

Senate Finance and Public Administration Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
SUPPLEMENTARY BUDGET ESTIMATES 2014-15

Finance Portfolio

Department/Agency: All
Outcome/Program: General
Topic: Departmental Staff Misconduct

Senator: Ludwig
Question reference number: F76
Type of question: Written
Date set by the committee for the return of answer: Wednesday, 31 December 2014

Number of pages: 7

Question:

Since Budget Estimates in May 2014:

1. Please provide a copy of the departmental staff code of conduct.
2. Have there been any identified breaches of this code of conduct by departmental staff? If yes:
 - a) List the breaches identified, broken by staffing classification level.
 - b) What remedy was put in place to manage the breach? If no remedy has been put in place, why not?
 - c) When was the breach identified? By whom? When was the Minister made aware?
 - d) Were there any legal ramifications for the department or staff member? Please detail.

Answer:

Department/ Agency	Response		
Finance	1. All Finance employees must comply with the APS Code of Conduct. 2. Four breaches of the APS Code of Conduct were identified.		
	a) Breach and Classification Level Per Section 13 - Public Service Act 1999	b) Remedy Per Section 15 - Public Service Act 1999	c) Date identified and by Whom *
	EL2 - S13(3) and (11)	S15(e) – Deduction from salary, by way of fine S15(f) – A reprimand	3 July 2014 by Code of Conduct breach decision maker

Department/ Agency	Response		
	EL1 – S13(3), (4) and (11)	S15(e) – Deduction from salary, by way of fine S15(f) – A reprimand	14 July 2014 by Code of Conduct breach decision maker
	APS2 – S13(2) and (11)	S15(f) – A reprimand	21 August 2014 by Code of Conduct breach decision maker
	APS5 – S13(2), (3), (5), (8) and (11)	The employee resigned before a remedy was put in place.	9 October 2014 by Code of Conduct breach decision maker
	<p>* The Minister is not made aware of breaches of the APS Code of Conduct.</p> <p>d) There have been no legal ramifications for any of the employees or the department.</p>		
Australian Electoral Commission	<p>For the period 28 May to 31 October 2014:</p> <ol style="list-style-type: none"> 1. AEC’s Procedures for determining breaches of the APS Code of Conduct and Sanctions provided at <u>Attachment A</u>. 2. No. 		
ComSuper	<ol style="list-style-type: none"> 1. ComSuper is covered by the APS Code of Conduct, as set out in Section 13 of the <i>Public Service Act 1999</i>. 2. Yes. <ol style="list-style-type: none"> a) One case was identified; providing further details may breach confidentiality and privacy. b) The process as to an appropriate sanction to be applied is currently in train. c) The breach was identified and reported by internal staff at the time, earlier this year. There was no requirement that the Minister be made aware of the breach. d) The matter is being addressed through normal agency procedures relating to the APS Code of Conduct. 		
Commonwealth Superannuation Corporation	<ol style="list-style-type: none"> 1. A copy is available on the CSC website: www.csc.gov.au/about-us/governance/ 2. No. <ol style="list-style-type: none"> a) – d) N/A. 		
Future Fund Management Agency	<ol style="list-style-type: none"> 1. The Future Fund Management Agency works to the APS Code of Conduct which is available on the APSC website. 2. No. <ol style="list-style-type: none"> a) – d) N/A. 		

1.

AEC procedures for determining breaches of the APS Code of Conduct and Sanctions

Updated: 15 September 2014

Objective

These procedures outline the steps that will be taken by the AEC when investigating a breach of the APS Code of Conduct, and when determining any sanctions that arise from that investigation.

Definitions

- **Act** – means the *Public Service Act 1999*.
- **Agency** – has the same meaning as in the Act.
- **APS Employee** – means an APS Employee as defined in the Act.
- **AEC** – means the Australian Electoral Commission.
- **Code** – means the APS Code of Conduct in section 13 of the *Public Service Act 1999*.
- **Deputy Electoral Commissioner** – means the person from time to time holding, occupying or performing the duties of the position of Deputy Electoral Commissioner as described in section 19 of the *Commonwealth Electoral Act 1918*.
- **Electoral Commissioner** – means the person from time to time holding, occupying or performing the duties of the position of Electoral Commissioner as described in section 18 of the *Commonwealth Electoral Act 1918*. The Electoral Commissioner is an "Agency Head" for the purposes of the Act (paragraph 29(2)(b) of the *Commonwealth Electoral Act 1918*).

Application

1 Application of the Procedures

1.1 The Procedures apply in determining whether an APS employee, has breached the Code in section 13 of the Act.

1.2 In these Procedures, unless the contrary intention appears, a reference to:

- a. an APS employee includes reference to a former APS employee who is suspected of having breached the Code while an employee in the AEC; and
- b. a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the Act in connection with their engagement as an APS employee.

1.3 In accordance with subsection 15(7) of the Act, these procedures are publicly available on the AEC's website.

Note: The Procedures apply only in relation to a suspected breach of the Code by an APS employee in respect of which a determination is to be made. Not all suspected breaches of the Code may need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate.

These Procedures are not legislative instruments (see subsection 15(8) of the Act).

