



Misconduct in the Australian Public Service

The regime for dealing with misconduct is one element in the management of an efficient and effective Australian Public Service (APS).¹

The main purposes of the APS misconduct regime are to protect the public, maintain proper standards of conduct by members of the APS and maintain public confidence in the integrity and reputation of the APS.²

Formal misconduct action is only one means of achieving these purposes. In some cases it is more appropriate to address conduct issues by means of other management action.

In particular, performance or medical problems that lead to conduct problems might be best addressed by management action other than misconduct action.

This briefing examines some key aspects of the misconduct regime.³



Paul Vermeesch
Deputy Chief Solicitor Dispute Resolution
T 02 6253 7428
paul.vermeesch@ags.gov.au

Legislation

Public Service Act 1999

The employment of people in the APS is governed primarily by the *Public Service Act 1999* (the PS Act). The PS Act provides the standards of conduct required by APS employees and the possible consequences of misconduct. The PS Act sets out the APS Values, the APS Employment Principles, the APS Code of Conduct (the Code) and provisions about how to deal with possible breaches of the Code.⁴

¹ See the objects of the PS Act set out in s 3.
² See the discussion below on the purpose of the APS misconduct regime.
³ This Briefing replaces AGS Legal Briefing No 80. References to legislation are current as at 1 September 2014.
⁴ See the APS Values in s 10, the APS Employment Principles in s 10A, the APS Code of Conduct in s 13 and provisions in s 15 about how to deal with possible breaches of the Code.

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Regulations and instruments

The following regulations and instruments are also relevant to the misconduct regime for APS employees:

- the *Public Service Regulations 1999* (the PS Regs)
- instruments made under the PS Act:
 - the directions on the APS Values made by the Australian Public Service Commissioner under s 11⁵
 - the directions made by the Australian Public Service Commissioner under s 15(6), which set out the basic requirements for agency procedures for determining breaches of the Code in the agency and imposition of any sanction⁶
 - the procedures made by each agency head under s 15(3) for determining breaches of the Code in the agency and imposition of any sanction.⁷

Employee knowledge of legislation

Each APS employee is required to inform themselves about the PS Act, the PS Regs and the directions of the Australian Public Service Commissioner under the PS Act.⁸

Purpose of APS misconduct provisions⁹

The High Court has held that public service legislation in Australia:

- serves public and constitutional purposes as well as those of employment
- facilitates government carrying into effect its constitutional obligations to act in the public interest
- contains a number of strictures and limitations that, for reasons of the public and government interest, go beyond the implied contractual duty of good faith and fidelity that many employees would owe to an employer.¹⁰

The High Court has held that the misconduct provisions of the PS Act are directed at securing values proper to a public service: those of integrity and the maintenance of public confidence in that integrity.¹¹

⁵ See Chapter 1 of the *Australian Public Service Commissioner's Directions 2013*.

⁶ See Chapter 6 of the *Australian Public Service Commissioner's Directions 2013*.

⁷ Section 15(4) of the PS Act requires that the procedures in each agency must comply with the basic procedural requirements set out in the *Australian Public Service Commissioner's Directions 2013*.

⁸ See reg 3.16 of the PS Regs.

⁹ The *Public Service Act 1922* referred to 'disciplining' public servants for misconduct. The current PS Act no longer uses the term 'discipline', but it does refer to sanctions. The general practice now is to refer to a conduct or misconduct or Code of Conduct matter, rather than a discipline matter, and this practice is adopted in this Briefing. As a matter of normal English usage it is correct to describe the regulation of conduct of APS employees under the PS Act 1999 as a discipline regime.

¹⁰ See *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34] to [35]. The implied contractual duty referred to by the High Court is the employee's duty of good faith and fidelity, as discussed by Finn J in *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24 to 25. As to the content of the implied duty owed by an APS employee, see *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [117] to [127].

¹¹ See *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34]–[35]. The case concerned the *Public Service Act 1922*. The High Court expressly indicated at [34] and footnote 97 that these views apply generally to public service legislation in Australia and in particular to the PS Act.

The High Court endorsed the observations of Finn J in *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24 to 25, including the holding by Finn J that the purpose of the statutory regulation of the conduct of public servants in the APS is to ensure continued public confidence in the integrity of the public service and of public servants in the APS and to secure values proper to be required of a public service in the Australian system of government.

See also, for example, *Bragg v Secretary, Department of Employment, Education and Training* [1996] 476 FCA 1 (*Bragg*), where the Federal Court (Madgwick J), adopting the decision of the Full Federal Court in *Hardcastle v Commissioner of Police* (1984) 53 ALR 593 at 597 about the protective nature of the discipline regime applicable to the Australian Federal Police (AFP), held that the objects of the APS misconduct regime include to protect the public, to maintain proper standards of conduct by members of the APS and to protect the reputation of the APS. The decision in *Bragg* concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act. See, for example, s 13(11) of the PS Act, which requires APS employees to behave in a way that upholds the integrity and good reputation of the APS.

Misconduct action does not involve the imposition of punishment for criminal offences.¹² It is clear that the purpose of the misconduct regime under the PS Act is protective (rather than punitive) – that is, the regime is intended to protect the public, maintain proper standards of conduct by APS employees and protect the reputation of the APS.¹³

Legislative history

Introduction of *Public Service Act 1999*

The current PS Act replaced the *Public Service Act 1922*.¹⁴ The 1999 misconduct provisions were introduced to address deficiencies identified in the misconduct provisions of the *Public Service Act 1922*, which were seen as being:

- too complex and legalistic
- too heavily weighted on process and concepts similar to those in criminal law
- out of touch with modern management philosophies
- concerned more with process than with outcomes.

The misconduct provisions introduced in 1999 were intended to provide a means for new approaches for dealing with misconduct that:

- dispense with red tape
- ensure procedural fairness
- enable agency heads to adopt procedures appropriate for their agency.¹⁵

‘..the [misconduct] regime is intended to protect the public, maintain proper standards of conduct by APS employees and protect the reputation of the APS.’

Changes to *Public Service Act* effective 1 July 2013

Relevant provisions of the PS Act and PS Regs were significantly amended with effect from 1 July 2013.¹⁶ The amendments were made as part of a reform agenda to position the APS to better serve the Australian government and Australian community.¹⁷

Amendments intended to allow agencies to deal more effectively and efficiently with misconduct included:

- extensively revising the APS Values and introducing the APS Employment Principles

12 In *R v White; Ex parte Byrnes* (1963) 109 CLR 665, the High Court held that the disciplinary regime under the *Public Service Act 1922* did not create offences punishable as crimes and that decision-making to impose a sanction by way of fine did not involve the exercise of federal judicial power (that is, the management of APS employees, including by way of misconduct action, involves the exercise of executive power, not judicial power). The decision concerned the PS Act 1922, but the principles should apply equally under the current PS Act. See also *White v Director of Military Prosecutions* (2007) 231 CLR 570.

Section 15 of the PS Act does not by its terms create criminal offences. Section 42 of the PS Act provides that the directions of the Australian Public Service Commissioner under the PS Act must not create offences or impose penalties.

13 See the objects set out in s 3, the Code in s 13, the APS Values in s 10 and the APS Employment Principles in s 10A. See also the cases referred to in footnotes 11 and 12.

14 Some caution needs to be exercised when considering whether case law about discipline under the *Public Service Act 1922* has application to current provisions in the PS Act. Most of the court cases about the APS that are referred to in this Briefing concern the *Public Service Act 1922*.

15 See the Senate, Public Service Bill 1999, explanatory memorandum, para 3.20.4.

16 See the *Public Service Amendment Act 2013* and the *Public Service Amendment Regulation 2013 (No 1)*. Schedule 4 of the *Public Service Amendment Act 2013* contains transitional provisions. The transitional provisions for the PS Regs are included in Pt 10 of the Regs.

17 See House of Representatives, Public Service Amendment Bill 2012, second reading speech, 1 March 2012, at 2443 to 2445. The reform agenda included implementation of the recommendations in the report *Ahead of the game: blueprint for the reform of Australian government administration*.

- empowering the Australian Public Service Commissioner and the Merit Protection Commissioner to determine alleged breaches of the Code by current and former APS employees¹⁸
- empowering agencies to determine alleged breaches of the Code by former APS employees
- enabling agencies to take misconduct action against an APS employee for their pre-employment conduct in connection with their engagement as an APS employee
- applying the conduct requirements in ss 13(1) to 13(4) in connection with the employee's employment (rather than in the course of employment)
- requiring an agency's procedures under s 15(3) to include procedures for determining sanction as well as breach.

Australian Public Service Commissioner's Directions 2013

Consequential to these changes to the PS Act and PS Regs, the *Australian Public Service Commissioner's Directions 2013* replaced the Commissioner's previous directions with effect from 1 July 2013. The new directions significantly revise the provisions on the APS Values. Changes of particular interest for misconduct include:

- an extensive explanatory note in Chapter 1 about the APS Values and how they are enforced
- a requirement to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way, having regard to the individual's duties and responsibilities¹⁹
- basic procedural requirements in Chapter 6 for determining breaches of the Code and imposing any sanction – before 1 July 2013 the procedures only covered determination of breach²⁰
- the Australian Public Service Commissioner's new power to issue standards and guidance for agencies to follow in deciding whether to initiate a Code inquiry under s 15(3) procedures where the conduct of an APS employee raises concerns about both effective performance and possible breaches of the Code.²¹

Changes to Public Service Act effective 1 July 2014

Minor revisions to some elements of the Code came into effect from 1 July 2014.²² These changes were to make the Code consistent with the duties of APS employees under the *Public Governance, Performance and Accountability Act 2013* from 1 July 2014.

18 Generally references in this briefing to an employee in the context of breach of the Code should be understood to include a former employee who is suspected of having breached the Code while they were an APS employee. A sanction cannot be imposed on a former employee.

19 Clause 1.3(f) provides that, having regard to an individual's duties and responsibilities, upholding the APS Value in s 10(2) of the PS Act requires reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way. The APS Value in s 10(2) is that the APS demonstrates leadership, is trustworthy and acts with integrity in all that it does. The requirement extends to misconduct and other unacceptable behaviour by *public servants* generally. It is not confined to misconduct and other unacceptable behaviour by APS employees.

20 Chapter 6 is discussed in detail below.

21 See *Australian Public Service Commissioner's Directions 2013*, cl 4.2. As at 1 September 2014 the Australian Public Service Commissioner has not issued any relevant standards and guidance.

22 See the *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014*, Sch 11, items 93–95. APS employees are subject to general duties, as officials, under the *Public Governance, Performance and Accountability Act 2013*.

APS Code of Conduct

The PS Act sets out duties of APS employees. Where it is suspected that these duties have been breached, an agency can take formal misconduct action. Such action can be taken only in accordance with the relevant statutory provisions.²³

APS employees are required to adhere to the Code,²⁴ which includes a requirement that they must at all times behave in a way that upholds the APS Values and the APS Employment Principles.²⁵ The *Australian Public Service Commissioner's Directions 2013* detail the specific conduct expectations and standards required to uphold each of the APS Values.²⁶

An APS employee is liable to sanctions only if they are found to have breached the Code.²⁷ A determination about a Code breach can be made for a current or former APS employee.²⁸ However, a sanction can only be imposed on a current APS employee.²⁹

Other conduct standards

The standards of behaviour of APS employees are not set only by the PS Act. APS employees are subject to other legal obligations about their conduct, including under statute law and the general law. For example:

- APS employees are subject to general duties, as officials, under the *Public Governance, Performance and Accountability Act 2013*.³⁰
- Under the general law, APS employees are subject to a duty of good faith and fidelity.³¹

'An APS employee is liable to sanctions only if they are found to have breached the Code.'

Breach of statutory obligations can be a breach of the Code under s 13(4) of the PS Act.³² Breach of obligations under statute or the general law may also involve a breach of other elements of the Code, such as the requirement in s 13(11) to behave in a way that upholds the APS Values and the integrity and good reputation of the agency and the APS.

