temporary employee is entitled to extended leave under subclause (1) in respect of the first 10 years and additional

extended leave, proportionate to his or her length of service, calculated at the rate of:

- (a) 5 months on full pay, or
- (b) 10 months on half pay, or
- (c) 2.5 months on double pay,

for each 10 years served after the first 10 years.

- (3) For the purposes of this clause, **service** includes any period of leave without pay taken before 13 December 1963.

### **3 Entitlement to leave if employment terminated in special circumstances**

- (1) This clause applies to an officer or temporary employee with at least 5 years' service but less than 7 years' service whose services are terminated:

- (a) by the officer or temporary employee, for reasons of illness, incapacity or domestic or other pressing necessity, or
- (b) by the Crown, the Governor or the appropriate Department Head, for reasons other than the officer's or temporary employee's serious and intentional misconduct.

- (2) The officer or temporary employee is entitled to:

- (a) for 5 years' service, one month's leave on full pay, and
- (b) for further service in excess of 5 years, additional leave proportionate to the officer's or temporary employee's length of service (up to but not including 7 years), calculated at the rate of 3 months' leave for 15 years' service.

- (3) For the purposes of this clause, **service** does not include any period of leave without pay, whether taken before, on or after 13 December 1963.

### **4 Payment of accrued leave on termination of employment**

- (1) If an officer or temporary employee has acquired a right to extended leave and his or her services are terminated, the officer or temporary employee may not take the extended leave but is instead to be paid the money value of the extended leave.
- (2) Any pension to which any such officer or temporary employee is entitled under the [Superannuation Act 1916](#) commences from and including the date on which the officer's or temporary employee's extended leave, if taken, would have commenced.

### **5 Leave to be paid out to dependants in cases of death**

- (1) If an officer or temporary employee has acquired a right to extended leave and dies before starting it, or after starting it dies before completing it:

- (a) the officer's or temporary employee's spouse, or
  - (b) if there is no such spouse, the officer's or temporary employee's children, or
  - (c) if there is no such spouse or child, the person who, in the opinion of the appropriate Department Head, was, at the time of the officer's or temporary employee's death, a dependent relative of the officer or temporary employee,
- is entitled to receive the money value of the extended leave not taken or not completed.
- (2) If an officer or temporary employee with at least 5 years' service but less than 7 years' service dies:
- (a) the officer's or temporary employee's spouse, or
  - (b) if there is no such spouse, the officer's or temporary employee's children, or
  - (c) if there is no such spouse or child, the person who, in the opinion of the appropriate Department Head, was, at the time of the officer's or temporary employee's death, a dependent relative of the officer or temporary employee,
- is entitled to receive the money value of the extended leave that would have accrued to the officer or temporary employee had his or her services terminated as referred to in clause 3 (1).
- (3) If there is a guardian of any child referred to in subclause (1) (b) or (2) (b), the payment to which the child is entitled may be made to the child's guardian for the child's maintenance, education and advancement.
- (4) If:
- (a) no person is entitled to receive a payment under subclause (1) or (2), or
  - (b) it appears to the appropriate Department Head that more than one person is entitled as a spouse to a payment under subclause (1) or (2),
- the payment must instead be made to the officer's or temporary employee's personal representatives.
- (5) Any payment under this clause is in addition to any payment due under any Act under which superannuation benefits are paid.
- (6) In this clause, **spouse** of an officer or temporary employee includes a person with whom the officer or temporary employee had a de facto relationship (within the meaning of the [Property \(Relationships\) Act 1984](#)) at the time of his or her death.

## **6 Calculation of money value of extended leave**

For the purpose of calculating the amount of an entitlement under this Schedule, the money value of extended leave accrued or payable to a chief executive officer or senior executive officer is to be determined on the basis of the officer's notional salary within the meaning of section 95.

## **7 Certain periods to be disregarded**

Any period during which an officer or temporary employee is not employed, as referred to in clause 3 (2) of Schedule 3A, is to be disregarded for the purpose of calculating his or her extended leave entitlement.

