

# Public Sector Employment and Management Regulation 2009

[2009-428]



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.

### Authorisation

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New South Wales

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# Public Sector Employment and Management Regulation 2009



New South Wales

## Part 1 Preliminary

### 1 Name of Regulation

This Regulation is the *Public Sector Employment and Management Regulation 2009*.

### 2 Commencement

This Regulation commences on 1 September 2009 and is required to be published on the NSW legislation website.

**Note—**

This Regulation replaces the *Public Sector Employment and Management (General) Regulation 1996* which is repealed on 1 September 2009 by section 10 (2) of the *Subordinate Legislation Act 1989*.

### 3 Definitions

(1) In this Regulation:

**executive officer** means a chief executive officer or a senior executive officer in the Public Service.

**member of staff** means an officer or a temporary employee.

**Note—**

Casual employees are not members of staff for the purposes of this Regulation.

**officer** means an officer of the Public Service, as referred to in section 7 (1) (a) of the Act.

**public service determination** means a determination referred to in section 130 of the Act.

**State industrial instrument** means an industrial instrument within the meaning of the *Industrial Relations Act 1996*.

**temporary employee** means a Departmental temporary employee, as referred to in

section 7 (2) (a) of the Act, or a special temporary employee, as referred to in section 7 (2) (b) of the Act.

**the Act** means the *Public Sector Employment and Management Act 2002*.

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

## **Part 2 Appointments**

### **4 Pre-placement health assessments**

- (1) A person may not be appointed to an officer's position before the person's fitness to carry out the duties of the position has been confirmed by a health assessment.
- (2) Fitness to carry out duties includes the ability to carry out those duties without endangering the health and safety of the public, of other persons employed in the Department and of the person concerned.
- (3) The health assessment is to be in the form considered necessary by the appropriate Department Head.
- (4) The form of the health assessment may include (but is not limited to) any one or more of the following:
  - (a) a declaration (which may be a statutory declaration if required) provided by the person concerning any illness, disability or condition of which the person is aware that might make the person unfit to carry out the duties of the position,
  - (b) a medical examination by a medical practitioner approved by the appropriate Department Head,
  - (c) an examination by a medical practitioner, an optometrist or other appropriately qualified health care professional, approved by the appropriate Department Head, of a particular aspect of the person's health likely to detrimentally affect the person's capacity to carry out the duties of the position.
- (5) The appropriate Department Head is to give the health care professional providing a health assessment referred to in subclause (4) (c) any requested information about the duties of the position concerned that is reasonably required for the purpose of providing the assessment.
- (6) This clause does not limit any requirements made by the appropriate Department Head with respect to health assessments of persons employed as temporary employees.

### **5 Selection procedures for officers**

- (1) Unless the appropriate Department Head otherwise determines, a selection

committee is to be established to assess the merit of applicants for appointment to a vacant officer's position.

- (2) A selection committee should, as far as practicable:
  - (a) consist of at least 2 persons, and
  - (b) include at least one person who does not hold a position in the branch of the Department in which the vacant position exists, and
  - (c) be constituted so as to ensure the fairest consideration of all applicants.
- (3) A selection committee must, as far as practicable, deal with each applicant in a similar fashion, but the committee is not required to grant an interview to all applicants.
- (4) A selection committee may use a range of processes as the basis of determining the merit of the applicants, including interviews and objective work-related tests. The committee is not obliged to use any particular process.
- (5) Nothing in this clause requires a Department Head to adopt any recommendation made by a selection committee in relation to the filling of a vacancy.

## 6 Selection in special cases

- (1) A person (whether or not an officer) may be appointed to an officer's position (other than a senior executive position) in accordance with the special procedures prescribed by this clause.
- (2) The appropriate Department Head may, with the approval of the Public Service Commissioner, recommend the appointment of a person belonging to a disadvantaged group of persons to a position in the Department that the Department Head considers suitable for the person.
- (3) A **disadvantaged group** of persons is a group of persons in the community that the Public Service Commissioner has designated as a disadvantaged group for the purposes of this clause. The Public Service Commissioner may so designate any group of persons who suffer a disadvantage in employment, including but not limited to:
  - (a) Aboriginals or Torres Strait Islanders, or
  - (b) persons who have a disability within the meaning of the [Anti-Discrimination Act 1977](#).
- (4) A person may be recommended for appointment under this clause only if the person belongs to a relevant disadvantaged group and, in the opinion of the appropriate Department Head, has the greatest merit of the eligible persons seeking appointment in accordance with this clause.

