118 Legal briefing

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Misconduct in the Australian Public Service

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In this issue

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 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]

Readers are also referred to the very helpful guidance in the Australian Public Service Commission (APSC) publication ***Handling misconduct: a human resources practitioner's manager's guide*****.[4]**

1 See the objects of the *Public Service Act 1999* (PS Act) in s 3.

2 See the cases discussed below under the heading 'Purpose of APS misconduct provisions'.

3 This briefing replaces AGS Legal Briefings No 80, No 104 and No 110. References to legislation are current as at November 2021.

4 Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021) https://www.apsc.gov.au/publication/handling-misconduct-human-resource-managers-guide.

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 of 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.[5]

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 11[6]
  - 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 sanction[7]
  - 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.[8]

Employee knowledge of legislation

Each APS employee is required to inform themselves about the PS Act, the PS Regs and the Australian Public Service Commissioner's Directions under the PS Act.[9]

Purpose of APS misconduct provisions[10]

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.[11]

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5 See the APS Values in s 10, the APS Employment Principles in s 10A, the APS Code of Conduct (the Code) in s 13 and provisions in s 15 about how to deal with possible breaches of the Code.

6 See the *Australian Public Service Commissioner's Directions 2016*, Pt 2.

7 See the *Australian Public Service Commissioner's Directions 2016*, Pt 5.

8 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 2016*.

9 See the *Public Service Regulations 1999* (PS Regs), reg 3.16.

10 The *Public Service Act 1922* referred to 'disciplining' public servants for misconduct. The current Act does not. Although it is correct to describe the regulation of conduct of APS employees under the PS Act as disciplinary matters, this briefing generally refers to conduct or misconduct or Code of Conduct matters.

11 See *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34]–[35]. See also Comcare v Banerji (2019) 267 CLR 373 at [30]–[34].

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.[12] The High Court has also observed that:

> Members of the Australian Public Service are enjoined by the *Public Service Act* (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest.[13]

The High Court has also held that, consistent with the significance of the APS as a constituent part of the system of representative and responsible government, the APS Code of Conduct regime is properly directed to maintaining and protecting an apolitical and professional public service that is skilled and efficient in serving the national interest.[14] In the context of our system of representative and responsible government it is important that the government, parliament and the Australian public have confidence in the APS as an apolitical and professional public service that is skilled and efficient in serving the national interest.[15]

Misconduct action does not involve the imposition of punishment for criminal offences.[16] The APS Code of Conduct regime is in the nature of a civil penalty regime directed at deterring conduct in breach of the Code and thus maintaining and protecting the public and constitutional purposes served by the APS.[17]

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

Legislative history

Introduction of *Public Service Act 1999*

The current PS Act replaced the *Public Service Act 1922*.[18] 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.[19]

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12 See *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34]–[35]. 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 current PS Act. The High Court endorsed the observations of Finn J in *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24–25.

13 *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at [55]. See also *Comcare v Banerji* (2019) 267 CLR 373 at [31].

14 *Comcare v Banerji* (2019) 267 CLR 373 at [30]–[34]. On the role of the APS in the system of representative and responsible government see [56]–[65], [142]–[155] and [202]–[206]. On the history and ethos of the APS see [66]–[75] and [171]–[182].

15 See previous footnote and *Comcare v Banerji* (2019) 267 CLR 373 at [101],[153]–[155] and [190].

16 See *R v White; Ex parte Byrnes* (1963) 109 CLR 665. 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.

17 *Comcare v Banerji* (2019) 267 CLR 373 at [40]–[44]. 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: see *Bragg v Secretary, Department of Employment, Education and Training* [1996] FCA 476.

18 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. This briefing refers to many cases concerning the *Public Service Act 1922*. Where it does so, we consider that the principles in the cases also apply under the current PS Act.

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

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.[20] The amendments were made as part of a reform agenda to position the APS to better serve the Australian Government and Australian community.[21] 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
- empowering the Australian Public Service Commissioner and the Merit Protection Commissioner to determine alleged breaches of the Code by current and former APS employees[22]
- 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.

Changes to Public Service Act effective 1 July 2014

Minor revisions to some elements of the Code came into effect from 1 July 2014.[23] These changes were to make the Code consistent with the duties of APS employees and other officials under the *Public Governance, Performance and Accountability Act 2013* from 1 July 2014.

Australian Public Service Commissioner's Directions 2016

The *Australian Public Service Commissioner's Directions 2016*[24] include:

- the standards and outcomes required of APS employees to ensure that they uphold the APS Values[25]
- 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 responsibilities[26]
- basic procedural requirements in Pt 5 for determining breaches of the Code and imposing any sanction[27]

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20 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 PS Regs.

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

22 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.

23 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*.

24 The *Australian Public Service Commissioner's Directions 2016* commenced on 1 December 2016. They replaced the *Australian Public Service Commissioner's Directions 2013*, which in turn replaced the Commissioner's previous directions with effect from 1 July 2013. Part 8 of the *Australian Public Service Commissioner's Directions 2016* sets out transitional provisions.

25 See the *Australian Public Service Commissioner's Directions 2016*, Pt 2. These directions are made pursuant to s 11 of the PS Act.

26 The reporting requirement in s 14(f) extends to misconduct and other unacceptable behaviour by *public servants* generally. It is not confined to misconduct and other unacceptable behaviour by APS employees.

27 Part 5 is discussed in detail below.

- the Australian Public Service Commissioner's 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.[28]

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.[29]

APS employees are required to adhere to the Code,[30] which includes a requirement that they must at all times behave in a way that upholds the APS Values and the APS Employment Principles.[31] The *Australian Public Service Commissioner's Directions 2016* detail the specific conduct expectations and standards required to uphold each of the APS Values.[32]

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

An APS employee is liable to sanctions only if they are found to have breached the Code.[33] A determination about a Code breach can be made for a current or former APS employee.[34] However, a sanction can only be imposed on a current APS employee.[35]

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*.[36]
- Under the general law, APS employees are subject to a duty of good faith and fidelity.[37]

Breach of statutory obligations can be a breach of the Code under s 13(4) of the PS Act.[38] 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

28 See the *Australian Public Service Commissioner's Directions 2016*, s 40, further discussed below. This provision was first introduced from 1 July 2013.

