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**Private and confidential**

The Hon Anthony Albanese MP  
Prime Minister  
Parliament House  
Canberra ACT 2600

## **Inquiry into allegations of breaches of the APS Code of Conduct by Mr Michael Pezzullo AO**

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**Report detailing findings of fact and determination of whether Mr Pezzullo has  
breached the APS Code of Conduct**

**Lynelle Briggs AO**

**22 November 2023**

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The Hon Anthony Albanese MP  
Prime Minister  
Parliament House  
Canberra ACT 2600

**Through:** Dr Gordon de Brouwer PSM  
Australian Public Service Commissioner

Dear Prime Minister

### **Inquiry into allegations of breaches of the APS Code of Conduct by Mr Michael Pezzullo AO**

On delegation from the Australian Public Service Commissioner, I have undertaken an inquiry pursuant to the *Public Service Act 1999* (Cth) (**PS Act**) into the conduct of Mr Michael Pezzullo AO, Secretary of the Department of Home Affairs.

The inquiry originated following media reporting by the Nine Network on 24 September 2023 of message exchanges between Mr Pezzullo and Mr Scott Briggs, a "confidant" to former Prime Ministers Turnbull and Morrison. After that, the inquiry obtained and analysed voluminous additional materials (over 1,400 text messages exchanged between Mr Pezzullo and Mr Scott Briggs) and contractual dealings between the Department of Home Affairs and an entity associated with Mr Briggs. Various people were also interviewed as part of the inquiry.

Despite voluminous evidence being received and analysed as part of the inquiry to obtain a complete understanding of Mr Pezzullo's behaviour, the inquiry has been conducted expeditiously while affording Mr Pezzullo all due procedural fairness.

Reflecting your familiarity with the Nine Network media reporting, I make only a few comments here focussing on Mr Pezzullo's conduct; the rest is covered in the **attached** report, which has detailed findings of fact and my determination as to whether Mr Pezzullo has breached the Australian Public Service (**APS**) Code of Conduct (**Code**).

In reaching my conclusions, I have undertaken careful and detailed assessment of Mr Pezzullo's actions and in doing so, provided him with ample opportunity to respond to the alleged breaches of the Code and accepted a number of his clarifications. Mr Pezzullo was respectful, co-operative and honourable in the way he conducted himself throughout the inquiry.

My assessment of Mr Pezzullo's conduct is based on fact and grounded by legislation as well as my knowledge of the norms of the Westminster system of government. My determinations on his conduct are based on the balance of probabilities, and the sanction proposed reflects the gravity of the allegations which I have found to be substantiated.

The Westminster system of government has established boundaries between the roles of politicians and public servants, but as you know those roles intersect in the everyday course of government business. By law and convention, however, there are areas where public servants have no role, namely in political matters such as the performance and choice of Ministers or electoral concerns, and there are established procedures by which public servants engage with Ministers and Cabinet—directly, through Ministers' offices, or through the hierarchical systems of government. These procedures are in place to safeguard the public interest by providing the necessary checks and balances that deliver stability and certainty in government administration.

ss 47E(c) and (d); 47F(1) and 11A(5)

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ss 47E(c) and (d); 47F(1) and 11A(5)

ss 47E(c) and (d); 47F(1) and 11A(5)

ss 47E(c) and (d); 47F(1) and 11A(5)

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I consider that Mr Pezzullo has overstepped the divide between usual public service discourse and engagement in the political domain ss 47E(c) and (d); 47F(1) and 11A(5)

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In the circumstances, I have concluded that he failed to act impartially and that it would be very difficult for any Government to trust Mr Pezzullo to maintain their confidences and for him to be considered apolitical in their future dealings with him.

ss 47E(c) and (d); 47F(1) and 11A(5)

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but to expedite the work as directed by Cabinet through engaging a company that on the face of it had expertise in the area and could deliver a solution quickly.

Although Mr Pezzullo denied many of the allegations, I have found that he has breached various provisions of the Code (as contained in section 13 of the PS Act) in several respects, as follows:

- (a) Section 13(2): that he failed to act with care and diligence in connection with his APS employment, in so far as he sought to gain an advantage for himself in his engagement with Mr Briggs and failed to declare a conflict of interest in the DPG Advisory direct sourced contract;
- (b) Section 13(3): that he failed to treat everyone with respect and courtesy, in so far as he was disparaging of and otherwise passed judgement on Ministers, disparaged Secretaries and their Departments and otherwise failed to demonstrate the level of professionalism, courtesy and integrity expected of senior public officials;
- (c) Section 13(6): he failed to maintain appropriate confidentiality about dealings with any Minister or Minister's member of staff, in so far as he communicated regularly with Mr Briggs, who was not employed in government and did not hold a security clearance, on sensitive government-related matters and breached Ministerial confidentiality on a number of occasions;
- (d) Section 13(7): he failed to take reasonable steps to avoid any conflict of interest, nor did he disclose that interest in so far as he failed to take reasonable steps to avoid and disclose details of his personal relationship with Mr Briggs and in the granting of a contract to Mr Briggs's company DPG Advisory in 2021;
- (e) Section 13(10)(a) and (b): he improperly used inside information or his duties, status, power or authority to seek to gain a benefit or advantage in terms of Ministerial appointments or machinery

of government changes, and he sought to cause detriment to certain Ministers and officials and their departments;

- (f) Section 13(11): he failed to behave in a way that at all times upholds the APS Values and the integrity and good reputation of his Agency and the APS, as demonstrated by his failure to comply with all of the APS Values at various times during his engagement with Mr Briggs; and
- (g) Section 13(13): he failed to comply with any other conduct requirements prescribed by the regulations, namely regarding the disclosure of confidential information that would be prejudicial to the effective workings of government.

Mr Pezzullo has also failed in his duty under section 12 of the PS Act to uphold and promote the APS Values in his role as an Agency Head.

ss 47E(c) and (d); 47F(1) and 11A(5)

Although I recognise Mr Pezzullo's perspective that his discussions with Mr Briggs were centred on public policy objectives, as distinct from attaining personal benefit, financial or otherwise, I have found to the contrary.

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I have recommended that a sanction of termination of Mr Pezzullo's appointment be imposed under s 59 of the PS Act, given the gravity and extent of the breaches of the Code and the requirement to uphold the APS Values as part of his role as Secretary of the Department of Home Affairs.

Yours sincerely



Lynelle Briggs AO

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# 1. Introduction

## 1.1 Executive summary

1. Upon the delegation of the Australian Public Service Commissioner (**APS Commissioner**), Dr Gordon De Brouwer, I have conducted an inquiry into alleged breaches of the Australian Public Service (**APS**) Code of Conduct (**Code**) by Mr Michael Pezzullo AO, Secretary of the Department of Home Affairs (**Inquiry**).
2. The Inquiry has been conducted pursuant to sections 41(2)(m) and 41A of the *Public Service Act 1999* (**PS Act**), which empower the APS Commissioner to inquire into an alleged breach of the Code by an Agency Head. Pursuant to section 41A(2) of the PS Act, where the Agency Head is a Secretary, the APS Commissioner is required to report on the results of an inquiry (including, if relevant, recommendations for sanction) to the Prime Minister. This report is provided to you in accordance with the requirements of the PS Act.
3. I can confirm that in reaching my conclusions, I have assessed Mr Pezzullo's actions against the Code, the APS Values and other provisions of the PS Act and that I have applied the basic requirements for procedures for determining alleged breaches of the Code as set out in the *Public Service Regulations 2023* (**PS Regulations 2023**) and the *Australian Public Service Commissioner's Directions 2016* (**Commissioner's Directions**).
4. The approach to the Inquiry is set out below, together with my findings of fact, determinations regarding breaches of the Code and recommendations as to sanction. A summary of my findings is at **Part 3.3** of this report. My detailed findings are set out in the sections below.
5. At the outset of this report, I note that as part of the Inquiry, I have considered many text messages which could constitute hundreds of separate breaches of the Code. However, given the sheer number of messages (over 1,400 individual exchanges), the way that I have proceeded in determining whether there has been a breach of the Code is to group the messages into five overarching allegations, broadly categorised based on the theme of the content of the text messages. The remaining two allegations relate to separate, discrete issues that were uncovered during the Inquiry.
6. I have assessed Mr Pezzullo's conduct and behaviour, including as disclosed in the publicly reported text messages themselves and also as reflected in the materials subsequently received as part of the Inquiry, and in numerous instances found the allegations made against Mr Pezzullo to be fully substantiated and recorded breaches of the Code in respect of them. In respect of two allegations where Code breaches against Mr Pezzullo have been partially substantiated, I have found that some aspects of the Code have been breached whilst others have not. In the latter circumstance, this is either because Mr Pezzullo has satisfied me, based on the evidence provided, that no breach has occurred, or in other circumstances, although evidence exists in relation to his conduct, this evidence does not, of itself rise to the threshold of a Code breach.
7. In short, my determination is that I have found that Mr Pezzullo has breached the Code in respect of five overarching allegations on at least 14 occasions as follows:
  - (a) in respect of Allegation 1 (using Mr Pezzullo's duty, power, status or authority to seek to gain a benefit or advantage for himself): sections 13(2), 13(7), 13(10)(a) and 13(11) of the PS Act, each constituting separate contraventions of the Code. To the extent that a contravention of section 13(11) has occurred, this arises due to a breach of the APS Values at sections 10(1) and 10(2) of the PS Act;
  - (b) in respect of Allegation 2 (engaging in gossip and disrespectful critique of Ministers and public servants): sections 13(3), 13(10)(b) and 13(11) of the PS Act, each constituting separate contraventions of the Code. To the extent that a contravention of section 13(11) has occurred, this arises due to a breach of the APS Values at sections 10(1), 10(2) and 10(3) of the PS Act;
  - (c) in respect of Allegation 3 (failure to maintain confidentiality of sensitive government information): sections 13(6), 13(11) and 13(13) of the PS Act, each constituting

separate contraventions of the Code. To the extent that a contravention of section 13(11) has occurred, this arises due to a breach of the APS Values at section 10(2) of the PS Act. To the extent that a contravention of section 13(13) has occurred, this arises due to a breach of regulation 2.1(3) of the *Public Service Regulations 1999* (Cth) (**PS Regulations 1999**);

- (d) in respect of Allegation 4 (failing to act apolitically in Mr Pezzullo's employment): section 13(11) of the PS Act, incorporating breaches of the APS Values at sections 10(2) and 10(5) of the PS Act; and
- (e) in respect of Allegation 6 (the engagement of DPG Advisory Solutions (**DPG Advisory**) for urgent advisory support in August 2021): sections 13(2), 13(7) and 13(11) of the PS Act (each constituting separate contraventions of the Code). To the extent that a contravention of section 13(11) has occurred, this arises due to a breach of the APS Values at sections 10(2) and 10(4) of the PS Act.

- 8. Despite the Code breach findings outlined in paragraph 7 above, had I applied a separate breach to each applicable text message, the quantum of Code breaches may even have extended into the hundreds. In my view, such an approach would have caused undue delay to the conclusion of the Inquiry, for no materially different overall recommendation.
- 9. I have also made a recommendation that a sanction of termination of Mr Pezzullo's appointment as Secretary is appropriate in the circumstances.
- 10. Finally, I wish to make the observation that in considering Mr Pezzullo's behaviour, I have been conscious that it is important for a Secretary to engage in fair and robust interactions with Ministers, their colleagues and other APS employees in respect of a myriad of subject matters concerning their departmental functioning and the broader public service. However, my findings in this Inquiry necessarily conclude that Mr Pezzullo's conduct strayed far beyond what a reasonable person would consider necessary or appropriate for a Secretary to engage in.

## 1.2 Scope of the Inquiry

- 11. After media reporting by the Nine Network about text messages that were alleged to have been sent by Mr Pezzullo to Mr Scott Briggs over a period of some years during the Turnbull and Morrison Governments, on 24 September 2023, Ms Clare O'Neil MP, Minister for Home Affairs and Minister for Cyber Security, wrote to the APS Commissioner referring the matter for his advice and consideration. A copy of this request is set out at **Annexure A**.
- 12. Over the course of the following week, further allegations were made in Nine Network reports about more message exchanges between Mr Pezzullo and Mr Briggs. The Inquiry covers alleged messages reported on 60 Minutes, in the Sydney Morning Herald and The Age newspapers over the week 24 to 30 September 2023, as well as other matters that have arisen since that time, as detailed in this report.
- 13. On 26 September 2023, acting under section 78(5A) of the PS Act, the APS Commissioner delegated his powers and functions under section 41(2)(m) of the PS Act to me to conduct the Inquiry (**Annexure B**). The delegation made clear that those powers and functions included special inquiry powers contained in section 43(2) of the PS Act. I have exercised those powers when required.
- 14. I advised the APS Commissioner on 25 September 2023 verbally and on 26 September 2023, in writing, that I had no actual or possible conflicts of interest that would cause me to exclude myself from the Inquiry, in particular, that I did not know Mr Briggs nor was he a relative.
- 15. I was contracted formally on 26 September 2023 by the APS Commissioner to conduct the Inquiry. Specifically, I was engaged to make:
  - (a) findings about the facts; and
  - (b) determinations about whether Mr Pezzullo breached the Code.

16. Shortly thereafter, Mr Matt Kelleher, a Partner at Clayton Utz, was engaged to support me with the Inquiry. Mr Kelleher and representatives from Clayton Utz have assisted me throughout the Inquiry.
17. On 27 September 2023, the APS Commissioner advised Mr Pezzullo of the Inquiry (**Annexure C**).

