



APS Code of Conduct – Determining Breaches and Determining Sanction (Revision 1)

Target audience: All Authority Employees

Alert/ safety/ special considerations:

I, Josh Thomas, Chief Executive Officer of the Great Barrier Reef Marine Park Authority, establish these procedures under subsection 15(3) of the *Public Service Act 1999* (the PS Act).

These procedures commence on the date of their publication in the Authority's [master document list](#).

These procedures supersede the previous procedures made for the Authority under subsection 15(3) of the PS Act, and apply, from the date of their commencement, to all new and ongoing processes for determining breaches of the APS Code of Conduct and for determining sanction.

Josh Thomas

Purpose

1. To establish procedures under subsection 15(3) of the *Public Service Act 1999* ('the PS Act') for determining:
 - 1.1. whether an Australian Public Service ('APS') employee, or a former employee, of the Great Barrier Reef Marine Park Authority ('the Authority') has breached the APS Code of Conduct set out in section 13 of the PS Act ('the Code'); and
 - 1.2. the sanction (if any) to be imposed on an APS employee of the Authority who is found to have breached the Code (including by engaging in conduct referred to in subsection (2A)).

Context/ scope

2. These procedures apply in determining whether:
 - 2.1. an APS employee of the Authority; or
 - 2.2. a former APS employee who was employed by the Authority at the time of the suspected misconduct; or
 - 2.3. a person, who is or was an APS employee, engaged in conduct set out in subsection 15(2A) of the PS Act in connection with their engagement as an APS employee of the Authority; has breached the Code.
3. These procedures apply in determining any sanction to be imposed on an APS employee of the Authority who has been found to have breached the Code.
4. Labour hire staff placed at the Authority are not subject to the Code, however, are required to complete a 'Deed of Commitment of Services' (document number 100110, on the Authority's internal [master document list](#)) prior to their placement which includes undertakings aligned to the Code's conduct requirements. These procedures do not apply to labour hire staff.
5. As provided for in subsection 15(7) of the PS Act, these procedures are publicly available on the Authority's website.

Definitions

- Reference to an 'APS employee' or 'employee' in these procedures is reference to a person engaged by the Authority under section 22 of the PS Act, or a person engaged as an APS employee under section 72 of the PS Act, and includes a former employee who is alleged or suspected to have breached the Code whilst an employee of the Authority.¹
- 'Procedural fairness' (also known as 'natural justice') refers to a general administrative law principle requiring that:

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PROCEDURE

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- A decision-maker be impartial and be free of actual or apparent bias ('the bias rule');
- A person whose interests will be affected by a proposed decision receives a fair hearing, including the opportunity to respond to any adverse material that could influence the decision ('the hearing rule'); and
- Findings are based on evidence that is relevant and logically capable of supporting the findings ('the evidence rule').^{2, 3}

Related documents/ legislation

- *Public Service Act 1999*
- *Public Service Regulations 1999* ('PS Regulations')
- *Australian Public Service Commissioner's Directions 2016*
- *Privacy Act 1988*
- *Archives Act 1983*
- The Authority's instrument of delegation, 'Delegation – People Management' (document number 100380, on the internal [master document list](#))
- The Authority's policy, 'Conflict of Interest' (document number 100254, on the internal [master document list](#), and also [available externally via the eLibrary](#))
- *Great Barrier Reef Marine Park Authority (GBRMPA) Enterprise Agreement 2018-2021* or any successor agreement
- The Australian Public Service Commission's (APSC) 'Handling misconduct: a human resource manager's guide'.

Required forms/ equipment

- Nil

Decision to commence formal misconduct action

6. Upon becoming aware of a suspected breach of the Code by an APS employee, the Chief Executive Officer of the Authority ('the CEO'), or a person authorised by the CEO, may decide to deal with the suspected breach in accordance with these procedures.

Note: Not all suspected breaches of the Code need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach may be more appropriate. Dealing with the matter informally may include taking management action (for example, directing the employee's manager to counsel or warn the employee and to keep a written record of this action).

Note: The Australian Public Service Commissioner's Direction 2016, section 40, provides that where the conduct of an APS employee raises concerns that relate to effective performance or possible breaches of the Code, the Agency Head must, before making a decision to commence formal misconduct action, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner. Relevant standards and guidance issued by the Australian Public Service Commissioner are currently set out in 'Handling misconduct: a human resource manager's guide' (APSC Publication).