- (5) The Public Service Commissioner is to determine the general or selective advertising or search procedures to be used for the purposes of seeking eligible persons for appointment under this clause and the selection procedures to be used for selecting a person from among the eligible persons seeking appointment.

## **7 Exception—appointment of chief executive officers**

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

## **Part 3 Conditions of service**

### **8 Application of Part**

The provisions of this Part:

- (a) are subject to any State industrial instrument, and
- (b) unless the contrary intention appears, apply to all members of staff, and
- (c) in the case of executive officers—are subject to the contract of employment under Part 3.1 of the Act between the executive officer and the executive officer's employer.

### **9 Hours of attendance on duty**

- (1) The hours of attendance on duty of members of staff and the manner of recording their attendance are to be as determined from time to time by the appropriate Department Head. Any such determination is to be made in accordance with any direction of the Public Service Commissioner.
- (2) The appropriate Department Head or a person authorised by the appropriate Department Head may require a member of staff to perform duty beyond the hours determined under subclause (1), but only if it is not unreasonable for the member of staff to be required to do so.

### **10 Public and local holidays**

- (1) In this clause:

**local holiday** means a public holiday that is not a public holiday throughout the State.

**public holiday** means a bank or public holiday under the [Banks and Bank Holidays Act 1912](#), but does not include:

- (a) a Saturday that is such a holiday by virtue of section 15A of that Act, and
  - (b) 1 August or such other day that is a bank holiday instead of 1 August.
- (2) A member of staff is entitled to be absent from duty on the following days unless the member of staff is required to attend for duty by the appropriate Department Head or

by a person authorised by the appropriate Department Head:

- (a) a day that is a public holiday throughout the State,
  - (b) a day that is a local holiday in that part of the State at or from which the member of staff performs duty,
  - (c) a day between Boxing Day and New Year's Day determined by the appropriate Department Head.
- (3) A member of staff who is required under this clause to attend for duty on a local holiday is not entitled to overtime or time in lieu on that account.
- (4) If a local holiday falls during a staff member's absence on leave, the member of staff is not to be credited with the holiday.

#### **11 Absence from duty**

- (1) A member of staff must not be absent from duty unless reasonable cause is shown.
- (2) If a member of staff is absent from duty because of illness or other emergency, the member of staff must, as soon as practicable, provide an explanation for the absence.
- (3) If the member of staff fails to provide that explanation to the satisfaction of the appropriate Department Head, the Department Head is to cause to be deducted from the pay of the member of staff the amount paid to the member of staff for the period of absence.
- (4) Nothing in this clause affects the taking of any action under Part 2.7 of the Act in relation to a member of staff who is absent from duty without authorised leave.

#### **12 Increments**

- (1) This clause does not apply to executive officers.
- (2) The payment to any member of staff of an increment in accordance with any State industrial instrument or public service determination is, unless otherwise provided by the instrument or determination, to be made only with the prior approval of the appropriate Department Head.
- (3) The payment of an increment to a member of staff is subject to the satisfactory conduct of, and the satisfactory performance of duties by, the member of staff as determined by the appropriate Department Head.
- (4) A member of staff must be promptly notified in writing by the appropriate Department Head of any decision to defer payment of an increment.
- (5) The payment of an increment may be deferred from time to time, but may not be deferred for more than 12 months at any one time.



### **13 Health and safety**

- (1) For the purposes of this clause, a member of staff is not fit for work if the health of the member of staff:
  - (a) may render the member of staff a danger to other members of staff or to the public, or
  - (b) is likely to be seriously affected by the staff member remaining on duty or, if the member of staff is absent from duty, by the staff member resuming duty.
- (2) If the appropriate Department Head has reason to believe that a member of staff is not fit for work, he or she may direct the member of staff to submit to such medical examination or other health assessment as the Department Head may, on the advice of a nominated medical assessor, consider necessary.
- (3) If the appropriate Department Head has issued a direction under subclause (2) to a member of staff, the member of staff:
  - (a) must, if on duty, cease duty immediately, and
  - (b) must not resume duty until the completion of the medical examination or other health assessment concerned unless the concurrence of a nominated medical assessor is first obtained or a certificate is furnished by a medical practitioner that the member of staff is fit for work.
- (4) If the appropriate Department Head receives a health assessment from a nominated medical assessor that a member of staff:
  - (a) is fit for work, the Department Head is to direct in writing that the member of staff, if absent from duty, must resume duty, or
  - (b) is not fit for work, the Department Head is to direct in writing that the member of staff must cease duty immediately or, if absent from duty, must not resume duty.
- (5) If a direction has been given to a member of staff under subclause (4), the nature of the leave, if any, to be granted to the member of staff during the absence from duty is to be determined by the appropriate Department Head after consideration of any relevant advice of the nominated medical assessor.
- (6) A member of staff to whom a direction has been given under subclause (4) (b) must not resume duty unless the appropriate Department Head, on the advice of a nominated medical assessor, approves in writing.
- (7) The appropriate Department Head is to give the health care professional providing a health assessment of a member of staff under this clause any requested information about the duties of the staff member's position that is reasonably required for the purpose of providing the assessment.