### 1.3 Methodology

18. There are no formal procedures governing inquiries into alleged breaches of the Code by an Agency Head.<sup>1</sup> However, in the conduct of the Inquiry, I have had regard to the principles of procedural fairness and carried out the investigation process with as little formality and as much expedition as proper consideration of the matter has permitted. As to this, at no point has Mr Pezzullo raised any concern in respect of the conduct of the Inquiry. ss 47E(c) and (d); 47F(1) and 11A(5)

[REDACTED]

ss 47E(c) and (d); 47F(1) and 11A(5)

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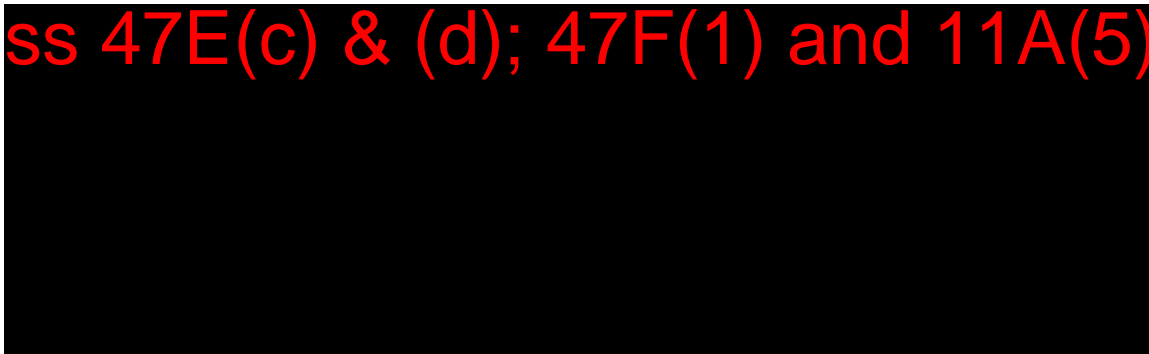
[REDACTED]

19. As part of the Inquiry, I have taken the following steps:
  - (a) On 29 September 2023, I wrote to Mr Pezzullo reaffirming that I had been appointed to conduct the Inquiry. In this correspondence I provided Mr Pezzullo with detail of the reported alleged text messages, advised him that I would examine the reported text messages to establish whether or not they would constitute a breach of one or more requirements contained in the Code, and that the scope of my Inquiry was not limited to the Code or may change depending on evidence that might emerge during the Inquiry (**Annexure D**).
  - (b) On 3 October 2023, Mr Pezzullo sent me an email confirming that, to the best of his recollection, he did send the messages in substantially the terms reported by the Nine Network (**Annexure E**).
  - (c) Following Mr Pezzullo's confirmation that he did send the messages as reported, I proceeded to review the messages and on 9 October 2023, I wrote to Mr Pezzullo to notify him of the allegations against him (**First Notice**) (**Annexure F**). The First Notice enclosed an Annexure particularising each of the 28 messages that I considered may amount to a breach of the Code for Mr Pezzullo's consideration and response. These messages were comprised of those which were the subject of initial reporting by the Nine Network.
  - (d) On 16 October 2023, Mr Pezzullo provided a written response to the First Notice advising, amongst other things, that he could not see in the Annexure enclosed with the First Notice where a case is presented as to why the messages constituted possible breaches of the Code (**Annexure G**).
  - (e) On 17 October 2023, I wrote to Mr Pezzullo clarifying that the specific provisions of the Code which it is alleged that he has breached by reason of sending or engaging in the exchange of the specific messages were clearly set out in the Annexure enclosed with the First Notice (**Annexure H**). Mr Pezzullo was provided with an opportunity to

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<sup>1</sup> Cf. The APSC's *Procedures for Inquiring into and Determining Breaches of the APS Code of Conduct by an APS Employee or former APS employee*, which applies to current and former APS employees.

provide any further written response and invited to attend an interview to discuss the allegations.

- (f) On 19 October 2023, Mr Pezzullo provided a further written response to the First Notice and confirmed his agreement to attend an interview (**Annexure I**).
- (g) On 23 October 2023, I invited Mr Pezzullo to attend an interview at Clayton Utz's offices (**Annexure J**).
- (h) I interviewed Mr Pezzullo on 25 October 2023. A copy of the transcript from Mr Pezzullo's interview is at **Annexure K (First Pezzullo Transcript)**.
- (i) Before interviewing Mr Pezzullo, I explained to him that:
  - (i) the interview would be audio recorded to ensure any evidence he provided was accurately represented; and
  - (ii) should he wish, he could obtain a copy of the transcript of the recording following the interview.
- (j) Mr Pezzullo requested a copy of the transcript of his interview and, on 10 November 2023, was provided with a copy of the First Pezzullo Transcript.
- (k) Through the exercise of the special inquiry powers contained under section 43(2) of the PS Act, which enable the APS Commissioner to utilise the coercive powers afforded to the Auditor-General under the *Auditor-General Act 1997* (Cth), further voluminous messages between Mr Pezzullo and Mr Briggs were obtained. This uncovered that approximately 1,400 text messages were exchanged between Mr Pezzullo and Mr Briggs between March 2017 to April 2023, approximately 755 of which were sent by Mr Pezzullo.
- (l) In addition to interviewing Mr Pezzullo, I conducted interviews with the following individuals:  

- (m) I then issued further requests for information to various Departments, including the Department of Home Affairs, the Department of Finance and the Department of the Prime Minister and Cabinet. Much of the information obtained from these Departments was also through the use of my special inquiry powers and informed a number of factual findings detailed in this report, including that Mr Briggs had never been engaged as an APS employee or contractor, was never employed or engaged by any Ministerial or Parliamentary office, and did not hold an appropriate security clearance. Documents regarding conflict of interest declarations made by Mr Pezzullo and any procurements between the Department of Home Affairs and Mr Briggs (or any entities in which Mr Briggs is involved) were also requested and provided.
- (n) Following analysis of the extensive additional evidence obtained through these enquiries, on 10 November 2023, I wrote to Mr Pezzullo to notify him of further allegations against him that I considered may amount to a breach of the Code (**Supplementary Notice**) (**Annexure O**).

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- (o) On 15 November 2023, Mr Pezzullo provided a written response to the Supplementary Notice (**Annexure Q**).
- (p) I conducted a further interview of Mr Pezzullo at Clayton Utz's offices on 17 November 2023. A copy of the transcript from Mr Pezzullo's interview is at **Annexure R (Second Pezzullo Transcript)**, a copy of which was provided to Mr Pezzullo on 20 November 2023.
- (q) I wrote to Mr Pezzullo on 20 November 2023 advising him of my preliminary determinations of his suspected breaches of the Code and that I proposed to recommend a sanction of termination of his appointment be imposed under section 59 of the PS Act.
- (r) On 22 November 2023, Mr Pezzullo responded to my preliminary determinations and recommendations (**Annexure S**), and I have taken into account this response in making my final findings and in the preparation of this report.
- (s) I have had regard to and applied the Australian Public Service Commission (**APSC**) publication *Handling Misconduct: A Human Resource Manager's Guide (APSC Misconduct Guide)*<sup>2</sup> in considering the standard of behaviour, the question of intention or motive and definitions of terms used in the Code.

## 1.4 Standard of proof

- 20. I have considered the allegations on the balance of probabilities. This requires me to be satisfied that, having considered all relevant, credible and significant evidence, a reasonable person would form the view that the suspected misconduct (as described in the First Notice and Supplementary Notice (together, the **Notices**)) is more likely than not to have occurred.
- 21. This standard of proof is based on the principles Dixon J set out in *Briginshaw v Briginshaw*<sup>3</sup> that:
 

*...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding...*

## 1.5 Standard of behaviour

- 22. The APSC Misconduct Guide applies an objective standard of behaviour:<sup>4</sup>
  - 2.5. *The standard of behaviour expected of APS employees is an objective one. This means that the question of whether particular conduct is in breach of the Code is not determined by the subjective standard of the particular employee who has engaged in the conduct.*
  - 2.6. *An employee's genuine belief that the action they took was proper is not relevant to a decision about whether that action was in breach of the Code. For example, an employee may genuinely have intended to compliment a colleague by remarking on their physical appearance, but such behaviour may not meet the objective standard of 'respect and courtesy, and without harassment' required by the Code.*
- 23. I agree that this is the correct standard to apply and have applied this standard in my report.

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<sup>2</sup> <https://www.apsc.gov.au/circulars-guidance-and-advice/handling-misconduct-human-resource-managers-guide>.

<sup>3</sup> (1938) 60 CLR 336 at 361-362.

<sup>4</sup> APSC Misconduct Guide, page 131.

## 1.6 Intention

24. The APSC Misconduct Guide advises that intention is not generally relevant to the question of whether the Code has been breached:<sup>5</sup>

4.13. *The Code does not use words such as ‘wilful’, ‘reckless’ or ‘negligent’ to qualify behaviour, and, generally speaking, intent does not need to be shown to determine that an employee has breached the Code. It can, for example, be inconsistent with the Code to act without respect and courtesy even if the employee did not intend to be disrespectful or discourteous. However, at the preliminary stage of considering conduct that appears not to meet expectations, it is reasonable for agencies to have regard to intent among other factors in deciding on a proportionate response.*

4.14. *Conduct that is the result of an honest and reasonable mistake, accident, or a lack of capability can generally be addressed through process improvements or management action such as training, performance management, or counselling. On the other hand, behaviour by an employee that is within their control—for example, a wilful refusal to follow lawful and reasonable directions, or a blatant disregard for expected behavioural standards—may be better dealt with through misconduct action.*

25. I agree that this is the correct approach and while I may make comments about the intention or otherwise of Mr Pezzullo in this report, I do not consider the intention behind his actions to be determinative in assessing whether there is sufficient evidence to establish to the requisite standard of proof relating to the factual matters underpinning the allegations in the Notices.

## 1.7 Overlapping Concepts

26. Various sections of the Code contain more than one element. I consider that for a breach of a section of the Code to be established only one element need be established. It is not necessary to be satisfied that all elements are made out, and although there may be some behaviour which will satisfy all elements, it is not necessary for this to occur. In forming this view, I have relied on the APSC Misconduct Guide, which states the following in relation to "Overlapping concepts":<sup>6</sup>

2.10. *There is some overlap between different elements of the Code and between obligations in the same section of the Code. For example, not taking reasonable steps to avoid a conflict of interest could also be a lack of care and diligence. Behaving dishonestly may also be a lack of integrity. It is generally unnecessary to determine the degree of overlap; a breach of one obligation is a breach of the Code.*

2.11. *Where multiple elements are in play it is appropriate to consider the allegation against each element separately to the extent needed. A breach of one element does not in itself mean any other element has been breached. For example, the fact that a person has acted without care and diligence does not mean they cannot have acted with integrity.*

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<sup>5</sup> APSC Misconduct Guide, page 32.

<sup>6</sup> APSC Misconduct Guide, page 132.

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## 2. Preliminary considerations informing the Inquiry

27. An important early consideration in the Inquiry was whether or not the reported messages were real, a distortion or a media fabrication. To ascertain this and to inform my decision about the next steps in the Inquiry, I asked Mr Pezzullo on 29 September 2023 to advise me:
- (a) if he sent the reported messages in the terms, or substantially the terms, as reported;
  - (b) if there were particular reported messages which he did not send and, if so, which ones were they, and
  - (c) if there were particular reported messages which he did not recall sending, which ones they were, and if he had reason to believe that he did not send those reported messages.

28. Mr Pezzullo responded on 3 October 2023 that to the best of his recollection, he believed:

*"I did send the reported messages in substantially the terms that have been reported by Nine. ss 47E(c) & (d); 47F(1) and 11A(5)*

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29. ss 47E(c) and (d); 47F(1) and 11A(5)

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30. I then let him know by email that same day that I would proceed to the next stage of the Inquiry, which would involve working my way through the reported messages and making an initial assessment against the Code and coming back to him thereafter for his input.

31. Another early consideration was whether or not the reported messages could be considered to be in connection with Mr Pezzullo's APS employment or as private exchanges between two people that bear little or no relationship to Mr Pezzullo's employment. Mr Briggs was reported on 25 September 2023 to have advised the Nine Network that he had had communications with Mr Pezzullo over a long time, but said they were always "private matters".<sup>7</sup> ss 47E(c) and (d); 47F(1) and 11A(5)

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32. The APSC Misconduct Guide at subsections 2.24-2.28 provides guidance on the Code requirement at subsection 13(11) of the Act to "at all times" behave in a way that upholds the APS Values and the integrity and good reputation of the Agency and the APS. It is noted in the Guide that the "term 'in connection with employment' is not confined to the performance of job-related tasks or other conduct in the course of employment. Employees are required to abide by the Code when engaged in activities outside work hours and away from the workplace where there is a reasonable connection with their APS employment."<sup>8</sup>

33. I am conscious in this regard that the reported messages were allegedly exchanges between Mr Pezzullo and Mr Briggs over encrypted message applications (WhatsApp and Signal) which the Department of Home Affairs had authorised for use for confidential work purposes by its personnel and via a departmental mobile phone issued by the Department of Home Affairs and used by the Secretary during the course of his duties. The reported messages have been sent at all times of the day, including during normal business hours. The messages are now very much in the public domain after widespread media coverage and have been directly associated with Mr Pezzullo's role as Secretary of the Department of Home Affairs.

34. The reported messages exchanged between Mr Pezzullo and Mr Briggs were regular and often and extended over a prolonged period, ss 47E(c) and (d); 47F(1) and 11A(5)

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<sup>7</sup> As reported in the Age on 24 September 2023 (see Annexure D).

<sup>8</sup> APSC Misconduct Guide, page 20.

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s.78(1)(b), s.78(1)(c) and s.78(1)(d) The reported messages cover a wide range of matters pertinent to Ministers, Secretaries, the nature of the Department of Home Affairs, government policy and delivery relevant to Mr Pezzullo's work. Mr Pezzullo acknowledges that the engagements "*pertained to the implementation of the government's policies and priorities*". I am therefore satisfied that there was a reasonable connection with Mr Pezzullo's employment to render them in scope for the Inquiry.