## **8 Leave entitlement reduced by leave already taken or paid out**

- (1) The following amounts of extended leave are to be deducted from an officer's or temporary employee's extended leave entitlement:
  - (a) for each period of extended leave taken on full pay—the number of days (or parts of a day) so taken,
  - (b) for each period of extended leave taken on half pay—half the number of days (or parts of a day) so taken,
  - (c) for each period of extended leave taken on double pay—twice the number of days (or parts of a day) so taken,
  - (d) for each period of extended leave in respect of which the officer or temporary employee has been paid the money value—the number of days of extended leave on full pay that is equivalent to the money paid.
- (2) If a public holiday occurs while an officer or temporary employee is taking extended leave, the amount of extended leave to be deducted is to be reduced by the length of the holiday (one day or half a day, as the case may be).
- (3) In subclause (2), **public holiday** means any special or public holiday for which the officer or temporary employee is entitled to payment.

## **9 Extended leave may be postponed for temporary employees**

If the period of extended leave to which a temporary employee is entitled under this Schedule exceeds the period for which the employee is employed under this Act, the balance of the period of extended leave may be taken during subsequent periods of employment in the Public Service, but only if each subsequent period of employment commences on the termination of a previous period of employment in the Public Service.

## **Schedule 3A Recognition of prior government service for public sector**

## employees extended leave entitlements

(Section 94)

### Part 1 Preliminary

#### 1 Definitions

In this Schedule:

**Australian Defence Force** includes the armed forces of the Commonwealth, however described.

**Commonwealth or interstate agency** means:

- (a) a body that:
  - (i) is established under an Act of the Commonwealth or another State or Territory, and
  - (ii) is under the control of a Minister of the Commonwealth or other State or Territory, and
  - (iii) is part of the public service (however described) of the Commonwealth or other State or Territory, and
  - (iv) is a body in which persons are employed under conditions substantially equivalent to the conditions under which officers are employed under this Act, or
- (b) a body that is declared to be a Commonwealth or interstate agency for the purposes of this Schedule pursuant to an order under clause 2,

but, subject to paragraph (b), does not include:

- (c) a local government authority, or
- (d) a university or the governing body of a university, or
- (e) a corporation owned by the Commonwealth or another State or Territory, or by the Crown in right of the Commonwealth or another State or Territory, or
- (f) a body that is declared not to be a Commonwealth or interstate agency for the purposes of this Schedule pursuant to an order under clause 2.

**continuous** is defined in clause 3.

**immediately follows** is defined in clause 4.

**judicial officer** has the meaning it has in the [Judicial Officers Act 1986](#).

**public sector agency** has the same meaning as public sector service.



**public sector employee** means a person who is employed in a public sector agency.

**recognised service**, in relation to a public sector employee, means service that is recognised service in relation to the employee pursuant to Part 2.

## 2 Declarations concerning Commonwealth or interstate agencies

- (1) The Director-General of the Premier's Department may, by order in writing, declare that a specified body is, or is not, a Commonwealth or interstate agency for the purposes of this Schedule.
- (2) An order under this clause:
  - (a) takes effect on such day as is specified in the order, being a day occurring before, on or after the day on which the order is made, and
  - (b) may be subject to specified limitations, but not so as to operate to the prejudice of any person who was a public sector employee immediately before the order took effect.
- (3) There are to be made publicly available at the offices of the Premier's Department:
  - (a) a list of the names of each body that is declared under this clause to be a Commonwealth or interstate agency, and
  - (b) a list of the names of each body that is declared under this clause not to be a Commonwealth or interstate agency.

## 3 Definition of "continuous"

- (1) For the purposes of this Schedule, a person's employment by an employer is **continuous**, in relation to a period, if the person remains employed by that employer for the whole of the period.
- (2) The person is taken to remain employed by the employer for the whole of any period even if, during that period, the person ceases to be employed by the employer on the grounds of retrenchment or reduction of work but is re-employed by the employer within the next 12 months.

## 4 Definition of "immediately follows"

- (1) For the purposes of this Schedule, a person's period of employment **immediately follows** another period of employment if:
  - (a) the later period commences:
    - (i) except as provided by subparagraph (ii), within 2 months after the end of the earlier period, or
    - (ii) if the earlier period comprises full-time war service as a member of the

Australian Defence Force, within 12 months after the end of the earlier period,  
and

(b) the earlier period ends otherwise than by reason of the person's dismissal for disciplinary reasons.

