

1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**PRIME MINISTER AND CABINET
(MISCELLANEOUS PROVISIONS) BILL 1993**

EXPLANATORY MEMORANDUM

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



**PRIME MINISTER AND CABINET
(MISCELLANEOUS PROVISIONS) BILL 1993**

OUTLINE

This Bill proposes a number of amendments to legislation administered within the portfolio of the Prime Minister, to make provision for Cabinet notebooks and to make consequential amendments to the *Superannuation Act 1976*.

Archives Act 1983

The Bill will amend the *Archives Act 1983* to make Cabinet notebooks subject to the provisions of that Act and to allow public access after 50 years.

Australian Science and Technology Council Act 1978

The main purpose of these amendments is to transfer staff supporting the Australian Science and Technology Council to the Department of the Prime Minister and Cabinet for the purposes of the *Public Service Act 1922*. The Bill also makes a number of minor technical amendments, including the replacement of references to the "Chairman" and "Deputy Chairman" with gender-neutral expressions.

Freedom of Information Act 1982

The *Freedom of Information Act 1982* will be amended to exclude Cabinet notebooks from the operation of the Act.

Merit Protection (Australian Government Employees) Act 1984

The amendments to this Act will:

- remove any doubt that the various appeal, review and grievance rights of Commonwealth employees under the Act are extended to staff employed under an industrial award by a statutory authority of the Commonwealth; and
- give the Merit Protection and Review Agency a discretion in appropriate cases to stop investigating a decision or action and to transfer it to the Ombudsman for investigation.

Ombudsman Act 1976

These amendments would implement the Government's response, tabled at the end of 1992, to the Report of the Review of the Office of the Ombudsman by the Senate Standing Committee on Finance and Public Administration. The amendments will:

- . clarify the jurisdiction of the Ombudsman in relation to incorporated companies over which the Commonwealth is able to exercise control and extend the Ombudsman's jurisdiction to Parliamentary Departments and federal court registries;
- . give the Ombudsman a discretion to decline to investigate or to cease investigating commercial actions of bodies otherwise within jurisdiction;
- . allow the Ombudsman to transfer a complaint to the Australian Broadcasting Authority, the Merit Protection and Review Agency or to an industry ombudsman, where appropriate;
- . allow a person specified in a notice by the Ombudsman to administer an oath or affirmation;
- . allow the Ombudsman to provide ombudsman-type services, on a fee for service basis, to other persons or bodies; and
- . allow the Minister rather than the Governor-General to appoint a person to act as Ombudsman.

Amendments will also preclude the Ombudsman from investigating the actions of public servants employed by the WA Government carrying out actions on behalf of the Commonwealth in relation to the Indian Ocean Territories.

Public Service Act 1922

The Bill includes amendments to the *Public Service Act 1922* to:

- . deal with certain aspects of the discipline process as it relates to unattached officers ~ to bring it more into line with the process that applies in relation to other officers ~ and to remedy a flaw in the suspension provisions;
- . ensure that the appeal mechanism available to excess officers in relation to transfers is only available to those excess officers who have applied for transfer to a position notified in the Gazette;
- . allow for the use of a Joint Selection Committee order of merit in filling identical and subsequent vacancies;
- . enable implementation of new remuneration arrangements for Secretaries and statutory office holders;

make other minor or technical amendments.

Royal Commissions Act 1902

The purpose of this amendment is to include the Australian Bureau of Criminal Intelligence as a body to which a Royal Commission can communicate information or evidence about a Commonwealth, State or Territory offence that the Commission obtains in the course of its inquiries.

Superannuation Act 1976

The Bill will amend the *Superannuation Act 1976* as a consequence of the decision to appoint Secretaries and holders of certain statutory offices for a limited tenure with new remuneration arrangements under the *Public Service Act 1922*.

The amendments would provide, among other things, that:

- where, immediately before appointment for a fixed term, the appointee had a right to superannuation involuntary retirement benefits if his or her services had no longer been required, the person generally would retain that right should his or her services not be required at the expiry of the fixed term;
- where, immediately before appointment for a fixed term, the appointee had no right to superannuation involuntary retirement benefits if his or her services had no longer been required, the person generally would not have such a right should his or her services not be required at the expiry of the fixed term; and
- where the appointment for a fixed term is terminated before its expiry, the person generally would be entitled to receive superannuation involuntary retirement benefits.

Council for Aboriginal Reconciliation Act 1991

The Act is amended to correct a drafting error.

FINANCIAL IMPACT STATEMENT

The amendment to the *Australian Science and Technology Council Act 1978* would result in some savings of an administrative nature. The remaining amendments are not expected to have any significant financial impact.

NOTES ON CLAUSES

PART 1 – PRELIMINARY

Clause 1: Short title

The Act will be called the *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1993*.

Clause 2: Commencement

Subclause 2(1) provides for the commencement of the Act, with the exception of clause 15(1), on the day on which it receives Royal Assent. Clause 15(1), the purpose of which is to amend the definition of "enactment" in the *Merit Protection (Australian Government Employees) Act 1984*, is taken to have commenced on 25 June 1984 (see Notes on clause 15).

PART 2 – AMENDMENTS OF THE ARCHIVES ACT 1983

Clause 3: Principal Act

This clause defines the term "Principal Act" to mean the *Archives Act 1983* for the purposes of Part 2 of the Bill.

Clause 4: Interpretation

This clause amends the definition of "Commonwealth record" in section 3 of the *Archives Act 1983* to delete the reference to Cabinet notebooks with the effect that Cabinet notebooks will no longer be excluded from the provisions of the Act.

Clause 5: Insertion of new section 22A

This clause inserts new section 22A in the Archives Act to ensure that a Cabinet notebook does not fall into the open access period for the purposes of that Act until the expiration of 50 years from the end of the calendar year in which it came into existence. For other Commonwealth records, the period is 30 years.

Clause 6: Application

This clause provides that the amendments to the Archives Act in clause 4 and 5 apply to Cabinet meetings and Cabinet notebooks regardless of whether they were held or created before or after the commencement of the amendments.

PART 3 – AMENDMENTS OF THE AUSTRALIAN SCIENCE AND TECHNOLOGY COUNCIL ACT 1978

Clause 7: Principal Act

This clause defines "Principal Act" to mean the *Australian Science and Technology Council Act 1978* for the purposes of Part 2 of the Bill.

Clause 8: Definitions

Clause 8 of the Bill amends section 3 of the *Australian Science and Technology Council Act 1978* which contains definitions of various terms used in the Act.

Subclause 8(a) omits the definition of "member" of the Council and substitutes a new definition in gender-neutral language.

Subclause 8(b) and subclause 8(c) omit the definitions of "Chairman" and "Deputy Chairman" and insert in their place gender-neutral definitions of "Chairperson" and "Deputy Chairperson".

Clause 9: Membership

Section 10 of the *Australian Science and Technology Council Act 1978* provides that the Council consists of a Chairman, a Deputy Chairman and between 3 and 13 other members. The effect of subclause 9(1) is to remove the references to "Chairman" and "Deputy Chairman" and replace them with "Chairperson" and "Deputy Chairperson". Subclauses 9(2) and (3) save the appointments of persons holding the office of Chairman or Deputy Chairman of the Council immediately before the commencement of the section.

Clause 10: Staff

Section 19 of the *Australian Science and Technology Council Act 1978* provides for the engagement of staff under the *Public Service Act 1922* to assist the Council in the performance of its functions. Powers of a Secretary under the Public Service Act are conferred on the "prescribed officer" in relation to those staff. (The "prescribed officer" is the person who performs full time the duties of the Chairman or, if there is no person performing those duties full time, the most senior staff member.)

