

# Monitor 8 of 2023 – Ministerial Responses

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## Senator the Hon Katy Gallagher

Minister for Finance  
Minister for Women  
Minister for the Public Service  
Senator for the Australian Capital Territory

REF: MC23-000169

Ms Fattimah Imtoul  
Acting Committee Secretary  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
Canberra ACT 2600

Dear Ms Imtoul

I am writing in relation to the technical scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation in Delegated Legislation Monitor 7 of 2023 in respect of the Public Service Regulations 2023. I appreciate the opportunity to respond to the matters raised by the Committee. Please find a response below.

**Consultation with persons affected compliance with Legislation Act 2003  
*How it was decided what updates were necessary to the 1999 regulations, and the impact of the updates, in the absence of consultation with persons likely to be affected by the instrument, including APS employees and the CPSU; and whether the CPSU can be notified of this instrument***

In undertaking to remake the Regulations, a review of the provisions was undertaken including consideration of feedback received by APS agencies through the Commission's various enquiry lines. This feedback provided information used to determine what changes might be required including where clarification was necessary.

As previously noted, I acknowledge the importance of undertaking broader consultation and have requested the Australian Public Service Commission ensure this occurs where a change to the legislative framework is considered.

The Commission has advised that it has already implemented this change and has commenced consultation with the CPSU on further proposed amendments to the Regulations. The CPSU was notified of the 2023 Regulations and provided with a draft prior to publishing.

## Availability of independent merits review

### ***How it was determined that the exemptions from the 1999 regulations that are listed in subsection 37(2) remain fit-for-purpose;***

The exemptions contribute to the efficient and effective operation of the Review of Actions scheme. There has not been feedback from APS employees or agencies that the provisions are problematic.

### ***The nature and scope of each of the exclusions from review contained in subsection 37(4) of the instrument;***

The nature and scope of the exceptions in subsection 37(4) broadly is to ensure the effective allocation of government resources in matters involving decisions where there is no appropriate remedy, decisions involving extensive inquiry processes, and decisions that have such a limited impact that the costs of review cannot be justified. These are situations where the availability of merits review may not be appropriate, consistent with clauses 4.49 to 4.57 of the ARC guidance document *What decisions should be subject to merit review?*.

Each of the exceptions contribute to this objective. The exceptions are where:

*The application is misconceived, lacking in substance, frivolous, or vexatious (ss 37(4)(a)–(b)):*

'Misconceived' refers to those situations where an applicant is mistaken in their views, have misinterpreted or failed to understand a matter or have put a false construction on a matter. 'Lacking in substance' refers to applications for review that lack essential elements for example do not identify an action or decision. 'Frivolous' is generally taken to mean that the case is 'obviously unsustainable'. 'Vexatious' means an application made for a collateral purpose, as a means of obtaining some advantage for which the Review of Actions scheme was not designed. In other words this means an application made for some other purpose (for example, as a bargaining chip). Applications that meet one of these criteria may involve decisions where there is no appropriate remedy, or have such limited impact that the costs of review cannot be justified.

*The affected employee (ss 37(4)(c)-(e)):*

- has previously applied for review of the action under Division 3 (Review of other APS actions) (s 37(4)(c)). This provision relates only to applications made seeking review of an action that has already been subject of review.
- has applied to have the action reviewed under Division 2 (Review of certain APS promotion decisions and engagement decisions) (s 37(4)(d)). This provision excludes from review, under Division 3 of the 2023 Regulations, those actions that comprise a promotion decision where the applicant has applied for a promotion review by a promotion review committee under Division 2 of the 2023 Regulations.
- has applied, or could apply, to have the action reviewed by an external review body, and review by the external review body would be more appropriate than review under Division 3 (Review of other APS actions) (s 37(4)(e)). This relates to applications for review of actions where the subject matter of the application falls within the jurisdiction of a specialist and expert review body that exists to consider such complaints. This can include actions about privacy (the Privacy Commissioner) and discrimination on a number of grounds, including sex, race and disability (the Australian Human Rights Commission). The practice is to advise the applicant of that expert body and contact details for the making of an application.

It would be an ineffective use of Government resources to duplicate a review process that has already occurred or is ongoing. For example, if the affected employee has already applied for review of the action, including under the Public Service Act 1999, or by another review body. The Review of Actions scheme should not provide employees with multiple opportunities to appeal the same action. Further, if the affected employee has already applied for review of the action, reviewing the action again may not be an appropriate route to remedy.

*The affected employee does not have sufficient direct personal interest in review of the action or review, or further review, of the action is not otherwise justified in all the circumstances (ss 37(4)(f)–(g)):*

Subsection 37(4)(f) relates to complaints about an action or decision taken in relation to another APS employee that has marginal or no effect on the APS employee who has made the complaint. In relation to subsection 37(4)(g), the Merit Protection Commissioner published and made available on its website, a policy on the exercise of the discretion in subsection 37(4)(g) and its predecessor in the 1999 Regulations 5.23(3)(g), prior to 2017. The drafting of 37(4)(g) and 5.23(3)(g) is the same. In April 2021, the Merit Protection Commissioner reviewed the policy and found it to remain fit for purpose – available here: <https://www.mpc.gov.au/policy-exercise-discretion-not-review-matter>. The Policy sets out a number of factors to which delegates have regard when they consider and use the discretion. Agency decision makers are encouraged to use the policy in making decisions under subsection 37(4)(g).

