

## NOTICE OF FILING

### Details of Filing

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File Title:	CPSU, THE COMMUNITY AND PUBLIC SECTOR UNION & ORS v THE STATE OF VICTORIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



## Amended Defence

Federal Court of Australia  
District Registry: Victoria  
Division: Fair Work

No. VID 165 of 2025

### **CPSU, the Community and Public Sector Union**

First Applicant

### **Patrick Wren**

Second Applicant

### **Ben Powell**

Third Applicant

### **The State of Victoria**

Respondent

#### **Note:**

A. Unless otherwise defined, capitalised terms have the meaning ascribed to them in the Statement of Claim.

### **A. THE PARTIES**

#### **A.1 The applicants and group members**

1. The respondent, acting for the purposes of this proceeding through the Department of Justice and Community Safety (~~which is~~ otherwise referred to below as the **Department**) does not plead to paragraph 1 because it does not allege a material fact.
2. As to paragraph 2, the respondent:
  - (a) admits sub-paragraphs (a) to (c);
  - (b) does not know and therefore cannot admit the allegations in sub-paragraph (d).

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**Filed on behalf of:** The respondent

Prepared by: Justin L Bourke KC and Helen Tiplady of counsel

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3. As to paragraph 3, the respondent:

- (a) admits sub-paragraphs (a) and (c);
- (b) admits that from 7 June 2018 to 23 November 2018, the second applicant, Mr Wren was:
  - (i) employed in the position of Assessment and Selection Advisor in People and Culture;
  - (ii) in that position, classified as a VPS Officer 4.1.7 in accordance with Schedule B to the 2016 Agreement;
- (c) admits that from 24 November 2018 to 31 January 2021, Mr Wren was:
  - (i) employed in the position of Team Leader – Campaigns in People and Culture;
  - (ii) in that position, classified as a Senior Officer 5.1 in accordance with Schedule B to the 2016 Agreement (during the 2016 Agreement Period) and Schedule C to the 2020 Agreement (during the 2020 Agreement Period);
- (d) says further that in the period from 2 March 2020 to 28 March 2020, acted on higher duties as a Senior Officer 6.1 in accordance with Schedule B to the 2016 Agreement;
- (e) admits that from 1 February 2021 to 29 September 2024, Mr Wren was:
  - (i) employed in the position of Assistant Manager – Talent Delivery in People and Workplace Services;
  - (ii) in that position, classified as a Senior Officer 5.1 in accordance with Schedule C to the 2020 Agreement;
- (f) says further that during the following periods, acted on higher duties as a Senior Officer 6.1 in accordance with Schedule C to the 2020 Agreement:
  - (i) from 16 October 2023 to 29 October 2023;
  - (ii) from 5 February 2024 to 6 June 2024; and
  - (iii) from 7 June 2024 to present;
- (g) otherwise denies the allegations.

4. As to paragraph 4, the respondent:

- (a) admits that the third applicant, Mr Powell is and was, from 7 August 2017:
  - (i) employed in the position of Assistant Manager – Work and Development Permit Scheme;

- (ii) in that position, classified as a Senior Officer 5.2 in accordance with Schedule B to the 2016 Agreement (during the 2016 Agreement Period) and Schedule C to the 2020 Agreement (during the 2020 Agreement Period);
- (b) says further that during the following periods, acted on higher duties as a Senior Officer 6.1 in accordance with Schedule B to the 2016 Agreement and Schedule C to the 2020 Agreement as the case may be:
  - 1. 2 October 2018 to 31 October 2018;
  - 2. 28 January 2019 to 8 March 2019;
  - 3. 2 September 2019 to 16 September 2019;
  - 4. 23 September 2019 to 29 September 2019;
  - 5. 30 September 2019 to 18 October 2019;
  - 6. 6 July 2020 to 28 August 2020; and
  - 7. 4 April 2022 to 11 May 2022;
- (c) admits sub-paragraph (b);
- (d) otherwise denies the allegations.

## **A.2 The respondent**

- 5. The respondent admits paragraph 5.

## **B. THE INDUSTRIAL INSTRUMENTS**

### **B.1 Background**

- 6. The respondent admits paragraph 6.
- 7. The respondent admits paragraph 7.
- 8. The respondent admits paragraph 8.
- 9. The respondent admits paragraph 9.
- 10. The respondent admits paragraph 10.
- 11. The respondent admits paragraph 11.
- 12. The respondent admits paragraph 12.
- 13. The respondent admits paragraph 13.

## B.2 2016 Agreement: applicable clauses

### B.2.1 The classification structure

14A. In relation to the allegations made in paragraphs 14 to 34 of the Statement of Claim, the Department says that:

- (a) the applicants plead the text of selected clauses and sub-clauses of the 2016 Agreement and the 2020 Agreement relating to the subject of progression and performance development, but the Department relies on all clauses in those agreements relating to progression and performance development (PPD Terms) in order to ascertain the full meaning and effect of those terms;
- (b) further to sub-paragraph (a), the process of determining the meaning of the PPD Terms requires, amongst other things, the identification of the purpose of those terms and it is apparent that the PPD Terms are intended to be and are descriptive of a system directed to the related subjects of performance development and progression;
- (c) the purpose of the PPD Terms with respect to Grade 5 to 7 employees under the 2020 Agreement and equivalent levels under the 2016 Agreement (Senior Grade employees) was that it was intended that progression would be warranted and be given to a Senior Grade employee where their job performance over a 12 month performance cycle was at a level which:
  - (i) demonstrated excellence and skill acquisition that was commensurate with the high level of responsibility of persons employed and the attainment of which was more challenging and difficult to achieve than the attainment of the level of performance which entitled an employee employed in lower grades to progression;
  - (ii) facilitated a combination of increasing capability, productivity, performance and professionalism in such employees.

(the Performance and Progression Purpose).

### PARTICULARS

Clause 24.4(d) and (e) of the 2016 Agreement; clause 29.3(c) of the 2020 Agreement.

- 14. The respondent admits paragraph 14.
- 15. The respondent admits paragraph 15.

### B.2.2 The entitlement to progression

- 16. The respondent admits paragraph 16.

17. The respondent admits paragraph 17.

18. The respondent admits paragraph 18.

#### *B.2.3 The performance review process*

19. The respondent admits paragraph 19.

20. The respondent admits paragraph 20. ~~and says further that clause 24.4(d) of the 2016 Agreement provided that:~~

~~(d) — An Employee will not be disadvantaged where learning and development opportunities are not available. It is to be acknowledged that within Grades 1 to 4, the progression criteria will not be as onerous as those which will be required for Grades 5 to Senior Technical Specialist. Whilst Grades 3 and 4 are clearly seen as transition points to higher levels of management within the structure and carry additional responsibility, this does not mean work at all lower levels will not be important and demanding. However, it is expected that in setting agreed progression criteria, the overwhelming majority of persons within Grades 1 to 4 will achieve the objectives and should move through the salary points. This is to be contrasted with persons in Grades 5 to Senior Technical Specialist. In these Grades, agreed objectives will include measures of excellence and skill acquisition commensurate with the high level of responsibility. It is expected that progression at these levels will be both more challenging and difficult to achieve.~~

#### *B.2.4 Payment of salaries*

21. The respondent admits paragraph 21.

### **B.3 2020 Agreement: applicable clauses**

#### *B.3.1 The classification structure*

22. The respondent admits paragraph 22.

23. The respondent admits paragraph 23.

#### *B.3.2 The entitlement to progression*

24. The respondent admits paragraph 24.

25. The respondent admits paragraph 25.

26. The respondent admits paragraph 26.

27. The respondent admits paragraph 27.

28. The respondent admits paragraph 28.

#### *B.3.3 The performance review process*

29. The respondent admits paragraph 29.

30. The respondent admits paragraph 30.

31. The respondent admits paragraph 31

32. The respondent admits paragraph 32.

33. The respondent admits paragraph 33.

#### *B.3.4 Payment of salaries*

34. The respondent admits paragraph 34.

### **B.4 The effect of the applicable clauses in the 2016 and 2020 Agreement**

35. As to paragraph 35, the respondent:

(a) admits sub-paragraphs (a) to (e) (g), (i) and (j);

(b) further says that the PPD Terms: denies sub-paragraph (h)

(i) provided that “progression criteria” were to be agreed with a Senior Grade employee at the start of the performance cycle or upon a Senior Grade employee’s commencement in a role and that the progression criteria could be adjusted by agreement during a performance cycle;

(ii) provided that a Senior Grade employee and the relevant management representative of the Department in exchange with each other were required to arrive at agreement about the particular tasks, objectives and responsibilities relating to specified subject matters which were to be the subject of assessment in the relevant 12 month performance cycle by the relevant supervisor or manager (Particular Performance Matters), and that the Particular Performance Matters could be adjusted during a performance cycle and that under the PPD Terms the specified subject matters:

A. in relation to the 2016 Agreement were the following matters: (1) achieving performance targets, (2) demonstrating public sector values and behaviours, and (3) applying learning and development (see clause 24.4(b) of the 2016 Agreement);