29 See the PS Act, s 15.

30 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.

31 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.

32 See the PS Act, s 42(2).

33 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 the PS Act, ss 15, 41B(3) and 50A(2). 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).

34 See s 15(3).

35 See s 15(1).

36 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*.

37 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].

38 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 below.

upholds the APS Values and the integrity and good reputation of the agency and the APS.

Persons bound by the APS Code of Conduct

The Code applies to APS employees as defined by the PS Act.[39] This includes ongoing and non-ongoing employees and any Head of Mission.[40] 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 head[41]
- a person who holds any office or appointment under an Act and prescribed by the PS Regs.[42]

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.[43] 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.[44]

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 which apply according to their terms. 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.[45] The High Court, in upholding the constitutional validity of s 13(11) and related provisions, has held that the legislative purpose of those provisions is to ensure that employees of the APS at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS and that the provisions are properly directed to maintaining and protecting an apolitical and professional public service that is skilled and efficient in serving the national interest, consistent with the system of representative and responsible government mandated by the *Constitution*.[46]

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

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

41 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.

42 See s 14(3). Regulation 2.2 prescribes certain persons for the purposes of the definition of 'statutory office holder' in s 14(3).

43 See, for example, *Hussein v Westpac Banking Corporation* (1995) 59 IR 103 at 107; and *Coward v Gunns Veneer Pty Ltd* [1997] FCA 1341 and [1998] FCA 696.

44 See *Blyth Chemicals v Bushnells* [(933) 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.

45 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. See also *Griffiths v Rose* (2011) 192 FCR 130 regarding improper 'private' use of a work computer.

46 *Comcare v Banerji* (2019) 267 CLR 373 at [30]–[34].

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 workplace[47]
- viewing pornography alone at home outside of work hours using a work computer on a privately owned internet connection[48]
- making comments on social media about work-related matters, even if anonymous at the time of making the comments[49]
- failure to lodge personal tax returns[50]
- 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).[51]

Conduct requirements in the Code of Conduct

The conduct requirements in ss 13(1), (2), (3) and (4) of the PS 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.[52] 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

Under 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 do[53]

47 For example, where such conduct is contrary to a lawful and reasonable direction: *McManus v Scott-Charlton* (1996) 70 FCR 16.

48 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).

49 *Comcare v Banerji* (2019) 267 CLR 373 at [24]. In *Starr v Department of Human Services* [2016] FWC 1460 the FWC found that conduct outside of work for a (non-trivial) breach of an APS social media policy was misconduct in breach of the Code – in particular, where it damaged the legitimate interests of the Commonwealth such as its reputation and perceived impartiality.

50 See *Kathuria v Australian Taxation Office* [2015] FWC 8553.

51 Compare *Corrective Services NSW v Danwer* (2013) 235 IR 215; [2013] NSWIRComm 61 at [50]–[67]. See the APS Value in s 10(2) and the requirements of s 14 of the *Australian Public Service Commissioner's Directions 2016* about the highest standards of ethical behaviour and acting in a way that is right and proper.

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

53 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. The concept of 'in connection with' APS employment is broader than the concept of 'in the course of' APS employment.

- conduct that is part of the employee's functions as an employee[54]
- conduct in the purported performance of duties, even if not in fact authorised[55]
- 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 that the employer agency has organised or endorsed 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 ss 13(1), 2), (3) and (4) were amended by the *Public Service Amendment Act 2013* (with effect from 1 July 2013), those sections 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.[56] 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. However, 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.

Agencies can also 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 would make their employment liable to termination.[57] Generally it is a simpler process to terminate employment for failure to meet a condition of engagement than for breach of the Code.

Former employees[58]

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 they were an APS employee.

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

55 *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.

56 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'.

57 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.

58 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 thought to have breached 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.[59] But no sanction can be imposed on a person who is not an APS employee.[60]

Elements of the Code of Conduct

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

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.[61]

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.[62]

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 nature and gravity of the employee's misconduct and thus the determination of an appropriate sanction.

Interpretation of the Code

The Code applies according to its terms in their context.[63] These terms generally are not defined by the PS Act and generally do not have any technical meaning beyond their ordinary English meaning in their context.

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.

59 See s 15(3).

60 See s 15(1).

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

62 Compare *O'Connell v Palmer* (1994) 53 FCR 429. See also *Bercove v Hermes* (No 3) (1983) 51 ALR 109 at 117 and 119–120, where a Full Court of the 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.

63 See *Comcare v Banerji* (2019) 267 CLR 373 for a discussion of the text, context and purpose of s 13(11) of the Code of Conduct and related provisions.

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.[64]

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 2016*. 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 even if this requires a finding that a criminal offence has been committed.[65]

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 Code[66]
- that agency heads and APS employees comply with the directions that the Australian Public Service Commissioner has issued under the PS Act.[67]

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*[68]
- 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.[69]

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.[70]

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64 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.

65 Compare *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352. Section 13(4) requires a finding of a failure to comply with a law and does not itself necessarily require a finding of commission of an offence. Whether such a finding is required depends on the terms of the law in issue. Compare also *Channel Seven Adelaide Pty Ltd v Australian Communications and Media Authority* (2014) 223 FCR 65.

66 See s 35(3).

67 See the PS Act, s 42(2), and the *Australian Public Service Commissioner's Directions 2016*. Section 7 defines the Commissioner's Directions as referred to in s 42(2).

68 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*.

69 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.

70 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.[71] Section 13(5) recognises that there is an implied power to give directions.[72]

An agency head does not generally need to provide a delegation or express authorisation to issue directions.[73] 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. 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.[74] The direction must also be reasonable in all the circumstances.[75]

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71 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 the PS Act, s 22(1). An employer has power under the general law (that is, the law of contract) to give lawful and reasonable directions to an employee.