The presumption in the legislation is that actions that meet the eligibility criteria should be reviewed unless there is a good reason not to do so. In the period July 2017 to June 2023, the discretion was used in only 63 of the 1025 applications for review of action received.

Circumstances in which this provision could apply include: the matter has already been reviewed but the review applicant is dissatisfied and has re-phrased their old complaint as if it were a new and different complaint; or the applicant does not respond to a request for further information about why the review is sought.

It is generally not appropriate to exercise this discretion for the following reasons: the delegate has formed a preliminary view, without reviewing the action, that the merits of the review applicant's case are weak; the decision for which review is being sought was consistent with the agency's policy (for example, a manager's discretion to refuse a leave without pay application) — this is an argument about the merits of the review applicant's case without doing a review.

Applications that meet one of these criteria may involve decisions where there is no appropriate remedy or that have such limited impact that the costs of review cannot be justified.

***Whether paragraph 37(4)(c) could prevent a person from making an application for review of an action if they have made a previous application for review in relation to a different action;***

See answer above as to the nature and scope of subsection 37(4)(c). Subsection 37(4)(c) uses the words 'the action' and it cannot prevent an APS employee from making an application for review in relation to a different action. In this regard note subsection 38(3)(c) provides for a direct application for primary review to be made to the Merit Protection Commissioner where the applicant is claiming the action for which review is sought is victimisation or harassment for having made a previous application for review [of a different action].

**Whether paragraph 37(4)(f) is necessary, noting section 33(1) of the Act already limits review to 'any APS action that relates to his or her APS employment'; and**

Subsection 37(4)(f) is necessary to ensure the objective of the effective allocation of government resources, as expressed above. Section 33(1) of the *Public Service Act 1999* is too broad to achieve this objective. A decision to transfer another employee into an employee's team may be interpreted to 'relate' to the second employee's employment, by virtue of the employees being employed now within the same team.

Subsection 37(4)(f) is necessary to create a closer nexus between the employee applying for review, and the action under review. The Review of Actions scheme is not intended to provide open standing to employees to appeal decisions made about other employees, which may not directly affect them but may be broadly interpreted to 'relate' to their employment, within the meaning of section 33(1) of the PS Act. A provision such as subsection 37(4)(f) of the Regulations is required to provide further clarity that the review applicant needs to be seeking review of something in which they have a direct personal interest rather than for example seeking a review of an action about how an agency handled allegations that a colleague was harassed, or where the applicant is not affected by an agency's decision that another employee did not breach the APS Code of Conduct.

**What factors must be considered when a person is exercising the discretionary power in paragraph 37(4)(g), and if there are any safeguards in place.**

See answer above as to the nature and scope of subsection 37(4)(g)

If an agency decision maker makes a decision under subsection 37(4)(g) then the affected employee is entitled by virtue of section 43 of the 2023 Regulations and its predecessor in the 1999 Regulations to apply to the Merit Protection Commissioner for secondary review of the action.

A review applicant who is dissatisfied with the outcome of their review may seek relief from the Federal Courts under the *Administrative Decisions (Judicial Review) Act 1977*.

The Merit Protection Commissioner has also published on its website a Tip Sheet for agency decision makers on determining review eligibility. A copy of that Tip Sheet is available here: <https://www.mpc.gov.au/resources/tip-sheet-determining-review-eligibility>.

**Adequacy of explanatory materials**

The Commission will amend the explanatory statement to include further detail about the purpose and operation of the Regulations.

I trust this information will assist the Committee in its consideration of the Regulations.

Yours sincerely

03 JUL 2023



**THE HON STEPHEN JONES MP**  
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-001133

Senator Linda White  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Suite 1.111  
Parliament House  
CANBERRA ACT 2600

Dear Senator *Linda*

I am writing in relation to the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments in Delegated Legislation Monitor 6 of 2023 about the following three instruments:

- Corporations Amendment (Design and Distribution Obligations – Income Management Regimes) Regulations 2023;
- Corporations Amendment (Litigation Funding) Regulations 2022; and
- Treasury Law Amendment (Rationalising ASIC Instruments) Regulations 2022.

The committee has sought advice as to whether amendments can be progressed to ensure that the Corporations Regulations 2001 are subject to sunseting; or alternatively, whether the matters introduced in these three instruments can be subject to a 10-year sunseting period.

In my previous correspondence, I drew the committee's attention to the reasons that the Corporations Regulations were exempt from sunseting in 2017. They were exempt on the basis that:

- they are part of an intergovernmental scheme
- commercial certainty would be undermined by sunseting
- the instrument is subject to regular review and amendment.

This is consistent with the Attorney-General's Department's guidance for exemptions to sunseting in the [Guide to Managing Sunseting of Legislative Instruments](#).

These three criteria continue to apply to the Corporations Regulations 2001 and necessitate an ongoing exemption to sunseting more broadly. I therefore do not intend to recommend to the Attorney-General that the current exemption for sunseting should be revoked.

However, in this instance I will seek amendments so that the matters in the three regulations listed above cease after ten years.

I trust that the information provides you with the assurance required for the removal of the disallowance motions to ensure that the amending regulations continue in force. They deliver important public policy objectives – including ensuring the continuity of essential assistance to marginalised, vulnerable or disadvantaged groups who cannot afford access to commercially provided financial advice.

I have copied this letter to the Treasurer and the Attorney-General.

Yours sincerely

The Hon Stephen Jones MP

CC: Treasurer, The Hon Jim Chalmers MP; Attorney-General, The Hon Mark Dreyfus MP