



Practitioners guide to managing suspected misconduct in the ATO

1. Foreword

Suspected breaches of the Australian Public Service (APS) Code of Conduct (the Code) **must** be managed in accordance with the [Procedures for determining whether an employee has breached the Australian Public Service \(APS\) Code of Conduct and imposition of sanction, Public Service Act 1999 \(PS Act\)](#), [Public Service Commissioner's Directions 2013](#) and [Public Service Regulations 1999 \(PS Regulations\)](#).

The [pictorial overview of the suspected misconduct process](#) provides a broad outline.

When dealing with a suspected breach of the Code, three basic questions need to be asked:

1. Did the employee do what they are alleged to have done?
2. If so, was it a breach of the Code?
3. If so, what, if any, is an appropriate sanction?

In answering such questions, there are three basic procedural requirements. These are that employee **must** be:

1. informed about what it is alleged they have done in clear, unambiguous terms so they understand the case they have to answer
2. shown the evidence that will be taken into consideration in regard to the determination of a breach of the Code and the determination of sanction/s, if any, to be imposed
3. allowed the opportunity to respond, and have any information they put forward considered in regard to the determination of a breach of the Code and the determination of sanction/s, if any, to be imposed.

It should be noted that, in minor cases, even if it is clear that an employee may have breached the Code, an authorised person may choose to deal with the matter other than through the ATO procedures. For example, in some cases counselling might be an appropriate alternative to commencing action to determine whether the employee has breached the Code.

1.1. Status of this guide

The [Procedures for determining whether an employee has breached the Australian Public Service \(APS\) Code of Conduct and imposition of sanction](#) (the ATO Procedures) set out the mandatory procedures which must be complied with in:

1. determining whether an APS employee in, or a former APS employee, of the ATO has breached the Code of Conduct
2. deciding what sanction, if any, should be imposed on an APS employee for a breach of the Code of Conduct.

The contents of this Guide have been endorsed by the Commissioner of Taxation and are intended as supplementary information for those persons who are involved in advising on, or carrying out, the ATO Procedures.

As a general rule, subject to the exception noted in 1.2 below the contents of this Guide have the status of guidelines. This reflects the legislative intent that action to determine whether an employee has breached the Code should not be overly formalised. It also recognises that the wide range of circumstances likely to be encountered does not make rigid prescription desirable or practical.

The purpose of this Guide is to promote good practice and consistency and departures from it need to be considered carefully and should not run contrary to the spirit of it.

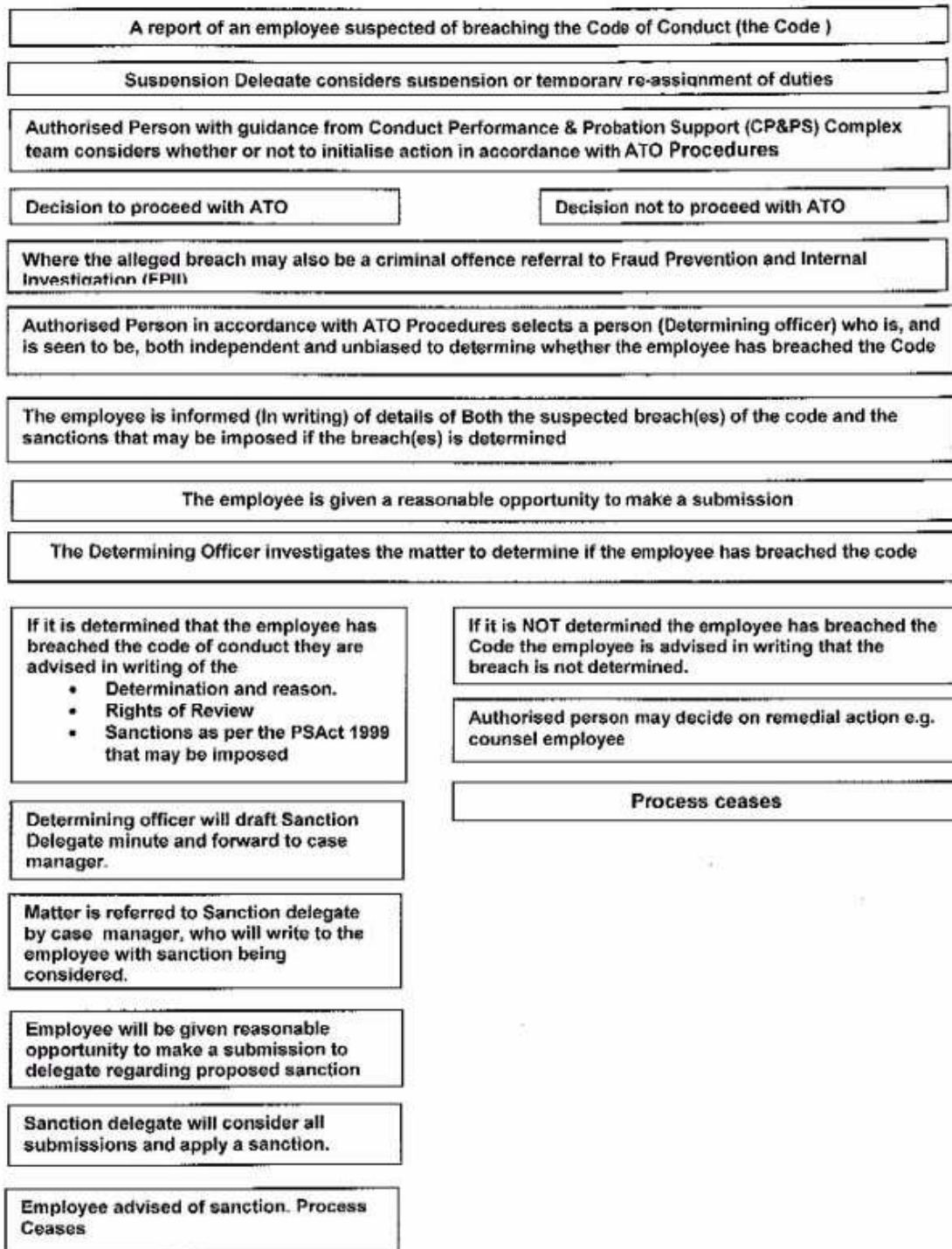
1.2. The 'must' exception

This Guide sometimes mentions mandatory requirements that are stipulated elsewhere. In doing so, it makes use occasionally of the word '**must**'. Wherever that word is used, it is highlighted in bold type and has the force of a direction. It follows that statements including the word '**must**' are not merely guidelines - because they reflect actions that are either mandated by the ATO Procedures, or compelled by specific legislation (for example PS Act) or binding legal principle (such as procedural fairness).

2. Overview of misconduct process

This pictorial overview of the misconduct process provides a broad outline.

OVERVIEW OF MISCONDUCT PROCESS



3. Suspected misconduct and breaches of the Code

3.1. The connection between employment and misconduct

The various elements of the Code specify two different levels of connectedness between the standard of conduct and APS employment, as follows:

1. 'in connection with APS employment'

2. 'at all times'.

'In connection with APS employment'

As a general rule 'in connection with APS employment' is usually used to address situations where an employee's actions may have some influence on how they perform their duties.

The elements of the Code applying 'in connection with APS employment' (for example an APS employee, when acting in connection with APS employment, **must** treat everyone with respect and courtesy, and without harassment) can cover behaviour outside the workplace but in work related contexts, such as work functions (for example Christmas parties) and business trips, would depend on factors such as:

- whether the activity was sponsored or organised by the employer
- where and when the behaviour occurred (for example did it occur at the workplace or during working hours, did a work function have a clear finishing time?)
- whether a person was 'on duty' (for example acting in a representational capacity).

Comments posted about the ATO or colleagues on social media forums may be considered to be in connection with APS employment'.

'At all times'

The term 'at all times' means that conduct which is apparently unrelated to the performance of duties may be subject to the Code if it can be demonstrated that there is a real connection between the behaviour and its effect on the workplace.

The term 'at all times' used in the element of the Code that requires that an APS employee **must** at all times behave in a way that upholds the APS Values, Employment Principles and the integrity and good reputation of the APS. Section 13(11) provides for a broader application to conduct outside of work hours than other elements of the Code. One example of a possible breach of section 13(11) could be harassment of one employee by another at a social event involving work colleagues outside of work (but not an event sponsored or organised by the employer).

Other elements of the Code

There are other elements of the Code where the level of connectedness is not specified. In these cases, connectedness is inherent in the element itself (for example the requirement to comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction). Team leaders and employees need to be aware of these different levels of connectedness to fully understand the standards of conduct required.

3.2. Misconduct that may also be a criminal act

The ATO can face difficult judgements where misconduct proceedings interact with criminal proceedings, including whether or not to commence misconduct proceedings concurrently with a criminal trial. Criminal proceedings may result from an employee's behaviour in the workplace as well as from his or her private actions.

Where an employee's behaviour may be both a breach of the Code and a criminal offence, misconduct action need not necessarily be delayed until criminal processes have been completed. Advice should be sought from FP&II, the police and the Director of Public Prosecutions before advising the employee of any allegations of misconduct.

A key consideration is the need to avoid prejudicing the criminal proceedings. Australian Government Solicitor (AGS) has advised that Agencies should not proceed with a misconduct action if the police or prosecuting authorities consider the misconduct action may prejudice criminal proceedings.

If there is some risk of prejudicing the criminal proceedings, Agencies may initiate a misconduct action (putting the employee on notice that an action will ensue) but may immediately suspend the investigation pending the outcome of criminal proceedings.

The Commonwealth Fraud Control Guidelines 2002 make it clear that Agencies **must** refer all allegations of serious or complex fraud involving Commonwealth interests to the Australian Federal Police.

In the ATO that needs to occur via FP&II Section. FP&II can also discuss other suspected behaviour that involves potentially serious criminal conduct with the relevant law enforcement Agency.

3.3. Criminal offences outside the workplace

The 'at all times' behavioural element of the Code may require a determining officer to consider whether an employee who has been found guilty of a criminal offence committed outside the workplace has also breached the Code. In order for a breach to be found in these cases, it would be necessary to assess whether the criminal behaviour has compromised the integrity and good reputation of the APS, and the extent to which that behaviour has adversely affected the employee's position in the workplace.

Such an assessment should take into account:

- the principle that APS employees are also citizens and like all other employees are entitled to a private life. In line with this principle, a criminal conviction for drink driving outside the work place, for example, where the employee was not required to drive a car as part of their duties is unlikely to be considered a breach of the Code.
- certain criminal charges may have different impacts in different Agencies depending on the nature of the charges and the role of the Agency.
- In serious criminal cases, it may be appropriate to suspend the employee from duty until the decision of the Court is known.

If an employee has been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code or has been found to have committed such an offence but no conviction is recorded, action may be taken to determine whether they have breached the Code.

3.4. Behaviour prior to APS employment

Providing false or misleading information, etc in connection with engagement as an APS employee can be addressed through action to determine a breach of the Code. If an employee:

- knowingly provided false or misleading information to another APS employee, or to a person acting on behalf of the Commonwealth
- wilfully failed to disclose to another APS employee, or to a person acting on behalf of the Commonwealth, information that the person knew, or ought reasonably to have known, was relevant, or
- otherwise failed to behave honestly and with integrity action can be taken under the ATO Procedures.