Under reg 3.2 an agency head has express power in certain circumstances to direct an APS employee to attend a medical examination. That express power should not be understood as limiting the general power to give lawful and reasonable directions.

Reg 2.1(6) recognises that an agency head's power to give lawful and reasonable directions extends to directions in relation to disclosure of information.

72 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]. Although the source of that power may be contractual, enforcement of a direction through Code action involves the exercise of statutory power.

73 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 to put beyond doubt any issue that the person giving a direction has authority to do so.

74 See *McManus v Scott-Charlton* (1996) 70 FCR 16, which the High Court referred to with approval in *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34].

A direction involves illegality if it is contrary to law. For example, in *Gallagher v Aboriginal Hostels Limited* [2006] AIRC 298, it was held that a direction to an employee to return a vehicle to the employer was unlawful because it was contrary to a contractual term and condition of employment that the employee have access to the vehicle. A direction that prevented or impaired an employee from assisting and co-operating with the authorities in the investigation and prosecution of crime would probably be unlawful: compare *A v Hayden* (1984) 156 CLR 532.

75 An employer direction can be unreasonable and therefore unenforceable if it unduly restricts freedom of expression, including expression on government and political matters (*Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [71], [81] and [110]–[116]) or unduly intrudes into an employee's private life: *McManus v Scott-Charlton* (1996) 70 FCR 16 at 29–30; *Griffiths v Rose* (2011) 192 FCR 130 at [34]–[36].

In *Griffiths v Rose* (2011) 192 FCR 130 it was held that an APS agency's direction 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. Compare *Anderson v Sullivan* (1997) 78 FCR 380. In *Johnson v Sullivan* [2002] FMCA 35, the Court upheld the validity of an agency head's direction to an APS employee to be absent from work on personal leave.

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 the Federal Court (in 2003) held to be invalid on the basis that it infringed the implied constitutional freedom of communication on political matters.[76]

A new reg 2.1 was inserted with effect from 15 July 2006.[77] A superior court has held this provision to be valid as not infringing the implied constitutional freedom of communication on political matters.[78]

Freedom of expression and implied constitutional freedom of communication

The common law recognises a right to freedom of expression. Where possible, courts will prefer a construction of legislation that is consistent with freedom of expression.[79] Public service legislation to some extent operates to restrict the freedom of expression of APS employees.[80]

The implied constitutional freedom is concerned with protecting communication on political and governmental matters. It operates as a constraint upon legislative power rather than as a conferral of positive individual rights.[81] In particular, it does not confer an individual right to continued employment.[82]

The test for the implied freedom of political communication does not apply to an individual exercise of statutory power, such as a decision about whether or not an APS employee has breached the Code and should be the subject of a sanction.[83] Unless the relevant statute, properly construed, so provides, an administrative decision-maker does not have to take into account the considerations in the test for the implied freedom of political communication.[84] The role of a court is to apply the test for the implied freedom to assess the validity of a legislative provision (for example, a provision permitting termination of employment), not the decision made in accordance with the legislation (for example, a termination decision).[85]

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76 See *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334. 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.

This amended version of reg 2.1 was in force in the period 23 December 2004 to 16 June 2005.

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

78 See *R v Goreng-Goreng* (2008) 220 FLR 21, a decision of the ACT Supreme Court constituted by Refshauge J. In *Comcare v Banerji* (2019) 267 CLR 373 the High Court held that ss 10(1), 13(11) and 15(1) of the PS Act did not impose an unjustified burden on the implied freedom of political communication, and the termination of the employee's employment with the Commonwealth was not unlawful.

79 See *Starr v Department of Human Services* [2016] FWC 1460 at [72]–[73].

80 See the PS Regs, reg 2.1. See also the PS Act, ss 10(5) and 13(11), and the Australian Public Service Commissioner's Directions 2016, s 17(b). In *Comcare v Banerji* (2019) 267 CLR 373 the High Court upheld the validity of ss 10(1), 13(11) and 15(1) of the PS Act as not infringing the implied freedom of political communication.

81 *Comcare v Banerji* (2019) 267 CLR 373 at [20].

82 See *Banerji v Minister for Immigration and Border Protection & Ors* [2017] HCATrans 101 (Edelman J), a case concerning APS employment. The High Court refused special leave to appeal from the judgment of Edelman J: [2017] HCASL 176.

83 *Comcare v Banerji* (2019) 267 CLR 373 at [20] and [43]–[45].

84 See previous footnote.

85 See previous footnote.

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.[86]

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.[87]

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

86 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).

87 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.

prior written consent of the Australian Public Service Commissioner does not apply when selecting a breach decision-maker.[88]

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.[89]

The agency head must also delegate power (under s 15(1) of the PS Act) to a person who imposes a sanction.[90] 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.[91]

Bias issues

To comply with the *Australian Public Service Commissioner's Directions 2016*, 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.[92] 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.'

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

88 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.

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

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

91 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.

92 *Australian Public Service Commissioner's Directions 2016*, s 45.

of perception but is determined objectively by a court.[93]

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

- has an interest in the outcome[94]
- previously expressed a concluded view on a matter that needs to be determined.[95]

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.[96] 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.[97]

'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.'

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.[98]

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 that the relevant Commissioner has established.[99] The Commissioner must report the results of their inquiry and determination to the agency head.[100] The Australian Public Service Commissioner may in some circumstances also recommend a sanction.[101]

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93 For example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

94 In *Isbester v Knox City Council* (2015) 255 CLR 135 it was held that a role as prosecutor was incompatible with a subsequent role as administrative de*cision-maker in a related matter and gave rise to a reasonable apprehension of bias.*

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).

95 See *Gaisford v Hunt* (1996) 71 FCR 187 regarding an inquiry under the Public Service Act 1922 into the conduct of APS employees. 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.