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### 3. Allegations and elements of the Code

#### 3.1 Allegations

35. The allegations against Mr Pezzullo are outlined in the Notices put to him and are as follows:

(a) Allegation 1: Using your duty, power, status or authority to seek to gain a benefit or advantage for yourself

- (i) It is alleged that by sending the messages (outlined at paragraph 7.1 of the Supplementary Notice) to a person with known close ties to the incumbent Prime Minister(s), and/or by being an active participant in exchanges of that nature, you attempted to use your duty, power, status or authority to seek to gain a benefit or advantage for yourself by:
- A. seeking to influence or interfere in the appointment of individuals to Ministerial appointments, to suit your own personal interests as Secretary of the Department of Home Affairs;
  - B. soliciting information about the dealings Mr Briggs has had with any Minister or a Minister's member of staff, to advance your interests as Secretary of the Department of Home Affairs;
  - C. seeking to influence the structure of the APS by communicating your personal views on machinery of government changes with a view to those views being expressed to Ministers outside the usual departmental or Ministerial processes; and/or

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ss 47E(c) and (d); 47F(1) and 11A(5)

(ii) By reason of that conduct, it is alleged that you have breached the Code.

(b) Allegation 2: Engaging in gossip and disrespectful critique of Ministers and public servants

- (i) It is alleged that by sending the messages (outlined at paragraph 8.1 of the Supplementary Notice) to a person with known close ties to the incumbent Prime Minister(s), and/or by being an active participant in exchanges of that nature, you:
- A. were disparaging of APS and other government personnel, including views they may have expressed and/or their competence in their role;
  - B. were disparaging of, and otherwise passed judgement on decisions made by Ministers and/or the Attorney General; and
  - C. otherwise failed to demonstrate the levels of professionalism, courtesy and integrity expected of senior public officials by government and members of the public.

(ii) By reason of that conduct, it is alleged that you have breached the Code.

(c) Allegation 3: Failure to maintain confidentiality of sensitive government information

- (i) It is alleged that your frequent communications with Mr Briggs included discussion of matters in respect of which you held a duty of confidentiality, namely:

- A. sensitive or confidential government-related matters;
- B. aspects of your dealings with various Ministers and Ministerial offices to Mr Briggs; and
- C. matters relating to the formulation or implementation of government policies and/or programs with Mr Briggs.

(ii) By reason of that conduct, it is alleged that you have breached the Code.

(d) Allegation 4: Failing to act apolitically in your employment

(i) It is alleged that by sending the messages (outlined at paragraph 10.1 of the Supplementary Notice) to a person with known close ties to the incumbent Prime Minister(s), and/or by being an active participant in exchanges of that nature, you failed to comply with your obligation to act impartially and apolitically, including by:

- A. seeking to influence political events and imposing your political views on or at your work; and
- B. using contact with Mr Briggs as a means to advance your views on various matters with two Prime Ministers.

(ii) By reason of that conduct, it is alleged that you have breached the Code.

ss 47E(c) and (d); 47F(1) and 11A(5)

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(f) Allegation 6: the engagement of DPG Advisory Solutions for urgent Advisory Support in August 2021

Cat 3

(i) It is alleged that on 16 August 2021, you directed [redacted] to engage DPG Advisory (a company with known ties to Mr Briggs) for an urgent advisory task of 2 months' duration, in contravention of your obligations as an APS employee, by:

Cat 3

- A. failing to disclose to ss 47E(c) and (d), 47F(1) and 11A(5) your relationship to Mr Briggs, nor any conflict of interest generally; and/or

**ss 47E(c) and (d); 47F(1) and 11A(5)**

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**ss 47E(c) and (d); 47F(1) and 11A(5)**

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### 3.2 Sections of the Code

36. The Code is contained in section 13 of the PS Act.

37. Specifically, Mr Pezzullo was alleged to have engaged in conduct that, if established, may have breached the following sections of the Code:

- (a) section 13(1), which states that:

*An APS employee must behave honestly and with integrity in connection with APS employment.*

- (b) section 13(2), which states that:

*An APS employee must act with care and diligence in connection with APS employment.*

- (c) section 13(3), which states that:

*An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.*

- (d) section 13(5), which states that:

*An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.*

- (e) section 13(6), which states that:

*An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.*

- (f) section 13(7), which states that:

*An APS employee must:*

*(a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and*

*(b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.*

(g) section 13(8), which states that:

*An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.*

(h) section 13(9), which states that:

*An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.*

(i) sections 13(10)(a) and 13(10)(b), which state that:

*An APS employee must not improperly use inside information or the employee's duties, status, power or authority:*

*(a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or*

*(b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.*

(j) section 13(11), which states that:

*An APS employee must at all times behave in a way that upholds:*

*(a) the APS Values and APS Employment Principles; and*

*(b) the integrity and good reputation of the employee's Agency and the APS.*

(k) section 13(13), which states that:

*An APS employee must comply with any other conduct requirement that is prescribed by the regulations.*

38. In respect of section 13(13) of the Code, I note that the PS Regulations 1999 were in force at the time of the exchange of messages and alleged breaches of the Code, and so I have had regard to this version of the Regulations in the course of the Inquiry.

39. The APSC Misconduct Guide recommends that words used in the Code are given their ordinary meaning:<sup>9</sup>

2.3. *The terms used in the Code are generally given their ordinary meaning. Decision-makers may rely on sources such as the Macquarie Dictionary for authority on definitions of terms used in the Code—for example, 'honestly', 'diligence', 'courtesy', 'improperly', etc.*

40. I have relied on this position in drafting my report. As a result, where I consider terms require definition, I have referred to both the APSC Misconduct Guide and the Macquarie Dictionary to assist me in defining these terms.

41. In addition to section 13 of the PS Act and the Code, section 12 of the PS Act specifies that Agency Heads are required to uphold and promote the APS Values and APS Employment

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<sup>9</sup> APSC Misconduct Guide, page 131.

Principles. Section 14 of the Act establishes that Agency Heads and statutory office holders are bound by, that is, they must comply with, the Code, and subsection 35(3) of the PS Act requires them by personal example and other appropriate means to promote the APS Values and the APS Employment Principles and compliance with the Code. The APSC Misconduct Guide at subsection 2.18 makes clear that Agency Heads have additional obligations relating to the Code as role models and advocates of APS integrity.<sup>10</sup>

42. Definitions and guidance on the Code elements are set out in **Attachment 1** to this report.

### 3.3 Summary of findings

43. The conclusions that I have made in respect of these allegations are set out in the following table:

No.	Allegation	Finding of fact	Determination of Code Breach
1.	Using your duty, power, status or authority to seek to gain a benefit or advantage for yourself	<p>I have found this Allegation is <b>partially substantiated</b> on the basis that I have found Allegations 1A, 1B and 1C substantiated, but Allegation 1D to be unsubstantiated.</p> <p>This finding is on the basis that I have found that:</p> <ul style="list-style-type: none"> <li>Mr Pezzullo acknowledges he used his relationship with Mr Briggs, and Mr Briggs's political connections to two Prime Ministers, as a means of communicating his views on machinery of government and Ministerial appointments;</li> <li>Mr Pezzullo also acknowledged that his communications with Mr Briggs placed him in a position to solicit information about the views of the Executive Government on matters pertaining to his portfolio as Secretary of the Department of Home Affairs, again through unofficial lines; and</li> </ul> <p><b>ss 47E(c) and (d); 47F(1) and 11A(5)</b></p>	<p>Sections 13(2), 13(7), 13(10)(a) and 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(1) and 10(2) of the PS Act)</p> <p>Cat 2</p>
2.	Engaging in gossip and disrespectful critique of Ministers and public servants	<p>I have found this Allegation is <b>substantiated</b>.</p> <p>This finding is on the basis that I have found that:</p> <ul style="list-style-type: none"> <li>the messages Mr Pezzullo exchanged with Mr Briggs included a range of communications that were clearly disparaging of senior public servants and Ministers;</li> <li>whilst the people the subject of Mr Pezzullo's critique were not recipients of those messages (at least at the time they were made), given Mr Pezzullo's awareness of Mr Briggs's connection to the Executive Government, and his status as a confidant of the incumbent Prime Ministers, Mr Pezzullo ought to have been aware of a clear risk that his views would be passed on to the Prime Minister of the day, and for his views to inform</li> </ul>	<p>Sections 13(3), 13(10)(b) and 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(1), 10(2) and 10(3) of the PS Act)</p> <p>Cat 2</p>

<sup>10</sup> APSC Misconduct Guide, page 19.

No.	Allegation	Finding of fact	Determination of Code Breach
		<p>any actions taken by the Prime Minister about the management of those individuals; and</p> <ul style="list-style-type: none"> <li>• as Secretary, Mr Pezzullo should have kept his views on Ministers to himself and left his pursuit of his views on machinery of government arrangements to the usual interdepartmental processes where Secretaries provide views directly to their current Ministers and the Secretary of the Department of the Prime Minister and Cabinet who provides advice, if requested by the Prime Minister.</li> </ul>	
3.	Failure to maintain confidentiality of sensitive government information	<p>I have found this Allegation is <b>substantiated</b>.</p> <p>This finding is on the basis that I have found that:</p> <ul style="list-style-type: none"> <li>• it is not in contest that Mr Pezzullo: <ul style="list-style-type: none"> <li>○ communicated with Mr Briggs on sensitive or confidential government-related matters;</li> <li>○ disclosed aspects of his dealings with various Ministers and Ministerial offices to Mr Briggs; and</li> <li>○ discussed the formulation or implementation of government policies and/or programs with Mr Briggs,</li> </ul> </li> <li>• by sending the relevant messages to Mr Briggs, not only did Mr Pezzullo regularly communicate with Mr Briggs on sensitive government-related matters, but he also breached Ministerial confidentiality on a number of occasions. Mr Pezzullo's conduct was made worse by the fact that Mr Briggs did not hold the security clearances that may otherwise have provided some protection; and</li> <li>• although it must be acknowledged that Mr Briggs was a confidant of two Prime Ministers and was likely to be well-informed on a number of issues discussed with Mr Pezzullo, this is not recognised as a relevant defence to a breach of the Code.</li> </ul>	Sections 13(6), 13(11) and 13(13) of the PS Act (incorporating breaches of the APS Values at section 10(2) of the PS Act; and regulation 2.1(3) of the PS Regulations)
4.	Failing to act apolitically in your employment	<p>I have found this Allegation is <b>substantiated</b>.</p> <p>This finding is on the basis that I have found that it is well beyond the political dividing line for a public servant at any level to insert their views and intervene in Ministerial appointments, which are rightly in the purview of the Prime Minister and politicians generally. Based on the evidence obtained throughout the Inquiry, I have found that a reasonable person (being the requisite test), would not conclude that Mr Pezzullo could serve any Government of the day impartially in circumstances where he has engaged in voluminous exchanges with Mr Briggs, when knowing</p>	Section 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(2) and 10(5) of the PS Act)

No.	Allegation	Finding of fact	Determination of Code Breach
		him to be a confidant of Liberal Party Prime Ministers and furthermore, a non-APS employed Liberal Party powerbroker.	
5.	<p>ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>[Redacted]</p>	<p>I have found this Allegation is <b>unsubstantiated</b>.</p> <p>ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>[Redacted]</p> <p>[Redacted]</p> <p>[Redacted]</p>	<p>Not applicable</p> <p>Cat 2</p>
6.	<p>The engagement of DPG Advisory for urgent Advisory Support in August 2021</p>	<p>I have found this Allegation is <b>partially substantiated</b>.</p> <p>I find that the allegation that Mr Pezzullo failed to make adequate conflict of interest disclosures (Allegation 6A) to be <u>substantiated</u>, noting that Mr Pezzullo accepted during the Inquiry that he failed to do so to the requisite standard.</p> <p>ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>[Redacted]</p>	<p>Sections 13(2), 13(7) and 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(2) and 10(4) of the PS Act)</p> <p>Cat 2</p>

No.	Allegation	Finding of fact	Determination of Code Breach
7.	ss 47E(c) and (d); 47F(1) and 11A(5)	I have found this Allegation is <b>unsubstantiated</b> . ss 47E(c) and (d); 47F(1) and 11A(5)  [Redacted text block]	Not applicable

Cat 2

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## 4. Initial observations

### 4.1 Mr Briggs's interface with the public service

44. I have received evidence that Mr Briggs was never employed under the *Members of Parliament (Staff) Act 1984* (Cth) (**MOPS Act**) as a Ministerial adviser or staffer, nor was he engaged as a consultant to any Minister during the relevant period. Mr Briggs confirmed that at interview and also indicated that he did not have a security clearance during the period in question – 2017 to the present.

45. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

46. Despite those matters, Mr Briggs has made his career in areas close to government. At the political level, Mr Briggs was Finance Director of the NSW Liberal Party (2016-18), Chief Operating Officer of the NSW Liberal Party (2005-07), Adviser to Turnbull & Partners (2003-05), and friend to Prime Ministers Mr Turnbull and Mr Morrison, amongst other things. Mr Briggs's business career covers areas that in one way or another involve government, including government advisory, foreign investment, visa processing, security and risk assessments and response, processing large-scale government transactions, and public-private partnerships, through companies including DPG Advisory, PACE First, FIA Australia, Ewey Creek Ventures, Southern Strategy, SecureFast, Pacific Blue Capital, and Australian Visa Processing.

ss 47E(c) and (d); 47F

Cat 3

### 4.2 Interviewees - Observations and Credibility

47. All interviewees were cooperative with the Inquiry, and I did not have concerns about the credibility of any interviewees. I especially note that Mr Pezzullo's demeanour during the Inquiry was at all times cordial, respectful and cooperative, despite the voluminous and challenging materials presented to him, and extensiveness of the allegations.