23 See s 15 of the PS Act.

24 See s 13 of the PS Act, which sets out the Code. Section 15(2A) sets out certain circumstances where conduct by an APS employee that is in connection with their engagement as an APS employee, and that was engaged in before they became an APS employee, is deemed to be a breach of the Code.

25 See s 13(11)(a) of the PS Act. The APS Values are set out in s 10. The APS Employment Principles are set out in s 10A.

26 See s 42(2) of the PS Act, which requires that Agency Heads and APS employees must comply with the directions issued by the Australian Public Service Commissioner under the PS Act.

27 Any breach of the Code must be found in accordance with the procedures made by the relevant agency head under s 15(3) where the agency determines breach; or in accordance with the procedures made by the relevant Commissioner under s 15(3) where the Australian Public Service Commissioner or Merit Protection Commissioner determines breach: see ss 15, 41B(3) and 50A(2) of the PS Act. An APS employee is also liable to sanctions if they have engaged in certain pre-employment conduct that is taken to have breached the Code in accordance with s 15(2A).

28 See s 15(3).

29 See s 15(1).

30 Guidance on duties of officials under the *Public Governance, Performance and Accountability Act 2013*, including their complementary operation with the Code, is available in the Department of Finance publication *Resource management guide No 203 – general duties of officials*.

31 The Federal Court has recognised that APS employees owe to the Commonwealth an obligation of good faith and fidelity. See *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [117]–[127]. The decision concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

32 Section 13(4) of the Act requires that an APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. It is discussed further below.

Persons bound by the APS Code of Conduct

The Code applies only to APS employees as defined by the PS Act.³³ This includes ongoing and non-ongoing employees and any Head of Mission.³⁴ It does not include locally engaged employees (that is, staff engaged overseas under s 74 to perform duties overseas).

By s 14, the Code also applies to:

- an agency head³⁵
- a person who holds any office or appointment under an Act and prescribed by the PS Regs.³⁶

Conduct of employees regulated by the Code of Conduct – extension to conduct outside work

Usually, under the general law, action against an employee for misconduct should be taken only where there is sufficient connection between the alleged misconduct and the employment.³⁷ Under the general law this can involve consideration of whether the conduct is contrary to the employee's duty of good faith and fidelity or is repugnant to the employment relationship.³⁸

The PS Act governs whether action can be taken against an APS employee for misconduct. The principles of the general law are subject to the specific provisions of the PS Act. An APS employee is liable to sanctions if the employee is found, in accordance with the agency's s 15(3) procedures, to have breached the Code.

The conduct requirements in s 13(11) (which apply to the conduct of an employee at all times) and the requirements in some other provisions of the Code can potentially be breached by conduct of an APS employee outside the course of APS employment or not otherwise connected with APS employment.³⁹ However, the terms of the Code are such that generally a breach will be in some way related to APS employment.

In some cases, conduct by an APS employee that might appear purely personal can involve a breach of the Code – for example:

- having contact with or harassing a fellow employee outside the workplace⁴⁰

33 An APS employee is defined by s 7 of the PS Act.

34 See s 39. A Head of Mission is required to be an APS employee.

35 An 'Agency Head' is defined by s 7. Section 41A sets out the powers of the Australian Public Service Commissioner to inquire into alleged breaches of the Code by agency heads.

36 See s 14(3). Regulation 2.2 prescribes certain persons for the purposes of the definition of 'statutory office holder' in s 14(3). They include certain persons who have dealings with APS employees in a supervisory capacity or another capacity related to the person's day-to-day working relationship with APS employees. The statutory office holders are bound by the Code when acting in these capacities. Regulation 2.2(3)(b) also sets out, for the purposes of s 14(2A), provisions concerning the extent to which statutory office holders are bound by the Code. Regulation 2.2(3)(b) provides that a statutory office holder is not bound by the Code to the extent that the Code is inconsistent with legislation relating to the statutory appointment or office.

37 See, for example, *Hussein v Westpac Banking Corporation* (1995) 59 IR 103 at 107 and *Coward v Gunns Veneer Pty Ltd* [1997] FCA 1341.

38 See *Blyth Chemicals v Bushnells* [(1933) 49 CLR 66. See *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [117]–[127] for a discussion of the content of the obligation of good faith and fidelity owed by an APS employee to the Commonwealth.

39 The courts have recognised that the PS Act can properly regulate and enforce what might be called the private conduct of an APS employee: *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34], referring with approval to *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24–25. The decisions concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act. See also *Griffiths v Rose* (2011) 192 FCR 130 regarding improper 'private' use of a work computer. Some provisions of the Code apply only to conduct in connection with APS employment, but other provisions are not so restricted in their application.

40 For example, where such conduct is contrary to a lawful and reasonable direction. In a case where harassment of one employee by another outside of work arose from the work relationship and had an adverse impact within the workplace, a direction prohibiting contact outside work was held by the Federal Court to be lawful and reasonable: *McManus v Scott-Charlton* (1996) 70 FCR 16, which was referred to with approval by the High Court in *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34]. The decisions concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

- viewing pornography alone at home outside of work hours using a work computer on a privately owned internet connection⁴¹
- being convicted of a criminal offence for conduct that is entirely unrelated to the workplace but involves a breach of s 13(11) (for example, dishonest conduct is inconsistent with the APS Value that states that the APS is trustworthy and acts with integrity in all it does).⁴²

Conduct requirements in the Code of Conduct

The conduct requirements in ss 13(1), (2), (3) and (4) of the Act apply only where an APS employee is acting ‘in connection with’ APS employment. Section 13(7) is concerned with conflicts of interest in connection with APS employment. Section 13(9) is concerned with requests for information made for official purposes in connection with the employee’s APS employment. The duty not to disclose information under reg 2.1 (which is made for the purposes of s 13(13)) applies to information that an APS employee obtains or generates in connection with their employment.

Sections 13(5), (6), (8) and (10) apply to specified types of conduct and will generally involve some relationship with APS employment.

Section 13(11) requires that an APS employee at *all times* behave in a way that upholds the APS Values, the APS Employment Principles and the integrity and good reputation of the employee’s agency and the APS.⁴³ Section 13(12) requires that an APS employee on duty overseas must at *all times* behave in a way that upholds the good reputation of Australia.

‘...an APS employee [must] at all times behave in a way that upholds the APS Values, the APS Employment Principles and the integrity and good reputation of the employee’s agency and the APS.’

Conduct connected with APS employment

In the context of the Code, conduct *in connection with* APS employment should be construed broadly. For example, it is not confined to performance of the tasks of the job or other conduct in the course of employment. It can include:

- conduct that is authorised expressly or impliedly or is incidental to what the employee is authorised to do⁴⁴
- conduct that is part of the employee’s functions as an employee⁴⁵
- conduct in the purported performance of duties, even if not in fact authorised⁴⁶
- any other conduct that has a connection with APS employment.

Conduct outside the normal workplace and normal working hours can be conduct in connection with employment (or even in the course of employment). For example, in some cases, an APS employee who engages in harassing behaviour at a social event

41 For example, where such conduct is contrary to a lawful and reasonable direction: see *Griffiths v Rose* (2011) 192 FCR 130. Misuse of a work computer could also be a breach of the Code on the ground of use of Commonwealth resources in an improper manner or for an improper purpose: s 13(8).

42 See the APS Value in s 10(2) and the requirements of cl 1.3 the *Australian Public Service Commissioner’s Directions 2013* about the highest standards of ethical behaviour and acting in a way that is right and proper. The APS Value in s 10(2) is that the APS demonstrates leadership, is trustworthy and acts with integrity in all that it does.

43 Compare *Mocicka v Chief of Army* (2003) 175 FLR 476; [2003] ADFDAT 1.

44 On the concept of ‘in the course of’ APS employment see *Day v Douglas* [1999] FCA 1444 and on appeal *Commonwealth v Day* [2000] FCA 474 concerning the discipline provisions of the *Public Service Act 1922* relating to ‘improper conduct as an officer’. Compare workers’ compensation cases: *Kavanagh v Commonwealth* (1960) 103 CLR 547 at 559; *Commonwealth v Oliver* (1962) 107 CLR 353 at 358; *Commonwealth v Lyons* (1979) 24 ALR 300 at 301 concerning the course of employment. The concept of ‘in connection with’ APS employment is broader than the concept of ‘in the course of’ APS employment.

45 Compare *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1.

46 *Day v Douglas* [1999] FCA 1444 at [32] and *Commonwealth v Day* [2000] FCA 474 at [16]. Producing a Customs identification card can establish that the officer purports to be carrying out official duties. In such circumstances, the officer can be found to be acting as an officer, even though the officer maintains the conduct was purely personal and even though the employer maintains the conduct was not authorised.

organised or endorsed by the employer agency would be in breach of the requirement in s 13(3) that an APS employee not harass others when acting in connection with APS employment.

Before being amended by the *Public Service Amendment Act 2013* (with effect from 1 July 2013), ss 13(1), 2), (3) and (4) governed conduct where an APS employee was acting *in the course of* APS employment. The relevant statutory test now is *in connection with* APS employment. There is no requirement that the conduct be in 'direct' connection with employment.⁴⁷ In some circumstances the association between the conduct and the employment will be so indirect or remote that it cannot properly be regarded as conduct in connection with employment.

Pre-employment conduct

The Code in s 13 does not apply to any conduct before a person became an APS employee. For example, the provisions of s 13 do not apply to conduct of a prospective employee who provides false information in a pre-employment vetting process before becoming an APS employee.

From 1 July 2013, s 15(2A) of the PS Act makes certain types of pre-employment conduct in connection with the person's engagement as an APS employee a breach of the Code. This includes:

- knowingly providing false or misleading information
- wilfully failing to disclose information that the person knew, or ought reasonably to have known, was relevant
- otherwise failing to behave with honesty and integrity.

Before s 15(2A), APS agencies had generally taken certain measures to allow them to take action against a person who had been dishonest in a pre-employment vetting process. For example:

- The agency could ask a person, once they become an employee, to confirm that the information they gave in the pre-employment vetting processes is correct and complete. The Code applies to the employee's conduct in giving that confirmation. This measure is no longer necessary since the amendments effective from 1 July 2013.
- The agency could make engagement under s 22(6) conditional on the employee having provided complete and accurate information in pre-employment vetting processes. Failure to meet this condition could make their employment liable to termination.⁴⁸ Agencies may wish to continue to use this measure, as it potentially enables them to terminate employment for failure to meet a condition of engagement. It may be simpler to do this than to use a formal misconduct process.

Former employees⁴⁹

Section 13 sets out the conduct standards required of an APS employee. With the exception of pre-employment conduct, as discussed above, the conduct of an employee can be a breach of the requirements of the Code in s 13 only where the person engaged in the conduct while an APS employee.

⁴⁷ The Public Service Amendment Bill 2012 explanatory memorandum stated at [26] that the amendment to the first 4 elements of the Code was so that 'they apply to conduct where there is a connection between that conduct and the employee's employment'.

⁴⁸ See s 29(3)(f) of the PS Act. See *Achieng v Commonwealth of Australia (Centrelink)* [2010] FWA 5174 for an example of a case where employment was successfully terminated for failure to meet such a condition of engagement.

⁴⁹ Generally references in this Briefing to an employee in the context of breach of the Code should be understood to include a former employee who is suspected of having breached the Code while they were an APS employee. A sanction cannot be imposed on a former employee.

Where a person, as an APS employee, has engaged in conduct that is suspected to breach the Code, the agency can institute or continue a formal process for determining whether the person has breached the Code even if they are no longer an APS employee.⁵⁰ But no sanction can be imposed on a person who is not an APS employee.⁵¹

Elements of the Code of Conduct

A failure to comply with any sub-element of the Code can be a breach. For example, it would be a breach of s 13(1) if an APS employee either failed to behave with honesty or failed to behave with integrity in connection with APS employment. Similarly, it would be a breach of s 13(11) if they failed to behave in a way that upheld any element of the APS Values or the APS Employment Principles or the integrity of their agency or the APS or the good reputation of the agency or the APS.⁵²

Intention not required

Under criminal law, a mental element is usually required to establish an offence (for example, a person must have deliberately, knowingly, intentionally or recklessly done the relevant act). Under the PS Act, it is not necessary to establish that a failure to comply with the Code involves this mental element.⁵³

‘A failure to comply with any sub-element of the Code can be a breach.’

