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MANAGING BREACHES OF THE APS CODE OF CONDUCT >> >>

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AUSTRALIAN  
PUBLIC SERVICE  
COMMISSION

## MANAGING BREACHES OF THE APS CODE OF CONDUCT

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## FOREWORD

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This is a revised edition of the Managing Breaches of the APS Code of Conduct booklet released in 2000 by the Public Service and Merit Protection Commission (PSMPC). This edition reflects recent administrative changes to the APS Commission including the change of name (to APS Commission in June 2002).

The earlier edition of this booklet was the first in the Working with the Act series of guides issued by the PSMPC following the passage of the Public Service Act 1999 (PS Act). This series and the Working Together and Values and Conduct series have now been brought together into one series of Commission guides. Other titles in this series are listed inside the front cover.

Under the PS Act, responsibility for employment decisions has been devolved to Agency Heads, giving them greater flexibility to manage their own workplaces. This guide is designed to assist agencies when managing breaches of the Code of Conduct under the framework of the PS Act and subordinate legislation.

This booklet provides Agency Heads, human resources practitioners and agency staff more generally, with advice on matters that should be considered when managing breaches of the APS Code of Conduct. It sets out the basic legislative obligations which agencies must observe, and around which they should establish appropriate agency-specific arrangements.



Andrew Podger  
Public Service Commissioner  
August 2002



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# INTRODUCTION



This booklet is designed to help agencies to develop their approach to managing suspected breaches of the APS Code of Conduct<sup>1</sup>. Section 15(3) of the *Public Service Act 1999* (the PS Act) requires Agency Heads to develop procedures for determining whether an employee in their agency has breached the Code of Conduct. This legislative requirement is supported by the Public Service Commissioner's Directions 1999 (the Directions) made under the Act and the Public Service Regulations 1999 (the Regulations)<sup>2</sup>.

This booklet does not include guidance on protection for whistleblowers. A separate publication, *Developing Whistleblowing Procedures in APS Agencies*, will be issued shortly.

Repeal of the *Public Service Act 1922* (PS Act 1922) and passage of the PS Act 1999 has led to a change in terminology used in this area. 'Disciplinary action' is now known as 'misconduct action' and 'failure to fulfil one's duty' is a 'breach of the Code of Conduct'. Until a determination has been made that a breach has occurred, the breach remains a 'suspected breach' or 'suspected misconduct'.

The principles underlying procedures for managing breaches of the Code of Conduct are:

- APS Employees must uphold the APS Values<sup>3</sup> and comply with the Code of Conduct. Agency Heads and SES employees have an additional duty to promote the Values<sup>3</sup>
- taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the APS and thereby maintaining public confidence in public administration
- misconduct action is part of a range of people management practices which agencies should have in place to encourage high quality performance
- agency procedures should be fair and reasonable, striking an appropriate balance between the needs of staff, the needs of the organisation and the public interest.

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1 This advice supersedes *Public Service Act 1999 Advice Number 5, Breaches of the Code of Conduct*, which was issued on 30 November 1999.

2 There are also transitional arrangements in the Public Employment (Consequential and Transitional) Amendment Act 1999 and its regulations. A summary of the transitional provisions is in Appendix 5.

3 Chapter 2 of the Directions give guidance on how both Agency Heads and APS employees can meet their obligations in relation to the Values.

Although the range of sanctions, including termination of employment, form an integral part of any misconduct process, imposing sanctions is not primarily about 'punishing' an employee who has failed to meet the required standards of conduct.

Sanctions are intended to be proportionate to the nature of the breach and in some cases will signify that the agency no longer has confidence that the employee has the appropriate qualities to perform certain duties. Sanctions also operate as a deterrent to others and confirm that misconduct is not tolerated in the agency.

Not all breaches of the Code will necessarily be the subject of formal action. Depending on the seriousness of the conduct, the employee's employment history and an assessment of whether the incident is likely to be an isolated one, a manager may consider counselling or a warning to be more appropriate. Other actions, such as specific training, varying the employee's duties or line of reporting, may also be considered.

It is also important to emphasise that an employee suspected of having breached the Code is presumed not to have committed the breach until a determination has been made, using the agency's procedures established under section 15(3) of the PS Act. The determination may, of course, be that the employee did not breach the Code and no further action is taken. It is also important to note that a sanction cannot be imposed on an employee until there is a determination that the Code has been breached.

# 1. STANDARDS OF CONDUCT

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The APS Code of Conduct sets out the standards of conduct required of APS employees. The Code derives from 2 parts of the legislation: sections 13(1) to 13(12) of the PS Act contain the first 12 elements of the Code, and there is an additional element in regulation 2.1 (which is an 'additional conduct requirement' permitted by section 13(13) of the PS Act).

These legislative provisions are set out in Appendix 1.

## 1.1 WHO IS COVERED?

The APS Code of Conduct applies to:

- all APS employees, including ongoing and non-ongoing employees and Heads of overseas Missions who are APS employees, but excluding locally engaged employees (section 7, section 13, section 39, section 74 of the PS Act)
- all Agency Heads, including Secretaries of Departments, Heads of Executive Agencies and Heads of Statutory Agencies (section 14(1) of the PS Act)
- certain statutory office holders (sections 14(2),(3) of the PS Act)<sup>4</sup>.

## 1.2 WHAT IS A BREACH OF THE CODE OF CONDUCT?

In broad terms, an APS employee whose conduct does not comply with an element of the Code of Conduct can be found to have breached the Code. It is important, however, to note the following three points.

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4 The statutory office holders who are bound by the Code of Conduct are defined by regulation 2.2 as persons who meet the following criteria:

- they are not APS Agency Heads;
- they do not hold a judicial office or appointment;
- they are engaged, employed or appointed under a Commonwealth Act;
- they are not APS employees; and
- they are acting in relation to the exercise of their direct or indirect supervisory duties in relation to APS employees.

