

Procedures for determining suspected breaches of the Australian Public Service Code of Conduct

I, Mark Booth, as Chief Executive Officer of Food Standards Australia New Zealand (the CEO), establish these procedures under subsection 15(3) of the Public Service Act 1999 (the Act).



These procedures apply from 30th April 2021.

These procedures supersede the previous procedures made for Food Standards Australia New Zealand (the agency) under subsection 15(3) of the Act, but the previous procedures may continue to apply for transitional purposes.

1. Introduction

Application of procedures

These procedures must be complied with in determining:

- whether an Australian Public Service employee or former employee in the agency has breached the Australian Public Service Code of Conduct (the Code of Conduct) set out in section 13 of the Act; and
- any sanction to be imposed on an Australia Public Service employee in the agency who is found to have breached the Code of Conduct.

A copy of the Code of Conduct is at **Attachment A**. A copy of the sanctions that may be imposed is at **Attachment B**.

For the purposes of these procedures, unless otherwise specified, a reference to:

- employee, includes a former employee
- the CEO, includes a delegate of the CEO or a person authorised by the CEO to exercise the relevant power or function
- a breach of the Code of Conduct 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 Australian Public Service employee (refer to **Attachment A**).

Publication of procedures

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

Decision to make a determination

These procedures apply only in relation to a suspected breach of the Code of Conduct by an employee where a determination is to be made.

Not all suspected breaches of the Code of Conduct that are dealt with under these procedures need to be dealt with by way of a determination. If the CEO becomes aware of a suspected breach of the Code of Conduct by an employee, the CEO may decide whether to deal with the suspected breach formally using these procedures or to deal with the suspected breach informally. This can include taking administrative action and a written record of any such action may be made.

If the conduct of an Australian Public Service employee raises concerns that relate to both effective performance and suspected breaches of the Code of Conduct, the CEO must, before deciding to initiate an investigation under these procedures, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner (refer to section 40 of the [Australian Public Service Commissioner's Direction 2016](#)).

2. Procedures for determining suspected breaches of the Australian Public Service Code of Conduct

The following sections set out the procedures for determining whether an Australian Public Service employee, or former Australian Public Service employee, in the agency has breached the Code of Conduct. These procedures are established by the CEO pursuant to section 15(3)(a) of the Act.

Selection and role of a decision maker and investigator

Decision maker

As soon as practicable after the CEO becomes aware of a suspected breach of the Code of Conduct that is to be dealt with under these procedures and has decided to deal with the suspected breach by way of determination, the CEO will appoint a decision maker.

The CEO will take reasonable steps to ensure that the decision maker is, and appears to be, independent and unbiased. Generally, the appointed decision maker should not have previously made a report in relation to any of the matters suspected of constituting a breach of the Code of Conduct by the employee.

The role of the decision maker is to:

- determine whether any breaches of the Code of Conduct have occurred
- prepare a written record stating whether the employee has been found to have breached the Code of Conduct
- advise the CEO and the employee of the determination.

Investigator

The CEO may also appoint an investigator to assist the decision maker by investigating the matter, gathering evidence and preparing a report of factual findings. The investigator may be an employee of the agency or another person. The CEO will take reasonable steps to ensure the investigator is, and appears to be, independent and unbiased.

Determination process to be informal

The process of determining whether an employee has breached the Code of Conduct should be carried out with as little formality and as much expedition as a proper consideration of the matter allows. A formal hearing is not required.

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

Before a determination is made in relation to an alleged breach of the Code of Conduct by an employee, that employee must:

- be informed in writing of:
 - the name of the decision maker and, where applicable, the investigator;
 - the details of the alleged breach of the Code of Conduct;
 - the range of sanctions that may be imposed if the employee is found to have breached the Code of Conduct (see **Attachment B**);
 - the option the employee has to have a support person present to assist the employee in any meetings or interviews relating to the Code of Conduct investigation; and
 - details of the agency's Employee Assistance Program; and
- be given a reasonable opportunity (usually seven calendar days) to make a statement in writing, or provide evidence, in relation to the alleged breach.