B. in relation to the 2020 Agreement were the following matters: (1) *Public Sector Values and Code of Conduct for Victorian Public Sector Employees*, (2) *Agreed performance goals appropriate to the Senior Grade employee's role*, and (3) *Agreed learning and development goals* (see Table under clause 29.2(g) of the 2020 Agreement);

(the **Relevant Performance Subjects**)

(iii) provided that a Senior Grade employee was entitled to progression where they were assessed as having “met” their progression criteria, and in so doing referred to the circumstance where the outcome of an evaluative assessment by the Senior Grade employee's supervisor or manager at the end of a 12 month performance cycle was required to be such that the performance of the employee in relation to their Particular Performance Matters was assessed at being at a standard which was consistent with the achievement of the Performance and Progression Purpose;

(c) says further that by reason of the matters referred to in sub-paragraph (b): at the commencement of and/or during each performance cycle, each Employee agreed performance standards with their manager, which comprised of accountability goals, performance goals, learning and development goals, and the demonstration of public sector values and behaviours;

(i) the granting of progression to a Senior Grade employee of the Department only where their performance was assessed by their supervisor or manager as having exceeded the expected normal requirements of their position was in accordance with the PPD Terms;

(ii) the non-granting of progression to a Senior Grade employee of the Department where their performance was assessed by their supervisor or manager as only having met the expected normal requirements of their position was in accordance with the PPD Terms;

(iii) the practice of the Department in respect of a Senior Grade employee as denoting an assessment referred to in sub-paragraph (c)(i) as “*exceeding expectations*” and denoting the assessment referred to in sub-paragraph (c)(ii) as “*achieving expectations*” was consistent with the PPD Terms and with the Performance and Progression Purpose.

(d) otherwise denies sub-paragraphs (f) to (i). says that the progression criteria that was agreed between each Employee and the State of Victoria in relation to each performance cycle comprised a requirement that the Employee achieve a particular rating in the end-of-cycle performance review with respect to their performance standards as in place at the end-of cycle performance review, namely, that they:



- i. ~~achieve the rating of exceeding expectations or above for the majority of the Department's values and behaviours, and achieving expectations for the remainder;~~
- ii. ~~achieve the rating of exceeding expectations or above for the majority of the Employee's performance goals and job-specific accountabilities, and achieving expectations for the remainder; and~~
- iii. ~~demonstrate active participation in learning activities (if applicable).~~

### **PARTICULARS**

~~The progression criteria were set out in the Department's policies and procedures, including the policy in respect of progression criteria and payments (DPGR Policy), as amended from time to time.~~

~~The Department's policies and procedures, including the DPGR Policy, were available on the Department's intranet, and via a link in the performance and development plan (PDP) in the DPGR's electronic system known as Nexus and/or was otherwise set out in the PDP itself.~~

~~The progression criteria were also set out in published mid-cycle review documents and end-cycle review documents.~~

~~The progression criteria were also the subject of online learning and training.~~

~~The DPGR Policy was also common knowledge amongst Grade 5 to 7 Employees.~~

~~Further, each year, the Department sent communications to staff which outlined and explained the Department's policies and procedures, including the DPGR Policy.~~

35A. Further to paragraph 35, and in order to remove any doubt or uncertainty, the Department says that if the applicants by paragraph 35 of the Statement of Claim or by any other paragraph of the Statement of Claim are alleging:

- (a) that on a proper construction of the PPD Terms the evaluative assessment of a Senior Grade employee's performance in the Department is confined to an assessment of whether the Senior Grade employee carried out the tasks and responsibilities contained in their Particular Performance Matters and that the question of at what qualitative standard they did so could only arise for evaluation where their Particular Performance Matters stated within their own terms that a required performance at a specified qualitative standard was necessary, it denies that allegation;
- (b) that on a proper construction of the PPD Terms the assessment required to be made by the supervisor or manager of a Senior Grade employee's performance in the Department at the end of a 12 month performance cycle entailed only the consideration of whether the Senior

Grade employee carried out their Particular Performance Matters to a satisfactory standard, that allegation is denied;

- (c) that on a proper construction of the PPD Terms the progression criteria of a Senior Grade employee in the Department comprises only that which is set out within the four walls of the final end of year review document electronically provided on the Department's information technology system known as Nexus, that allegation is denied.

35B. Further to paragraph 35A(c), if under the PPD Terms in order for the determination of whether the performance of a Senior Grade employee in the Department met their progression criteria the Senior Grade employee's progression criteria had to indicate how the progression criteria would be assessed by the Senior Grade employee's supervisor or manager (which is denied), the Department in the alternative says that:

- (a) under the PPD Terms, the progression criteria of each Senior Grade employee of the Department was comprised of what was agreed between the Senior Grade employee concerned and the Department on that subject at the beginning of a 12 month performance cycle save to the extent, if any, there was an adjustment by agreement during the performance cycle;
- (b) each Senior Grade employee of the Department agreed at the beginning of a 12 month performance cycle that their progression criteria included that they perform their Particular Performance Matters as a specified qualitative standard, that standard being that they exceed the expected normal requirements of their position according to the evaluative assessment of their supervisor or manager;

#### **PARTICULARS**

The agreement by each Senior Grade employee of the Department is to be inferred from one or more of the matters in paragraphs 35B(c) and (d) below.

- (c) Further or in the alternative to sub-paragraph (b):

- (i) Senior Grade employees in the Department must be taken to know, or presumed to know, the PPD Terms, including the Performance and Progression Purpose, or otherwise such matters must be read with, or included in, any progression criteria;

#### **PARTICULARS**

A Senior Grade employee must be taken to know, or presumed to know, the PPD Terms, including the Performance and Progression Purpose, by reason of one or more of the following matters:

- (i) the PPD Terms, including the Performance and Progression Purposes, are terms of, or the effect of, the terms in, the 2016 and 2020 Agreement (as the case may be);
  - (ii) the matters in (i) underpin the progression and performance development scheme (**PPD Scheme**) that a Senior Grade employee is participating in at any relevant time;
  - (iii) by participating in the PPD Scheme, a Senior Grade employee should come to know the matters in (ii);
  - (iv) at all relevant times, the employment of Senior Grade employees were covered by the 2016 Agreement or the 2020 Agreement;
  - (v) a Senior Grade employee covered at the relevant time by the 2016 Agreement and/or 2020 Agreement may have voted, or had the opportunity to vote, on the approval of one or both of the 2016 or 2020 Agreements;
  - (vi) a Senior Grade employee, especially given their level of experience and seniority, would be presumed to know the matters in (i), (ii) and/or (iii).
- (ii) the Particular Performance Matters during the Claim Period concerned matters consistent with the expected normal requirements of the Senior Grade employee's position within the Department;
- (iii) in the circumstances of sub-paragraphs (i) and (ii), a Senior Grade employee of the Department would be agreeing to the need for an evaluative assessment being made by their supervisor or manager as to whether the Senior Grade employee has exceeded the Particular Performance Matters, that is, exceeded the expected normal requirements of their position to obtain progression;
- (d) further or in the alternative to the matters above, Senior Grade employees of the Department each agreed that the Particular Performance Matters during the Claim Period concerned matters consistent with the expected normal requirements of the Senior Grade employee's position within the Department and to the evaluative assessment of their Particular Performance Matters by their supervisor or manager in accordance with the Department's well-known policies and practices by reason of one or more of the matters below (the **Department's Policies and Practices as to Progression**) (the **Policies and Practices Alternative Case**) or in the alternative, such awareness and agreement to the matters that support the Policies and Practices Alternative Case are to be presumed in the absence of any indication by a Senior Grade employee to the contrary;

- (i) the Department's Policies and Practices as to Progression were set out in the policies and guidance material that was published by the Department from time to time and available to its employees;
- (ii) an explanation of the Department's Policies and Practices as to Progression was provided in online training and in the final online electronic document published for the mid-year and final year cycle reviews that were completed on the electronic system known as Nexus during a 12 month performance cycle period;
- (iii) the participation by Senior Grade employees in the agreement of Particular Performance Matters with their supervisor or manager and such employees being granted or not granted progression in accordance with the Department's Policies and Practices as to Progression, including that such granting and non-granting of progression could only be understood by a Senior Grade employee by having an understanding of the Department's Policies and Practices as to Progression;
- (iv) the Department's Policies and Practices as to Progression or their general effect, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "*exceeding expectations*" or above, that is, exceeded the expected normal requirements of the position to obtain progression, were common knowledge within the Department;
- (v) Senior Grade employees needed to know the Department's Policies and Practices as to Progression in order to discuss and agree with their supervisor or manager as to the Particular Performance Matters and to do self-assessments during the mid-year and end of year performance review process and in order to understand any assessment by their supervisor or manager during the mid-year and end of year cycle;
- (vi) Senior Grade employees who completed assessments of *other* employees in their capacity as a supervisor or manager of those employees needed to know the Department's Policies and Practices as to Progression in order to complete assessments during the mid-year and end of year performance review process and in order to discuss and agree with employees as to Particular Performance Matters.

