

CHAPTER 3: CONDUCT

3.4. THE CODE OF CONDUCT

The Australian Centre for International Agricultural Research (ACIAR) is committed to building a diverse and inclusive culture where all employees are respected and accountable for their actions. This policy recognises that people with different opinions and interests need to work together under the same values and provides guidance on how to proceed with inappropriate conduct.

These procedures apply to a person who is an ongoing or non-ongoing Australian Public Servant (APS) employee of ACIAR, or a former APS employee employed with ACIAR at the time of the suspected misconduct.

3.4.1. PRINCIPLES

Any investigation of possible breaches of the Code must be consistent with the laws of natural justice. This features procedural fairness, ensuring fair, unbiased decision-making, and giving people the opportunity to be heard in relation to decisions being made about them.

The principles that set the foundation for the process at ACIAR are that:

- the process must be carried out with as little formality and as much expedition as proper consideration of the matter allows
- an employee suspected of a breach of the Code shall be informed of the details of the suspected breach, including any subsequent variation of those details
- an employee suspected of a breach of the Code has a right to provide a statement of response before a decision is made
- an employee suspected of a breach of the Code may nominate a person to assist them with their case at any time
- any persons involved in investigating, making a recommendation or decision must act fairly and without bias

3.4.2. MISCONDUCT

For the purposes of these procedures, misconduct is inappropriate behaviour that does not align with the APS Values and refers to any action or behaviour by employees which may be a breach of the Code. The Code applies where there is a connection between the misconduct and the Agency's confidence in the employee to perform their duties professionally or where the misconduct may impact the reputation of the Agency or the APS.

Misconduct can vary from serious issues involving fraud, theft, misuse of personal information or leaking information, to relatively minor issues such as poor behaviour, inappropriate emails, internet usage or misuse of flex. Misconduct may also include activities such as comments on social media, conduct on work trips, training, or work-related social events, these may not occur during 'work time' but could still be considered a breach.

Not all suspected misconduct needs to be dealt with through these procedures. In some instances, it might be more appropriate to use the performance management system, workplace harassment procedures or alternative forms of dispute resolution, such as mediation or counselling. Due regard should be given to the seriousness of the allegation and any past conduct by the respondent. The objective is to correct inappropriate behaviour.

3.4.3. DECISION-MAKERS

The Chief Executive Officer (CEO) and the General Manager (GM) Corporate have the delegation to determine whether a breach of the Code has occurred, however, the CEO may engage an external person to make a recommendation. This person may investigate the alleged breach, gather evidence, and make a report of recommended findings. This is the preferred option where a serious breach is believed to have occurred or where the CEO or GM Corporate believe that an independent person is more appropriate.

The CEO is the only person with the delegation of power to impose sanctions under the *Public Service Act 1999* (the Act). Where the CEO is the delegate in determining whether a breach has occurred and then imposes a sanction in the same process, consideration will be given to the circumstances of the case and the need to ensure procedural fairness.

3.4.4. PROCEDURES

The process for determining whether an APS employee has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows. A final decision should not be made until the employee who is the subject of the process has been afforded procedural fairness. Procedural fairness generally requires that:

- *the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision-maker)*
- *the person is provided with an opportunity to respond before any decision is made*
- *the decision-maker acts without bias or an appearance of bias*

Step 1: Preliminary enquiry

Where a complaint that may constitute a breach of the Code is made, the person receiving the complaint should take written details of the complaint and provide it to the GM Corporate or HR Manager as soon as possible, if inappropriate, the complaint should be given to the CEO.

