

Australian Capital Territory

# Public Sector Management (Executive Employee Conditions of Employment) Amendment Standards 2013 (No 1)

Disallowable instrument DI2013–187

made under the

Public Sector Management Act 1994, s 251 (Management standards)

## EXPLANATORY STATEMENT

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### Background

The Public Sector Management Standards 2006 (the PSM Standards) are a subordinate law, which supports the *Public Sector Management Act 1994* (the PSM Act).

Section 251 of the PSM Act allows the Commissioner for Public Administration (the Commissioner), with the approval of the Chief Minister, to make PSM Standards for the purposes of the PSM Act.

This amendment relates to the appointment and conditions of the head of service, directors-general engaged under Division 3.4 of the PSM Act and executives engaged under Division 5.4 of the PSM Act (referred to collectively as ‘executive employees’). Where the amendment refers to a ‘relevant person’ being able to take a particular action in relation to executive employees, that person is the Chief Minister for the head of service, and the head of service for all other executive employees.

There are 3 primary areas of change.

The first is to provide a degree of flexibility to respond to issues surrounding the recruitment of executive employees to the ACT Public Service (ACTPS). The provisions allow for remuneration to be fixed above the level set by the Standards and the Remuneration Tribunal in limited circumstances.

The second focuses on importing conditions of employment that have previously been included in standard form executive employee contracts, either directly, by reference or implication, executed prior to this amendment into the PSM Standards. The aim of

these changes is to simplify the employment framework that applies to executive employees by placing the majority of their conditions of employment in one instrument.

The third introduces a new performance management regime for executive employees. The provisions create requirements for a more rigorous and contemporary performance arrangement, with particulars to be determined by policy. The provisions also specify procedures and consequences relating to misconduct and underperformance.

## **Detail**

### **Clause 1                      Name of instrument**

This is a technical clause stating the name of the instrument as the Public Sector Management (Executive Employee Conditions of Employment) Amendment Standards 2013 (No 1).

### **Clause 2                      Commencement**

This is a technical clause stating that the instrument commences on the day after it is notified on the Legislation Register.

### **Clause 3                      Legislation amended**

This is a technical clause stating the instrument being amended is the *Public Sector Management Standards 2006* (PSM Standards).

### **Clause 4                      Parts 9.1 to 9.3**

This clause repeals previous Parts 9.1 to 9.3 of the PSM Standards and replaces it with new Parts 9.1, 9.2, 9.3, 9.3A, 9.3B and 9.3C, which contain revised conditions and entitlements provisions for executive employees.

#### **Part 9.1      Executive employee conditions of employment**

New Part 9.1 is an addition to the PSM Standards. It states the sources of an executive employee's conditions of employment.

### ***Section 618 – Application –pt 9.1***

This provision specifies that Parts 9.1, 9.2, 9.3, 9.3A, 9.3B and 9.3C only apply to contracts entered into after the Parts commence (which is the day after notification on the Legislation Register).

This is required as the changes import and amend parts of the standard form executive employee contracts into the PSM Standards that were used throughout the ACTPS prior to these provisions coming into effect. Accordingly, new Parts 9.1 to 9.3C will only apply to executives with new contracts executed after the commencement of the amendments.

Contracts entered into prior to the commencement of new Parts 9.1 to 9.3C will be governed by the previous Parts 9.1 to 9.3.

### ***Section 619 – Executive employee conditions of employment***

This provision specifies where an executive employee's conditions of employment come from, which are:

- the written contract, required under one of sections 23C, 23J, 28, 30, 72 and 76 of the PSM Act to engage an executive employee in the ACTPS;
- Chapter 9 of the PSM Standards, which contains provisions in relation to the employment of executive employees, except for Part 9.4 as it deals with statutory officeholders only; and
- anything else required under the law (such as conditions provided under the *Fair Work Act 2009*, for example).

For clarity, this provision further indicates that Chapter 9 prevails over the provisions in the contract to the extent of any inconsistency.

## **Part 9.2 Executive employee's functions**

New Part 9.2 is an addition to the PSM Standards. It states the sources of an executive employee's functions and some additional functions.

