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# Consultation Draft Government Sector Employment Rules 2014 – Explanatory Note

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## Background to the Government Sector Employment Rules

The Rules form a key part of the regulatory framework for the administration of government sector workforce and employment matters.

The *Government Sector Employment Act 2013* (the GSE Act) is to be supported by:

- The *Government Sector Employment Regulation 2014* which deal with matters necessary to give effect to the GSE Act (including for example employee entitlements); and
- the Government Sector Employment Rules 2014 which deal with more operational and procedural employment matters and which may be applied to the Government Sector or more narrowly to the Public Service; and
- Guidelines made by the Commissioner under the GSE Act which are intended to provide decision-makers with guidance and direction to promote consistency, but do not contain mandatory requirements.

## Status of Government Sector Employment Rules

The *Government Sector Employment Act 2013* confers power on the Public Service Commissioner to make Government Sector Employment Rules ('GSE Rules').

The GSE Rules may contain mandatory requirements, particularly for agency heads and employers generally carrying out workforce management roles, and a failure to comply with obligations under the GSE Rules may be treated as misconduct.

Generally, for non-executive employees whose terms and conditions of employment fall within the scope of the industrial employment arrangements, the GSE Rules do not seek to duplicate those matters.

For senior executives, the GSE Rules are the source of the written executive contract to which they agree to be bound when they are employed.

The GSE Rules must be published on the NSW legislation and the Public Service Commission websites.

The Commissioner will monitor the implementation of the GSE Rules over time and where improvements are needed as the reforms are implemented adjustments can be made as necessary.

The GSE Rules are not 'statutory rules' within the meaning of the *Interpretation Act 1987* and are not subject to disallowance by Parliament. They can be described as a form of statutory instrument (in that they are expressly enabled by statute) and also as a "subordinate" instrument in the sense that the Rules are subordinate in status to both

the Regulation and the GSE Act and must not be inconsistent with either.

This form of statutory instrument has not been used previously to govern public employment in New South Wales. However most other jurisdictions have similar binding requirements (variously called directions, mandatory standards, by-laws for public sector employment purposes) similar to the GSE Rules. This includes, for example, the Australian Public Service Commissioner's Directions and Classification Rules made under the Commonwealth *Public Service Act 2004*.

## Purpose of Government Sector Employment Rules

The purpose of the GSE Rules is to:

- Enable the Public Service Commissioner to co-ordinate consistent, system level change to employment practices across the government sector.
- Permit the Public Service Commissioner to establish consistent, transparent, requirements for employment matters.
- Devolve responsibility to Secretaries and Agency Heads to allow them to perform their employer functions under the GSE Act.
- Enable the Commissioner to set out essential requirements in employment matters, against which compliance with workforce management practice can be assessed. The GSE Rules will include requirements for agency heads to establish policies, systems and business processes to give effect to the rules and to enable the agency head to efficiently and effectively monitor and report on compliance with the requirements of the GSE Act, the GSE Regulation and the GSE Rules.
- Enable the Commissioner to require Secretaries and agency heads to report to the Commissioner on key performance indicators including compliance and key metrics in human capital management.

## Consultation and the making of Government Sector Employment Rules

A Consultation Draft of the GSE Rules will be released for a six week consultation period, and following review of the submissions made during the consultation process the GSE Rules will be formally made by the Commissioner and commence on 24 February 2014, at the same time as the commencement of the GSE Act.

Once made, the GSE Rules will form the platform on which agencies can establish internal policies and business processes.

It is expected that once established the GSE Rules will not require frequent change. However change may be required

to respond to finalise areas of new policy development over the coming few years, and where issues are identified by the sector to be addressed in the Rules or arising from judicial decisions.

## **Content and structure of Government Sector Employment Rules**

Section 12 of the GSE Act provides that Rules may be made on matters authorised to be made by or under the GSE Act. The Consultation Draft Rules have been apply to Public Service agencies and employees and, as relevant, to government sector agencies and employees (all as defined in the *Government Sector Employment Act 2013* and in the GSE Rules themselves).

The content of the Consultation Draft Rules deals with priority matters that are required for the commencement of the GSE Act on 24 February 2014. The GSE Rules are structured as a single Rules instrument set out in Parts. Further Amending Rules dealing with matters will be developed where required during 2014.

The Table in Attachment 1 lists the subject matters the sections of the GSE Act which enable the Commissioner to makes rules, and (in the right hand column), the Table indicates whether that subject matter is covered by Rules or Guidelines.

