



**APS EMPLOYMENT MATTERS
SUBMISSION TO SENATE FINANCE AND PUBLIC ADMINISTRATION
REFERENCES COMMITTEE**

Background

This submission is made by the Merit Protection and Review Agency (MPRA) to assist the Senate Finance and Public Administration References Committee's inquiry into Australian Public Service (APS) employment matters.

The MPRA is a statutory authority established by the *Merit Protection (Australian Government Employees) Act 1984* (the Merit Protection Act) to provide independent administrative review of decisions and actions affecting Commonwealth employees in relation to their employment. The MPRA's object is to ensure that such actions and decisions are fair, equitable and in accordance with sound personnel management practices while having regard to the efficiency of, and harmonious working relationships in, Commonwealth agencies (section 4 of the Merit Protection Act). The Merit Protection Act vests particular review functions in the MPRA and various tripartite staff selection and review committees established by the MPRA. For staff of the Australian Public Service employed under the *Public Service Act 1922* (the Public Service Act), access to certain review mechanisms has been prescribed by the Parliament in that Act and in regulations under it.

The functions of the MPRA may be summarised as follows (section 6 of the Merit Protection Act):

- (a) to establish committees to hear appeals against promotion, temporary performance (higher duties), discipline, and re-deployment and retirement decisions;
- (b) to establish committees to determine appropriate classification, and salary level for unattached employees applying to return to the APS after a period of employment in a Commonwealth statutory authority, or with a Minister or Member of Parliament;
- (c) to review grievances raised by employees in relation to their employment;
- (d) to nominate convenors of Joint Selection Committees established under sections 50DA and 50DB of the Public Service Act;
- (e) to provide advice to public servants about grievance and appeal rights;
- (f) to perform employment related functions on request (on a fee-for-service basis); and
- (h) at the request of the Minister, in this case the Minister Assisting the Prime Minister for the Public Service, or the Public Service Commissioner to conduct inquiries into decisions affecting individual Commonwealth employees or specified classes of Commonwealth employees.

Within the Australian Public Service the MPRA plays an important role in supporting adherence to the APS Values and APS Code of Conduct set out in the Public Service Regulations. For example, the MPRA's processes help ensure that certain employment decisions within the APS are based on merit; that the workplace is free from discrimination and harassment; and that APS employees behave honestly and with integrity in the course of their employment. These are goals consistent with the MPRA's own statutory object.

In addition to providing services to the Australian Public Service (APS), the MPRA performs external review functions on behalf of a number of Commonwealth bodies outside the APS including the Australian Federal Police, the Health Insurance Commission and the Australia Council. On a fee-for-service basis, it also provides such services for the ACT Government.

The MPRA consists of a full time Merit Protection Commissioner who is assisted by up to four part-time members. The current membership of the MPRA is: Mr Alan Doolan (Merit Protection Commissioner), Ms Ruth Campbell, Professor Bob Officer and Mr Mark Paterson (part-time members).

Much of the work of the MPRA is undertaken by staff made available by the Public Service Commissioner under section 18B of the Public Service Act. In this role they are accountable for the performance of the statutory functions which are performed under delegation from the MPRA, directly to the Merit Protection Commissioner and report directly to MPRA members on a regular basis.

The MPRA's casework is undertaken through offices of the Public Service and Merit Protection Commission. For management purposes these offices are grouped into two teams as follows:

- Client Services (North-East): Australian Capital Territory, New South Wales and Queensland
- Client Services (South-West): Victoria, South Australia, and Western Australia.

Issues arising in Tasmania or the Northern Territory are dealt with by staff in the Client Services (South-West) team.

Turning to the matters particularly raised by Senator Campbell in his letter of 30 June 1999 to the Prime Minister.

1. Evolving changes in the nature of the Senior Executive Service, including chief executive officers, as a result of the devolution of responsibility for staffing matters to individual agencies, such changes including, but not limited to, selection, tenure and independence, remuneration, including relativities, mobility and career development.