Where it is found that an employee has failed to comply with certain obligations imposed by the Code, some consideration of their mental state might be required – for example, depending on the circumstances, where an employee has acted dishonestly in breach of s 13(1). Also, the employee’s state of mind can be relevant to the determination of sanction.

Interpretation of the Code

The Code generally applies according to the ordinary and natural meaning of its terms in their context. These terms generally are not defined by the PS Act and generally do not have any technical meaning.

Comments on some provisions of the Code of Conduct

Section 13(4) – compliance with laws

Laws covered by section 13(4)

Section 13(4) of the Code requires an APS employee acting in connection with APS employment to comply with all applicable Australian laws. Section 13(4) defines ‘Australian law’ as:

- any Act of the Commonwealth Parliament, or any instrument made under such an Act
- any law of a State or Territory, including any instrument made under such law.

⁵⁰ See s 15(3).

⁵¹ See s 15(1).

⁵² See *Rothfield v Australian Bureau of Statistics* [PR 927240] AIRC (3 February 2003), where Senior Deputy President Lacy held that the provisions in s 13(3) should be read disjunctively.

⁵³ Compare *O’Connell v Palmer* (1994) 53 FCR 429, where the Full Court of the Federal Court held that it is not a necessary element of a charge of improper conduct under the disciplinary regime in the AFP that the officer concerned was aware that what they were doing would be regarded as improper. See also *Bercove v Hermes* (No 3) (1983) 74 FLR 315, where a Full Court of the Federal Court held that it was open to find that a Commonwealth public servant infringed the proscription against improper conduct even though the employee believed in the ‘legitimacy and propriety’ of the employee’s actions. The Full Federal Court supported the approach adopted by the judge at first instance (in *Bercove v Hermes* (1983) 67 FLR 186 at 195) that the propriety of the actions of a public servant should be assessed by reference to the standard of conduct expected of a public servant, having regard principally to the expectations of the public. The decisions concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

In *R v White; Ex parte Byrnes* (1963) 109 CLR 665, the High Court held that the disciplinary regime under the *Public Service Act 1922* did not create offences punishable as crimes. See also *White v Director of Military Prosecutions* (2007) 231 CLR 570.

The laws covered by s 13(4) include any Commonwealth, State or Territory legislation. It is not clear whether, under s 13(4), State or Territory law includes the common law (that is, non-statutory judge-made law) that applies in the State or Territory.⁵⁴

The laws that an APS employee must comply with under s 13(4) include any applicable statutory standard of conduct, including the standards of conduct in the PS Act, the PS Regs and the *Australian Public Service Commissioner's Directions 2013*. It can include a conduct standard contained in a statute where that statute sets out a conduct requirement and also provides that a breach is a criminal offence. A person making a decision on a breach may find that an employee has failed to comply with a conduct standard in an applicable Australian law provided that this does not involve any finding that a criminal offence has been committed.⁵⁵

Examples of laws covered by section 13(4)

Relevant conduct requirements in the PS Act, in addition to those in the Code in s 13, include:

- that senior executive service (SES) employees model and promote the APS Values, the APS Employment Principles and compliance with the Code⁵⁶
- that agency heads and APS employees comply with the directions issued by the Australian Public Service Commissioner under the PS Act.⁵⁷

Obligations imposed on APS employees by other Acts which might be of particular interest to agencies include:

- general duties of APS employees, as officials, under the *Public Governance, Performance and Accountability Act 2013*⁵⁸
- obligations under the *Work Health and Safety Act 2011*
- statutory secrecy, non-disclosure and privacy provisions.

Code of Conduct or criminal law action?

Where an APS employee engages in conduct that can breach both the Code and the criminal law, the agency needs to make a management decision about the handling of the case. For example, the agency must decide whether to refer the matter to the Australian Federal Police and/or the Commonwealth Director of Public Prosecutions for criminal investigation and/or possible prosecution. In some situations agencies will have an obligation to notify the police.⁵⁹

If a criminal investigation or prosecution takes place, the agency needs to decide whether it will proceed with misconduct action or defer action pending the outcome of the criminal investigation or prosecution.⁶⁰

54 There is a single common law of Australia (as determined by the High Court), but the common law can vary in each state and territory of Australia to the extent that the common law is modified by the legislation of each State and Territory.

55 Compare *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 22 (which at the time of writing is the subject of an appeal to the High Court).

56 See s 35(3). See also the obligation in cl 1.8 of the *Australian Public Service Commissioner's Directions 2013* for an SES employee to promote and reflect the APS Values. Under s 42(2) APS employees are obliged to comply with the *Australian Public Service Commissioner's Directions 2013*.

57 See s 42(2) of the PS Act and the *Australian Public Service Commissioner's Directions 2013*. Section 7 defines the Commissioner's Directions as referred to in s 42(2).

58 The 5 general duties of officials under the *Public Governance, Performance and Accountability Act 2013* are: duty of care and diligence (s 25); duty to act honestly, in good faith and for a proper purpose (s 26); duty in relation to use of position (s 27); duty in relation to use of information (s 28); and duty to disclose interests (s 29). Guidance on duties of officials under the *Public Governance, Performance and Accountability Act 2013*, including their complementary operation with the Code, is available in the Department of Finance publication *Resource management guide No 203 – general duties of officials*.

59 Section 56(2) of the *Public Interest Disclosure Act 2013* requires notification to police of certain information relating to offences punishable by imprisonment for a period of 2 or more years.

60 Section 15(5) of the PS Act provides that agency head procedures under s 15(3) can make specific provision for dealing with employees who are convicted of an offence or found to have committed an offence. Agency procedures commonly do not include such provisions.

Section 13(5) – compliance with directions

Source of power to give directions

Under s 13(5) an APS employee must comply with any lawful and reasonable direction from someone in their agency who has authority to give the direction. No provision of the PS Act expressly authorises the giving of directions.⁶¹ Section 13(5) recognises that there is an implied power to give directions.⁶²

An agency head does not generally need to provide a delegation or express authorisation to issue directions.⁶³ A supervisor has implied authority to direct subordinate staff. An employee with functional responsibility for a particular matter generally has implied authority to give directions relevant to that matter.

‘...an APS employee must comply with any lawful and reasonable direction from someone in their agency who has authority to give the direction.’

Scope of directions

Under contract law, the usual test for whether a direction to an employee is lawful is that it involves no illegality and is within the subject matter of the employment or the scope of the contract of service. The test for lawfulness of a direction to an APS employee can be broader than this.⁶⁴ While public servants are in an employment relationship, that relationship has a constitutional and statutory setting that includes values and interests beyond bare matters of employment. A direction to an APS employee can be lawful if it involves no illegality and if it is reasonably adapted to protect the legitimate interests of the Commonwealth as employer or to discharge the obligations of the Commonwealth as an employer.⁶⁵ The direction must also be reasonable in all the circumstances.⁶⁶

Regulation 2.1 – duty not to disclose

The non-disclosure obligations of reg 2.1 of the PS Regs in force before 23 December 2004, and between 16 June 2005 and 14 July 2006, were in the same terms as a regulation under the *Public Service Act 1922* that was held invalid by the Federal Court (in 2003) on the basis that it infringed the implied constitutional freedom of communication on political matters.⁶⁷

61 Under s 20(1) of the PS Act an agency head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the agency. APS employees are employees of the Commonwealth: see s 22(1) of the PS Act. An employer has power under the general law (that is, the law of contract) to give lawful and reasonable directions to an employee.

62 It has been held in the APS context that the source of the power to give a direction was the contract of employment, not the *Public Service Act 1922*. Thus the decision to give a direction was held to not be a decision to which the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applied: *Bayley v Osborne* (1984) 4 FCR 141 at [33]. See footnote 61 about relevant provisions under the current PS Act.

63 As noted above, an agency head clearly has power to give lawful and reasonable directions to any APS employee in their agency. An agency head can delegate this power or give an express authorisation. In some situations it might be desirable to do so in order to put beyond doubt any issue that the person giving a direction has authority to do so.

64 See *McManus v Scott-Charlton* (1996) 70 FCR 16, which was referred to with approval by the High Court in *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34]. The decisions concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act. See also *Griffiths v Rose* (2011) 192 FCR 130.

65 A direction involves illegality if it is contrary to law. For example, a direction will not be lawful if its nature is such that it would unnecessarily or unreasonably impair the freedom of communication about government and political matters protected by the Constitution: see *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [81]. The decision concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act. In *Johnson v Sullivan* [2002] FMCA 35 the Court upheld the validity of a direction by a CEO to an APS employee to be absent from work on personal leave. Compare *Anderson v Sullivan* (1997) 78 FCR 380. See also *Gallagher v Aboriginal Hostels Limited* [2006] AIRC 298.

66 See *McManus v Scott-Charlton* (1996) 70 FCR 16, which was referred to with approval by the High Court in *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34]. The decisions concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act. In *Griffiths v Rose* (2011) 192 FCR 130 it was held that a direction by an APS agency prohibiting any use of work computers to view pornography, including in private outside of work, was lawful and reasonable, as it was not contrary to privacy protections under the *Privacy Act 1988*, the general law or international law.

67 See *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334. The decision concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act. The amendments to reg 2.1 that were inserted by *Public Service Amendment Regulations 2004* (No 2) were disallowed with effect from and including 16 June 2005. This amended version of reg 2.1 was in force in the period 23 December 2004 to 16 June 2005.

A new reg 2.1 was inserted with effect from 15 July 2006.⁶⁸ This provision has been held by a superior court to be valid as not infringing the implied constitutional freedom of communication on political matters.⁶⁹

Decision-makers in agency misconduct processes

Potential decision-making roles

Any misconduct process in the employer agency may involve the following decisions:

- suspension from duties and review of suspension under reg 3.10
- selection (or other authorisation), under the agency's s 15(3) procedures, of a person to determine whether a breach has occurred
- determination of breach under the agency's s 15(3) procedures
- imposition of sanction under s 15(1)
- review under s 33 of suspension decisions or possibly other APS action in the misconduct process preceding decisions about breach or sanction.⁷⁰

Subject to the terms of the agency's s 15(3) procedures, it is possible for one person to make decisions about both breach and sanction. Some s 15(3) procedures require different decision-makers. Even where the agency's s 15(3) procedures allow one decision-maker for both tasks, it may be desirable as a matter of risk management to have different decision-makers so that there can be no issue of perception of bias and therefore reduced risk of legal challenge on that ground.

Generally, the suspension delegate should be a different person from the breach decision-maker or sanction delegate. Also, generally a s 33 review delegate should not have had any previous involvement.

Steps should be taken to ensure that the relevant decision-makers have lawful power to make their decisions and that they are independent and unbiased.

Lawful selection of decision-maker on breach

The agency's procedures under s 15(3) of the PS Act will generally specify who is to select the person who will make a decision on the breach and how they must be selected or authorised (for example, whether the selection/authorisation needs to be in writing).

Section 15(3) procedures commonly permit anyone (who is, and appears to be, independent and unbiased) to be selected to make a decision on the breach. Where the procedures permit, the person does not have to be an APS employee. For example, the person can be a consultant who is not employed in the APS.

If there are no provisions in the procedures about selecting the decision-maker to determine a breach, the agency head will need to appoint or authorise the decision-maker to perform the role. This appointment or authorisation should be in writing, signed by the agency head.⁷¹

⁶⁸ See *Public Service Regulations 2006* (No 1).

⁶⁹ See *R v Goreng-Goreng* (2008) 220 FLR 21, a decision of the ACT Supreme Court constituted by Refshauge J. See also the interlocutory decision of Federal Circuit Court of Australia in *Banerji v Bowles* [2013] FCCA 1052.