(8) In this clause:

***nominated medical assessor*** means a person or body, or a person who is a member of a class of persons, nominated by the Public Service Commissioner for the purposes of this clause.

## **Part 4 Allowances**

### **Division 1 Preliminary**

#### **14 Application of Part**

The provisions of this Part are subject to any State industrial instrument.

**Note—**

Other allowances are set out in the *Crown Employees (Public Service Conditions of Employment) Award 2009*.

#### **15 Rates and conditions of payment of allowances**

- (1) The rates and conditions of payment of allowances under this Part are, subject to this Part, to be as determined by the Director-General of the Department of Premier and Cabinet from time to time.
- (2) If an allowance under this Part is payable at a daily rate, the amount to be paid for a portion of a day is to be the appropriate proportion of the daily rate and, for the purpose of calculating that amount, any fraction of an hour is to be corrected to the nearest half-hour.

#### **16 Payment where allowance not adequate or available**

- (1) If the appropriate Department Head is satisfied that, but for this clause, the actual expenses properly and reasonably incurred by a member of staff in the performance of official duties:
  - (a) are not adequately covered by an allowance to which the member of staff is entitled under this Part, or
  - (b) are not covered by any allowance payable under this Part or under any State industrial instrument,the member of staff is to be paid an allowance equivalent to the amount of those additional expenses or the amount of those expenses, as the case may be.
- (2) An allowance is not payable under this clause unless the member of staff produces official receipts for the expenses incurred by the member of staff.
- (3) An allowance under this clause may be reduced if it exceeds without good cause any limit approved in advance by the appropriate Department Head for the expenses concerned.

## **Division 2 Higher duties and acting allowances**

### **17 Entitlement to allowance when relieving in other positions**

- (1) This clause applies when the appropriate Department Head directs that the duties of a position which is vacant, or the holder of which is suspended, sick or absent, are to be performed by one or more other members of staff.
- (2) A member of staff who, during a period of relief in another position, satisfactorily performs, in the opinion of the appropriate Department Head, the whole of the duties and assumes the whole of the responsibilities of that position is to be paid by allowance any difference between the staff member's present salary or wage and the salary or wage to which the member of staff would have been entitled if appointed to that position.
- (3) A member of staff who, during a period of relief in another position, does not perform the whole of the duties or assume the whole of the responsibilities of that position is to be paid that proportion of the allowance referred to in subclause (2) that the duties satisfactorily performed and responsibilities assumed bear to the whole of the duties and responsibilities of that position. The amount of the allowance so paid is to be as determined by the appropriate Department Head.
- (4) In this clause, a reference to the duties and responsibilities of a position is a reference to those duties and responsibilities that, during the period of relief, the member of staff appointed to the position would ordinarily have performed or assumed.
- (5) Except where the Director-General of the Department of Premier and Cabinet otherwise determines, an allowance is not to be paid under this clause in respect of a single period of relief in another position of less than 5 ordinary working days.
- (6) An allowance is not to be paid under this clause in respect of any unbroken period of leave, exceeding 5 ordinary working days, taken by the member of staff during any period of relief in another position.
- (7) Despite subclause (6), if a member of staff affords part-time relief in a position on a continuing basis, an allowance is to be paid under this clause calculated as though the member of staff were relieving on a full-time basis but the amount of the allowance is to be calculated in the same proportion as the ordinary weekly hours actually worked bear to the weekly hours required to be worked by a full-time member of staff appointed to the position.
- (8) A member of staff appointed to a position the principal purpose of which is to provide relief in certain other positions is not, unless otherwise determined by the appropriate Department Head, to be paid an allowance under this clause except in respect of so much of a single period of relief in the same position as exceeds 13 weeks.