The MPRA has jurisdiction for members of the Senior Executive Service (SES) in respect of disciplinary appeals, re-appointment review and re-integration assessments, the investigation of grievances and redeployment appeals. Schedule 5 of the Workplace Relations Regulations allows agencies to make Australian workplace agreements and certified agreements which have the effect of removing MPRA jurisdiction for all APS employees, including the SES, in respect of involuntary retirement and dismissal arrangements. This reflects the position operating since 1995 when involuntary retirement and dismissal arrangements became the

responsibility of the Australian Industrial Relations Commission. Responsibility for SES appointments and promotions rests with the Public Service Commissioner under sections 42 and 49B of the Public Service Act. SES officers do not have rights of appeal to the promotion appeal committees established by the MPRA.

Cases involving SES officers arise infrequently. Since the establishment of the MPRA there have been a number of applications to reintegration assessment committees, a very small number of disciplinary appeal cases, and some SES officers have lodged grievances. It is the experience of the MPRA that SES officers rarely pursue concerns through the grievance mechanism but when they do choose to do so, such complaints are often serious and sensitive.

In general the MPRA has no jurisdiction for those chief executive officers who are statutory office holders. In respect of chief executive officers with the powers of secretary the jurisdiction in respect of grievances within Public Service Regulations 82-86 is not used in practice.

Substantial devolution of responsibility to agencies has occurred over the last 12 years. The changes to the APS in recent years, culminating in the latest public administration and workplace relations reforms, have all been aimed at providing organisations and individuals with greater flexibility of action. The MPRA experience over recent years has been that the number of grievances lodged remained relatively static from 1993-94 until 1995-96. In 1996-97 a large number of invalid grievance applications relating to voluntary redundancy and industrial action were received. In 1997-98 the numbers of grievances lodged fell from 1995-96 levels and fell again in 1998-99. Where grievances have been lodged, the MPRA has also worked with individual agencies, on matters raised by the grievances, to improve systems that they have in place for the employment and management of their staff. For example, following a recent grievance investigation for a Commonwealth authority which made recommendations concerning the need for improved selection procedures, the MPRA was approached by the authority to develop and conduct training in relation to appropriate selection procedures for its staff, particularly training for selections in a multicultural environment.

In 1998-99 the issues raised most frequently in grievances have concerned relationships between staff in the workplace. While the number of grievances lodged overall is declining, this category has increased over 1997-98 levels, both in absolute terms and as a proportion of the number of grievances lodged. Within this category, the highest number of grievances lodged in 1998-99 related to issues of harassment and management style with the latter type, in particular, showing a marked increase over previous year figures. The number of grievances lodged about selection procedures has remained static between 1997-98 and 1998-99, both in absolute and relative terms.

The number of selection processes attracting appeals has continued to decline over recent years. In 1998-99 the number of promotion appeal cases was 13% less than in 1997-98 following significantly larger falls in the previous two years (45% and 35% respectively). The reduced rate of decrease may signify that the major impact of recent changes resulting in a decrease in appealable promotions has now been felt. These changes include:

- agency downsizing;

- the outsourcing of services to the private sector either directly or following the exposure to competition of previously provided in-house services;
- the transfer of functions out of the APS into Commonwealth authorities which do not provide staff with rights of access to MPRA appeal mechanisms; and
- increased use of broadbanding of classification levels which allow advancement through levels, based on skills assessment and performance appraisal, without the need for traditional selection and appeal processes.

There has been little change in the number of disciplinary appeals lodged with the MPRA over recent years. In 1998–99 there were 28 applications lodged compared with 39 in 1997–98, 32 in 1996–97 and 38 in 1995–96.

2. The impact of agency-based bargaining in contributing to the development of a more efficient, productive and independent Australian Public Service, accountable to the Australian Parliament.

The role the MPRA has fulfilled since the passage of the Merit Protection Act in 1984 has been to help ensure accountability by providing for independent external review of decisions and actions affecting Commonwealth employees in relation to their employment.

Commonwealth public sector organisations, including the APS, are able to confer jurisdiction on the MPRA by an enactment. Enactments can be tailored to the needs of the relevant Commonwealth body and the services provided by the MPRA to non-APS organisations under these arrangements are often agency specific. The Merit Protection Act defines the term ‘enactment’ broadly to include both Australian workplace agreements and certified agreements. As a result Commonwealth agencies and statutory authorities have been provided with increased access to the flexibility within the Merit Protection Act through the enabling provision of the *Workplace Relations Act 1996* (Workplace Relations Act).