Principles

2 Who may determine a breach of the Code and impose a sanction

Note: Sub clause 4.2 of the Australian Public Service Commissioner's Direction 2013 provides that where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the Agency Head must, before making a decision to deal with a suspected breach under the formal misconduct provisions (being these Procedures), have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner.

Investigations of suspected misconduct by former employees can be undertaken, but sanctions cannot be imposed on former employees.

2.1 As soon as practicable after a suspected breach of the Code has been identified, the Electoral Commissioner or the Deputy Electoral Commissioner may deal with a suspected breach, in accordance with the Procedures, by:

- a. making a written determination whether the APS employee has breached the Code; or
- b. selecting the person, subject to clause 5 below, to make a determination whether the APS employee has breached the Code (**the breach decision maker**).

Note: The Australian Public Service Commissioner's prior written consent is required if a non APS employee will be selected as the breach decision maker / sanction delegate (subsection 78(8) of the Act).

2.2 An internal or external investigator may be appointed by the breach decision maker to investigate the alleged breach, gather evidence and present a report of factual findings, including recommendations.

2.3 The person making the decision on sanction must hold a delegation under the Act to do so (**the sanction delegate**).

2.4 Subject to sub clause 2.3 above, these Procedures do not prevent the breach decision maker from being the sanction decision maker in the same matter.

2.5 The breach decision maker and sanction decision maker must have regard to the Australian Public Service Commission publication '[Handling Misconduct: a human resource practitioner's guide to reporting and handling of suspected and determined breaches of the APS Code of Conduct](#)', in making the determination and sanction decision.

3 Determination process

3.1 The process for determining whether an APS employee has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.

3.2 The process must be consistent with the principles of procedural fairness.

3.3 A formal hearing is not required in order for a person to determine whether an APS employee has breached the Code.

4 Information to be given to employee before a determination is made

4.1 A determination may not be made in relation to a suspected breach of the Code by an APS employee unless reasonable steps have been taken to inform the employee of:

- a. the details of the suspected breach of the Code including any variation of those details; and
- b. the sanctions that may be imposed on the employee under subsection 15(1) of the Act.

4.2 A person who is making a determination in relation to a suspected breach of the Code by an APS employee must give that employee a reasonable opportunity to make an oral or written statement, or both, in relation to the suspected breach:

- a. within seven days of the APS employee being informed of the details (or any variation of those details) of the suspected breach; or
- b. such longer period as is allowed.

4.3 An APS employee who does not make a statement in relation to the suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

4.4 The breach decision maker or the investigator may agree to a request made by the APS employee who is suspected of breaching the Code to have a support person present in a meeting or interview they conduct. The support person is not a representative or advocate for the APS employee.

5 Persons involved in making a determination or imposing a sanction to be independent and unbiased

5.1 The breach decision maker, any investigator assisting the breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased.

5.2 A person must not determine whether an APS employee has breached the Code if the person has previously made a report in relation to all or any matter suspected of constituting the breach by the employee.

6 Sanctions

6.1 If a determination is made that an APS employee has breached the Code, the APS employee may be subject to the imposition of a sanction under section 15 of the Act.

6.2 Sanctions are intended to be proportionate to the nature of the breach, and provide a clear message to the relevant employee that their behaviour was unacceptable.

6.3 The process for deciding on sanction must be consistent with the principles of procedural fairness.

6.4 If a determination is made that an APS employee has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:

- a. inform the APS employee of:
 - i. the determination that has been made;
 - ii. the sanction or sanctions that are under consideration; and
 - iii. the factors that are under consideration in determining any sanction to be imposed; and
- b. give the APS employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration within 7 calendar days, or any longer period that is allowed by the sanction delegate.

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

7 Record of determination and sanction

7.1 If a determination is made in relation to a suspected breach of the Code by an APS employee, a written record must be made of:

- a. the suspected breach; and
- b. the determination; and
- c. any sanctions imposed as a result of a determination that the employee breached the Code; and
- d. if a statement of reasons was given to the employee – the statement of reasons.

Note: The Archives Act 1983 and the Privacy Act 1988 apply to a record made under this clause.

8 Procedures where basis of engagement in the AEC changes or ends

8.1 This clause applies where an APS employee is suspected of having breached the Code and a determination has not been made in relation to the suspected breach before:

- a. the basis of the employee's engagement in the AEC changes; or
- b. the employee moves to another Agency,

Note: Examples of a change in the basis of an APS employee's engagement in an Agency are as follows:

- a. a change from engagement for a specified term, or for the duration of a specified task, to engagement as an ongoing APS employee;
- b. a change from engagement for duties that are irregular or intermittent to engagement as an ongoing APS employee.

8.2 If the basis of the APS employee's engagement in the AEC has changed before a determination is made in relation to the suspected breach, the determination must be made in accordance with the procedures applicable to the basis of the employee's engagement in the AEC at the time the process for determining whether the employee has breached the Code is commenced.

8.3 Movements (including promotions) will not take effect until the matter is resolved, unless both Agency Heads agree otherwise.

Note: The matter is taken to be resolved when:

- a. *a determination is made; or*
- b. *it is decided that a determination is not necessary.*

Legislation

- *Archives Act 1983 (Cth)*
- *Privacy Act 1988 (Cth)*
- *Public Service Act 1999 (Cth)*
- *Public Governance, Performance and Accountability Act 2013 (Cth)*
- *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014 (Cth)*