- Where a provision of the Code contains more than one element, it may not be necessary for the employee to have breached all elements in order for a breach of the Code to be determined. For example, in the case of section 13(3) of the PS Act, which requires that *an APS employee, when acting in the course of employment, must treat everyone with respect and courtesy, and without harassment*, an employee who was discourteous, but who has not engaged in harassing behaviour, could be found to have breached the Code.
- The Code specifies three different levels of connectedness between the standard of conduct and APS employment, as follows:
  - 'in the course of employment'
  - 'in connection with employment'
  - 'at all times'

There are other elements of the Code where the level of connectedness is not specified, for example, elements (5), (6), (8) and (10). In these cases, connectedness is inherent in the element itself (eg. the requirement to comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction). Agencies need to be aware of these different levels of connectedness in determining whether a breach of the Code has occurred.

- The term 'at all times' used in section 13(11) of the PS Act<sup>5</sup> means that conduct which is apparently unrelated to the performance of duties may be subject to the Code—as long as there is a real connection between the conduct and its effect on the workplace. This element of the Code may provide one of the bases for determining whether an employee who has been found guilty of a criminal offence has also breached the Code. In order for a breach to be found in these cases, it would be necessary to assess whether the criminal behaviour has compromised the integrity and good reputation of the APS, and the extent to which that behaviour has adversely affected the employee's position in the workplace.

### 1.3 AGENCY-BASED CODES

The misconduct procedures referred to in section 15(3) of the PS Act can be triggered only by a suspected breach of the Code of Conduct—as set out in the Act and Regulations. Agency-based codes, which may be useful in articulating expected conduct standards in that agency, cannot in themselves form the basis of misconduct action. If there is an infringement of an agency-based code, it will be necessary to link the conduct in question to a particular element in the APS Code of Conduct, if it is to form the basis of a misconduct process. It would be wise to link any provisions of agency-based codes to the APS Code in material that is distributed to staff.

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<sup>5</sup> Section 13(11) of the PS Act provides that an APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

#### 1.4 HOW DOES UNSATISFACTORY PERFORMANCE RELATE TO MISCONDUCT?

If a person's unsatisfactory performance is for reasons or causes within their control and can be linked to the Code of Conduct, it can be dealt with as a possible breach of the Code of Conduct (*an employee must act with care and diligence in the course of APS employment and an employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction*). Whether or not something is within a person's control must be determined according to each case, having regard to the person's physical and mental capacities. For example, a person's persistent failure to comply with instructions could be because they are simply incapable of following instructions or because they choose not to follow them. If the person is incapable of following instructions they should be dealt with under the Agency's procedures relating to underperformance; if they are unwilling (or refuse) to follow instructions, they should be dealt with under the misconduct procedures.



## 2. AGENCY PROCEDURES

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The legislative framework<sup>6</sup> contains no single, prescriptive set of procedures for dealing with suspected breaches of the Code.

### 2.1 AGENCY PROCEDURES WHERE A BREACH OF THE CODE OF CONDUCT IS SUSPECTED

Agency Heads are required to establish procedures for determining whether an APS employee in their agency has breached the Code of Conduct (section 15(3) of the PS Act). Under this provision:

- the procedures:
  - must comply with the basic procedural requirements contained in the Directions (section 15(3)(a) of the PS Act)
  - must have due regard to procedural fairness<sup>7</sup> (section 15(3)(b) of the PS Act)
  - may be different for different categories of APS employees (section 15(3)(c) of the PS Act). For example, procedures for ongoing employees may be different from procedures for non-ongoing employees
- Agency Heads must take reasonable steps to ensure that every employee in their agency has ready access to the documents that set out the procedures (section 15(5) of the PS Act).

The Directions (Chapter 5) set out the basic procedural requirements with which an Agency must comply in its procedures for determining whether an APS employee has breached the Code of Conduct. Briefly, these provisions are as follows:

- before any determination about whether or not an APS employee has breached the Code of Conduct is made, the employee must be informed of the details of the suspected breach and the range of sanctions that may be imposed, should there be a finding that the employee has breached the Code. The employee must also be given reasonable opportunity to make a statement in relation to the suspected breach (Clause 5.2 of the Directions)

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6 Relevant extracts from the PS Act, the Regulations and the Directions are included at Appendix 1.

7 The principles of procedural fairness are described later in this document (page 13).

- the process for determining whether an APS employee has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows (Clause 5.3 of the Directions)
- reasonable steps must be taken to ensure that the person who determines whether an employee has breached the Code is, and appears to be, independent and unbiased (Clause 5.4 of the Directions)
- after a determination in relation to a suspected breach of the Code has been made, a written record stating whether the employee has been found to have breached the Code must be prepared (Clause 5.5 of the Directions). The *Archives Act 1983*, the *Privacy Act 1988* and the *Freedom of Information Act 1982* apply to records of this kind. Where the written record is to form the basis of a statement specifying the grounds for termination of employment (as required by section 29(2) of the PS Act), the statement must also have regard to the requirements of section 25D of the *Acts Interpretation Act 1901*.
  - ie, as well as specifying the grounds, it must also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.<sup>8</sup>

Not all suspected breaches of the Code need to be dealt with by way of determination (Note to Clause 5.1 of the Directions). For example, where a suspected breach appears to be a minor infringement, it may be sufficient to warn the employee about his or her conduct, noting that any further similar conduct could lead to formal action. In such circumstances, it may be appropriate for the manager to make a note of the discussion.<sup>9</sup> In this case, however, the manager must be careful not to imply that there has been any actual determination of a breach.

It is important that agency procedures established under section 15(3) of the PS Act comply with all the legislative requirements and are sufficiently comprehensive. Agency staff involved in managing a suspected breach should not have to look beyond the Agency Head's procedures for the full set of mandatory requirements associated with the misconduct process. If advisory supporting material is also developed within the agency, it must be made clear which procedures are mandatory and which material is advisory only.

It should also be noted that the Directions<sup>10</sup> identify which procedures will apply if the employee changes status (from non-ongoing to ongoing, or vice versa) or moves to a different Agency. In both cases, the applicable procedures are those that apply to the employee's status or agency at the time when the process for determining the breach is commenced. This is particularly important where an employee comes into the agency before a suspected breach of

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8 Further guidance on statements of reasons can be found in *Practical Guidelines for Preparing Statements of Reasons*, Administrative Review Council, June 2000.

9 Any such record made should be retained and managed in accordance with the Privacy Act and the Administrative Functions Disposal Authority.

10 Clause 5.6 of the Directions.

the Code which occurred in the former agency comes to light. While the contents of Clause 5.6 of the Directions do not need to form a part of an agency's procedures, it would be useful for a note drawing attention to these provisions to be included in the introduction to, or at the end of, the procedures.