Breach decision-maker and investigator

7. As soon as practicable after a suspected breach of the Code has been identified and the CEO, or a person authorised by the CEO, has decided to deal with the suspected breach formally under these procedures, the CEO or that person will select a decision-maker ('the breach decision-maker') to make a determination under these procedures whether or not the employee has engaged in any conduct that is a breach of the Code.
8. The breach decision-maker may be an APS employee of the Authority or another person.
9. The breach decision-maker must be, and must appear to be, independent and unbiased. The breach decision-maker must advise the CEO, or the person authorised by the CEO to appoint the

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breach decision-maker, 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.

Note: Refer to the Authority's 'Conflict of Interest' policy (document number 100254).

10. The role of the breach decision-maker is to:
 - 10.1. investigate the suspected breach and make findings about what conduct occurred;
 - 10.2. determine whether a breach of the Code has occurred;
 - 10.3. prepare a written record stating whether the APS employee has been found to have breached the Code; and
 - 10.4. advise the APS employee of the determination.
11. The CEO, or a person authorised by the CEO, may appoint an investigator to assist the breach decision-maker by investigating the matter and gathering evidence. This may or may not include making a report of factual findings for the consideration of the breach decision-maker (who is responsible for finding what conduct occurred and if it is a breach).
12. The investigator may be an APS employee of the Authority or another person (including an external consultant).
13. The investigator must be, and must appear to be, independent and unbiased. The investigator must advise the CEO, or the person authorised by the CEO to appoint the investigator, 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.
14. These procedures do not prevent the breach decision-maker from being the sanction delegate in the same matter.

Note: Separating these roles, however, may assist in minimising procedural flaws and provide a safeguard to the administrative law requirement about not having regard to irrelevant considerations and/or avoiding perceptions of bias. When the role of determining if there is a breach is combined with determining the sanction, extra care must be taken when imposing a sanction so that only those matters relevant to deciding the sanction are considered.

The determination process

15. The process for determining whether a person who is, or was, an APS employee of the Authority 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.⁴
16. The process must be consistent with the principles of [procedural fairness](#), including that by the time the breach decision-maker comes to making a determination, reasonable steps have been taken for the employee suspected of breaching the Code to be informed of the case against them.

Note: Administrative decisions that might adversely affect the rights and interests of individuals must be made in accordance with the rules of procedural fairness and other administrative law principles.^{2; 3}
17. A determination may not be made in relation to a suspected breach of the Code by an employee unless reasonable steps have been taken to:
 - 17.1. inform the employee of:
 - (a) the details of the suspected breach of the Code (including any subsequent variation of those details); and

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- (b) the sanctions that may be imposed on them under subsection 15(1) of the PS Act; and

17.2 give the employee a reasonable opportunity to make a written statement in relation to the suspected breach.²

Note: Generally, the breach decision-maker should allow the employee at least seven (7) calendar days to provide a written statement.

18. An employee who chooses not make a statement in relation to a suspected breach of the Code is not, for that reason alone, to be taken to have admitted to committing the suspected breach.
19. When determining whether an employee has breached the Code, the breach decision-maker should consider all relevant information available to them (including any statement provided by the employee) and make a determination whether the employee has or has not breached the Code.

Note: The standard of proof applicable in determining whether a breach of the Code has occurred is the balance of probabilities (i.e. it is more likely than not that a breach has occurred).

Sanctions

20. Where an APS employee has been found to have breached the Code, the CEO or a delegate ('the sanction delegate') will decide on the sanction or sanctions (if any) to be imposed on the employee.
21. The sanction delegate:
- 21.1. may be an APS employee of the Authority or another person;
- 21.2. may be the same person as the breach decision-maker;
- Note:** See also clause 14 of these procedures.
- 21.3. must be, and must appear to be, independent and unbiased.
22. The sanction delegate must advise the CEO, or the person authorised by the CEO to appoint the sanction delegate, 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.
- Note:** Refer to the Authority's 'Conflict of Interest' policy (document number 100254).
23. The sanction delegate is required to decide whether disciplinary action and/or management action, or no action at all, is to be taken. If a decision to take no further action is made, the process under these procedures concludes and the employee is to be informed of that decision in writing.
24. Where the sanction delegate proposes a sanction is to be imposed, a sanction may not be imposed on the employee unless reasonable steps have been taken to:
- 24.1. inform the employee of:
- (a) the breach determination that has been made; and
- (b) the sanction or sanctions that are under consideration; and
- (c) the factors that are under consideration in determining any sanction or sanctions to be imposed; and
- 24.2 give the employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration.
- Note:** Generally, the breach decision-maker should allow the employee at least seven (7) calendar days to provide a written statement.
25. The sanction delegate may impose one or more of the following sanctions under subsection 15(1) of the PS Act:
- 25.1. Termination of employment
- 25.2. Reduction in classification