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

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

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

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

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

101 See s 41B(9).

Suspension from duties[102]

Possible reassignment[103]

When considering suspension from duties, consideration should be given to the possibility of assignment of other duties under s 25.[104] Suspension should generally be imposed only where assignment of other duties is not appropriate.[105]

The power under s 25 should be exercised only for operational reasons and not as a means of, in effect, imposing a sanction.[106]

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.[107]

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.[108]

It might be appropriate not to accord procedural fairness where there is urgency or some overriding public interest – if there are safety concerns, for example.[109] 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.

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

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

104 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].

105 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.

106 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).

107 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. See *Smith v Australian Criminal Intelligence Commission* [2019] FCCA 1811 for an example of case where there was internal and MPC review of a suspension decision and also judicial review.

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

109 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.

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.[110]

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.[111] 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 that the agency head has made 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 2016*
- must have due regard to procedural fairness
- may be different for different categories of APS employees.[112]

Agency heads are required to make written procedures under s 15 and to ensure that they are made publicly available.[113]

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110 *Department of Employment and Workplace Relations v Oakley* [PR 954267] AIRC (15 December 2004). See also *Turner v Linkenbagh* (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.

111 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*.

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

113 See s 15(6) and (7), which took effect from 1 July 2013.

Commissioner's Directions

Part 5 of the *Australian Public Service Commissioner's Directions 2016* includes the following basic requirements for procedures for determining breaches of the Code and imposing any sanction:[114]

'Reasonable steps must be taken to give the employee a reasonable opportunity to make a statement on the suspected breach…[and] on the sanctions under consideration.'

- Before any determination on a suspected breach of the Code is made, 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.[115]
- 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.[116]
- 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.[117]
- The process for determining a breach must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.[118]
- 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.[119]

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).

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114 References in the directions to an employee are generally taken to include a reference to a former employee: see s 42. But note that a sanction can only be imposed on a current employee.

115 See the *Australian Public Service Commissioner's Directions 2016*, s 43.

116 See s 44.

117 See s 45.

118 See s 46.

119 See s 47. See further the discussion below under the heading Reasons for decision as to when reasons are required and the content of any statement of reasons.

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
- breach of contractual provisions can give rise to remedies for breach of contract[120]
- breach of industrial instruments can render the agency liable to remedies under the FW Act – for example, penalties or dispute resolution procedures in the FWC.[121]

Adherence to procedures

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

A failure to comply with procedures under s 15(3) can be a breach of administrative law requirements. This would render a decision liable to be set aside on judicial review as invalid.[122] 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.[123]

A failure to comply with s 15(3) procedures will not necessarily lead to a finding that a termination of employment was harsh, unjust or unreasonable.[124] Generally the FWC will uphold a termination of employment that is a fair outcome overall, despite a failure to comply with some procedural requirements.[125] However, a significant procedural defect, such as a failure to provide a reasonable opportunity to comment, can result in a finding that a termination of employment was harsh, unjust or unreasonable, even if there is a valid reason for termination.

'...the seriousness of misconduct can ... destroy the trust and confidence underlying the employment relationship.'

No duty of trust and confidence

It is now established that Australian law does not imply a duty of trust and confidence in employment contracts.[126] However, it remains the case that the seriousness of misconduct can be assessed by reference to its tendency to destroy the trust and confidence underlying the employment relationship.[127]

120 For example, in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403, a Full Court of the Federal Court held that policies for the handling and investigation of certain allegations were contractually binding. In *Gramotnev v Queensland University of Technology* (2015) 251 IR 448; [2015] QCA 127 it was held that the university's discipline policy operated as contractual terms.

121 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.

122 See *Henzell v Centrelink* [2006] FCA 1844 at [31].

123 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].

124 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], where a Full Bench held that, while is it clearly desirable, even highly desirable, that an agency's s 15(3) procedure be observed, it does not follow that a failure to follow such a procedure will automatically result in the termination being harsh, unjust or unreasonable.

125 For an example in an APS context, see *Nemcic v Australian Electoral Commission T/A AEC* [2018] FWC 5645 where the FWC upheld a termination for serious misconduct despite material procedural deficiencies.

126 See *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

127 See *Melbourne Stadiums v Souther* (2015) 317 ALR 665.

Employer's duty of good faith

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.[128]

The scope and content of any implied mutual duty of good faith in an employment contract is uncertain.[129] 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
- the implied duty does not require utmost good faith or discharge of a fiduciary duty
- the implied duty does not deprive the employer of its capacity to exercise rights in its own interests.[130]

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 was established.[131]

No duty of care in conducting disciplinary process

It is desirable that employers act reasonably in conducting disciplinary processes and with sensitivity to an employee's health and wellbeing. However, if the employer fails to do so, this will not necessarily give rise to a cause of action for damages under the general law. When an employer is carrying out a disciplinary investigation and decision-making process, its duty of care to its employees does not require it to exercise reasonable care to prevent an employee from suffering reasonably foreseeable injury or loss as a result of that process.[132]

Some procedural issues[133]

Decision to institute a misconduct process

The PS legislation makes no specific provision about when it is appropriate to institute a formal misconduct process.[134]

128 See *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [42].

129 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.

130 See the decision of the Supreme Court of NSW (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. Compare *Regulski v State of Victoria* [2015] FCA 206 at [219]–[223].

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

132 See *State of New South Wales v Paige* (2002) 60 NSWLR 371. See also *Govier v The Uniting Church in Australia Property Trust (Q)* [2017] QCA 12 (Govier) at [60]–[78] per Fraser JA, [87] per Gotterson JA and [88] per North J. Compare *Quinn v Overland* [2010] 199 IR 40 at [48]–[64].

133 See generally Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021).

134 In the APS context a formal misconduct process is the process for determining whether there has been a breach of the Code and, if there has been, what sanction (if any) should be imposed.

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 misconduct.[135]

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.[136] Where the conduct problems reflect systemic problems or management deficiencies, it is usually preferable to deal with them as such rather than as individual misconduct matters.