## 2.2 WHAT SHOULD AGENCY PROCEDURES COVER?

As a minimum, agency procedures must satisfy the requirements of section 15 of the PS Act and Chapter 5 of the Directions. In addition, the Australian Government Solicitor has advised that it is preferable for agency procedures to include a statement about how the person who determines whether a breach has occurred is to be selected or otherwise identified. For example, 'Subject to the Agency Head having made a selection, the person who determines whether a breach of the Code of Conduct has occurred will be selected by [*name of person(s) or position(s)*]'! An Agency Head may nominate any person to make that selection, but the procedures must clearly identify one person or position who can select a decision maker in each case.

On 30 November 1999 the PSMPC circulated a set of suggested procedures which agencies were invited to adopt, on an interim basis until alternative agency procedures were finalised. The suggested procedures were developed in consultation with the Australian Government Solicitor and settled by the Office of Legislative Drafting. A copy is at Appendix 2. A flow chart which illustrates one option for implementing the suggested procedures is at Appendix 3.

Adoption of these procedures will meet the minimum requirements of section 15 of the PS Act and Chapter 5 of the Directions. However, agencies should consider whether, and to what extent, they may want to elaborate on these procedures, noting that they are limited to making a determination about whether a breach has occurred.

Agencies may wish to consider dealing with additional issues, such as the following, in explanatory material which accompanies the procedures:

- the different roles of managers and decision makers in the misconduct process
- the relationship between misconduct action and other people management issues, such as performance management, whistleblowing and workplace harassment
- the requirements of procedural fairness
- the sorts of circumstances in which an employee suspected of having breached the Code may be suspended or be subject to temporary re-assignment of duties, pending determination of the case
- arrangements for periodic review of suspension with or without remuneration, pending determination of the case
- arrangements for setting appropriate sanctions and the date of effect
- the contents of statements of reasons
- arrangements in relation to reviews of actions
- the keeping of records

- delegations, authorisations and any standard documents needed to support the procedures
- contact points within the Agency for advice.

Agencies may also wish to consider including provisions in the procedures which deal with the following sorts of matters:

- different processes for different categories of employees, e.g. ongoing and non-ongoing employees
- an abbreviated procedure in cases where the employee admits to breaching the Code.

Any document which sets out both the procedures and explanatory material referring to other matters should clearly distinguish between them. The procedures adopted under section 15(3) of the PS Act must be confined to determining whether a breach of the Code of Conduct has occurred.

Any other related procedures that are developed, for example relating to the imposition of sanctions, may conveniently be published in conjunction with the procedures under section 15(3) of the PS Act.

### 2.3 APPROPRIATE AUTHORITY FOR DECISION MAKERS

At each stage of the misconduct process, it is important to ensure that the decision maker is appropriately authorised or is in receipt of a valid delegation to exercise power in this context.

There are three significant points in the misconduct process where powers may be exercised.

- Suspending or temporarily re-assigning the duties of an employee who is suspected of having breached the Code (section 25, section 28 of the PS Act and regulation 3.10)
  - This person must be the Agency Head or a delegate or sub-delegate (section 78(7) of the PS Act, regulation 3.10).
- Determining whether an employee has breached the Code (section 15(3) of the PS Act)
  - This person does not have to hold a delegation. He or she may be selected and authorised in accordance with the Agency's procedures. In accordance with the Directions, Agency Heads must take reasonable steps to ensure that this person is, and appears to be, independent and unbiased (Clause 5.4 of the Directions).
  - In some instances, it may be appropriate for an Agency Head to select a person from outside the agency or outside the APS, if it is not possible to satisfy this requirement from within the agency.
- Imposing a sanction on an employee, following a determination that he or she has breached the Code (section 15(1) of the PS Act)
  - This person must be a delegate or sub-delegate of the Agency Head (section 15(1), section 78(7), section 78(9) of the PS Act).

## 3. SUSPENSION AND TEMPORARY



### RE-ASSIGNMENT OF DUTIES

Section 28 of the PS Act and regulation 3.10 set out the legislative basis for suspending an employee who is suspected of having breached the Code. In brief, the provisions are as follows:

- an employee may be suspended, with or without remuneration, where the Agency Head believes on reasonable grounds that the employee has, or may have, breached the Code and where the suspension is in the public interest, or the agency's interest (regulation 3.10(1), (2), (3))
- where the suspension is without remuneration, the maximum period is generally to be no more than 30 days. A longer period of suspension without remuneration is permitted only where there are exceptional circumstances (regulation 3.10(3))
- exceptional circumstances are not defined, but could include:
  - where an employee has been charged with a criminal offence and is waiting to have the charge heard and determined
  - where an employee has appealed against a conviction and is waiting to have the appeal heard
- continuing suspension must be reviewed at reasonable intervals (regulation 3.10(4))
- suspension must immediately end when the Agency Head no longer believes on reasonable grounds that the employee has, or may have, breached the Code, or that it is in the public interest, or the Agency's interest, to continue the suspension. In addition, suspension must cease as soon as any sanction is imposed for the relevant breach of the Code (regulation 3.10(5), (6))
- in exercising suspension powers, the Agency Head must have due regard to procedural fairness, unless on reasonable grounds he or she believes that it would not be appropriate to do so in the particular circumstances (regulation 3.10(7)), for example, where there is an imminent serious threat to the safety of other employees if suspension were to be delayed, or where there is a real possibility that the employee will destroy evidence or otherwise tamper with it. These considerations apply, regardless of whether the suspension is to be with or without remuneration

- in general terms, suspension may be appropriate where, should the employee be found to have breached the Code, the likely sanction would be termination of employment. It may be appropriate to suspend, even in respect of less serious suspected breaches, if it is in the public, or the agency's, interest to do so.

If an employee is suspended with remuneration, allowances which are regular and routine should continue to be paid. An employee who is not receiving remuneration may be able to access leave credits during suspension—although this may depend on the provisions of the Agency's Certified Agreement or his or her Australian Workplace Agreement. In addition, an employee who is suspended without remuneration should be advised about the length of the suspension and the fact that he or she may seek outside employment while the suspension is in place.