### **C. THE DEPARTMENT'S APPROACH TO PROGRESSION**

36. As to paragraph 36 the respondent: ~~admits paragraph 36~~
- (a) admits that for the purpose of the practical implementation of the approach to employee performance development and progression required by the PPD Terms, the Department put in place certain electronic processes via the online application called Nexus;
  - (b) says that the electronic processes available via Nexus at all material times were utilised by Senior Grade employees of the Department and their supervisors and managers and other persons having functions in relation to performance development and progression, and there

was no claim made by Senior Grade employees, including the second and third applicants, that the use of those electronic processes entailed any breach of the PPD Terms;

(c) otherwise denies paragraph 36.

37. As to paragraph 37, the respondent:

- (a) refers to and repeats ~~sub~~-paragraphs 35~~(c) and (d)~~, 35A and 35B above;
- (b) ~~otherwise admits paragraph 37~~ says that the 2016 and 2020 Agreements required each employee's progression criteria to be agreed with them and it admits that it required that to occur;

(c) otherwise denies paragraph 37.

38. As to paragraph 38, the respondent:

- (a) refers to and repeats ~~sub~~-paragraphs 35~~(c) and (d)~~, 35A and 35B above;
- (b) ~~otherwise denies the allegations~~ says that if by the allegation the applicants are alleging that the Department at all material times adopted the position that progression criteria were required to relate to the Relevant Performance Subjects, it admits the allegation and says further that the adoption of that position was in accordance with the PPD Terms;

(c) otherwise denies paragraph 38.

39. As to paragraph 39, the respondent:

~~(a) — admits sub-paragraph (a);~~

~~(a)(b)~~ refers to and repeats ~~sub~~-paragraphs 35~~(c) and (d)~~, 35A, 35B and 36 above, including that the progression criteria were required to relate to the Relevant Performance Subjects;

~~(b)(c)~~ otherwise denies the allegations.

40. The respondent ~~admits~~ refers to and repeats paragraphs 35, 35A, 35B and 36 above, including that the progression criteria were required to relate to the Relevant Performance Subjects and otherwise denies paragraph 40.

41. ~~As to paragraph 41,~~ The respondent: ~~(a)~~ refers to and repeats ~~sub~~-paragraphs 35~~(c) and (d)~~, 35A, 35B and 36 above, ~~;~~ ~~(b)~~ including that the progression criteria were required to relate to the Relevant Performance Subjects and otherwise denies ~~the allegations~~ paragraph 41.

42. As to paragraph 42, the respondent:

- (a) ~~refers to and repeats paragraphs 36 to 41 above~~ says that it did not grant progression to Senior Grade employees of the Department who were assessed at the end of a 12 month

performance cycle occurring at a time that the 2016 Agreement or the 2020 Agreement applied, as “achieving expectations” (as distinct from being assessed as “exceeding expectations”);

- (b) otherwise denies the allegations says that by doing so as referred to in sub-paragraph (a) it did not “deny” progression amounts to those persons in the sense of not giving them progression where they were entitled to progression under the PPD Terms because on a proper construction of those terms an evaluative assessment that a Senior Grade employee of the Department was “achieving expectations”, that is, that the employee had merely met the expected normal requirement of their position, did not constitute an assessment that the Senior Grade employee met their progression criteria;

(c) says that by reason of sub-paragraph (b), such a Senior Grade employee of the Department was not entitled under the PPD Terms to receive progression;

(d) otherwise denies paragraph 42.

## **D. CONTRAVENTIONS OF THE 2016 AGREEMENT**

### **D.1 Contraventions of the 2016 Agreement in respect of Mr Wren**

#### *D.1.1 2018-19 performance cycle*

43. The respondent admits paragraph 43 and says further that Ms Nguyen's email also stated, inter alia:

*"Please find attached the PDP policy and related guideline as well as descriptors for rating to share with the team. I have found though that they are written quite broadly so as discussed last week, please ensure you have a conversation with staff around goal expectations or any inconsistent ratings to get yourselves back on the same page."*

## **PARTICULARS**

Ms Nguyen's email attached a copy of the DPGR Policy ~~which set out the progression criteria.~~

44. Save to say that Ms Trang Nguyen sent the email with the subject line “Re: PDP goals – VPS5 Team Leaders.” at 5:15pm on 26 February 2019 (not 27 February 2019), the respondent admits paragraph 44 and says further that Ms Nguyen's email attached a copy of the DPGR Policy ~~which set out the progression criteria.~~
45. The respondent admits paragraph 45.
46. As to paragraph 46, the respondent:
- (a) says that on or about 26 February 2019, Ms Nguyen entered Mr Wren's goals into Nexus for the 2018-19 performance cycle and assigned these to Mr Wren;

- (b) otherwise does not know and cannot admit the allegations.
47. As to paragraph 47, the respondent:
- (a) admits that on or about 26 February 2019, upon Ms Nguyen assigning Mr Wren's goals in Nexus to Mr Wren, the goals were recorded as "approved";
- (b) otherwise does not know and cannot admit the allegations.
48. As to paragraph 48, the respondent:
- (a) says that Mr Wren's goals, as approved by Ms Nguyen, ~~comprised Mr Wren's performance standards for the~~ were Particular Performance Matters in relation to his 2018-19 performance cycle ~~subject to any variation in those performance standards during the performance cycle;~~
- (b) refers to ~~sub-~~paragraphs 35~~(c) and (d)~~, 35A and 35B above;
- (c) says that to the extent the Policies and Practices Alternative Case is relevant, Mr Wren was aware of, and had agreed to the matters that support the Policies and Practices Alternative Case or in the alternative, such awareness and agreement to the matters that support the Policies and Practices Alternative Case are to be presumed in the absence of any indication to the contrary, ~~the progression criteria as described in sub-paragraphs 35(c) and (d) above;~~

### PARTICULARS

The Department refers to and repeats sub-paragraph 35B(d) above.

Further, it ~~it~~ was a term of Mr Wren's employment with the Department that he comply with the Department's policies and ~~practices~~ procedures, including the ~~DPGR Policy~~ Department's Policies and Practices as to Progression. Accordingly, Mr Wren was obliged to be familiar with the Department's Policies and Practices as to Progression (such contractual obligation, however, was not capable of overriding the terms of the 2016 or 2020 Agreements).

The Department's Policies and Practices as to Progression were ~~as~~ stated in letters from the Department to Mr Wren dated 29 May 2018 and 27 November 2018.

The Department's Policies and Practices as to Progression ~~policies and procedures, including the DPGR Policy, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression,~~ were available to Mr Wren on the intranet and were otherwise publicised by the Department via Department communications such as emails and posters to Employees.

The ~~effect of the~~ Department's Policies and Practices as to Progression ~~policies and procedures, including the DPGR Policy~~ were available via a link within the PDP form in Nexus and/or were otherwise set out in the PDP itself.

The ~~effect of the Department's Policies and Practices as to Progression~~ progression criteria were also set out in Mr Wren's published end-cycle review document.

Mr Wren completed online learning and attended training on 15 June 2018 and 11 June 2019 at which the Department's Policies and Practices as to Progression ~~DPGR Policy was were~~ explained ~~on 15 June 2018 and 11 June 2019~~.

The ~~DPGR Policy~~ Department's Policies and Practices as to Progression or their general effect, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression, was common knowledge amongst Grade 5 to 7 Employees, including Mr Wren.

Mr Wren had to be aware of the Department's Policies and Practices as to Progression ~~DPGR Policy~~, in order to assess Grade 3 and 4 Employees who he was responsible for assessing against their progression criteria.

Further, each year, Mr Wren was sent communications by the Department which outlined and explained the Department's Policies and Practices as to Progression, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression ~~policies and procedures, including the DPGR Policy~~.