## 5. Allegation 1

### 5.1 Executive summary of Allegation 1

<p>Using your duty, power, status or authority to seek to gain a benefit or advantage for yourself by:</p> <p>A) seeking to influence or interfere in the appointment of individuals to Ministerial appointments, to suit your own personal interests as Secretary of the Department of Home Affairs;</p> <p>B) soliciting information about the dealings Mr Briggs has had with any Minister or a Minister's member of staff, to advance your interests as Secretary of the Department of Home Affairs;</p> <p>C) seeking to influence the structure of the APS by communicating your personal views on machinery of government changes with a view to those views being expressed to Ministers outside the usual departmental or Ministerial processes; and/or</p> <p>D) <b>ss 47E(c) and (d); 47F(1) and 11A(5)</b></p>	<p>Substantiated in respect of 1A, 1B and 1C but not 1D</p> <p>Cat 2</p>
<p>Allegation 1 accuses Mr Pezzullo of leveraging Mr Briggs's political connections to influence the Prime Minister's decisions on matters relating to Mr Pezzullo's portfolio as Secretary of the Department of Home Affairs, including Ministerial appointments. The Inquiry reveals extensive communication between them, with hundreds of messages assessed as relevant to the allegation. <b>ss 47E(c) and (d); 47F(1) and 11A(5)</b></p> <p><b>ss 47E(c) and (d); 47F(1) and 11A(5)</b> Cat 1</p> <p>It is not ordinarily a breach of the Code for a Secretary to further the interests of their Minister in pursuit of good policy or delivery outcomes, and <b>ss 47E(c) and (d); 47F(1) and 11A(5)</b> care must be taken to ensure that bystanders are not quick to characterise advice given in good faith, and for the betterment of the nation, as a breach of the Code where a collateral benefit or advantage arises for a public servant.</p> <p><b>ss 47E(c) and (d); 47F(1) and 11A(5)</b> Cat 1</p> <p><b>ss 47E(c) and (d); 47F(1) and 11A(5)</b> Cat 1</p> <p>Although Mr Pezzullo provided comprehensive and cogent responses to the concerns raised, on balance I am satisfied that Allegations 1A, 1B and 1C are established, and that a breach of the Code arises by reason of this conduct.</p>	

## 5.2 Analysis of evidence

48. Allegation 1 is perhaps the most complex of the allegations, raising philosophical questions about the capacity for senior public servants to influence decision making of the Executive Government and exploit unofficial methods of communication with the Executive Government, including for altruistic purposes. Those matters extend beyond the scope of this Inquiry (as set out further below).

49. The thrust of Allegation 1 is that Mr Pezzullo, sought to wield Mr Briggs's political connections as a means to influence decisions made by Prime Ministers in relation to Mr Pezzullo's career, the structure of the APS, and Ministerial appointments to his Department.

50. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

51. Against that background, Mr Pezzullo engaged regularly with Mr Briggs over the years 2017 to the present (in over a thousand messages, phone calls, emails and over meals) and was aware of Mr Briggs's political associations and business arrangements, including in areas where the Department of Home Affairs has some responsibilities. Mr Pezzullo pursued contact with Mr Briggs to gossip over political events, discuss personal and professional matters and sought to reinforce his particular views on various matters.

52. Of the text messages analysed, approximately 80 rows (out of 238 detailed in Annexure A to the Supplementary Notice) have been referenced as having some relationship to this allegation.

ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

53. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

54. However, in lamenting the quality of political leadership, Mr Pezzullo suggested by message to Mr Briggs in November 2017 that the "*Parliamentary route is now contaminated with few exceptions. We need to build a meritocracy by stealth and run government from the bureaucracy, working to 4-5 powerful and capable Ministers*". He had earlier in July 2017 joked about him possibly being given Defence and Home Affairs departments at the same time. In 2018 he argues for fewer, bigger departments. Even though Mr Pezzullo evidently understands the concept of Ministerial accountability, I doubt that any reasonable person would consider that to "*build a meritocracy by stealth and run government from the bureaucracy*" is appropriate for a Secretary to argue in our system of democratic government nor consistent with usual public service accountability arrangements.

55. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 3

56. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

(a) ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

Cat 4

[Redacted]

[Redacted]

[Redacted]

[Redacted]

57. ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted] Cats 3 and 4

ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]

Cat 4

Respectfully, I do not agree that any reasonable comparison may be drawn to those circumstances.

58. ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted] ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 4

59. In my experience, ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]

Even though I am prepared to accept that public servants at this level necessarily engage with stakeholders and discuss matters of public policy and delivery

Cat 1

import as a part of their usual duties, I do not accept that this was a "*business as usual*" arrangement. It was indiscreet and it was ill-advised.

### 5.3 Findings of fact in relation to Allegation 1

60. I find, on the balance of probabilities, that items A, B and C of Allegation 1 are substantiated, but item D is not substantiated; and on that basis, Allegation 1 is partially substantiated.

61. This finding is reached on the basis that:

- (a) Mr Pezzullo acknowledges he used his relationship with Mr Briggs, and Mr Briggs's political connections to two Prime Ministers, as a means of communicating his views on machinery of government and Ministerial appointments to two Prime Ministers;
- (b) Mr Pezzullo also acknowledged that his communications with Mr Briggs also placed him in a position to solicit information about the views of the Executive Government on matters pertaining to his portfolio as Secretary of the Department of Home Affairs, again through unofficial lines; and

Cats 1 and 4

ss 47E(c) and (d); 47F(1) and 11A(5)

ss 47E(c) and (d); 47F(1) and 11A(5)

### 5.4 Breach determination in relation to Allegation 1

Cat 1

63. The relevant sections of the Code that Mr Pezzullo may have breached in relation to this allegation are set out in the following sections of the PS Act:

- (a) ss 47E(c) and (d); 47F(1) and 11A(5)
- (b) Section 13(2) (see Attachment 1, paragraphs 6 to 8);
- (c) Section 13(7) (see Attachment 1, paragraph 21);
- (d) Section 13(10) (see Attachment 1, paragraphs 24 to 30); and
- (e) Section 13(11) (see Attachment 1, paragraphs 31 to 43).

Cat 2

64. Assessing each section in turn:

- (a) ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

(b) Section 13(2) involves conduct that falls below the standards of due care and diligence expected of APS employees - ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

Therefore, in my view Mr Pezzullo has contravened section 13(2) of the PS Act;

(c) Section 13(7) is concerned with the avoidance and disclosure of conflicts of interest in connection with the employee's APS employment. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

I am therefore satisfied that Mr Pezzullo's behaviour has contravened section 13(7) of the PS Act;

(d) Section 13(10) is concerned with the improper use of inside information or the employee's duties, status, power or authority to gain, or seek to gain a benefit or advantage for the employee or any other person; or, conversely, a disadvantage for another person. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 4

and therefore, I am satisfied that a breach of section 13(10)(a) has arisen; and

(e) Section 13(11) relevantly requires APS employees to uphold the APS Values, integrity and good reputation of the employee's Agency and the APS. The APS Values include broad principles such as acting in accordance with defined principles of respect and ethics. Taking into account my descriptions of each criteria at Attachment 1, and my analysis of section 13(1) of the PS Act, I am not satisfied that Mr Pezzullo's meets the standards of ethics under section 10(2) of the PS Act and described at paragraph 37 of Attachment 1. In particular, I am of the view that Mr Pezzullo has failed to act in a way "that is right and proper", and I am therefore satisfied that Mr Pezzullo's behaviour has contravened Section 13(11) of the PS Act. I am also of the view that Mr Pezzullo has failed to act in a way that upholds the APS value of "Committed to Service" under section 10(1) of the PS Act, taking into account my analysis of sections 13(2), 13(7) and 13(10) above, and the requirements described at paragraph 35 of Attachment 1.

65. As such, based on the findings of fact outlined above, it is my determination that Mr Pezzullo has breached sections 13(2), 13(7), 13(10)(a) and 13(11) of the PS Act (each breach constituting a separate breach of the Code). To the extent that I am satisfied a breach of section 13(11) has occurred, this arises due to a breach of the APS Values at sections 10(1) and 10(2) of the PS Act.

## 6. Allegation 2

### 6.1 Executive Summary of Allegation 2

<p><b>Engaging in gossip and disrespectful critique of Ministers and public servants that:</b></p> <p><b>A) were disparaging of APS and other government personnel, including views they may have expressed and/or their competence in their role;</b></p> <p><b>B) were disparaging of, and otherwise passed judgement on decisions made by Ministers and/or the Attorney General; and</b></p> <p><b>C) otherwise failed to demonstrate the levels of professionalism, courtesy and integrity expected of senior public officials by government and members of the public.</b></p>	<p><b>Substantiated</b></p>
<p>Allegation 2 is concerned with the manner in which Mr Pezzullo has spoken about Ministers and public servants in the course of his exchanges with Mr Briggs, and against the background of Mr Briggs being a known associate of senior Ministers and the Liberal Party generally.</p> <p><b>ss 47E(c) and (d); 47F(1) and 11A(5)</b></p> <p>Cat 1</p> <p>Relationships are the glue that hold us all together, and the public service is no exception. The PS Act makes it abundantly clear through the APS Values that public servants are to work cooperatively and respect all people, and through the Code that public servants should behave with honesty and integrity, act with care and diligence, and treat everyone with respect in connection with their employment.</p> <p>As Secretary, Mr Pezzullo should have kept his views on Ministers to himself and left his pursuit of his views on machinery of government arrangements to the usual interdepartmental processes where Secretaries provide views directly to their current Ministers and the Secretary of the Department of the Prime Minister and Cabinet who provides advice, if requested by the Prime Minister.</p> <p>Through his conduct, Mr Pezzullo failed to act with respect and courtesy to Ministers and Secretaries when he criticised them in a way that was likely or intended to be passed on to Prime Ministers. In so doing, he has also failed to comply with his responsibilities to uphold the APS Values and the good reputation of the APS.</p> <p>I am therefore satisfied that Allegation 2 is established, and that a breach of the Code arises by reason of this conduct.</p>	

### 6.2 Analysis of evidence

66. Allegation 2 is concerned with the manner in which Mr Pezzullo has spoken about Ministers and public servants in the course of his exchanges with Mr Briggs, and against the background of Mr Briggs being a known associate of senior Ministers and the Liberal Party generally.
67. Mr Pezzullo had a lot to say about some Ministers and some senior public servants, suggesting to Mr Briggs that the Prime Minister “*change out the leadership*”. He criticised the Secretary and Ministers of the Attorney-General’s Department and the Department of Foreign Affairs and Trade among others; “*Don’t trust anything served up by AGD – I don’t.*” **ss 47E(c) and (d); 47F(1) and 11A(5)**
- Department of the Prime Minister and Cabinet and its Secretary, Mr Parkinson

AO, who he variously described as “*Parkinson isn’t up to it*”, inept and incompetent, “*insecure*”, “*befuddled*”, lacking in “*vitality*” and “*missing in action*”. At other times, he offers himself as an alternative Secretary to Prime Minister and Cabinet: “*I might well be in PM&C which I would reluctantly have to accept*” and “[i]f he gets stuck regarding the PM&C job and he wants a driver in there, I would do it for him. It’s not a job that I’ve ever been interested in but if he needs a finisher in there I would of course answer the call. But only if he gets stuck!”

68. Of the messages analysed, approximately 35 (out of 238) rows have been referenced as having some relationship to this allegation. A number of those messages were discussed with Mr Pezzullo at length.

69. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

### 6.3 Findings of fact in relation to Allegation 2

75. I find, on the balance of probabilities, that Allegation 2 is substantiated.

76. Having considered the responses provided by Mr Pezzullo, my finding is that the messages he exchanged with Mr Briggs did include a range of communications that were disparaging of senior public servants and Ministers.

77. Although I accept that people the subject of Mr Pezzullo's critique were not recipients of those messages (at least at the time they were made), I do not accept that this provides a sufficient defence to the allegation. I note in particular Mr Pezzullo's awareness of Mr Briggs's connection to the Executive Government, and his status as a confidant of the incumbent Prime Ministers. Against that background, Mr Pezzullo ought to have been aware of a clear risk that his views would be passed on to the Prime Minister of the day, and for his views to inform any actions taken by the Prime Minister about the management of those individuals. Mr Pezzullo's conduct takes on a different character against the backdrop of that possibility.

78. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

ss 47E(c) and (d); 47F(1) and 11A(5)

As Secretary, Mr Pezzullo would be conscious that any utterances by him, privately or publicly, hold considerable weight and are likely to have undermined the positions of those concerned if reported on to Prime Ministers, as the reported messages confirm they were, or if spread more widely as has occurred as a result of the publishing of the messages.

79.

ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

I accept that it is common in our system of government for public servants to present different views directly with Ministers and other public servants either privately or in meetings. APS employees would be expected to do so respectfully. They might also vent privately about things that happen at work or their bosses, and people may be given some latitude to do that. However, in my view, very few other individuals would be given the same opportunity as Mr Pezzullo was given, to influence the views and actions of the Prime Minister through unofficial channels. It is that distinguishing factor that elevates the severity of Mr Pezzullo's conduct.

80.

I do not therefore accept that Mr Pezzullo's conduct merely aligns with the accepted standards of behaviour within the APS.

81.

ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 4

## 6.4 Breach determination in relation to Allegation 2

82. The relevant sections of the Code that Mr Pezzullo may have breached in relation to this allegation are set out in the following sections of the PS Act:

- (a) Section 13(3) (see Attachment 1, paragraphs 9 to 16);
- (b) Section 13(10) (see Attachment 1, paragraphs 24 to 30); and
- (c) Section 13(11) (see Attachment 1, paragraphs 31 to 43).