⁷⁰ See also reg 5.27. There is no review within the agency of a decision that there has been a breach of the Code or a decision to impose a sanction. Such decisions are reviewed directly by the Merit Protection Commissioner. See reg 5.24(2).

⁷¹ Where there are no general provisions in the existing procedures under s 15(3) about selection of a decision-maker to determine breach, we consider that s 15(3) is the source of the agency head's power in a particular matter to authorise a person to determine breach. Such an authorisation is itself a procedure under s 15(3) for determining whether an APS employee has breached the Code (rather than, for example, an exercise of general employer powers under s 20). An agency head procedure under s 15(3) is required to be in writing.

The provisions of the PS Act (and PS Regs) do not give the agency head any power to determine breach, therefore the breach decision-maker is not acting as a delegate of the agency head. The power to determine a breach can be conferred only under an agency's s 15(3) procedures. The requirement that a delegation can be made to an 'outsider' only with prior written consent of the Australian Public Service Commissioner does not apply when selecting a breach decision-maker.⁷²

The power to determine breach is distinct from the power to impose sanction. A person delegated under s 15(1) of the PS Act to impose a sanction is not also automatically authorised to determine a breach. If the agency requires the same person to both determine a breach and impose a sanction, the agency must ensure that the person has both the authorisation to determine the breach and the delegation to impose the sanction.

Delegates

The agency head must delegate power (under reg 3.10 of the PS Regs) to a person who makes decisions about suspension, including through review of a suspension under reg 3.10.⁷³

The agency head must also delegate power (under s 15(1) of the PS Act) to a person who imposes a sanction.⁷⁴ The person might also need to be delegated other powers related to any sanction to be imposed – for example, the power under s 25 to assign duties, the power under s 23 and the *Public Service Classification Rules 2000* to reduce an employee's classification and the power under s 29 to terminate employment. In particular, a delegate under s 29 will clearly have power to both terminate employment and give notice of termination.

A person who exercises internal review functions must be a delegate of the powers of the agency head under reg 5.27 of the PS Regs.

Limitations on delegations – outsiders

Where delegations are being made in accordance with s 78 or reg 9.3, agencies must ensure compliance with the limitations on delegations set out in those provisions. In particular, a delegation cannot be made to an 'outsider' except with the prior written consent of the Australian Public Service Commissioner.⁷⁵

Bias issues

To comply with the *Australian Public Service Commissioner's Directions 2013*, the person who determines whether there has been a breach of the Code and the person who determines whether any sanction should be imposed must be, and must appear to be, independent and unbiased. Also, any person who makes decisions on misconduct matters must comply with the administrative law requirement that they not be biased.

'...[the decision-maker] must be, and must appear to be, independent and unbiased.'

72 An outsider is defined by s 78(8) and reg 9.3(9) to be a person other than an APS employee or a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

73 See reg 9.3 of the PS Regs concerning the delegation of agency head powers under the PS Regs.

74 See s 78 of the PS Act concerning the delegation of agency head powers under the PS Act.

75 An outsider is defined by s 78(8) and reg 9.3(9) to be a person other than an APS employee or a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

Administrative law requires that a decision-maker be free from actual bias or any reasonable apprehension of bias. Actual bias occurs where the decision-maker has a partial mind. The test for reasonable apprehension of bias is whether a hypothetical fair-minded person, properly informed of relevant circumstances, *might* reasonably apprehend that the decision-maker *might* not have brought an impartial mind to the decision. This issue is one of perception but is determined objectively by a court.⁷⁶

A reasonable apprehension of bias can arise where it can reasonably be seen that a decision-maker:

- has an interest in the outcome⁷⁷
- previously expressed a concluded view on a matter that needs to be determined.⁷⁸

It can arise where a superior officer has expressed a view about what the outcome should be or a view critical of the relevant employee.⁷⁹ It can also arise where the decision-maker has had access to prejudicial information that is not relevant to the matters to be determined but could reasonably be seen as influencing the decision-maker's views.⁸⁰

Referral to Commissioner

An agency head can ask the Australian Public Service Commissioner or the Merit Protection Commissioner to inquire into an alleged breach of the Code by a current or former APS employee.⁸¹

The Australian Public Service Commissioner can inquire into and determine whether an APS employee (or former employee) has breached the Code if the agency head or Prime Minister has requested the Commissioner to do so and the Commissioner considers it appropriate to do so. The Merit Protection Commissioner can inquire into and determine whether an APS employee has breached the Code if the agency head requests the Commissioner to do so, the Commissioner considers it appropriate to do so and the APS employee agrees to the Commissioner doing so.

Such inquiries must be carried out in accordance with written procedures established by the relevant Commissioner.⁸² The Commissioner must report the results of their inquiry and determination to the agency head.⁸³ The Australian Public Service Commissioner may in some circumstances also recommend a sanction.⁸⁴

76 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

77 In *Scott v Centrelink* [PR 907822] AIRC (16 August 2001) the Australian Industrial Relations Commission (AIRC) held that a reasonable apprehension of bias arose where the decision-maker determining whether an APS employee had breached the Code by failing to follow a direction was the supervisor who had given the direction. The employee was reinstated for this and other reasons. See also *Keiko Adachi v Qantas Airways Limited* [2014] FWC 518 (10 February 2014).

78 See *Gaisford v Hunt* (1996) 71 FCR 187 regarding a statutorily-based inquiry into the conduct of APS employees. This was not a formal misconduct investigation and concerned an inquiry under the *Public Service Act 1922*, but the principles should apply to a formal misconduct investigation under the current PS Act.

In *Lohse v Arthur* (No 3) (2009) 180 FCR 334 the Federal Court held at 364–367, [53](e), that the breach decision-maker's conduct of witness interviews demonstrated bias.

79 *Phillips v Secretary, Department of Immigration and Ethnic Affairs* (1994) 48 FCR 57; *Mongan v Woodward* [2003] FCA 66 (12 February 2003).

80 See *Bohills v Friedman* (2001) 110 FCR 338.

81 See s 41B(1) regarding the Australian Public Service Commissioner and s 50A regarding the Merit Protection Commissioner.

82 See s 41B(3)–(6) regarding the Australian Public Service Commissioner and s 50A(2)–(5) regarding the Merit Protection Commissioner.

83 See s 41B(8) and s 50A(7).

84 See s 41B(9).

Suspension from duties⁸⁵

Possible reassignment⁸⁶

When considering suspension from duties, consideration should be given to the possibility of assignment of other duties under s 25.⁸⁷ Suspension should generally be imposed only where assignment of other duties is not appropriate.⁸⁸

The power under s 25 should be exercised only for operational reasons and not as a means of, in effect, imposing a sanction.⁸⁹

Review of suspension

A review under reg 3.10 is a review of the suspension. It is a fresh decision on whether the employee should continue to be suspended, considering the statutory preconditions for suspension and all relevant material available at the time of the review. It is not a review of the original decision to suspend.⁹⁰

‘When considering suspension from duties, consideration should be given to the possibility of assignment of other duties...’

Procedural fairness in the suspension process

Regulation 3.10(7) enables the delegate to determine whether to discharge procedural fairness requirements. It permits the delegate to dispense with procedural fairness requirements where appropriate. If the delegate makes a decision under reg 3.10(7) that it is appropriate not to accord procedural fairness then this should override any procedural fairness obligations. Of course, there must be a reasonable basis for the delegate to do this. Such cases will be unusual.⁹¹

It might be appropriate not to accord procedural fairness in circumstances where there is urgency or some overriding public interest – if there are safety concerns, for example.⁹² Even in such cases, the employee might properly be given the right to comment after the initial suspension and any comments must be taken into account on a review of the suspension.

Where a delegate considers that procedural fairness should not be accorded, it is good practice for them to record their reasons and, to the extent possible, give the affected employee notice of those reasons.

⁸⁵ Section 28 of the PS Act and reg 3.10 of the PS Regs set out the power to suspend.

⁸⁶ The suspension delegate should also be a delegate of the powers of the agency head under s 25.

⁸⁷ The employee should be given an opportunity to comment before any adverse reassignment decision is made, for example because it impacts on reputation: compare *Foster v Secretary, Department of Education and Early Childhood Development* [2008] VSC 504 at [45]–[54].

⁸⁸ In *Quinn v Overland* [2010] 199 IR 40 the Federal Court noted at [95]–[129] that non-pecuniary attributes of work are important and that their denial can be devastating to the legitimate interests of any worker. The Court emphasised the potentially serious adverse consequences of a suspension.

⁸⁹ Reassignment of duties is one of the sanctions available under s 15. See *Bennett v Commonwealth of Australia* (1980) 1 NSWLR 581. See also *James v McDonald* (unreported, Federal Court of Australia, Sackville J, NG 631 of 1994, 21 October 1994), *Bennett v Commonwealth of Australia* and *James v McDonald* concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

⁹⁰ Any review of action under reg 5.27 is more in the nature of a review of the suspension decision. A review of action under reg 5.27 must consider whether the suspension decision should be confirmed, varied or set aside.

⁹¹ Compare *Gaisford v Fisher* (unreported, Federal Court of Australia, Finn J, ACTG 27 of 1996, 29 November 1996).

⁹² The concerns must be genuine and have a logically probative basis: compare *Gaisford v Fisher* (unreported, Federal Court of Australia, Finn J, ACTG 27 of 1996, 29 November 1996). Generally the relevant public interest grounds are the kind recognised by the law of public interest immunity.

See *Dunstan v Orr* [2008] FCA 31 at [115] for an example of a case where the Federal Court accepted that there were security (that is, safety) concerns held by the agency that justified an APS employee not being given notice of certain matters when he was given an opportunity to comment about a proposed decision to suspend him from duties. The case concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

Not suspending

Where an employee is suspected of serious misconduct that would warrant termination of employment if established, it is generally appropriate to suspend the employee. However, where the employee is not suspended, it does not necessarily mean that they cannot properly be subject to a sanction of termination.⁹³

Effect of suspension – with or without remuneration

Under the general law a suspension from duty has the effect of suspending most incidents of the employment relationship, including payment of salary.⁹⁴ The PS Regs make specific provision for the possibility of suspension with remuneration.

Under the PS Regs a suspension without remuneration must not be for more than 30 days unless exceptional circumstances apply.

Other issues

There can be issues as to whether a suspended employee can access leave entitlements during suspension. Difficult issues can also arise as to whether the agency can take any action to reinstate an employee's entitlements where an employee who was suspended is found not to have breached the Code.

Process in agency for determination of breach issues

Section 15(3) procedures

In an agency misconduct process a sanction for misconduct can be imposed only if there has been a determination of breach of the Code in accordance with procedures made by the agency head under s 15(3) of the PS Act.

Under s 15(3) of the PS Act, agency head procedures:

- must comply with basic procedural requirements set out in the *Australian Public Service Commissioner's Directions 2013*
- must have due regard to procedural fairness
- may be different for different categories of APS employees.⁹⁵

From 1 July 2013 agency heads have been required to make written procedures under s 15 and to ensure that they are made publicly available.⁹⁶

Commissioner's Directions

Chapter 6 of the *Australian Public Service Commissioner's Directions 2013* includes the following basic requirements for procedures for determining breaches of the Code and imposing any sanction.⁹⁷

93 *Department of Employment and Workplace Relations v Oakley* [PR 954267] AIRC (15 December 2004). See also *Turner v Linkenbach* (1994) 37 ALD 106 at [27]. Contrast *Langley v Commonwealth of Australia* (Australian Customs Service) [2007] AIRC 250, where the AIRC held at [123] that a dismissal was harsh, unjust and unreasonable where (among other things) the employee was not suspended and the termination of employment was more than 2 years after the occurrence of the allegedly serious misconduct.

94 Contract law can provide guidance on the effect of the suspension of an APS employee. Compare *Australian Municipal, Administrative, Clerical and Services Union v Australian Taxation Office*; *Australian Taxation Office v Australian Municipal, Administrative, Clerical and Services Union* [2007] AIRC 511, and on appeal [2007] AIRCFB 591, where the AIRC refused to permit a suspended employee to exercise rights of entry to the workplace under the *Workplace Relations Act 1996*.