Section 20 of the *Australian Science and Technology Council Act 1978* allows arrangements to be made between the Council and a Commonwealth authority for the services of officers or employees of that authority to be made available to the Council. As an efficiency measure, the staff supporting the Council will be integrated into the Department of the Prime Minister and Cabinet, rather than being a separate department for the purposes of the *Public Service Act 1922* as they are now.

Clause 10 repeals existing sections 19 and 20 and replaces them with a new section 19 which provides that the staff required to assist the Council are to be appointed or employed under the *Public Service Act 1922* and made available by the Secretary to

the Department of the Prime Minister and Cabinet. Proposed subsection 19(2) provides that the staff will work under the direction of the Council, the Chairperson or a person appointed by the Council as its representative for these purposes.

PART 4 – AMENDMENTS OF THE FREEDOM OF INFORMATION ACT 1982

Clause 11: Principal Act

This clause defines "Principal Act" to mean the *Freedom of Information Act 1982* for the purposes of Part 4 of the Bill.

Clause 12: Interpretation

This clause defines "Cabinet notebook" for the purposes of the *Freedom of Information Act 1982* and removes Cabinet notebooks from the definition of "document" in subsection 4(1) of that Act. The effect of these amendments is that the Freedom of Information Act does not apply to Cabinet notebooks and therefore access to them is not available under the Act.

Clause 13: Application

This clause provides that the amendment at clause 12 applies to Cabinet meetings and Cabinet notebooks regardless of whether they were held or created before or after the commencement of the amendments

PART 5 – AMENDMENTS OF THE MERIT PROTECTION (AUSTRALIAN GOVERNMENT EMPLOYEES) ACT 1984

Clause 14: Principal Act

This clause defines the term "Principal Act" to mean the *Merit Protection (Australian Government Employees) Act 1984* for the purposes of Part 3 of the Bill.

Clause 15: Definitions

The *Merit Protection (Australian Government Employees) Act 1984* (the Merit Protection Act) allows the Merit Protection and Review Agency (the Agency) to conduct appeals and reviews and investigate grievances of persons employed under an "enactment" if the enactment so provides. "Enactment" is defined in section 3 of the Merit Review Act to include an Act, an Ordinance of the ACT or an instrument (including determinations, rules, regulations or by laws) made under an Act or Ordinance. The full bench of the Australian Industrial Relations Commission has expressed the view that the definition of "enactment" in section 3 of the Merit Protection Act may not be sufficiently broad to include an industrial award.

Subclause 15(1) would omit subsection (c) of the existing definition of "enactment" and substitute a new definition which would remove any doubt that the Agency has

jurisdiction over Commonwealth employees employed by a statutory authority under an industrial award.

By subclause 2(2), the amendment made by this subclause would be taken to have commenced on the date that the Merit Protection Act received Royal Assent (25 June 1984). This will preserve the status of matters already dealt with by the Agency.

Subclause 15(2) would restructure the definition of "enactment" to ensure that the Agency will be able to conduct appeals and reviews and investigate grievances of persons employed under a law of the Australian Capital Territory.

Clause 16: Discretion not to investigate

The clause inserts new subsections in section 49 of the Merit Protection Act which allow the Agency to transfer to the Ombudsman for investigation any application which could have been made to the Ombudsman and would be more appropriately investigated by the Ombudsman. The provision requires the Agency to give the Ombudsman any information or documents relating to an application which is transferred, and to inform the applicant of the transfer as soon as practicable.

This amendment mirrors the proposed amendment to the *Ombudsman Act 1976* (see Notes on clause 22) which allows the Ombudsman to transfer a complaint to the Merit Protection and Review Agency if he or she is of the opinion that the Agency could be more conveniently or effectively deal with the complaint.

PART 6 – AMENDMENTS OF THE OMBUDSMAN ACT 1976

Clause 17: Principal Act

This clause defines "Principal Act" to mean the *Ombudsman Act 1976* for the purposes of Part 4 of the Bill.

Clause 18: Definitions

Section 3 of the Ombudsman Act, which would be amended by this clause, defines various terms used in the Act. Clause 18 of the Bill inserts into section 3 definitions of the terms "chief executive officer of a court or tribunal", "Commonwealth-controlled company", "ombudsman scheme", "Parliamentary Department" and "Secretary".

The term "chief executive officer of a court or tribunal" is defined to mean the Clerk of the High Court, the Registrar of the Federal Court of Australia, the Chief Executive Officer of the Family Court of Australia, the Registrar of the Administrative Appeals Tribunal (or an office prescribed by the regulations in lieu of one of these specified offices) or the holder of an office declared by the regulations to be an office of chief executive officer of a court or tribunal for the purposes of the Act. The purpose of the amendment is to ensure that the administrative actions of these and other officers employed in courts and tribunals are actions which the Ombudsman may investigate.

A "Commonwealth-controlled company" is defined to mean an incorporated company in which the Commonwealth has an interest that allows the Commonwealth:

- . to control the composition of the board of directors;
- . to cast, or control the casting of, more than half of the votes at a general meeting of the company; or
- . to control more than half of the issued share capital of the company (excluding any amount that carries no right to participate beyond a specified amount in a distribution of profits or capital).

(This definition is relevant to the amended definition of "prescribed authority" – see Notes on clause 18(b).) New section 3AB, which will be inserted by clause 19, determines whether a Commonwealth-controlled company is a "prescribed authority" for the purposes of the Act.

An "ombudsman scheme" is defined to mean a scheme providing for the investigation of complaints by consumers about matters relating to decisions or actions of the holders of licences or authorities granted under Commonwealth legislation. (Clause 21 of the Bill will amend section 5 of the Ombudsman Act to allow the Ombudsman, with the approval of the Minister, to accept appointments and perform functions under an Ombudsman scheme established in accordance with the conditions of licences or authorities issued under Commonwealth legislation.)

"Parliamentary Department" is defined to mean the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff or the Joint House Department.

"Secretary" is defined to mean, in relation to a Department, the person who is Secretary of the Department for the purposes of the *Public Service Act 1922*.

Subsection 3(1) of the Ombudsman Act includes a definition of the term "prescribed authority", paragraph (b) of which defines that term to mean an incorporated or unincorporated body (other than Qantas or a subsidiary of Qantas), which has been established by the Governor-General or by a Minister or which is an incorporated company controlled by the Commonwealth and which has been declared by regulations to be a prescribed authority for the purposes of the Act. Clause 18(b) of the Bill will omit existing paragraph (b) of the definition of "prescribed authority" and substitute a new definition which will mean that:

- . a Commonwealth-controlled company (other than Qantas or a Qantas subsidiary) that is a prescribed authority by virtue of new section 3AB (see Notes on clause 19);
- . a body corporate or an unincorporated body established by the Governor-General or by a Minister and declared by the regulations to be a prescribed authority; and

the chief executive officer of a court or tribunal (as defined),

will all be "prescribed authorities" for the purposes of the Act. The practical effect of these changes will be that, from the date of commencement, a Commonwealth-controlled company created after the commencement of the amendments will fall within the Ombudsman's jurisdiction unless it is excluded by regulations made under the Act. (Currently, a company owned by the Commonwealth within the Ombudsman's jurisdiction only if the regulations declare it to be so. The effect of regulations already in existence will be preserved by new section 3AB.)

Clause 18(b) of the Bill also makes changes to the present paragraph (c) of the definition of "prescribed authority" which are consequential on the definition of "chief executive officer of a court or tribunal".

A new definition of "Department" is inserted by clause 18(c) to include the Parliamentary Departments. Complaints about the actions of those departments will therefore be subject to investigation by the Ombudsman.

