

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MERIT PROTECTION (AUSTRALIAN GOVERNMENT EMPLOYEES)  
AMENDMENT BILL 1994**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Prime Minister, the Hon P J Keating, MP)





# MERIT PROTECTION (AUSTRALIAN GOVERNMENT EMPLOYEES) AMENDMENT BILL 1994

## OUTLINE

This Bill proposes a number of amendments to the *Merit Protection (Australian Government Employees) Act 1984*.

The Merit Protection and Review Agency (MPRA) is an independent administrative review body. In broad terms, its role is:

to ensure that personnel management practices of Commonwealth departments and authorities reflect the accepted human resource management principles—particularly fairness, equity, ethics and accountability; and

to protect the rights of individual Commonwealth employees without limiting the ability of Commonwealth managers to manage consistent with sound personnel management practices.

The functions of the MPRA and of the Review Committees established by the MPRA, namely:

- Disciplinary Appeal Committees;  
Redeployment and Retirement Appeal Committees;  
Promotion Appeal Committees;  
Re-appointment Review Committees; and
- Re-integration Assessment Committees;

are, in their particular field, not unlike the administrative review functions of the Ombudsman and the Administrative Appeals Tribunal (AAT). Generally, the jurisdiction of these two bodies does not include Commonwealth employment matters.

The amendments would provide that:

on request of a Commonwealth department or authority and the principal relevant staff organisation, the MPRA, or a Review Committee established for that purpose by the MPRA, may perform specified employment-related functions not involving a formal appeal or application for review already provided for in the *Merit Protection (Australian Government Employees) Act 1984* (eg mediating in a

dispute, selecting staff for transfer or, where there is a "spill" of positions, establishing the order of merit);

the MPRA would be able to deem a promotion appeal to be an application for review and *vice versa* (to help avoid situations where an officer with an otherwise valid entitlement may be disadvantaged because of his or her lack of detailed knowledge of the relevant legislation);

- the MPRA would have the power to issue guidelines on procedures to Joint Selection Committees, being committees established—whether under the *Public Service Act 1922* or some other enactment—to advise on selection of staff for promotion or transfer (a similar provision already exists in relation to Review Committees—section 8 of the *Merit Protection (Australian Government Employees) Act 1984* refers);
- the MPRA would not be subject to direction by any other person or by any body or authority other than a court—a similar provision already exists in relation to Review Committee members (section 36 of the Act refers);
- disruption of the proceedings of a Review Committee established under the Act (eg Disciplinary Appeal Committee or Promotion Appeal Committee) would be an offence—as is already the case with disruption of, for example, MPRA hearings (section 81 of the Act refers);
- Review Committee members would be subject to the same confidentiality provisions as MPRA members and staff (section 84 of the Act refers); and
- there would be a penalty for a failure to comply with a summons—to give evidence or produce documents—issued by the convenor of a Redeployment and Retirement Appeal Committee (this is already the case in relation to a summons issued by the convenor of a Disciplinary Appeal Committee—section 85 of the Act refers).

## FINANCIAL IMPACT STATEMENT

The amendments are not expected to have any significant financial impact.

## NOTES ON CLAUSES

### Clause 1: Short title etc

Subclause 1(1) provides that this Act is to be called the *Merit Protection (Australian Government Employees) Amendment Act 1994*.

Subclause 1(2) defines the term "Principal Act" to mean the *Merit Protection (Australian Government Employees) Act 1984*.

### Clause 2: Commencement

Subclause 2(1) provides for the commencement of the Act, with the exception of paragraphs 4(c) and (d), on the day on which it receives Royal Assent.

Subclause 2(2) provides that paragraphs 4(c) and (d) are to commence either on the day on which the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* receives Royal Assent or on the day on which this Act receives Royal Assent, whichever is the later.

### Clause 3: Interpretation

This clause defines "Joint Selection Committee" for the purposes of the Principal Act.