As an alternative to suspension, an Agency Head may decide that it is more appropriate to temporarily re-assign the employee's duties. The power to do so is the general assignment of duties power in the PS Act (section 25).

*An Agency Head may from time to time determine the duties of an APS employee in the Agency, and the place or places at which the duties are to be performed.*

Action to suspend, or to temporarily re-assign duties, may be taken at any time prior to, or during, the process of determining whether a breach of the Code has occurred. In exercising these powers, it is important for the decision maker not to prejudge, and not to be seen to prejudge, whether a breach has occurred.

Where an employee who has been suspended is subsequently found not to have breached the Code, any salary forgone during the period of suspension should ordinarily be reinstated.

Suspension while an investigation is proceeding is an administrative action that must be taken for sound reasons. It should not be characterised as a sanction in itself.

A suggested checklist for managing suspension is at Appendix 4.

## 4. IMPORTANT PRINCIPLES

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Decision makers need to be aware of the important principles of procedural fairness and standard of proof.

### 4.1 PROCEDURAL FAIRNESS

An agency's procedures under section 15(3) of the PS Act are required to have due regard for procedural fairness (section 15(3)(b) of the PS Act). The principles of procedural fairness require people whose interests will be adversely affected by a decision to be given an opportunity to be heard, and decision-makers to act without bias or self-interest, and to base their decisions on compelling or 'logically probative' evidence. These principles are known as the hearing rule, the bias rule and the no evidence rule.

The application of the principles of procedural fairness may vary, depending on the circumstances of the particular case or the way in which the particular statutory power is framed.

In its fullest application, procedural fairness requires that

- people against whom an adverse decision may be made must be informed of any allegations against them in as much detail as possible
- wherever possible people must be provided with an opportunity to put their case, and to hear the case against them, whether at an oral hearing or otherwise
- where a decision has to be made between competing interests, all parties to a matter must be heard and all arguments considered
- no person judges their own case or a case in which they have a direct interest
- decision makers must act fairly and without bias.



## 4.2 STANDARD OF PROOF

Consistent with the requirements of administrative law, the standard of proof for determining whether a breach of the Code of Conduct has occurred is *on the balance of probabilities*. This means that the decision maker must be satisfied that a breach of the Code is more probable than not. This differs from the criminal law standard of proof which is *beyond reasonable doubt*.

The level of satisfaction required by the civil standard of proof, while never reaching the criminal standard of proof, will rise in accordance with the seriousness or importance of the issue to be determined (*Briginshaw v Briginshaw* [1938] 60 CLR 336).

## 5. SANCTIONS

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A sanction can be imposed on an employee only after it has been determined that the employee has breached the Code of Conduct, using procedures established by the Agency Head under section 15(3) of the PS Act.

Where such a determination has been made, an Agency Head (or a delegate or sub-delegate) may impose one or more of the following sanctions on the employee (section 15(1) of the PS Act):

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

There is no legislative impediment to the imposition of more than one sanction, but the person imposing the sanction must be satisfied that more than one sanction is appropriate in the circumstances. For example, an employee may be re-assigned duties and have a fine imposed.

A determination that a breach has occurred does not necessarily mean that a sanction must be imposed. A decision can be taken that other action may be appropriate. For example, the employee may be counselled, with a view to preventing a recurrence of the conduct in question.

In relation to reduction in salary or classification or re-assignment of duties, the PS Act does not contain explicit capacity to impose these sanctions for a fixed period, as was possible under the PS Act 1922.

While subsection 15(1) of the PS Act is silent about the possibility of reducing an employees salary for a specified period, agency heads are not excluded from doing so.

Paragraph 15(1) (d) – reduction in salary – can be imposed for a temporary period or for an indefinite period, and in either case the reduction will be subject to any subsequent salary event, such as a promotion or a salary increase provided for in an agreement. For example, if a sanction of reduction in salary from the top salary point of an APS 5 to the bottom salary point of an APS 5 were imposed for a period of 12 months and after 6 months the person was promoted to APS 6, the salary reduction would clearly be overtaken by the promotion.

Where an employee's salary is temporarily reduced and that temporary period ends, then provided no event has intervened to take the employee's salary higher than the original rate (salary point X), it would move back to salary point X in the relevant scale.

More information about reduction in salary for a specified period can be found in APS Commission Circular 2002/5.

The sanction involving a re-assignment of duties (including to a different location) is intended to be used in situations where the integrity and effectiveness of the APS may be compromised if an employee is not removed from a particular location, for example, a small office, even though the conduct in question does not warrant termination of employment. Where the re-assignment involves a change of location, the sanction should be used only after careful consideration of all the circumstances, taking into account the impact on the employee, such as the financial costs and the effect of dislocation on the employee and his or her family.

Deductions from salary are limited to no more than 2% of an employee's annual salary (regulation 2.3). In developing their approach, agencies will need to consider carefully the meaning of the term 'salary' in the light of the Agency's remuneration arrangements including any relevant Certified Agreement or Australian Workplace Agreement. Where there is any doubt about what payments received by a particular employee should be included in 'salary' for the purposes of the regulation, legal advice should be sought.

It should be noted that where the sanction imposed is a reprimand, it is subject to the same standards of record-keeping as apply to other sanctions.

## 6. OTHER CONSIDERATIONS

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There are a number of other issues relevant to the misconduct process, particularly relating to past conduct, referee reports and resignation during an investigation. This chapter also deals with review of actions, criminal matters and record-keeping.

### 6.1 PAST CONDUCT

The person who is determining whether or not a breach has occurred should ordinarily consider only the incident(s) in question to make that determination. In some cases, however, evidence of prior 'similar facts', or evidence which shows a particular tendency, may be relevant to a determination about the incident(s) in question. The employee should be advised of any past conduct that it is proposed to take into account in this regard.

When deciding on an appropriate sanction, a decision maker may consider past behaviour, and in particular whether previous warnings, counselling or sanctions have relevance. For example, if repeated counselling has not changed the employee's conduct, a more serious sanction may be appropriate. The employee should be advised of any past conduct (both satisfactory and unsatisfactory) that it is proposed to take into account when deciding a sanction. In any event, the rules of procedural fairness would require that, in imposing a sanction, a statement of reasons should be provided to the employee.