(2) For the purposes of subclause (1) (a) (ii), **war service** means:

(a) service occurring during, or partly during, a period of war in which the Australian Defence Force is engaged, or

(b) service of a kind declared by the regulations to be war service for the purposes of this clause.

## **Part 2 Recognition of former government service for public sector employees generally**

### **5 Object of Part**

The object of this Part is to provide for the recognition of former government service in the calculation of a public sector employee's extended leave entitlement, whether such an entitlement arises:

(a) under Schedule 3 (in the case of an officer or temporary employee), or

(b) under some other Act or law, such as an award or industrial agreement (in any other case).

### **6 Recognition of former government service**

(1) For the purpose of calculating a public sector employee's extended leave entitlement, the public sector employee's service with his or her current employer is taken to include his or her recognised service.

(2) The person's employment in a public sector agency or a Commonwealth or interstate agency (**the former agency**) is **recognised service** in relation to the person's subsequent employment in a public sector agency (**the current agency**) if:

(a) the period of employment in the former agency has been continuous, and

(b) either:

(i) the person's employment in the current agency has immediately followed the person's employment in the former agency, or

(ii) the person is entitled, by law or administrative practice, to have the service in the former agency form part of the service in the current agency for the purpose of calculating the person's extended leave entitlement.

- (3) A period of recognised service may not be counted more than once for the purpose of calculating the person's extended leave entitlement.

**7 Leave already taken, paid or deemed to have been taken excluded**

- (1) The following amounts of leave are to be deducted from a public sector employee's extended leave entitlement:
- (a) the amount of any extended leave taken by the public sector employee in relation to recognised service,
  - (b) the amount of any extended leave in respect of which the public sector employee has elected to be paid the money value under clause 8 in respect of recognised service,
  - (c) the amount of any extended leave that the public sector employee is deemed to have taken under clause 9 in respect of recognised service.
- (2) For the purposes of subclause (1) (a), the public sector employee is deemed to have taken extended leave if he or she has been paid the money value of that leave.
- (3) A period of extended leave is not to be deducted more than once under this clause.

**8 Public sector employee may elect to be paid money value of accrued leave if former employer a public sector agency (cf s 95)**

- (1) A public sector employee who ceases to be employed in a public sector agency (***the prior employment***) and immediately commences employment in another public sector agency (***the current employment***) may elect:
- (a) to be paid the money value of the public sector employee's accrued extended leave, or
  - (b) to retain the entitlement to that accrued extended leave.

**Note—**

For example, such an election may not be made by an officer who merely moves between different Departments of the Public Service.

- (2) This clause does not apply to an officer or temporary employee who has been paid the money value of his or her accrued extended leave under clause 4 of Schedule 3.

**Note—**

Whichever election the public sector employee makes, his or her service with the current employer will, pursuant to clause 6, be deemed to include service with the former employer.

**9 Employee who has recognised interstate service and was entitled to take leave in**

**former agency deemed to have taken leave**

- (1) For the purposes of clause 7 (1) (c), a public sector employee:
- (a) whose employment in a public sector agency (***the current agency***) immediately follows employment in a Commonwealth or interstate agency (***the former agency***), or
  - (b) who is entitled, by law or administrative practice, to have the service in the former agency form part of the service in the current agency,
- and who, at any time during his or her employment in the former agency, has been entitled under the relevant Commonwealth or interstate law to take extended leave or be paid the money value of extended leave is deemed to have taken the leave.
- (2) The amount of extended leave that the public sector employee is deemed to have taken is calculated as if:
- (a) leave had accrued in relation to his or her service in the former agency at the same rate as leave accrues in relation to his or her service in the current agency, and
  - (b) the service in the former agency in respect of which leave accrued was the whole of the service recognised by the former agency for the purpose of calculating his or her extended leave entitlement, and
  - (c) the amount of leave taken before the calculation of the entitlement was nil, and
  - (d) the money value of leave paid before the calculation of the entitlement was nil.