95 For example, the procedures for ongoing employees may be different from those for non-ongoing employees.

96 See s 15(6) and (7).

97 References in the Directions to an employee are generally taken to include a reference to a former employee: see cl 6.2. But note that a sanction can only be imposed on a current employee.

- Before any determination on a suspected breach of the Code, reasonable steps must be taken to inform the employee of the details of the suspected breach (including any subsequent variation of those details) and the sanctions that may be imposed under s 15(1). Reasonable steps must be taken to give the employee a reasonable opportunity to make a statement on the suspected breach.⁹⁸
- After a determination of breach is made and before any sanction is imposed, reasonable steps must be taken to inform the employee of the determination of breach, the sanctions under consideration and the factors under consideration in determining any sanction. Reasonable steps must be taken to give the employee a reasonable opportunity to make a statement on the sanctions under consideration.⁹⁹
- The agency head must take reasonable steps to ensure that the person who determines whether there has been a breach and the person who determines any sanction are, and appear to be, independent and unbiased.¹⁰⁰
- The process for determining breach must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.¹⁰¹
- If a determination is made on a suspected breach, a written record must be made of the suspected breach, the determination about breach and any sanctions imposed. A written record of reasons must be made where a statement of reasons is given to the employee.¹⁰²

‘Reasonable steps must be taken to give the employee a reasonable opportunity to make statements both on the suspected breach...[and] on the sanctions under consideration.’

Contents of procedures

Procedures under s 15(3) are procedures for determining a breach of the Code and any sanction. The procedures are legally confined to these matters.

As s 15(3) procedures are legally binding, they should include only requirements that an agency is prepared to comply with as a matter of law. Usually procedures determined under s 15(3) should not include guidance of the kind more appropriate for inclusion in a manual or general instructions for decision-makers or employees.

Terms and conditions of employment

We recommend that legally binding procedures about misconduct matters be confined to an agency’s procedures under s 15(3) to minimise the legal risks that otherwise can arise (see below).

Terms and conditions of employment can be set out in various instruments that have legal force and effect, such as:

- statutory determinations of terms and conditions of employment, such as under s 24 of the PS Act
- contractually agreed terms and conditions, such as those set out in letters of offer and acceptance
- industrial instruments, such as enterprise agreements under the *Fair Work Act 2009* (FW Act).

Breach of these provisions might have legal consequences. For example:

- breach of statutory requirements might render decisions invalid

⁹⁸ See cl 6.3 the *Australian Public Service Commissioner’s Directions 2013*.

⁹⁹ See cl 6.4.

¹⁰⁰ See cl 6.5.

¹⁰¹ See cl 6.6.

¹⁰² See cl 6.7.

- breach of contractual provisions can give rise to remedies for breach of contract
- breach of industrial instruments can render the agency liable to remedies under the FW Act such as penalties or grievance procedures in the Fair Work Commission (FWC).¹⁰³

Adherence to procedures

It is generally desirable to strictly adhere to procedures under s 15(3).

Failing to comply with procedures under s 15(3) can be a breach of administrative law requirements, which would render a decision liable to be set aside on judicial review as invalid. Not every breach will result in invalidity. It is a matter of statutory construction for a court to determine which breaches (if any) are intended by the s 15(3) procedures and PS Act to result in invalidity.¹⁰⁴

Usually a failure to comply with s 15(3) procedures will not in itself lead to a finding that a termination of employment was harsh, unjust or unreasonable.¹⁰⁵ Generally the FWC will uphold a termination of employment that is a fair outcome overall, despite a failure to comply with some procedural requirements.

Employer's duty of good faith

It is now established that Australian law does not imply a duty of trust and confidence in employment contracts.¹⁰⁶ The High Court has left open the questions whether there is a general obligation to act in good faith in the performance of contracts and whether contractual powers and discretions may be limited by good faith and rationality requirements analogous to those applicable in public law.¹⁰⁷

The scope and content of any implied mutual duty of good faith in an employment contract is uncertain.¹⁰⁸ One attempted formulation is that an implied duty of good faith requires that the employer act honestly, reasonably and with prudence, diligence, caution and due care when exercising employer powers and entitlements or otherwise dealing with employees; that the implied duty does not require utmost good faith or discharge of a fiduciary duty; and that the implied duty does not deprive the employer of its capacity to exercise rights in its own interests.¹⁰⁹

Any implied duty of good faith does not require that an employer carry out a misconduct process without deficiencies. For example, the New South Wales Court of Appeal has held that the fact that a misconduct investigation was defective, to the extent that it could have been improved by conducting an interview with the employee face to face rather than by telephone, did not mean that a breach of any implied duty of good faith (or of trust and confidence) was established.¹¹⁰

103 See *Australian Municipal, Administrative, Clerical and Services Union v Australian Taxation Office* [PR 961315] AIRC (11 August 2005), [2005] AIRC 700, concerning alleged non-compliance with a certified agreement that included a statement that the Australian Taxation Office (ATO) is committed to ensuring that the ATO procedure 'Managing Misconduct in the ATO' is properly applied. A Full Bench held that the certified agreement imposed compliance obligations on the ATO.

104 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–391. See also *Bromet v Oddie* [2003] FCAFC 213 at [115]–[116].

105 See *Farquharson v Qantas* (2006) 155 IR 22 [PR971685] AIRC Full Bench (10 August 2006). See also *Palmer v Commonwealth of Australia* (Austrac) [2007] AIRCFB 265 at [33].

106 See *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

107 See *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [42].

108 The *Court of Appeal in Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559 referred to case law that had found a duty of good faith to exist in some circumstances and left open the issue whether the duty is implied in all employment contracts and, if so, the scope and content of the duty.

109 See the decision of the NSW Supreme Court (Rothman J) in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198 at [112]–[118]. That decision was overturned on appeal in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559.

110 See *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559 at [1], [37], [73] to [74], overturning the finding at first instance.

Some procedural issues¹¹¹

Decision to institute a misconduct process

The PS legislation makes no specific provision about when it is appropriate to institute a formal process for determining whether there has been a breach of the Code and, if there has been, what sanction (if any) should be imposed.¹¹²

There is provision in the *Australian Public Service Commissioner's Directions 2013* for the Commissioner to issue standards and guidance about whether to initiate a Code process for performance matters.¹¹³

Agency procedures under s 15(3) generally include procedures for selecting (or otherwise authorising) a person to determine whether there has been a breach of the Code. The procedures generally do not include provisions about when to institute a misconduct process. An agency's procedures under s 15(3) should not seek to regulate the circumstances where it is appropriate to institute a misconduct process, as this ensures that broad management discretion is available in deciding how best to deal with any suspected misconduct.¹¹⁴

Generally misconduct action is not appropriate where the conduct of concern has been expressly or implicitly approved or condoned by management – for example, where management has not taken action when made aware of the conduct.¹¹⁵ Where the conduct problems reflect systemic problems or management deficiencies it is commonly preferable to deal with them as such rather than as individual misconduct matters.

'...[a] broad management discretion is available in deciding how best to deal with any suspected misconduct.'

Procedural fairness obligations do not apply to a decision to institute a process for determining whether there has been a breach of the Code.¹¹⁶

Dealing with unsatisfactory performance

An employee who unsatisfactorily performs their duties can (among other things) be demoted or have their employment terminated.¹¹⁷

¹¹¹ See generally Australian Public Service Commission, *Handling misconduct: a human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct*, 2008, which at the time of writing is under revision by the APSC.

¹¹² The extensive note in Ch 1 of the *Australian Public Service Commissioner's Directions 2013* in the section on how the APS values are enforced includes statements that not every failure to act consistently with the APS Values needs to be dealt with by implementing misconduct procedures and that misconduct action is part of a range of people management practices that agencies have available to support high-quality performance.

Some other public sector regimes have specific tests for commencement of a misconduct process. See *Hall v State of South Australia* [2010] SASC 219 for a discussion of a requirement of suspicion on reasonable grounds of possible breach. See *Pervan v Frawley* (2011) 20 Tas R 185 for a discussion of a requirement of belief on reasonable grounds of possible breach.

¹¹³ See cl 4.2 of the *Australian Public Service Commissioner's Directions 2013*. As at 1 September 2014 the Commissioner had not issued any such standards and guidance.

¹¹⁴ The discretion may be exercised having regard to any factors that are within the scope and purpose of the PS Act and considered by the decision-maker to be relevant.

¹¹⁵ See, for example, *Australasian Transport Officers Association v Department of Motor Transport* (1988) 25 IR 235 at 244. It follows that where inappropriate behaviour has been in effect tolerated by management it might not be appropriate to institute a misconduct process without management having first made clear to the employees what standards of conduct are now expected by management.

¹¹⁶ Compare *Buonopane v Secretary, Department of Employment, Education and Youth Affairs* (1998) 87 FCR 173. That decision was followed in *Dunstan v Orr* [2008] FCA 31 at [99].

¹¹⁷ See s 23(4)(e) and s 29(3)(c) of the PS Act.

Action for possible breaches of the Code is potentially available where an APS employee fails to:

- perform duties with care and diligence¹¹⁸
- comply with a lawful and reasonable direction about performance of duties¹¹⁹
- uphold the APS Values or the APS Employment Principles,¹²⁰ or comply with the Commissioner's Directions¹²¹ relevant to performance,¹²² including the requirement that an employee properly participate in the agency's performance management system.¹²³

Clause 4.2 of the *Australian Public Service Commissioner's Directions 2013* provides that, where the conduct of an APS employee raises concerns about both effective performance and possible breaches of the Code, the agency head must have regard to any relevant standards and guidance from the Australian Public Service Commissioner before deciding whether to initiate any inquiry under s 15(3) procedures.¹²⁴

Subject to the standards and guidance issued by the Commissioner, performance problems are generally better dealt with as performance issues rather than as a possible breach of the Code for a failure to perform duties with care and diligence.¹²⁵

Code action may be appropriate where the employee is wilfully refusing to satisfactorily perform duties, where there is a deliberate or flagrant failure to act with care and diligence or where the employee has had repeated underperformance problems that appear to be within their control and have previously been dealt with as underperformance.¹²⁶ In each of these situations performance management action would also be an option.

Dealing with probationers

In accordance with s 22(6)(a) of the PS Act, an APS employee's engagement may be made subject to conditions dealing with probation.

A probation condition enables the agency to assess whether the employee is suitable for employment, including by reference to their behaviour and performance.¹²⁷

If a probationer fails to meet a probation condition there is a ground for termination of employment.¹²⁸ Subject to the precise terms of the probation condition and any

¹¹⁸ See s 13(2) of the PS Act.

¹¹⁹ See s 13(5).

¹²⁰ See s 13(11). Note that the APS Employment Principle in s 10A(1)(d) provides that the APS requires effective performance from each employee.

¹²¹ See 13(4) and s 42(2).

¹²² See, for example, cl 1.2 of the *Australian Public Service Commissioner's Directions 2013* – in particular, cl 1.2(a), (g) and (k). See cl 4.1 for the elements of the performance management system required to be implemented by the agency head.

¹²³ See cl 1.5(g) of the *Australian Public Service Commissioner's Directions 2013*, which requires that an employee is answerable for individual performance through performance management systems. See cl 4.1 for the elements of the performance management system required to be implemented by the agency head and, in particular, the element in cl 4.1(d) that the agency head must ensure that the agency requires employees to participate constructively in agency-based performance management processes and practices.

¹²⁴ As at 1 September 2014 the APSC has not issued any relevant standards and guidance.

¹²⁵ In *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390, a Full Bench of the Fair Work Commission confirmed that a misconduct process is not necessary where the termination of employment is on the ground of non-performance of duties (as provided for in s 29(3)(c) of the PS Act). Similarly, a misconduct process is not necessarily required where the primary concern is unsatisfactory performance of duties (which is also a ground for termination of employment provided for in s 29(3)(c) of the PS Act).