Clause 18(d) of the Bill inserts a new subsection 3(14), the purpose of which is to make clear that officers of a court or tribunal, registry staff, employees of a Department or Commonwealth authority whose services are made available to a court or tribunal and persons declared by the regulations to be members of the staff of a court or tribunal are to be taken to be members of the staff of the chief executive officer of the court or tribunal.

Proposed subsection 3(15) will ensure that a judge of a court or a member of a tribunal will be excluded from the definition of "an officer of a court or tribunal".

The clause also inserts new subsections 3(16), (17) and (18) which, taken together, provide that, in the case of matters concerning courts, tribunals and Parliamentary Departments, "responsible Minister" is to be read in a particular way in provisions of the Act relating to notification to that Minister. In the case of a court, the reference to the "responsible Minister" is to be read as a reference to the chief justice or chief judge of that court; in a matter concerning the Administrative Appeals Tribunal, as a reference to the President of the Tribunal; in a matter concerning another tribunal to the president or principal member of that tribunal; in a matter concerning the Department of the Senate to the President of the Senate; in a matter concerning the Department of the House of Representatives to the Speaker; and in a matter concerning any other Parliamentary Department to the President and the Speaker.

Clause 19: Prescribed authorities

Clause 19 will insert a new section 3AB which would determine when a "Commonwealth-controlled company" is to be taken to be within the new definition of "prescribed authority" [see Notes on clause 18(b)]. A "Commonwealth-controlled company" will be a prescribed authority unless it is declared by the regulations not to be so, or is a company in which the Commonwealth held a controlling interest prior to the commencement of these provisions, but which had not been declared by the regulations to be a "prescribed authority". There is provision for regulations to allow

companies of the latter kind to be included within the Ombudsman's jurisdiction in appropriate cases.

Clause 20: Establishment of offices of Ombudsman and Deputy Ombudsman

Paragraph 4(1)(b) of the Ombudsman Act provides for there to be three Deputy Commonwealth Ombudsmen. Clause 20 would omit paragraph 4(1)(b) and replace it with a new provision which would require that there be at least one, but not more than three, Deputy Commonwealth Ombudsmen.

Clause 21: Functions of Ombudsman

Subsection 5(1) of the Ombudsman Act provides that the functions of the Ombudsman include investigation of an action relating to a matter of administration taken by a Department or a prescribed authority, either as a result of a complaint or of his or her own accord.

Clause 21(a) inserts a new paragraph (c) into subsection 5(1) which allows the Ombudsman, with the consent of the Minister, to perform ombudsman-type functions under an "ombudsman scheme". The purpose of this amendment is to allow the Ombudsman to perform these functions under a scheme set up to provide a mechanism for the investigation of complaints by consumers about the actions of holders of licences or authorities under Commonwealth legislation.

Subsection 5(2) of the Ombudsman Act precludes the Ombudsman from investigating certain actions, such as those of a Minister or Judge. Clause 21(b) inserts a new paragraph 5(2)(aa) into the Act to ensure that in investigating the actions of a Parliamentary Department, the Ombudsman does not investigate proceedings of the Parliament (as defined in section 16 of the *Parliamentary Privileges Act 1987*).

Clause 21(c) inserts a new paragraph 5(2)(ba) to ensure that in investigating the actions of officers of a court, the Ombudsman is precluded from investigating actions of a judicial nature or which amount to the exercise of a power of the court. The effect of this amendment, in conjunction with the new definition of "chief executive officer of a court or tribunal" (see Notes on clause 18(a)), is to bring administrative actions of federal courts into the jurisdiction of the Ombudsman, while excluding actions of a judicial nature.

Clause 21(d) inserts new subsections 5(5) and 5(6). The purpose of these subsections is to preclude the Ombudsman from investigating an action taken by a person employed by the Western Australian government, where that action is taken under a law of Western Australia as it is applied to either Christmas Island or the Cocos (Keeling) Islands. (Western Australian laws may apply to the Territory of Christmas Island by virtue of the operation of the *Christmas Island Act 1958*, and to the Territory of Cocos (Keeling) Islands by virtue of the *Cocos (Keeling) Islands Act 1955*.)

A new subsection 5(7) will also be inserted by this clause, the effect of which will be to allow the Ombudsman to impose a charge for ombudsman-type functions performed by the Ombudsman under an industry ombudsman scheme.

Clause 22: Discretion not to investigate certain complaints

Section 6 of the Ombudsman Act provides the Ombudsman with a discretion to decline to investigate actions taken by Departments or prescribed authorities if, for example, the complainant was aware of the action more than 12 months prior to the complaint being made or if the complaint is vexatious or frivolous or has not first been investigated by the Department or prescribed authority to which the action relates. It also provides the Ombudsman with a discretion to decline to investigate, for example, matters that could be investigated by the Privacy Commissioner and to transfer the complaint and relevant documents to the Commissioner.

Clause 22 would insert a number of new subsections into section 6 which have the effect of extending the power of the Ombudsman to decline to investigate complaints and to transfer them to another body where the Ombudsman considers it could be more conveniently or effectively dealt with by that other body.

New subsection 6(6) permits the Ombudsman to decide not to investigate, or further investigate an action of a prescribed authority that is a national broadcasting service for the purposes of the *Broadcasting Services Act 1992* (eg the Australian Broadcasting Corporation) and to transfer the complaint to the Australian Broadcasting Authority if the complaint could have been made to the Authority and the Ombudsman considers that it could more conveniently or effectively be dealt with by the Authority. Proposed new subsection 6(7) requires the Ombudsman to effect such a transfer as soon as possible, give the Authority any information or documents relating to the complaint, and notify the complainant in writing that the complaint has been transferred. Proposed new subsection 6(8) provides that such a complaint is to be taken as if it were a complaint made under the *Broadcasting Services Act 1992*.

Similar provisions allowing the Ombudsman to transfer complaints to the Merit Protection and Review Agency are inserted by proposed subsections 6(9), 6(10) and 6(11). These provisions mirror the proposed amendment to the *Merit Protection (Australian Government Employees) Act 1984* which allows the Merit Protection and Review Agency to transfer applications for investigation to the Ombudsman if appropriate (See Notes on clause 16).

Proposed new subsection 6(9) permits the Ombudsman to transfer a complaint to the Merit Protection and Review Agency where it would be more convenient or effective for the Agency to investigate the complaint. New subsection 6(10) would require the Ombudsman to transfer the complaint as soon as possible, to give the Merit Protection and Review Agency any information or documents relating to such a complaint, and to notify the complainant in writing that the complaint has been transferred. Proposed new subsection 6(11) provides that a complaint that is transferred in this manner is to be taken to have been made under the *Merit Protection (Australian Government Employees) Act 1984*.

New subsection 6(12) provides that, if the Ombudsman forms the opinion that a complaint relates to a commercial activity of a Department or prescribed authority, the Ombudsman may decide not to investigate it.

Provisions allowing a complaint to be transferred to an industry ombudsman are inserted by proposed new subsections 6(13), 6(14) and 6(15). Proposed subsection 6(13) permits the Ombudsman to transfer a complaint to an industry ombudsman where the complaint relates to an action taken by the holder of a licence or authority issued under Commonwealth legislation and where it would be more convenient or effective for it to be investigated by such a person. New subsection 6(14) requires the Ombudsman to transfer a complaint of this kind as soon as possible, to give the industry ombudsman such information and documents as the Ombudsman considers are necessary for the industry ombudsman to deal with the complaint.

Proposed subsection 6(15) defines the term "industry ombudsman" for a particular industry ombudsman scheme to mean a person holding or acting in an office declared by the regulations to be the industry ombudsman office for that industry.