4. Reporting of suspected misconduct and breaches of the Code

4.1. Reporting the incident/s

An employee can report a suspected breach of the Code to a range of people, including the employee's direct manager, senior business line managers, member of Conduct Performance and Probation Support (CP&PS) team in ATO People, Fraud Prevention and Internal Investigation (FP&II) and persons authorised to receive reports of suspected misconduct under the *Public Interest Disclosure Act 2013* (PID Act).

If an employee becomes aware of any work-related conduct that might constitute criminal behaviour, the employee should immediately consult FP&II.

The report may be oral in the first instance, and should be followed up in writing. The report should provide the following information, if known:

- a description of the behaviour or incident causing concern
- the name of the person initiating the report
- the name of any employee/s suspected of breaching the Code
- the date on which it occurred
- the names of any witness/es
- any available evidence
- if relevant, records of prior attempts to address the matters of concern
- any other information relevant to the matter.

Misconduct reports and Public interest disclosure

- The PID Act seeks to promote integrity and accountability in the APS by encouraging the disclosure of information about alleged wrongdoing, protecting those who make such disclosures and ensuring that disclosures are properly actioned.
- An 'authorised person' under the PID Act is not necessarily the same 'authorised person' under the [Procedures for determining whether an employee has breached the Australian Public Service \(APS\) Code of Conduct and imposition of sanction](#)).

The role of Authorised Officers is to receive disclosures, make an initial assessment whether the disclosure can be treated under the Public interest disclosure (PID) procedures, and to allocate the disclosure to a delegate of the Commissioner to determine whether an investigation should proceed, and, if so, to manage that investigation. If the disclosure relates to persons or matters of another agency, the Authorised Officer will allocate the disclosure to the relevant agency.

Specific procedures apply to this sort of reporting - refer to the [PID procedures](#) for details.

The PID Act provides protection to ATO employees making reports as it prohibits any person performing functions in or for an Agency from victimising, or discriminating against, employees who have reported suspected breaches of the Code.

Reports can be lodged to the [Public interest disclosure mailbox](#).

Privacy Notice

The ATO is authorised by the *Public Service Act 1999* to collect personal information from you directly and from third parties (for example, managers, witnesses), in relation to potential misconduct matters.

The ATO will use this information to assist an Authorised Person make an informed decision and apply procedural fairness to the informal conduct case process. Employees are not compelled to provide this information, however it may assist the Authorised Person consider mitigating circumstances surrounding an employee's conduct matter.

If you are required to provide information but do not provide it, the Authorised Person will only be able to make an informed decision based on the facts available to them.

Where authorised by law to do so, we may give this information to other government agencies. These agencies include, but are not limited to; Commonwealth bodies such as the Australian Public Service Commission, The Office of the Merit Protection Commission, Fair Work Commission and agencies that conduct intra-agency, pre-employment checks or law enforcement agencies.

The ATO's privacy policy is on ato.gov.au. The policy contains important information about your privacy, including information about how you can access and seek correction of information we hold about you, how you may complain about a breach of the Australian Privacy Principles and how the ATO will deal with any privacy complaint.

The ATO is unlikely to disclose the information to overseas recipients.

5. Suspension/re-assignment of duties

When a report of a suspected breach of the Code has been received it may be necessary to consider whether there is a need to re-assign duties or to suspend the employee from duties.

Consideration of suspension from, or reassignment of, duties, should normally occur shortly after a report of a suspected breach of the Code is received. Depending on the circumstances, this could occur at other points throughout the process. It is important to note that suspension and temporary re-assignment of duties while an investigation is proceeding are administrative actions and not sanctions in themselves.

While consideration should generally be given to re-assignment of duties as an initial option, there will be situations where the alleged misconduct is so serious that public perceptions of the integrity of the ATO would be significantly affected if it were to become known that the employee was still working in the ATO, even if alternative duties could be found for the employee.

The decision to suspend an employee is a reviewable decision. For further information refer to the [Procedures for review of employment actions](#).

5.1. Delegation to suspend an employee from duty

The specific power to suspend an employee from duties is contained in the PS Regulations. The Commissioner of Taxation has delegated his powers under PS Regulation 3.10 to the following persons, [Personnel Delegations - Suspension from duties](#):

While the PS Act and PS Regulations do not preclude an employee from exercising the suspension delegation as well as the authorisation to determine a breach of the Code and/or the delegation to impose a sanction, care **must** be taken to ensure that the person who exercises any of these powers is, and appears to be, unbiased. It may be appropriate for different persons to exercise these delegations/authorisations in relation to any one employee.

Refer to [Personnel Delegations - Suspension from duties](#).

5.2. Relevant considerations

Suspension delegates should seek advice on suspension from the CP&PS consultant. The CP&PS consultant can assist in preparing documentation in relation to the suspension or re-assignment of duties.

Re-assignment of duties

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

Examples of cases where re-assignment of duties may be appropriate include those where a:

- field based employee has lost their licence for traffic offences committed while driving a Commonwealth vehicle
- call centre employee is being investigated for handling client phone calls inappropriately.

Suspension

- Under PS Regulation 3.10 (1), a delegate may suspend an employee only if they believe on reasonable grounds that the:
- employee has, or may have, breached the Code of Conduct, or
- employee's suspension is in the public, or the Agency's, interest.

Having regard to these two factors, examples of the types of cases where suspension may be appropriate include those involving:

- potential serious criminal charges
- significant fraud against the Commonwealth
- violent behaviour in the workplace, assault on another employee
- serious suspected breaches of the confidentiality of taxpayer information
- behaviour so abhorrent that a reasonable person would think that suspension was warranted
- any situation where the evidence suggests a fundamental breach of trust
- any situation where a delegate believes there is a risk of further offences if the employee were to remain in the workplace.

5.3. Suspension with/without remuneration

Under PS Regulation 3.10 (2), suspension may be with or without remuneration. The suspension delegate also decides whether the suspension from duties will be with or without remuneration. It should be noted that remuneration may be full or partial, that is, a suspension delegate could decide to suspend on part remuneration for a period and determine a set rate of payment, for example \$300 per fortnight. It is recommended that suspension delegates seek advice from a member of the CP&PS consultant on the issue of remuneration during suspension.

Suspension with remuneration should be for a specified period in the first instance. Employees should be advised that any suspension with remuneration is not for an indefinite period but may be reviewed at any time, depending on the circumstances of the case.

All suspensions **must** be reviewed at reasonable intervals.

PS Regulation 3.10 requires that the maximum period for suspension without remuneration is 30 days, unless there are exceptional circumstances. Exceptional circumstances are not defined, but could include circumstances where an employee has:

- been charged with a criminal offence and is waiting to have the charge determined
- appealed against a conviction and is waiting to have the appeal heard.

Other factors which might be taken into consideration in determining that a suspension should be without remuneration are the:

- seriousness of the allegations/suspected breaches
- weight of the evidence, any admission made by the employee (which would suggest that there is a high likelihood that the breach will be determined to have occurred)
- likely length of the investigation and determination process
- public perceptions of the integrity of the ATO if the employee were suspended with remuneration.

5.4. Suspension process

The PS Regulations require that, when exercising suspension powers, including the review of suspensions at reasonable intervals, the suspension delegate **must** have due regard to procedural fairness. This means, for example, that an employee would generally be given the opportunity to be heard in relation to suspension and remuneration if suspended.

However, in particular circumstances, the suspension delegate may decide on reasonable grounds that it would not be appropriate to do so. Examples where it would not be appropriate include situations involving an imminent serious threat to the safety of other employees or a real possibility that the employee will destroy evidence or otherwise tamper with it. In such cases, the employee can be suspended and immediately following suspension, be given the opportunity to make submissions regarding suspension.

Once the suspension delegate makes a decision about suspension, taking into consideration any comments provided by the employee, the employee should be notified in writing of the suspension delegate's decision.

As consideration of suspension generally only relates to the most serious cases where the suspension delegate believes that it is in the public or ATO's interest to suspend the employee, there is often an imperative to make such decisions quickly. The time periods involved in the suspension process (for example the notice given of an interview, the time allowed for written submission, the time taken to make the decision) can be relatively short.

As noted in 5.3 above, all suspensions **must** be reviewed at reasonable intervals.

5.5. Access to accrued leave

The PS Act and PS Regulations are silent about a suspended employee's ability to access their accrued leave credits. Approval to use accrued leave credits during a period of suspension is therefore not automatic and the decision on whether to grant the leave should be made by the suspension delegate. An employee who accesses paid leave credits during suspension is still suspended from duties. The CP&PS consultant can provide advice when the suspension delegate is considering this matter.

5.6. Outside employment during suspension

Employees who are suspended from duty without remuneration may engage in outside employment. Notification of outside employment **must** be submitted by the suspended employee in accordance with [PS CM 2004/02 Conflicts of Interest](#). If an employee who is suspended with full or part remuneration engages in outside employment the delegate may determine that the extent of the remuneration shall cease.

5.7. When does suspension cease?

The suspension delegate **must** immediately end the suspension if:

- they no longer believe on reasonable grounds that the employee has, or may have, breached the Code
- it is no longer in the public, or the ATO's, interest to continue the suspension
- a sanction has been imposed as a result of the employee having been found to have breached the Code.

6. Decision to proceed under the ATO Procedures or otherwise

A report of a suspected breach of the Code **must** be referred to an Authorised Person who can decide if it is appropriate to initiate action in accordance with the ATO procedures and if so, select a person to investigate and determine suspected breaches of the Code.

6.1. Authorised Person

The following people in the ATO are authorised to act as Authorised Persons for the purposes of the ATO Procedures.

- Commissioner of Taxation
- Second Commissioners
- First Assistant Commissioner, ATO People
- National Program Managers
- SES as defined in section 34 of the PS Act
- second level of reporting, and above, (minimum level of EL1)
- employees at the APS 6 classification level, and above, in the Complex Case team in Conduct Performance and Probation Support, ATO People (for all employees).



Note - At the time of establishing the new ATO Procedures the Commissioner also endorsed a preferred position, for the foreseeable future, as to who would fulfil the role of Authorised Person. Accordingly the role of Authorised Person is to be exercised by the BSL SES responsible for People/HR matters. While that is to be the preferred approach, it is recognised that situations shall arise where it is either not practical, sensible or structurally feasible for that to occur. Nevertheless, it remains the preferred and current approach.

The determination of whether an employee has breached the Code is not a decision made under the PS Act but is a decision under the ATO Procedures, which have been established in accordance with sub-section 15(3) of the PS Act.

6.2. Preliminary considerations

An authorised person who has received a report of suspected misconduct **must** contact a member of the Complex Case team in CP&PS to discuss whether or not the matter should be handled under the ATO Procedures. The decision about how to handle the matter is nevertheless a decision to be made by the authorised person, not CP&PS.

In some cases, before making a decision on how to proceed, the authorised person may discuss the report of suspected misconduct with the employee concerned or provide the employee a copy of the report and afford them an opportunity to comment. This may be appropriate, for example, where the evidence is relatively limited and the authorised person considers that they need more information in order to make a decision.