In broad terms, a Joint Selection Committee (JSC) is a committee of three persons established, under the *Public Service Act 1922* or some other enactment, to advise on selection of staff for promotion or transfer. The JSC is chaired by a convenor nominated by the MPRA. The other two members of the JSC are nominated by the relevant Commonwealth department or authority and the principal relevant staff organisation.

### Clause 4: Functions of Agency

Section 6 of the Principal Act, which would be amended by this clause, sets out the functions of the MPRA.

The effect of paragraphs 4(a) and 4(b) would be to allow the MPRA, or a Review Committee established by the MPRA under new section 35A, to perform functions referred to in new section 35A or 57A (see notes on clauses 7 and 10) if requested to do so by a Commonwealth department or authority and the appropriate staff organisation. The amendments would ensure that the same statutory powers, obligations and protections would apply to such activities as apply to other activities of the MPRA.

The purpose of paragraph 4(c) is to replace paragraph 6(1)(g) of the Principal Act (which would be inserted by the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994*) with a new paragraph which will ensure that the provision applies to Joint Selection Committees (JSCs) established under various enactments, including the *Public Service Act 1922*.

Paragraph 4(d) provides that the MPRA may require payment for the provision of services in connection with the establishment, constitution and operation of JSCs. Charging for these services is consistent with the "user pays" principle and has been endorsed by the Australian Public Service Management Advisory Board (a body established under section 22 of the *Public Service Act 1922*). The MPRA has been charging for these services since 1 October 1991, and the amendment will remove any doubt about the legality of these arrangements.

#### Clause 5: Interpretation

Section 7 of the Principal Act defines "Review Committee" for the purposes of Division 2 of that Act to mean:

- a Disciplinary Appeal Committee;
- a Redeployment and Retirement Appeal Committee;
- a Promotion Appeal Committee;
- a Re-appointment Review Committee; or
- a Re-integration Assessment Committee.

The effect of the amendment would be to extend the definition of "Review Committee" to include committees established under new Subdivision FA (see notes on clause 7).

#### Clause 6: Agency to ensure efficiency of Joint Selection Committees and Review Committees

Section 8 of the Principal Act requires the MPRA, in discharging its duty to take reasonable steps to ensure that Review Committees carry out their functions properly and efficiently, to issue procedural guidelines to Review Committees.

The effect of the amendment would be to enable the MPRA to issue such guidelines not only to Review Committees but also to Joint Selection Committees.

#### Clause 7: Insertion of new Subdivision

This clause inserts a proposed new subdivision, *Subdivision FA—Other committees*, into the Principal Act. The subdivision consists of 3 new sections—sections 35A, 35B and 35C.

##### *New section 35A—Establishment of other committees*

New section 35A would provide that, on the request of a Commonwealth department or authority and the appropriate staff organisation, the MPRA may establish a Review Committee to perform functions specified in the request in relation to matters:

affecting the employment of Commonwealth employees by the department or authority; and

relating to the administration of the department or authority.

In broad terms, requests of this nature may cover employment-related matters not involving a formal appeal or application for review already provided for elsewhere in the Principal Act. The amendment will allow a committee to be established, for example, to mediate in a dispute, select staff for transfer or, where there is a "spill" of positions, establish the order of merit.

##### *New section 35B—Constitution of committee*

New section 35B provides that—as is the case with all other Review Committees and Joint Selection Committees—a committee established under section 35A would be constituted by a convenor nominated by the MPRA, a person nominated by the relevant Commonwealth department or authority and a person nominated by the appropriate staff organisation.

##### *New section 35C—Member ceasing to act*

New section 35C provides that if, before a committee established under section 35A completes the performance of the requested functions, a member of the committee ceases for any reason to take part in the activities of the committee, the task would be completed by the remaining members and a new member nominated in accordance with section 35B. Similar provisions already apply in relation to other Review Committees and Joint Selection Committees.

#### Clause 8: Members of certain Committees not subject to direction

Section 36 of the Principal Act, which would be amended by this clause, provides that members of Review Committees are not subject to direction by any other person or by any body or authority other than a court.