Clause 23: Power to examine witnesses

Subsection 9(2) of the Ombudsman Act allows the Ombudsman to require persons believed to have information relevant to an investigation to attend before a person specified in a notice and to answer questions relevant to the investigation. Under section 13, the Ombudsman is able to examine under oath or affirmation a person called to attend for the purposes of an investigation.

This clause inserts a new subsection 13(2) into the Ombudsman Act which allows the person specified in the notice to administer an oath or affirmation and to examine the witness without the need for a separate delegation of these powers.

Clause 24: Reports where appropriate action not taken on Ombudsman's report

Section 16 of the Ombudsman Act provides that where the Ombudsman has made a report to a Department or prescribed authority and the Department or authority has not taken appropriate action with respect to the matters and recommendations included in that report within a reasonable time of receiving it, the Ombudsman may report the matter to the Prime Minister.

Clause 24 of the Bill amends section 16 by inserting new subsections 16(4), (5) and (6), the effect of which is to provide that, rather than informing the Prime Minister about a failure to take appropriate action in respect of an Ombudsman's report, the Ombudsman may provide the information as follows:

- if the report relates to the Department of the Senate – to the President of the Senate;
- if the report relates to the Department of the House of Representatives – to the Speaker of the House of Representatives;
- in any other case involving a report relating to a Parliamentary Department – to the President of the Senate and the Speaker of the House of Representatives;

- if the report relates to the chief executive officer of a court – to the chief justice or chief judge of the court; and
- if the report relates to chief executive officer of a tribunal – to the President of the Tribunal or equivalent.

In any other case, the Ombudsman will continue to report to the Prime Minister in these circumstances.

Clause 25: Special reports to Parliament

This clause makes an amendment to section 17 of the Ombudsman Act which is consequential upon the amendments made to section 16 by clause 24.

Clause 26: Acting appointments

Under section 29 of the Ombudsman Act, the Governor-General is able to appoint a person to act as the Commonwealth Ombudsman during a vacancy in the office or when the Ombudsman is absent from duty. The maximum length of time for which a person can act as the Ombudsman is twelve months.

This clause will amend section 29 so that the Minister, rather than the Governor-General, will be able to appoint persons to act as the Ombudsman and terminate such an appointment.

Subclause 26(2) saves the appointment of any person acting in the office of Commonwealth Ombudsman immediately before the commencement of the section.

PART 7 – AMENDMENTS OF THE PUBLIC SERVICE ACT 1922

Clause 27: Principal Act

This clause defines the term "Principal Act" to mean the *Public Service Act 1922* for the purposes of Part 7 of the Bill.

Clause 28: Public Service Commissioner

Subsection 11(6) of the Act currently provides for the Public Service Commissioner, upon appointment, to be deemed to be an unattached Secretary thereby making the Commissioner potentially subject, upon completion of his or her appointment, to the redeployment and retirement provisions of the Act that relate to unattached Secretaries. This clause amends subsection 11(6) to put beyond doubt that the Public Service Commissioner ceases to be an unattached Secretary if he or she resigns from the public service. Such resignation would be required if the Commissioner elects to be covered by the changed remuneration arrangements the Government is seeking to make available for Secretaries of departments and certain equivalent level statutory office-holders such as the Commissioner.

Clause 29: Powers of Commissioner

Amends section 19 of the Act to substitute a new penalty in line with advice received from the Attorney-General's Department.

Clause 30: Classification of offices and officers

Amends subsection 28(4) of the Act to reflect the additional mechanisms by which an officer may become unattached without consent which are inserted into the Public Service Act by this Bill. The additional mechanisms relate to the discipline process for unattached officers which is being amended. The opportunity has also been taken to include references to other relevant sections of the Act (sections 76L and 76W).

Clause 31: Fixed-term appointments

Section 37 of the Act is currently restricted to enabling the appointment of persons from **outside** the public service as Secretaries of departments on a fixed-term basis, that is, their appointment as a Secretary does not give them tenure in the service beyond the expiry or termination of the term of appointment. This provision has in practice not been used since its inclusion in the Act in 1984 and all Secretaries, whether from inside or outside the service, have been appointed on the basis that, while they do not have tenure in the particular position of Secretary to which they have been appointed, they do have continuing tenure in the public service.

This clause amends section 37 so that it can be applied to **existing** officers of the service including existing Secretaries. The Government has decided to seek changes in the remuneration arrangements applying to Secretaries of departments so that if Secretaries (including existing Secretaries) elect to accept appointment on a fixed-term basis they receive a limited tenure margin determined by the Remuneration Tribunal.

Section 37 as amended by this clause will enable the Governor-General to determine that an appointment as Secretary is for a fixed-term of up to five years. The amendment does not affect the present requirements for the appointment of Secretaries, that is that the appointment be made on the recommendation of the Prime Minister after consideration of a report prepared by the Secretary of the Department of the Prime Minister and Cabinet (or by the Public Service Commissioner when that Secretary position is being filled).

The Governor-General, on the recommendation of the Prime Minister, as at present, will be able to terminate the appointment of a Secretary at any time. Where a Secretary's appointment is terminated before the expiry of the original term he or she will be entitled to compensation as determined by the Governor-General at the time of appointment. (The rate of compensation will be the same as determined by the Remuneration Tribunal for statutory office-holders in a similar situation, that is, four months' pay for each year of service foregone.)

Section 37 as amended will make it clear that when a Secretary's position is abolished, when his or her term has expired, or when it is terminated early, the Secretary is retired

from the service. While he or she will then be entitled to superannuation involuntary retirement benefits, the retiring Secretary will not be entitled to any special lump sum benefit determined by the Public Service Commissioner under section 76FA as is the case for unattached Secretaries who have continuing tenure in the public service.

The clause also amends section 37 to include provision to enable short-term postponement of the retirement of a Secretary. On occasions this will avoid the need for the Secretary to cease to be employed during short gaps between appointments. It is also intended that Secretaries whose appointments have expired, or are terminated, and for whom no further appointment is immediately available, should have up to three months' further employment with the Commonwealth while seeking a new long-term appointment. It is intended that Secretaries would retain their previous terms and conditions of employment during such further employment and that similar arrangements would also apply to equivalent level statutory office holders.

Clause 32: Transfer or promotion on advice of Joint Selection Committee

Amends section 50DA of the Act to permit the order of merit provided by a Joint Selection Committee (JSC) to be used to fill identical and subsequent vacancies under section 50DA. The Act currently permits the Secretary of a Department in limited circumstances to use the order of merit in a selection process to fill a vacant office by promotion under section 50 of the Act without advertising the vacancy. This amendment will permit filling in similar circumstances under section 50DA.

Clause 32 of the Bill inserts new subsections (11), (12) and (13) in section 50DA.

New subsection 50DA(11) provides that where a JSC has advised a Secretary with respect to the filling of a vacant office and either:

- the person who is the subject of the recommendation advises that he or she is no longer available to be promoted or transferred to the vacant office; or
- within 6 months after the original office is filled in accordance with the advice of the JSC the original office again becomes vacant (eg. the person never takes up duty or moves to another position shortly after taking up duty) or an identical office in the same department becomes vacant,

the Secretary may promote or transfer the applicant next in order of merit according to the advice of the JSC to the original office or the identical office as the case may be.

New subsection (12) provides that offices are identical if the classification, duties and geographical location of the offices are the same.

New subsection (13) provides that where the Secretary promotes an officer in accordance with subsection (11) the promotion is taken to be in accordance with the advice of the JSC. The effect of this is to provide that the second promotion like the original promotion will not be appealable.

