



Procedures for determining breaches of the Code of Conduct and for determining sanction

I, David Parker, Chair of the Clean Energy Regulator ('the Agency'), establish these procedures under subsection 15(3) of the *Public Service Act 1999* ('the Act').

These procedures commence on the date of signing and apply to any APS Code of Conduct matter commenced on or after this date.

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

A handwritten signature in black ink, appearing to read 'David Parker', written over a horizontal line.

DAVID PARKER, AM

Chair of the Clean Energy Regulator and Agency Head

Date: 11 / 11 / 2017

1. Application of procedures

- 1.1. These procedures apply in determining whether a person who is an APS employee in the Agency, or who is a former APS employee who was employed in the Agency at the time of the suspected misconduct, has breached the APS Code of Conduct ('the Code') in section 13 of the *Public Service Act 1999* ('the Act').
- 1.2. These procedures apply in determining any sanction to be imposed on an APS employee in the Agency who has been found to have breached the Code.
- 1.3. These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except for one in respect of which a decision had been made before 1 July 2013 to begin an investigation to determine whether there had been a breach of the Code.
- 1.4. These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after 1 July 2013.
- 1.5. In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the Act in connection with their engagement as an APS employee.

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

2. Availability of procedures

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

3. Breach decision maker and sanction delegate

- 3.1. As soon as practicable after a suspected breach of the Code has been identified and the Chair, or a person authorised by the Chair, has decided to deal with the suspected breach under these procedures, the Chair or that person will appoint a decision maker ('the breach decision maker') to make a determination under these procedures.

Note: Section 40 of the Australian Public Service Commissioner's Directions 2016 provide that where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the Agency Head must, before making a decision to commence formal misconduct action under these procedures, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner.

- 3.2. The role of the breach decision maker is to determine in writing whether a breach of the Code has occurred.
- 3.3. The breach decision maker may seek the assistance of an internal or external investigator with matters including investigating the alleged breach, gathering evidence and making a report of recommended factual findings to the breach decision maker.
- 3.4. The Chair, or a delegate of the Chair, or a sub-delegate of the Chair ('the sanction delegate') will decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code. The sanction delegate must hold a delegation of the power under the Act to impose sanctions.
- 3.5. Subject to clause 3.4, these procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

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

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

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

- 4.1. The breach decision maker, any investigator assisting the breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased.
- 4.2. The breach decision maker, any investigator assisting the breach decision maker and the sanction delegate must advise the Chair in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased, for example if they are a witness in the matter or have previously made a report in relation to all or any matters suspected of constituting the breach of the Code by the employee.

5. The determination process

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

Note: Procedural fairness generally requires that:

- *the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision maker that is adverse to the person or their interests and that is credible, relevant and significant)*
- *the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction*
- *the decision maker acts without bias or an appearance of bias*
- *there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.*

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

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

and

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

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

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

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

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

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

Note: The person who is suspected of breaching the code of conduct may have some impediment or special need for which allowance needs to be made in order that they can properly put their views.

6. Sanctions

- 6.1. The process for deciding on sanction must be consistent with the principles of procedural fairness.
- 6.2. If a determination is made that an APS employee of the Agency has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:
 - a) inform the employee of:
 - i. the determination that has been made;
 - ii. the sanction or sanctions that are under consideration; and
 - iii. the factors that are under consideration in determining any sanction to be imposed; and
 - b) give the employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration within 7 calendar days, or any longer period that is allowed by the sanction delegate.

Note: The sanction delegate may decide to give the employee the opportunity to make a written statement and/or an oral statement.

7. Record of determination and sanction

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

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

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

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

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

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

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