~~He was sent the following emails during the 2018-19 performance cycle:~~

**~~PDP plan:~~**

- ~~1. Email sent on 10 October 2018, titled: Your 2018-19 Performance and Development Plan (PDP) in Nexus;~~
- ~~2. Email sent to managers at any time during performance year, once employee submits goal to manager for approval, titled: Nexus Notification – Goal approval request;~~
- ~~3. Email sent at any time during the performance year, once manager approves goal in Nexus system, titled: Nexus Notification – Goal Approved;~~

**~~Mid-cycle review:~~**

- ~~4. Email sent on 23 January 2019, titled: Mid-cycle performance reviews are fast approaching;~~



- ~~5. Email sent on 4 February 2019 following mid-cycle self-reviews being assigned to the employee, titled: Important—Performance Review instructions;~~
- ~~6. Email sent one day after self review is overdue (19 February 2019), titled: Important reminder—Performance Self Review Step Not Complete;~~
- ~~7. Email sent seven days after self review is overdue (26 February 2019), titled: Important reminder—Performance Self Review Step Not Complete;~~
- ~~8. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopen;~~
- ~~9. Email sent to managers at any time during performance year, once employee submits self review, titled: Important—Performance review instructions for Managers;~~
- ~~10. Email sent one day after manager review is overdue (12 March 2019), titled: Important Reminder—Manager Performance Review step not complete;~~
- ~~11. Email sent seven days after manager review is overdue (19 March 2019), titled: Important Reminder—Manager Performance Review step not complete;~~
- ~~12. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—Staff Acknowledgement of the Review;~~
- ~~13. Email sent one day after employee acknowledgement is overdue (19 March 2019), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~14. Email sent seven days after employee acknowledgement is overdue (26 March 2019), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~15. Email sent once mid-cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed;~~

**End of cycle review:**

- ~~16. Email sent on 19 June 2019, titled: End of Cycle Performance Review 2019—Fast Approaching;~~
- ~~17. Email sent on 1 July 2019, titled: Important—Performance Review instructions;~~
- ~~18. Email sent one day after self review is overdue (16 July 2019), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~19. Email sent seven days after self review is overdue (23 July 2019), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~

- ~~20. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopened;~~
- ~~21. Email sent to managers once employee submits self review, titled: Important—Performance review instructions for Managers;~~
- ~~22. Email sent one day after manager review is overdue (6 August 2019), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~23. Email sent seven days after manager review is overdue (14 August 2019), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~24. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~25. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—REVIEW.STEP.TITLE step of the performance review;~~
- ~~26. Email sent one day after employee acknowledgement is overdue (13 August 2019), titled: Important reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~27. Email sent seven days after employee acknowledgement is overdue (20 August 2019), titled: Important reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~28. Email sent once end of cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed.~~

Further particulars may be provided following discovery.

(d) otherwise denies the allegations;

(e) further says that the agreed Particular Performance Matters for the 2018-2019 performance cycle for Mr Wren reflected the expected normal requirements of his position and accordingly, as a Senior Grade employee of the Department, he had to achieve an overall evaluative assessment that exceeded the expected normal requirements of his position, that is, “*exceeding expectations*” or above, in order to obtain progression.

49. As to paragraph 49, the respondent:

- (a) refers to and repeats paragraph 48 above;
- (b) otherwise denies the allegations;

(c) further say that the need to achieve an overall evaluative assessment of “*exceeding expectations*”, if not forming part of, or to be read with, the progression criteria (which is denied) was otherwise a requirement of the 2016 Agreement for progression as a Senior Grade employee had to have an evaluative assessment that the employee exceeded the expected normal requirements of the position to obtain progression (clause 24.4(d)).

50. As to paragraph 50, the respondent:

- (a) admits that Ms Nguyen completed the *Performance Assessment – End Cycle Review 1 July 2019* on or around 26 August 2019;
- (b) admits that Ms Nguyen provided an overall assessment rating for Mr Wren of “Achieving Expectations”;
- (c) refers to and repeats paragraph 48 above;
- (d) otherwise denies the allegations;

(e) further says that an overall evaluative assessment of “*achieving expectations*” meant that Mr Wren was evaluated as having simply met the expected normal requirements of his position, which assessment did not entitle (let alone permit) Mr Wren to obtain progression.

51. The respondent denies the allegations in paragraph 51.

52. The respondent denies the allegations in paragraph 52.

53. As to paragraph 53, the respondent:

- (a) admits that the State of Victoria did not provide, and Mr Wren did not receive, any progression in respect of the 2018-19 performance cycle;
- (b) says that the State of Victoria was not obliged to provide, and Mr Wren was not entitled to receive, any progression in respect of the 2018-19 performance cycle;
- (c) otherwise denies the allegations.

54. The respondent denies the allegations in paragraph 54.

#### *D.1.2 2019-20 performance cycle*

55. The respondent admits paragraph 55.

56. The respondent admits paragraph 56.

57. As to paragraph 57, the respondent:

- (a) admits that on or about 21 and 26 February 2020, Mr Wren entered goals into Nexus for the 2019-20 performance cycle;

- (b) otherwise does not know and therefore cannot admit the allegations.
58. It admits paragraph 58.
59. As to paragraph 59, the respondent:
- (a) says that the goals entered by Mr Wren, and approved by Ms Nguyen, ~~comprised Mr Wren's performance standards for were~~ Particular Performance Matters in relation to his the 2019-20 performance cycle ~~subject to any variation in these performance standards during the performance cycle;~~
  - (b) refers to ~~sub~~-paragraphs 35~~(c) and (d)~~, 35A and 35B above;
  - (c) says that to the extent the Policies and Practices Alternative Case is relevant, Mr Wren was aware of, and had agreed to the matters that support the Policies and Practices Alternative Case or in the alternative, such awareness and agreement to the matters that support the Policies and Practices Alternative Case are to be presumed in the absence of any indication to the contrary, the progression criteria as described in sub-paragraphs 35(c) and (d) above;

### PARTICULARS

~~The Department refers to and repeats the particulars under paragraph 48(c). It was a term of Mr Wren's employment with the Department that he comply with the Department's policies and procedures, including the DPGR Policy, as stated in letter from the Department to Mr Wren dated 1 July 2019.~~

~~The Department's policies and procedures, including the DPGR Policy, were available to Mr Wren on the intranet and were otherwise publicised by the Department via Department communications such as emails and posters to Employees.~~

~~The Department's policies and procedures, including the DPGR Policy, were available via a link within the PDP form in Nexus and/or were otherwise set out in the PDP itself.~~

~~The progression criteria were also set out in Mr Wren's published mid-cycle review documents and end-cycle review documents.~~

~~The DPGR Policy was common knowledge amongst Grade 5 to 7 Employees, including Mr Wren.~~

~~Mr Wren had to be aware of the DPGR Policy in order to assess Grade 3 to 4 Employees who he was, or had been, responsible for assessing against their progression criteria.~~

~~Mr Wren completed online learning and attended training at which the DPGR Policy was explained on 15 June 2018 and 11 June 2019.~~

Further, each year, Mr Wren was sent communications by the Department which outlined and explained the Department's Policies and Practices as to Progression, including that a Senior

Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of “*exceeding expectations*” or above, that is, exceeded the expected normal requirements of the position to obtain progression. policies and procedures, including the DPGR Policy. He was sent the following emails during the 2019-20 performance cycle (and equivalent emails in earlier performance cycles):

**PDP plan:**

1. ~~Email sent on 10 October 2019, titled: Your 2019-20 Performance and Development Plan (PDP) in Nexus;~~
2. ~~Email sent to managers at any time during performance year, once employee submits goal to manager for approval, titled: Nexus Notification – Goal approval request;~~
3. ~~Email sent at any time during the performance year, once manager approves goal in Nexus system, titled: Nexus Notification – Goal Approved;~~

**Mid-cycle review:**

4. ~~Email sent on 17 January 2020, titled: Mid-cycle performance reviews are fast approaching;~~
5. ~~Email sent on 3 February 2020 following mid-cycle self-reviews being assigned to the employee, titled: Important – Performance Review instructions;~~
6. ~~Email sent one day after self-review is overdue (18 February 2020), titled: Important reminder – Performance Self Review Step Not Complete;~~
7. ~~Email sent seven days after self-review is overdue (26 February 2020), titled: Important reminder – Performance Self Review Step Not Complete;~~
8. ~~Email sent on an ad hoc basis if manager requires the employee to make edits to their self-review, titled: Important – Self Review reopen;~~
9. ~~Email sent to managers at any time during performance year, once employee submits self-review, titled: Important – Performance review instructions for Managers;~~
10. ~~Email sent one day after manager review is overdue (10 March 2020), titled: Important Reminder – REVIEW.STEP.TITLE step not complete;~~
11. ~~Email sent seven days after manager review is overdue (17 March 2020), titled: Important Reminder – REVIEW.STEP.TITLE step not complete;~~

- ~~12. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~13. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—Staff Acknowledgement of the Review;~~
- ~~14. Email sent one day after employee acknowledgement is overdue (17 March 2020), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~15. Email sent seven days after employee acknowledgement is overdue (24 March 2020), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~16. Email sent once mid-cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed;~~

**End of cycle review:**

- ~~17. Email sent on 18 June 2020, titled: End of Cycle Performance Review 2020—Fast Approaching;~~
- ~~18. Email sent to managers on 23 June 2020, titled: End of Cycle performance reviews fast approaching—Information for managers;~~
- ~~19. Email sent on 1 July 2020, titled: Important—Performance Review instructions;~~
- ~~20. Email sent one day after self review is overdue (16 July 2020), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~21. Email sent seven days after self review is overdue (23 July 2020), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~22. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopened;~~
- ~~23. Email sent to managers once employee submits self review, titled: Important—Performance review instructions for Managers;~~
- ~~24. Email sent one day after manager review is overdue (6 August 2019), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~25. Email sent seven days after manager review is overdue (14 August 2019), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~

- ~~26. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~27. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions— REVIEW.STEP.TITLE step of the performance review;~~
- ~~28. Email sent one day after employee acknowledgement is overdue (13 August 2020), titled: Important reminder— REVIEW.STEP.TITLE step not complete;~~
- ~~29. Email sent seven days after employee acknowledgement is overdue (20 August 2020), titled: Important reminder— REVIEW.STEP.TITLE step not complete; and~~
- ~~30. Email sent once end of cycle review PDP completed, titled: Nexus Notification— REVIEW.TASK.TITLE Completed.~~

Further particulars may be provided following discovery.