### **18 Allowance for acting or temporary appointments**

- (1) This clause applies when an officer is appointed to act in another position, or is temporarily appointed to another position, which is vacant or the holder of which is suspended, sick or absent.
- (2) Any such officer is to be paid by allowance any difference between the officer's present salary or wage and the salary or wage to which the officer would have been entitled if appointed to that position (other than on an acting or temporary basis).

### **19 Member of staff not to suffer reduction in remuneration**

A member of staff relieving, acting in, or temporarily appointed to another position is not, as a result, to suffer any reduction in salary or wage.

### **20 Provisions relating to executive positions**

- (1) For the purposes of this Division, the salary or wage of an executive officer is, subject to this clause, the amount of the remuneration package for the executive position concerned.
- (2) If the remuneration package for an executive position consists of a range of amounts, the salary or wage is the amount within that range to which the officer is entitled (in the case of the officer's present salary or wage) or the amount within that range determined by the officer's employer (in the case of the salary or wage to which the officer would have been entitled if appointed to the executive position concerned).
- (3) If an officer who is not an executive officer relieves or acts in an executive position, the salary or wage to which the officer would have been entitled if appointed to the executive position is to be reduced by the superannuation guarantee amount payable in respect of the officer.
- (4) In this clause, **executive position** and **remuneration package** have the same meanings they have in Part 3.1 of the Act.

## **Division 3 Relocation expenses**

### **21 Relocation expenses—senior executive officers**

- (1) A senior executive officer is, in connection with any relocation during the term of the officer's employment, entitled to any relocation expenses payable under the applicable State industrial instrument to an officer who is not a senior executive officer.
- (2) A senior executive officer is entitled to such relocation expenses as the appropriate Department Head determines if:
  - (a) the officer is required to relocate when selected for the position, and

- (b) the place to which the officer is required to relocate is of sufficient distance, in the opinion of the Department Head, to warrant relocation expenses.

## **Part 4A Procurement of goods and services**

### **21A Procurement for emergencies**

- (1) A government agency head or a government agency employee nominated for the purposes of this clause by the agency head may, in any case of emergency, authorise the procurement of goods and services to a value sufficient to meet that particular emergency.
- (2) Every authorisation under this clause must be reported to the Board as soon as possible.
- (3) Section 149 of the Act does not apply in relation to the procurement of goods and services under this clause.
- (4) This clause does not authorise the procurement of goods and services in excess of those necessary to meet the immediate needs of any emergency.

### **21B Supply of goods and services by approved disability employment organisations**

- (1) A government agency may procure goods and services that are supplied by a person or body approved as a disability employment organisation under this clause.
- (2) Section 149 of the Act does not apply in relation to the procurement of goods and services under this clause. However, procurement under this clause is subject to any Board direction issued in relation to such procurement.
- (3) The Minister for Disability Services may, by order, approve a person or body as a disability employment organisation if satisfied that the person or body conducts a business a principal purpose of which is to provide employment to persons with a disability.
- (4) An approval may apply to a specified person or body or to all members of a specified class of persons or bodies.
- (5) An approval may apply to a branch or unit within a larger body. For that purpose, a reference in this clause to a body includes a reference to a branch or unit within a larger body.
- (6) An approval may be limited to specified goods and services supplied by a person or body. In that case, the person or body is approved as a disability employment organisation only in relation to those specified goods and services.
- (7) A register of disability employment organisations is to be kept for the purposes of this clause and is to include particulars of approvals given under this clause.

- (8) The register is to be kept by a person or body appointed for the time being by the Minister for Disability Services to maintain the register.
- (9) Information contained on the register is to be made available to the public in such manner as the Minister for Disability Services directs.
- (10) In this clause, **disability**, in relation to a person, has the same meaning as it has in the *Disability Discrimination Act 1992* of the Commonwealth.

### **21C Procurement arrangements for other public bodies**

- (1) The Board may enter into agreements with public bodies that are not government agencies relating to the procurement of goods and services by and for those bodies.
- (2) The Board may do so by allowing those bodies to have access to the procurement arrangements for government agencies or by making separate arrangements.
- (3) The Board may establish criteria for the exercise of the Board's functions under this clause, including but not limited to the circumstances in which, and the public bodies to which, access to the arrangements for government agencies will not be given.
- (4) The Director-General of the Department of Finance and Services may charge a fee in connection with any agreement entered into between a public body and the Board under this clause.
- (5) In this clause:

**community non-profit organisation** does not include an industry association or similar body the activities of which are intended to promote the interests of a particular industry or sector of an industry.