A preliminary enquiry will then be conducted to determine whether a sufficient case exists for the determination process to be commenced. If so, the person undertaking this process will:

- (a) inform the employee of the matter as soon as possible
- (b) provide the employee with written details of the complaint and possible sanctions
- (c) invite the employee to respond with a written statement within seven days

Step 2: Determining how to proceed

Following the preliminary enquiry, the GM Corporate or the HR Manager will consider all the facts including the employee's response to the complaint and make a recommendation to the CEO on how to proceed with one of the following options:

- (a) there is no basis on which to proceed
- (b) the matter is frivolous or vexatious
- (c) the matter has basis, and a breach of the Code may have occurred
- (d) the employee has admitted to the breach

Step 3: Further Investigation

If the CEO or their delegate decides that further investigation is warranted, the process will commence by informing the person of:

- all the details of the suspected breach of the Code
- the element(s) of the Code the allegation relates to
- the sanction(s) that may be imposed on them
- their right to seek the support of a third party through the process
- their opportunity to make a written statement, or provide further evidence, within seven days

A person who does not make a statement in relation to the suspected breach is not to be taken to have admitted to committing the suspected breach because they have not made a statement.

Following the response period, the matter will be investigated in the most appropriate manner, ensuring there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.

Step 4: Determination

Following the investigation, the CEO or their delegate should ensure that reasonable steps have been taken for the person suspected of the breach to be informed of the case against them and be afforded the opportunity to respond.

The CEO or the delegate will consider all the information and make a determination as to whether there has been a breach of the Code. The CEO or their delegate will keep a written report of the process including the suspected breach, the determination and any sanctions imposed as a result of the determination.

Where the CEO determines that the employee has not breached the Code, a written record of the determination is provided to the employee and the process is concluded.

Step 5: Sanction

Where the CEO or their delegate determines that the employee has breached the Code, before any sanction is imposed, reasonable steps must have been taken to:

- inform the employee of the determination that they have breached the Code and the reasons for the determination
- inform the employee of the sanction(s) that are being considered and any factors being considered by the CEO in determining any sanction
- give the employee seven days to make a statement in relation to the sanction(s)

When deciding on an appropriate sanction the CEO may consider past behaviour, and whether previous warnings, counselling or sanctions have relevance. For example, if repeated counselling has not changed the employee's conduct a more serious sanction may be appropriate. The employee should be advised of any past conduct that will be taken into account when a sanction is being decided.

Alternatively, a reprimand or no sanction may be imposed. In determining that either a reprimand or no sanction is appropriate, the employee's response to the misconduct should demonstrate that a repetition of the behaviour is unlikely. In this instance the CEO may decide that the appropriate course of action is:

- a) informal discussions between a manager and the employee
- b) counselling of the employee or a requirement to attend training
- c) formal direction and warning
- d) adverse performance assessment

Where a sanction is imposed, the following sanctions include

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of fine (no more than 2% of annual salary)
- a reprimand

If the employee's employment is terminated for a breach of the Code, before that termination comes into effect, ACIAR is required to gazette (i.e. publish) the employee's name and the section of the Act under which their employment was terminated.

3.4.5. SUSPENSION DURING THE PROCESS

The Public Service Regulations set out the legislative basis for suspending an employee who is suspected of having breached the Code. Suspension, while an investigation is proceeding, must only be taken if the employee has, or may have, breached the Code and where the suspension is in the public interest or ACIAR's interest. This may occur where there is an imminent serious threat to the safety of others or where there is a real possibility that the employee will destroy evidence or otherwise tamper with it.

Where the suspension is without remuneration, the maximum period is generally to be no more than 30 days and the employee may be able to access leave credits for this period. A longer period of suspension is permitted only where there are exceptional circumstances, such as where an employee has been charged with a criminal offence and is waiting for a decision.

The continuation of a suspension must be reviewed at reasonable intervals and if the CEO no longer believes on reasonable grounds that it is in the public or ACIAR's interest to continue the suspension, the suspension must immediately end. Suspension must also cease as soon as any sanction is imposed for the relevant breach of the Code.

3.4.6. MOVEMENT TO ANOTHER AGENCY

Unless the CEO and the new Agency Head agree otherwise, any movements (including promotion) should not take effect until a determination is made about whether or not the employee has breached the Code, or it is decided that a determination is not necessary. This only applies where an ongoing APS employee is suspected of having breached the Code and has been informed of the matter, but the matter is yet to be resolved and a decision would have been made that, apart from this process, would result in the movement of the employee.