- (d) otherwise denies the allegations;
- (e) further says that the Particular Performance Matters for the 2019-20 performance cycle for Mr Wren reflected the expected normal requirements of his position and accordingly, as a Senior Grade employee of the Department, he had to achieve an overall evaluative assessment of exceeded the expected normal requirements of his position, that is, “exceeding expectations” or above, in order to obtain progression.

60. As to paragraph 60, the respondent:

- (a) refers to and repeats paragraph 59 above;
- (b) otherwise denies the allegations<sub>3</sub>:-
- (c) further says that the need to achieve an overall evaluative assessment of “exceeding expectations”, if not forming part of, or to be read with, the progression criteria (which is denied) was otherwise a requirement of the 2016 Agreement for progression as a Senior Grade employee of the Department had to have an evaluative assessment that the employee exceeded the expected normal requirements of the position to obtain progression (clause 24.4(d)).

61. As to paragraph 61, the respondent:

- (a) admits that Mr Houston completed the *Performance Assessment – End Cycle Review 1 July 2020* on or around 31 July 2020;

- (b) admits that Mr Houston provided an overall assessment rating for Mr Wren of “Achieving Expectations”;
- (c) refers to and repeats paragraph 59 above;
- (d) otherwise denies the allegations;
- (e) further says that an overall evaluative assessment of “achieving expectations” meant that Mr Wren was evaluated as having simply met the expected normal requirements of his position, which assessment did not entitle (let alone permit) Mr Wren to progression.

62. The respondent denies the allegations in paragraph 62.

63. The respondent denies the allegations in paragraph 63.

64. As to paragraph 64, the respondent:

- (a) admits that the State of Victoria did not provide, and Mr Wren did not receive, any progression in respect of the 2019-20 performance cycle;
- (b) says that the State of Victoria was not obliged to provide, and Mr Wren was not entitled to receive, any progression in respect of the 2019-20 performance cycle;
- (c) otherwise denies the allegations.

65. The respondent denies the allegations in paragraph 65.

## **D.2 Contraventions of the 2016 Agreement in respect of Mr Powell**

### *D.2.1 2018-19 performance cycle*

66. As to paragraph 66, the respondent:

- (a) admits that on or about 27 November 2018, Mr Powell entered goals into Nexus for the 2018-19 performance cycle;
- (b) otherwise does not know and therefore cannot admit the allegations.

67. As to paragraph 67, the respondent:

- (a) says that on or about 11 to 13 March 2019, Ms Roake used Nexus to record comments in relation to Mr Powell's draft goals;
- (b) otherwise does not know and cannot admit the allegations.

68. As to paragraph 68, the respondent:



- (a) says that on or about 14 March 2019, Mr Powell modified his goals in Nexus;
- (b) otherwise does not know and therefore cannot admit the allegations.

69. As to paragraph 69, the respondent:

- (a) admits that on or about 14 March 2019, Ms Roake recorded Mr Powell's goals in Nexus as approved;
- (b) otherwise does not know and therefore cannot admit the allegations.

70. As to paragraph 70, the respondent:

- (a) says that the goals entered by Mr Powell, and approved by Ms Roake, were Particular Performance Matters in relation to Mr Powell's ~~comprised Mr Powell's performance standards for the~~ 2018-19 performance cycle;
- (b) refers to ~~sub~~-paragraphs 35~~(c) and (d)~~, 35A and 35B above;
- (c) says that to the extent the Policies and Practices Alternative Case is relevant, Mr Powell was aware of, and had agreed to, the matters that support the Policies and Practices Alternative Case or in the alternative, such awareness and agreement to the matters that support the Policies and Practices Alternative Case are to be presumed in the absence of any indication to the contrary ~~the progression criteria as described in sub-paragraphs 35(c) and (d) above~~;

## PARTICULARS

The Department refers to and repeats sub-paragraph 35B(d) above.

Further, ~~it~~ it was a term of Mr Powell's employment with the Department that he comply with the Department's policies and practices procedures, including the DPGR Policy, Department's Policies and Practices as to Progression, as stated in the letter from the Department to Mr Powell dated 17 July 2017. Accordingly, Mr Powell was obliged to be familiar with the Department's Policies and Practices as to Progression (such contractual obligation, however, was not capable of overriding the terms of the 2016 or 2020 Agreements).

The Department's Policies and Practices as to Progression, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of this position to obtain progression, ~~policies and procedures, including the DPGR Policy~~ were available to Mr Powell on the intranet and were otherwise publicised by the Department via Department communications such as emails and posters to Employees.

The effect of the Department's Policies and Practices as to Progression ~~policies and procedures, including the DPGR Policy~~, were available to Mr Powell via a link within the PDP form in Nexus and/or were otherwise set out in the PDP itself.

The effect of the Department's Policies and Practices as to Progression~~progression criteria~~ were also set out in Mr Powell's published mid-cycle review documents and end-cycle review documents.

The Department's Policies and Practices as to Progression or their general effect, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression, ~~the DPGR Policy,~~ was common knowledge amongst Grade 5 to 7 Employees, including Mr Powell.

Further, each year, Mr Powell was sent communications by the Department which outlined and explained the Department's Policies and Practices as to Progression, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression. ~~policies and procedures, including the DPGR Policy. He was sent the following emails during the 2018-19 performance cycle (and equivalent emails in earlier performance cycles):~~

**~~PDP plan:~~**

- ~~1. Email sent on 10 October 2018, titled: Your 2018-19 Performance and Development Plan (PDP) in Nexus;~~
- ~~2. Email sent at any time during the performance year, once manager approves goal in Nexus system, titled: Nexus Notification - Goal Approved;~~

**~~Mid-cycle review:~~**

- ~~3. Email sent on 23 January 2019, titled: Mid-cycle performance reviews are fast approaching;~~
- ~~4. Email sent on 4 February 2019 following mid-cycle self-reviews being assigned to the employee, titled: Important - Performance Review instructions;~~
- ~~5. Email sent one day after self review is overdue (19 February 2019), titled: Important reminder - Performance Self Review Step Not Complete;~~
- ~~6. Email sent seven days after self review is overdue (26 February 2019), titled: Important reminder - Performance Self Review Step Not Complete;~~
- ~~7. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important - Self Review reopen;~~

- ~~8. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—Staff Acknowledgement of the Review;~~
- ~~9. Email sent one day after employee acknowledgement is overdue (19 March 2019), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~10. Email sent seven days after employee acknowledgement is overdue (26 March 2019), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~11. Email sent once mid-cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed;~~
- End of cycle review:**
- ~~12. Email sent on 19 June 2019, titled: End of Cycle Performance Review 2019—Fast Approaching;~~
- ~~13. Email sent on 1 July 2019, titled: Important—Performance Review instructions;~~
- ~~14. Email sent one day after self review is overdue (16 July 2019), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~15. Email sent seven days after self review is overdue (23 July 2019), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~16. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopened;~~
- ~~17. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—REVIEW.STEP.TITLE step of the performance review;~~
- ~~18. Email sent one day after employee acknowledgement is overdue (13 August 2019), titled: Important reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~19. Email sent seven days after employee acknowledgement is overdue (20 August 2019), titled: Important reminder—REVIEW.STEP.TITLE step not complete; and~~
- ~~20. Email sent once end of cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed.~~

Further particulars may be provided following discovery.

- (d) otherwise denies the allegations<sup>37</sup>;

(e) further says that the Particular Performance Matters for the 2018-19 performance cycle for Mr Powell reflected the expected normal requirements of his position and accordingly, as a Senior Grade employee of the Department, he had to achieve an overall evaluative assessment of exceeding the expected normal requirements of his position, that is, “exceeding expectations” or above, in order to obtain progression.

71. As to paragraph 71, the respondent:

(a) refers to and repeats paragraph 70 above;

(b) otherwise denies the allegations:-

(c) further say that the need to achieve an overall evaluative assessment of “exceeding expectations”, if not forming part of, or to be read with, the progression criteria (which is denied) was otherwise a requirement of the 2016 Agreement for progression as a Senior Grade employee of the Department had to have an overall evaluative assessment that the employee exceeded the expected normal requirements of the position to obtain progression (clause 24.4(d)).