83. Assessing each section in turn:

- (a) Although in the usual course, private communications exchanged between APS employees and independent third parties are unlikely to give rise to a breach of section 13(3) of the Code, Mr Pezzullo's conduct takes on a different character for the reasons I have alluded to at paragraphs 77 to 79 above. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

In light of those matters, I am prepared to accept that Mr Pezzullo's messages to Mr Briggs included a range of disrespectful messages, and that the issuance of those messages bore a connection to Mr Pezzullo's APS employment;

- (b) Section 13(10) is concerned with the improper use of inside information or the employee's duties, status, power or authority to gain, or seek to gain a benefit or advantage for the employee or any other person; or, conversely, a disadvantage for another person. For Allegation 2, it is the second of those two impacts that is relevant:

specifically, the question I need to consider is whether or not Mr Pezzullo criticised individuals in a way that was likely or intended to cause detriment to them. In the circumstances, drawing upon the matters I have raised above at paragraphs 77 to 78, I am satisfied that such a detriment may arise from Mr Briggs passing on Mr Pezzullo's critique to Prime Ministers or other members of the Executive Government. The remaining question is whether or not that detriment was intended, or sought by Mr Pezzullo. In my view, the answer to that question must be yes ss 47E(c) and (d); 47F(1) and 11A(6)

Cats 1 and 4

[REDACTED]

I am therefore satisfied that a breach of section 13(10)(b) has arisen; and

- (c) Section 13(11) relevantly requires APS employees to uphold the APS Values, integrity and good reputation of the employee's Agency and the APS. The APS Values include broad principles such as acting in accordance with defined principles of respect and ethics. Taking into account my descriptions of each criteria at Attachment 1, I am of the view that Mr Pezzullo has failed to act in a way that meets the standards of professionalism, integrity and respect provided for under sections 10(1), (2) and (3) of the APS Values. I am therefore satisfied that Mr Pezzullo has contravened Section 13(11) of the PS Act.

84. As such, based on the findings of fact outlined above, it is my determination that Mr Pezzullo has breached sections 13(3), 13(10)(b) and 13(11) of the PS Act (each breach constituting a separate breach of the Code). To the extent that I am satisfied a breach of section 13(11) has occurred, this arises due to a breach of the APS Values at sections 10(1), 10(2) and 10(3) of the PS Act.

## 7. Allegation 3

### 7.1 Executive Summary of Allegation 3

Failure to maintain confidentiality of sensitive government information	Substantiated
<p>In dealings that public servants have with people working outside government, it is expected that they will maintain confidentiality in their use and handling of government information.</p> <p>By sending the relevant messages to Mr Briggs, not only did Mr Pezzullo regularly communicate with Mr Briggs on sensitive government-related matters, but he also breached Ministerial confidentiality on a number of occasions. Mr Pezzullo's conduct was made worse by the fact that Mr Briggs did not hold the security clearances that may otherwise have provided some protection.</p> <p>Although it must be acknowledged that Mr Briggs was a confidant of two Prime Ministers and was likely to be well-informed on a number of issues discussed with Mr Pezzullo, this is not recognised as a relevant defence to a breach of the Code.</p> <p>I am therefore satisfied that Allegation 3 is established, and that a breach of the Code arises by reason of this conduct.</p>	

### 7.2 Analysis of evidence

85. The thrust of Allegation 3 is that Mr Pezzullo communicated with Mr Briggs on matters in respect of which he was under a duty of confidentiality. **ss 47E(c) and (d); 47F(1) and 11A(5)**

Cat 1

86. **ss 47E(c) and (d); 47F(1) and 11A(5)** that his messaging with Mr Briggs touched on matters that were confidential and sensitive, and on that basis, I do not intend to further elaborate on those matters in the body of this report. **ss 47E(c) and (d); 47F(1) and 11A(5)**

Cats 1 and 4

Cat 4

- (a) Ministers and non-APS employees (such as Mr Briggs) are not subject to the APS Code;
- (b) as Secretary of the Department of Home Affairs, the matters within his portfolio are of particular sensitivity and of international interest; and
- (c) as far as he is aware, Mr Briggs has never been an APS employee, has never been formally employed by a Ministerial office, nor did he hold a security clearance.

87. **ss 47E(c) and (d); 47F(1) and 11A(5)**

Cat 4

88. **ss 47E(c) and (d); 47F(1) and 11A(5)**

Cat 4

<sup>11</sup> **ss 47E(c) and (d); 47F(1) and 11A(5)**

Cat 1

ss 47E(c) and (d); 47F(1) and 11A(5)

89. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

90. ss 47E(c) and (d); 47F(1) and 11A(5)

91. ss 47E(c) and (d); 47F(1) and 11A(5)

### 7.3 Findings of fact in relation to Allegation 3

92. My finding, on the balance of probabilities, is that Allegation 3 is substantiated.

93. This finding has been reached by reason of the following:

- (a) it is not in contest that Mr Pezzullo:
  - (i) communicated with Mr Briggs on sensitive or confidential government-related matters;
  - (ii) disclosed aspects of his dealings with various Ministers and Ministerial offices to Mr Briggs; and
  - (iii) discussed the formulation or implementation of government policies and/or programs with Mr Briggs;
- (b) I do not accept that Mr Pezzullo's confidentiality obligations under the Code are limited to *classified* information. If that were true, then the confidentiality obligations contained within the Code might only have meaningful application in respect of high-level public servants who interact with the Executive Government or who have visibility of Cabinet-in-Confidence documentation. To the contrary, the duty of a public servant must extend to any sensitive information to which the person has been exposed in their employment and which has not been made publicly available. This includes information that has been the subject of limited consultation with external stakeholders, who would be expected to exercise discretion over the discussion and disclosure of that information; and
- (c) although I acknowledge the matters described at paragraphs 86 to 90, I do not accept that Mr Pezzullo provided sufficient justification for his conduct, particularly against the background of the matters set out at paragraph 85, and my findings in relation to Allegation 1.

## 7.4 Breach determination in relation to Allegation 3

94. The relevant sections of the Code that Mr Pezzullo has breached in relation to this allegation are set out in the following sections of the PS Act:
- (a) Section 13(6) (see Attachment 1, paragraph 20);
  - (b) Section 13(11) (see Attachment 1, paragraphs 31 to 43); and
  - (c) Section 13(13) (see Attachment 1, paragraph 44 to 45).
95. In relation to Section 13(6), the APSC Misconduct Guide is clear that *any* dealings with Ministers or Ministers' offices are to be treated with appropriate confidentiality in order to protect "sensitive information" to which they may be privy.<sup>12</sup> This includes retaining confidentiality from other APS employees who do not have a "proper need to know". This obligation is couched in exceptionally broad terms and in my view has been contravened by reason of Mr Pezzullo's disclosures to Mr Briggs;
96. Section 13(11) requires APS employees to uphold the APS Values, integrity and good reputation of the employee's Agency and the APS. Relevantly, the APS Values include broad principles demonstrating leadership, trustworthiness and integrity. Taking into account my descriptions of each criteria at Attachment 1, and my analysis of section 13(6) of the PS Act, I am not satisfied that Mr Pezzullo has met the standards of ethics described at paragraph 37 of Attachment 1. In particular, I am of the view that Mr Pezzullo has failed to act in a way "that is right and proper", and I am therefore satisfied that Mr Pezzullo's behaviour has contravened Section 13(11) of the PS Act; and
97. In practice, section 13(13) refers to the obligation of APS employees to comply with additional obligations under the regulations. Relevantly, this includes the disclosure of information that could be prejudicial to the effective working of government. **ss 47E(c) and (d); 47F(1) and 11A(5)**
- Cat 1** [REDACTED]
- This disclosure of confidential information was prejudicial to the effective workings of government (subsection 2.1(3) of the PS Regulations 1999).
98. By reason of those findings, I conclude that there is a sufficient basis to establish that Mr Pezzullo's conduct has breached sections 13(6), 13(11) and 13(13) of the PS Act (each breach constituting a separate breach of the Code). To the extent that I am satisfied that a breach of section 13(11) has occurred, this arises due to a breach of the APS Values at section 10(2) of the PS Act. Finally, to the extent that I am satisfied that a breach of section 13(13) has occurred, this arises due to a breach of regulation 2.1(3) of the PS Regulations 1999.

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<sup>12</sup> APSC Misconduct Guide, page 137.

## 8. Allegation 4

### 8.1 Executive summary of Allegation 4

Failing to act apolitically in your employment	Substantiated
<p>Under our Westminster system of government, there is a clear divide between the activities of the government and politicians more generally and the public service. While public servants can be a member of a political party, they are required to be apolitical in their APS employment and faithfully serve the government of the day. Among other things, this means that they cannot behave in a manner that seeks to influence political events or impose their political views on or at their work, and that they must manage their conduct in a way that avoids actual or perceived conflicts of interest or political interests.</p> <p>It is well beyond the political dividing line for a public servant at any level to insert their views and intervene in Ministerial appointments, which are rightly the purview of the Prime Minister and politicians more generally. ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>Cats 1 and 4 [REDACTED]</p> <p>This is also supported by the fact that message exchanges with this tenor were not fleeting or sporadic, but have been exchanged extensively and consistently with Mr Briggs over an extended period of time.</p> <p>Based on the evidence obtained throughout the Inquiry, I have found that a reasonable person (being the requisite test), would not conclude that Mr Pezzullo could serve any Government of the day impartially in circumstances where he has engaged ss 47E(c) and (d); 47F(1) and 11A(5) with Mr Briggs in the context of him being a known confidant of Liberal Party Prime Ministers and furthermore, a non-APS employed Liberal Party powerbroker. Cat 1</p> <p>On that basis, Allegation 4 is substantiated.</p>	

### 8.2 Analysis of evidence

99. Allegation 4 is concerned with a perceived failure of Mr Pezzullo to act apolitically in his employment.
100. This allegation was founded upon a review of a number of messages recovered during the course of the Inquiry, and which were put to Mr Pezzullo for response, which raised concerns that Mr Pezzullo sought to:
- (a) influence political events and impose his political views on outcomes in the course of his APS employment; and
  - (b) use his contact with Mr Briggs as a means to advance his views on various matters with two Prime Ministers.

101. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

[REDACTED]

[REDACTED]

[REDACTED]

Cats 1 and 4

102. ss 47E(c) and (d); 47F(1) and 11A(5)

103. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 4

Cat 4

### 8.3 Findings of fact in relation to Allegation 4

105. I find, on the balance of probabilities, that Allegation 4 is substantiated.

106. In arriving at this finding, I have had regard to section 17 of the Commissioner's Directions and the various requirements to uphold the APS Value of impartiality. Of particular relevance is the requirement to "[ensure] that the individual's actions do not provide grounds for a reasonable person to conclude that the individual could not serve the Government of the day impartially".

107. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

108. Notwithstanding these contentions, I find that the messages exchanged between Mr Pezzullo and Mr Briggs include various statements attributed to Mr Pezzullo which, objectively viewed, are not apolitical ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

109. It is also relevant to note that messages with this tenor obtained throughout the course of the Inquiry are not fleeting or sporadic. Rather, they have been exchanged extensively and consistently with Mr Briggs who was a known confidant of Prime Ministers Mr Turnbull and Mr Morrison and furthermore, a non-APS employed Liberal Party powerbroker.

Cats 1 and 4

110. ss 47E(c) and (d); 47F(1) and 11A(5)

I therefore consider that Mr Pezzullo has overstepped the divide between usual public sector discourse and engagement in the political domain. In the circumstances, I have no doubt that some Ministers in both of the major political parties would be unlikely to trust Mr Pezzullo to work apolitically and would fear that he could undermine their positions through the use of back-door political channels.

111. Based on this evidence, I am satisfied that a reasonable person would not conclude that Mr Pezzullo could serve any Government of the day impartially in circumstances where he has engaged in voluminous and ongoing exchanges with Mr Briggs, and which also informed the conduct and behaviours that are the subject of Allegations 1 and 2.

## 8.4 Breach determination in relation to Allegation 4

112. The relevant section of the Code that Mr Pezzullo has breached in relation to this allegation is set out in section 13(11) (see Attachment 1, paragraphs 31 to 43). This view is reached based on the following assessment:
- (a) Section 13(11) relevantly requires APS employees to uphold the APS Values, integrity and good reputation of the employee's Agency and the APS. The APS Values include broad principles such as acting in accordance with defined principles of respect and ethics.
  - (b) Taking into account my descriptions of each criteria at Attachment 1, I am not satisfied that Mr Pezzullo's meets the standards of ethics described at paragraph 37 of Attachment 1 and provided for under section 10(2) of the APS Values. In particular, I am of the view that Mr Pezzullo has failed to act in a way "that is right and proper"; and
  - (c) Nor am I satisfied that Mr Pezzullo has acted in a way that meets the standard of being impartial as provided for under section 10(5) of the APS Values. In particular, I am of the view that Mr Pezzullo has failed to act in a way of ensuring that his actions do not provide grounds for a reasonable person to conclude that he could not serve any Government of the day impartially, as described at paragraph 42 of Attachment 1.
113. As such, based on the findings of fact outlined above, it is my determination that Mr Pezzullo has breached the Code by reason of his breach of sections 10(2) and 10(5) of the PS Act (which set out the APS Values), and therefore, his breach of section 13(11) of the PS Act.

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## 9. Allegation 5

### 9.1 Executive summary of Allegation 5

ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]	Unsubstantiated
ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]	
On that basis, the allegation is unsubstantiated.	

Cat 2

### 9.2 Analysis of evidence

Cat 2

ss 47E(c) and (d); 47F(1) and 11A(5)

[Redacted]

ss 47E(c) and (d); 47F(1) and 11A(5)



Cat 2

ss 47E(c) and (d); 47F(1) and 11A(5)

**9.3 Findings of fact in relation to Allegation 5**

ss 47E(c) and (d); 47F(1) and 11A(5)

129. By reason of those findings, I conclude that Mr Pezzullo's conduct did not give rise to a breach of the Code in respect of this allegation.