Clause 33: Transfer or promotion on advice of management-initiated Joint Selection Committee

Amends section 50DB of the Act to permit the order of merit provided by a Joint Selection Committee (JSC) to be used to fill identical and subsequent vacancies under section 50DB. The Act currently permits the Secretary of a Department in limited circumstances to use the order of merit in a selection process to fill a vacant office by promotion under section 50 of the Act without advertising the vacancy. The amendment in clause 32 above will permit filling in similar circumstances under section 50DA of the Act and this amendment will make similar amendments to section 50DB.

Clause 33 of the Bill inserts new subsections (12), (13) and (14) in section 50DB.

New subsection 50DB(12) provides that where a JSC has advised a Secretary with respect to the filling of a vacant office and either:

- the person who is the subject of the recommendation advises that he or she is no longer available to be promoted or transferred to the vacant office; or
- within 6 months after the original office is filled in accordance with the advice of the JSC the original office again becomes vacant (eg. the person never takes up duty or moves to another position shortly after taking up duty) or an identical office in the same department becomes vacant,

the Secretary may promote or transfer the applicant next in order of merit according to the advice of the JSC to the original office or the identical office as the case may be.

New subsection (13) provides that offices are identical if the classification, duties and geographical location of the offices are the same.

New subsection (14) provides that where the Secretary promotes an officer in accordance with subsection (12) the promotion is taken to be in accordance with the advice of the JSC.

Clause 34: Promotion appeal rights of certain officers

Clause 34 amends section 50H of the Act to ensure that the special appeal mechanism which permits excess officers to appeal against the promotion of another person to a vacant office, the classification of which is equal to or lower than the classification of the office occupied by the excess officer, is only available to those excess officers who have applied for transfer to the vacant office when it was notified in the Gazette. This brings the special appeal provision in line with the common appeal provision in section 50B of the Act.

Clause 34 inserts new subsection 50H(2B) which provides that an excess officer is not entitled to appeal against the promotion of a person unless the officer had applied for a transfer to the vacant office.

Clause 35: Suspension

Clause 35 amends section 63B of the Act to provide for a power of suspension where an officer has been convicted of a criminal offence or where, without recording a conviction, a court has made a finding that an officer has committed such an offence.

Section 63B currently provides a power of suspension and a power to direct an officer to perform other duties temporarily where the officer has been charged with having committed a criminal offence and the Secretary is of the opinion that, inter alia, it would be prejudicial to the effective operation of the APS if the officer were to continue to perform duty pending the hearing and determination of the charge.

New subsection 63B(1A) provides an additional power to suspend or direct following the determination of the charge but before the Secretary has finalised disciplinary action under section 63 of the Act.

New subsection 63B(1B) provides that the same considerations as to the effective operation of the Service and the interests of the public, the officer or other officers as are relevant in a decision to suspend or direct where an officer has been charged with a criminal offence are to be relevant in the exercise of this additional suspension and direction power.

New subsection 63B(1C) replicates the opportunity to be heard provision contained in 63B but repealed by this amendment and extends it to the additional suspension and direction power.

Clause 36: Removal and variation of suspension

This clause amends section 63C to make consequential amendments made necessary by the amendments to section 63B.

Clause 37: Suspension

This clause amends the Act by inserting a new section 63JA into Subdivision D of Division 6 of Part III of the Act which relates to the discipline provisions relevant to officers employed otherwise than in a Department.

New section 63JA provides a mechanism to introduce a new power of suspension and direction for use in the discipline process in relation to a class of officers described as "unattached officers" as defined in section 63J of the Act.

New subsection 63JA(1) provides a regulation-making power by which the provisions of the suspension powers in sections 63B and 63C of the Act which apply to officers other than unattached officers may be modified and adapted to apply to unattached officers.

New subsection 63JA(2) defines "modification" as including the addition or omission of a provision or the substitution of a provision for another provision.

New subsection 63JA(3) is an interpretive clause providing that sections 63B and 63C of the Act are to be regarded as included in Subdivision D of Division 6 of Part III of the Act for certain purposes.

Clause 38: Misconduct committed before becoming an unattached officer

Clause 38 amends section 63K of the Act to:

- widen the range of sanctions available to the person holding an inquiry where that person is satisfied that an unattached officer has committed misconduct before becoming unattached; and
- provide a provision preserving the applicability of Subdivision D of Division 6 of Part III of the Act where disciplinary action has commenced under section 63K of that subdivision but before the action is concluded the person ceases to be an unattached officer.

Subclause 38(a) inserts new subsections 63K(3), 63K(3A) and 63K(3B).

New subsection 63K(3) replicates the counselling sanction available under current subsection 63K(3) which is omitted by this clause.

New subsection 63K(3A) provides the wider range of sanctions available when the person holding an inquiry is of the opinion that counselling is not sufficient. In addition to dismissal from the Service which is currently available, it provides for the new sanctions of admonishment, direction to deduct an amount from money due by the Commonwealth to the officer, and reduction in classification. This amendment is to bring the available sanctions more closely into alignment with the sanctions available when dealing with misconduct where an officer who is not an unattached officer is involved.

New subsection 63K(3B) defines the term "money due by the Commonwealth to an officer" which occurs in subsection 63K(3A).

Subclause 38(b) makes a consequential amendment to subsection 63K(4) of the Act.

Subclause 38(c) makes a consequential amendment to subsection 63K(5) of the Act.

Subclause 38(d) inserts a new subsection (8) in section 63K which provides that where a person is charged under section 63K of the Act but before disciplinary action has been finalised the person ceases to be an unattached officer but remains an officer, the disciplinary action so commenced may be completed as if the person were still an unattached officer.

Clause 39: Misconduct while unattached officer

Clause 39 amends section 63L of the Act to:

- widen the range of sanctions available to the person holding an inquiry where that person is satisfied that an unattached officer has committed misconduct while an unattached officer; and
- provide a provision preserving the applicability of Subdivision D of Division 6 of Part III of the Act where disciplinary action has commenced under section 63L of that subdivision but before the action is concluded the person ceases to be an unattached officer.

Subclause 39(a) inserts new subsection 63L(3), 63L(3A) and 63L(3B).

New subsection 63L(3) replicates the counselling sanction available under current subsection 63L(3) which is omitted by this clause.

New subsection 63L(3A) provides the wider range of sanctions available when the person holding an inquiry is of the opinion that counselling is not sufficient. In addition to dismissal from the Service which is currently available it provides for the new sanctions of admonishment, direction to deduct an amount from money due by the Commonwealth to the officer, and reduction in classification. This amendment is to bring the available sanctions more closely into alignment with the sanctions available when dealing with misconduct where an officer who is not an unattached officer is involved.

New subsection 63L(3B) defines the term "money due by the Commonwealth to an officer" which occurs in new subsection 63L(3A).

Subclause 39(b) makes a consequential amendment to subsection 63L(4) of the Act.

Subclause 39(c) makes a consequential amendment to subsection 63L(5) of the Act.

Subclause 39(d) inserts a new subsection (8) in section 63L which provides that where a person is charged under section 63L of the Act but before disciplinary action has been finalised the person ceases to be an unattached officer but remains an officer, the disciplinary action so commenced may be completed as if the person were still an unattached officer.

Clause 40: Criminal offences

This clause amends section 63M of the Act to:

- widen the range of sanctions available to the person selected by the Commissioner to consider appropriate disciplinary action where a court has convicted an unattached officer of a criminal offence or found, without recording a conviction, that an unattached officer has committed such an offence; and
- provide a provision preserving the applicability of Subdivision D of Division 6 of Part III of the Act where disciplinary action has commenced under section 63M of that subdivision but before the action is concluded the person ceases to be an unattached officer.