### 6.2 REVIEW OF ACTIONS

Non-SES employees who have been found to have breached the Code and who wish to challenge either the determination that a breach has occurred or the sanction imposed (except in the case of termination of employment), may lodge an application for a review of actions under Division 5.3 of the Regulations. A decision to suspend an employee can also be the subject of review.



A decision to temporarily re-assign the employee's duties would be subject to review only where the reassignment involved any of the circumstances provided for in Schedule 1 of the Regulations.<sup>11</sup>

An application for review of a determination that an employee has breached the Code of Conduct, or of a sanction imposed for a breach of the Code, must be made to the Merit Protection Commissioner (regulation 5.24(2)). Applications for the review of decisions relating to suspension will generally be made in the first instance to the Agency Head (regulation 5.24(1)). The making of an application for review does not operate to stay the action (regulation 5.36).

While there is no strict time limit applying to the lodgement of a request for a review of action relating to a determination that the Code has been breached or consequent sanction imposed, the person conducting the review has a discretion to say that actions that are more than 12 months old may not be reviewed (regulation 5.23(3)(a)).

An employee who has been dismissed may have the right under the unfair dismissal provisions of the *Workplace Relations Act 1996* to apply to the Australian Industrial Relations Commission for a remedy.

### 6.3 CRIMINAL MATTERS

Criminal proceedings may result from an employee's behaviour in the workplace as well as through his or her private actions.

Where an employee is being dealt with in connection with both criminal action in the workplace and a suspected breach of the Code, procedural fairness would require that the two matters are dealt with by different people. While it is possible to pursue the misconduct process at the same time as the criminal process, care must be taken not to risk jeopardising the prosecution of the criminal charge. Close liaison with the external investigating authority and the prosecuting authority is recommended.

Where it comes to light that an employee, *through their private actions*, has been charged with a criminal offence, and where the criminal charge relates to behaviour that could have an impact on the person's ability to maintain honesty and integrity in their APS employment, or if the employee's behaviour is otherwise inconsistent with the APS Values or is likely to damage

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11 Clause 10 of Schedule 1 of the Regulations provides that:

An action that determines, under section 25 of the Act, duties of an APS employee, or the place or places where they are to be performed, unless the action involves:

- a. a reduction in classification
- b. a relocation to another place
- c. a promotion that meets the following criteria:
  - i. the affected employee was an applicant for the promotion
  - ii. the promotion was to employment at a classification mentioned in Group 7 or 8 in Schedule 1 to the Classification Rules
  - iii. there were serious defects in the selection process
- d. the assignment to an employee of duties that the employee could not reasonably be expected to perform.

the integrity and/or good reputation of the APS<sup>12</sup>, it may be appropriate to take action to investigate the matter as a possible breach of the Code. In serious cases, it may be appropriate to suspend the person until the decision of the Court is known. The Agency Head, or delegate, should take action to suspend an employee only where the Agency Head, or delegate, believes on reasonable grounds that the employee has, or may have, breached the Code; and that the employee's suspension is in the public or the Agency's interest (regulation 3.10).

If a criminal charge has been heard, the Agency Head may commence a misconduct process on the basis of its effect on the employee's employment.

Certain criminal charges may have different impacts in different agencies. For example, an employee of a law enforcement agency may be treated more severely for actions involving non-compliance with legal requirements, such as tax avoidance. A person charged with child abuse offences may face very severe sanctions if their work involves working with children.

#### 6.4 RESIGNATION DURING MISCONDUCT INVESTIGATION

Where an employee resigns during the course of an investigation of suspected misconduct, the investigation must be discontinued. The legislative framework does not permit action to be taken against former employees: section 15(3) of the PS Act refers only to the conduct of an APS employee, not to former employees. Any documents that have been obtained or created up to the date of resignation should be retained<sup>13</sup>, even where the investigation is not complete. If the person later seeks re-engagement to the APS, these records can be used as part of the pre-employment checking process, but those using them for that purpose will need to ensure that the principles of procedural fairness are applied, including advising the former employee that the decision maker was taking such records into account and giving him or her the opportunity to comment.

#### 6.5 RECORD KEEPING

The *Archives Act 1983*, the *Freedom of Information Act 1982* and the *Privacy Act 1988* are relevant to the keeping of written records.

Records relating to misconduct action should not be placed on the personal file of the employee concerned, but rather on a separate misconduct action file or, where appropriate, an investigation file. The existence of a separate misconduct file should, however, be made apparent on the personal file (eg by cross-reference).

Files of this kind are to be classified 'In Confidence' and should be held in secure storage. Access for management purposes should be allowed only on a strict need-to-know basis. Decision-makers who are either determining whether the Code has been breached or who are deciding an appropriate sanction should have access to these records. The weight they give to the conduct record in the decision making process, however, will depend on the recency and the nature of the misconduct that has been recorded.

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12 Sections 13(1) and 13(11) of the PS Act are the relevant parts of the Code of Conduct. In addition, regulation 2.1 may also be relevant to private conduct outside the workplace.

13 For further advice on the retention of records, refer to the next section headed *Record keeping*

For further advice on retention of records, reference should be made to the *Administrative Functions Disposal Authority* produced by the National Archives of Australia in February 2000 which provides specific information on the retention of records relating to counselling and misconduct matters.

## **6.6 REFEREE REPORTS DURING AND AFTER A MISCONDUCT INVESTIGATION**

Where an employee whose conduct is under investigation asks a referee from the agency to provide a report, for example, in connection with an application for promotion, where the investigation may be relevant to the work-related qualities required for the job, he or she could indicate that there have been concerns as yet unresolved where the situation warrants it. To go beyond that could be seen as prejudging the situation, particularly where there is no clear determination of misconduct.

Where an investigation has concluded that the employee did not breach the Code, it would be inappropriate for the referee to make any reference to the investigation, unless the investigation resulted in some findings relating to matters of performance or attitude which, although not amounting to misconduct, may nevertheless reflect on the employee's suitability for the position in question.

If a breach of the Code has been found to have occurred, and where the breach is relevant, the referee may include an outline of the circumstances surrounding the breach and comment on the relevance of the matter to the position.

Whether the investigation is in progress or has been concluded, an employee's conduct, or misconduct, record is relevant only to the extent that the circumstances have a bearing on the duties and the qualities required for the position for which the reference is being sought.