Cat 2

## 10. Allegation 6

### 10.1 Executive summary of Allegation 6

<p>Impropriety in the engagement of DPG Advisory in August 2021, by:</p> <p>A) failing to make adequate conflict of interest disclosures regarding his relationship to Mr Briggs, nor any conflict of interest generally; and/or</p> <p>ss 47E(c) and (d); 47F(1) and 11A(5)</p>	<p>Substantiated in respect of 6A but not 6B</p> <p>Cat 2</p>
<p>Allegation 6 is concerned with the engagement of DPG Advisory in August 2021.</p> <p>During the COVID-19 pandemic, the Department was under pressure from the Government to quickly find alternative quarantine housing arrangements for returning citizens, and then progressively for foreign students and incoming workers.</p> <p>An entity affiliated with Mr Briggs - DPG Advisory - ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>Although the value of that contract was \$80,000, no competitive procurement process appears to have been followed in respect of that engagement.</p> <p>Upon review of the file for that contract, no conflict of interest declaration by Mr Pezzullo was located. ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>Cats 2 and 3</p> <p>After discussing my concerns with Mr Pezzullo, he accepted that he had not taken sufficient steps to make a conflict of interest declaration in respect of the procurement.</p> <p>I am therefore satisfied that Allegation 6A is established, and that a breach of the Code arises by reason of this conduct.</p> <p>Cat 2</p> <p>ss 47E(c) and (d); 47F(1) and 11A(5)</p> <p>Therefore, on balance, Allegation 6 is partially substantiated.</p>	

### 10.2 Analysis of evidence

130. Allegation 6 is concerned with the engagement of DPG Advisory for a two-month engagement in August 2021, in circumstances where:

- (a) ss 47E(c) and (d); 47F(1) and 11A(5)
- (b) it is alleged that Mr Pezzullo did not disclose his affiliation with Mr Briggs, nor any conflict of interest in relation to the procurement generally.

Cat 3

131. ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cats 2 and 3

132. On 4 August 2021, the Minister for Home Affairs was given in-principle agreement to engage a commercial service provider through competitive tender to provide a fully scalable service to facilitate the entry and quarantine of temporary skilled migration.

133. ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cats 2 and 3

134. ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cats 2 and 3

135. ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cats 2 and 3

136. It is not in contest that:

(a) ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cat 2

(b) ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cat 2

(c) ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted]  
[Redacted] Cats 2 and 3

(d) Mr Pezzullo's email [Redacted] ss 47E(c) and (d); 47F(1) and 11A(5) [Redacted] did not include any reference to Mr Pezzullo's relationship to Mr Briggs, nor did it identify any conflict of interest generally; and [Redacted] Cat 3

(e) on 17 August 2021, DPG Advisory was engaged by the Department of Home Affairs with a contracted amount of \$79,950 for a two month period (with there being no explanation why the contracted amount was reduced by \$50 from the 16 August 2021 proposal from Mr Gazard) (**Annexure P**).

137. Upon review of documents held by the Department of Home Affairs in relation to this tender, it did not appear that any conflict of interest declaration had been made in relation to this procurement.

138. The non-existence of any conflict of interest declaration was supported by Mr Pezzullo's response ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 2 and 3

That response, ss 47E(c) and (d); 47F(1) and 11A(5) and signed by Mr Pezzullo provided that "no conflict of interest declarations were made."

139. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 2 and 4

140. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 2 and 4

141. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 2 and 4

### 10.3 Findings of fact in relation to Allegation 6

142. I find, on the balance of probabilities, that Allegation 6 is partially substantiated.

143. This view is reached on the basis of the following factual findings:

(a) in relation to the issue of Mr Pezzullo's conflict of interest disclosures:

(i) I consider that Mr Pezzullo had a direct conflict of interest ss 47E(c) and (d), 47F(1) and 11A(5)

It was clearly necessary for Mr Pezzullo to disclose that conflict ss 47E(c)

Cats 2 and 3

and (d);  
47F(1)  
and  
11A(5)

(ii) ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 4

he appropriately conceded that he did not do so when presented with the proposition that no objective evidence could be located to support that view, despite comprehensive searches being conducted of Mr Pezzullo's emails and Departmental records (noting that the Department's records otherwise appeared to be comprehensive and well maintained). There was also no independent witness able to corroborate any oral disclosure that was initially thought to have been made;

(iii) even if a conflict was declared in the manner described by Mr Pezzullo (which he concedes he did not do), I consider that the steps he described taking to declare and document that conflict, and to manage the conflict, would not have been sufficient. In particular, Mr Pezzullo's failure to document a conflict of interest ss 47E(c) and (d), 47F(1) and 11A(5)

Cat 3

in his 16 August 2021 email (even if previously given orally) constitutes a significant lapse in judgement.

Cat 3

The same can be said of Mr Pezzullo's failure to disclose his conflict of interest ss 47E(c) and (d), 47F(1) and 11A(5) at the time of ss 47E(c) subsequent inquiry. Mr Pezzullo also recognises his failure to sign a standalone declaration in relation to this procurement, as he had done previously. ss 47E(c) and (d); 47F(1) and 11A(5)

Cats 1 and 3

All of those matters weigh heavily against Mr Pezzullo on this occasion;

(iv) ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

(v) Therefore, on balance, I consider it more likely than not that Mr Pezzullo failed to make either a written or oral declaration in relation to this procurement,

(b) ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

(ii) ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

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#### 10.4 Breach determination in relation to Allegation 6

144. The relevant sections of the Code that Mr Pezzullo may have breached in relation to this allegation are set out in the following sections of the PS Act:

(a) ss 47E(c) and (d); 47F(1) and 11A(5) Cat 2

(b) Section 13(2) (see Attachment 1, paragraphs 6 to 8);

(c) Section 13(7) (see Attachment 1, paragraph 21);

(d) ss 47E(c) and (d); 47F(1) and 11A(5) Cat 2

(e) ss 47E(c) and (d); 47F(1) and 11A(5) and Cat 2

(f) Section 13(11) (see Attachment 1, paragraphs 31 to 43).

145. Assessing each section in turn: Cat 2

(a) ss 47E(c) and (d); 47F(1) and 11A(5)

(b) Section 13(2) involves conduct that falls below the standards of due care and diligence expected of APS employees - this threshold is clearly met, for the reasons I have already stated. It was highly inappropriate for Mr Pezzullo to have any involvement in

the procurement of DPG Advisory whatsoever. His failure to recognise this 'in the moment', and to make sure his conflict of interest was clearly stated on the record, were both significant lapses of judgment. In my view Mr Pezzullo has clearly contravened section 13(2) of the PS Act;

(c) Section 13(7) is concerned with the avoidance and disclosure of conflicts of interest in connection with the employee's APS employment. For the reasons set out at paragraph 143(a), in my view Mr Pezzullo has clearly contravened this section of the Code;

(d) ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

(e) ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

(f) Section 13(11) relevantly requires APS employees to uphold the APS Values, integrity and good reputation of the employee's Agency and the APS. The APS Values include broad principles such as acting in accordance with defined principles of respect and ethics. Taking into account my descriptions of each criteria at Attachment 1, I am not satisfied that Mr Pezzullo meets the standards of ethics described at paragraph 37 of Attachment 1. In particular, I am of the view that Mr Pezzullo has failed to act in a way that is trustworthy, and "right and proper". I am also of the view that Mr Pezzullo has failed to act in a way that upholds the APS value of being "Accountable" under section 10(4) of the PS Act, taking into account the requirements described at paragraph 41 of Attachment 1, including the requirement of "being open to scrutiny and being transparent in decision making". I am therefore satisfied that Mr Pezzullo's behaviour has contravened section 13(11) of the PS Act.

146. As such, based on the findings of fact outlined above, it is my determination that Mr Pezzullo has breached sections 13(2), 13(7) and 13(11) of the PS Act (each breach constituting a separate breach of the Code). To the extent that I am satisfied that a breach of section 13(11) has occurred, this arises due to a breach of the APS Values at sections 10(2) and 10(4) of the PS Act.



152. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 2

### 11.3 Findings of fact in relation to Allegation 7

153. I find, on the balance of probabilities, that Allegation 7 is unsubstantiated for the reasons set out above.

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## 12. Mr Pezzullo's concluding remarks

154. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 4

155. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

I do not agree that my findings have the far-reaching consequences he suggests, nor do I accept that they will impede a Secretary's ability to provide frank and fearless advice to a Minister or their appointed advisor, nor to their colleagues. I also note that this is not a matter that my present inquiry needs to resolve.

156. The legitimacy of communications between a journalist and a high-ranking public servant are also well outside the scope of this Inquiry, though I would observe that a critical difference between such a relationship and Mr Pezzullo's case, is:

- (a) the status of Mr Briggs as a confidant of the Prime Minister; and
- (b) the capacity for Mr Pezzullo to exploit that relationship to advance his interests in the manner described in this report.

157. ss 47E(c) and (d); 47F(1) and 11A(5)

Cat 1

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## **13. Determination and recommendation**

### **13.1 Determination regarding breach of Code**

158. Based on the matters set out in my report at parts 5 - 11 above, it is my conclusion that Mr Pezzullo has breached the Code by reason of the following contraventions of the PS Act:
- (a) in respect of Allegation 1: sections 13(2), 13(7), 13(10)(a) and 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(1) and 10(2) of the PS Act);
  - (b) in respect of Allegation 2: sections 13(3), 13(10)(b) and 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(1), 10(2) and 10(3) of the PS Act);
  - (c) in respect of Allegation 3: sections 13(6), 13(11) and 13(13) of the PS Act (incorporating breaches of regulation 2.1(3) of the PS Regulations 1999; and breaches of the APS Values at section 10(2) of the PS Act);
  - (d) in respect of Allegation 4: section 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(2) and 10(5) of the PS Act); and
  - (e) in respect of Allegation 6: sections 13(2), 13(7) and 13(11) of the PS Act (incorporating breaches of the APS Values at sections 10(2) and 10(4) of the PS Act).
159. In addition to section 13 of the PS Act and the Code, I also consider that in each of the instances of behaviours and conduct that are the subject of these allegations, Mr Pezzullo has also failed in his duty under section 12 of the PS Act to uphold and promote the APS Values in his role as an Agency Head. As noted at paragraph 41 above, Agency Heads are bound by, and must comply with, the Code (section 14 of the PS Act), and must also promote the APS Values and the APS Employment Principles and compliance with the Code by personal example and other appropriate means (section 35(3)(c)).

### **13.2 Recommendation as to sanction**

160. It is unusual to conduct an inquiry into a Secretary for breaches of the Code, and this case is particularly unusual because it involves a series of text messages first reported in the media between a Secretary and a person outside the public service, but closely associated with Prime Ministers Turnbull and Morrison and the Liberal Party of Australia.
161. Michael Pezzullo AO has had a long and distinguished public service career, reaching the top of his profession; an achievement that few can replicate. He is a very intelligent person and seemingly has great strategic talent, recognised by Ministers on both sides of politics. Mr Pezzullo has been a significant leader and administrator, overseeing a department that is challenging to say the least. He has been awarded one of Australia's highest honours for his public service work.
162. Mr Pezzullo made clear in this Inquiry that his energy and enthusiasm for public policy, homeland security and his country have driven his endeavours, and not the pursuit of any personal gain.
163. Be that as it may, his engagement with a Liberal Party power broker in Mr Briggs was ill-advised, reckless and a step too far in terms of the boundaries of normal public service practice. Through this engagement, he sought to influence Ministerial appointments and machinery of government arrangements to his advantage and denigrated Ministers and fellow Secretaries.
164. Mr Pezzullo continued his engagement with Mr Briggs over many years, enabling Mr Pezzullo to systematically advance his views and interests and providing him with an avenue to power and influence beyond the usual Ministerial systems of the Westminster system. Such is the extent of his engagement with Mr Briggs that it cannot be seen as a one off or temporary lapse of judgement. In the circumstances, it is hard to imagine that he might be trusted now and into the future by governments of either political persuasion or by his colleagues.

165. Proven breaches of the Code by a Secretary are of great moment because if the Secretary fails to work within the norms and boundaries of public service behaviour and practice, there is a high likelihood that:
- (a) the trusting relationship so important to their and their Department's relationship with Ministers will be undermined;
  - (b) colleagues in the public sector will also be less likely to trust that engagement with the Secretary and their Department will be properly respected and confidentially managed;
  - (c) the general public will likely lose confidence in the public service to work in the public interest; and
  - (d) public service employees who rely on their Secretary to set standards, provide them leadership and provide an example as to how behaviour in line with the Code is to be modelled in practice, will be confused about how they should handle themselves.
166. The implications for quality public service are profound.
167. Section 59 of the PS Act provides for the termination of appointment of a Secretary. In this particular instance, with Mr Pezzullo having breached so many elements of the Code and the APS Values, I cannot imagine a reason why he should avoid consequence or continue in his current position.
168. **ss 47E(c) and (d); 47F(1) and 11A(5)**  
  
Cat 4
169. **ss 47E(c) and (d); 47F(1) and 11A(5)** termination of his appointment as a Secretary is the most appropriate sanction for Mr Pezzullo, reflecting the extent of the Secretary's breaches, his duty to uphold, model and promote the APS Values, and the position of trust and leadership that he commands. Other than the countervailing factors I have assessed in the context of each individual allegation, I do not consider there to be any additional mitigating factors in this case that may warrant the imposition of a more lenient sanction.  
Cat 1
170. I recommend that you note my findings and my conclusion that Mr Pezzullo has breached the Code on numerous occasions as a result of his conduct which has been established during the Inquiry.
171. I further recommend that you impose a sanction of termination of Mr Pezzullo's appointment as a Secretary pursuant to section 59 of the PS Act.