Subclause 40(a) amends subsection 63M(1) to provide a wider range of sanctions available when the relevant person is of the opinion that dismissal from the Service is not appropriate. In addition to dismissal from the Service which is currently available, it provides for the counselling of the officer and the new sanction of directing a reduction in classification. This amendment is to bring the available sanctions more closely into alignment with the sanctions available in section 63 of the Act when dealing with an officer who is not an unattached officer.

Subclause 40(b) makes a consequential amendment to subsection 63M(3) of the Act.

Subclause 40(c) inserts a new subsection (5) in section 63M which provides that where a court convicts an unattached officer of a criminal offence or finds that such a person has committed a criminal offence but before disciplinary action has been finalised the person ceases to be an unattached officer but remains an officer, the disciplinary action so commenced may be completed as if the person were still an unattached officer.

Clause 41: Date of effect of directions

Clause 41 repeals section 63N of the Act and substitutes provisions governing the date of effect of disciplinary directions which take into account the proposed amendments to sections 63K, 63L and 63M.

New subsection 63N(1) defines the directions which are the subject of the taking effect provisions.

New subsection 63N(2) provides that unless a direction is set aside on appeal under section 63P a direction that is subject to appeal takes effect as follows:

- . where an appeal against the direction lapses – the direction takes effect on the lapsing;
- . if the direction is confirmed on appeal – the direction takes effect on confirmation; and
- . if no appeal is lodged – the direction takes effect at the end of the appeal period.

New subsection 63N(3) provides that a direction that is not subject to appeal takes effect when it is given.

New subsection 63N(4) provides that where a deduction from money due by the Commonwealth to the officer is directed under section 63K or 63L but there is insufficient money to put the direction into effect the direction may be put into effect at any time and may be put into effect by deduction of instalments.

Clause 42: Appeals

This clause amends section 63P to take account of the broader range of sanctions introduced by the proposed amendments to sections 63K, 63L and 63M.

Subclause 42(a) is consequential on the amendment made by subclause 42(c).

Subclause 42(b) amends subsection 63P(1) by substituting a new paragraph (b) which sets out the circumstances in which an officer may appeal against a direction on the ground of it being unduly severe.

Subclause 42(c) inserts new subsection 63P(1A) which provides that there is no appeal right against a direction to deduct money due by the Commonwealth to the officer where the amount to be deducted does not exceed \$50. This is in line with the appeal rights of officers who are not unattached officers which are set out in section 63D of the Act.

Clause 43: Reasons to be given for finding or direction

Clause 43 amends section 63Q of the Act consequential on the proposed amendments to sections 63K and 63L of the Act.

Clause 44: Attachment of salaries of officers

This clause amends section 64 of the Act to substitute a new penalty in line with advice received from the Attorney-General's Department.

Clause 45: Determination of matters by reference to other instruments

This clause amends section 82E of the Act to enable the terms and conditions of staff employed by the Commonwealth who reside in a foreign country, and who are employed under existing section 82AF (locally engaged staff), to be employed under terms and conditions that pertain in that country.

Specifically, the amendment will enable determinations made under Part III Division 10A of the Act, and applying to locally engaged staff, to apply, adopt or incorporate the law (or part thereof) of another country. The proposed amendments allow a law to be incorporated by general reference and to apply as in force on a particular day or as in force from time to time.

Clause 46: Interpretation

This clause amends section 87 to provide a regulation-making power to exclude the application of the Part IV mobility provisions to a person who would otherwise be covered by Part IV. This regulation-making power will be used to exclude certain second level executives in Government Business Enterprises from Part IV coverage in line with government policy that APS tenure be foregone by persons remunerated under the revised arrangements relating to Government Business Enterprises.

New subsection 87(12) provides a regulation-making power.

New subsection 87(13) limits that power to specifying in the regulations only offices or positions which have a salary rate not less than the minimum rate at which salary is

payable to an officer who occupies an office having a classification of Senior Executive Band 2.

New subsection 87(14) defines what is meant by "the relevant salary rate in respect of an office or position" in subsection 87(13).

New subsection 87(15) provides that the regulation-making power has effect in spite of any other provision of Part IV of the Act.

Clause 47: Person to whom Division applies

Public servants appointed to statutory offices are normally covered by Division 2 of Part IV of the Act. This arrangement (frequently described as "first tier") enables the public servant to remain an officer of the service at his or her previous level for the duration of the statutory appointment and to continue his or her career at that level upon completion of the appointment.

Section 87K currently provides that where a public servant who holds a statutory office resigns from the service, he or she is covered by Division 3 of Part IV. The effect of this "second tier" coverage is to provide rights of re-appointment to the service upon non-renewal of the statutory appointment.

This clause adds a new subsection 87K(13) to enable statutory office holders to elect not to be covered by the "second tier" arrangements of Division 3 of Part IV. Resignation from the public service and election to forego the "second tier" re-appointment rights will be required where a statutory office-holder who is a public servant chooses to take up the limited tenure remuneration arrangement

Clause 48: Application for re-appointment to the Service

Clause 48 amends section 87N of the Act to correct an anomaly by inserting a new subsection 87N(2A) to regularise the re-appointment rights of persons who were compulsorily transferred from the Service to a body which does not fall within the definition of "Commonwealth authority" in Part IV.

Clause 49: New Section 87ZCA – Postponement of effect of resignation in certain circumstances

This clause inserts a proposed new section 87ZCA in Division 5 (Special Provisions Relating to Certain Persons) of Part IV (Officers Holding Public Office or Employed by Public Authorities). The amendment is necessary to give effect to the Government's decision to enable Secretaries of departments and some equivalent-level statutory office-holders to forego their continuing tenure in the public service in return for a margin on their salary set by the Remuneration Tribunal. Proposed section 87ZCA is the counterpart of proposed new subsections 37(5) to (6B) (which relate to Secretaries) and will enable former statutory office holders covered by the new limited tenure arrangements to remain in the public service for limited periods in certain circumstances. For example on occasions this will avoid the need for the person to cease to be employed during short gaps between appointments. It is also intended that

statutory office-holders whose appointments have expired, or are terminated, and for whom no further appointment is immediately available, should have up to 3 months' further employment with the Commonwealth while seeking a new long-term appointment.

Clause 50: Personation etc. at examinations

Clause 50 amends section 96 of the Act to substitute a new penalty in line with advice provided by the Attorney-General's Department.

Clause 51: Schedules 2 and 3

This clause repeals Schedules 2 and 3 of the Act and substitutes new Schedules 2 and 3 to reflect current departmental structure.

PART 8 – AMENDMENTS OF THE ROYAL COMMISSIONS ACT 1902

Clause 52: Principal Act

This clause defines "Principal Act" to mean the *Royal Commissions Act 1902* for the purposes of Part 6 of the Bill.

Clause 53: Definitions

This clause inserts a definition of the term "Australian Bureau of Criminal Intelligence" into section 1B of the Royal Commissions Act. The Australian Bureau of Criminal Intelligence is an organisation established under an agreement made in 1981 between the Commonwealth, the States and the Northern Territory.

Clause 54: Power of Commission in relation to documents and other things

This clause makes a consequential amendment to subsection 6F(2) of the Act following the amendment to section 6P.

Clause 55: Commission may communicate information

Clause 55 amends section 6P of the Royal Commission Act so as to include the Australian Bureau of Criminal Intelligence as a body to which a Royal Commission can communicate information or evidence about a Commonwealth, State or Territory offence that the Commission obtains in the course of its inquiries if in the opinion of the Commission it is appropriate to do so.

PART 9 – AMENDMENTS OF THE SUPERANNUATION ACT 1976

Clause 56: Principal Act

This clause provides that the *Superannuation Act 1976* is the Principal Act in this Part of the Bill.