¹²⁶ In *Rothfield v Australian Bureau of Statistics* (3 February 2003) Print PR927240, the AIRC upheld a decision by an APS agency to terminate employment on the ground of misconduct related to an underperformance process.

¹²⁷ See *R v Agency* [2010] FWA 3446 and *Randall v Australian Taxation Office* [2010] FWA 5626.

¹²⁸ See s 29(3)(f) of the PS Act.

applicable agency probation policies, an agency can terminate the employment of a probationer for inappropriate conduct without the need to find a breach of the Code in accordance with the agency's s 15(3) procedures.¹²⁹ Similarly, provided that any legally binding instruments make clear that the agency's procedures for management of unsatisfactory performance do not apply to probationers, the agency can terminate the employment of a probationer for unsatisfactory performance without a need to follow those procedures.¹³⁰

Concurrent criminal proceedings

Where the conduct in question involves a possible criminal offence as well as a possible breach of the Code there is no automatic rule that administrative action must await the outcome of criminal proceedings. An employee may choose not to provide evidence or submissions in a misconduct process because they wish to protect their rights in a current or possible criminal process (such as the right to silence or the privilege against self-incrimination); however, this does not prevent a misconduct process from proceeding.¹³¹

Agencies may exercise discretion to postpone a Code investigation where appropriate.

An agency generally should not proceed with misconduct action if the police or prosecuting authorities consider that it would involve any prejudice to a criminal investigation or prosecution. Agency action that prejudices a prosecution could be a contempt of court. Agencies should consult the police or prosecuting authorities before taking any action that might affect a criminal investigation or prosecution.

'If a probationer fails to meet a probation condition there is a ground for termination of employment.'

Standard of proof

The standard of proof in determining misconduct matters is the ordinary civil standard of the balance of probabilities.

However, the more serious the alleged breach and its possible consequences, the higher the level of satisfaction required.¹³²

Right to silence

Under the common law a general privilege of silence operates unless qualified by law. The employment relationship qualifies the privilege of silence and creates a legal right for an employer to ask questions or direct an employee to answer questions. This relationship imposes a legal duty requiring an employee to answer employer questions where the matters are work related and the questions are otherwise reasonable.¹³³

However, this is subject to the employee's privilege against self-incrimination and the privilege against self-exposure to penalties.

129 See *R v Agency* [2010] FWA 3446 and *Randall v Australian Taxation Office* [2010] FWAFB 5626. But a breach of the Code can be made only in accordance with the agency's s 15(3) procedures.

130 Compare *Wilson v Australian Taxation Office* (2002) 112 IR 24, where a Full Bench of the AIRC held that underperformance procedures in a certified agreement under the *Workplace Relations Act 1996* applied to a probationer – in particular, because the certified agreement did not make clear that the underperformance procedures did not apply to performance concerns about a probationer.

131 See *Goreng Goreng v Jennaway* (2007) 164 FCR 567.

132 *Briginshaw v Briginshaw* (1938) 60 CLR 336. The AIRC has held the *Briginshaw* standard applicable to APS misconduct matters: see for example *Deer v Centrelink* [T0091] AIRC (1 September 2000).

133 *Associated Dominions Assurance Society Pty Ltd v Andrew* (1949) 49 SR (NSW) 351 at 357–358 per Herron J.

Misconduct processes are generally conducted on the basis that answering questions is voluntary. However, an employer can direct an employee to answer questions subject to the employee's privilege against self-incrimination and self-exposure to penalties.

The fact that an employee chooses not to provide evidence or submissions in a misconduct process does not in itself establish a breach of the Code.

Privileges against self-incrimination and self-exposure to penalty

An APS employee who is requested to provide information (documentary or oral) in a Code of Conduct process is entitled to decline to provide the information on the basis of the privilege against self-incrimination or self-exposure to penalty. APS employees cannot be required to answer questions or to provide information that would tend to incriminate them or expose them to a disciplinary sanction. Any direction to an employee to answer questions or provide information in such circumstances would not be lawful and reasonable.

In *Police Service Board v Morris*¹³⁴ (*Morris*) the High Court held that the privilege against self-exposure to a penalty could apply to a statutory provision that required members of the police force to answer questions tending to show that they had committed disciplinary offences. By analogy, the privilege against self-exposure to penalty could apply to an APS misconduct process.

In *Re Comptroller-General of Customs v Disciplinary Appeal Committee*¹³⁵ (*Day*) the Federal Court (Gummow J) held that the privilege against self-incrimination was applicable to disciplinary action under the then PS Act 1922.¹³⁶ On this approach the privilege would be applicable to misconduct action under the current PS Act.

Nothing in the PS Act abrogates the privileges against self-incrimination or self-exposure to penalty.

Some decisions of the High Court suggest that the privileges against self-incrimination and self-exposure to penalty are not substantive rules of law and that they apply only in judicial proceedings.¹³⁷

On this approach the privileges could not be claimed in an APS misconduct process. However, the Court has not overturned the decisions in *Morris* or *Day*. Until it does so, we should assume that the principles set out in *Morris* and *Day* remain good law.

The privilege against self-incrimination extends to making a disclosure that may lead to incrimination or to the discovery of real evidence of an incriminating character. The privilege is available if there is a reasonable ground to apprehend danger of incrimination to the employee if they are compelled to answer.

Procedural fairness

The PS Act requires fairness in decision-making in misconduct matters. In particular the APS Employment Principles include the principle that the APS makes fair employment decisions.¹³⁸

¹³⁴ (1985) 156 CLR 397.

¹³⁵ (1992) 35 FCR 466.

¹³⁶ In *X v McDermott* (1994) 51 FCR 1 at [43]–[49] the Federal Court held the privilege applicable in an inquiry process under the Defence (Inquiry) Regulations.

¹³⁷ See *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 559; and *Rich v ASIC* (2004) 220 CLR 129 at [24].

¹³⁸ See s 10A(1)(a) of the PS Act. The objects of the PS Act include to provide a legal framework for the effective and fair employment and management of APS employees: see the PS Act, s 3(b). An agency's s 15(3) procedures are required to have due regard to procedural fairness: see the PS Act, s 15(4)(b).

In accordance with the procedural fairness requirements of the general law, an APS employee is entitled to have a reasonable opportunity to make their case before any decision is made that they have breached the Code or that a sanction should be imposed.

The procedures set out in the PS Act and PS Regs and instruments made under them are not an exclusive code that exhaustively sets out procedural fairness requirements.¹³⁹ For example, procedural fairness is not necessarily ensured by giving notice to an employee of the details of suspected breaches of the Code in accordance with requirements under the *Australian Public Service Commissioner's Directions 2013* and an agency's s 15(3) procedures. The steps that will meet procedural fairness obligations will depend on the circumstances of each case.¹⁴⁰

Communications subject to legal professional privilege

Procedural fairness obligations do not prevent legal professional privilege from attaching to privileged communications between an agency and its legal advisers during a misconduct process. Privileged communications are not required to be produced in court proceedings that challenge the outcome of the misconduct process (unless privilege is waived).¹⁴¹

'...an APS employee is entitled to have a reasonable opportunity to make their case before any decision is made that they have breached the Code or that a sanction should be imposed.'

No right to cross-examination

A person making a decision about breaches of the Code or about sanctions has no general power to require anyone to give oral evidence or to require that witnesses be subject to cross-examination. The decision-maker therefore has no procedural fairness obligation to require that witnesses be subject to cross-examination.¹⁴² Decision-makers should nevertheless appropriately test the evidence given to them.

No right to legal representation – role of support person

Decision-makers in misconduct processes are not obliged by administrative law to permit legal representation.¹⁴³ Industrial instruments and procedures made under s 15(3) of the PS Act can provide for representation or support of employees who are subject to a misconduct process, but they are not required to so.

In any discussions relating to termination of employment, the employer should not unreasonably refuse to allow the affected employee to have a support person present.¹⁴⁴

Where the misconduct process might result in termination of employment, generally the employer should not unreasonably avoid having a discussion with the employee and allowing the employee to have a support person present.¹⁴⁵

¹³⁹ See *Rose v Bridges* (1997) 79 FCR 378; *Buonopane v Secretary, Department of Employment, Education and Youth Affairs* (1998) 87 FCR 173; and *Dunstan v Orr* [2008] FCA 31. The decisions concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

¹⁴⁰ See *Lohse v Arthur* (No 3) (2009) 180 FCR 334 for an example of a case where the employee was denied procedural fairness.

¹⁴¹ See *Griffiths v Rose* (2010) 190 FCR 173.

¹⁴² *Rose v Bridges* (1997) 79 FCR 378. The decision concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

¹⁴³ *McGibbon v Linkenbach* (1996) 41 ALD 219. The decision concerned the *Public Service Act 1922*, but the principles should apply equally under the current PS Act.

¹⁴⁴ The employer is otherwise exposed to a finding by the FWC that the termination of employment was harsh, unjust or unreasonable: see s 387(d) of the *Fair Work Act 2009*.

¹⁴⁵ See *Cowan v Sargeant Transport Pty Ltd* [2014] FWC 5330. Compare *Kim v Australian Federal Police* [2013] FWC 1231.

Reasons for decision

Chapter 6 of the *Australian Public Service Commissioner's Directions 2013* does not require statements of reasons for breach or sanction decisions.¹⁴⁶ So there is no general requirement to give a statement of reasons that sets out findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives reasons for the decision.¹⁴⁷ However, it is good administrative practice to inform an employee in writing of the reasons for a breach or sanction decision. The APSC considers that, as a matter of policy, the decision-maker should give informative reasons so that the employee can understand why the decision was made and can meaningfully consider whether to pursue any avenue of redress.

Administrative Decisions (Judicial Review) Act 1977

Decisions that an APS employee should be suspended from duties, has breached the Code or should be subject to a sanction are decisions to which the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act) applies. The employee is entitled to request under the AD(JR) Act that a statement of reasons be provided. Where such a request is made, the decision-maker is obliged to provide a statement of reasons in the form required by s 13 of the AD(JR) Act.¹⁴⁸ Section 13 requires that a statement be provided that sets out findings on material questions of fact, refers to the evidence or other material on which the findings were based and gives reasons for the decision.

Section 15(3) procedures

Where procedures under s 15(3) of the PS Act require that a decision-maker provide a statement of reasons then, unless a contrary intention appears in the procedures, the decision-maker must provide a statement that sets out findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives reasons for the decision.¹⁴⁹

Cessation of employment

In the absence of any relevant provision in the terms and conditions of employment, including in any industrial instrument, an ongoing APS employee has a right to resign, provided that reasonable notice is given. The right of an ongoing employee to resign is not subject to the consent of the employer.¹⁵⁰ What is reasonable notice depends on the circumstances. Two weeks' notice might be regarded as reasonable for most employees, with the possible exception of senior and specialist employees. The employer can agree to shorter notice. For example, an employer can accept a resignation with immediate effect.

Where a person ceases to be an APS employee the agency may proceed to make a determination about breach, but no sanction can be imposed.¹⁵¹ In such cases the decision-making process should continue in accordance with the agency's s 15(3)

¹⁴⁶ See in particular cl 6.7(d).

¹⁴⁷ Compare s 25D of the *Acts Interpretation Act 1901* (Cth) (AI Act) and see following footnote.

¹⁴⁸ The obligation to give reasons under s 13 is subject to certain exclusions: see in particular Sch 2 to the AD(JR) Act. Decisions that an APS employee should be suspended from duties, has breached the Code or should be subject to a sanction are not subject to any exclusions.

¹⁴⁹ See the AI Act, s 25D. The provisions of the AI Act apply to an instrument under an Act – such as the procedures under s 15(3) of the PS Act – whether or not the instrument is legislative: see s 13 of the *Legislative Instruments Act 2003* (Cth) and s 46 of the AI Act. Section 15(8) of the PS Act provides that procedures established under s 15(3) are not legislative instruments.

¹⁵⁰ See APSC Circular No 2000/4. Some classes of non-ongoing employees might require employer consent for resignation, depending on their terms and conditions of employment.