In other circumstances, there may be a need to delay any decision about whether to proceed with action under the ATO Procedures. For example, it would be inappropriate for the authorised person to bring a suspected breach to the notice of the employee where a sensitive preliminary investigation of a serious matter is being undertaken by FP&II. To so alert the employee may compromise the investigation and risk the potential destruction of critical evidence. In such circumstances the decision not to proceed immediately under the ATO Procedures, and the reasons for that decision, should be recorded.

6.3. Available options

An authorised person may decide to:

- take no further action
- refer the matter other than through the ATO Procedures (for example for a minor matter, formal counselling may be the most appropriate form of action)

- seek or await further information, for example investigations by FP&II.
- initiate action in accordance with the ATO Procedures and select a person to investigate and determine suspected breaches of the Code.

6.4. Dealing with matters outside of the ATO Procedures

Not all suspected misconduct is best dealt with via the ATO Procedures.

Examples of where an authorised person may decide to handle a matter other than in accordance with ATO Procedures include:

- the matter is relatively minor or trivial, for example one-off distribution of an inoffensive chain email, failure to disclose outside employment due to an oversight (where no conflict of interests exists), one-off low-level rudeness to a fellow worker
- there is insufficient evidence, or the facts are unclear and not likely to be able to be determined on the balance of probabilities
- a more immediate resolution option is available and appropriate, for example informal or formal counselling
- the matter is not serious and the employee's prior conduct has been exemplary
- the incident is totally out of character and the employee has immediately expressed remorse and/or taken corrective action.

Where the suspected breach is minor, the authorised person may consider dealing with the matter other than through the ATO Procedures.

For example this could include:

- arranging mediation or conciliation between the parties in some cases involving interpersonal issues
- informal or formal counselling of the employee, including suggestions for improvement and a warning that any further similar conduct could result in action being taken under the ATO Procedures
- addressing the matter using the performance management system, including specifying the standard of future conduct required.

Where appropriate, using other procedures can often resolve problems more quickly and effectively than by applying the ATO Procedures.

Where it is decided not to proceed under the ATO Procedures, care should be taken to ensure that the language used does not imply there has been a breach of the Code. A finding of a breach can only be made by a person authorised to make a determination, and then only following an investigation conducted in accordance with the ATO Procedures. So, for example, if the employee is counselled, reference to the Code should be limited to its role in setting the standards against which future conduct will be measured.

- The principles of procedural fairness should be followed at all times, whether or not the ATO Procedures are engaged.

6.5. Probationary employees

While the ATO Procedures may be applied to probationary employees, it is generally not necessary to do so.

The purpose of the probationary period is to evaluate an employee's performance and suitability to continued employment in the ATO. Where performance and/or behavioural issues arise in relation to an employee who is on probation, the matter should be handled within the probationary framework.

6.6. Employees whose performance is unsatisfactory

There are a number of avenues for addressing unsatisfactory performance in the ATO. If an employee's unsatisfactory performance is for reasons within his or her control, it can be dealt with as a suspected breach of the Code. Whether underperformance is within a person's control is determined according to each case, having regard to the person's physical and mental capabilities. For example, a manager would need to make a judgment on whether an employee's persistent failure to comply with instructions is because the employee is incapable of following instructions or because he or she chooses not to follow them.

If a person is failing to meet expected standards of performance for reasons outside their control, he or she should be dealt with under [unsatisfactory performance procedures](#) as specified in the Enterprise Agreement. Any health concerns should be explored if appropriate in accordance with the [PS CM 2006/10 - Managing illness and injury in the workplace](#).

Action under the ATO Procedures

- Generally, the decision to initiate action in accordance with the ATO Procedures to determine suspected breaches of the Code will be made by an authorised person within the business/service line of the employee (usually the BSL SES with specific responsibility for HR or people matters).

The authorised person **must** contact a member of the Complex Case team in CP&PS who will provide the authorised person with assistance in the interpretation and application of the ATO Procedures.

The initial decision on what approach to take to deal with suspected misconduct when reported is a key one.

Often it will be the team leader/manager of the employee suspected of misconduct that, in the first instance, makes an assessment of the seriousness of the suspected misconduct and the best approach to take to dealing with it. This is because the suspected misconduct may have been observed by the team leader, or another employee may have reported it to them - for example, a report by an employee about their team leader or another employee. If the suspected misconduct has been reported by another employee, that employee needs to be advised about how their report will be handled and their rights to protection from any victimisation or harassment.

6.7. Consistency of approach

The ATO approach to employee misconduct **must** be broadly consistent across the Agency, so that employees are given consistent messages about the ATO's views on various types of misconduct. It is reasonable for employees to expect that the standards of behaviour required in each individual workplace will be essentially the same.

The ATO treats misconduct seriously and some types of conduct are regarded most seriously. Examples of these types of conduct include:

- fraud or theft (including flex or attendance fraud)
- unauthorised access to taxpayer information
- improper and/or unreasonable personal use of ATO information technology
- work place assault or harassment
- being drunk or under the influence of non-prescribed drugs in the work place
- failure to obey lawful and reasonable directions.

These examples do not limit in any way an authorised person's capacity to commence formal action in relation to other types of suspected misconduct.

6.8. Commencing action under the Procedures

In considering whether or not to use the ATO Procedures, the nature of the suspected misconduct should be considered. As a general rule, the ATO Procedures should be used if it is likely that a sanction would be imposed (either termination of employment, reduction in classification, re-assignment of duties, reduction in salary, a fine or a reprimand), if the suspected misconduct was determined to be a breach of the Code.

Whilst deciding whether to commence action under the ATO Procedures to determine a suspected breach one **must** also consider when to commence the action.

Different issues of misconduct often raise greater or lesser difficulties in gathering initial evidence to assess whether there is a prima facie case. Matters become complicated if key employees are geographically dispersed or temporarily unavailable. To avoid or minimise the prospect of the employee destroying or removing evidence, information gathering should be completed as far as reasonably practicable before the employee is advised that they may be under any suspicion.

The ATO should aim to keep the preliminary investigative phase as short as possible without compromising the quality of the work undertaken. In doing this duplicating the formal investigation prior to deciding whether to notify the employee that they were suspected of misconduct should be avoided. Advising employees earlier rather than later can also help to avoid the undesirable situation of the employee finding out through unofficial sources that an initial investigation is underway.

In serious cases where any delay in acting raises a real risk that the safety of employees or clients may be compromised or evidence may be destroyed, it is appropriate to decide to commence action under the ATO Procedures as quickly as possible. Prompt consideration should also be given to suspending the employee from duty or assigning them to other duties.

How the evidence is assessed, or whether further evidence is sought, will be up to the authorised person who is authorised to make the decision about whether to commence the ATO Procedures whilst keeping in mind that a formal investigation has not yet commenced.

The test to apply in deciding whether to institute an investigation pursuant to the ATO Procedures is not whether the evidence establishes that a breach of the Code has probably occurred, but rather whether the allegations of misconduct are sufficient to warrant further investigation.

6.9. Avoiding apprehended bias

An authorised person who decides to pursue action under the ATO Procedures **must** guard against any bias – real or perceived in either themselves or any one selected by them to investigate and determine whether or not the suspected misconduct has occurred.

As well, it is of paramount importance that, once having decided upon a formal course of action, the authorised person avoids:

- approaching a decision to pursue the suspected misconduct under the ATO Procedures with the attitude of 'proving the allegation' rather than a disinterested attitude of finding out all the relevant facts and circumstances (that is starting with a

presumption of guilt)

- confusing their role with that of the determining officer - once assigned the role, the determining officer assumes overall responsibility for the processes associated with investigating and determining the suspected misconduct
- making comments about the case that presume the accused employee's guilt prior to a determination being made — this type of comment, made particularly by more senior employees such as the authorised person, can result in the decision made by the determining officer being overturned on review, because of perception of apprehended bias.

7. Determining officer

After deciding to initiate action under the ATO Procedures, an authorised person may select a person to perform the role of determining officer. The determining officer will investigate and determine whether or not an employee suspected of breaching the Code has, in fact, breached the Code.

A team of investigators has been established within CP&PS and generally these individuals perform the role of determining officer.

In some situations, for example where cases are more complex or where there are difficulties in ensuring that a person who is independent and unbiased is available to act as determining officer, a person from outside the ATO or the APS may be selected to conduct the investigation and determine whether there has been a breach of the Code.

Recent amendments to the PS Act enable the APS agencies to request the Australian Public Service and the Merit Protection Commissioners to determine suspected breaches of the Code. Second Commissioners and the FAC, ATO People hold the delegation to make the request to either of these Commissioners.

The authorised person **must** issue the selected determining officer an authorisation in writing to investigate the suspected breach of the Code and to determine whether or not the employee breached the Code..

The CP&PS consultant can assist in preparing the appropriate authorisation.

7.1. Ensuring impartiality

Reasonable steps **must** be taken to ensure that the determining officer selected is, and appears to be, independent and unbiased. The decision by an authorised person to have a matter investigated as a suspected breach of the Code does not in itself compromise that person's independence or impartiality.

Following are some examples of where bias could, or could be thought to, arise:

- a determining officer has a personal interest in the decision
- a determining officer has a work or personal relationship with the employee being investigated, or witnesses
- a senior manager makes comment on the case in a manner which could be perceived to influence the more junior determining officer
- a determining officer is a witness in the matter.

A person **must** not determine whether an employee has breached the Code if the person has previously made a report in relation to any of the matters suspected of constituting a breach of the Code by the employee (see also section 10.1).

Care also needs to be taken to avoid perceived bias if a determining officer has previously investigated the matter in another capacity (for example a privacy investigation or a review of action). While they may have a view about what had happened, they may not necessarily hold an opinion as to whether this constituted misconduct. It may still be possible to select them. This would not be encouraged as the determining officer **must** be free from 'apparent bias'.

If there is any doubt about the suitability of a determining officer, it is wise to make another choice. It may be appropriate for a person from outside the ATO or outside the APS to be selected, if it is not possible to satisfy the 'freedom from apparent bias' test from within the ATO, in accordance with the principles of natural justice.

This could include a private consultant or the services from an employee in another APS Agency. The ATO has a panel of approved external providers, who may be accessed through the CP&PS consultant. The cost of any external investigator is the responsibility of the BSL requesting the service.

An external investigator might be appointed when:

- the circumstances of the suspected breach of the Code are such that the employee under suspicion might reasonably claim apprehended bias
- the ATO cannot afford to divert any suitable person from their usual duties to attend to the investigation in a timely manner
- no-one in the ATO possesses the skills and experience required to properly investigate the nature of the allegations
- a cost-benefit analysis indicates that the most efficient course would be to appoint an external investigator.

Where external investigators are used it is important to give them clear instructions about their role:

- will they be asked to make a recommendation
- will they be required to make a determination about whether a breach has occurred or not

- will they be required to provide recommendations on sanction
- to observe the ATO Procedures, relevant legislation and any guidance material that **must** be observed
- required timeframes (including review dates as well as a date by which they are required to furnish their report consistent with the requirements demanded of them).

7.2. Resources

An authorised person needs also to ensure that the person they select as determining officer is provided with a level of resources that allows them to carry out the investigation and determination of the matter in a proper and timely manner. This might involve, for example, being granted time off-line at key points during the investigation and being provided with access to a private workstation.