**Lynelle Briggs AO**

22 November 2023

## Attachment 1

### Definitions and guidance on Code elements

#### Honesty and integrity (section 13(1))

1. The concepts of "honesty" and "integrity" are not defined in the PS Act.
2. The APSC Misconduct Guide states the following about section 13(1) of the Code and the concepts of "honesty" and "integrity":<sup>13</sup>
  - 2.12. *Behaving honestly and with integrity involves concepts such as 'truthfulness', 'sincerity' and 'frankness'. Integrity involves a 'soundness of moral principle and character (Macquarie Concise Dictionary).*
  - 2.13. *Failure to act honestly includes deliberate behaviour that the employee knows to be wrong. However, employees may make honest mistakes without breaching this element of the Code. Such action will usually be better dealt with through management action such as training or counselling. In more serious cases, it may be dealt with as a potential breach of s.13(2) of the PS Act if the behaviour in the circumstances appears to indicate a lack of care and diligence. In some cases, however, behaviour that is not engaged in deliberately may nonetheless indicate a lack of integrity, and should be considered as a potential breach of s.13(1).*
3. The Macquarie Dictionary defines "honesty" as:<sup>14</sup>
  1. *the quality or fact of being honest; uprightness, probity, or integrity.*
  2. *truthfulness, sincerity, or frankness.*
  3. *freedom from deceit or fraud.*
4. The second concept in this section of the Code is the term "integrity". The Macquarie Dictionary defines "integrity" as:<sup>15</sup>
  1. *soundness of moral principle and character; uprightness; honesty.*
  2. *the state of being whole, entire, or undiminished: to preserve the integrity of the empire.*
  3. *sound, unimpaired, or perfect condition: the integrity of the text.*
5. A key term in the definition of "integrity" is "moral", which, based on the Macquarie Dictionary I define as "relating to or concerned with right conduct or the distinction between right or wrong".<sup>16</sup>

#### Care and diligence (section 13(2))

6. The APSC Misconduct Guide states the following about section 13(2) of the Code:<sup>17</sup>
  - 2.14. *Care and diligence have their ordinary meanings of 'serious attention and solicitude to work' and 'earnest effort to accomplish what is undertaken' (Macquarie Concise Dictionary). The standard of care and diligence required is objective and can be assessed by applying the standard of a 'reasonable person' in the same circumstances as the APS employee. The level of care and diligence required of senior managers*

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<sup>13</sup> APSC Misconduct Guide, page 132.

<sup>14</sup> Macquarie Dictionary, *Honesty* (accessed online).

<sup>15</sup> Macquarie Dictionary, *Integrity* (accessed online).

<sup>16</sup> Macquarie Dictionary, *Moral* (accessed online).

<sup>17</sup> APSC Misconduct Guide, page 133.

responsible for the delivery of a program of work may be higher than that of other employees delivering single elements of that program.

- 2.15. *Things done carelessly or without appropriate attention, i.e. without diligence, might be dealt with as a performance issue, through training, or through counselling—or might be dealt with as a breach of the Code, particularly for more serious examples. The relevant decision-maker will need to decide which option best meets the circumstances—see Chapter 4: ‘When behaviour doesn’t meet expectations—preliminary considerations’ of this guide.*
- 2.16. *Once it has been decided that a Code investigation is warranted, the breach decision-maker can then consider whether the conduct was careless or lacked diligence. It is not, however, enough for the breach decision-maker merely to come to a view that it would have been preferable to deal with the matter in question differently. A difference of opinion on how a matter should have been handled does not necessarily mean that the matter was handled without appropriate care or diligence. The question will be what a reasonably careful and diligent employee in the same position should have done in all the relevant circumstances. This may include, for example, a consideration of whether the employee’s conduct was consistent with any professional standards that might apply in that role, in addition to those under the Code, Values, and Employment Principles.*
- 2.17. *In some cases, the personal attributes of the employee may be relevant to whether they have acted with care and diligence. For example:*
- a) *an employee who has received training in a specialist skill may be expected to exercise that skill. A person who was known not to have those skills could not reasonably be expected to exercise them*
  - b) *an employee with many years of relevant experience might reasonably be expected to discharge their duties more effectively than an employee who had no previous directly relevant experience.*

7. The Macquarie Dictionary relevantly defines "care" as "serious attention; solicitude; heed; caution: devote great care to work".<sup>18</sup>

8. The Macquarie Dictionary defines "diligence" as "constant and earnest effort to accomplish what is undertaken; persistent exertion of body or mind".<sup>19</sup>

### **Respect, courtesy and without harassment (section 13(3))**

9. The concepts of "respect", "courtesy" and "without harassment" are not defined in the Act.

10. The APSC Misconduct Guide states the following about the interpretation of section 13(3) of the Code:<sup>20</sup>

2.18. *The terms ‘respect’ and ‘courtesy’ have their ordinary meanings: ‘esteem felt or shown’; ‘excellence of manners or behaviour; politeness’ (Macquarie Concise Dictionary). Workplace harassment entails offensive, belittling, or threatening behaviour directed at an individual or group. The behaviour is unwelcome, unsolicited, usually unreciprocated, and often repeated. The use of the word ‘treat’ does not require direct communication with a particular person, or that the behaviour is directed at a particular person.*

2.19. *The requirement to treat everyone with respect and courtesy, and without harassment, is an objective one. The subjective opinion of a complainant that behaviour is*

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<sup>18</sup> Macquarie Dictionary, *Care* (accessed online).

<sup>19</sup> Macquarie Dictionary, *Diligence* (accessed online).

<sup>20</sup> APSC Misconduct Guide, page 134. Note that the relevant provisions of the Commissioner Directions in the 2022 iteration were the same as they were in the 2016 iteration, except as otherwise identified.

*disrespectful, discourteous, or harassing does not establish that a behaviour is in breach of s.13(3). Similarly, a breach of this element does not require that the person who was the subject of the behaviour be offended by it—or even aware of it. The question is whether a reasonable person observing the behaviour would consider that the behaviour in question met the standard of the Code.*

- 2.20. *It may be necessary to consider patterns and overall behaviour when looking at allegations of disrespect, discourtesy, or harassment. Individual actions may not appear to be very significant but, taken in conjunction with other actions, might reveal a pattern of behaviour.*
- 2.21. *Care should be taken with general allegations of disrespect, discourtesy, or harassment, such as vague claims of 'passive aggressive' behaviour or feelings of being undermined. Allegations of this sort may be a description of the complainant's subjective response to the person they are complaining about. For a breach of the Code to be determined, it is necessary to identify specific incidents and events that can be assessed objectively.*
- 2.22. *In addition, a lack of such specificity in allegations of misconduct will make it more difficult to ensure that the person who is the subject of those allegations is able to respond to them in a fair and meaningful way. If an agency is taking into consideration a pattern of behaviour, that pattern has to be linked to observable incidents that are capable of being proven as misconduct.*
- 2.23. *'Respectful' is one of the APS Values. It requires employees to respect all people, including their rights and their heritage. Further information on the application of this Value can be found in section 15 of the Australian Public Service Commissioner's Directions 2022 (Commissioner's Directions).*

11. The Macquarie Dictionary relevantly defines "respect" as:<sup>21</sup>

- 1. *esteem or deferential regard felt or shown.*
- ...
- 4. *consideration or regard, as to something that might influence a choice.*
- ...
- 8. *to show esteem, regard, or consideration for: to respect someone's wishes.*
- 9. *to treat with consideration; refrain from interfering with: to respect a person's privacy.*

12. I also think it is relevant that the Macquarie Dictionary defines "disrespect" as:<sup>22</sup>

- 1. *lack of respect; disesteem; rudeness.*
- 2. *to regard or treat without respect; regard or treat with contempt or rudeness.*

13. The Macquarie Dictionary defines "courtesy" as:<sup>23</sup>

- 1. *excellence of manners or behaviour; politeness.*
- 2. *a courteous act or expression.*
- 3. *acquiescence; indulgence; consent: a title by courtesy rather than by right.*

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<sup>21</sup> Macquarie Dictionary, *Respect* (accessed online).

<sup>22</sup> Macquarie Dictionary, *Disrespect* (accessed online).

<sup>23</sup> Macquarie Dictionary, *Courtesy* (accessed online).

14. The Macquarie Dictionary defines "*discourteous*" as:<sup>24</sup>
- lacking courtesy; impolite; uncivil; rude.*
15. The Macquarie Dictionary defines "*harass*" as:<sup>25</sup>
1. *to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid.*
  2. *to disturb persistently; torment*
16. I also note that the version of the Commissioner's Directions in operation at the relevant time, defines "*respectful*" as:
- (a) *treating all people with dignity and recognising that all people have value;*
  - (b) *dealing with all people honestly and with integrity;*
  - (c) *recognising the importance of human rights and understanding Australia's human rights obligations;*
  - (d) *recognising and fostering diversity;*
  - (e) *collaborating and being open to ideas in policy development, implementation, program management and regulation;*
  - (f) *complying with all relevant anti-discrimination laws.*<sup>26</sup>

#### **Lawful and reasonable direction (section 13(5))**

17. It has long been recognised at common law that employees are obliged to comply with a command that "*relates to the subject matter of the employment*", "*involves no illegality*" and is "*reasonable*".<sup>27</sup>
18. The APSC Guide states the following about section 13(5) of the Code:<sup>28</sup>
- 2.32 . *A direction needs to be 'tightly drafted, using the language of command throughout, and specify exactly what actions should and should not be taken'. It is appropriate to use language that is clear and directive, and that which provides the employee with no discretion in relation to their behaviour.*
  - 2.33. *A general policy or guideline is not a direction for the purposes of the Code. Where a policy document is intended to be a direction from an agency head the document should be written using the language of command, and specify that it is a direction for the purposes of the PS Act.*
  - 2.36. *A direction also needs to be clear in its terms and capable of being complied with. A direction to 'behave appropriately', for example, may be difficult to comply with and enforce as it is not clear what is meant by the term.*
  - ...
  - 2.38. *...a supervisor has implied authority to direct subordinate staff and an employee with functional responsibility for a particular matter generally has implied authority to give directions relevant to that matter.*

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<sup>24</sup> Macquarie Dictionary, *Discourteous* (accessed online).

<sup>25</sup> Macquarie Dictionary, *Harassment* (accessed online).

<sup>26</sup> *Australian Public Service Commissioner's Directions 2016* (Cth), section 15.

<sup>27</sup> *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601.

<sup>28</sup> APSC Misconduct Guide, page 136.

19. I consider that for it to be open to the breach decision-maker to be satisfied that the alleged misconduct breaches an element of the Code, it must be shown that:
- (a) any direction was sufficiently clear that Mr Pezzullo could understand and comply with its terms;
  - (b) any direction was not unlawful;
  - (c) any direction was reasonable and proportionate; and
  - (d) any direction was given by someone with authority to issue it.

#### **Appropriate confidentiality about dealings with Ministers and staff (section 13(6))**

20. The APSC Misconduct Guide states the following about section 13(6) of the Code:<sup>29</sup>
- 2.30 *APS employees who deal with Ministers or with Ministers' offices may be privy to sensitive information in the course of their employment. APS employees must treat any such dealings with appropriate confidentiality. The phrase 'appropriate confidentiality' allows for disclosure to whomever else within the APS and the Government might have a proper need to know.*

#### **Conflict of interest (section 13(7))**

21. The APSC Misconduct Guide states the following about section 13(7) of the Code:<sup>30</sup>
- 2.41. *A conflict of interest, including a material personal interest, can arise out of a work, private or social context. It might arise due to an APS employee's private share holdings, or those of their immediate family, other personal interests, acceptance of a gift, benefit or hospitality, cultural obligations, political activities or personal relationships. It can also arise through outside work—paid or voluntary.*
- 2.42. *To be 'material' a personal interest needs to be of a type that can give rise to a real or apparent conflict of interest. Personal interests do not give rise to a conflict of interest unless there is a real or sensible possibility of conflict and not simply a remote or theoretical possibility of conflict. If no reasonable person could draw a connection between the employee's personal interest and their duties, then the personal interest is not 'material'.*
- 2.43. *Once a material personal interest is identified, the employee must disclose that interest. If an employee is in a position to, or perceived to be in a position to, influence an outcome or a decision then that person needs to take reasonable steps to avoid that conflict of interest.*
- 2.44. *APS Values and Code of Conduct in practice provides detailed guidance on conflicts of interest.*

#### **Commonwealth resources (section 13(8))**

22. The APSC Misconduct Guide states the following about section 13(8) of the Code:<sup>31</sup>
- 2.45. *'Commonwealth resources' is a broad term and includes money, goods, services, vehicles, office equipment, official records, office premises, telephones or other telecommunication devices and computers. It also includes the salary costs of APS employees.*

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<sup>29</sup> APSC Misconduct Guide, pages 137.

<sup>30</sup> APSC Misconduct Guide, pages 137.

<sup>31</sup> APSC Misconduct Guide, page 138.

- 2.46. *Most agencies have policies advising their employees on the appropriate use of Commonwealth resources. It is not appropriate for Commonwealth resources to be used for private gain. However, subject to agency policies, it is reasonable for APS employees to have limited private use of office equipment, for example reasonable and necessary telephone or email communication with family. Inappropriate use of an agency's ICT resources at work or out of office hours is covered by this section of the Code.*
- 2.47. *Damage to Commonwealth resources, however caused, can come within this section but each case will need to be considered carefully on its merits before deciding that misconduct action is*

**False or misleading information in response to request for information (section 13(9))**

- 23. The APSC Misconduct Guide states the following about section 13(9) of the Code:<sup>32</sup>
  - 2.48. *APS employees are required to provide responsive, efficient and effective services consistent with the APS Values, Employment Principles and associated Directions. Requests for information for official purposes may be made by members of the public, businesses, members of the media, other jurisdictions—national and international, members of Parliament, other Commonwealth agencies, by the employee's agency or another APS agency, or by work colleagues.*
  - 2.49. *The information provided by APS employees in connection with their APS employment should not be misleading and should be appropriate to the request being made. An objective consideration of the information given and the circumstances in which it was given is necessary to determine whether the information was misleading. That a person receiving the information was misled does not make the information misleading in and of itself.*
  - 2.50. *This element of the Code applies to requests for information made for official purposes in connection with an employee's APS employment. This is broader than requests for information that an employee may receive as part of their duties, and includes requests for information that relate to their own employment, such as information relevant to the job, applications for promotion, or to leave applications.*

**Improper use of position to gain benefit (section 13(10))**

- 24. The APSC Misconduct Guide states the following about section 13(10) of the Code:<sup>33</sup>
  - 2.51 *A breach of this element could occur if, for example, an APS employee gains, or seeks to gain an advantage for themselves, a friend, family member or associate. It can also occur if a senior officer in a supervisory role uses their status to gain favours from a member of their team or other junior staff. The benefit or advantage is not defined and is not limited to financial gain.*
  - 2.52 *Whether or not any person actually obtained a benefit from the employee's actions does not determine whether the behaviour is in breach of this element of the Code. This element can be breached if the employee merely sought a benefit or advantage. Similarly, actual detriment to the agency, Commonwealth or other person does not have to have occurred for a breach to be found.*
  - ...
  - 2.54 *Whether a use is improper, or not, will depend on the circumstances of each case. It is appropriate, generally, to assess the case by considering whether a reasonable person would, having regard to any relevant agency guidance, form the view that the use was improper. Employees of the APS are expected to undertake their duties in the*

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<sup>32</sup> APSC Misconduct Guide, pages 138.