**Part 3 Additional provisions for former members of Australian Defence Force and for holders of certain statutory offices**

**10 Recognition of service with Australian Defence Force**

For the purposes of this Schedule:

- (a) a public sector employee who has previously been employed, on a full-time basis, as a member of the Australian Defence Force is taken to have been employed in a Commonwealth or interstate agency during the period for which he or she was so employed, and
- (b) the Australian Defence Force is taken to have been the public sector employee's employer during that period.

**11 Recognition of service in certain statutory offices**

- (1) For the purposes of this Schedule:

(a) a person who:

(i) in relation to a body referred to in the Table to this clause, holds or acts in an office specified in that Table, on a full-time basis, and

(ii) has previously been a public sector employee,

is taken to be employed in a public sector agency during the period for which the person holds or acts in that office, and

(b) the body concerned is taken to be the person's employer during that period.

(2) For the purposes of this Schedule:

(a) a public sector employee who, in relation to a body referred to in the Table to this clause, has previously held or acted in an office specified in that Table, on a full-time basis, is taken to have been employed in a public sector agency during the period for which he or she held or acted in that office, and

(b) the body concerned is taken to have been the public sector employee's employer during that period.

(3) Without limiting any other law preserving rights to extended leave, a person who, in relation to a body referred to in the Table to this clause, holds an office specified in that Table, on a full-time basis, is entitled to have his or her recognised service as a public sector employee recognised as service for the purposes of the law or arrangement that provides for his or her entitlement, as the holder of the office, to extended leave.

## **Table**

### **Administrative Decisions Tribunal of New South Wales**

Deputy President (not being a judicial officer)

Non-presidential judicial member (not being a judicial officer)

Non-judicial member

Assessor

### **Consumer, Trader and Tenancy Tribunal of New South Wales**

Deputy Chairperson

Member

### **Government and Related Employees Appeal Tribunal**

Senior Chairperson

Chairperson

**Industrial Relations Commission of New South Wales**

Member

**Police Integrity Commission**

Commissioner

Inspector

**Transport Appeal Boards**

Chairperson

**Workers Compensation Commission of New South Wales**

Deputy President (not being a judicial officer)

Registrar

Arbitrator

**Schedule 4 Savings, transitional and other provisions**

(Section 166)

**Part 1 Preliminary**

**1 Regulations**

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

    this Act

[\*Public Sector Employment and Management Amendment \(Extended Leave\) Act 2005\*](#)

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

    (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

    (b) to impose liabilities on any person (other than the State or an authority of the

State) in respect of anything done or omitted to be done before the date of its publication.

## 2 Superseded references

In any other Act, or in any instrument made under any Act or in any other instrument of any kind:

- (a) a reference to the Public Service Board (or the Chairman or a member of that Board) or to the Public Employment Industrial Relations Authority is to be read as a reference to:
  - (i) subject to subparagraph (ii)—the Public Employment Office, or
  - (ii) in the case of any particular reference—such person or body as is prescribed by the regulations in respect of that reference, and
- (b) a reference to the *Public Service Act 1902*, the *Public Service Act 1979* or the *Public Sector Management Act 1988* is to be read as a reference to this Act.

## Part 2 Provisions consequent on enactment of this Act

### 3 Definition

In this Part:

**former Act** means the *Public Sector Management Act 1988*.

### 4 Saving of regulations under former Act

- (1) The following regulations under the former Act as in force immediately before the repeal of that Act and as amended by this Act, are taken to be regulations made under this Act:
  - (a) the *Public Sector Management (General) Regulation 1996*,
  - (b) the *Public Sector Management (Goods and Services) Regulation 2000*.
- (2) For the purposes of Part 3 of the *Subordinate Legislation Act 1989*, those regulations are taken to have been published on the commencement of this clause.