3.4.7. FORMER APS EMPLOYEES

A former employee can be found to have breached the Code; however, a sanction cannot be imposed. If an employee's resignation takes effect before a sanction is imposed, a sanction will not be imposed, and the employee's separation will be treated and recorded as a resignation. Any determination that there has been a breach of the Code will remain on the employee's record and the employee will be notified in writing of the determination.

3.4.8. PROVISION OF PERSONAL INFORMATION

During the course of a Code process, or after the process is complete, personal information about the person under investigation or who is found to have breached the Code may be disclosed to others by ACIAR, without notice to the person, including to:

- a) the employee's managers (for employment and/or performance purposes)
- b) any person, either internal or external to ACIAR, undertaking recruitment, promotion or employment selection in relation to the person
- c) advise the complainant of the outcome
- d) external bodies or agencies with involvement in the matter (e.g. Merit Protection Commissioner or Commonwealth Ombudsman)
- e) any enforcement body (e.g. the Australian Federal Police) or any security assessment agency

All information about a Code process will be destroyed in accordance with the *Archives Act 1983* and will generally not be disclosed after the passing of five years from the date of a breach determination.

Where the result of a Code process is a finding of no breach, it will often be appropriate to advise relevant witnesses (including the complainant) and managers that the employee was found to have not breached the Code.

Confidentiality during the process

During the course of a Code process, the person subject to the Code process will usually be provided with sensitive information to ensure they are afforded procedural fairness. Other employees or persons may also be provided with information or documents as part of the process. Everyone involved in the process, including witnesses, must treat any information as 'sensitive: personal' and should only use or disclose it for the purpose of the process, except where listed above.

3.4.9. INTERACTION WITH PUBLIC INTEREST DISCLOSURE

The *Public Interest Disclosure Act 2013* (PID Act) provides a framework for facilitating the disclosure of suspected wrongdoing in the APS, for protecting disclosers from adverse consequences of making a disclosure, and for timely and effective investigation of disclosures of suspected wrongdoing. This section provides information on the connection between the PID Act and breaches of the Code in relation to internal disclosures.

Internal disclosures protected by the PID Act

Disclosable conduct in the PID Act covers a broad range of inappropriate conduct within the APS, therefore a disclosure may contain material that alleges a breach of the Code. Internal disclosures are those made in accordance with the PID Act to an appropriate 'authorised officer' in ACIAR. A current public official may also make a disclosure under the PID Act to their supervisor, who is then obliged to pass it on to an authorised officer in ACIAR.

Once an authorised officer receives a disclosure under the PID Act, they must notify the CEO. When a disclosure alleges a breach of the Code, the CEO will need to manage the disclosure under the terms of the PID Act in the first instance.

The CEO may conduct a preliminary investigation in accordance with these procedures and simultaneously investigate the disclosure under the terms of the PID Act. The CEO will then, decide whether it is appropriate to further investigate the matter as a suspected breach of the Code in accordance with these procedures. Where this option is chosen, the investigator will need to exercise great care to ensure that they meet all their obligations under the PID Act and these procedures.

Where there was only a PID investigation the focus may be on whether there is sufficient substance to merit an investigation as a suspected breach of the Code. The PID investigation report could include a recommendation to proceed with a Code investigation. If it is decided that further inquiry in accordance with these procedures is not appropriate, then the reasons for reaching this conclusion and the recommendation or decision as to what other action, if any, would be appropriate must be recorded in writing.