### ***Section 620 – Executive employee functions-generally***

This provision specifies that an executive employee's functions (defined in the *Legislation Act 2001* to include authority, duty and power) are those contained in:

- the PSM Act;
- the PSM Standards;
- his or her contract; and
- any other law (such as requirements under work health and safety legislation, for example).

### ***Section 621 – Executive employee functions-financial management***

This provision specifies an additional executive employee function, which is not to exceed the budget set for their directorate or business unit. This requirement is imported from standard form executive employee contracts that were used prior to this amendment commencing.

### **Part 9.3 Executive employee remuneration**

New Part 9.3 is an addition to the PSM Standards. It provides a comprehensive statement of the sources of an executive's remuneration. It imports entitlements from standard form executive employee contracts that were used prior to this amendment commencing.

#### ***Section 622 – Executive employee salary***

This provision specifies that an executive employee is required to be paid an amount in cash that is provided by:

- the PSM Act;
- the PSM Standards;
- a determination under the *Remuneration Tribunal Act 1995*, which requires the salary and some entitlements of executive employees to be reviewed periodically; and
- any relevant industrial instrument (such as under the *Fair Work Act 2009*).

#### ***Section 623 – Executive employee entitlements generally***

This provision specifies that an executive employee is required to be given all entitlements, benefits and allowances that are provided in:

- the PSM Act;
- the PSM Standards;
- a determination under the *Remuneration Tribunal Act 1995*, which requires the salary and some entitlements of executive employees to be reviewed periodically;
- any relevant industrial instrument (such as an enterprise agreement or a Modern Award); and
- any other Territory or Commonwealth law (such as public holidays legislation or the *Fair Work Act 2009*).

### **Part 9.3A Working out executive employee remuneration**

New Part 9.3A replaces and partially amends Part 9.1 of the Standards. It specifies how an executive employee's remuneration is determined.

#### ***Section 624 – Definitions-pt 9.3A***

This provision contains definitions for terms used in new Part 9.3A.

Notably, the provision expressly defines 'remuneration' to include salary and any other entitlements. All other terms defined in the provision are signpost definitions.

#### ***Section 625 – Meaning of total remuneration point-pt 9.3A***

This provision reproduces the term 'total remuneration point' from previous section 620 of the Standards.

Although Table 625 is different in form to previous Table 620 (it numbers the rows and omits the last column with the remuneration zones), the total remuneration points assigned to the ranges of assessed work value have not been amended.

### ***Section 626 – Assessed work value for an executive employee office***

This provision reproduces parts of previous section 620 of the Standards. It maintains the requirement for the head of service to approve an independent job evaluation methodology for determining work value for executive employee offices.

For clarity, the provision adds that all executive employee offices require a work value.

### ***Section 627 – Circumstances where assessed work value for an executive employee not required***

This provision reproduces previous section 622 of the PSM Standards with some changes to wording. While it refers to the head of service or Chief Minister deciding that an ‘assessed work value’ is not required rather than an ‘independent job evaluation’, and the language in parts of the section has been simplified, the effect of the provision is the same.

### ***Section 628 – Executive employee - base remuneration***

This provision defines a new term, ‘base remuneration’. It refers to all entitlements specified in determinations issued by the Remuneration Tribunal in relation to a total remuneration point and includes:

- salary
- superannuation
- an executive vehicle (or cash in lieu)
- a parking space (or cash in lieu) and
- fringe benefits (or cash in lieu).

### ***Section 629 – Head of service may approve higher remuneration – new executive employees***

This provision enables the head of service to approve, under limited circumstances, a higher base remuneration (as defined under proposed section 628). The head of service may do this on his or her own initiative or at the request of a director-general. The power can only be exercised in relation to new executive employees, that is an executive employee that is not currently in the executive position to which they are being engaged.

The provision gives the head of service the discretion to set higher base remuneration, not revise the total remuneration point. In order to exercise this power, the head of service must have consulted with the Commissioner for Public Administration, and be satisfied that the higher remuneration is fair considering the remuneration of other executive employees in the service.