Section 40 of the *Australian Public Service Commissioner's Directions 2016* 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. Such standards and guidance have been issued.[137] They provide useful general guidance about whether to institute a formal misconduct process.

Under the Commissioner's standards and guidance, in each case employers must give careful consideration to which approach they will use, having regard to issues such as the seriousness of the suspected behaviour, the likelihood of a constructive response by the employee to action under the agency's performance management framework and the extent to which the suspected behaviour is within the employee's control.[138]

Procedural fairness obligations do not apply to a decision to institute a process for determining whether there has been a breach of the Code.[139]

Dealing with unsatisfactory performance

An employee who unsatisfactorily performs their duties can (among other things) be demoted or have their employment terminated.[140]

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

- perform duties with care and diligence[141]
- comply with a lawful and reasonable direction about performance of duties[142]

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135 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 – for example, any consideration relevant to the efficient and effective operation of the agency or APS: see the objects of the PS Act set out in s 3.

136 See, for example, *Burge v New South Wales BHP Steel Proprietary Limited* (2001) 105 IR 325 at [31]. 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.

137 The standards and guidance are set out in the Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021), paras 5.1.5–5.1.9.

138 See Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021), paras 5.1.5–5.1.9.

139 Compare *Buonopane v Secretary, Department of Employment, Education and Youth Affairs* (1998) 87 FCR 173 at 184–185. That decision was followed in *Dunstan v Orr* (2008) 217 FCR 559 at [99] and [102]–[104].

140 See the PS Act, ss 23(4)(e) and 29(3)(c).

141 See the PS Act, s 13(2).

142 See s 13(5).

- uphold the APS Values or the APS Employment Principles[143] or comply with the Commissioner's directions[144] relevant to performance,[145] including the requirement that an employee be answerable for their individual performance.[146]

'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.'

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.[147] 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.[148] In each of these situations, performance management action would also be an option, subject to taking into account the Commissioner's standards and guidance.[149]

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.[150]

If a probationer fails to meet a probation condition, there is a ground for termination of employment.[151] Subject to the precise terms of the probation condition and any applicable agency probation policies, an agency can terminate a probationer's employment for inappropriate conduct without the need to find a breach of the Code in accordance with the agency's s 15(3) procedures.[152] 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 a probationer's employment for unsatisfactory performance without a need to follow those procedures.[153]

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143 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.

144 See ss 13(4) and 42(2).

145 See, for example, the *Australian Public Service Commissioner's Directions 2016*, s 13. See s 39 for the elements of the performance management system required to be implemented by the agency head.

146 See the *Australian Public Service Commissioner's Directions 2016*, s 16(g). See s 39B for the performance obligations of APS employees, including obligations.

147 In *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390, a Full Bench of the FWC 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).

148 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.

149 See the *Australian Public Service Commissioner's Directions 2016*, s 40; and Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021), section 5 (as discussed above).

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

151 See the PS Act, s 29(3)(f).

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

153 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.

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 their privilege against self-incrimination); however, this does not prevent a misconduct process from proceeding.[154]

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.

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.[155]

Right to silence

Under the general law a number of principles, taken together, give rise to what is commonly referred to as a 'right to silence'. An important part of the right to silence is the privilege against self-incrimination, under which a person cannot be compelled to reveal information that would have the tendency to expose that person to a criminal conviction. This 'right' may be qualified by law. However, as the privilege against self-incrimination is a fundamental common law immunity, it can only be qualified by statutory provisions in terms which are express or require as much by necessary implication.

The employment relationship carries with it a legal right for an employer to direct an employee to answer the employer's questions where the matters are work related and the questions are otherwise reasonable.[156] However, this general entitlement does not abrogate the employee's privilege against self-incrimination. Accordingly, while an employer can direct an employee to answer questions during a misconduct process, the employer's direction does not abrogate the employee's right to exercise the privilege against self-incrimination.

Absent any direction by an employer, misconduct processes are generally conducted on the basis that answering questions and providing information is voluntary.[157] Where an employee chooses not to provide evidence or submissions in a misconduct process, this is not an implied admission and does not itself establish a breach of the Code.

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

155 *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) at [54].

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

157 A general practice of not directing employees to provide information in Code matters appears to have developed when it was the general view that the privilege against self-exposure to penalties applied to the APS misconduct regime. That is no longer the general view since *Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5.

Privilege against self-incrimination

Under the general law, the privilege against self-incrimination is a substantive rule of law. Nothing in the PS Act abrogates the privilege. The privilege can be claimed in an APS misconduct process.[158]

An APS employee who is required 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. If an APS employee properly claims this privilege, the employee cannot be required to answer questions or to provide information that would tend to incriminate them for a criminal offence. Any direction to an employee to answer questions or provide information in such circumstances would not be lawful and could not be enforced.

The privilege against self-incrimination extends to making a disclosure that may lead to conviction of the person for a criminal offence or to the discovery of real evidence which might assist in establishing commission of a criminal offence. The privilege is available if there is a reasonable ground to apprehend danger of incrimination to the employee if they are compelled to answer.

The proper making of a claim of privilege against self-incrimination is not an implied admission and cannot itself establish a breach of the Code. Decision-makers in Code processes should be cautious in drawing adverse inferences where a person properly claims the privilege against self-incrimination.[159]

Privilege against self-exposure to penalty

In some situations a person may be able to assert a privilege against self-exposure to penalties (that is, sanctions in the nature of a penalty which are not themselves a criminal offence). However, the privilege cannot be claimed where sanctions may potentially be imposed through the APS misconduct regime. The privilege cannot be claimed in that context to excuse an employee from being compelled to answer questions about work-related matters.

It is now established that penalty privilege is not generally available in a federal administrative context unless it is applied by statute.[160] In that context, penalty privilege is not a substantive rule of law applicable outside of judicial proceedings. Accordingly, it will only be available in that context if the relevant legislation expressly, or by clear implication, provides that penalty privilege applies. The legislation applicable to APS misconduct processes does not so provide.