Clause 57: Definition

This clause inserts a new section, section 57B, in the *Superannuation Act* before section 58 in Division 2 of Part V which defines the expression "fixed-term employee" to be used in Division 2 of Part V.

Clause 58: Early Retirement – voluntary or involuntary retirement

This clause deletes paragraph 58(3)(c) from the *Superannuation Act*. The other provisions in this Part of the Bill, among other things, replace that paragraph.

Clause 59: Special provision regarding certain holders of statutory offices and certain fixed-term employees

This clause inserts two new sections, sections 58A and 58B, in the *Superannuation Act* after section 58 in Division 2 of Part V of that Act.

New section 58A generally sets out the circumstances under which the holders of statutory offices for a fixed term would be deemed to be retired involuntarily for the purposes of the *Superannuation Act* should they cease to be members of the superannuation scheme established by the *Superannuation Act* ("eligible employees" is the term used in that Act for members) when their term of appointment expires or is terminated before the expiry of the fixed term.

New section 58B generally sets out the circumstances under which fixed-term employees would be deemed to be retired involuntarily for the purposes of the *Superannuation Act* should they cease to be eligible employees for the purposes of that Act when their fixed term expires or their employment is terminated before the expiry of the fixed term.

Definition of term for use in the Explanatory Memorandum

For ease of exposition in this Explanatory Memorandum (the term is not used in the Bill), the term "non-renewal of the fixed-term appointment" is used to mean the situation (for either the holder of a statutory office or a fixed-term employee) where:

- . the fixed term of appointment or employment of a person expires; and
- . the person is eligible to be re-appointed or re-employed; and
- . the person desires to be so re-appointed or re-employed, but is not so re-appointed or re-employed; and
- . the person does not obtain other employment which enables him or her to continue as an eligible employee for the purposes of the *Superannuation Act* .

New section 58A applies to holders of statutory offices who are appointed for a fixed term.

New subsection 58A(1) sets out the persons to whom new subsection 58A(2) applies. In broad terms, new subsection 58A(2) applies, with some exceptions, to persons who, immediately before taking up the statutory office held immediately prior to ceasing to be an eligible employee, were persons who would have been deemed to have retired involuntarily for the purposes of the Superannuation Act should they have ceased to be eligible employees because their services were no longer required.

New subsection 58A(1) provides that new subsection 58A(2) applies to the holder of a statutory office (the relevant statutory office) who ceases to be an eligible employee and who, immediately before taking up the relevant statutory office, was a person in certain classes of persons.

New subparagraphs 58A(1)(c)(i) and (iii) essentially relate to classes of persons who are becoming holders of statutory offices for a fixed term for the first time. New subparagraphs 58A(1)(c)(ii) and (iv) relate to persons who were fixed-term employees before being appointed to the statutory office. New subparagraph 58A(1)(c)(v) relates to a person who was the holder of a statutory office before being appointed to the relevant statutory office.

Where immediately before being appointed to the relevant statutory office, persons were fixed-term employees or holders of statutory offices, they would be included in the class of person to be covered by new subsection 58A(2) in respect of the relevant position if they would have been covered by that subsection in respect of their immediately preceding position.

New subsection 58A(2) provides that a person to whom the subsection applies would be deemed to have retired involuntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment".

New subsection 58A(3) provides that a holder of a statutory office who ceases to be an eligible employee on the expiration of the term of his or her appointment to the office but who is not a person to whom new subsection 58A(2) applies would not be deemed to have retired involuntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment".

New subsection 58A(4) essentially provides that the document by means of which a person is appointed to a statutory office, or a term and condition of that appointment, may override the provisions in new section 58A(2) by providing that new subsection 58A(2) is not to apply to the person in relation to that office.

In such circumstances, new subsection 58A(4) provides that the person would not be deemed to have retired involuntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment" even if the person would have been deemed to have retired involuntarily but for this subsection.

New subsection 58A(5) essentially provides that the document by means of which a person is appointed to a statutory office, or a term and condition of that appointment, may override the provisions in new subsection 58A(3) by providing that subsection 58A(3) is not to apply to the person in relation to that office.

In such circumstances, new subsection 58A(5) provides that the person would be deemed to have retired voluntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed term appointment" even if the person would not have been deemed to have retired involuntarily but for this subsection.

New subsection 58A(6) provides that where the appointment of a person to a statutory office is terminated before the expiry of the fixed term, the person would be deemed to have retired involuntarily for the purposes of the Superannuation Act unless the document by means of which a person is appointed to a statutory office, or a term and condition of that appointment, provides otherwise.

New subsection 58A(7) provides that the document by means of which a person is appointed to a statutory office may not provide, in accordance with subsection 58A(5), that subsection 58A(3) is not to apply to a person without the approval of the Minister for Finance.

The effect of new subsection 58A(7) is that the document of appointment may not override subsection 58A(3) to deem a holder of a statutory office to have retired involuntarily on the "non-renewal of the fixed-term appointment" unless the Minister for Finance approves.

New subsection 58A(8) provides that an appointment to a statutory office may not be made on the basis that, in accordance with subsection 58A(5), it is a term and condition of the appointment that subsection 58A(3) is not to apply to a person without the approval of the Minister for Finance.

The effect of new subsection 58A(8) is that a term and condition of appointment may not override subsection 58A(3) to deem a holder of a statutory office to have retired involuntarily on the "non-renewal of the fixed-term appointment" unless the Minister for Finance approves.

New subsection 58A(9) provides that the inclusion in the document by means of which a person is appointed to a statutory office of a provision in contravention of subsection 58A(7) is ineffective for the purposes of subsection 58A(5) but the document is effective in all other respects.

New subsection 58A(10) provides that an appointment made in contravention of new subsection 58A(8) means that the term and condition referred to in subsection 58A(8) is ineffective for the purposes of subsection 58A(5) but all other terms and conditions are effective.

New subsection 58A(11) clarifies that where a person has ceased to be an eligible employee on more than one occasion, new section 58A cannot have effect except in relation to the last such occasion.

New section 58B applies to persons who are fixed-term employees.

New subsection 58B(1) sets out the persons to whom new subsection 58B(2) applies. In broad terms, subsection 58B(2) applies, with some exceptions, to persons who, immediately before taking up the fixed-term employment applicable immediately prior to ceasing to be an eligible employee, were persons who would have been deemed to have retired involuntarily for the purposes of the Superannuation Act should they have ceased to be eligible employees because their services were no longer required.

New subsection 58B(1) provides that new subsection 58B(2) applies to a fixed-term employee who ceases to be an eligible employee and who, immediately before taking up the fixed-term employment applicable immediately prior to ceasing to be an eligible employee (the latest employment), was a person in certain classes of persons.

New subparagraphs 58B(1)(c)(i), (ii) and (iii) essentially relate to classes of persons who are becoming fixed-term employees the first time. New subparagraphs 58B(1)(c)(iv) and (v) relate to persons who were fixed-term employees before being appointed as fixed-term employees. New subparagraph 58B(1)(c)(vi) relates to a person who was the holder of a statutory office before being appointed as a fixed-term employee.

Where immediately before being appointed to the latest fixed-term employment, persons were fixed-term employees or holders of statutory offices, they would be included in the class of person to be covered by subsection 58B(2) in respect of the latest position if they would have been covered by that subsection 58A(2), in respect of their immediately preceding subsection 58B(2).

New subsection 58B(2) provides that a person to whom the subsection applies would be deemed to have retired involuntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment".

New subsection 58B(3) provides that a fixed-term employee who ceases to be an eligible employee on the expiration of the fixed term but who is not a person to whom subsection 58B(2) applies would not be deemed to have retired involuntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment".