A further condition of exercising this power is that the head of service must be satisfied at least one of three situations applies:

- The position has been advertised at base remuneration and no candidate was ranked suitable.
- The entity that administers the independent job evaluation methodology has advised that remuneration above the total remuneration point for a particular position may be required.

- The new executive was employed outside the service immediately before being offered employment in an executive position in the service on a higher remuneration than the base remuneration for that position.

In the first two listed circumstances, there is no cap on the amount of higher base remuneration the head of service may offer. However, where the new executive is joining from outside the service as per the third situation, the head of service can only offer up to 10% more than the base remuneration that would usually apply to the total remuneration point, as would usually apply to that employee's circumstances.

Also regarding the first two listed circumstances, the head of service's exercise of power would be in relation to a position, and therefore could be applied to subsequent instances of this position being advertised if the head of service was so inclined. However, in the third listed situation, the head of service would be exercising the power in favour of a particular individual and would only to apply to that executive employee. Therefore if the position was to become vacant again, the position could not be advertised at the higher rate.

The provision requires that a director-general requesting exercise of this power must do so before a new executive employee is engaged. A director-general may delegate the power to request but only to another director-general or executive.

### ***Section 630 — Contract variation to increase total remuneration point***

This provision reproduces previous section 621 of the PSM Standards with some changes to wording. While the heading has changed, and the language in parts of the section has been clarified, the effect of the provision is the same.

## **Part 9.3B Other executive employee conditions of employment**

New Part 9.3B reproduces and adds to previous Part 9.2 of the PSM Standards. It specifies other conditions of employment for executive employees that are either in the previous Standards or were contained in the standard form executive employee contracts executed prior to this amendment. The new Part also contains extended requirement in relation to the performance and conduct obligations of executive employees.

### **Division 9.3B.1 General matters**

New Division 9.3B.1 reproduces existing obligations on executive employees with slight amendments, that are currently contained in the PSM Standards and the standard form executive employee contracts executed prior to this amendment.

### ***Section 631 – Exclusive employment***

This provision reproduces and partially amends previous section 626 of the PSM Standards and also imports aspects of the standard form executive employee contracts executed prior to this amendment around exclusive employment.

The provision applies the requirements in section 244 of the PSM Act to executive employees to provide information about second jobs in particular circumstances.

### ***Section 632 – Warranty by executive employee***

This is a new provision that imports and partially amends a condition from the standard form executive employee contracts executed prior to this amendment around executive warranty.

This provision requires an executive employee to warrant that he or she will continue to be a fit and proper person as per the previous contract requirement. However, the provision slightly alters the requirement around disclosure of convictions, so that the executive employee is now required to warrant all convictions or findings of guilt (other than spent convictions).

### ***Section 633 – Disclosure of material interests***

This provision reproduces previous section 625 of the PSM Standards and also imports aspects of the standard form executive employee contracts executed prior to this amendment around disclosure of financial interests.

The provision applies to executive employees engaged under a contract of 3 months or more. It requires the executive employee to provide a statement of material interests relevant to employment before the contract is entered into, every 12 months after the contract commences and when circumstances change.

The provision is expansive in defining material interests to include any interest relevant to employment whether financial or non-financial, and direct or indirect, and applies to real or perceived conflicts. The provision provides guidance on what could constitute an indirect interest.

### ***Section 634 – Confidentiality of information***

This provision reproduces and partially amends previous section 626A of the PSM Standards and also imports aspects of the standard form executive employee contracts executed prior to this amendment around disclosure of information.

The provision requires the executive employee not to disclose information gained in the course of employment once the executive employee has ceased employment in the service without written approval from the relevant person. A prohibition on disclosures during employment is already provided for in section 9 of the PSM Act.

### ***Section 635 – Equity and diversity – director-general responsibilities***

This provision reproduces previous section 628 of the PSM Standards with some changes to wording. Apart from clarifying that a director-general must report to the head of service on implementation of an equity and diversity plan, the provision imposes the same requirements on directors-general to prepare, implement and review plans.