Procedural fairness

The *Public Service Act 1922* required that a disciplinary charge be laid against an employee suspected of misconduct, and the general practice was to provide particulars of a charge where appropriate.[161] The current legislation has no requirement for the laying of charges

158 In *Re Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466 the Federal Court (Gummow J) held that the privilege against self-incrimination was applicable to disciplinary action under the *Public Service Act 1922*. In *X v McDermott* (1994) 51 FCR 1 at 10–11 the Federal Court held the privilege applicable in an inquiry process under the *Defence (Inquiry) Regulations 1985*.

159 See, for example, *C v T* (1995) 58 FCR 1 (a case concerning an inquiry process under the *Defence (Inquiry) Regulations 1985)*. Compare *Weisensteiner v The Queen* (1993) 178 CLR 217.

160 *Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5. See AGS Express Law, 15 February 2018, for a summary of the decision.

161 Where the decision-maker on a disciplinary charge is a tribunal analogous to a court (which is not the case with the APS discipline regime), the person charged may be entitled to proper particulars of the charge against them: see, for example, *Etherton v Public Service Board of New South Wales* [1983] 3 NSWLR 297 at 305.

or the provision of particulars of a charge. The extrinsic materials indicate a legislative intention to cease using processes and concepts similar to those in the criminal law.[162]

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.[163]

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.

'...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.[164] In some circumstances, compliance with those procedures might be sufficient to discharge procedural fairness obligations.[165] However, 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 2016* and an agency's s 15(3) procedures.[166] The steps that will meet procedural fairness obligations will depend on the circumstances of each case.

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).[167]

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.[168] 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.[169] 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 do so.

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

163 See the PS Act, s 10A(1)(a). 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).

164 See *Dixon v Commonwealth of Australia* (1981) 61 ALR 173; *Rose v Bridges* (1997) 79 FCR 378 at 386; *Buonopane v Secretary, Department of Employment, Education and Youth Affairs* (1998) 87 FCR 173 at 186; *Henzell v Centrelink* [2006] FCA 1844 at [31] (a case about the current PS Act); and *Dunstan v Orr* [2008] FCA 31.

165 In *Buonopane v Secretary, Department of Employment, Education and Youth Affairs* (1998) 87 FCR 173 at 186 it was held that compliance with the statutory procedures was sufficient and no supplementation was required.

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

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

168 *Rose v Bridges* (1997) 79 FCR 378.

169 *McGibbon v Linkenbagh* (1996) 41 ALD 219.

'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.'

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.[170] 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.[171]

Reasons for decision

Part 5 of the *Australian Public Service Commissioner's Directions 2016* does not require statements of reasons for breach or sanction decisions.[172] 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.[173] However, it is good administrative practice to inform an employee in writing of the reasons for a breach or sanction decision. It is generally good practice for the decision-maker to 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.[174] 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.[175]

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

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

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

172 See in particular s 47(d).

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

174 Decisions that an APS employee should be suspended from duties, has breached the Code or should be subject to a sanction are not excluded from the obligation to give reasons under s 13: see the AD(JR) Act, Sch 2.

175 See the AI Act, s 25D and s 46.

not subject to the consent of the employer.[176] What is reasonable notice depends on the circumstances. Two weeks' notice might generally be regarded as reasonable, 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 an employee chooses to resign after being advised that it is proposed to terminate their employment for breach of the Code, that will not be a forced resignation by way of constructive dismissal, provided there has been an appropriate decision making process. The mere fact of a proposed termination in such circumstances does not involve any duress.[177]

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.[178] In such cases the decision-making process should continue in accordance with the agency's s 15(3) 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 maintain and protect the integrity and reputation of the APS and ensure adherence to proper standards of conduct.[179]

In assessing the appropriate sanction (if any), it is necessary to consider the nature and gravity of the misconduct, the need for both specific and general deterrence (to deter any future misconduct by the specific employee and by employees generally) and the personal circumstances of the employee.[180]

Factors to which the sanction decision-maker may have regard include any other matters relevant to the objects of the PS Act and adherence to proper standards of conduct in the APS.[181]

The High Court has described the task of the sanction decision-maker as follows.[182]

> [40] Section 15 of the Public Service Act provides for a range of penalties and for the selection and imposition of the appropriate penalty by the Agency Head in the exercise of discretion. As a matter of law, that **discretion must be exercised reasonably and, therefore, according to the nature and gravity of the subject contravention**. As with other civil penalties, the **essence of the task** is to put a price on the contravention sufficiently high **to deter repetition** by the contravenor and others who might be tempted to contravene, but bearing in mind that a penalty of dismissal must not be "harsh, unjust or unreasonable". Unquestionably, there are cases of breach of s 13(11) that are so serious in the damage done to the integrity and good

176 Some non-ongoing employees might require employer consent for resignation, depending on their terms and conditions of employment.

177 *Stephens v Department of Communication and the Arts* [2019] FWC 6399.

178 See the PS Act, s 15(1) and (3).

179 See above in this briefing under the heading 'Purpose of APS misconduct provisions'.

180 *Comcare v Banerji* (2019) 267 CLR 373 at [40]–[45].

181 See above in this briefing under the heading 'Purpose of APS misconduct provisions' and for example *Bragg v Secretary, Department of Employment, Education and Training* [1996] FCA 476.

182 *Comcare v Banerji* (2019) 267 CLR 373 at [40]–[45].

> reputation of the APS that the only appropriate penalty is termination of employment. ... By contrast, in other cases the level of the employee involved and the nature of the conduct in issue may be such that nothing more than a reprimand is warranted. And of course between those two extremes lies a range of possible situations warranting the imposition in the reasonable exercise of discretion of differing penalties according to the particular facts and circumstances of the matter. ... Breach of the [Code of Conduct] renders an employee of the APS **liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct**....
>
> [44] ...If a decision maker imposes a manifestly excessive penalty, it will be unlawful because the decision maker has acted unreasonably...
>
> [45]... **The task is to impose a penalty which accords to the nature and gravity of the subject breach and the personal circumstances of the employee in question.**
>
> [Emphasis added, footnotes omitted]

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 for breach of the Code[183]
- 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 head[184]
- 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.[185]

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 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.[186] 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.