In all cases, the weight to be given to records of determined misconduct will diminish over time.

# APPENDIX A

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## LEGISLATIVE FRAMEWORK

### PUBLIC SERVICE ACT 1999 – SECT 13

#### The APS Code of Conduct

1. An APS employee must behave honestly and with integrity in the course of APS employment.
2. An APS employee must act with care and diligence in the course of APS employment.
3. An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
4. An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
  - a. any Act (including this Act), or any instrument made under an Act
  - b. any law of a State or Territory, including any instrument made under such a law.
5. An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
6. An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
7. An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
8. An APS employee must use Commonwealth resources in a proper manner.
9. An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.

10. An APS employee must not make improper use of:
  - a. inside information
  - b. the employee's duties, status, power or authority  
in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
11. An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
12. An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
13. An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

## **PUBLIC SERVICE REGULATIONS 1999**

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

For the purposes of subsection 13(13) of the Act, an APS employee, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, must not give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

*Note:* Under s 70 of the *Crimes Act 1914*, it is an offence for an APS employee to publish or communicate the information.

## **PUBLIC SERVICE ACT 1999 – SECT 15**

### **Breaches of the Code of Conduct**

1. An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection 3 to have breached the Code of Conduct:
  - a. termination of employment
  - b. reduction in classification
  - c. re-assignment of duties
  - d. reduction in salary
  - e. deductions from salary, by way of fine
  - f. a reprimand.
2. The regulations may prescribe limitations on the power of an Agency Head to impose sanctions under subsection 1.

3. An Agency Head must establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. The procedures:
  - a. must comply with basic procedural requirements set out in Commissioner's Directions
  - b. must have due regard to procedural fairness
  - c. may be different for different categories of APS employees.
4. The Commissioner must issue directions in writing for the purposes of subsection 3.
5. An Agency Head must take reasonable steps to ensure that every APS employee in the Agency has ready access to the documents that set out the procedures referred to in subsection 3.

## **PUBLIC SERVICE REGULATIONS 1999**

### **Reg 3.10 Suspension from Duties (Act s 28)**

1. An Agency Head may suspend an APS employee employed in the Agency from duties if the Agency Head believes on reasonable grounds that:
  - a. the employee has, or may have, breached the Code of Conduct
  - b. the employee's suspension is in the public, or the Agency's, interest.
2. The suspension may be with remuneration.
3. If the suspension is to be without remuneration, the period without remuneration is to be:
  - a. not more than 30 days
  - b. if exceptional circumstances apply – a longer period.
4. The Agency Head must review the suspension at reasonable intervals.
5. The Agency Head must immediately end the suspension if the Agency Head no longer believes on reasonable grounds:
  - a. that the APS employee has, or may have, breached the Code of Conduct
  - b. that the employee's suspension is in the public, or the Agency's, interest.
6. The Agency Head must immediately end the suspension if a sanction has been imposed on the APS employee for the relevant breach of the Code of Conduct.
7. In exercising powers under this regulation, the Agency Head must have due regard to procedural fairness unless the Agency Head is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate.

### **Reg 5.24 Application for Primary Review**

1. An affected employee may apply in writing to the relevant Agency Head for primary review of a reviewable action.

2. However, the application must be made to the Merit Protection Commissioner if the application is for review of:
  - a. a determination that the affected employee has breached the Code of Conduct
  - b. a sanction imposed for breach of the Code of Conduct.
3. Also, the employee may apply in writing to the Merit Protection Commissioner for review of the action if:
  - a. the Agency Head was directly involved in the action
  - b. it is not appropriate, because of the seriousness or sensitivity of the action, for the Agency Head to deal with the application
  - c. the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action.
4. The application must state briefly:
  - a. why the review is sought
  - b. if a particular outcome is sought—the outcome sought.

*Examples of outcomes*

1. Reconsideration of the action.
2. Re-assignment of duties.

**Reg 5.36 Making of Application does not Operate as Stay**

The making of an application for review of an APS action under this Division does not operate to stay the action.

**PUBLIC SERVICE COMMISSIONER'S DIRECTIONS 1999**

**Chapter 5 – Basic Requirements for Procedures for Determining Breaches of the Code of Conduct**

**5.1 PURPOSE OF CHAPTER 5**

The purpose of this Chapter is to set out the basic procedural requirements that must be complied with by the procedures established by an Agency Head under subsection 15 (3) of the Act for determining whether an APS employee in the Agency has breached the Code of Conduct.

*Note:* The requirements set out in this Chapter and the procedures established under subsection 15 (3) of the Act apply only in relation to a suspected breach of the Code of Conduct by an APS employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct 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.

## **5.2 INFORMATION TO BE GIVEN TO EMPLOYEE BEFORE DETERMINATION IS MADE**

Before any determination is made in relation to a suspected breach of the Code of Conduct by an APS employee, the employee must:

- a. be informed of:
  - i. the details of the suspected breach of the Code of Conduct (including any variation of those details)
  - ii. the sanctions that may be imposed on the employee under subsection 15 (1) of the Act (including any limitations on that power contained in regulations made for the purposes of subsection 15 (2) of the Act)
- b. be given reasonable opportunity to make a statement in relation to the suspected breach.

## **5.3 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.

## **5.4 PERSON MAKING DETERMINATION TO BE INDEPENDENT AND UNBIASED**

An Agency Head must take reasonable steps to ensure that the person who determines whether an APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

## **5.5 RECORD OF DETERMINATION**

After a determination in relation to a suspected breach of the Code of Conduct by an APS employee is made, a written record stating whether the employee has been found to have breached the Code of Conduct must be prepared.

*Note:* The Archives Act 1983 and the Privacy Act 1988 apply to a record made under this clause.

## **5.6 APPROPRIATE PROCEDURES IF BASIS OF APS EMPLOYEE'S ENGAGEMENT IN AN AGENCY CHANGES OR EMPLOYEE MOVES TO A DIFFERENT AGENCY**

1. This clause applies if:
  - a. an APS employee in an Agency is suspected of having breached the Code of Conduct
  - b. before any determination is made in relation to the suspected breach:
    - i. the basis of the employee's engagement in the Agency changes
    - ii. the employee moves to a different Agency.