**public body** includes the following:

- (a) a private hospital,
- (b) a local council or other local authority,
- (c) a charity or other community non-profit organisation,
- (d) a private school or college,
- (e) a university,
- (f) a public authority of the Commonwealth, any other State or Territory,
- (g) a public authority of any other jurisdiction (but only if it carries on activities in this State),
- (h) a contractor to a public authority (but only in respect of things done as such a contractor).

## 21D Savings

- (1) Any act, matter or thing that, immediately before the repeal of the *Public Sector Employment and Management (Goods and Services) Regulation 2010* (the **repealed Regulation**) by the *Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012* (the **amending Act**), had effect under the repealed Regulation continues to have effect under this Part.
- (2) Any policies and procedures determined under clause 6 of the repealed Regulation continue to apply, despite the repeal of that clause, to infrastructure projects to which the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* applies.
- (3) Clause 7 (3) of the repealed Regulation continues to apply to public sector agencies (within the meaning of the repealed Regulation) until 1 September 2012.
- (4) A direction issued by the State Contracts Control Board under clause 10 of the repealed Regulation and in force immediately before the commencement of the amending Act (including the direction described as the General Purchasing Delegation that took effect on 7 December 2010) is taken to be a direction issued by the NSW Procurement Board. Any such direction continues to apply to public sector agencies (within the meaning of the repealed Regulation) until 1 September 2012, unless sooner revoked by the NSW Procurement Board.
- (5) The Chairperson of the NSW Procurement Board may, until 1 September 2012, issue directions to government agencies under section 148 of the Act on behalf of the NSW Procurement Board.
- (6) Clause 20 of the repealed Regulation continues to apply to tenders and contracts to which Part 3 of the repealed Regulation applied immediately before the commencement of the amending Act until 1 September 2012.
- (7) A government agency that, immediately before the commencement of the amending Act, was accredited by the State Contracts Control Board to procure goods and services for that agency may continue to do so in accordance with the terms of that accreditation until 1 September 2012 or until the agency is accredited under an accreditation scheme established by the NSW Procurement Board, whichever occurs first.

## Part 5 Miscellaneous

### 22 Leave

- (1) The provisions of this clause apply:
  - (a) to members of staff who are executive officers or special temporary employees employed under Part 2.5 of the Act, and

(b) to any other members of staff not covered by a State industrial instrument.

**Note—**

Leave entitlements for members of staff covered by a State industrial instrument are set out in the *Crown Employees (Public Service Conditions of Employment) Award 2009*.

- (2) The provisions of the *Crown Employees (Public Service Conditions of Employment) Award 2009* that relate to leave are taken to apply to a member of staff to which this clause applies and any such person is entitled to leave in accordance with that award subject to any conditions or limitation set out in that award as if the person were covered by that award.
- (3) The amount of leave of any kind which may be granted to a member of staff and the conditions on which it may be granted is, subject to this clause, to be as determined by the Director-General of the Department of Premier and Cabinet from time to time.

### **23 Availability of Act, Regulation and other relevant information**

The appropriate Department Head is to make available to members of staff employed in the Department, in a reasonably accessible form, the Act, this Regulation and any other relevant information relating to the Public Service.

### **24 Determinations and approvals**

- (1) A determination or an approval of a relevant person under this Regulation is to be published or notified in such manner as the person considers necessary in order to bring the determination or approval to the notice of the members of staff to whom it applies.
- (2) A determination or an approval of a relevant person under this Regulation may do either or both of the following:
  - (a) apply generally or be limited in its application by reference to specified exceptions or factors,
  - (b) apply differently according to different factors of a specified kind.
- (3) In this clause:

**relevant person** means any of the following:

  - (a) the Public Service Commissioner,
  - (b) the Director-General of the Department of Premier and Cabinet,
  - (c) a Department Head.

### **25 Deductions for rent in certain cases**

- (1) Except as provided in subclause (3), if any member of staff of a Department is allowed



to use, for residential purposes, any premises belonging to the Government, the Director-General of the Department of Premier and Cabinet may direct that a fair and reasonable sum as rent for the premises be deducted from the salary of the member of staff.