The provisions of an Australian workplace agreement or a certified agreement, however, cannot override the provisions of the Public Service Act or Public Service Regulations except to the extent prescribed by the regulations made under the Workplace Relations Act. Save for involuntary retirement and dismissal arrangements, the functions for which the MPRA is responsible are not so prescribed. APS agencies may however, confer jurisdiction on the MPRA additional to that provided for by the Public Service Act and regulations and some have chosen to do so. Accountability to Parliament is strengthened by the requirements of section 37A of the Merit Protection Act which specifies that certain instruments conferring jurisdiction on the MPRA, which include Australian workplace agreements and certified agreements, must be tabled in the Parliament.

In light of the change to agency-based bargaining, in early 1999 the MPRA commissioned a review of certified agreements in organisations staffed under the Public Service Act to determine the impact of certified agreements on its jurisdiction and also to identify any agreements which may have incorrectly represented that jurisdiction. This was necessary to ensure that the MPRA, in performing its statutory function of providing advice on rights of review, was providing advice to employees which was consistent with that of their employers.

A number of agencies were found to have made provision in their certified agreements for new or amended review mechanisms which were inconsistent with existing legislation. These mostly related to changed timeframes for temporary performance appeals and use of incorrect terminology. To ensure consistency of advice, the MPRA wrote to each agency setting out an understanding of the particular issues identified and invited comment on that understanding. As a consequence of the review of agreements, staff supporting the MPRA developed advice to be included in a PSMPC circular to APS agencies about the principles that might be adopted by agencies in developing internal mechanisms for resolving grievances.

The advent of agency-based bargaining has left unchanged the provisions of the Merit Protection Act which make APS agencies accountable to the Parliament for their employment decisions. Under section 52 of the Merit Protection Act the MPRA may make a written report to the Prime Minister if, in its opinion, action which is adequate and appropriate is not taken by an agency in response to recommendations and matters included in a MPRA report on the investigation of a grievance. Section 53 of the Merit Protection Act allows the MPRA to forward the same information to the President of the Senate and the House of Representatives for presentation to Parliament.

On a relatively small number of occasions the MPRA has carefully considered reporting under sections 52 and 53 of the Merit Protection Act but has chosen not to do so. In practice MPRA recommendations made in a report following a grievance are usually accepted by agencies.

3. The extent to which performance pay is being incorporated into agreements negotiated by individual agencies, the disparity between agency agreements in performance pay and the impact of such agreements on agency performance, accountability and transparency.

The MPRA has noted that most, if not all, APS agencies have made provision for performance pay within their certified agreements and that various methods of implementation have been adopted. Many agencies have developed processes and principles for the internal resolution of disagreements in the workplace, including disagreements about performance pay, some of which include provision for mediation by a person appointed by the relevant agency. These arrangements are additional to the grievance provisions of Public Service Regulations 82-86.

The MPRA supports endeavours by employers to reach quick and informal resolutions of such disagreements which should then reduce the need for external review. The MPRA has access to staff who are trained and accredited in alternative dispute resolution procedures and some agencies have requested the MPRA's services in mediating or conciliating where difficulties have arisen in the context of performance assessment.

The approach the MPRA has usually taken to the review of performance assessment is to look at the decision process rather than attempt to substitute its own decision for that of the initial decision taker. The MPRA view is that it would be difficult for the MPRA to place itself in the position of a supervisor who has had direct knowledge of an employee's performance over the relevant period. The MPRA experience has been that in the absence of a significant procedural defect which has directly affected the appraisal, grievances about

performance pay are difficult to resolve to the satisfaction of all parties. Where procedural irregularities are found the MPRA is likely to recommend that the matter be remitted for further assessment. Nevertheless, during 1998–99 in at least one case, the MPRA recommended the backpayment of performance bonuses with interest and this recommendation was accepted by the relevant department.

Additionally, following the investigation of a grievance, the MPRA has also recommended improvements in a department's national performance assessment and feedback scheme to address issues identified by the MPRA, including matters such as providing training in report writing and the development of initiatives to emphasise the importance of protecting rights to confidentiality and privacy in the workplace.

Further information

Further information can be obtained from the MPRA's website at '<http://www.mpra.gov.au/>' or contact the Merit Protection Commissioner on 02 6272 3506.

Merit Protection and Review Agency
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