In some circumstances the authorised person may select the services of another employee or an external provider to assist the determining officer in the investigation of the case.

7.3. Investigative skills

Although investigating suspected misconduct is sometimes straightforward if the facts and circumstances of the case are clear, it can be difficult and requires judgement, attention to detail and established investigative skills. The choice of determining officer is an important one. It is preferable that the determining officer selected to undertake the determination of whether a breach of the Code has occurred has been trained in the required skills and processes and/or has experience in such a role, including investigation skills and administrative decision-making.

Recognised qualifications for investigators include:

- Certificate IV in Government (Investigation), or its equivalent. This qualification should be obtained before an officer is primarily engaged as an investigator; otherwise the officer should be under the supervision of a qualified investigator.
- Diploma of Government (Investigation) for staff primarily engaged in the coordination and supervision of investigations

The determining officer may decide to use someone with specialised investigative skills to assist them in their role. The determining officer retains final responsibility for adhering to the ATO Procedures and processes including procedural fairness. The determining officer should be actively involved in the planning of the investigation and in ensuring the quality of the processes. It is the determining officer who makes the determination as to whether the Code has been breached — not the investigator, unless they are the same person. They **must** be satisfied:

- with the quality and quantity of the evidence that has been collected
- with the way it has been collected
- that all mandatory procedural steps have been observed.

8. Notice of Suspected Breach of the Code

Once a decision has been made to proceed formally under the ATO Procedures, the next step is for the authorised person to provide the employee with written Notice of Suspected Breach of the Code (the Notice).

8.1. Contents of the Notice

The Notice **must** include:

- incident/allegation details that are the subject of the suspected breach
- the relevant sub-section/s of the Code the employee is suspected of having breached
- relationship or connection between the incidents/allegations and the relevant sub-section/s of the Code so the employee understands the case they have to answer
- a copy of the material that the authorised person has available to them at that point including the report of suspected misconduct. (There may be limited circumstances where it may not be appropriate to provide a copy of a document for example where there is an imminent threat to health and safety, or other reasons including privacy and secrecy. In these instances advice should be sought from a member of the Complex Case team in Conduct Performance and Probation Support.
- sanctions that may be imposed if a breach is determined including any limitations on those sanctions contained in the Regulations
- advice that the employee has an opportunity to provide a statement to the determining officer within a reasonable timeframe. The employee's statement may be written or oral, or the employee may make both a written and an oral statement. (As a general guide, seven days from the date of the Notice would normally be considered reasonable. A longer period may be provided in more complex cases or cases involving multiple suspected breaches [see employee's statement section below])
- notice of disclosure of personal information in relation to conduct allegation
- a copy of the ATO Procedures.

Relevant sub-section/s of the Code

The CP&PS consultant will provide general guidance to an authorised person on which element/s of the Code the employee is suspected of having breached. The authorised person should have regard to all of the elements of the Code and **must** notify the

employee of which particular elements may have been breached, and invite comment via the Notice. It is important to choose the relevant element/s of the Code and to assess whether it is more appropriate to choose one element of the Code or whether to use a number of elements. The wrong choice can complicate or prolong matters.

There are two main approaches available when considering the elements of the Code:

- An authorised person may opt to build in multiple elements of the Code depending upon the suspected misconduct so that the final determination taken is more exhaustive. This approach also helps prevent situations where there is suspected misconduct but the extent of it is not immediately obvious. For example, inappropriate use of the internet could be a breach of element 13(8) requiring proper use of Commonwealth resources but following investigation it could also involve a breach of a lawful direction (13(5)), be found to affect the integrity and reputation of the APS (13(11)) and, if the conduct involved accessing material such as child pornography, amount to a failure to comply with an applicable law (13(4)).
- An authorised person may choose one or two elements of the Code that are most directly relevant to the suspected misconduct. A targeted approach is more consistent with the concept that actions to address misconduct in the APS have a corrective function. It is easier to explain to an employee that their conduct was wrong or inappropriate, if the elements of the Code applied are obviously relevant to the suspected misconduct.

Even if the case can be made for a number of elements, adding extra elements can create an impression of technical abstraction and be unnecessarily resource and time intensive. The determining officer **must** be satisfied on the balance of probabilities (the standard of proof) in relation to each separate element of the Code that the employee is suspected of having breached. See 11.2 of this guide.

Rather than adopting one approach only, the authorised person should start with the flexibility to decide on the approach that best suits the nature of the suspected misconduct.

Whichever approach is adopted by the authorised person, the determining officer has an obligation to test the evidence and the employee's response against every element of the Code as specified in the Notice before they make the final determination.

If an authorised person chooses to apply as many elements of the Code as possible and the suspected misconduct is proven, then the overall sanction should reflect the seriousness of the behaviour, not the technical question of how many elements have been breached.

As a general rule, the Notice should specify the most obvious relevant sub-section/s and be kept as simple as possible while providing sufficient information for the employee to understand clearly the case he or she needs to answer.

Advice **must** be sought from a member of the Complex Case team in CP&PS regarding the preparation of the Notice.

If the suspected misconduct involves criminal behaviour, the investigation may need to be handled differently.

8.2. When to issue the Notice

The Notice should be provided to the employee as soon as possible after the report is received by the authorised person. It is considered good practice for the Notice be issued within ten working days following receipt of the report of suspected misconduct.

In deciding when to notify an employee of a suspected breach, care **must** be taken to ensure that any sensitive enquiries are not compromised by doing so. Advice on such matters **must** be sought from a member of the Complex Case team in Conduct Performance and Probation Support and/or Fraud Prevention and Internal Investigation section.

8.3. Delivery of the Notice

The method of delivery of the Notice will depend on the circumstances of the individual case.

The authorised person or their representative may deliver the Notice to the employee in person.

The Notice may be emailed to the employee's ATO email address. Notification should be given to the employee and the employees manager when this is about to occur, and a read receipt should be placed on the email as evidence of delivery.

In the event that the employee is absent from the workplace, the Notice and supporting material is to be sent by Express Post to the last known postal address recorded for the employee on SAP. Keeping the Express Post tab allows for confirmation of delivery details to be obtained in the event the employee disputes receipt.

Couriering or sending the material by Registered Mail is not a preferred option due to the potential for an employee to refuse the delivery of it.

Privacy Notice

The ATO is authorised by the *Public Service Act 1999* to collect personal information from you directly and from third parties (for example, managers, witnesses), in relation to potential misconduct matters.

The ATO will use this information to assist an Authorised Person make an informed decision and apply procedural fairness to the informal conduct case process. Employees are not compelled to provide this information, however it may assist the Authorised Person consider mitigating circumstances surrounding an employee's conduct matter.

If you are required to provide information but do not provide it, the Authorised Person will only be able to make an informed decision based on the facts available to them.

Where authorised by law to do so, we may give this information to other government agencies. These agencies include, but are not limited to; Commonwealth bodies such as the Australian Public Service Commission, The Office of the Merit Protection Commission, Fair Work Commission and agencies that conduct intra-agency, pre-employment checks or law enforcement agencies.

The ATO's privacy policy is on ato.gov.au. The policy contains important information about your privacy, including information about how you can access and seek correction of information we hold about you, how you may complain about a breach of the Australian Privacy Principles and how the ATO will deal with any privacy complaint.

The ATO is unlikely to disclose the information to overseas recipients.

9. Investigation process

9.1. Basic requirements of investigation

The process of determining whether the Code has been breached consists of:

- investigating the suspected breach/es
- making a finding on whether the employee has committed the alleged behaviour based on evidence obtained through the investigation; and, if so
- determining whether the behaviour constitutes a breach of the Code.

If there is no real dispute as to the facts, or if the employee admits the alleged misconduct, the process may be no more involved than making a decision based on whatever has been reported, for example by the manager, and the employee's response. The determining officer may be able to make a determination without conducting any further investigations.

In other cases, where facts or circumstances are in dispute, it may be necessary to interview and/or seek statements from a range of other persons.

Regardless of the process that is followed to determine whether a suspected breach has occurred, it should be carried out with as little formality and as quickly as a proper consideration of the matter allows. A formal hearing is not required. Beyond ensuring procedural fairness is observed throughout the process, the steps to be taken will depend on the circumstances of the case.

9.2. Employee's statement

The employee **must** be provided with a reasonable opportunity to make a statement in response to the Notice. The statement may be oral or in writing, or both. 'Reasonable opportunity' includes the employee having:

- a reasonable period of time to provide a statement
- access to the material which will be considered in determining the matter. In limited circumstances it may not be appropriate to provide a copy of a document, for example where there is an imminent threat to health and safety, or other reasons including privacy and secrecy. On these occasions advice should be sought from the CP&PS consultant.

As outlined above, the Notice should include a copy of the material that the authorised person had available to them at the time of issuing the Notice.

Generally seven calendar days from receipt of the Notice is considered to be a reasonable period for submission of a statement in response to the Notice of suspected breach. However, if circumstances warrant, a longer period may be provided. In setting down the period for the employee to make a statement, the determining officer should consider the:

- seriousness and/or number of suspected breaches, that is the more serious and/or the greater number of suspected breaches, the more appropriate it may be to grant the employee a longer period in which to respond
- employment status of the employee, for example where the employee is non-ongoing and employed for a short duration the response period may be reduced
- ease of access to information and materials necessary for the employee to make an adequate statement, that is where relevant documentation is not readily available to an employee, a longer response time may be appropriate.

Any request for an extension of time in making a statement should be considered on its merits. The response should balance the need to be fair to the employee with the ATO's interest in having suspected breaches dealt with in a timely manner.

An employee's decision not to provide a statement **must** not be taken to be an admission of the suspected breach.

If further information and evidence becomes available during the course of the investigation, it should be provided to the employee and a further opportunity given to the employee to provide comment.

Oral statement

If an employee chooses to make an oral statement, the statement may be provided via telephone, via video conference or in person. It will not always be possible for oral statements to be provided in person due to the determining officer being based in a different state to the employee.

A written record should be kept of any oral statement and a copy given to the employee. The employee should be advised of his or her right to negotiate corrections or annotations to their statement. The employee should also be asked to countersign the written record. If the employee refuses to sign the written record it should be noted that they have been provided with a copy, and have declined the request to sign the record

9.3. Employee interview

The determining officer may, based on the allegations contained in the Notice and/or the employee's response, deem it appropriate to interview the employee. The person under investigation is not bound to say or do anything in response to the determining officer's questions, suggestions or allegations. An employee's decision not to participate in an interview **must** not be taken to be an admission of the suspected breach.

9.4. Employee representation

An employee may choose to have a representative present at the time of providing an oral statement to the determining officer.

Where an employee is to be interviewed in the course of the investigation, the employee is to be provided with at least 24 hours notice of the interview and advised that he or she may bring an employee representative.

The employee representative should be independent and have no involvement or interest in the suspected breach. The employee representative can assist or represent the employee. This assistance includes acting as an advocate. All participants will treat each other with courtesy and respect and all participants will deal with the employee's representative in good faith.

In the event that taxpayer or protected information is to be discussed or referred to, and the support person is from outside the ATO, consideration should be given as to how to deal with this information in order to comply with secrecy and privacy requirements. Advice should be sought from the CP&PS consultant if this situation arises.