## **Division 9.3B.2 Performance**

New Division 9.3B.2 introduces new standards and requirements in relation to the performance of executive employees. It replaces previous section 624 of the PSM Standards and also imports aspects of the standard form executive employee contracts executed prior to this amendment around performance agreements.

### ***Section 636 – Performance agreement***

This is a new provision that requires an executive employee to provide a draft of a performance agreement to the relevant person within 3 months of the commencement of the employee's contract.

The head of service must either approve the performance agreement, or after consulting with the executive employee, amend and approve the agreement.

The performance agreement must comply with any policy approved by the head of service in relation to performance. The executive employee must comply with the agreement.

### ***Section 636A – Underperformance***

This is a new provision that specifies the process for when an executive employee is not performing satisfactorily.

In this situation, the relevant person may manage the executive employee's performance but in doing so must comply with any policy that might be made by the head of service in relation to performance, or in accordance with natural justice and procedural fairness if no such policy is in place.

### ***Section 636B – Performance policy***

This is a new provision that allows the head of service to approve a policy that contains procedures for dealing with underperformance by executive employees. Any processes must comply with procedural fairness and natural justice principles.

### **Division 9.3B.3 Misconduct**

New Division 9.3B.3 introduces new standards and requirements in relation to the conduct of executive employees. This broadly mirrors conditions in ACT Public Service enterprise agreements.

### ***Section 636C – Misconduct***

This is a new provision that specifies the process for when misconduct by an executive employee is alleged and/or proven.

Where the relevant person for an executive employee receives an allegation of misconduct against an employee, the relevant person may, by written notice:

- suspend the employee with or without pay and/or
- transfer the employee to other duties.

Where the relevant person for an executive employee is satisfied on reasonable grounds that the employee has engaged in misconduct, the relevant person may do 1 or more of the following:

- counsel the employee
- provide a written warning
- transfer the employee to other duties and/or
- deduct a monetary penalty from the employee's wages.



The relevant person may also terminate employment, but this is covered separately in section 636F.

If the relevant person takes any of the actions listed under this provision, he or she must comply with any policy that might be made by the head of service in relation to misconduct, or in accordance with the principles of natural justice and procedural fairness if no such policy is in place.

If the relevant person suspends an executive employee with or without pay, the written notice must indicate the date when the suspension starts and ends, and the reason for the suspension.

For the purposes of the section, ‘misconduct’ has a non-exhaustive definition that expressly includes conduct that harms or is likely to harm the reputation of the service or the Territory, as well as a breach of section 9 of the PSM Act.

### ***Section 636D – Misconduct policy***

This is a new provision that allows the head of service to make a policy that contains procedures for dealing with misconduct by executive employees. Any processes must comply with the principles of procedural fairness and natural justice.

### **Division 9.3B.4 Termination**

New Division 9.3B.4 specifies when an executive employee’s employment is and/or can be terminated.

### ***Section 636E – Termination by the executive employee***

This is a new provision that imports a condition from the standard form executive employee contracts executed prior to this amendment around termination by the employee with slightly amended wording.

The provision allows an executive employee to terminate his or her employment with the Territory at any time for any reason by giving the relevant person 8 weeks written notice or some other notice period agreed by the parties.

### ***Section 636F – Termination by the Territory***

This is a new provision that imports and adds to a condition from the standard form executive employee contracts executed prior to this amendment around termination by the employer.

The provision allows the relevant person to terminate an executive employee’s employment by giving the executive employee 8 weeks written notice, or some other notice period agreed by the parties, but only where the relevant person is satisfied on reasonable grounds that:

- misconduct by the executive employee has occurred;
- the executive employee has not complied with the conditions of employment
- the executive employee’s position is no longer required for operational reasons

- the executive employee is not a fit and proper person or has not disclosed relevant unspent convictions or findings of guilt (as required under new section 632) or
- after the relevant person has managed the executive employee's performance under new section 636B, the executive employee is continuing to underperform or is likely to continue to underperform.

The relevant person may also terminate the employee's employment without notice where satisfied on reasonable grounds that serious misconduct has occurred.

