



# Determining Breaches of the Code of Conduct Procedure

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## 1. Introduction

All Australian Public Service (APS) employees are bound by the APS Values (the Values), the APS Employment Principles and the Code of Conduct (the Code). The APS Values, the APS Employment Principles and the Code are outlined in the *Public Service Act 1999* (PS Act), and set out the standard of behaviour expected of APS employees.

Section 15(3) of the PS Act requires Agency Heads to develop procedures for determining whether an employee in their agency has breached the Code. The purpose of these procedures is to set out AFMA's basic procedural requirements in accordance with the *Australian Public Service Commissioner's Direction 2013* (the Directions) and must:

- have due regard to procedural fairness;
- may be different for different categories of APS employees or former APS employees;
- may be different for APS employees, or former APS employees who:
  - I. have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct; or
  - II. have been found to have committed such an offence but no conviction is recorded.

*Note: these procedures apply only in relation to a suspected breach of the Code by an APS employee in respect of which a determination is to be made. Not all suspected breaches of the Code may need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate.*

## 2. Application of procedures

These procedures must be complied within the determining whether an APS employee has breached the Code of Conduct 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. These procedures should be read in conjunction with AFMA's Conduct and Ethics Policy.

### 2.1 Current APS employees

In these procedures the reference to an APS employee in AFMA includes current APS employees employed by AFMA who are suspected of having breached the Code of Conduct.

### 2.2 Former APS employees

In these procedures the reference to an APS employee in AFMA includes former APS employees who are suspected of having breached the Code of Conduct while an APS employee in AFMA in connection with their APS employment. Former employees can be found to have breached the Code of Conduct however sanctions cannot be imposed on former employees.

### 2.3 Pre-engagement

The application of the Code of Conduct also applies to an APS employees who , before being appointed an APS employee , is believed to have provided false or misleading information,



and/or failed to provide relevant information or otherwise failed to act with honesty or integrity in connection with their engagement.

### **3. Availability of procedures**

As provided for in subsection 15 (7) of the Act, these procedures are publicly available on the Agencies website.

### **4. Selection of a decision-maker and sanction delegate**

As soon as practicable after a suspected breach of the Code has been identified the Chief Executive Officer (CEO) will select a person, in writing, to determine whether an APS employee has breached the Code. Alternatively, the General Manager, Corporate Services, is authorised to select a decision-maker for this purpose. In some cases the decision-maker may be from outside the agency.

*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 Agency Head 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.*

In selecting a decision-maker, the CEO or the General Manager, Corporate Services, will take reasonable steps to ensure that the person selected is, and appears to be, independent and unbiased. In particular, they will ensure that the person selected has not previously made a report in relation to any of the matters suspected of constituting a breach by the employee of the Code.

The decision-maker may also be required to make recommendations in relation to the sanction(s) to be applied in the event that he or she determines that an employee has breached the Code ('the sanction delegate').

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.*

### **5. Determination process to be informal**

The process for determining whether an APS employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.



## **6. Information to be given to an employee before a determination is made**

Before a determination about whether or not an APS employee has breached the Code is made, the employee must:

- be informed of the details of the suspected breach of the Code (including any variation of those details)
- be informed of the range of sanctions that may be imposed under (s 15(1)) of the PS Act
- be given reasonable opportunity to make a statement, whether orally or in writing, in relation to the suspected breach within seven days of the employee being served with notice of the suspected breach of the Code. The decision-maker may allow the employee a period longer than 7 days to make a statement if satisfied that a longer period is justified in the circumstances of the case. Failure to make a statement in relation to the suspected breach is not, on its own, an admission of committing the suspected breach.

*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.*

## **7. Level of proof**

The level of satisfaction required for determining that an employee has breached the Code of Conduct on the “balance of probabilities”.

## **8. Action that may be taken if a breach is found to have occurred**

If a determination is made that an APS employee has breached the Code of Conduct a sanction may not be imposed unless reasonable steps have been taken to inform the employee of the determination, the sanction or sanctions that are under consideration and the factors that are under consideration in determining any sanction to be imposed and the employee is given a reasonable opportunity to make a statement in relation to the determination and the sanctions that are under consideration (usually 7 days).