The employee must also be given a reasonable opportunity to make an oral statement. An employee who does not make a statement in relation to an alleged breach of the Code of Conduct is not, for that reason alone, to be taken to have admitted to committing the alleged breach.

Variation in investigation

If, during the course of an investigation, it becomes evident that there is a material variation in the nature or extent of the alleged breach notified to the employee, the employee must be notified in writing of the variation and any variation in the range of sanctions that may be imposed if the employee is found to have breached the Code of Conduct. The employee must be provided with a reasonable opportunity (usually, seven calendar days) to make a further written statement or provide further evidence before a determination is made.

Determination of breach

The decision maker will determine whether the employee has breached the Code of Conduct on the balance of probabilities. The decision maker will advise the employee in writing of the determination.

Where it is necessary as a matter of procedural fairness, the decision maker will provide the employee with a draft decision in relation to the determination of a breach of the Code of Conduct together with the evidence on which that draft decision is based. The decision maker will give the employee a reasonable opportunity to comment on that material before making a final decision on the breach.

3. Procedures for determining sanction

The following sets out the procedures for determining the sanction or sanctions (if any) to be imposed on an Australian Public Service employee who is found to have breached the Code of Conduct. These procedures are established by the CEO pursuant to section 15(3)(b) of the Act.

Determination of sanction

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

If a determination is made that an employee has breached the Code of Conduct, the decision maker may decide to impose a sanction or sanctions. Sanctions cannot be imposed on former employees.

Subsection 15(1) of the Act prescribes the range of sanctions that may be imposed (see **Attachment B**). The decision maker may decide that the employee will be counselled, either instead of or in addition to imposing a sanction or sanctions.

The decision maker will take into account the following factors when considering a possible sanction or sanctions:

- the nature and seriousness of the breach of the Code of Conduct
- any prior determinations of breach of the Code of Conduct by the employee
- the relevance of the breach of the Code of Conduct to the employee's duties
- whether the misconduct affects the reputation of the agency or the Australian Public Service
- the likelihood of a recurrence of the misconduct
- the effect of the proposed sanction on the employee
- the presence of any mitigating factors.

Prior to making a decision to impose sanction or sanctions, the proposed sanction or sanctions will be provided to the employee.

The employee must be given a reasonable opportunity (usually, seven calendar days) to make a statement in writing in relation to the proposed sanction or sanctions before the report is finalised.

The employee must also be given a reasonable opportunity to make an oral statement.

Record of determination

The decision maker must provide the CEO with a report regarding the determination and any recommended sanction or sanctions or other action.

The CEO must make a record setting out:

- any determination that has been made by the decision maker that the employee has breached the Code of Conduct
- the reasons for any determination that has been made
- details of the sanction or sanctions (if any) to be imposed and the reasons for that sanction or sanctions
- details of the employee's right to have the determination reviewed.

A copy of the record must be provided to the employee who was the subject of the investigation.

4. Other matters

Review of determination or imposition of sanction

Section 33 of the Act makes provision for a non-senior executive service employee to seek a review of an employment-related action, including a determination that the Code of Conduct has been breached and the imposition of a sanction or sanctions (other than termination of employment). The application must be made to the [Merit Protection Commissioner](#).

The [Fair Work Act 2009](#) provides a review process for termination of employment.

Effect on movements or promotion to/from other Australian Public Service departments or agencies

Part 4, Division 1 of the [Australian Public Service Commissioner's Direction's 2016](#) places limitations on the movement (including on promotion) of employees who are being investigated for suspected breaches of the Code of Conduct. These limitations apply until a determination is made in relation to whether or not the employee has breached the Code of Conduct.