*Note:* Examples of a change in the basis of an APS employee's engagement in an Agency are as follows:

- a. a change from engagement for a specified term, or for the duration of a specified task, to engagement as an ongoing APS employee
  - b. a change from engagement for duties that are irregular or intermittent to engagement as an ongoing APS employee.
2. A determination (if any) in relation to the suspected breach must be made:
- a. if the basis of the employee's engagement in the Agency has changed—in accordance with the procedures applicable to the basis of the employee's engagement in the Agency at the time the process for determining whether the employee has breached the Code of Conduct is commenced
  - b. if the employee has moved to a different Agency—in accordance with the procedures applicable in the Agency to which the employee has moved at the time the process for determining whether the employee has breached the Code of Conduct is commenced.

## A P P E N D I X B

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### SUGGESTED PROCEDURES

#### PROCEDURES FOR DETERMINING BREACHES OF CODE OF CONDUCT

I, [*name of Agency Head*], [*position and name of Agency*], establish these Procedures under subsection 15 (3) of the *Public Service Act 1999*.

Dated

## **1 Application of procedures**

These Procedures must be complied with in determining whether an APS employee has breached the Code of Conduct.

*Note: These Procedures apply only in relation to a suspected breach of the Code of Conduct by an APS employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct 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 Selection of decision maker**

Subject to the Agency Head having made a selection, the person who determines whether an APS employee has breached the Code of Conduct is to be selected by [name or title of person].

## **3 Formal hearing not required**

For the purpose of determining whether an APS employee in an Agency has breached the Code of Conduct, a formal hearing is not required.

## **4 Information to be given to employee before determination is made**

- 1 Before a determination is made in relation to a suspected breach of the Code of Conduct by an APS employee, the employee must:
  - a be informed of:
    - i the details of the suspected breach of the Code of Conduct (including any variation of those details)
    - ii the sanctions that may be imposed on the employee under subsection 15 (1) of the Act (including any limitations on that power contained in regulations made for the purposes of subsection 15 (2) of the Act)
  - b be given reasonable opportunity to make a statement, in writing, in relation to the suspected breach within 7 days or any longer period as is allowed.
- 2 If the employee makes a written statement within 7 days (or, if allowed, any longer period) of being given the opportunity to do so, the employee must also be given the opportunity to make an oral statement in relation to the suspected breach.
- 3 An employee who does not make a written statement in relation to the suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

## **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 Person making determination to be independent and unbiased**

- 1 An Agency Head must take reasonable steps to ensure that the person who determines whether an APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased.
- 2 In particular, a person must not determine whether the 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 employee of the Code of Conduct.

## **7 Action that may be taken if breach found to have occurred**

- 1 If a determination is made that an APS employee has breached the Code of Conduct, the employee may be counselled or a sanction may be imposed on the employee under section 15 of the *Public Service Act 1999*.
- 2 If a sanction is imposed on the employee, the employee must be given a written statement setting out the reasons for the determination and the imposition of the sanction.

## **8 Record of determination**

After a determination in relation to a suspected breach of the Code of Conduct by an APS employee is made, a written record stating whether the employee has been found to have breached the Code of Conduct must be prepared.

*Note:* The Archives Act 1983 and the Privacy Act 1988 apply to a record made under this clause.

## **9 Appropriate procedures if basis of aps employee's engagement in an agency changes or employee moves to a different agency**

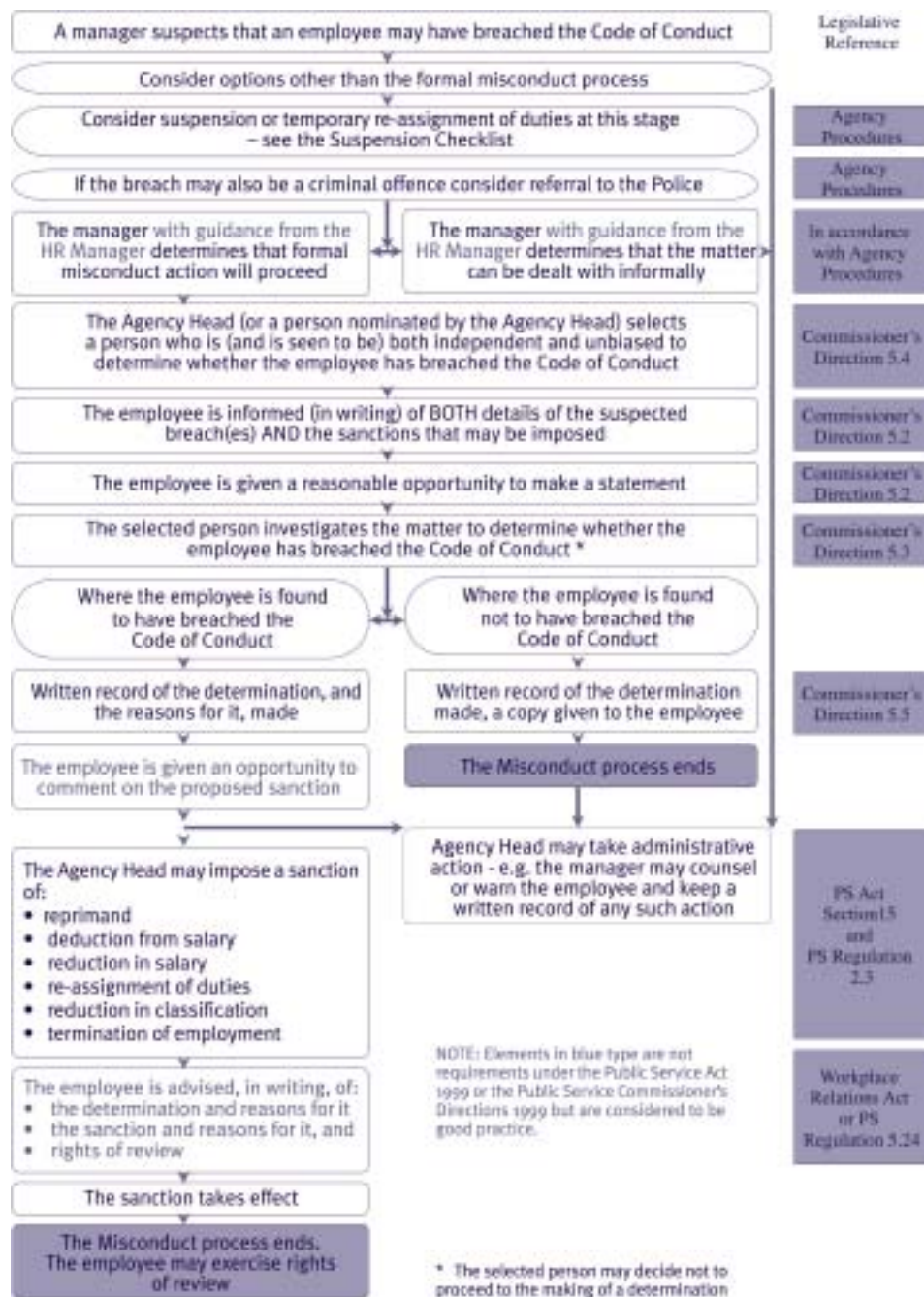
- 1 This clause applies if:
  - a an APS employee in an Agency is suspected of having breached the Code of Conduct
  - b before any determination is made in relation to the suspected breach:
    - i the basis of the employee's engagement in the Agency changes
    - ii the employee moves to a different Agency.