9.5. Witness interviews

The determining officer may, based on the allegations contained in the Notice, deem it appropriate to interview witnesses to obtain evidence. As the evidence needs to be made available to the employee being investigated, generally the determining officer should advise the interviewees that any comments they provide will be recorded and will be disclosed to the employee who is suspected of having breached the Code. For example, the identity of a witness may be essential to the accused employee's defence of the allegations, for example in some cases of harassment.

In circumstances where there is a risk of victimisation or discrimination against a witness, or a concern for the safety of the witness, it may be appropriate to protect the identity of a witness. The determining officer should be explicit about any assurances that are given about protecting a person's identity. Advice should be sought from the CP&PS consultant if this situation arises.

9.6. Documenting interviews

A written record should be kept of any interview and a copy given to the interviewee. The interviewee should be advised of his or her right to negotiate corrections or annotations to their statement. The interviewee should also be asked to countersign the written record. If the interviewee refuses to sign the written record it should be noted that they have been provided with a copy, and have declined the request to sign the record.

9.7. Recording interviews

It is generally not appropriate to make an audio recording of interviews in administrative matters and to do so would generally be an exception rather than the rule. In complex matters it may sometimes be necessary to consider recorded interviews. However, this can only occur after the interviewee has agreed to the recording. If recording an interview, a dual tape or CD deck should be used and each party should be provided a copy of the recording at the end of the meeting. The tape or CD should be transcribed as soon as possible after the interview and copies of the transcript provided to all parties.

9.8. Information and evidence obtained during the investigation

As the investigation proceeds, additional information and material may be gathered for example witness statements, other documentary evidence, and recorded interviews. Any additional information which the determining officer will take into account

must be provided to the employee suspected of having breached the Code, prior to the matter being determined.

Where additional information is provided, the employee should be invited to make a further statement (refer 10.2) prior to the determination being made. There may be limited circumstances where it may not be appropriate to provide the employee with certain material for example where there is an imminent threat to health and safety, or other reasons including privacy and secrecy. On these occasions advice should be sought from the CP&PS consultant.

9.9. Variation in the suspected breach

If, during the course of the investigation, it becomes evident that there is a significant variation in the nature or extent of the suspected breach which was originally notified to the employee, the employee **must** be notified in writing of the variation. The employee **must** then be provided with a reasonable opportunity (refer 10.2) to make a statement in regard to the variation before a determination is made.

9.10. Confidentiality

An important component of any investigation is to maintain the highest level of confidentiality regarding all aspects of the investigation. The authorised person, determining officer and anyone assisting by undertaking investigations, **must** ensure that information such as progress reports are only provided to those who have a 'need-to-know'. The information provided should only be in such terms and level of detail which do not unnecessarily compromise the privacy of any individual involved and do not jeopardise the successful completion of the investigation.

9.11. Procedural fairness

The process of determining whether an employee has breached the Code **must** abide by the principles of procedural fairness which are governed by three key rules:

1. The hearing rule

Requires a decision-maker to give an opportunity to be heard to persons whose interests or rights may be adversely affected by a decision (a reasonable opportunity to present a case should include a reasonable opportunity to prepare a case).

2. The 'no bias' rule

Requires a decision-maker to be disinterested in the matter to be decided (that is they **must** not have a vested interest in the outcome). The underlying rationale of this rule is that justice should not only be done, but should be seen to be done.

3. The 'evidence' rule

Decisions are required to be based on reasonable evidence. That is, findings **must** not be based on speculation or suspicion, but on evidence which tends logically to demonstrate the findings.

9.12. Ensuring decisions are valid

It is also important that decision-makers understand that there are a number of circumstances which can cause a decision to be invalid. Decisions may be invalid where the decision-maker:

- is not empowered through an Act, delegation or authorisation to make the decision
- fails to conform to a procedure in the relevant legislation
- acts for a wrong purpose
- takes into account irrelevant considerations
- fails to take into account relevant considerations
- acts unreasonably
- acts on the basis of insufficient evidence
- acts at the dictation of another person.

10. Determination process

10.1. Considerations in making a determination

Although the determining officer is not bound by the rules of evidence, great care should be taken to ensure that irrelevant factors have not been taken into account in deciding whether or not a breach has occurred. In the use of and reliance on material:

- primary sources of evidence are preferable to secondary sources, for example an original document is better than a photocopy
- disputed facts should, where possible, be corroborated by other evidence

- hearsay evidence, that is, evidence that a third person said something, does not establish the truth of what may have been said, and should be approached with caution
- previous counselling or misconduct action is not relevant to the inquiry on whether a breach has occurred but may be relevant to the later separate decision as to the action that should be taken, if there is a finding that the Code has been breached.

When making a finding that the Code has been breached, a clear link should be made between the evidence and the relevant sub-section/s of the Code. For example, a finding that an employee has lied to a supervisor would constitute a breach of sub-section (1) of the Code, 'An employee **must** behave honestly and with integrity in the course of APS employment', on the grounds that the employee has behaved dishonestly by lying.

The provision of reasons for a determination of a breach is necessary because:

- the link between misconduct and a breach of the Code may not be self-evident, for example where the relevant sub-section of the Code involves more difficult concepts such as what amounts to 'in the course of APS employment' or a 'lawful and reasonable direction'
- it clearly states the view of the determining officer in the event of any formal review
- it helps to explain to the employee why his or her actions were unacceptable, thereby playing a corrective or educative role (with the exception of where termination is the final outcome).

When making a determination, the determining officer should be aware that:

- if more than one sub-section of the Code was specified in the Notice, it is only necessary to determine that a single sub-section has been breached for the Code itself to have been breached
- where a particular sub-section contains more than one element, it is not necessary for the employee to have breached all elements in order for the breach of the sub-section, and therefore a breach of the Code, to be found to have occurred.

For example, sub-section 13. (11) of the Code states that 'An employee **must** at all times behave in a way that upholds the APS Values and the integrity and reputation of the APS'. It would be sufficient for an employee to be found to have behaved in a way that did not uphold the APS Values, or alternatively did not uphold the integrity and reputation of the APS, for a breach of the sub-section to be found.

10.2. Standard of proof

The 'standard of proof' for determining whether a breach of the Code has occurred is 'the balance of probabilities'. This means that the determining officer **must** be satisfied that it is more probable than not that the breach has occurred, and that the employee was responsible for the breach. This civil standard of proof differs from the criminal law standard of proof which is 'beyond reasonable doubt'.

The standard of proof applicable to findings of fact or findings that the Code has been breached is the civil standard. That is, findings **must** be based on the conclusion that it is more probable than not that the matter found to have occurred, in fact occurred. However, before reaching a finding the determining officer needs to have regard to the gravity of the adverse consequences which might flow to the employee. In that sense, the civil standard of proof increases in accordance with the seriousness of the matter under consideration. In *Briginshaw v Briginshaw* (1938) 60 CLR 336 the High Court of Australia referred to the need to act with much care and caution before finding that a serious allegation is established.

10.3. Evidence does not support a case of misconduct

In some cases it may become clear early in the course of the investigation that a breach has not occurred or there will be insufficient evidence upon which to base a finding that a breach has occurred. If this happens the determining officer should notify in writing the employee suspected of misconduct as soon as possible. Such notification should be placed on the misconduct file.

11. Determination of breaches of the Code

On completion of an investigation, and in accordance with the ATO Procedures the determining officer **must** prepare a written report stating whether or not it has been determined that the employee has breached the Code.

11.1. Determination report

The determination report **must**:

- refer to the evidence or other material on which the findings were based
- set out key findings
- specify whether specific sub-section/s of the Code have been breached by the employee's behaviour and, thereby, determine whether the Code has been breached
- provide reasons for that determination, that is relate the findings to the sub-section/s of the Code that are determined to have been breached.

The content and length of the determination report and detail required will depend on the circumstances of the case. Sufficient information to support the decision and withstand external scrutiny should be included in the report.

Advice regarding preparation of the determination report **must** be sought from the CP&PS consultant.

A general expectation is that the determining officer will finalise the determination report within four weeks of the completion of the investigation.

11.2. Notice of determination - advising employee of the findings

If the determining officer determines that a breach has occurred, they are to write to the employee informing them of the final decision (Notice of determination). The notice should:

- enclose a copy of the determination report and the determining officer's decision record
- reiterate the range of possible sanctions, and what the next steps of the process will involve.
- notify the employee of their right to seek review of the findings under section 33 of the PS Act, noting that seeking a review will not operate to stay the finding of breach or consideration of the sanction.

Drafting of the notice of determination should be discussed with the CP&PS consultant.

12. Sanctioning

Where it has been determined that an employee has breached the Code, a sanction may be imposed under Section 15 (1) of the PS Act. The person who imposes a sanction **must** have the delegation to do so.

Once a determination is made, an Investigation Summary will be provided to the sanction delegate for their consideration of whether a sanction/s should be imposed. The sanction delegate will advise the employee of the sanction they are considering based on the investigation summary and supporting evidence, and provide the employee with an opportunity to respond, usually 7 days.

The sanction delegate will make the decision on what, if any sanction should be imposed after consideration of any information put forward by the employee in regard to sanction/s.

12.1. Delegation to impose a sanction

The following people hold the standing delegation to impose a sanction:

- Second Commissioners
- First Assistant Commissioner, ATO People
- All SES employees located in ATO People
- Chief Finance Officer
- Executive Director, Issues Management, ATO People for non-SES employees and excluding the sanction of termination of employment
- Director, Conduct Performance and Probation Support, ATO People, for non-SES employees and excluding the sanction of termination of employment.

ATO policy states that, for reasons of consistency and good governance, sanctions shall be imposed by persons so delegated within ATO People. It is currently the case that sanctions will be imposed by the:

- Assistant Commissioner, First Point of Resolution and Issues Management, ATO People
- Executive Director, Issues Management, ATO People
- Director, Conduct Performance and Probation Support, ATO People.

Refer to [Personnel delegations - Sanctions for Code of Conduct breaches](#).

12.2. Ensuring impartiality

Reasonable steps **must** be taken to ensure that the sanction delegate is, and appears to be, independent and unbiased.

Following are some examples of where bias could, or could be thought to, arise:

- a sanction delegate has a personal interest in the decision
- a sanction delegate has a work or personal relationship with the employee being investigated, or witnesses
- a senior manager makes comment on the case in a manner which could be perceived to influence the more sanction delegate
- a sanction delegate is a witness in the matter.

Care also needs to be taken to avoid perceived bias if a sanction delegate has previously been involved in the matter in another capacity.

If there is any doubt about the suitability of a sanction delegate, it is wise to make another choice.

12.3. Actions available where breach proven

If it is determined that the employee has breached the Code, the sanction delegate may decide to impose one or more sanctions specified in section 15(1) of the PS Act.

A sanction delegate may decide not to impose a sanction and may decide that the other remedial action may be appropriate, such as counselling, or that no further action is required.

12.4. Counselling

Counselling after a breach has been determined would be appropriate in cases where, had all the circumstances been known at the start of the investigation, the matter would not have been dealt with under the ATO Procedures. In such cases counselling is not a reprimand for having breached the Code but a discussion of the expected standards of behaviour and how those standards are to be maintained. Such counselling should encompass a warning to the employee that any future breach/es of the Code will be dealt with more severely.