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183 See the *Australian Public Service Commissioner's Directions 2016*, s 34(1)(e).

184 See the PS Regs, reg 9.2(1). 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 28 January 2021 no such guidelines have been issued: *Handling misconduct: a human resource manager's guide* (28 January 2021) at 8.3.2.

185 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 28 January 2021 no such guidelines have been issued: *Handling misconduct: a human resource manager's guide* (28 January 2021) at 8.3.2.

186 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.

Avenues of redress

Review of actions

An APS employee who is not an SES 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.[187]

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.[188] 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.[189]

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.[190]

An application for review of an APS action does not operate to stay the action.[191] 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.

The sanction imposed on an employee, and any related legal proceedings that the employee takes, can affect whether the Commissioner can or should review the breach determination and sanction decision.[192] Also, if a sanction of termination is imposed, the employee ceases to be entitled to any review of action, including for the breach decision.[193]

'An application for review of an APS action does not operate to stay the action.'

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:[194]

- 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)[195]
- 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

187 See the PS Act, s 33; and the PS Regs, Divs 5.3 and 7.3.

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

189 See the PS Act, s 33; and the PS Regs, Div 5.3.

190 See the PS Regs, Div 7.3.

191 See the PS Regs, regs 5.36 and 7.2G.

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

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

194 For the general test see *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).

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

- the sanction is harsh in its consequences for the personal and economic situation of the employee.[196]

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

- bullying behaviour over an extended period[197]
- failing to disclose previous misconduct and previous dismissals[198]
- making false job applications with the employer agency[199]
- using a Commonwealth credit card for personal purposes[200]
- misconduct regarding security reviews[201]
- using departmental computer facilities to falsify football tipping records and falsely win the competition, then providing false and misleading explanations to departmental investigators[202]
- interference in an electoral count by an employee in the Australian Electoral Commission who also lied to the misconduct investigation[203]
- disclosing information taken from confidential departmental files[204]
- unauthorised access of tax file records and subsequent criminal convictions[205]
- failure by an Australian Taxation Office officer to lodge personal tax returns for 4 consecutive years[206]
- 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 department[207]
- rude, abusive, harassing and intimidating behaviour towards co-workers[208]

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196 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.

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

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

199 *Rahman v Commonwealth of Australia* as represented by the Australian Taxation Office [2016] FWC 4575; permission to appeal refused in [2016] FWCFB 4652.

200 *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.

201 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.

Compare *Applicant v Department of Defence* [2014] FWC 4919, where the FWC upheld termination of employment on the ground of loss of an essential qualification where the employee's security clearance was revoked.

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

203 *Nemcic v Australian Electoral Commission T/A AEC* [2018] FWC 5645.

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

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

206 *Kathuria v Australian Taxation Office* [2015] FWC 8553.

207 *Utting v Department of Social Security* [P0267] AIRC (17 April 1997).

208 *Harlen v Department of Defence* [1997] IRCA 238.

- continuing to send inappropriate and offensive communications despite repeated warnings [209]
- harassing fellow employees and managers by making false allegations against them and engaging in other inappropriate behaviour[210]
- inappropriate use of work IT facilities[211]
- failure to follow lawful and reasonable directions about attendance at work.[212]
- making a large number of unsubstantiated complaints about supervisors and colleagues over an extended period in circumstances where the employer reasonably tried to resolve the employee's concerns.[213]

Where the FWC finds that termination of employment is unfair, it can order reinstatement and payment of compensation where appropriate.[214] The 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.[215]

General protections under the Fair Work Act

The protections under the FW Act include a prohibition on a person taking adverse action[216] 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 right[217]

209 *Salmond v Department of Defence* [2010] FWA 5395 and on appeal [2010] FWAFB 9636, concerning the dismissal of an employee for making numerous unsubstantiated allegations and disparaging comments about other employees and ministers. But note that there are potentially relevant protections of complainants under the general protections under the FW Act and of whistleblowers under the *Public Interest Disclosure Act 2013* as discussed below.

210 *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.

211 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 T*hanh Vu v Commonwealth of Australia* (Australian Taxation Office) [2014] FWC 755 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 FWC 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.

212 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] FWAFB 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 and *McIntosh v Commonwealth of Australia*, as represented by the Commissioner of Police [2014] FWCFB 6662, concerning the dismissal of an employee for failing to follow directions about the required hours of attendance.

213 *Gunawardana v Commonwealth of Australia, as represented by Services Australia* [2021] FWC 2243.

214 See the FW Act, ss 390–393.

215 *McKeon v Centrelink* [PR 911316] AIRC (15 November 2001). Compare *Melbourne Stadiums Ltd v Sautner* (2015) 317 ALR 665 to the effect that the seriousness of misconduct can be assessed by reference to its tendency to destroy the trust and confidence underlying the employment relationship.

216 See the FW Act, s 342, as to what constitutes adverse action.

217 See the FW Act, s 340. See the FW Act, s 341, 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 concerning their employment. This would generally include complaints of misconduct by another employee: see *Walsh v Greater Metropolitan Cemeteries Trust* (No 2) [2014] FCA 456; 243 IR 468 at [41]–[44].

- discriminatory grounds such as physical or mental disability and family or carers' responsibilities[218]
- because of temporary absence from work because of illness or injury of a kind prescribed by regulations under the FW Act.[219]

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.[220] Suspension from duties under reg 3.10 or imposition of a sanction under s 15(1) will constitute adverse action.[221] 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 will infringe the protections where actuated by a proscribed reason such as disability; it is not sufficient that the employee's misconduct arises from or is a manifestation of an illness such as depression.[222]

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, through evidence from the decision-maker, noting that the agency must discharge the reverse evidentiary onus imposed by the FW Act.[223]

The FW Act states that adverse action does not include action that is authorised by or under Commonwealth law.[224] 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.[225]

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.[226]

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218 See the FW Act, s 351. 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).

