



Australian
Competition &
Consumer
Commission

PROCEDURES FOR DETERMINING BREACHES OF THE CODE OF CONDUCT AND FOR DETERMINING SANCTION

BACKGROUND

Purpose

Section 13 of the *Public Service Act 1999* (the PS Act) sets out the standards of behaviour expected of Australian Public Service (APS) employees. Collectively, these standards are known as the Code of Conduct.

Section 15(3) of the PS Act requires agency heads to develop procedures for determining whether an APS employee, or a former APS employee, in the agency has breached the Code of Conduct. Those procedures must comply with the basic procedural requirements set out in the *Public Service Commissioner's Directions 2013*.

This document contains the Commission's policy and procedures for determining breaches of the Code of Conduct. It should be noted that the Code of Conduct includes a requirement to uphold the APS Values and the integrity and good reputation of the APS (section 13(11)). While on duty overseas, an APS employee must at all times behave in a way that upholds the good reputation of Australia (section 13(13)).

Authority

The following legislation also gives authority to this policy and procedure:

- *Public Service Act 1999*
- *Public Service Amendment Act 2013*
- *Public Service Regulations 1999*
- *Public Service Commissioner's Directions 1999*.

Application

This policy and procedure applies to all APS employees of the Commission; including ongoing and non-ongoing employees, statutory office holders and the Chairman (refer section PS Act sections 7 and 14 and PS Regulation 2.2). The policy and procedure generally applies to the conduct of APS employees, however, certain conduct which occurs before being engaged as an APS employee may be found to be in breach of the Code of Conduct, and a breach may be determined after an employee has left APS employment.

POLICY

The Commission is committed to creating and maintaining a workplace that upholds the APS Values, Employment Principles and Code of Conduct. It is also committed to

ensuring that breaches of the Code of Conduct are handled promptly and with due regard to procedural fairness.

All Commission employees should familiarise themselves with the Values, Employment Principles and the Code of Conduct and uphold them as required.

Managers and supervisors have an important role to play in embedding the Values; Employment Principles and promoting the Code. They are expected to lead by example; modelling behaviours that are consistent with the Values; Employment Principles and the Code of Conduct and reminding staff of appropriate behaviours as necessary.

Reporting suspected misconduct is part of every employee's duty as an APS and Commission employee. All alleged breaches of the Code should be reported and handled consistent with the *Procedures for Determining Breaches of the APS Code of Conduct*.

Employees who make complaints of Code breaches, or who are witnesses in Code investigations must be treated with respect and courtesy and protected from harassment or discrimination.

Further guidance is provided on the Commission's intranet and the Australian Public Service Commission's website.

PROCEDURES FOR DETERMINING BREACHES OF THE APS CODE OF CONDUCT AND FOR DETERMINING SANCTION

I, Rodney Sims, Chairman, Australian Competition and Consumer Commission, establish these Procedures under subsection 15(3) of the *Public Service Act 1999* and the *Public Service Amendment Act 2013*

These procedures commence on 1 July 2013.

These procedures supersede the previous procedures made for the Commission under subsection 15 (3) of the Act, but the previous procedures may continue to apply for transitional purposes.

Signed:

Dated:

1. Application of procedures

- 1.1. These procedures apply in determining whether a person who is an APS employee in the Commission, or who is a former APS employee who was employed in the Commission at the time of the suspected misconduct, has breached the APS Code of Conduct ('the Code') in section 13 of the *Public Service Act 1999* ('the Act').
- 1.2. These procedures apply in determining any sanction to be imposed on an APS employee in the Commission who has been found to have breached the Code.
- 1.3. These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except for one in respect of

which a decision had been made before 1 July 2013 to begin an investigation to determine whether there had been a breach of the Code.

- 1.4. These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after 1 July 2013.
- 1.5. In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15 (2A) of the Act in connection with their engagement as an APS employee.

Note: *Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including performance management.*

2. Availability of procedures

- 2.1. As provided for in subsection 15 (7) of the Act, these procedures are publicly available on the Commission's website.

3. Breach decision maker and sanction delegate

The delegates for selecting a decision maker (the 'breach decision maker'):

- Chief Executive Officer
- Executive General Manager Corporate
- General Manager Human Resources (not filled)
- Directors HR.

The Delegate has authority for suspending or temporarily reassigning the duties of an employee of the Commission who is suspected of having breached the Code.

- 3.1. On receipt of the allegation, the Delegate is to determine whether the allegation should be investigated under these procedures, or whether some other action (or no action) should be taken in respect of the allegation. As soon as practicable after a suspected breach of the Code has been identified and the Delegate has decided to deal with the suspected breach under these procedures, the Delegate will appoint a decision maker ('the breach decision maker') to make a determination under these procedures.

Note: The Australian Public Service Commissioner's Directions 2013 provide that where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the Delegate must, before making a decision to commence formal misconduct action, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner (clause 4.2).

- 3.2. The role of the breach decision maker is to determine in writing whether a breach of the Code has occurred.
- 3.3. The breach decision maker may seek the assistance of an investigator with matters including investigating the alleged breach, gathering evidence and making a report

of recommended factual findings to the breach decision maker.