Protection of disclosers including confidentiality

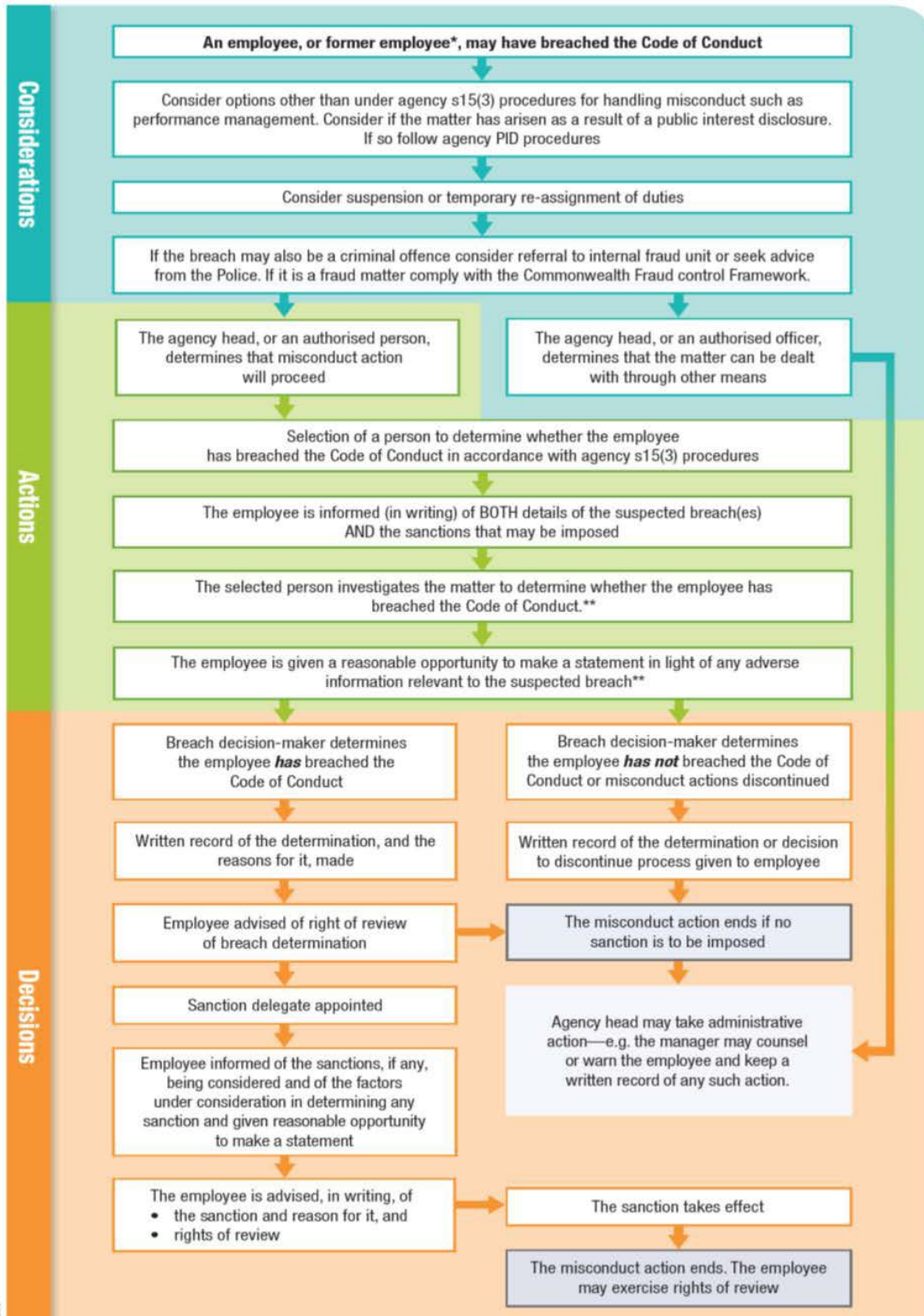
A person who makes a public interest disclosure covered by the PID Act has immunities from legal liability and protection from reprisals. The discloser's identity has special protection under section 20 of the PID Act. These protections will continue to apply to the discloser where an investigation under these procedures arises from a PID disclosure.

It is an offence to disclose information obtained in the course of a PID investigation, or in connection with the performance of a function under the PID Act unless the information is used for the purposes of the PID Act or taking action in response to a disclosure investigation.

An investigation conducted under these procedures following a decision or recommendation of a PID investigation is considered an action taken in response to a disclosure investigation. ACIAR staff concerned will need to carefully consider the disclosure of information obtained in the course of the PID investigation.

ATTACHMENT A – MISCONDUCT PROCESS

●●● Main steps in handling suspected misconduct



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*For the purposes of this diagram, subsequent references to employees in consideration and breach determination include former employees. Sanctions cannot be imposed in relation to former employees.

**There are ongoing procedural fairness obligations in the misconduct process. See Part II of the guide for further information.