72. As to paragraph 72, the respondent:

(a) admits that Ms Roake completed the *Performance Assessment – End Cycle Review 1 July 2019* on or around 12 August 2019;

(b) admits that Ms Roake provided an overall rating for Mr Powell of “Achieving Expectations”;

(c) refers to and repeats paragraph 70 above;

(d) otherwise denies the allegations:-

(e) further says that an overall evaluative assessment of “achieving expectations” meant that Mr Powell was evaluated as having simply met the expected normal requirements of his position, which assessment did not entitle (let alone permit) Mr Powell to progression.

73. The respondent denies the allegations in paragraph 73.

74. The respondent denies the allegations in paragraph 74.

75. As to paragraph 75, the respondent:

(a) admits that the State of Victoria did not provide, and Mr Powell did not receive, any progression in respect of the 2018-19 performance cycle;

(b) says that the State of Victoria was not obliged to provide, and Mr Powell was not entitled to receive, any progression in respect of the 2018-19 performance cycle;

- (c) otherwise denies the allegations.

76. The respondent denies the allegations in paragraph 76.

#### *D.2.2 2019-20 performance cycle*

77. As to paragraph 77, the respondent:

- (a) admits that on or about 30 and 31 January 2020, Mr Powell entered goals into Nexus for the 2019-20 performance cycle;
- (b) otherwise does not know and therefore cannot admit the allegations.

78. As to paragraph 78, the respondent:

- (a) says that on or about 4 February and 25 February 2020, Ms Roake used Nexus to record comments in relation to Mr Powell's draft goals;
- (b) otherwise does not know and cannot admit the allegations.

79. As to paragraph 79, the respondent:

- (a) admits that between 31 January 2020 and 18 March 2020, Mr Powell modified his goals in Nexus;
- (b) otherwise does not know and therefore cannot admit paragraph 79.

80. As to paragraph 80, the respondent:

- (a) admits that on or about 5 and 26 February and 18 March 2019, Ms Roake recorded Mr Powell's goals in Nexus as approved;
- (b) otherwise does not know and therefore cannot admit paragraph 80.

81. As to paragraph 81, the respondent:

- (a) says that the goals entered by Mr Powell, and approved by Ms Roake, were Particular Performance Matters comprised for Mr Powell's performance standards for the 2019-20 performance cycle;
- (b) refers to and repeats sub-paragraphs 35(c) and (d), 35A and 35B above;
- (c) says that to the extent the Policies and Practices Alternative Case is relevant, Mr Powell was aware of, and had agreed to, the matters that support the Policies and Practices Case or in the alternative, such awareness and agreement to the matters that support the Policies and Practices Alternative Case are to be presumed in the absence of any indication to the contrary the progression criteria as described in sub-paragraph 35(c) and (d) above;

## PARTICULARS

~~The Department refers to and repeats the particulars under sub-paragraph 70(c). It was a term of Mr Powell's employment with the Department that he comply with the Department's policies and procedures, including the DPGR Policy, as stated in the letter from the Department to Mr Powell dated 17 July 2017.~~

~~The Department's policies and procedures, including the DPGR Policy, were available to Mr Powell on the intranet and were otherwise publicised by the Department via Department communications such as emails and posters to Employees.~~

~~The Department's policies and procedures, including the DPGR Policy, were available via a link within the PDP form in Nexus and/or were otherwise set out in the PDP itself.~~

~~The progression criteria were also set out in Mr Powell's published mid-cycle review documents and end-cycle review documents.~~

~~The DPGR Policy was common knowledge amongst Grade 5 to 7 Employees, including Mr Powell.~~

~~Mr Powell had to be aware of the DPGR Policy in order to assess Grade 3 Employees who he was responsible for assessing against their progression criteria.~~

Further, each year, Mr Powell was sent communications by the Department which outlined and explained the Department's Policies and Practices as to Progression, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression. ~~policies and procedures, including the DPGR Policy. He was sent the following emails during the 2019-20 performance cycle (and equivalent emails in earlier performance cycles):~~

### **~~PDP plan:~~**

- ~~1.—Email sent on 10 October 2019, titled: Your 2019-20 Performance and Development Plan (PDP) in Nexus;~~
- ~~2.—Email sent to managers at any time during performance year, once employee submits goal to manager for approval, titled: Nexus Notification—Goal approval request;~~
- ~~3.—Email sent at any time during the performance year, once manager approves goal in Nexus system, titled: Nexus Notification—Goal Approved;~~

### **~~Mid-cycle review:~~**

- ~~4.—Email sent on 17 January 2020, titled: Mid-cycle performance reviews are fast approaching;~~

- ~~5. Email sent on 3 February 2020 following mid-cycle self-reviews being assigned to the employee, titled: Important—Performance Review instructions;~~
- ~~6. Email sent one day after self review is overdue (18 February 2020), titled: Important reminder—Performance Self Review Step Not Complete;~~
- ~~7. Email sent seven days after self review is overdue (26 February 2020), titled: Important reminder—Performance Self Review Step Not Complete;~~
- ~~8. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopen;~~
- ~~9. Email sent to managers at any time during performance year, once employee submits self review, titled: Important—Performance review instructions for Managers;~~
- ~~10. Email sent one day after manager review is overdue (10 March 2020), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~11. Email sent seven days after manager review is overdue (17 March 2020), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~12. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~13. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—Staff Acknowledgement of the Review;~~
- ~~14. Email sent one day after employee acknowledgement is overdue (17 March 2020), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~15. Email sent seven days after employee acknowledgement is overdue (24 March 2020), titled: Important reminder—Employee Acknowledgment Step Not Complete;~~
- ~~16. Email sent once mid-cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed;~~

**End of cycle review:**

- ~~17. Email sent on 18 June 2020, titled: End of Cycle Performance Review 2020—Fast Approaching;~~
- ~~18. Email sent to managers on 23 June 2020, titled: End of Cycle performance reviews fast approaching—Information for managers;~~

- ~~19. Email sent on 1 July 2020, titled: Important—Performance Review instructions;~~
- ~~20. Email sent one day after self review is overdue (16 July 2020), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~21. Email sent seven days after self review is overdue (23 July 2020), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~22. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopened;~~
- ~~23. Email sent to managers once employee submits self review, titled: Important—Performance review instructions for Managers;~~
- ~~24. Email sent one day after manager review is overdue (6 August 2019), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~25. Email sent seven days after manager review is overdue (14 August 2019), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~26. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~27. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—REVIEW.STEP.TITLE step of the performance review;~~
- ~~28. Email sent one day after employee acknowledgement is overdue (13 August 2020), titled: Important reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~29. Email sent seven days after employee acknowledgement is overdue (20 August 2020), titled: Important reminder—REVIEW.STEP.TITLE step not complete; and~~
- ~~30. Email sent once end of cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed.~~

Further particulars may be provided following discovery.

(d) otherwise denies the allegations;:-

(e) further says that the Particular Performance Matters for the 2019-20 performance cycle for Mr Powell reflected the expected normal requirements of his position and accordingly, as a Senior Grade employee in the Department, he had to achieve an overall evaluative



assessment of exceeded the expected normal requirements of his position, that is, “exceeding expectations” or above, in order to obtain progression.

82. As to paragraph 82, the respondent:

(a) refers to and repeats paragraph 81 above;

(b) otherwise denies the allegations:-

(c) further say that the need to achieve an overall evaluative assessment of “exceeding expectations”, if not forming part of, or to be read with, the progression criteria (which is denied) was otherwise a requirement of the 2016 Agreement for progression as a Senior Grade employee had to have an overall evaluative assessment that the employee exceeded the expected normal requirements of the position to obtain progression (clause 24.4(d)).

83. As to paragraph 83, the respondent:

(a) admits that Ms Roake completed the *Performance Assessment – End Cycle Review 1 July 2020* on or around 17 August 2020;

(b) admits that Ms Roake provided an overall rating for Mr Powell of “Achieving Expectations”;

(c) refers to and repeats paragraph 81 above;

(d) otherwise denies the allegations:-

(e) further says that an overall evaluative assessment of “achieving expectations” meant that Mr Powell was evaluated as having simply met the expected normal requirements of his position, which assessment did not entitle (let alone permit) Mr Powell to progression.

84. The respondent denies the allegations in paragraph 84.

85. The respondent denies the allegations in paragraph 85.

86. As to paragraph 86, the respondent:

(a) admits that the State of Victoria did not provide, and Mr Powell did not receive, any progression in respect of the 2019-20 performance cycle;

(b) says that the State of Victoria was not obliged to provide, and Mr Powell was not entitled to receive, any progression in respect of the 2019-20 performance cycle;

(c) otherwise denies the allegations.

87. The respondent denies the allegations in paragraph 87.

### D.3 Contraventions of the 2016 Agreement in respect of the 2016 Agreement Group Members

88. As to paragraph 88, the respondent:

- (a) admits that in accordance with clause 24.3(c) of the 2016 Agreement each 2016 Agreement Group Member agreed progression criteria for each 2016 Agreement Performance Cycle with the State of Victoria on various dates during the 2016 Agreement Period; within the meaning of clause 24.3(c) of the 2016 Agreement;
- (b) otherwise does not know and therefore cannot admit the allegations.