¹⁵¹ See s 15(1) and (3) of the PS Act.

procedures and the requirements of procedural fairness. The fact that a person ceases to be an employee does not prevent the agency from completing documentation of its concerns or its investigations, even where the agency decides not to make a determination about breach.

Sanction

Any sanction that is imposed must only concern the conduct found to have been in breach of the Code. Thus the primary focus of the sanction decision-maker must be on the employee's misconduct (as found in the decision on breach).

The appropriate sanction in any case will be the sanction that the decision-maker considers meets the object of imposing a misconduct sanction, which is not to punish or exact retribution but to protect the reputation of the APS and ensure adherence to proper standards of conduct.¹⁵²

Since the objectives of the APS misconduct regime include to protect the public and maintain proper standards of conduct, it is relevant to consider the need for both specific and general deterrence (to deter any future misconduct by the particular employee and by employees generally).

Factors relevant to the assessment of sanction will include all matters relevant to adherence to proper standards of conduct in the APS and may include a range of factors (apart from the employee's actual misconduct) particular to the individual employee and the circumstances of the case.¹⁵³

Information and records management

Privacy obligations

Use and disclosure of misconduct records is subject to the constraints of the *Privacy Act 1988*. The following uses or disclosures will not contravene an agency's privacy obligations:

- publication in the *Gazette* of the termination of an ongoing employee's employment on the ground under s 29(3)(g)¹⁵⁴
- an agency head's use of an employee's personal information, including misconduct information, where it is relevant to the performance or exercise of employer powers of the agency head¹⁵⁵
- one agency head's disclosure of such information to another agency head where the disclosure is relevant to the performance or exercise of the employer powers of the disclosing or receiving agency head.¹⁵⁶

For example, use or disclosure of misconduct information might be relevant to any future APS employment vetting process. Such information might be relevant to an assessment conducted in accordance with the merit principle (for example, it might be

'...[some] uses or disclosures will not contravene an agency's privacy obligations...'

¹⁵² See the section above in this Briefing on the purpose of the APS misconduct provisions.

¹⁵³ See the section above in this Briefing on the purpose of the APS misconduct provisions and in particular *Bragg v Secretary, Department of Employment, Education and Training* [1996] 476 FCA 1.

¹⁵⁴ The ground of termination in s 29(3)(g) is breach of the Code. See cl 2.29(1)(i) of the *Australian Public Service Commissioner's Directions 2013*.

¹⁵⁵ See reg 9.2(1) of the PS Regs. Use or disclosure under reg 9.2 must be consistent with any guidelines issued by the APSC for that purpose: reg 9.2(6). As at 1 September 2014 no such guidelines have been issued.

¹⁵⁶ See reg 9.2(2). Use or disclosure under reg 9.2 must be consistent with any guidelines issued by the APSC for that purpose: reg 9.2(6). As at 1 September 2014 no such guidelines have been issued.

relevant to the person's ability to perform the duties of the position). Alternatively, it might be relevant to the person's satisfaction of any conditions of engagement relating to character or security.

Retention and destruction of records

Retention and destruction of misconduct records should be in accordance with the requirements of the *Archives Act 1983*. Disposal authorities under the Archives Act permit (but do not require) the destruction of certain classes of misconduct records after a specified period.¹⁵⁷ Agencies can choose to retain records longer if they wish, subject to any obligation to destroy the records. Agency misconduct procedures under s 15(3) of the PS Act sometimes require the destruction of misconduct records after a specified period.

Avenues of redress

Review of actions

An APS employee who is not a senior executive service officer can seek a review of an APS action that relates to their employment, in accordance with the review of action provisions of the PS Act and Regs.¹⁵⁸

An employee must apply directly to the Merit Protection Commissioner for review of a determination that the employee breached the Code and of a sanction imposed for breach of the Code, other than a sanction of termination of employment.¹⁵⁹ The review of action provisions of the PS Act and PS Regs for primary review within the agency at the request of an employee can potentially apply to any action in a misconduct process preceding breach and sanction decisions.¹⁶⁰

Where a person has ceased to be an APS employee and it has been determined that the person breached the Code, they may apply directly to the Merit Protection Commissioner for review of the determination that they breached the Code.¹⁶¹

Making an application for review of an APS action does not operate to stay the action.¹⁶² For example, an employee can seek review of a breach determination without waiting for a decision on sanction, but this does not prevent a decision being made about sanction. Where an employee seeks review of a breach determination, the usual practice of the Merit Protection Commissioner is to await the sanction decision before considering whether the Commissioner can and should conduct a review of the breach decision.

The sanction imposed on an employee, and any related legal proceedings taken by the employee, can affect whether the breach determination and sanction decision can or should be reviewed by the Commissioner.¹⁶³ Also, if a sanction of termination is imposed, the employee ceases to be entitled to any review of action, including for the breach decision.¹⁶⁴

¹⁵⁷ Under current disposal authorities under the Archives Act, records relating to Code investigations that result in a sanction can be destroyed 5 years after action is completed. Where the allegations are not proven, or the allegation is not investigated (including frivolous or vexatious allegations), the records can be destroyed after 18 months. The relevant classes of documents are numbers 20962, 1705, 1706 and 1707 of the *Administrative Functions Disposal Authority* of March 2010 and numbers 20304, 20308 and 20312 of the *General Records Authority AFDA Express*.

¹⁵⁸ See s 33 of the PS Act, and Divs 5.3 and 7.3 of the PS Regs.

¹⁵⁹ See reg 5.24(2) of the PS Regs. Section 33(1) provides that there is no entitlement to a review of action for termination of employment.

¹⁶⁰ See s 33 of the PS Act, and Divs 5.3 of the PS Regs.

¹⁶¹ See Div 7.3 of the PS Regs.

¹⁶² See regs 5.36 and 7.2G the PS Regs.

¹⁶³ An action is reviewable only if it is a *reviewable action* as defined by reg 5.23: see reg 5.22(1)(b).

¹⁶⁴ Reg 5.22(2)(a) provides that a person ceases to be entitled to a review where the person ceases to be an employee.

Unfair dismissal under the Fair Work Act

An APS employee whose employment is terminated for breach of the Code has a right to seek redress under the FW Act (subject to exclusions under that Act), including on the ground that the termination was ‘harsh, unjust or unreasonable’.

The FWC can find that termination was harsh, unjust or unreasonable in the following circumstances:¹⁶⁵

- the employee was not guilty of the misconduct on which the employer acted (having regard to the evidence before the Commission, not just the evidence before the employer decision-maker)¹⁶⁶
- the termination was decided on inferences that could not reasonably have been drawn from the material before the employer
- the sanction is disproportionate to the gravity of the misconduct
- the sanction is harsh in its consequences for the personal and economic situation of the employee.¹⁶⁷

The FWC (and its predecessors) has upheld terminations of APS employment for the following employee misconduct:

- bullying behaviour over an extended period¹⁶⁸
- failing to disclose previous misconduct and previous dismissals¹⁶⁹
- using a Commonwealth credit card for personal purposes¹⁷⁰
- misconduct regarding security reviews¹⁷¹
- using departmental computer facilities to falsify football tipping records and falsely win the competition, then providing false and misleading explanations to departmental investigators¹⁷²
- disclosing information taken from confidential departmental files¹⁷³
- unauthorised access of tax file records and subsequent criminal convictions¹⁷⁴
- unauthorised access to the computer records of clients and conviction on 3 counts of intentionally and without authority obtaining access to personal and financial information of 3 named clients of the departments¹⁷⁵

‘Making an application for review of an APS action does not operate to stay the action.’

165 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410. For an example in the APS context see *Caughley v Department of Defence* [PR 947175] AIRC (27 May 2004).

166 See *Uink v Department of Social Security* (unreported, Australian Industrial Relations Commission, P1965, 24 December 1997). See also *Smith v Department of Foreign Affairs and Trade* [2007] AIRC 765.

167 See *Bates v Commonwealth of Australia (Department of Defence)* [2009] AIRC 899. See also *Black v The Commonwealth of Australia (Department of Defence)* [2011] FWA 293. Contrast *Thanh Vu v Commonwealth of Australia (Australian Taxation Office)* [2014] FWC 755, where a termination of employment for flagrant disregard of the ATO’s IT policy was upheld despite the employee’s long service and the adverse impact on him and his family.

168 *Purser v Commonwealth Attorney-General’s Department* [PR 932560] AIRC (5 June 2003).

169 *Ahmed v Department of Immigration and Multicultural Affairs* [PR 920150] AIRC (16 July 2002).

170 *Department of Employment and Workplace Relations v Oakley* [PR 954267] AIRC (15 December 2004). See also *Magers v Department of Health and Ageing* [2010] FWA 831 and *Sharp v Commonwealth of Australia (Department of Defence)* [2014] FWC 5176 upholding terminations of employment for misuse of credit cards and other misappropriations of public funds for personal use.

See *Day v Australian Customs Service* [2006] AIRC 39 at [117] about the importance of public faith in the integrity of public servants and their handling of public money.

171 See *Corey v Attorney-General’s Department* [PR 956106] AIRC (25 February 2005), where the AIRC upheld a termination of employment for providing false and misleading information in security clearance interviews and failing to disclose to the vetting officer a sexual relationship of possible concern from a security viewpoint.

See *Lever v Australian Nuclear Science and Technology Organisation* [2009] AIRC 784 and on appeal [2009] FWAFB 1733, where the AIRC upheld a termination of employment for a range of misconduct including a failure to comply with a lawful and reasonable direction to undergo a security clearance.

172 *Cunningham v Australian Bureau of Statistics* [PR 963720], [2005] AIRC 872.

173 *Patton v Department of Human Services* [PR 946728] AIRC (14 May 2004).

174 *Bauer v Australian Taxation Office* [P8088] AIRC (14 January 1998).

175 *Utting v Department of Social Security* (unreported, Australian Industrial Relations Commission, Lawson C, Po267, 17 April 1997).

- continuing to send inappropriate and offensive communications despite repeated warnings¹⁷⁶
- harassing fellow employees and managers by making false allegations against them and engaging in other inappropriate behaviour¹⁷⁷
- inappropriate use of work IT facilities¹⁷⁸
- failure to follow lawful and reasonable directions about attendance at work.¹⁷⁹

Where the FWC finds that termination of employment is unfair, it can order reinstatement and payment of compensation where appropriate.¹⁸⁰ FWC should order reinstatement rather than compensation unless it is satisfied that reinstatement is inappropriate. For example, it can decline to order reinstatement where it accepts evidence that the employment relationship had irrevocably broken down.¹⁸¹

General protections under Fair Work Act

The protections under the FW Act include a prohibition on a person taking adverse action¹⁸² against another person for certain reasons, including:

- because the other person has a workplace right, has exercised a workplace right or proposes to exercise a workplace right¹⁸³
- discriminatory grounds such as physical or mental disability and family or carers' responsibilities¹⁸⁴
- because of temporary absence from work because of illness or injury of a kind prescribed by regulations under the FW Act.¹⁸⁵

176 *Salmond v Department of Defence* [2010] FWA 5395 and on appeal [2010] FWA 9636, concerning the dismissal of an employee for making numerous unsubstantiated allegations and disparaging comments about other employees and Ministers.

177 *McKeon v Centrelink* [PR 911316] AIRC (15 November 2001). See previous footnote. See also *Hunter v Commonwealth Department of Sustainability Environment, Water, Populations and Communities* [2013] FWC 7917 concerning the dismissal of an employee for making false allegations of bullying against his supervisor.

178 See *Williams v Centrelink* [PR 942762] AIRC (15 January 2004) concerning the dismissal of an employee for sending 23 inappropriate emails, including pornographic or otherwise sexually explicit images, to other employees and to external recipients. See also *O'Neile v Centrelink* [2006] AIRC 493, where a termination of employment was upheld.