- (2) When giving a direction under subclause (1), the Director-General of the Department of Premier and Cabinet is to either fix the amount of rent to be deducted or specify a person by whom the amount of rent to be deducted is to be fixed.
- (3) If a member of staff of a Department is allowed to use, for residential purposes, any premises or any land vested in or managed by the Teacher Housing Authority of New South Wales, an amount fixed by that Authority in respect of rent is to be deducted from the salary of the member of staff and paid to that Authority.
- (4) In this clause, **rent** includes payment for board and lodging.
- (5) This clause is subject, in the case of an executive officer, to the contract of employment entered into by the executive officer under Part 3.1 of the Act.

## **26 SOCs prescribed as public sector service**

For the purposes of paragraph (g) of the definition of **public sector service** in section 3 (1) of the Act, State owned corporations are prescribed as a class but only in relation to sections 102 and 103 of the Act.

## **27 Report of charges and convictions for serious offences**

- (1) A member of staff who is charged with having committed, or is convicted of, a serious offence must immediately report that fact in writing to the appropriate Department Head.
- (2) If the senior officer has reason to believe that a member of staff:
  - (a) has been charged with having committed, or has been convicted of, a serious offence, and
  - (b) has not reported the matter to the appropriate Department Head in accordance with subclause (1),

the senior officer must immediately inform the appropriate Department Head in writing that the senior officer has reason to believe that the member of staff has been charged with having committed, or has been convicted of, a serious offence.

- (3) In this clause:

**senior officer**, in relation to a member of staff, means the senior officer in the branch or section of the Department in which the member of staff is employed.

**serious offence** means an offence referred to in section 48 of the Act.

## 28 War service

The following kinds of service are declared to be war service for the purposes of clause 4 of Schedule 3A to the Act:

- (a) war service within the meaning of Division 8 of Part III of the *Repatriation Act 1920* of the Commonwealth,
- (b) service outside Australia as a member of the Interim Forces within the meaning of the *Interim Forces Benefits Act 1947* of the Commonwealth,
- (c) Malayan service within the meaning of the *Repatriation (Far East Strategic Reserve) Act 1956* of the Commonwealth,
- (d) special service within the meaning of the *Repatriation (Special Overseas Service) Act 1962* of the Commonwealth,

as those Acts were in force immediately before their repeal on 22 May 1986.

## 29 Saving

Any act, matter or thing that, immediately before the repeal of the *Public Sector Employment and Management (General) Regulation 1996*, had effect under that Regulation continues to have effect under this Regulation.

# Schedule 1 Competitive neutrality in tendering

## Part 1 Preliminary

### 1 Purpose and application of Schedule (1988 Act, s 107)

- (1) The purpose of this Schedule 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 Schedule 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 Schedule 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*.

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

In this Schedule:

**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.

## Part 2 Complaints

### 3 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 Schedule.

#### **4 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.

#### **5 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.

**6 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 clause 10.
- (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.

### **Part 3 Investigations**

**7 Definition** (1988 Act, s 113)

In this Part:

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

**8 Conduct of investigations** (1988 Act, s 114)

- (1) Subject to this Schedule, 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 clause 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.

**9 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 clause, 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.

**10 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 clause, 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 clause, 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.

**11 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 subclause (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 subclause (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 subclause (4).

(5A) Subclause (4) is specified for the purposes of section 146 (3) of the Act (which makes a contravention of subclause (4) an offence).

(6) A reference in this clause 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.

**12 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 Part, 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 Part.

(2) It is a reasonable excuse for the purposes of subclause (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 Part 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.

(5A) Subclauses (1), (3), (4) and (5) are specified for the purposes of section 146 (3) of the Act (which makes a contravention of any of those subclauses an offence).

(6) Subclause (1) does not apply to a complainant in relation to a notice served on the complainant under clause 10.

**13 Cabinet information and proceedings** (1988 Act, s 120)

(1) This Schedule 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 disclose Cabinet information, or
  - (c) to inspect Cabinet information.
- (2) For the purposes of this clause, a certificate of the Director-General or Deputy Director-General (General Counsel) of the Department of Premier and Cabinet that:
- (a) any information or question relates to confidential proceedings of Cabinet, or
  - (b) information is Cabinet information,
- is conclusive of that fact.
- (3) In this clause:

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

**Cabinet information** means information that is Cabinet information under the [Government Information \(Public Access\) Act 2009](#).

#### **14 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.