89. As to paragraph 89, the respondent:

- (a) says specifically that if what is alleged in that paragraph is that the progression criteria of each 2016 Agreement Group Member was comprised only of what was set out in text within the electronic document known and referred to as the PDP maintained electronically in Nexus which had been completed by each such person at the beginning of a 12 month performance cycle, that allegation is denied and the Department further refers to and repeats paragraphs 35, 35A and 35B above; that at the commencement of and/or during each 2016 Agreement Performance Cycle, each 2016 Agreement Group Member agreed performance standards with their manager, which comprised accountability goals, performance goals, learning and development goals, and the demonstration of public sector values and behaviours;
- (b) ~~says that that progression criteria that was agreed between each 2016 Agreement Group Member and the State of Victoria in relation to each 2016 Agreement Performance Cycle comprised a requirement that the 2016 Agreement Group Member achieve a particular rating in the end-of-cycle performance review with respect to their performance standards as in place at the end-of cycle performance review, namely, that they:~~
  - ~~i. achieve the rating of exceeding expectations or above for the majority of the Department's values and behaviours, and achieving expectations for the remainder;~~
  - ~~ii. achieve the rating of exceeding expectations or above for the majority of the Employee's performance goals and job-specific accountabilities, and achieving expectations for the remainder; and~~
  - ~~iii. demonstrate active participation in learning activities (if applicable).~~

#### PARTICULARS

~~The respondent refers to and repeats the particulars under paragraph 35 above.~~

- ~~(b)(e)~~ otherwise denies the allegations.

90. As to paragraph 90, the respondent:

- (a) refers to and repeats paragraphs s 89-35, 35A and 35B above;
- (b) otherwise denies the allegations<sub>:-</sub>

(c) further says that the agreed Particular Performance Matters for each 2016 Agreement Group Member reflected the expected normal requirements of their position and accordingly, as Senior Grade employees, such employees had to achieve an overall evaluative assessment that exceeded the expected normal requirements of their position, that is, “exceeding expectations” or above, in order to obtain progression.

91. As to paragraph 91, The respondent:

(a) does not know and cannot admit paragraph 91<sub>:-</sub>

(b) further says that an overall evaluative assessment of “achieving expectations” meant that a 2016 Agreement Group Member in the Department was evaluated as having simply met the expected normal requirements of their position, which assessment would not entitle (let alone permit) such a Senior Grade employee to progression.

92. As to paragraph 92, the respondent:

- (a) refers to and repeats paragraphs s 89-35, 35A, 35B and 91 above;
- (b) otherwise denies the allegations.

93. The respondent denies the allegations in paragraph 93.

94. As to paragraph 94, the respondent:

- (a) admits that if a 2016 Agreement Group Member was assessed ~~rated~~ as “Achieving Expectations”, the State of Victoria did not provide, and the 2016 Agreement Group Member did not receive, any progression in respect of the relevant performance cycle;
- (b) says that if a 2016 Agreement Group Member was assessed ~~rated~~ as “Achieving Expectations”, the State of Victoria was not obliged to provide, and the 2016 Agreement Group Member was not entitled to receive, any progression in respect of the relevant performance cycle;
- (c) otherwise denies the allegations.

95. The respondent denies the allegations in paragraph 95.

## **E. CONTRAVENTIONS OF THE 2020 AGREEMENT**

### **E.1 Contraventions of the 2020 Agreement in respect of Mr Powell**

96. As to paragraph 96, the respondent:

- (a) admits that on or about 1 December 2023, Mr Powell entered goals into Nexus for the 2023-24 performance cycle;
- (b) otherwise does not know and therefore cannot admit the allegations.

97. As to paragraph 97, the respondent:

- (a) admits that on or about 4 December 2023, Ms Poirrier recorded two of Mr Powell's goals in Nexus as approved;
- (b) says further that on or about 4 March 2024, Ms Jo-Anne Gabriel recorded one of Mr Powell's goals in Nexus as approved.

98. As to paragraph 98, the respondent:

- (a) says that the goals entered by Mr Powell, and approved by Ms Poirrier and Ms Gabriel, were Particular Performance Matters for ~~comprised~~ Mr Powell's ~~performance standards for the~~ 2023-24 performance cycle;
- (b) refers to and repeats ~~sub-paragraphs 35(c) and (d)~~ 35A and 35B above;
- (c) says that to the extent the Policies and Practices Alternative Case is relevant, Mr Powell was aware of, and had agreed to, the matters that support the Policies and Practices Case or in the alternative, such awareness and agreement to the matters that support the Policies and Practices Alternative Case are to be presumed in the absence of any indication to the contrary ~~the progression criteria as described in sub-paragraphs 35(c) and (d) above~~;

## PARTICULARS

~~The Department refers to and repeats the particulars under sub-paragraph 81(c). It was a term of Mr Powell's employment with the Department that he comply with the Department's policies and procedures, including the DPGR Policy, as stated in the letter from the Department to Mr Powell dated 17 July 2017.~~

~~The Department's policies and procedures, including the DPGR Policy, were available to Mr Powell on the intranet and were otherwise publicised by the Department via Department communications such as emails and posters to Employees.~~

~~The Department's policies and procedures, including the DPGR Policy, were available via a link within the PDP form in Nexus and/or were otherwise set out in the PDP itself.~~

~~The progression criteria were also set out in the published mid-cycle review documents and end-cycle review documents.~~

~~The DPGR Policy was common knowledge amongst Grade 5 to 7 Employees, including Mr Powell.~~

Mr Powell had to be aware of the [Department's Policies and Practices as to Progression DPGR Policy](#) in order to assess Grade 2 to 3 Employees who he was, or had been, responsible for assessing against their progression criteria.

Mr Powell attended training at which the [Department's Policies and Practices as to Progression DPGR Policy](#) was [were](#) explained on 29 March 2022.

Further, each year, Mr Powell was sent communications by the Department which outlined and explained the Department's [Policies and Practices as to Progression, including that a Senior Grade employee needed to achieve an overall evaluative assessment of their supervisor or manager of "exceeding expectations" or above, that is, exceeded the expected normal requirements of the position to obtain progression. policies and procedures, including the DPGR Policy. He was sent the following emails during the 2023-24 performance cycle \(and equivalent emails in earlier performance cycles\):](#)

**~~PDP plan:~~**

- ~~1.—Email sent on 24 October 2023, titled: Your 2023-24 Performance and Development Plan (PDP) in Nexus;~~
- ~~2.—Email sent to managers at any time during performance year, once employee submits goal to manager for approval, titled: Nexus Notification—Goal approval request;~~
- ~~3.—Email sent at any time during the performance year, once manager approves goal in Nexus system, titled: Nexus Notification—Goal Approved;~~

**~~Mid-cycle review:~~**

- ~~4.—Email sent on 19 January 2024, titled: Mid-cycle performance reviews are fast approaching;~~
- ~~5.—Email sent on 1 February 2024 following mid-cycle self-reviews being assigned to the employee, titled: Important—Performance Review instructions;~~
- ~~6.—Email sent one day after self-review is overdue (16 February 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~7.—Email sent seven days after self-review is overdue (23 February 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~8.—Email sent on an ad hoc basis if manager requires the employee to make edits to their self-review, titled: Important—Self Review reopen;~~
- ~~9.—Email sent to managers at any time during performance year, once employee submits self-review, titled: Important—Performance review instructions for Managers;~~

- ~~10. Email sent one day after manager review is overdue (9 March 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~11. Email sent seven days after manager review is overdue (17 March 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~12. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~13. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—Staff Acknowledgement of the Review;~~
- ~~14. Email sent one day after employee acknowledgement is overdue (16 March 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~15. Email sent seven days after employee acknowledgement is overdue (23 March 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~16. Email sent once mid-cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed;~~

**~~End of cycle review:~~**

- ~~17. Email sent on 24 June 2024, titled: End of Cycle Performance Review 2024—Fast Approaching;~~
- ~~18. Email sent on 1 July 2024, titled: Important—Performance Review instructions, which set out the progression criteria;~~
- ~~19. Email sent one day after self review is overdue (15 July 2024), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~20. Email sent seven days after self review is overdue (22 July 2024), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~21. Email sent to employee and manager 14 days after self review is overdue (29 July 2024), titled: Important Reminder—Performance REVIEW.STEP.TITLE step not complete;~~
- ~~22. Email sent on an ad hoc basis if manager requires the employee to make edits to their self review, titled: Important—Self Review reopened;~~

- ~~23. Email sent to managers once employee submits self review, titled: Important—Performance review instructions for Managers;~~
- ~~24. Email sent one day after manager review is overdue (6 August 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~25. Email sent seven days after manager review is overdue (13 August 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~26. Email sent 14 days after manager review is overdue (20 August 2024), titled: Important Reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~27. Email sent to manager on an ad hoc basis if manager reopens a step to make edits once they have already submitted their review, titled: REVIEW.TASK.TITLE reopened to REVIEW.STEP.TITLE;~~
- ~~28. Email sent once manager review is completed to prompt employee to complete employee acknowledgment step of review, titled: Important Instructions—REVIEW.STEP.TITLE step of the performance review;~~
- ~~29. Email sent one day after employee acknowledgement is overdue (13 August 2024), titled: Important reminder—REVIEW.STEP.TITLE step not complete;~~
- ~~30. Email sent seven days after employee acknowledgement is overdue (20 August 2024), titled: Important reminder—REVIEW.STEP.TITLE step not complete; and~~
- ~~31. Email sent once end of cycle review PDP completed, titled: Nexus Notification—REVIEW.TASK.TITLE Completed.~~

Further particulars may be provided following discovery.