219 See s 352.

220 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. See also *Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* (2013) 216 FCR 70 at [95]–[106].
Alternatively, commencement of a formal disciplinary process and the conduct of an investigation of 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].

221 *See Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* (2013) 216 FCR 70 at [107]–[115] regarding suspension.

222 See State of Victoria (Office of Public Prosecutions) v Grant (2014) 246 IR 441. Compare *National Tertiary Education Industry Union v University of Sydney* (2021) 392 ALR 252.

223 See the FW Act, s 361. A mere assertion that an alleged adverse action by way of disciplinary action was taken for prohibited reasons is not enough to trigger the reverse onus; there must be some evidence of a connection: *Rahman v Commonwealth of Australia* [2014] FCA 1356 at [42]–[47].

224 See the FW Act, s 342(3).

225 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. See *Ashby v Commonwealth of Australia* (No 2) [2021] FCA 830 as to the test to make out the exception in s 342(3) of the FW Act. See *Ashby v Commonwealth of Australia (No 2)* [2021] FCA 830 as to the test to make out the exception in s 342(3) of the FW Act.

226 See the FW Act, Ch 4.

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 law[227] or under the AD(JR) Act.

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

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.[229]

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.[230]

Where a PID Act disclosure relates to an alleged breach of the Code of Conduct, a decision needs to be made about how to carry out any investigation.[231] A PID Act investigation may include consideration of whether a different investigation should be conducted under another law of the Commonwealth or procedures established under such a law[232]: this would include Code procedures established under s 15(3) of the PS Act. The report of a PID Act investigation may include a recommendation that there should be a formal Code investigation.[233]

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

228 See the PID Act, ss 10–19A.

229 See ss 46–54 regarding 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.

230 See s 29(2).

231 Under s 48 there is a discretion to not investigate. If the matters are being investigated in a formal Code investigation, a decision can be made to not (further) investigate the matters under the PID Act: s 48(1)(f).

232 See ss 47(3) and (4).

233 Section 51(2) sets out what must be included in a report of a PID Act investigation, including any recommended action. Note 1 to s 51 gives the example of a recommendation that there should be a formal Code investigation.

One approach is to carry out a short form PID Act investigation. This can be done quickly if, having regard to the information that is disclosed, the PID investigator considers that there should be a formal Code investigation. The PID investigator can provide a short report and recommendation accordingly.

Alternatively, the PID Act investigator may consider that a longer PID Act investigation is required. An extensive PID Act investigation may nevertheless result in a recommendation that there should be a formal Code investigation. Such a recommendation can be made in the course of or on completion of a PID Act investigation and should be included in the PID Act investigation report.[234]

Where an agency conducts a PID Act investigation concerning an alleged breach of the Code, the agency must comply with its procedures under s 15(3) of the PS Act.[235] To avoid procedural complexity, it is generally undesirable for a person to attempt to simultaneously carry out a PID Act investigation and a Code investigation.[236]

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.

Under s 5A of the SRC Act, an injury or disease that is the result of reasonable administrative action is excluded from compensation if the action was taken in a reasonable manner in respect of the employee's employment.[237] The exclusion covers injuries and diseases resulting from disciplinary action (formal or informal), reasonable counselling action (formal or informal) and reasonable suspension action.[238] It extends to anything reasonably done in connection with counselling, suspension or disciplinary action.[239] The exclusion does not extend to action that concerns the employee performing their ordinary duties.[240]

In *Comcare v Martin*[241] the High Court clarified the causal connection between 'administrative action' and a disease that must be made to potentially exclude liability under the SRC Act. Previously, it was considered that the exclusion in s 5A could apply if 'administrative action' was an operative cause of an employee's psychological condition. The High Court's decision introduces a more nuanced enquiry. Now, the question will be whether the administrative action made the difference between the employee's employment failing to contribute to the employee's ailment or aggravation, to a significant degree, and their employment contributing to their ailment or aggravation, to a significant degree. By virtue of s 5B(3) of the SRC Act, a contribution to a significant degree will be 'a degree that is substantially more than material'.

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234 See s 51(1)(d).

235 See s 53(5)(b).

236 Where simultaneous PID Act and Code investigations are carried out, it is generally necessary and desirable that the PID investigator also be authorised under the agency's s 15(3) procedures to determine whether there has been a breach of the Code.

237 An identical s 5A operates in the same way in the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

238 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. See *CXFD and Comcare* [2021] AATA 2377 for an example of a case concerning proposed suspension and institution of a Code investigation.

239 See the SRC Act, s 5A.

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.

240 See *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463.

241 (2016) 258 CLR 467.

Under s 14(3) of the SRC Act, compensation is not payable for an injury that is not self-inflicted and is caused by an employee's serious and wilful misconduct unless the injury results in death or serious and permanent impairment. The assessment of whether, in particular circumstances, serious and wilful misconduct has been established is a question of fact to be decided in all the circumstances of the particular case.[242] The conduct must be 'a direct and proximate cause and not simply the cause of the cause or the mere occasion of the injury'.[243] Misconduct is serious if it significantly increases the likelihood of serious injury.[244] To be serious and wilful misconduct, 'it must be such as to give rise to an immediate risk of serious injury, it must be deliberate and not merely a thoughtless act done on the spur of the moment and it must be accompanied by an appreciation of the risk which is involved in it'.[245]

242 *Inco Ships Pty Ltd v Hardman* (2007) 167 FCR 294 at 75.

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

244 *Inco Ships Pty Ltd v Hardman* (2007) 167 FCR 294 at 81. However, 'serious' refers to the misconduct and not to its consequences: *Comcare v Calipari* [2001] FCA 1534 at [3].

245 *Hills v Brambles Holdings Ltd* (1987) 4 ANZ Ins Cas 60–785 per Green CJ.

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