A written record of the counselling will be maintained on the employee's personnel records and maintained for a period of (up to) two years in accordance with the Administration Functions Disposal Authority - Class No 1702.

12.5. Sanction/s

Under section 15(1) of the PS Act the available sanctions are:

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deduction from salary, by way of fine (which **must** not be more than 2% of annual salary)
- reprimand.

There is no provision in the PS Act for any other form of sanction, but other management action may be warranted in order to reduce the risk of further misconduct (for example restricting an employee's access to the internet following a finding of internet misuse). Any such action should clearly be cast as a management action and not a sanction.

The purpose of the imposition of sanctions is to ensure effective administration and to maintain public confidence in the integrity of the ATO's processes and practices rather than to punish individuals. Sanctions should focus on reducing or eliminating the likelihood of future similar behaviour.

Sanctions are to be proportionate to the nature of the breach, provide a clear message to the employee that their behaviour was not acceptable and act as a deterrent to the employee and others. Where a sanction is seen as too severe, it is likely to be seen as unfair by the employee involved, and others (if they become aware of the outcome), and may be counterproductive. The sanction should focus on the seriousness of what the employee has done – the number of elements breached is not, of itself, a relevant consideration.

Prior misconduct is also relevant to the imposition of a sanction and might be taken into account where it:

- indicates that the employee was, or should have been, well aware of the standard of conduct expected and the potential consequences of misconduct
- demonstrates that the employee is apparently unwilling to adhere to the standard expected.

12.6. Employee's opportunity to comment on sanction

The employee **must** be provided with an opportunity to comment on the matter of sanction. While the employee has opportunity to comment on sanction in response to the Notice, they should be afforded a further opportunity to comment again once the breach has been determined. This is because the employee may have previously focussed on the issue of whether a breach did in fact occur, and may not have addressed the question of possible sanction thoroughly.

The employee should be provided with the details of the sanction/s which are under the consideration of the sanction delegate.

If additional information comes to light at any time after the employee has commented on sanction, and that information will be considered by the sanction delegate, in accordance with the principles of natural justice, the employee **must** be provided with a further opportunity for comment.

The employee should be allowed a reasonable timeframe in which to provide their comments. In setting down this timeframe, consideration should be given to the individual circumstances of the case. In general, seven days would be considered to be reasonable.

The courts have indicated a range of other factors that are or may be relevant in determining the level of sanction to be applied. These are outlined in more detail hereunder.

12.7. Considerations for sanction/s

When considering what, if any, sanction/s to impose, the sanction delegate will consider the comments the employee presents in response to the proposed sanctions they are advised of.

The sanction delegate in deciding on the appropriate sanction should have regard to the following factors:

- Nature and seriousness of the breach. For example:
 - the type of conduct involved
 - amounts, values or quantities
 - the period of time over which the conduct occurred
 - evidence of any personal benefit from the breach
 - the actual and potential consequences of the employee's conduct
 - the standard of professional care and skill required in the employee's position for example a higher standard of care may be expected from a senior employee
 - the impact that the breach has had on the employee/employer relationship.
- Degree of relevance of the breach to the employee's duties or reputation of the ATO or of the APS. For example:
 - whether a breach of trust is involved
 - whether the breach affects management's confidence in the employee's continued ability to properly perform his or her duties
 - the seniority of the employee, with more senior employees generally expected to set an example for more junior staff, and required to exercise a greater degree of judgement
 - any special requirements of the job, for example public contact positions, the need to maintain professional and ethical standards, public safety considerations
 - extent to which the misconduct affects the reputation of the APS.
- Circumstances of the breach. For example:
 - the degree of participation by the employee, for example if several employees were involved in one incident, their relative responsibilities for the incident
 - whether the employee's action was well-meaning but misguided or a knowing breach of the Code.
- Mitigating factors. For example:
 - contrition or remorse expressed by the employee
 - external pressures on the employee such as provocation, financial difficulties, domestic or cultural pressures
 - level of experience
 - medical factors
 - lack of training.
- Previous employment history and general character of the employee. For example:
 - the length of service, balancing a previously unblemished record against the expectation of greater awareness of behavioural expectations
 - previous counselling, warnings and sanctions retained in accordance with the Administrative Functions Disposal Authority (the weight given to information on past disciplinary actions should diminish with time)
 - manager's report/s on the employee's character and work performance may be taken into account. However, when taking a manager's report into account the following **must** be considered:
 - general work and character references clearly do not constitute exculpatory evidence in respect of the particular breach
 - employees are assumed to have a satisfactory work history and general character anyway, unless there is some formal record to the contrary
 - an outstanding work history and general character do not necessarily mitigate the breach.
- Response to the misconduct, and the likelihood of recurrence including:
 - whether the employee admits the breach, shows a willingness to take responsibility, shows remorse and understands the seriousness of the breach
 - cooperation with the investigation
 - whether the employee has reflected on the action and how it can be avoided in the future and their commitment not to repeat the breach in the future.
- Effect of the proposed action on the employee
 - In considering the effect of a proposed action on the employee, the sanction delegate's objective is not to be lenient to the employee. An otherwise appropriate sanction should therefore not be lessened simply because the effect on the employee would be severe. The sanction delegate should, however, think through the impacts of their proposed action on the employee, so that an unreasonably harsh decision is not made in ignorance.
 - loss of earnings from suspension.

12.7.1. Applying multiple sanctions for one breach

It is possible for more than one sanction to be applied to an employee found to have breached the Code as long as the sanction delegate is satisfied that more than one sanction is appropriate in the circumstances of the case and can give a proper reason for their decision. For example, an employee may be re-assigned duties and have a fine imposed.

12.7.2. Applying sanctions for multiple breaches

It is usually appropriate to reflect the existence of multiple related breaches in a more severe sanction rather than separate sanctions for each breach. Where the breaches are unrelated, for example a harassment incident and an unrelated theft, separate sanctions may be appropriate. In any case, the sanction delegate should, after deciding what sanction is warranted in relation to each breach, consider these decisions in order to ensure that the total effect is not disproportionate (that is neither too harsh nor too lenient) to the seriousness of the breaches considered as a whole—in other words, apply the totality principle 'take a last look at the total to see whether it looks wrong', *Mill v The Queen*, (1988), 166 CLR 54.

12.8. When particular sanctions may be appropriate

The sanction delegate imposing the sanction **must** be satisfied that the sanction is proportionate to the misconduct.

12.8.1. Termination of employment

Termination of employment is the most severe of sanctions. It is appropriate only where:

- it is considered that the misconduct is so serious that it is no longer desirable that the employee should remain in the APS
- the employee, through their action, has repudiated a basic element of the employment relationship (for example by indicating that they do not accept the need to follow lawful and reasonable directions from their team leaders).

While every case needs to be considered in the context of its particular circumstances, examples of behaviour determined to be a valid reason for termination of employment by the former AIRC are:

- repeated and consistent failure, when acting in the course of APS employment, to treat everyone with respect and courtesy and without harassment (as required under section 13(3) of the PS Act)
 - An employee was terminated after behaviour that included making blatantly false allegations, dogged refusal to acknowledge relevant policies and the Code, grievance based harassment of fellow employees and team leaders; concoction of assault stories; and inability to communicate with other staff and to conform to normal behavioural standards (McKeon v Centrelink, PR911316—this case also involved breaches of sections 13(1) and 13 (5) of the PS Act)
 - In another decision, the former AIRC noted that, despite warnings, the approach of the employee in relation to providing co-workers with respect and courtesy did not change (Curr v ATO, PR953053).

These appear to be the most common type of behaviour where terminated employees seek remedies through the Fair Work Commission, with behaviour involving treatment of colleagues, junior staff, team leader and customers.

- serious failure to behave with honesty and integrity in the course of APS employment
 - Failure to disclose dismissal from previous employment for Code breaches along with failure to declare participation for profit in a private sector company whose business related to the business of the Agency (also breached sections 13(9) and (11)) (Ahmed v Department of Immigration and Multicultural Affairs, PR916461)
 - Misuse of departmental credit card (Department of Employment and Workplace Relations v Oakley, PR954267 and PR954267—also involved breach of sections 13 (5), (10) and (11)). This decision is also significant in that the Full Bench held that it was appropriate and reasonable to delay taking Code action so as not to prejudice criminal proceedings about the same matter, and that the decision to place the employee on alternative, restricted duties was appropriate and preferable to suspension.
- Failure, generally repeatedly, to comply with lawful and reasonable directions
 - Directions in relation to return to duty (A Romanov-Hughes v Department of Defence, PR920194)
- Serious misuse of Commonwealth resources
 - Receiving, storing and sending pornographic or otherwise sexually explicit emails or other offensive material using the employer's email system (Williams v Centrelink, PR942762—also found to be a breach of section 13(11)—and O'Neile v Centrelink, PR973658).

12.8.2. Reduction in classification

Reduction in classification is particularly appropriate where it is considered on the basis of the determined misconduct that the employee can no longer be trusted to perform the duties of their current position or another position at the same level of responsibility. For example where an employee demonstrates by their misconduct that they should no longer have any supervisory responsibilities, or responsibility for authorising payments, it would be appropriate to effect a reduction in classification.

Reduction in classification is also appropriate where termination of employment would be warranted but for mitigating factors that suggest that the employee should be given a chance to redeem themselves. Discussions would need to take place within the Agency to ensure that duties were available at the classification level proposed, before the sanction is imposed.

A reduction in classification cannot be made to operate only for a specific period. The practical impact of the sanction will evaporate immediately if the employee secures higher duties or a substantive promotion to their original level.

12.8.3. Re-assignment of duties

The sanction involving a re-assignment of duties at the same classification level (including to a different location) is intended to be used in situations where the integrity and effectiveness of the APS may be compromised if employees are not removed from a particular location or from their present duties, even though the conduct in question does not warrant termination of employment. For example, this could occur:

- where the nature of the employee's conduct is such that it may be difficult for colleagues to continue working harmoniously with them
- where an employee is no longer trusted to take due care with a particular aspect of their current duties, for example, the handling of cash

Where the reassignment involves a change of location, the sanction should be used only after careful consideration of all the circumstances, taking into account the impact on the employee, such as the financial costs and the effect of dislocation on the employee and his or her family.

Discussions would need to take place within the Agency to ensure that a position in another area/location was available, before the sanction is imposed.

This sanction could be imposed for a defined period if it incorporated a decision to return the employee to their former duties after a specific period.

12.8.4. Reduction in salary

A reduction in salary can be used to demonstrate the seriousness with which the employee's conduct is viewed. It may be particularly appropriate where the employee's conduct does not indicate that he or she understands the seriousness of the breach they have committed and as a signal about appropriate behaviour.

A reduction in salary can be imposed for a temporary period or for an indefinite period. Generally, the reduction will be subject to any subsequent salary event, such as a promotion or a salary increase provided for in an agreement.

Generally, the reduction will be subject to any subsequent salary event, such as a promotion or a salary increase provided for in an agreement. It is, however, possible for the ATO to impose a salary reduction for a defined period that makes provision for how the reduction would interact with any subsequent salary event—the sanction could state, for example, that there will be 'a reduction of 10% in the salary which would otherwise be payable from time to time over a 12-month period'.