See *Thanh Vu v Commonwealth of Australia (Australian Taxation Office)* [2014] FWC 755 (30 January 2014) concerning the dismissal of an employee for using work IT facilities to send inappropriate material to a personal email address and to store offensive material where there was a firm IT policy, no culture of toleration and the employee had been given a prior warning for an earlier breach with notice that further breaches would be dealt with as misconduct.

Contrast *Bates v Commonwealth of Australia (Department of Defence)* [2009] AIRC 899, where it was held that the dismissal was unfair despite breaches of Code and departmental ICT policies for storing inappropriate material on a work computer. Also contrast *Gmitrovic v Australian Government, Department of Defence* [2014] FWC 1637, where it was held that the employee was not validly dismissed because FWA was not satisfied that there was excessive personal use of the internet or use of an 'anonymous' search engine in breach of IT security requirements. See also *Tonkin v Centrelink* [2006] AIRC 375 and *X v Commonwealth of Australia* [2013] FWC 9140 for examples of cases where dismissals for alleged improper use of ITC systems were held to be unfair.

179 See *Eyre v Department of Human Services* [2006] AIRC 533 concerning the dismissal of an employee for failing to follow directions that the employee either resign unapproved external employment and return to APS duties or resign from the APS. See *Paunovska v Commonwealth of Australia (Centrelink)* [2011] FWA 2505 and on appeal [2012] FWA 2820, concerning the dismissal of an employee for failing to follow directions about recording hours of attendance. See *McIntosh v Australian Federal Police* [2014] FWC 1497, concerning the dismissal of an employee for failing to follow directions about the required hours of attendance.

180 See the FW Act, ss 390–393.

181 *McKeon v Centrelink* [PR 911316] AIRC (15 November 2001).

182 See s 342 of the FW Act as to what constitutes adverse action.

183 See s 340 of the FW Act. See s 341 of the FW Act as to what constitutes a workplace right. A workplace right will generally include benefits to which an employee is entitled under legislation or industrial instruments. It also includes an employee's ability to make a complaint or inquiry in relation to their employment.

184 See s 351 of the FW Act. These protections are subject to an exception where action is taken because of the inherent requirements of the particular position concerned: see s 351(2)(b).

185 See s 352.

Depending on the circumstances, the commencement of a formal disciplinary process and the conduct of an investigation into misconduct allegations might be regarded as adverse action.¹⁸⁶ Suspension from duties under reg 3.10 or imposition of a sanction under s 15(1) will constitute adverse action. A finding of breach is likely to be regarded as adverse action. Such misconduct action against an employee will infringe the protections where it is taken for a proscribed reason. For example, suspension and termination of employment for misconduct have been held to constitute adverse action for a proscribed reason where the employee's misconduct arises from or is a manifestation of an illness such as depression.¹⁸⁷

Agencies need to be careful to ensure that misconduct processes and actions are taken for genuine disciplinary purposes and not for any proscribed reasons. If necessary, agencies must be in a position to establish this to the satisfaction of a court – for example, by way of evidence from the decision-maker, noting that the agency must discharge the reverse onus imposed on employers and others by the FW Act.¹⁸⁸

The FW Act states that adverse action does not include action that is authorised by or under Commonwealth law.¹⁸⁹ An agency should be able to establish that it comes within this exclusion provided it takes misconduct action in accordance with the PS Act and the agency's procedures under s 15(3) and otherwise acts in accordance with all legal requirements, including the requirements of administrative law.

Remedies for breach of the general protections provisions under the FW Act can be sought by the affected employee, relevant union or an inspector appointed under the FW Act. Remedies include court orders imposing civil penalties and various protective or remedial orders, including injunctions and orders for reinstatement or compensation.¹⁹⁰

Judicial review

Employment decisions under the PS Act are subject to the usual administrative law requirements, including a requirement that employees be afforded procedural fairness in decision-making. An employee can seek judicial review under the general law¹⁹¹ or under the AD(JR) Act.

'...suspension and termination of employment for misconduct have been held to constitute adverse action for a proscribed reason where the employee's misconduct arises from or is a manifestation of an illness such as depression.'

¹⁸⁶ See *Police Federation of Australia v Nixon* (2008) 168 FCR 340. See also *Jones v Queensland Tertiary Admissions Centre Ltd* (No 2) (2010) 186 FCR 22.

Alternatively, commencement of a formal disciplinary process and the conduct of an investigation into misconduct allegations might be regarded as normal incidents of employment that do not themselves constitute adverse action: see for example *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (2003) 198 ALR 466 at [89]–[92].

¹⁸⁷ See *Grant v State of Victoria* (The Office of Public Prosecutions) [2014] FCCA 17.

¹⁸⁸ See s 361 of the FW Act.

¹⁸⁹ See s 342(3) of the FW Act. For example, in *Eriksson v Commonwealth of Australia* [2011] FMCA 964 at [42] it was held that, where a termination of employment pursuant to s 29(3)(d) of the PS Act (on the ground of inability to perform duties because of a physical or mental incapacity) was lawfully made, the decision did not constitute adverse action, as it was within the exception in s 342(3) of the FW Act.

¹⁹⁰ See Ch 4 of the FW Act.

¹⁹¹ For example, under the jurisdiction conferred on the Federal Court by s 39B of the *Judiciary Act 1903*.

Whistleblower protections under the Public Interest Disclosure Act

The *Public Interest Disclosure Act 2013* (PID Act) provides for the protection of current and former public officials (including APS employees) who make a public interest disclosure of the kind that is covered by the Act. The PID Act also provides for investigation of a public interest disclosure covered by the Act.

A person who makes a public interest disclosure covered by the PID Act has immunities from legal liability and protection from reprisals.¹⁹² It is a criminal offence to take, or threaten to take, such reprisal action against another person. The Federal Court or Federal Circuit Court can make orders to protect a person from reprisals or threatened reprisals and can make remedial orders, including reinstatement and payment of compensation.

Where misconduct action is taken for legitimate management purposes and not because a person has made a public interest disclosure, there is no breach of the protections in the PID Act.

Where a person makes a public interest disclosure covered by the PID Act, there is generally an obligation to investigate, subject to some exceptions.¹⁹³

Disclosures of the kind that can attract the protections and engage the investigation obligations under the PID Act include disclosures of alleged misconduct where:

- the disclosure is of information that tends to show, or that the discloser believes on reasonable grounds tends to show, conduct that could, if proved, give reasonable grounds for disciplinary action against a public official (including an APS employee)
- the disclosure is made by an APS employee to their supervisor; an authorised officer in their agency or in the agency to which the conduct relates; or the Ombudsman.¹⁹⁴

Where an agency conducts a PID Act investigation that relates to an alleged breach of the Code, the agency must comply with its procedures under s 15(3) of the PS Act.¹⁹⁵ Agencies should therefore ensure that procedures under s 15(3) take appropriate account of the operation of the PID Act.

Commonly, a convenient means of ensuring compliance with obligations under the PID Act is to require that a PID Act investigation be carried out before the commencement of any formal misconduct process under the PS Act and that the PID investigation be the basis for deciding whether to commence a formal misconduct process. Alternatively, in some cases it is appropriate for a Code investigation to proceed, in which case a decision might be made, once the Code action has commenced, not to investigate the disclosure under the PID Act.

¹⁹² See ss 10–19A of the PID Act.

¹⁹³ See ss 46–54 in relation to investigations. Note also the obligations in ss 42–45 concerning allocation of public interest disclosures to the appropriate agency for handling of the investigation and any consequential action.

¹⁹⁴ See s 29(2).

¹⁹⁵ See s 53(5)(b).

Workers' compensation

The *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) provides for compensation to be paid to Commonwealth employees when they suffer a work-related injury or disease. Comcare makes decisions under the SRC Act.

Under the SRC Act, injuries or diseases that are the result of reasonable disciplinary action (formal or informal) are excluded from compensation if the action was taken in a reasonable manner in respect of the employee's employment.¹⁹⁶ The exclusion also covers reasonable counselling action (formal or informal) and reasonable suspension action. It extends to anything reasonably done in connection with counselling, suspension or disciplinary action.¹⁹⁷

The scope of the exclusionary provision was significantly expanded in 2007.¹⁹⁸ Before then the courts and Administrative Appeals Tribunal had been restrictive in determining what was reasonable disciplinary action under the old exclusion. Broadly, steps taken before determining a breach or imposing a sanction, including investigation of possible breaches of the Code, were held not to amount to reasonable disciplinary action.¹⁹⁹ These cases on the restrictions under the old exclusion no longer provide useful guidance. The current exclusion extends to anything reasonably done in connection with formal or informal disciplinary action. For example, it can clearly cover the decision to commence a formal Code process and investigation.

'Where a person makes a public interest disclosure covered by the PID Act, there is generally an obligation to investigate...'

Under s 14(3) of the SRC Act compensation is not payable in respect of an injury that is caused by serious and wilful misconduct by the employee unless the injury results in death or serious and permanent impairment.²⁰⁰ The conduct must be 'a direct and proximate cause and not simply the cause of the cause or the mere occasion of the injury.'²⁰¹ 'Serious' refers to the misconduct and not to its consequences.²⁰²

¹⁹⁶ For an example of informal disciplinary action see *Perera v Comcare* [2013] AATA 589, in which the Administrative Appeals Tribunal (AAT) found that a reprimand given to an employee in a meeting about the employee's behaviour in that meeting was reasonable administrative action taken in a reasonable manner.

¹⁹⁷ See s 5A of the SRC Act. The Full Court of the Federal Court in *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463 confirmed that the exclusion applies to actions such as disciplinary action and explained that the exclusion does not extend to action in relation to the employee performing their ordinary duties. See *Comcare v Martinez* (No 2) (2013) 212 FCR 272 at [65]–[84] as to the proper approach for assessing whether action is reasonable for the purposes of the exclusionary provisions in s 5A of the SRC Act. See for example *Blatchford v Commonwealth Bank of Australia Ltd* [2011] AATA 735 and *Re Jane Amanda Sands and Comcare* [2011] AATA 710.

¹⁹⁸ See the *Safety, Rehabilitation and Compensation Act and Other Legislation Amendment Act 2007*.

¹⁹⁹ See *Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees v Chenhall* (1992) 37 FCR 75 at 83. See also *Ramalingam and Comcare* [2004] AATA.

²⁰⁰ The Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 introduced on 19 March 2014 proposes to remove the exception to s 14(3). If passed, s 14(3) will preclude the payment of compensation for any injury caused by the serious and wilful misconduct of the employee.

²⁰¹ *Re Elvin and Comcare* (1998) 51 ALD 706 at 741.

²⁰² *Comcare v Calipari* [2001] FCA 1534 at [3].

This briefing was prepared by Paul Vermeesch

Paul Vermeesch works extensively in misconduct matters, assisting clients to manage misconduct processes and make decisions, and to deal with legal challenges.

AGS contacts

Canberra	Sarah Wright	02 6253 7630
	Catherine Mann	02 6253 7402
Sydney	Richard Harding	02 9581 7671
	Paulina Fusitu'a	02 9581 7759
Melbourne	Virginia Masters	03 9242 1201
	Craig Rawson	03 9242 1248
Brisbane	Jane Lye	07 3360 5736
	Fiona Dempsey	07 3360 5737
Perth	Wendy Endebrock-Brown	08 9268 1113
Adelaide/Darwin	Rodger Prince	08 8205 4211
Hobart	David Wilson	03 6210 2101

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Offices

Canberra	4 National Circuit, Barton ACT 2600
Sydney	Level 42, 19 Martin Place, Sydney NSW 2000
Melbourne	Level 21, 200 Queen Street, Melbourne VIC 3000
Brisbane	Level 11, 145 Ann Street, Brisbane QLD 4000
Perth	Level 19, 2 The Esplanade, Perth WA 6000
Adelaide	Level 18, 25 Grenfell Street, Adelaide SA 5000
Hobart	Level 8, 188 Collins Street, Hobart TAS 7000
Darwin	Level 9, 9–11 Cavenagh Street, Darwin NT 0800

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E ags@ags.gov.au*

ISSN 1448-4803
Approved Postage PP 233744/00042