New subsection 58B(4) essentially provides that the document by means of which a person is appointed as a fixed-term employee, or a term and condition of that appointment, may override the provisions in subsection 58B(2) by providing that subsection 58B(2) is not to apply to the person in relation to that office.

In such circumstances, new subsection 58B(4) provides that the person would not be deemed to have retired involuntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment" even if the person would have been deemed to have retired involuntarily but for this subsection.

New subsection 58B(5) essentially provides that the document by means of which a person is appointed as a fixed-term employee, or a term and condition of that appointment, may override the provisions in subsection 58B(3) by providing that subsection 58B(3) is not to apply to the person in relation to that office.

In such circumstances, new subsection 58B(5) provides that the person would be deemed to have retired voluntarily for the purposes of the Superannuation Act on the "non-renewal of the fixed-term appointment" even if the person would not have been deemed to have retired involuntarily but for this subsection.

New subsection 58B(6) provides that where the appointment of a person as a fixed-term employee is terminated before the expiry of the fixed term, the person would be deemed to have retired involuntarily for the purposes of the Superannuation Act unless the document by means of which a person is appointed as a fixed-term employee, or a term and condition of that appointment, provides otherwise.

New subsection 58B(7) provides that the document by means of which a person is appointed as a fixed-term employee may not provide, in accordance with subsection 58V(5), that subsection 58B(3) is not to apply to a person without the approval of the Minister for Finance.

The effect of new subsection 58B(7) is that the document of appointment may not override subsection 58B(3) to deem a fixed-term employee to have retired involuntarily on the "non-renewal of the fixed-term appointment" unless the Minister for Finance approves.

New subsection 58B(8) provides that an appointment as a fixed-term employee may not be made on the basis that, in accordance with subsection 58B(5), it is a term and condition of the appointment that subsection 58B(3) is not to apply to a person without the approval of the Minister for Finance.

The effect of new subsection 58B(8) is that a term and condition of appointment may not override subsection 58B(3) to deem a fixed-term employee to have retired involuntarily on the "non-renewal of the fixed-term appointment" unless the Minister for Finance approves.

New subsection 58B(9) provides that the inclusion in the document by means of which a person is appointed as a fixed-term employee of a provision in contravention of subsection 58B(7) is ineffective for the purposes of subsection 58B(5) but the document is effective in all other respects.

New subsection 58B(10) provides that an appointment as a fixed-term employee made in contravention of subsection 58B(8) means that the term and condition referred to in subsection 58B(8) is ineffective for the purposes of subsection 58B(5) but all other terms and conditions are effective.

New subsection 58B(11) clarifies that where a person has ceased to be an eligible employee on more than one occasion, new section 58B cannot have effect except in relation to the last such occasion.

Clause 60: Election for lump sum benefit in case of involuntary retirement

This clause amends subsection 62(1) of the Superannuation Act to include a reference to the new sections 58A and 58 B inserted by the Bill.

Clause 61: Payment of productivity benefit

This clause amends subparagraph 110R(1)(a)(iii) of the Superannuation Act to include a reference to the new sections 58A and 58 B inserted by the Bill.

Clause 62: Election that Division apply

This clause amends paragraph 137(1)(b) of the Superannuation Act to include a reference to the new sections 58A and 58 B inserted by the Bill.

Clause 63: Savings Provisions

The Part contains savings provisions to ensure that a person's rights or entitlements under appointments in place before the changes in the Bill come into effect are not affected by the changes made by the Bill.

Subclause 63(1) provides that the holder of a statutory office immediately prior to the commencement of the Part who ceases to be an eligible employee because the term of the appointment to that statutory office expires would be deemed to have retired involuntarily for the purposes of the Superannuation Act if the person was eligible for re-appointment and desired to be re-appointed, but was not so re-appointed. This provision restores the situation that existed under paragraph 58(3)(c) of the Superannuation Act which is to be deleted by the Bill.

Subclause 63(2) provides that the terms of appointment or employment of a person appointed or employed on a fixed-term basis relating to deemed involuntary retirement on non-renewal of appointment or employment on the expiry of the fixed term immediately before the changes in this Part come into effect are not altered by the changes made by this Part.

If the person would have been deemed to have retired involuntarily on non-renewal in certain circumstances before the changes came into effect, the person would be deemed to have retired involuntarily if that appointment or employment were not renewed on the expiry of its fixed term in the same circumstances after the changes came into effect.

Similarly, if the person would not have been deemed to have retired involuntarily on non-renewal in certain circumstances before the changes came into effect, the person would not be deemed to have retired involuntarily if that appointment or employment were not renewed on the expiry of its fixed term in the same circumstances after the changes came into effect.

The Superannuation Act currently provides that temporary employees who cease to be eligible employees because their positions cease to exist are not to be deemed to have retired involuntarily. It is possible that some eligible employees may be employed on a fixed-term basis before the amendments in this Part come into effect and that such employees could meet the definition of fixed-term employee and, if so, could be covered by the new provisions with windfall superannuation benefits in certain circumstances.

Subclause 63(3) provides that persons who, immediately before the changes in this Part came into effect, would not have been entitled to be deemed to have retired involuntarily if their position or office had ceased to exist would not be deemed to

have retired involuntarily if that position or office ceased to exist after the changes in this Part came into effect.

PART 10 – FURTHER AMENDMENTS

Clause 64: Schedule of amendments

This clause provides for various Acts referred to in the Schedule to be amended as set out in the Schedule.

SCHEDULE – FURTHER AMENDMENTS

Australian Science and Technology Council Act 1978

These provisions identify each occurrence of the terms "Chairman" and "Deputy Chairman" in the *Australian Science and Technology Council Act 1978* and provide for them to be replaced with the terms "Chairperson" and "Deputy Chairperson", respectively.

Council for Aboriginal Reconciliation Act 1991

This amendment corrects a drafting error by substituting "19(7)" for "19(6)" in paragraph 24(2)(b) of the *Council for Aboriginal Reconciliation Act 1991*.

Public Service Act 1922

A new definition of "returned soldier" is inserted in subsection 7(1) consequential on the omission of the definition of "The War". The effective meaning of the term "returned soldier" has not changed.

The definition of "The War" in subsection 7 (1) is omitted as it is no longer appropriate.

An outdated reference to section 30 in subsection 8A(1) is omitted.

An incorrect reference to the Minister in subsection 13(2) is omitted and a reference to the Prime Minister is substituted.

An incorrect reference in subsection 22A(5) to section 22 is omitted and a reference to section 15 is substituted.

An incorrect reference in subsection 22B(11) to section 22 is omitted and a reference to section 15 is substituted.

An incorrect reference to in subsection 22C(10) section 22 is omitted and a reference to section 15 is substituted.

The heading to Division 1 of Part III is omitted as it is inappropriate heading. A new heading is substituted.

A reference to "subsection" in subsection 25(9) is substituted for a reference to "subclause".

An amendment is made to subsection 47A(3) consequential on the omission of the definition of the term "The War" and the inclusion of an amended definition of "returned soldier" in section 7 of the Act.

A definition of "the war" in subsection 47A(4) which has become redundant with the inclusion of the amended definition of "returned soldier" in section 7 of the Act is omitted.

Subsection 49B(3) is amended to replace the words "it is satisfied" with "he or she is satisfied".

Subsection 55(2) is amended to omit a comma.

A reference to "the Service" in paragraph 82AD(2)(b) is substituted for the reference to "the service".

A reference to "*Tribunal*" in paragraph 82D(2)(b) is substituted for the reference to "*Tribunals*".

Public Service and Statutory Authorities Amendment Act 1980

Section 33 is repealed. The provision is unproclaimed and is no longer required.

Subsection 45(7) is repealed. The provision is unproclaimed and is no longer required.