The period for which a reduction in salary is to have effect should be clearly specified at the time the sanction is determined. Once the period of sanction is complete, the employee is entitled to be paid the salary at the level the employee would have received if they had not been subject to the temporary reduction.

12.8.5. Deductions from salary (fine)

This sanction is appropriate for less serious breaches, where it is appropriate for the ATO to demonstrate the seriousness with which the employee's conduct is viewed, but it is not appropriate for the sanction to have long-term financial implications for the employee. A sanction of a fine may be imposed by way of a one-off deduction or by deducting an amount from salary each pay for a defined period.

Deductions from salary are limited to no more than 2% of an employee's annual salary.

In determining the upper-limit of a fine in a particular case, the decision maker needs to consider carefully the meaning of the term 'salary' in the light of the ATO's remuneration arrangements.

12.8.6. Reprimand

A reprimand is the least severe form of sanction and is most appropriate in situations where the misconduct is not of a grave nature, or where it is clear that the employee has learned from the disciplinary process and presents no appreciable risk of further misconduct.

It acts as both a mark of disapproval of past conduct and as a warning for the future.

It should be noted that where a reprimand is imposed it is subject to the same standards of recordkeeping as apply to other sanctions. For this reason it is preferable for the reprimand to be administered at a face-to-face meeting, by reference to a written record of the reprimand, which is provided to the employee at the conclusion of the meeting, with a copy placed on the conduct file.

The sanction delegate should also consider who would be the most effective person to deliver the reprimand—generally a reprimand delivered by a higher level team leader will carry greatest weight.

Privacy notice

The ATO is authorised by the *Public Service Act 1999* to collect personal information from you directly and from third parties (for example, managers, witnesses), in relation to potential misconduct matters.

The ATO will use this information to assist a Sanction Delegate make an informed decision and apply procedural fairness to the Code of Conduct process. This information will be considered by the Sanction Delegate to determine what, if any, sanction/s to impose.

Where you are provided an opportunity to comment on sanction but do not provide any information, the Sanction Delegate will only be able to make an informed decision based on the facts available to them.

Where authorised by law to do so, we may give this information to other government agencies. These agencies include, but are not limited to; Commonwealth bodies such as the Australian Public Service Commission, The Office of the Merit Protection

Commission, Fair Work Commission and agencies that conduct intra-agency, pre-employment checks or law enforcement agencies.

The ATO's privacy policy is on ato.gov.au. The policy contains important information about your privacy, including information about how you can access and seek correction of information we hold about you, how you may complain about a breach of the Australian Privacy Principles and how the ATO will deal with any privacy complaint.

The ATO is unlikely to disclose the information to overseas recipients.

13. Imposing a sanction/s

When a sanction is imposed on the employee, the employee **must** be given a written statement of reasons for the decision on the sanction/s. Ordinarily this will comprise a Notice of Imposition of Sanction together with the recommendation made to the sanction delegate in the event the delegate accepts the recommendation/s made. Where the sanction delegate varies the recommendation/s made, the sanction delegate will provide their reasons for doing so. The CP&PS consultant can assist with the preparation of the required documentation.

13.1. Sanction of termination of employment – Notice period

In calculating the date of effect of termination of employment, regard **must** be made to the requirements of the:

- [Fair Work Act 2009](#)
- [Clause 120.6](#) of the ATO Enterprise Agreement 2011.

The *Fair Work Act 2009* notice periods does not apply if the employee's conduct is found to be 'serious misconduct' – a term that is defined to include:

- a. wilful, or deliberate, behaviour by an employee that is inconsistent with the continuation of the contract of employment
- b. conduct that causes imminent, and serious, risk to the:
 - health, or safety, of a person
 - reputation, viability or profitability of the employer's business.

For the purposes of a. above, serious misconduct includes behaviour in the course of employment that involves:

- theft, fraud or assault
- refusing to carry out a lawful and reasonable instruction
- being intoxicated at work.

An employee is taken to be intoxicated at work, if the employee's faculties are by reason of the employee being under the influence of intoxicating liquor or an un-prescribed drug, so impaired that the employee is unfit to be entrusted with the employee's or with any duty that the employee may be called upon to perform, unless the employee is able to show that, in the circumstances, their misconduct was not conduct that made employment in the period of notice unreasonable.

An employee whose employment is terminated because of serious misconduct is not entitled to a notice period, or payment in lieu of notice. Termination of employment as a result of a breach of the Code for behaviours that satisfy the definition of serious misconduct would therefore not entitle the employee to any notice period. It follows that there is no entitlement to payment in lieu of notice.

Where a breach of the Code does not meet the definition of serious misconduct in the Fair Work Act, the ATO's Enterprise Agreements operate to provide that the minimum period of notice for termination of employment is 14 days after the employee has been furnished with reasons for the termination or after any greater period of notice required by the Fair Work Act as per the following table.

Employee's period of continuous APS service	Period of notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

The periods shown in this table are increased by one week if an employee whose employment is to be terminated is over 45 years of age and has completed two or more year's continuous APS employment.

As with any termination of employment, the employee **must** be provided with a written notice of termination. The CP&PS consultant can assist in drafting the necessary documentation.

13.2. Sanctions other than termination of employment

Reprimand - A reprimand should be verbally delivered in person by at least an Executive Level employee in the BSL and accompanied by a formal letter of reprimand. The CP&PS consultant will assist in preparation of the formal letter.

Fine - In accordance with PS Regulation 2.3, fines are to be limited to no more than 2% of an employee's annual salary. The sanction delegate will need to consider the meaning of the term 'salary' in the light of the ATO's remuneration arrangements, including any relevant Enterprise agreement or an employee's Australian Workplace Agreement.

The usual expectation is that a fine will come out of one pay. Where this would involve hardship, the employee may seek to pay by instalments. The employee should be advised to send any such request to the sanction delegate who imposed the sanction. It is up to the employee to demonstrate that real hardship is involved.

It is important to remember that fines are meant to have a sharp impact on the employee. Employees should not be allowed to dilute the corrective purpose of fines by extending payment over a long period. In cases of real hardship, it should rarely be necessary to allow payment over more than 2 or 3 fortnightly pay periods.

13.3. Imposing sanctions other than termination of employment

The date of effect of a reduction in salary, re-assignment of duties or a reduction in classification, will take effect as soon as practicably possible after the decision of sanction is made.

The sanction delegate should arrange for actioning of the sanction and ensure that evidence of the implementation of the sanction is placed on the employee's personnel file.

If the employee is suspended, the suspension delegate **must** now lift any suspension in place. A notice of cessation of suspension can be provided by the CP&PS consultant.

14. Record keeping

14.1. Misconduct file

Once an authorised person initiates action under the ATO Procedures a CP&PS consultant will create a misconduct file which will be maintained throughout the process.

If a breach of the Code is determined the ATO **must** maintain a written record of:

- the suspected breach
- the determination
- any sanctions imposed as a result of a determination that the employee breached the Code
- if a statement of reasons was given to the employee—the statement of reasons.

The CP&PS consultant will be responsible for ensuring the file contains copies of all information, statements and evidence obtained in regard to the investigation, determination of breach and decision on sanction imposed.

The file will be managed in accordance with the Administrative Functions Disposal Authority, *Archives Act 1983* and *the Privacy Act 1988* and the *Freedom of Information Act 1982*.

14.2. Recording sanctions on personnel files

Where a breach of the Code has been determined, a written record **must** be placed on the employees personnel file. This is referred to as an Official Conduct Record (OCR). The OCR should state:

- the date on which it was determined that the employee breached the Code
- the specific sub-sections of the Code determined to have been breached
- the sanction/s to be imposed, if any
- the details of the HR Case in which the material relating to the matter is stored.

Beyond the information shown above, the OCR should not record details of the breach. The OCR will be held on the personnel file for a period specified in the Administrative Functions Disposal Authority – a minimum of five years in any matter in which a sanction is imposed (seven years if the sanction imposed is termination of employment). Sanction delegates should consult the CP&PS consultant for assistance with the preparation of the OCR.

14.3. Handling evidence

It is important that investigators ensure that evidence obtained during the course of the investigation is handled appropriately.

All evidence, but especially primary evidence, including statements from the employee and witnesses, other documents, photographs, handwritten notes etc should be handled in a manner which preserves its original condition.

The following guidelines apply:

- documents should not be permanently marked or defaced
- the source of each document should be recorded where this is not obvious from the document itself
- if evidence is removed from the misconduct investigation file or taken to a different location, details of changes in possession should be recorded
- evidence should be kept in a secure location that can not be accessed by members of the public or unauthorised staff
- evidence should be kept in logical order and maintained in such a way that another party can readily ascertain the current status of the case.

15. Employee review rights

A request by a non-SES employee for a review of action, other than a finding of a breach of the Code or the imposition of a sanction for such a breach, can be made in accordance with the ATO's Procedures for Review of Employment Actions.

15.1. Review of suspension from duty decision

An employee who has been suspended from duty has a right to review under PS Regulation 5.24 (1). The employee should apply to the First assistant Commissioner (FAC) ATO People for a Review of Employment Actions.

15.2. Review of determination that employee has breached the Code:

An employee who has been determined to have breached the Code has a right of review. However, a request for review of a determination that the employee has breached the Code **must** be made directly to the Merit Protection Commissioner pursuant to Public Service Regulation 5.24(2) (a).

15.3. Review of sanction (other than termination)

The imposition of a sanction is also reviewable; however, a request for a review of the imposition of a sanction (other than termination of employment) **must** be made directly to the Merit Protection Commissioner pursuant to Public Service Regulation 5.24(2) (b).

15.4. Review of sanction - termination

Termination of employment is excluded from the APS review processes, section 33(1) PS Act, as there is a right of review for unfair or unlawful dismissal under section 394(1) of the *Fair Work Act 2009* to the Fair Work Commission.

The making of an application for review, in any of the above circumstances, does not operate to stay the action/decision and, generally, implementation of a decision will not be deferred. However, the sanction delegate will assess all the circumstances of the case, taking into account factors such as whether things could easily be restored to where they were, in the event that a sanction decision is reversed, eg where the sanction is a fine or reduction in salary.

Non-ongoing employees have the same rights of review as ongoing employees. They are also to be provided with the required period of notice of termination in accordance with the *Fair Work Act 2009*.

16. Disclosure of personal information

If an employee:

- is found to have breached the Code and been sanctioned and subsequently leaves the ATO
- is found to have breached the Code and leaves the ATO before a decision about imposing a sanction is made
- becomes the subject of a misconduct allegation and leaves the ATO before the matter is resolved

then information about the breach or allegation may be disclosed to other parties.

16.1. Disclosure of personal information to others

During the course of a Code of Conduct investigation, or after the investigation is complete, personal information (refer to Glossary of Terms) about an employee under investigation may, where necessary, appropriate and reasonable, be disclosed to others, including:

- the complainant
- other Commonwealth bodies who have been involved in the matter, such as the Commonwealth Ombudsman, the Office of

- the Privacy Commissioner or the Inspector-General of Intelligence and Security
- an APS Agency where the employee moves or seeks to move in the future.