A written notice issued by the relevant person terminating employment must state the reason for termination.

### **Part 9.3C Executive employee financial entitlements**

New Part 9.3C reproduces previous Part 9.3 of the PSM Standards with slightly amended wording. All the entitlements provided under this Part existed previously.

#### ***Section 636G – Meaning of continuous recognised service-pt 9.3C***

This provision reproduces previous subsection 634(2) of the PSM Standards with slightly amended wording. The definition of 'continuous recognised service' is unchanged.

#### ***Section 636H – Meaning of transitional executive-pt 9.3C***

This provision reproduces the definition of 'transitional executive' in previous section 631 of the PSM Standards with slight amendments to formatting.

#### ***Section 636I –***

##### ***Head of service and director-general employment benefit***

This provision reproduces previous section 632 of the PSM Standards with slight amendments to wording, cross-references and formatting. The conditions for the benefit remain the same.

#### ***Section 636J – Payment instead of termination notice period***

This provision reproduces that part of previous section 633 of the PSM Standards with slight amendments to wording and cross-references. The conditions for payment instead of notice remain the same.

#### ***Section 636K – Special benefit payable on early termination of contract – generally***

This provision reproduces previous section 634 of the PSM Standards with slight amendments to wording, cross-references and formatting. The conditions for the benefit remain the same.

#### ***Section 636L – Special benefit payable on early termination of contract – transitional executives***

This provision reproduces that part of previous section 635 of the PSM Standards which dealt with early termination of employment for transitional executives

(particularly subsections 635(3) and 635(6)), with slight amendments to wording, cross-references and formatting. The conditions for the benefit remain the same.

The remainder of previous section 635 is incorporated into new section 636M.

***Section 636M – Special benefits payable on non-renewal of contract in certain circumstances-transitional executives***

This provision reproduces that part of previous subsections 635 of the PSM Standards which dealt with non-renewal of contracts (particularly subsections 635(4) and 635(5)), with slight amendments to wording, cross-references and formatting. The conditions for the benefit remain the same.

***Section 636N – Superannuation-executive employees***

This provision reproduces previous section 636 of the PSM Standards with slight amendments to wording, cross-references and formatting. The conditions for the benefit remain the same.

**Clause 5 Choice of motor vehicle – Section 647 (7), note 1**

This is a consequential amendment required because the table in previous section 620 of the PSM Standards has been amended. The maximum vehicle value in relation to each remuneration zone is unchanged from the previous Standards.

**Clause 6 – Section 647 (8)**

This is a consequential amendment required because the table in previous section 620 of the PSM Standards has been amended. The maximum vehicle value in relation to each remuneration zone is unchanged from the previous Standards.

**Clause 7 – New section 647 (9)**

This is a consequential amendment required because the table in previous section 620 of the PSM Standards has been amended. The maximum vehicle value in relation to each remuneration zone is unchanged from the previous Standards..

**Clause 8 – Payment in lieu of executive vehicle entitlement – Section 648 (1), note 1**

This is a consequential amendment required because the table in previous section 620 of the PSM Standards has been amended. The value of payment in lieu in relation to each remuneration zone is unchanged from the previous Standards.

## **Clause 9 – Section 648 (2)**

This is a consequential amendment required because the table in previous section 620 of the PSM Standards has been amended. The value of payment in lieu in relation to each remuneration zone is unchanged from the previous Standards.

## **Clause 10 – New section 648 (8)**

This is a consequential amendment required because the table in previous section 620 of the PSM Standards has been amended. The value of payment in lieu in relation to each remuneration zone is unchanged from the previous Standards.

## **Clause 11 – Dictionary, new definitions**

This is a new provision that defines new terms in the amendment.

There are two terms of particular note, as they are used throughout the new provisions.

‘Executive employee’ is defined to include all executives, being the head of service, directors-general and executives, whether on short or long-term contracts.

‘Relevant person’ in relation to an executive employee is the Chief Minister in relation to the head of service, or the head of service in relation to directors-general and executives.

All other terms listed in the dictionary are signpost definitions.