Use and disclosure of information obtained in accordance with these procedures

The agency may use personal information obtained in connection with a matter covered by these procedures in accordance with the section 72E of the Act and Public Service Regulation 9.2 of the [Public Service Regulations 1999](#) (the PS Regulations).

Suspension or temporary re-assignment of duties

In accordance with section 28 of the Act and Public Service Regulation 3.10 of the PS Regulations, the CEO, or a person authorised by the CEO, may, by notice in writing, suspend an employee from duties if they believe on reasonable grounds that:

- an employee has, or may have, breached the Code of Conduct; and
- the employee's suspension is in the public interest or the agency's interest.

Suspension may be with or without remuneration.

If the suspension is to be without remuneration, the period without remuneration is as determined by the CEO, or a person authorised by the CEO, to be:

- not more than 30 days; or
- if exceptional circumstances apply – a longer period.

The CEO, or a person authorised by the CEO, must review the suspension at reasonable intervals.

The CEO, or a person authorised by the CEO, must immediately end the suspension if they no longer believe on reasonable grounds that:

- an employee has, or may have, breached the Code of Conduct; or

- the employee's suspension is in the public interest or the agency's interest.

The CEO, or a person authorised by the CEO, must immediately end the suspension and notify the employee in writing if a sanction has been imposed on the employee for the relevant breach of the Code of Conduct.

In exercising suspension powers the CEO, or a person authorised by the CEO, must have due regard to procedural fairness unless they are satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate.

The CEO, or a person authorised by the CEO should provide the employee with a written notice of the decision to suspend as soon as practicable after the decision has been made. The notice should include:

- the reason for the decision
- the date of effect
- the intervals at which the suspension will be reviewed
- the specific fortnightly monies to be paid (if varied from regular remuneration)
- the employee's right of review.

Where an employee who has been suspended from duty is subsequently found not to have breached the Code of Conduct, consideration should be given to whether any salary forgone during the period of suspension is to be reinstated.

The CEO may decide that it is appropriate to temporarily reassign the employee's duties. Any assignment of duties will be undertaken in accordance with section 25 of the Act.

Action to suspend or temporarily re-assign duties may be taken at any time prior to, or during, the alleged misconduct investigation process. Suspension or temporary re-assignment of duties while an investigation is proceeding, are administrative actions and not sanctions in themselves.

Controlled by	Human Resources
Date of effect	30 April 2021
Approved by	Mark Booth, CEO

Attachment A – the Code of Conduct

Per section 13 of the Act, the Code of Conduct is as follows:

- (1) An APS employee must behave honestly and with integrity in connection with APS employment.
- (2) An APS employee must act with care and diligence in connection with APS employment.
- (3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
 - (a) any Act (including this Act), or any instrument made under an Act; or
 - (b) any law of a State or Territory, including any instrument made under such a law.
- (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
- (7) An APS employee must:
 - (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
 - (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.
- (8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
- (9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
- (10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
 - (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
 - (b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
- (11) An APS employee must at all times behave in a way that upholds:
 - (a) the APS Values and APS Employment Principles; and
 - (b) the integrity and good reputation of the employee's Agency and the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

In addition, subsection 15(2A) provides that:

A person who is, or was, an APS employee is taken to have breached the Code of Conduct if the person is found (under procedures established under subsection (3) of this section or subsection 41B(3) or 50A(2)) to have, before being engaged as an APS employee:

- (a) knowingly provided false or misleading information to another APS employee, or to a person acting on behalf of the Commonwealth; or
- (b) 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

- (c) otherwise failed to behave honestly and with integrity;
in connection with the person's engagement as an APS employee.

Attachment B – sanctions that may be imposed

Under subsection 15(1) of the Act, the sanctions that may be imposed on an employee who is found to have breached the Code of Conduct are:

- termination of employment;
- reduction in classification;
- re-assignment of duties;
- reduction in salary;
- deductions from salary, by way of fine;
- a reprimand.