### 5 Construction of certain references

- (1) In any other Act, or in any instrument made under any Act or in any other instrument of any kind:
  - (a) a reference to the appointment or employment by the Governor of an officer or employee under and subject to the former Act is to be read as a reference to the appointment or employment of an officer or employee under Chapter 2 of this Act, and

- (b) a reference to Part 2A of the former Act is to be read as a reference to Part 3.1 of this Act, and
  - (c) a reference to section 42Q of the former Act is to be read as a reference to section 77 of this Act, and
  - (d) a reference to an officer or position being listed in Schedule 3B to the former Act is to be read as a reference to a senior executive officer, or senior executive position, respectively, within the meaning of this Act, and
  - (e) a reference to Part 8 of the former Act is to be read as a reference to Chapter 5 of this Act, and
  - (f) a reference to a declared authority under or within the meaning of former Act is to be read as a reference to a declared authority to which Part 6.4 of this Act applies.
- (2) Subclause (1) does not limit the operation of any provision of the *Interpretation Act 1987*.

## **6 Existing public service staff**

- (1) Any officers employed under the former Act immediately before the repeal of that Act are taken to be officers employed under this Act.
- (2) Any Departmental temporary employees or special temporary employees employed under the former Act immediately before the repeal of that Act are taken to be Departmental temporary employees and special temporary employees, respectively, employed under this Act.
- (3) If any procedures have been commenced before the commencement of this Act in relation to the filling of a vacancy in the Public Service or the appointment of a person to any position in the Public Service, the procedures must be completed in accordance with this Act (unless the regulations otherwise provide).

## **7 Continuation of certain bodies**

- (1) The Public Employment Office constituted by this Act is a continuation of, and the same legal entity as, the Public Employment Office constituted by the former Act.
- (2) The State Contracts Control Board established under Part 7.1 of this Act is a continuation of the State Contracts Control Board established under the *Public Sector Management (Goods and Services) Regulation 2000* as in force immediately before the commencement of this subclause.

## **8 Management of conduct and performance and existing disciplinary proceedings**

- (1) Part 2.7 of this Act extends to conduct occurring before the commencement of that Part.



- (2) Any disciplinary proceedings pending under Part 5 of the former Act immediately before the commencement of the repeal of that Part by this Act are to continue to be dealt with under the provisions of that Part as if it had not been repealed.

#### **9 Existing delegations under former Act**

- (1) Any delegation by a Department Head under section 12 of the former Act and in force immediately before the repeal of that section by this Act is taken to be a delegation by the Department Head that is in force under section 15 of this Act.
- (2) Any delegation by the Public Employment Office (as constituted by the former Act) under section 49F of the former Act and in force immediately before the repeal of that section by this Act is taken to be a delegation by the Public Employment Office that is in force under section 124 of this Act.

#### **10 Saving of orders under Part 3A of former Act**

An order under Part 3A of the former Act and in force immediately before the commencement of this clause is taken to have been made under Chapter 4 of this Act (and may be amended or repealed accordingly).

#### **11 Right of return of existing executive officers** (1988 Act, ss 42N, 42R, 42T)

- (1) This clause applies to an executive officer within the meaning of Part 3.1 of this Act who made an election to retain a right of return to the public sector under section 42R of the *Public Sector Management Act 1988* and the election was in force on 13 October 1995 (the date of commencement of section 42R (2A) of that Act) and was also in force immediately before the repeal of that Act.
- (2) Any such election is taken to be an election under this clause.
- (3) For the purposes of Division 4 of Part 3.1 of this Act, an **employment benefit** includes a right of return to the public sector by an executive officer who elects to retain that right under this clause.
- (4) An executive officer to whom this clause applies may elect to retain a right of return to the public sector if:
  - (a) the officer was engaged in the public sector on a full-time basis when he or she first became an executive officer, and
  - (b) for at least some part of that engagement the person was an employee in the public sector.
- (5) Any such election:
  - (a) may be made in the first contract of employment entered into by the executive officer, but (unless made in that first contract) may not be made in any