<sup>33</sup> APSC Misconduct Guide, pages 139.

public interest. On that basis, deciding whether a use was improper would have regard to the nature of the benefit or advantage they were attempting to gain, or the detriment they were attempting to cause.

2.55 The phrases 'seek to gain' a benefit and 'seek to cause' detriment indicate that the employee's conduct was intentional. In considering behaviour against this element of the Code, agencies will need to be able to establish that the employee acted with some degree of intention to achieve the gain or cause the detriment.

25. The Macquarie Dictionary defines "improper" as:<sup>34</sup>

1. *not proper; not strictly belonging, applicable, or right: an improper use for a thing.*
2. *not in accordance with propriety of behaviour, manners, etc.: improper conduct.*
3. *unsuitable or inappropriate, as for the purpose or occasion: improper tools.*
4. *abnormal or irregular.*

26. The second concept in this element of the Code is seeking to obtain a benefit or cause a detriment. The key term in this concept is "seek". I have extracted below the Macquarie Dictionary definition for this term:<sup>35</sup>

1. *to go in search or quest of: to seek a new home.*
2. *to try to find by searching or endeavour: to seek a solution.*
3. *to try to obtain: to seek fame.*
4. *to try or attempt (to do something): to seek to convince a person.*
5. *to ask for; request: to seek advice.*
6. *to make search or inquiry.*

27. The definition of seek consistently uses the phrase "to try", which is a state of intent. I consider that this supports the APSC Misconduct Guide definition of "seek" and as such have adopted this definition of the term "seek" and will apply that throughout this report.

28. The Macquarie Dictionary defines "status" as:<sup>36</sup>

1. *condition, position, or standing socially, professionally, or otherwise.*
2. *the relative rank or social position of an individual or group: high status; low status.*
3. *the relative standing, position, or condition of anything: the status of the renovations.*
4. *the state or condition of affairs: the current status of the situation.*
- ...

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<sup>34</sup> Macquarie Dictionary, *Improper* (accessed online).

<sup>35</sup> Macquarie Dictionary, *Seek* (accessed online).

29. The Macquarie Dictionary defines "benefit" as:<sup>37</sup>

1. an act of kindness.
2. anything that is for the good of a person or thing.
3. a theatrical performance or other public entertainment to raise money for a worthy purpose.
4. a payment or other assistance given by an insurance company, mutual benefit society, or public agency.
5. a beneficial outcome: ease of transport as a benefit of working close to home.

30. The Macquarie Dictionary defines "detriment" as:<sup>38</sup>

1. loss, damage, or injury.
2. a cause of loss or damage.

### **APS Values, APS Employment Principles and reputation of the Department and APS (section 13(11))**

31. The APSC Misconduct Guide states the following about section 13(11) of the Code:<sup>39</sup>

- 2.56 *This element of the Code applies to an APS employee's behaviour 'at all times'. It may be breached by an APS employee outside normal work hours and at non-work premises. There is no explicit requirement in the section that the suspected conduct of the employee must be connected to their APS employment. In practice, however, determining that an action breaches the Code will generally require some degree of connection to the employee's employment.*
- 2.57 *This element of the Code places a positive obligation on APS employees to behave in a way that maintains confidence in their ability to serve the Government of the day professionally and does not undermine public confidence in their agency or the APS.*
- 2.58 *Because this element of the Code places a positive obligation on employees, it is not necessary to establish actual damage to the reputation of the agency or the APS in order to find that this section of the Code has been breached. A lack of damage may be relevant to a decision to start an investigation under an agency's s15(3) procedures or be relevant to mitigation when deciding a sanction.*
- 2.59 *Where an agency is alleging that an employee has breached s13(11) of the Code for behaviour that fails to uphold the Values and/or the Employment Principles, it is necessary to identify which Values or Employment Principles are at issue. It also necessary to advise the employee which Values or Employment Principles are at issue, and to give the employee an opportunity to respond, consistent with the agency's s15(3) procedures, prior to making a decision on breach.*
- 2.60 *The concept of integrity in this section of the Code is different to integrity in s13(1). Under s13(1), it is necessary to behave with integrity; here, an APS employee has to behave in a way that upholds the integrity of the employee's agency and the APS. For example, a public servant agreeing with critical comments made by a client about government policy may not be consistent with a requirement to behave in a way that upholds the integrity of their agency and the APS, in the sense of upholding their*

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<sup>37</sup> Macquarie Dictionary, *Benefit* (accessed online).

<sup>38</sup> Macquarie Dictionary, *Detriment* (accessed online).

<sup>39</sup> APSC Misconduct Guide, page 140.

*sound or unimpaired condition, but it may not in itself indicate that the public servant lacks integrity.*

32. The core term in this definition is "*integrity*". While the APSC Misconduct Guide confirms that the concept of integrity is different in the context of section 13(11) than section 13(1), I consider it is the application which is different and not the definition of the term. I therefore accept that definition of integrity (as set out above at paragraphs 4 and 5) as an appropriate definition and will apply that definition in this report.
33. The APS Values are contained within section 10 of the PS Act and relevantly state:
- (1) *Committed to service: The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.*
  - (2) *Ethical: The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.*
  - (3) *Respectful: The APS respects all people, including their rights and their heritage.*
  - (4) *Accountable: The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.*
  - (5) *Impartial: The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.*
34. I consider that all of the APS Values are relevant to Mr Pezzullo.
35. Section 13 of the Commissioner's Directions states the following in relation to the APS Value "*Committed to Service*":
- Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(1) of the Act requires the following:*
- (a) engaging effectively with the community and providing responsive, client-focussed service delivery;*
  - (b) providing appropriate and accessible information to clients and the community about rights and entitlements, and the process for gaining access to them;*
  - (c) ensuring that decisions and interactions with clients are objective and impartial, and in accordance with Government policy;*
  - (d) encouraging innovative thought and supporting innovative solutions;*
  - (e) managing data to enhance evidence-based policy advice, ensuring information is readily available to the community;*
  - (f) supporting collaboration and teamwork, both within an Agency and with other agencies and the wider community;*
  - (g) promoting continuous improvement and managing change effectively;*
  - (h) identifying and managing areas of potential risk;*
  - (i) pursuing and supporting training and development to improve capability;*
  - (j) being responsive to Ministers, including being knowledgeable about the Government's policies and understanding the relevant issues and options, the Government's objectives and the environment in which it operates.*

36. The Macquarie Dictionary defines "ethical" as:<sup>40</sup>

1. *relating to or dealing with morals or the principles of morality; relating to right and wrong in conduct.*
2. *in accordance with the rules or standards for right conduct or practice, especially the standards of a profession: it is not considered ethical for doctors to advertise.*

37. I also note that section 14 of the Commissioner's Directions states the following in relation to the APS Value "Ethical":

*Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(2) of the PS Act requires the following:*

- (a) *acting in a way that models and promotes the highest standard of ethical behaviour;*
- (b) *following through on commitments made;*
- (c) *having the courage to address difficult issues;*
- (d) *complying with all relevant laws, appropriate professional standards and the APS Code of Conduct;*
- (e) *acting in a way that is right and proper, as well as technically and legally correct or preferable;*
- (f) *reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way;*
- (g) *providing leadership in policy development, implementation, program management and regulation;*
- (h) *supporting systems that give APS employees appropriate opportunities to develop and demonstrate leadership qualities.*

38. I also note the reference to "integrity" in the definition of "ethical" and will adopt the definition explained above. The definition also refers to being 'trustworthy', which is defined in the Macquarie Dictionary as 'worthy of trust or confidence; reliable'.<sup>41</sup> In determining whether the respondent has breached this element of the Code, I will therefore also consider whether their conduct has demonstrated they are worthy of trust or confidence.

39. I have relied on the definitions of "respectful" discussed above at paragraphs 9 to 16.

40. The Macquarie Dictionary defines "accountable" as:<sup>42</sup>

1. *liable to be called to account; responsible (to a person, for an act, etc.):*
2. *capable of being explained*

41. I also note that section 16 of the Commissioner's Directions states the following in relation to the APS Value "Accountable":

*Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(4) of the Act requires the following:*

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<sup>40</sup> Macquarie Dictionary, *Ethical* (accessed online).

<sup>41</sup> Macquarie Dictionary, *Trustworthy* (accessed online).

<sup>42</sup> Macquarie Dictionary, *Accountable* (accessed online).

- (a) *being answerable to Ministers for the exercise of delegated authority, and, through them, to Parliament;*
- (b) *being open to scrutiny and being transparent in decision making;*
- (c) *being able to demonstrate that actions and decisions have been made with appropriate consideration;*
- (d) *being able to explain actions and decisions to the people affected by them;*
- (e) *being accountable for actions and decisions through statutory and administrative reporting systems;*
- (f) *being able to demonstrate clearly that resources have been used efficiently, effectively, economically and ethically;*
- (g) *being answerable for individual performance.*

42. I also note that section 17 of the Commissioner's Directions states the following in relation to the APS Value "*Impartial*":

*Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(5) of the Act requires the following:*

- (a) *serving the Government of the day with high quality professional support, irrespective of which political party is in power and of personal political beliefs;*
- (b) *ensuring that the individual's actions do not provide grounds for a reasonable person to conclude that the individual could not serve the Government of the day impartially;*
- (c) *ensuring that management and staffing decisions are made on a basis that is independent of the political party system, free from political bias and not influenced by the individual's political beliefs;*
- (d) *understanding the needs of the Government and providing it with the best objective, non-partisan advice based on the best evidence available;*
- (e) *providing advice that is relevant and comprehensive, is not affected by fear of consequences, and does not withhold important facts or bad news;*
- (f) *providing advice that takes account of the context in which policy needs to be implemented, the broader policy directions set by Government and, where appropriate, implications for the longer term;*
- (g) *implementing Government policies in a way that is free from bias, and in accordance with the law.*

43. The APS Employment Principles are included in section 10A of the PS Act and relevantly state:

- (1) *The APS is a career-based public service that:*
  - (a) *makes fair employment decisions with a fair system of review; and*
  - ...
  - (c) *makes decisions relating to engagement and promotion that are based on merit; and*
  - ...
  - (f) *provides workplaces that are free from discrimination, patronage and favouritism...*

(2) *For the purposes of paragraph (1)(c), a decision relating to engagement or promotion is based on merit if:*

...

- (b) *an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process;*
- (c) *the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties; and*
- (d) *the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and*
- (e) *the assessment is the primary consideration in making the decision.*

**Comply with any other conduct requirement prescribed by the Regulations (section 13(13))**

44. The APSC Misconduct Guide states the following about section 13(13) of the Code:<sup>43</sup>

- 2.65. *To date, only one other conduct requirement has been prescribed under the Public Service Regulations 1999 (PS Regulations).*
- 2.66. *Regulation 2.1 of the PS Regulations imposes a duty on APS employees not to disclose certain information without authority. The duty applies to information communicated in confidence or where disclosure could be prejudicial to the effective working of government. Regulation 2.1(5) of the PS Regulations sets out circumstances where APS employees are not prevented from disclosing information.*
- 2.67. *The regulation is not designed to regulate the disclosure of official information comprehensively. It operates alongside other provisions and obligations, including agency-level directions and authorisations.*
- 2.68. *This regulation may constitute a relevant Commonwealth statutory duty for the purposes of s.122.4 of the Criminal Code Act 1995 (Criminal Code). That section makes it an offence for a current or former Commonwealth officer, which includes an APS employee or a contractor, from communicating information obtained by reason of being a Commonwealth officer, or otherwise being engaged to perform work for a Commonwealth entity, if there is a Commonwealth statutory duty not to disclose this information. A breach of s.122.4 of the Criminal Code carries a maximum penalty of two years' imprisonment.*

45. For completeness, regulation 2.1 of the PS Regulations 1999, in force at the time of the exchanges of messages and the alleged breaches of the Code, imposed the following requirements regarding the disclosure of information:

**2.1 Duty not to disclose information (Act s 13)**

- (1) *This regulation is made for subsection 13(13) of the Act.*
- (2) *This regulation does not affect other restrictions on the disclosure of information.*
- (3) *An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably*

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<sup>43</sup> APSC Misconduct Guide, pages 141.

*foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.*

- (4) *An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:*
- (a) was, or is to be, communicated in confidence within the government; or*
  - (b) was received in confidence by the government from a person or persons outside the government;*
- whether or not the disclosure would found an action for breach of confidence.*
- (5) *Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee if:*
- (a) the information is disclosed in the course of the APS employee's duties; or*
  - (b) the information is disclosed in accordance with an authorisation given by an Agency Head; or*
  - (c) the disclosure is otherwise authorised by law; or*
  - (d) the information that is disclosed:*
    - (i) is already in the public domain as the result of a disclosure of information that is lawful under these Regulations or another law; and*
    - (ii) can be disclosed without disclosing, expressly or by implication, other information to which subregulation (3) or (4) applies.*
- (6) *Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.*

*Note: Under section 70 of the Crimes Act 1914, it is an offence for an APS employee to publish or communicate any fact or document which comes to the employee's knowledge, or into the employee's possession, by virtue of being a Commonwealth officer, and which it is the employee's duty not to disclose.*

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