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- 25.3. Re-assignment of duties
 - 25.4. Reduction in salary
 - 25.5. Deductions from salary, by way of a fine
 - 25.6. A reprimand.
26. No sanction can be imposed on a former employee who has been found to have breached the Code.

Access to a support person

27. Where an APS employee who is suspected of breaching the Code is to make a verbal presentation to the breach decision-maker, or where the APS employee is to be interviewed by the breach decision-maker or an investigator, or where they are to make a verbal presentation to the sanction delegate, they may be permitted to be accompanied by a support person.
- Note:** Where a sanction of termination of employment is under consideration, the sanction delegate should not unreasonably refuse to allow the employee to have a support person present to assist at any discussion relating to termination to ensure that any termination of employment will not be found unfair by the Fair Work Commission because of any such refusal: see section 387(d) of the *Fair Work Act 2009*.
28. A support person may be a work colleague, friend, family member, or union or legal representative. The employee's support person cannot be a person who is or may be a potential witness or if the person has had or may have had any involvement in the conduct which is the subject of the breach allegation(s) and/or have a conflict of interest.
29. The role of the support person at the presentation or interview of the APS employee suspected of breaching the Code is to:
- 29.1. provide emotional support and reassurance;
 - 29.2. quietly prompt or give advice to the employee, including requesting a break if needed;
 - 29.3. respect and maintain confidentiality at all times;
 - 29.4. not answer questions on behalf of the employee; and
 - 29.5. not advocate for the employee.
30. The breach decision-maker or investigator or sanction decision-maker can advise the employee and their support person of the role of the support person and can restrict the role of support person as considered appropriate, including making clear that the support person cannot act as a representative.

Record of determination and sanction

31. If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Authority, a written record must be made of:
- 31.1. the suspected breach; and
 - 31.2. the determination; and
 - 31.3. any sanctions imposed as a result of the determination that the employee has breached the Code; and
 - 31.4. if a statement of reasons was given to the person regarding the determination in relation to a suspected breach of the Code or regarding any sanction decision, that statement of reasons or those statements of reasons.
- Note:** The *Archives Act 1983* and the *Privacy Act 1988* apply to a record made under this clause.
- Note:** Notice of a breach or sanction decision can refer to the employee's review rights. Under section 33 of the PS Act, a non-Senior Executive Service ('SES') APS employee who has been found to have breached the Code and who wishes to challenge either the determination that a breach has occurred and/or the sanction imposed, may lodge an

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application for review with the Merit Protection Commission under the PS Regulations. In addition to the sanctions mentioned in clause 25, other decisions relating to the investigation for suspected misconduct by a non-SES employee may also be reviewable including, for example, a decision to suspend an employee from duties or to re-assign an employee's duties temporarily whilst a Code investigation is underway. These decisions in the first instance are usually reviewable by the CEO. An employee whose APS employment has been terminated for misconduct cannot apply for review of that decision under section 33 of the PS Act but may have access to remedies under the *Fair Work Act 2009* by making an application to the Fair Work Commission. The date a sanction takes effect is not delayed where an employee applies for a review of the breach and/or sanction decision, by the Merit Protection Commission.

References

- 1 *Public Service Act 1999*.
- 2 Australian Public Service Commission. 2017, *Handling misconduct: a human resource manager's guide*, Commonwealth of Australia, Canberra.
- 3 Administrative Review Council. 2007, *Decision making: natural justice. Best practice guide 2*, Commonwealth of Australia, Canberra.
- 4 *Australian Public Service Commissioners Directions 2016*.

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