(d) otherwise denies the allegations<sub>1</sub>;

(e) further says that the Particular Performance Matters for the 2023-24 performance cycle for Mr Powell reflected the expected normal requirements of his position and accordingly, as a Senior Grade employee in the Department, he had to achieve an overall evaluative assessment of exceeded the expected normal requirements of his position, that is, “exceeding expectations” or above in order to obtain progression.

99. As to paragraph 99, the respondent:

- (a) refers to and repeats paragraph 98 above;
- (b) otherwise denies the allegations<sub>1</sub>;

(c) further says that the need to achieve an overall evaluative assessment of “*exceeding expectations*”, if not forming part of, or to be read with, the progression criteria (which is denied), was otherwise a requirement of the 2020 Agreement as a Senior Grade employee in the Department had to have an overall evaluative assessment that the Senior Grade employee exceeded the expected normal job requirements (clause 29.3(d)(ii)).

100. As to paragraph 100, the respondent:

- (a) admits that Ms Gabriel completed the *Performance Assessment – End Cycle Review 1 July 2024* on or around 23 July 2024;
- (b) admits that Ms Gabriel provided an overall rating for Mr Powell of “Achieving Expectations”;
- (c) refers to and repeats paragraph 98 above;
- (d) otherwise denies the allegations<sub>37</sub>;

(e) further says that an overall evaluative assessment of “*achieving expectations*” meant that Mr Powell was evaluated as having simply met the expected normal requirements of his position, which assessment did not entitle (let alone permit) Mr Powell to progression.

101. The respondent denies the allegations in paragraph 101.

102. The respondent denies the allegations in paragraph 102.

103. As to paragraph 103, the respondent:

- (a) admits that the State of Victoria did not provide, and Mr Powell did not receive, any progression in respect of the 2023-24 performance cycle;
- (b) says that the State of Victoria was not obliged to provide, and Mr Powell was not entitled to receive, any progression in respect of the 2023-24 performance cycle;
- (c) otherwise denies the allegations.

104. The respondent denies the allegations in paragraph 104.

## **E.2 Contraventions of the 2020 Agreement in respect of the 2020 Agreement Group Members**

105. As to paragraph 105, the respondent:

- (a) admits that each 2020 Agreement Group Member agreed progression criteria for each 2020 Agreement Performance Cycle with the State of Victoria, within the meaning of clause 29.3(c) of the 2020 Agreement;
- (b) otherwise does not know and therefore cannot admit the allegations.



106. As to paragraph 106, the respondent:

- (a) says that at the commencement of and/or during each 2020 Agreement Performance Cycle, each 2020 Agreement Group Member agreed Particular Performance Matters performance standards with their manager, which comprised accountability goals, performance goals, learning and development goals, and the demonstration of public sector values and behaviours;
- (b) says specifically that if what is alleged in that paragraph is that the progression criteria of each 2020 Agreement Group Member was comprised only of what was set out in text within the PDP maintained electronically in Nexus which had been completed by each such person at the beginning of a 12 month performance cycle, that allegation is denied and the respondent further refers to and repeats paragraphs 35, 35A and 35B above; that that progression criteria that was agreed between each 2020 Agreement Group Member and the State of Victoria in relation to each 2020 Agreement Performance Cycle comprised a requirement that the 2020 Agreement Group Member achieve a particular rating in the end-of-cycle performance review with respect to their performance standards as in place at the end-of-cycle performance review, namely, that they:
  - (i) ~~achieve the rating of exceeding expectations or above for the majority of the Department's values and behaviours, and achieving expectations for the remainder;~~
  - (ii) ~~achieve the rating of exceeding expectations or above for the majority of the Employee's performance goals and job specific accountabilities, and achieving expectations for the remainder; and~~
  - (iii) ~~demonstrate active participation in learning activities (if applicable).~~

#### **PARTICULARS**

~~The respondent refers to and repeats the particulars subjoined to paragraph 35 above.~~

- (c) otherwise denies the allegations.

107. As to paragraph 107, the respondent:

- (a) refers to and repeats paragraph 106;
- (b) otherwise denies the allegations;
- (c) further says that the agreed Particular Performance Matters for each 2020 Agreement Group Member reflected the expected normal requirements of their position and accordingly, as Senior Grade employees in the Department, such employees had to achieve an overall evaluative assessment that exceeded the expected normal requirements of their position, that is, "exceeding expectations" or above, in order to obtain progression.

108. The respondent admits paragraph 108- and says further says that an overall evaluative assessment of “achieving expectations” meant that a 2020 Agreement Group Member was evaluated as having simply met the expected normal requirements of their position, which assessment would not entitle (let alone permit) such a Senior Grade employee to progression.
109. As to paragraph 109, the respondent:
- (a) refers to and repeats 106;
  - (b) otherwise denies the allegations.
110. The respondent denies the allegations in paragraph 110.
111. As to paragraph 111, the respondent:
- (a) admits that if a 2020 Agreement Group Member was assessed ~~rated~~ as “Achieving Expectations”, the State of Victoria did not provide, and the 2020 Agreement Group Member did not receive, any progression in respect of the relevant performance cycle;
  - (b) says that if a 2020 Agreement Group Member was assessed ~~rated~~ as “Achieving Expectations”, the State of Victoria was not obliged to provide, and the 2020 Agreement Group Member was not entitled to receive, any progression in respect of the relevant performance cycle;
  - (c) otherwise denies the allegations.
112. The respondent denies the allegations in paragraph 112.

#### **F. LOSS OR DAMAGE**

113. The respondent denies the allegations in paragraph 113.
114. The respondent denies the allegations in paragraph 114.
115. The respondent denies the allegations in paragraph 115.
116. The respondent denies the allegations in paragraph 116.

#### **G. RELIEF**

117. The respondent does not plead to paragraph 117 as it contains no allegation of material fact against it.

#### **H. EXCEEDING THE NORMAL REQUIREMENTS OF THE POSITION – A REQUIREMENT FOR A PROGRESSION PAYMENT**

118. At all material times the progression criteria for Mr Wren, Mr Powell and the 2016 and 2020 Agreement Group Members contained Particular Performance Matters that were consistent with the expected normal requirements of the applicable Senior Grade employee's position in the Department.

119. By reason of the matters in paragraph 118 above, and irrespective of what may be found to ultimately constitute the content of the applicable progression criteria, an overall evaluative assessment by a Senior Grade employee's supervisor or manager of "*achieving expectations*" and hence an assessment of simply having met the expected normal requirements of the position was inadequate to meet the required assessment level for a progression having regard to the Performance and Progression Purpose, including by reason of the terms of:

(a) clause 24.4(d) and (e) of the 2016 Agreement (during the period applicable under this agreement);

(b) clause 29.3(d)(ii) of the 2020 Agreement (during the period applicable under this agreement).

**I. ALTERNATIVE DEFENCE – NO AGREEMENT AS TO HOW THE PARTICULAR PERFORMANCE MATTERS ARE TO BE EVALUATED – NO DEFAULT POSITION OF OBTAINING A PROGRESSION PAYMENT**

120. Further and in the alternative, in the event the Court finds that there was no "*agreement*" as to how the evaluative assessment by a supervisor or manager of a Senior Grade employee, whether Mr Wren, Mr Powell or any 2016 or 2020 Agreement Group Member, was to be undertaken and that such "*agreement*" is required for the purposes of the progression assessment process (both matters being denied), such absence of "*agreement*" does not result in an entitlement by a Senior Grade employee to progression for an applicable performance cycle.

121. Further, regardless of what is ultimately found to be "*agreed*" by a relevant Senior Grade employee in the Department, whether Mr Wren, Mr Powell or any 2016 or 2020 Agreement Group Member, by reason of the matters in paragraphs 118 and 119 above, an overall evaluative assessment of "*achieving expectations*" by any Senior Grade employee's supervisor or manager will not create an entitlement to obtain progression.

**JUSTIN L BOURKE KC**

**HELEN TIPLADY**

**DATED** ~~4 June 2025~~ 27 August 2025



.....  
Signed by Andrew Morrison

**CLAYTON UTZ**  
Lawyers for the respondent

**Certificate of lawyer**

I Andrew Morrison certify to the Court that, in relation to the amended defence filed on behalf of the respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 27 August 2025



.....  
Signed by Andrew Morrison  
Lawyer for the respondent