## **Content of the Consultation Draft Government Sector Employment Rules**

The following is an explanation of the Clauses in the Consultation Draft Rules. These explanations are for guidance only and do not form part of the GSE Rules.

### **Part 1 – Preliminary**

This Part sets out introductory matters and defines terms used in the GSE Rules.

### **Part 2 – General provisions**

**Clause 4** provides that the Public Service Commissioner is to provide guidance on certain matters, including in relation to termination of employment of non-executive employees.

**Clause 5** limits the scope of the delegation power of a Public Service agency head so that assignment to different executive roles and termination of executives cannot be delegated.

### **Part 3 – General public service employment provisions**

**Clause 6** deals with probation periods, which is dealt with under the GSE Act as a condition of engagement. The GSE Rules permit probation for executives (with a maximum of 3 months) and for non-executives, a maximum of 6 months (with possible extension up to a maximum period of 12 months). An employer has a discretion whether or not to place a probation period on an employee. The probation period ends on confirmation of employment or termination of employment.

**Clauses 7 to 10** set out requirements for other conditions of engagement of Public Service employees, including citizenship, qualifications, security clearances, and health assessments. In relation to health assessments, Clause 10 provides for possible forms of health assessments that can be undertaken, including a medical examination by a

medical practitioner approved by the Commissioner. There are changes made to the requirements under the PSEM regime for citizenship, with the new requirements expressed to allow more flexibility

**Clause 11** limits the maximum period of temporary employment of non-executive employees to 4 years, or 5 years with the approval of the Commissioner. The period has been increased from a maximum of 3 years which was previously set out in section 28 of the PSEM Act.

The rationale for the increase is based on an examination of the length of temporary employment across the sector, including requests for extensions and the reasons for contract extensions. There are valid reasons for current temporary employment being extended, including where the role is required for large infrastructure projects or where employees take extended maternity leave. Setting the period at 4 years will reduce the number of instances that agencies need to request an extension. The maximum period of 5 years has been set as a hard line to reduce instances of temporary employees continuing for many years without an organisation making a decision on whether the role is required on an ongoing basis.

**Clause 12** sets out procedural requirements for the termination of non-executive employees under s47 of the Act (Note that s47 of the Act sets out grounds on which the employment of a non-executive employee may be terminated (failing to meet a condition of engagement, failure to hold an essential qualification, unsatisfactory performance, lack of physical or mental capacity, retirement on medical grounds, refusal to perform duties, abandonment of employment, misconduct, conviction of a serious offence, on the basis of being declared excess, or other ground prescribed by the regulations). The GSE Rules requires a non-executive employee to be given an opportunity to make submissions on the proposed termination which are to be taken into consideration. Clause 4(2) provides that the Commissioner is to provide guidance to agency heads in relation to termination under s47 of the GSE Act.

### **Part 4 – Merit based employment**

**Clause 13** sets out application and definitions for this Part. This sets out new assessment requirements including suitability assessment and comparative assessment.

**Clause 14** provides a statement on the principle of merit [Clause 14(1)], and a set of specific merit-related principles. These principles provide the high level basis for making employment decisions.

**Clause 15** sets out what constitutes a comparative assessment and what processes may be used. A comparative assessment is the basis for ongoing employment and for temporary employment for longer than 6 months. It includes comparison of a multiple applicants

**Clause 16** sets out what constitutes a suitability assessment. A suitability assessment is the minimum assessment required for an employment decision where a comparative assessment is not required. Suitability assessment is assessment of an applicant against the requirements of the role. It does not require a comparison against other applicants.

**Clause 17** sets out what constitutes a talent pool. Talent pools are a new concept being introduced to improve efficiency of recruitment processes. A person's placement in a talent pool is current for up to 12 months, consistent with

the period of currency of some capability based assessments. Talent pools replace existing eligibility list arrangements under the PSEM Act.

**Clause 18** requires a decision to employ a person in ongoing employment to be based on a comparative assessment (see Clause 15), and external advertising.

**Clause 19** provides selection options for employing a person in temporary or term employment for a period less than 6 months. The period of employment is limited to 6 months unless a comparative assessment has been undertaken. Where an employee is employed on the basis of a suitability assessment, and an employer wishes to extend the employee beyond 6 months, further action is needed to meet the requirements of comparative assessment after 3 months of the temporary or term employment. This requirement is a strengthening of the merit requirements under the GSE Act from the PSEM Act, as under the latter, no assessment was required of temporary employees engaged for a period of less than 12 months.