- subsequent contract for the same or another executive position, and
- (b) is revoked if the election is not made by the executive officer in a subsequent contract of employment, and
  - (c) may be revoked by the executive officer by notice in writing to the officer's employer, and
  - (d) if revoked, may not be made again.
- (6) If an executive officer has elected to retain a right of return to the public sector, the officer's contract of employment must provide for the cost of that right as part of the officer's remuneration package under Division 4 of Part 3.1 of this Act.
- (7) An executive officer who has elected to retain a right of return to the public sector is entitled to an engagement in the public sector if the person ceases to be an executive officer and:
- (a) in the case of a chief executive officer—is not re-appointed to the same or another chief executive position, or
  - (b) in the case of a senior executive officer—is not re-appointed to the same or another senior executive position.
- (8) A person is not entitled to an engagement in the public sector under this clause if the person ceased to be an executive officer because the person resigned or was (after due inquiry) removed from office for misbehaviour.
- (9) The engagement in the public sector to which a person is entitled under this clause is to be an engagement:
- (a) in the case of a chief executive officer—as a senior executive officer in any part of the public sector, or
  - (b) in the case of a senior executive officer—in any part of the public sector at a salary not lower than the current maximum salary for:
    - (i) the previous engagement of the person as such an employee within the public sector, or
    - (ii) a clerk (grade 12) in the Public Service,whichever is the lesser.
- (10) A person who is entitled to such an engagement is not entitled to any compensation for ceasing to hold office as an executive officer or to any remuneration in respect of the office for any period afterwards (except remuneration in respect of a subsequent re-appointment to the office).

- (11) Subclause (10) does not prevent the payment of additional remuneration to a person who is engaged in the public sector under this clause in order to maintain, in accordance with the employer's redeployment policy, the level of the person's previous remuneration package for a period after the person ceases to be an executive officer.
- (12) If an executive officer has not entered into a contract of employment and is eligible to make an election under this clause:
- (a) the officer is (until the officer enters into a contract of employment) to be taken to have made an election under this clause, but may revoke that election, and
  - (b) the cost (under Division 4 of Part 3.1 of this Act) of the right of return to the public sector in accordance with that election is to be deducted from the officer's remuneration.
- (13) A reference in this clause to an executive officer ceasing to be an executive officer is, in the case of an executive officer removed from office under section 77 of this Act, a reference to an executive officer ceasing to be such an officer as referred to in section 77 (5) of this Act.
- (14) An executive officer who is entitled to be engaged in the public sector under this clause may, before being so engaged, elect in writing to take compensation referred to in section 78 of this Act.
- (15) On the election taking effect, the person ceases to be entitled to be engaged in the public sector under this clause.
- (16) A reference in this clause to:
- (a) employment in the public sector is a reference to employment as an officer in the Public Service, the Health Service or the Teaching Service, as a member of the Police Service or as an officer in the service of a public authority, and
  - (b) engagement in the public sector is a reference to employment in the public sector or to the holding of a statutory office.

## **12 General savings provision**

Subject to this Act and the regulations, anything done or omitted to be done under or for the purposes of the former Act is taken to have been done or omitted to be done under or for the purposes of this Act.

## **Part 3 Provisions consequent on enactment of **Public Sector Employment and Management Amendment (Extended Leave) Act****

## 2005

### 13 Interpretation

(1) In this Part:

**the amending Act** means the *Public Sector Employment and Management Amendment (Extended Leave) Act 2005*.

**the repealed Act** means the *Transferred Officers Extended Leave Act 1961*.

(2) Without limiting section 68 (3) of the *Interpretation Act 1987*, a reference in this Part to an award or enterprise agreement extends to the award or enterprise agreement (if any) that is the replacement, for the time being, for the award or enterprise agreement.

### 14 Section 30 of the *Interpretation Act 1987* unaffected

Nothing in this Part limits the effect of section 30 of the *Interpretation Act 1987*.

### 15 Validation of matters relating to extended leave

(1) Anything that was done or omitted during the validation period, and that would have been valid had the amending Act been in force during that period, is taken to have been validly done or omitted.

(2) In this clause, **validation period** means the period beginning on 1 January 2005 and ending on the commencement of Schedule 1 [4] to the amending Act.