Clause 8 would amend section 36 to provide that members of Joint Selection Committees, while acting as such and regardless of the enactment under which the committee is established, would also not be subject to direction by any other person or by any body or authority other than a court.

#### Clause 9: Procedure of Joint Selection Committees and Review Committees

Section 37 of the Principal Act provides that:

- a Review Committee is required to make such inquiries as it considers necessary into the matter before the committee;
- the procedure of the committee is, subject to any relevant legislation, within the discretion of the committee;
- the proceedings before the committee are to be conducted with as little formality and technicality and as quickly as a proper consideration of the matter before the committee permits; and
- the committee is not bound by rules of evidence.

Clause 9 would amend section 37 so that it would apply not only to Review Committees but also to Joint Selection Committees established under various enactments, including the *Public Service Act 1922*.

#### Clause 10: Insertion of new Division

This clause inserts a proposed new division, *Division 6A—Performance of functions on request*, into the Principal Act. The division consists of one new section—section 57A.

##### *New section 57A—Agency to perform functions on request*

New section 57A provides that, on the request of a Commonwealth department or authority and the appropriate staff organisation, the MPRA may perform functions specified in the request in relation to matters:

- affecting the employment of Commonwealth employees by the department or authority; and
- relating to the administration of the department or authority.

In broad terms, requests of this nature may cover employment-related matters not involving a formal appeal or application for review already provided for elsewhere in the Principal Act. The amendment will, for example, allow the MPRA to mediate in a dispute, select staff for transfer or, where there is a “spill” of positions, establish the order of merit.



## Clause 11: Insertion of new sections

Under section 50B of the Public Service Act, an officer who has applied unsuccessfully for a position (generally at the Administrative Service Officer level or equivalent) in the Australian Public Service may appeal to a Promotion Appeal Committee against the promotion of another officer on the ground that he or she is more efficient than the officer promoted. If the appellant is successful, he or she will be promoted instead of the other officer.

Under section 50DAA of the Public Service Act, an officer who has applied unsuccessfully for a position (generally at the Senior Officer level or equivalent) cannot appeal against the promotion of the successful applicant, but can apply for review of the promotion on the ground that the selection process involved either statutory or serious procedural breaches, or both. If the application is successful, the MPRA may recommend to the relevant Secretary that the promotion be cancelled.

Similar appeal and review provisions exist in other enactments.

Occasionally, officers lodge appeals against promotions when they should have lodged applications for review and vice versa.

Subclause 11(1) inserts 4 new sections—sections 58A, 58B, 58C and 58D—into the Principal Act. The purpose of these provisions is to enable the MPRA to deem a promotion appeal to be an application for review and *vice versa* and so help avoid situations where an officer with an otherwise valid entitlement may be disadvantaged because of his or her lack of detailed knowledge of the relevant legislation.

### *New section 58A—Certain purported appeals against non-appellable promotions in the Service may be treated as applications for review*

New section 58A would provide that if an officer who is entitled to lodge an application under section 50DAA of the *Public Service Act 1922* for review of a non-appellable promotion in the Australian Public Service (generally, a promotion to a Senior Officer position or equivalent) mistakenly lodges an appeal against that promotion under section 50B of that Act, the MPRA may notify the officer that he or she may, within 14 days:

request that the purported appeal be treated as an application for review;

- state the ground or grounds for the review; and

give the required particulars;

in which case the purported appeal would be taken to have been a properly lodged application for review.

*New section 58B—Certain purported appeals against non-appellable promotions outside the Service may be treated as applications for review*

New section 58B makes similar provision in relation to purported appeals against non-appellable promotions outside the Australian Public Service, that is, in relation to Commonwealth employees employed otherwise than under the *Public Service Act 1922*.

*New section 58C—Certain purported applications for review of appellable promotions in the Service may be treated as appeals*

New section 58C provides that if an officer who is entitled to lodge an appeal under section 50B of the *Public Service Act 1922* against a promotion to a position in the Australian Public Service (generally, a promotion to an Administrative Service Officer position or equivalent) mistakenly lodges an application for review of that promotion under section 50DAA of that Act, the MPRA may notify the officer that he or she may, within 14 days, request that the purported application for review be treated as an appeal.