**Clause 21** outlines requirements for agency heads to convert term or temporary employees to ongoing employment, and employees on above-level temporary secondments to ongoing employment at the higher level. Under this clause, employees may be converted to ongoing employment after 12 months in the role provided the required conditions in subclause 21(2) are met. This provides greater flexibility for agencies than under the PSEM Act, as under the PSEM Act employees must have performed in the role for 2 years before they can be considered for conversion. It also reinforces current performance management outcomes as a factor in conversion decisions.

**Clause 22** requires that decisions to employ a person in an at-level temporary secondment must be based on a suitability assessment.

**Clause 23** provides options for employing a person in an above-level temporary secondment for a period less than 6 months and outlines assessment requirements. The period of employment to 6 months unless a comparative assessment has been undertaken. In cases where a suitability assessment has been used to facilitate the secondment, clause 23 requires action to undertake additional requirements of a comparative assessment after 3 months if the secondment is expected to continue beyond 6 months.

**Clause 24** requires that decisions to employ a person in an above-level temporary secondment for longer than 6 months must be based on a comparative assessment.

**Clause 25** requires that decisions to transfer at level to ongoing employment in a different agency under section 64 of the Act must be based on a suitability assessment.

## Part 5 – Review of promotion decisions

**Clause 26** provides a process for internal review of a promotion decision relating to a non-executive employee in the Public Service. The review is of the selection process, and not of the merit of the recommended applicant.

**Clause 27** provides for the conduct of such a review and what findings can be made. The review may confirm the promotion decision or make a recommendation to the

agency head that the agency head revoke the decision and carry out another process. The reviewer's decision is final.

## Part 6 – Workforce diversity

**Clause 28** provides specific arrangements for the employment of Aboriginal people, people with a disability, young people, and other groups of employees designated from time to time (all known as 'eligible persons'), having regard to a person's suitability for the role and the application of the merit principle as between eligible employees. This replaces the old clause 6 of the PSEM Regulation 2009.

**Clause 29** requires agency heads to collect information on workforce diversity for the purposes of possible reporting to the Commissioner, if and when required.

## Part 7- Transfers and temporary secondments

**Clause 30** sets out requirements for transfers including that transfers can only be made at the same or an equivalent grade or level. (A permanent move to a new agency at a higher level is considered a recruitment outcome and not a transfer). Transfers may be employee or employer initiated. Where they are employer initiated, the employee has a right to have the transfer decision reviewed by a senior executive who was not involved in the transfer decision (see clause 32 for details). See also clause 25 (Transfers at-level) which requires transfer decisions to be based on a suitability assessment.

**Clause 31** outlines the requirements to be agreed between agencies for employee and employer initiated temporary secondments. This includes agreeing to the period of temporary secondment (up to a maximum of 2 years), the financial responsibilities of each agency in relation to the temporary secondment, the actions required at the conclusion of the temporary secondment, and the circumstances in which the temporary secondment may be terminated.

**Clause 32** outlines the process for review of employer initiated transfers and temporary secondments. It requires the employee to lodge the review request in writing within 10 business days of being notified of the proposed transfer or temporary secondment, and for the review to be undertaken by a senior executive not involved in the proposed transfer or temporary secondment within 10 business days. This time period allows time for relevant factors to be considered, and for a decision to be made in a reasonable time frame. The decision of the reviewer is final, and the review is to be completed prior to the transfer or temporary secondment taking place.

## Part 8 – Performance management

Part 8 applies to government sector agencies that are subject to sections 67 and 68 of the GSE Act.

**Clause 33** sets out the core requirements that must form part of a performance management system in a government sector agency, as required under s67 of the GSE Act. The core requirements are based on those currently set out in the Performance Development Framework.

**Clause 34** provides the procedural requirements for dealing with unsatisfactory performance prior to taking action under s68 (2) of the GSE Act. The clause sets out steps to be taken by the agency head commencing with a determination

of unsatisfactory performance, formal notification to the employee of what action is being proposed, and steps permitting the employee to respond to the proposed action. Action available to deal with unsatisfactory performance under s68 (2) includes termination, reduction of remuneration, or assignment to a different role.

## Part 9 – Misconduct- procedural requirements

Part 9 of the Rules (and sections 69 and 70 of the Act) replaces those provisions of Part 2.7 PSEM Act dealing with misconduct, Clause 27 PSEM Regulation 2009, and the procedural guidelines issued pursuant to s44 PSEM Act.

**Clause 35** states that the misconduct procedure applies to agencies within the meaning of section 69 of the GSE Act (being for the time being only Public Service agencies).