*Note:* *Examples of a change in the basis of an APS employee's engagement in an Agency are as follows:*

- a *a change from engagement for a specified term, or for the duration of a specified task, to engagement as an ongoing APS employee*
- b *a change from engagement for duties that are irregular or intermittent to engagement as an ongoing APS employee.*

- 2 A determination (if any) in relation to the suspected breach must be made:
  - a if the basis of the employee's engagement in the Agency has changed—in accordance with the procedures applicable to the basis of the employee's engagement in the Agency at the time the process for determining whether the employee has breached the Code of Conduct is commenced
  - b if the employee has moved to a different Agency—in accordance with the procedures applicable in the Agency to which the employee has moved at the time the process for determining whether the employee has breached the Code of Conduct is commenced.

# APPENDIX C





## MANAGING THE SUSPENSION OF EMPLOYEES

### CHECKLIST

#### Deciding whether or not to suspend<sup>1</sup>

- Is it in the public interest, or the agency's interest, to remove the employee from the workplace?
- Has re-assignment of duties been considered as an option?
- Is it clear that the decision maker is not prejudging and is seen as not prejudging whether the employee has breached the Code of Conduct?

#### When imposing suspension

- Will the suspension be with pay or without pay?
- Has there been an opportunity for the employee to make a statement before the suspension is implemented?
- Has the employee been advised of the possible length of the suspension and of his/her ongoing status? (e.g. attendance at training courses previously booked, entitlement to apply for vacancies, access to the work premises)

#### Where suspension is without pay

- Has the employee been advised about possible access to leave credits?
- Has the employee been advised about the length of the period of suspension and the fact that he/she could seek outside employment?

#### During suspension

- Is the suspension being reviewed at reasonable intervals?
- Are there exceptional circumstances warranting the extending of unpaid suspension beyond 30 days?

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<sup>1</sup> Regulation 3.10 requires that an Agency Head may suspend an APS employee employed in the agency from duties if the Agency Head believes on reasonable grounds that:

- a. the employee has, or may have, breached the Code of Conduct; and
- b. the employee's suspension is in the public, or the agency's interest.

**Where it is determined that the employee suspended without pay has not breached the Code of Conduct**

- Is salary forgone during suspension to be reinstated or is there a case for not doing so?
- Is it appropriate to re-credit any paid recreation leave or long service leave applied for during suspension?
- Is it appropriate to take outside earnings into account before reinstating forgone salary?

**Terminating the suspension**

- Has a sanction been imposed on the employee for the relevant breach? OR
- Does the agency head no longer believe that the employee has or may have breached the code? OR
- Does the agency head no longer believe that the suspension is in the public interest or in the agency's interest?

**At the conclusion of the period of suspension**

- Is it necessary to decide whether the period of suspension counts as service?
- Has the appropriate documentation been completed?



**TRANSITIONAL 'PRE-COMMENCEMENT' MISCONDUCT**

The *Public Employment (Consequential and Transitional) Act 1999* (the PECTA Act) requires certain cases of suspected 'pre-commencement misconduct' (ie. misconduct occurring before 5 December 1999) to be dealt with in different ways. Procedures will differ according to whether:

- misconduct charges were laid before 5 December 1999 but were not brought to finality by that date; or
- misconduct charges were not laid before 5 December 1999.

The different scenarios are as follows.

a Cases where charges were laid before 5 December 1999

Where charges were laid under the 1922 Act and the case was not finalised prior to 5 December 1999, the provisions of the 1922 Act will apply until the case is brought to finality. This means that, for these cases, the provisions of the 1922 Act relating to appeals, suspension and sanctions for officers and employees will apply until the case is brought to finality (section 10 of the PECTA Act).

b Cases where a breach of the Code may have occurred before 5 December 1999 but no action was taken before 5 December 1999

Where no charge was laid before 5 December 1999, the provisions of the 1999 Act will apply, even though the misconduct may have occurred before that date. In such cases, a decision must be made, in accordance with subsection 10(3) of the PECTA Act, that the conduct in question was both misconduct under the 1922 Act (which includes a breach of the Code of Conduct contained in the March 1998 regulations) and would, had it occurred after 5 December 1999, constitute a breach of the Code under the 1999 Act.

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## A P S V A L U E S > > > >

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The Australian Public Service:

- is apolitical, performing its functions in an impartial and professional manner;
- is a public service in which employment decisions are based on merit;
- provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
- has the highest ethical standards;
- is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
- delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
- has leadership of the highest quality;
- establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
- provides a fair, flexible, safe and rewarding workplace;
- focuses on achieving results and managing performance;
- promotes equity in employment;
- provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
- is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
- provides a fair system of review of decisions taken in respect of APS employees.

Agency Heads are bound by the Code of Conduct in the same way as APS employees and have an additional duty to promote the APS Values.



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MANAGING BREACHES OF THE APS CODE OF CONDUCT >>>



AUSTRALIAN  
PUBLIC SERVICE  
COMMISSION

Booklets 1–7 are available in the *Working with the Act*, *Working Together* and *Values and Conduct* series. See inside cover.