If the officer makes such a request, the purported application for review would be taken to have been a properly lodged appeal.

*New section 58D—Certain purported applications for review of appellable promotions outside the Service may be treated as appeals*

New section 58D makes similar provision in relation to purported applications for review of appellable promotions outside the Australian Public Service, that is, in relation to Commonwealth employees employed otherwise than under the *Public Service Act 1922*.

### *Application*

Subclauses 11(2) and (3) would provide that new sections 58A, 58B, 58C and 58D apply to any purported appeals or applications for review made after the Act receives the Royal Assent.

### Clause 12: Insertion of new section

Clause 12 inserts a new section 79A - Agency not subject to direction - the effect of which would be that the MPRA, or a member of the MPRA acting as such, is not subject to direction by any other person or by any body or authority other than a court.

A similar provision (section 36 of the Principal Act) already exists in relation to Review Committee members.

### Clause 13: Offences

Section 81 of the Principal Act provides that it is an offence:

without reasonable excuse, to fail to provide information to the MPRA where so required under the Principal Act;

knowingly, to provide false information to the MPRA; or

to obstruct the MPRA, or an MPRA member, in the performance of the MPRA's functions or to disrupt a hearing of the MPRA.

Section 81 provides that the penalty for a given offence is a term of imprisonment or a fine, or both. Paragraphs 13(a) and (b) would amend subsections 81(1) and (2) by omitting the references to pecuniary penalties. A court, if it thinks it appropriate, will be able to convert the term of imprisonment to a pecuniary penalty (or add a pecuniary penalty to the term of imprisonment) calculated in accordance with the formula set out in subsection 4B(2) of the *Crimes Act 1914*.

Subsection 81(3) as currently drafted makes it an offence for a person to obstruct or hinder the MPRA or a member of the MPRA or to disrupt an MPRA hearing. Paragraph 13(c) will omit subsection 81(3) and substitute a new provision which would expand the offence to include hindrance or obstruction of a Review Committee or member of a Review Committee, or the disruption of a Review Committee hearing.

### Clause 14: Officers to observe secrecy

Section 84 of the Principal Act requires the members and staff of the MPRA not to divulge any information acquired by them in the performance of their duties, except for purposes connected with the performance of the MPRA's functions, and provides that the members and staff of the MPRA may not be compelled to divulge such information in any legal proceedings.

Paragraphs 14(a) and (b) would amend section 84 so that it would apply not only to the members and staff of the MPRA but also to members of Joint Selection Committees and Review Committees.

Paragraph 14(c) would omit the reference to a pecuniary penalty in subsection 84(2)—see the note on clause 13 re subsection 4B(2) of the *Crimes Act 1914*. Paragraph 14(d) would amend subsection 84(5) to provide that a person to whom the section applies is not competent and may not be required to divulge information to which the section applies in any legal proceedings. In effect, he or she could not elect, as a matter of his or her discretion, to give evidence and disclose confidential information obtained under the Principal Act.

#### Clause 15: Regulations

Section 85 of the Principal Act provides a regulation-making power by which the Governor-General may make regulations, not inconsistent with the Act, prescribing matters:

- required or permitted by the Act to be so prescribed; or
- necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Paragraph 85(2)(g) allows regulations to be made imposing a penalty, not exceeding a fine of \$500, for failing to comply with a summons issued by a Disciplinary Appeal Committee, to give evidence or produce documents. Clause 15 would amend paragraph 85(2)(g) to allow regulations to be made imposing a similar penalty on persons who fail to comply with a summons issued by a Redeployment and Retirement Appeal Committee.

#### Clause 16: Additional amendments

Clause 16 provides for the Principal Act to be amended as set out in the Schedule.

### SCHEDULE

The effect of the amendments is to identify each reference to the former Public Service Board in the Principal Act and to provide for them to be replaced with the terms "Public Service Commissioner" or "Commissioner", as appropriate.