**Clause 36** sets out the requirements for the initial stage for dealing with misconduct. An agency head may conduct an initial assessment to ensure that a claim is not trivial or factually difficult to establish as early as possible.

**Clause 37** Agency heads have discretion in determining how the inquiry is to be carried out.

**Clause 38** sets out the procedure for the making of a finding of misconduct in accordance with the requirements of procedural fairness. If other action for misconduct is not taken against the employee, the agency head can decide to monitor the conduct of the relevant employee over a period of time and may take any future conduct during that time into account in taking further action against the employee.

**Clause 39** provides that written records of misconduct proceedings and actions be kept by the agency.

In relation to the personal file of the employee concerned, the agency head is to balance the competing public interests in the need to keep records on findings of misconduct and the need to minimise prejudicial information on a person's file.

## Part 10 – Additional provisions relating to Public Service senior executives

**Clause 40** imposes an obligation on Public Service employers to report to the Commissioner following the

termination of employment of a Public Service senior executive. The report must provide a summary of the process and reasons for the termination of employment. The requirement does not apply where the employer of the executive is a Minister. This is a new requirement established to ensure the exercise of the power of termination under 41 of the Act has been exercised appropriately.

**Clause 41** prescribes the model contract of employment for senior executives and sets out requirements relating to those executive contracts.

**Clause 42** requires a Public Service senior executive to comply with the obligations in the contract.

**Clause 43** provides that the contract of employment does not commence until any conditions of engagement are satisfied (note that under Clause 8 the manner and timing of providing evidence of an executive's formal qualifications may not prevent engagement from occurring subject to the condition to provide evidence being produced is fulfilled) (Note also specific conditions of employment in Clause 48).

**Clause 44** provides for approval of part time work arrangements for senior executives.

**Clauses 45 and 46** require a senior executive to enter into a performance agreement, be subject to performance reviews, and to participate in regular capability and technical assessments.

**Clause 47** provides that total remuneration package consists of monetary and employment benefits components as set out in the contract.

**Clause 48 (note may move to 43)** – allows an employer of a senior executive to impose a role-specific condition of engagement (see also Clause 43 relating to general conditions of engagement).

**Clause 50 clarifies** that senior executives are not entitled to flex leave or payment for working overtime.

## Attachment 1

Head of Power in GSE Act (Section No.)	Subject Matter of the Rule	Initial approach: Rule (by clause) or Guideline
s17(4)	Requirements for Commissioner approval, concurrence or consultation	Guidelines
s27(4)	Limits on delegation power of Secretary of Department	Clause 5
s32(4)	Limits on delegation of heads of Public Service agencies	Clause 5
s36	Rules relating to senior executive - general	Part 10 rules
s36(a)	Work level standards for roles of senior executives	Guidelines
s36(b)	Methods of job evaluation for senior executive roles	Guidelines
s36(c)	Capabilities for roles of senior executives	Guidelines
s36(d)	Assignment to roles of senior executives	Rules (to be settled)
s36, .44, s39(4)(b)	Conditions of engagement	Clauses 6 - 10
s36(e)	Senior executive contracts of employment	Clause 41
s48	Rules relating to non-executive employees – general	Various Clauses
s48(a)	Recruitment of non-executive employees	Guidelines
s48(a)	The principle of employment on merit	Clauses 13 – 25
s48(b)	Employment in a particular kind of employment	Clauses 11, 18-21
s44, s48(c)	Conditions of engagement (non-executive employees)	Clauses 6 - 11
s48(d)	Work level standards for non-executive roles	Guidelines
s48(e)	Methods of job evaluation for non-executive roles	Guidelines
s48(f)	Capabilities for non-executive roles	Guidelines
s48(g)	Assignment to roles for non-executive	Rules still to be settled
s48(h)	Acting appointments of non-executives	Clauses 22-25
s48(i)	Termination of non-executive employment	Clause 12
s47(1)(j), s48(j)	Termination of excess non-executive employees	GSE Regulation and Policy
s63(3)	Workforce Diversity	Clauses 28 -29
s64	Transfer and secondment of employees between government sector agencies	Clauses 30 -32
s64(4)	Review of transfer decisions	Clause 32
s66(4)	Temporary assignment of staff between government sector agencies and other relevant bodies	
s67(2)	Core requirements for performance management systems	Clauses 33
s68(1)	Unsatisfactory performance – procedural requirements	Clause 34
s69(3)	Misconduct	Clauses 35 – 39