16.2. Disclosure of the personal information to the employee

During the course of a Code of Conduct investigation, or after the investigation is complete, in accordance with the principles of procedural fairness, the employee may be provided with personal information about an individual who is a party to the investigation. This may include the complainant and any witnesses to the investigation. Disclosure of information about the complainant and any witnesses to the respondent employee or others should be done in accordance with the Agency's obligations under the *Privacy Act 1988* (Privacy Act).

16.3. Opportunity to make a case as to why information should not be disclosed

Where the ATO is considering disclosing personal information about an employee to another person, body or Agency, the employee will be advised in writing and given the opportunity to make a case prior to the information being disclosed, as to why their personal information should not be disclosed. The employee will have 7 days to provide a case, in writing, to the investigating officer.

16.4. Disclosure of disclose general information

Prior to disclosing information about the outcome of a Code of Conduct investigation, The ATO will have due regard to the *Privacy Act 1988*, including determining whether personal information will be used or disclosed and in what circumstances. General information containing no personal information may be disclosed to others where the ATO considers it necessary, appropriate and reasonable to do so.

16.5. Disclosure of personal information in relation to employment decisions

It is the usual practice of the ATO to pass information on to another APS agency where the ATO believes that the information might be relevant to employment related decisions which might need to be considered or made by the other APS Agency, including:

- recruitment decisions
- decisions as to whether or not an employee has breached the Code of conduct
- decisions as to whether or not an employee should be sanctioned for any breach that is determined.

In addition, it is also the usual practice of the ATO to use information of the breach found proven and information of any sanction imposed when making decisions regarding employee's employment in the ATO (including, for example, assessing any application for promotion or transfer) where the ATO believes that the information is relevant to those employment related decisions.



The relevant Privacy notices are available in sections 4, 8 and 12 of this document.

17. Other matters

17.1. Procedure when an employee is to move to another Agency during an investigation

The ATO Procedures details the measures to be observed in cases where an employee suspected of having breached the Code, but about which no determination has yet been made, and the basis of the employee's engagement in an APS Agency changes or the employee moves to a different APS Agency.

Where an alleged breach is unresolved and the employee has been informed, a move to the new agency is put on hold until the suspected breach has been resolved (including promotions) unless one of the following delegates determines the move may proceed:

- FAC, ATO People
- AC, Issues Management and Employment Policy, ATO People
- Executive Director, Conduct, Performance and Probation Support, ATO People
- Director, Conduct, Performance and Probation Support, ATO People

17.2. Resignation during the course of an investigation

If an employee resigns after a notice of suspected breach has been issued, the matter can still be determined as outlined in the procedures.

Determinations of whether a person has breached the Code while an APS employee are able to be made even after the person leaves APS employment.

A resignation will not be accepted after an instrument of termination has been issued.

A resignation will not stop any criminal action that has been instigated against the employee or former employee.

17.3. Transitional arrangements

The revised ATO Procedures take effect from 1 July 2013.

If a Notice of Suspected Breach of the Code has been given to an employee under the Managing Misconduct - ATO Procedures for Determining Breaches of the Code of Conduct of January 2001, prior to 1 July 2013, the matter is to be determined under the former Procedures. A copy of those Procedures is available from the CP&PS consultant.

Where a suspected breach of the Code occurred before 1 July 2013 and the Notice had not yet been issued, the matter is to be progressed in accordance with the revised ATO Procedures. The Notice will include the elements of the Code that were effective 1 July 2013.

18. Misconduct and selection exercises

18.1. Referee reports

It is a common practice for APS Agencies to ask applicants seeking promotion or movement at level to obtain a referee report from their current supervisor or team leader.

The information privacy principles (IPPs) apply to giving a referee comment regardless of whether there are issues with the employee such as underperformance, poor attendance or misconduct.

Team leaders should avoid any comment in a referee report that is unrelated to the employee's work performance. Any comment that is made **must** be relevant to the selection criteria.

In determining whether to disclose information on a prior or suspected breach of the Code, factors that **must** be taken into account include:

- nature of the breach or suspected breach
- how long ago the breach occurred
- duties being undertaken at the time and the proposed duties of the new work
- employee's conduct since the breach.

Where an employee whose conduct is under investigation asks a manager or team leader to provide a referee report and the investigation may be relevant to the work-related qualities required for the job, the referee could indicate that there have been concerns as yet unresolved where the situation warrants it. To go beyond that could be seen as prejudging the situation, particularly where there is no clear determination of misconduct.

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

Where an investigation has been finalised and a breach determined which has relevance to the nature of the duties to be performed, eg if the breach relates to the disclosure of information and the job in question involves handling sensitive or protected information, the referee has a duty to disclose the information. The referee should briefly describe the circumstances surrounding the breach and the sanction imposed, and should comment on the relevance of the matter to the job in question. Ultimately the effect of the misconduct upon the suitability or otherwise of the candidate is a decision to be made by the delegate for the selection process (see also 18.2).

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

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

18.2. Considering misconduct in the selection process

The selection process is a key means by which the ATO gains relevant information regarding eligibility and suitability from applicants.

In accordance with [PS CM 2009/01 – Recruitment and selections](#), it is a requirement that, prior to the finalisation of a gazetted selection exercise, the names of candidates rated as suitable are provided to the Director, Conduct, Performance and Probation Support for a check of ATO employment records.

Having a work history that includes a finding that the employee has breached the Code or being investigated for a suspected breach does not automatically exclude that employee from consideration in a selection process. If an applicant discloses prior misconduct or the delegate or panel is aware of prior misconduct, a decision on whether the person is suitable for employment should not be made without assessing the work-related qualities of the applicant against the identified work-related qualities (which includes personal qualities) genuinely required for the duties.

When dealing with a previous breach of the Code, the following factors should be considered:

- nature of the breach (or suspected breach)
- sanction imposed
- how long ago the breach or suspected breach occurred
- nature of the duties being performed at the time
- duties of the current employment opportunity
- was this a one-off action or part of a pattern of behaviour?

If an applicant is involved in a misconduct action that has yet to be finalised, care needs to be taken so as to not prejudge the outcome of any investigation while ensuring the work related qualities of the employee are appropriate for the duties to be performed. If, after the assessment of the person's work-related qualities, the person is a preferred applicant, the options available include:

- wait for the outcome of the investigation (if feasible)
- proceed with the assignment of duties or movement if the proposed breach is considered minor or the possibility of such a potential breach in the new Agency is low
- offer the person a temporary assignment or movement pending the finalisation of the investigation.

Disciplinary and other issues may be taken into account in the selection delegate's final decision if they impact upon the applicant's ability to undertake the inherent requirements of the advertised job. Natural justice principles **must** be adhered to in considering these other matters.

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

It is the responsibility of the selection delegate to determine whether the information is relevant to the selection process and, if so, whether it should be taken into consideration. Selection delegates **must** document their reasons if the referee's report or record of sanctions results in the selection delegate not supporting any selection committee recommendation.

19. Legislative context and references

[Procedures for determining whether an employee has breached the Australian Public Service \(APS\) Code of Conduct and imposition of sanction](#)

[Administrative Functions Disposal Authority \(AFDA\)](#)

[CMPS 2006/10 Managing illness and injury in the workplace](#)

[PS CM 2009/01 Recruitment and selections](#)

[Probation in the ATO - A team leader's guide](#)

[Procedures for review of employment actions](#)

[Public Service Act 1999 \(PS Act\)](#)

[Australian Public Service Commissioner's Directions 2013](#)

[Public Service Regulations 1999 \(PS Regulations\)](#)

[Personnel delegations](#)

20. Glossary of terms

20.1. ATO Procedures

The ATO Procedures for determining Whether an Employee Has Breached the APS Code of Conduct and Imposition of Sanction are the Procedures established by the Commissioner of Taxation in accordance with sub section 15(3) of the *Public Service Act 1999*. Any formal consideration of suspected misconduct **must** be advanced in accordance with the ATO Procedures.

20.2. Authorised person

The authorised person is the person who has authorisation to initiate action under the Procedures and select a person to investigate and determine (the determining officer) a suspected breach of the Code.

20.3. Determining officer

A determining officer is a person selected by an authorised person to investigate and determine a suspected breach or breaches of the Code. In the event that a determining officer determines a breach has occurred they will also be required to make recommendations on an appropriate sanction/s to the sanction delegate.

20.4. Determining a breach

In this Guide, the term 'determining a breach' and similar terms are used to mean deciding whether an APS employee in the ATO has breached the Code. The word 'determining' is used because this is what is used in the PS Act itself.

20.5. Fraud Prevention and Internal Investigation

Fraud Prevention and Internal Investigation (FP&II) has responsibility for the investigation of allegations made against ATO employees of serious misconduct and criminal matters. FP&II do determination breaches of the Code and confines its activities in that regard to the evidence-gathering process. Where required FP&II will also provide a liaison role between the ATO and law enforcement Agencies.

20.6. Conduct Performance and Probation Support (CP&PS)

CP&PS is a part of the First Point of Resolution and Issues Management Branch within ATO People. The Complex Case team within CP&PS exists to assist Business and Service Line management in the proper management of suspected misconduct and related matters. The Complex Case team is recognised as the ATO's centre of excellence in dealing with misconduct and suspected breaches of the Code. However, they do not replace or in any way reduce team leaders' responsibility for managing individual employees.

20.7. Misconduct

Misconduct is a generic term which refers to an action or behaviour by an APS employee who is determined to have breached the APS Code of Conduct. Prior to such a determination, the action or behaviour is referred to as suspected misconduct.

20.8. Misconduct action

Misconduct action refers to the decision taken by an authorised person to commence action under the ATO Procedures in respect of an employee who is suspected of having breached the Code.

20.9. Personal information

Personal information is defined in section 6 of the *Privacy Act 1988* as 'information or an opinion...about an individual...whose identity is apparent, or can reasonably be ascertained, from the information or opinion'. (Agency) will ensure that, where appropriate, necessary and reasonable, personal information about an employee under investigation will remain confidential.

20.10. Sensitive information

Sensitive information is defined in section 6 of the Privacy Act as 'information or an opinion about an individual's racial or ethnic origin or political opinions or membership of a political association or religious beliefs or affiliations or philosophical beliefs or membership of a professional or trade association or membership of a trade union or sexual preferences or practices or criminal record that is also personal information or health information about an individual or genetic information about an individual that is not otherwise health information'. Special care should be taken in the handling of sensitive information. Sensitive information should generally not be disclosed to a third party without the express consent of the individual concerned.

20.11. Sanction delegate

The sanction delegate is the person who has been delegated the power to make a decision regarding the matter of sanction under s.15.1 of the PS Act, once an employee has been found to have breached the Code. Current practice within the ATO is to have this function exercised exclusively within ATO People.

20.12. Selection delegate

The Selection delegate is the person who has been delegated the power under s.22.1 of the PS Act to engage persons as employees of the APS.

20.13. Suspension delegate

The suspension delegate is the person who has been delegated the power under regulation 3.10 of the PS Regulations to suspend an employee from duties.

21. Contact

For further information relating to this Guide, contact a member of the Complex Case team in Conduct Performance and Probation Support ATO People by contacting the [People Helpline \(PHL\)](#).

Modified Date:Friday, 4 April 2014

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