### 16 Certain classes of persons to whom certain amendments do not apply

(1) In its application to the persons or classes of persons listed in the Table to this clause, Schedule 3, as substituted by the amending Act, applies with the following modifications:

(a) a reference in clause 2 (1) of Schedule 3 to “7 years or more but not more than 10 years” is to be read as a reference to “10 years”,

(b) a reference in clauses 3 (1) and (2) (b) and 5 (2) of Schedule 3 to “7” is to be read as a reference to “10”,

(c) clauses 2 (1) (c) and (2) (c) and 8 (1) (c) and (2) of Schedule 3 do not have effect.

(2) The Governor may, by proclamation, omit any of the items to the Table to this clause except for item 15.

### Table

- 1 officers covered by the *Australian Music Examinations Board (New South Wales) Examiners, Assessors and Advisers Employed by the Office of the Board of Studies Award*,
- 2 (Repealed)
- 3 officers covered by the *Crown Employees (Education Employees Department of Corrective Services) Consent Award 2002*,
- 4 officers covered by the *Crown Employees (National Art School, Academic Staff) Salaries and Conditions Award 2004*,
- 5 officers covered by the *Crown Employees (Office of the Board of Studies—Education Officers) Salaries and Conditions Award*,
- 6 officers covered by the *Crown Employees (Public Service Training Wage) Award 2002*,
- 7, 8 (Repealed)
- 9 officers covered by the *Forestry Commission of New South Wales (Trading as State Forests of New South Wales) Fieldwork (And Other) Staff Award*,
- 10 officers covered by the *Higher School Certificate and School Certificate Marking and Related Casual Employees Rates of Pay and Conditions Award*,
- 11 officers covered by the *NSW Adult Migrant English Service Crown Employees (Teachers and Related Employees) Award 2004*,
- 12 officers covered by the *Restaurants, &c., Employees (State) Award*,
- 13 officers covered by the *Shop Employees (State) Award*,
- 14 officers covered by the *Skilled Trades Staff—Department of Ageing, Disability and Home Care (State) Award 2001*,
- 15 any persons or class of persons prescribed by the regulations for the purposes of this clause.

### **17 Certain references to Schedule 3**

- (1) In its application for the purposes of the Acts and instruments set out in the Table to this clause, Schedule 3, as substituted by the amending Act, applies with the following modifications unless the contrary intention appears:
- (a) a reference in clause 2 (1) of Schedule 3 to “7 years or more but not more than 10 years” is to be read as a reference to “10 years”,
  - (b) a reference in clauses 3 (1) and (2) (b) and 5 (2) of Schedule 3 to “7” is to be read as a reference to “10”,
  - (c) clauses 2 (1) (c) and (2) (c) and 8 (1) (c) and (2) of Schedule 3 do not have effect.

(2) The Governor may, by proclamation, omit any of the items to the Table to this clause except for item 18.

**Table**

1	(Repealed)
2	the <i>Bradfield College (Department of Education and Training) Salaries and Conditions Award</i> ,
3	the <i>Canteen, &amp;c. Workers (State) Award</i> ,
4	the <i>Caterers Employees (State) Award</i> ,
5	the <i>Clothing Trades (State) Award</i> ,
6	the <i>Crown Employees (Institute Managers in TAFE) Salaries and Conditions Award</i> ,
7	the <i>Crown Employees (Public Service Training Wage) Award 2002</i> ,
8	the <i>Hairdressers', &amp;c. (State) Award</i> ,
9	the <i>Lidcombe Castlereagh Waste Management Centre Enterprise Award—1997</i> ,
10	the <i>Miscellaneous Workers'—Kindergartens and Child Care Centres, &amp;c. (State) Award</i> ,
11	the <i>Miscellaneous Workers' Kindergartens and Child Care Centres (State) Training Wage Award</i> ,
12	the <i>Motels, Accommodation and Resorts, &amp;c. (State) Award</i> ,
13	(Repealed)
14	the <i>Restaurants, &amp;c., Employees (State) Award</i> ,
15	the <i>Shop Employees (State) Award</i> ,
16	(Repealed)
17	the <i>TAFE NSW Riverina Institute National Aerospace Training Centre of Excellence (NATCOE) Enterprise Agreement 2004-EA04/324</i> ,
18	an Act or instrument prescribed by the regulations for the purposes of this clause.

**Schedules 5-7 (Repealed)**