3.4. The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code must hold a delegation of the power under the Act and in line with the Commission's Human Resources Delegation to impose sanctions ('the sanction delegate').

3.5. These procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

Note: Any delegation of powers under the Act that is proposed to be made to a person who is not an APS employee must be approved in writing in advance by the Australian Public Service Commissioner. This is required by subsection 78 (8) of the Act. This would include delegation of the power under subsection 15 (1) to impose a sanction.

Note: Appointment as a breach decision maker under these procedures does not empower the breach decision maker to make a decision regarding sanction. Only the Commissioner or a person delegated the power under section 15 of the Act, and related powers, such as under section 29 of the Act, may make a sanction decision.

4. Person or persons making breach determination and imposing any sanction to be independent and unbiased

4.1. The breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased.

4.2. The breach decision maker and the sanction delegate must advise the Commission Delegate in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased; for example, if they are a witness in the matter.

4.3. In particular, a person must not determine whether the person who is or was an employee has breached the Code of Conduct if the person has previously made a report in relation to any of the matters suspected of constituting a breach, by the person who is or was an employee, of the Code of Conduct.

5. The determination process

5.1. The process for determining whether a person who is, or was, an APS employee in the Commission has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.

5.2. The process must be consistent with the principles of procedural fairness.

Note: Procedural fairness generally requires that:

- *the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision maker that is adverse to the person or their interests and that is credible, relevant and significant)*

- *the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction*
- *the decision maker acts without bias or an appearance of bias*
- *there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.*

5.3. A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to:

- a) inform the person of:
 - i. the details of the suspected breach of the Code (including any subsequent variation of those details); and
 - ii. where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act;

and
- b) give the person a reasonable opportunity to make a written statement, or provide further evidence in relation to the suspected breach, within 7 calendar days or any longer period that is allowed.

Note: This clause is designed to ensure that by the time the breach decision maker comes to make a determination, reasonable steps have been taken for the person suspected of breach to be informed of the case against them. It will generally also be good practice to give the person notice at an early stage in the process of a summary of the details of the suspected breach that are available at that time and notice of the elements of the Code that are suspected to have been breached.

Note: The breach decision maker may decide to give the person the opportunity to make both a written and an oral statement.

5.4. A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.

5.5. For the purpose of determining whether a person who is, or was, an APS employee in the Commission has breached the Code, a formal hearing is not required.

5.6. The breach decision maker (or the person assisting the breach decision maker, if any) where they consider in all the circumstances that the request is reasonable, must agree to a request made by the person who is suspected of breaching the Code to have a support person present in a meeting or interview they conduct.

6. Expeditious process for determining a breach

6.1. Where the decision maker considers that he or she has been provided with sufficient evidence to proceed to determine whether there has been a breach of the Code of Conduct, the decision maker may do so without carrying out further investigation, but the decision maker will otherwise comply with these procedures.

Note: The decision maker is required to provide natural justice in making a determination notwithstanding that he or she may have decided that no further investigation of the facts is required

before he or she determines whether a breach has occurred.

7. Sanctions

- 7.1. The process for deciding on sanction must be consistent with the principles of procedural fairness.
- 7.2. If a determination is made that an APS person who is or was an employee in the Commission has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:
 - 7.2.1. inform the person who is or was an employee of:
 - (i) the determination that has been made
 - (ii) the sanction or sanctions that are under consideration and
 - (iii) the factors that are under consideration in determining any sanction to be imposed and
 - 7.2.2. give the person who is or was an employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration within 7 calendar days, or any longer period that is allowed by the sanction delegate.
- 7.3. If a determination is made that an APS employee of the Commission has breached the Code of Conduct, the APS employee may be counselled or a sanction may be imposed on the employee under section 15 of the *Public Service Act 1999*.

Note: The sanction delegate may decide to give the person who is or was an employee the opportunity to make both a written and an oral statement.

8. Record of determination and sanction

- 8.1. If a determination in relation to a suspected breach of the Code by a person who is, or was, an APS employee of the Commission is made, a written record must be made of:
 - a) the suspected breach and
 - b) the determination and
 - c) where the person is an APS employee--any sanctions imposed as a result of a determination that the employee has breached the Code and
 - d) if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of a person who is or was an employee, regarding the sanction decision--that statement of reasons or those statements of reasons.

Note: The Archives Act 1983 and the Privacy Act 1988 apply to Commission records.

9. Procedure when an ongoing employee is to move to another agency

9.1. This clause applies if:

- a) a person who is an ongoing APS employee in the Commission is suspected of having breached the Code and
- b) the employee has been informed of the matters mentioned in 5.3.(a) and
- c) the matter has not yet been resolved and
- d) a decision has been made that, apart from this clause, the employee would move to another agency in accordance with section 26 of the Act (including on promotion).

9.2. Unless the Secretary and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until the matter is resolved.

9.3. For the purpose of this clause the matter is taken to be resolved when:

- a) a determination in relation to suspected breach of the Code is made in accordance with these procedures or
- b) the Secretary decides that a determination is not necessary.