The following sanction(s) may be imposed on an employee who is found to have breached the Code:

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of a fine
- a reprimand.



The employee may also be counselled or other management action may be taken in order to reduce the risk of further breach of the Code.

If a sanction(s) is imposed on the employee, the employee must be given a written statement setting out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

## **9. Record of determination**

If a determination in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Agency is made, a written record must be made of:

- the suspected breach; and
- the determination; and
- where the person is an APS employee--any sanctions imposed as a result of a determination that the employee has breached the Code; and
- 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 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 Agencies records.*

## **10. Advice to complainants**

A suspected breach of the Code may be initially investigated as being a public interest disclosure under the *Public Interest Disclosure Act 2013* (PID Act). If the disclosure of a suspected breach of the Code is investigated under the PID Act AFMA will advise the complainant in accordance with the provisions of the PID Act. (See the Intranet: ***Making a Public Interest Disclosure***).

If a report under the PID Act contains a finding that the disclosure of a suspected breach of the Code should be further investigated then, following the further investigation and report AFMA will advise the complainant of the outcome. The scope of the information that is given about the outcome of the report including the reasons for any decision will be a matter of judgement for the CEO. The CEO will have regard to the circumstances of each case and taking into account the requirements of the *Privacy Act 1988*.

## **11. Procedures if an APS Employee in AFMA moves to different agency during an investigation**

Unless the CEO and new agency head agree otherwise, an ongoing APS employee who is to move to another agency (eg through promotion or transfer) and is under investigation for a suspected breach of the Code of Conduct and has been informed of the suspected breach including possible sanctions that may be imposed if the misconduct is proven, must remain at AFMA until the matter is resolved. 'Resolved' means that a determination is made or it is decided that a determination is not necessary.



## **12. Procedure when an APS employee has moved to another agency and is suspected of breaching the Code of Conduct**

This applies to APS employees who whilst an employee of the Agency are suspected of having breached the Code of Conduct.

If a determination is made that the employee did breach the Code of Conduct whilst an employee of the Agency, this information will be passed onto the new Agency for the appropriate delegate of that Agency to make a decision as to whether a sanction will be imposed under section 15(1) of the *Public Service Act 1999* and if a sanction is to be imposed, what the sanction will be.

It is the usual practice for AFMA is to pass such information to another agency where it is believed that the information might be relevant to employment related decisions which might need to be considered or made by the other agency, including: recruitment decisions; decisions as to whether or not you have breached the Code of Conduct and whether or not you should be sanctioned for any breach that is determined; and decisions as to whether or not you should be sanctioned in relation to a breach of the Code.

## **13. Procedure when a former APS employee is suspected of breaching the Code of Conduct**

This applies to a former APS employee of the Agency. Where a former APS employee is suspected of having breached the Code of Conduct whilst an employee of the Agency, in line with the above requirements, and a determination is made that the former APS employee breached the Code of Conduct, no sanction may be imposed in accordance with Australian Public Service Commissioner's Directions 2013 6.2

## **14. Resignation**

These procedures will not cease to apply to an APS employee upon their resignation from APS employment. AFMA may choose to continue the investigation, as the application of the Code applies to former employees (in connection with the person's employment).

## **15. Disclosure and use of employee's personal information concerning Code of Conduct matters**

Agency Heads are authorised under regulation 9.2 explicitly the use or disclosure of personal information where it is necessary or relevant to the exercise of their employer powers or the employer powers of another agency head.

Authorised use of personal information may include:

- use of employee misconduct information (e.g. decisions about breaches of the Code of Conduct and imposition of sanctions) for the purposes of internal recruitment, including promotion decisions or movements within agencies,
- use of employee personal information obtained in recruitment processes to commence or inform Code of Conduct investigations, where relevant,



- use of relevant employee personal information to monitor compliance with internal agency policies (e.g. use of log-in information to check attendance or whether an employee has been browsing client records),
- use of relevant employee personal information to monitor inappropriate internet browsing;
- use of relevant employee personal information for ensuring that employees satisfy conditions of engagement.

