

PUBLIC INTEREST DISCLOSURE PROCEDURES

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BACKGROUND

Prior to the introduction of the PID Act, the ACCC maintained a whistleblower policy in accordance with s16 of the *Public Service Act 1999*. The PID Act repealed that section and imposed a broader scheme for protecting individuals who choose to make disclosures of information found to be in the public interest. This document deals with internal disclosure only. Where external and/or emergency disclosure may be required, individuals are encouraged to seek independent (external to the ACCC) legal advice.

Purpose

This document outlines the ACCC's procedures for dealing with internal public interest disclosures, as required by the [Public Interest Disclosure Act 2013](#) ("PID Act").

The PID Act provides that any public official who wishes to make a disclosure of information in the public interest, and receive the protections afforded by the PID Act, must follow legislative and ACCC procedures.

Authority

The following legislation also gives authority to these procedures:

- *Public Interest Disclosure Act 2013*
- *Public Service Act 1999*
- Public Interest Disclosure Standard 2013
- Commonwealth Fraud Control Guidelines

Application

These procedures apply to persons working in, or with a relevant connection to, the Australian Competition and Consumer Commission as legislated under Section 69 of the PID Act.

PUBLIC INTEREST DISCLOSURE PROCEDURES

I, Rodney Sims, Chairman, Australian Competition and Consumer Commission, establish these Procedures under the Public Interest Disclosure Act 2013.

These procedures commence January 2014.

These procedures supersede the whistleblower provisions under subsection 16 of the *Public Service Act 1999*.

Signed:



Dated:

22/1/14

DEFINITIONS

Authorised internal recipient

An authorised internal recipient is defined in section 34 of the PID Act and will depend on the agency and the conduct which the disclosure relates to.

Authorised Officer

Authorised Officers are officers of an agency authorised in writing by the Principal Officer for the purposes of the PID Act (s36). They have a range of decision-making, notification and other responsibilities under the PID Act. Refer to Attachment A of the ACCC Human Resources Delegations.

Discloser

A person who was or is currently a 'public official', as defined in s69 of the PID Act who makes a public interest disclosure under the PID Act.

Disclosable conduct

Disclosable conduct is defined in the PID Act (section 29) as including, but not limited to:

- illegal conduct, whether in contravention of Commonwealth, State, Territory, or foreign laws
- maladministration
- imminent danger to the public or the environment
- corruption
- perversion of justice
- abuse of public trust
- fabrication/falsification or misconduct relating to scientific research
- wastage of public money and property

which is engaged in by an agency, a public official in connection with their position as a public official, or contracted service provider for a Commonwealth contract in connection with entering into, or giving effect to, that contract.

Immunity from liability

A person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure (s 10(1)(a)).

Investigating Officer

A Principal Officer or their delegate who will decide whether or not to investigate the disclosure.

Managers and supervisors

A supervisor includes any public official who supervises or manages the discloser (s 8).

Ombudsman

Means the Commonwealth Ombudsman.

Principal Officer

The Principal Officer is the agency head or their delegate. See the Human Resources Delegations on the Corporate Portal for further information.

Public interest disclosure

A disclosure of information will be a public interest disclosure if certain criteria are satisfied:

- The person making the disclosure is, or has been, a public official.
- The person receiving the disclosure is an appropriate recipient (see table below).
- The disclosure concerns information that tends to show, or the discloser believes on reasonable grounds, that the information tends to show, one or more instances of disclosable conduct (see table below).

There are four kinds of disclosure outlined in the legislation.

Internal disclosure	<p>Must be made to an authorised internal recipient or a supervisor of the discloser.</p> <p>The information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.</p>
External disclosure	<p>Must be made to any person other than a foreign public official.</p> <p>May only be made after an internal disclosure has been made, and not dealt with effectively. Further requirements are outlined in the PID Act (section 26).</p>
Emergency disclosure	<p>Must be made to any person other than a foreign public official.</p> <p>May only be made in circumstances where a substantial and imminent danger to the health and safety of one or more persons, or the environment, exists. Further requirements are outlined in the PID Act (section 26).</p>
Legal practitioner disclosure	<p>Must be made to an Australian legal practitioner.</p> <p>May be made for the purposes of obtaining legal advice or professional assistance regarding making a public interest disclosure. Further requirements are outlined in the PID Act (section 26).</p>

Public Official

A public official, for the purposes of the PID Act, is broadly defined and covers persons working in, or with a relevant connection to, the Commonwealth Public Sector.

Reprisal

Reprisal occurs if someone causes, by an act or omission, any detriment to another person because they believe or suspect that person, or anyone else, may have made or intends to make a public interest disclosure (s 13(1)).

Taking a reprisal is a criminal offence, punishable by imprisonment for two years or 120 penalty units, or both (s 19). It is not necessary to prove that a person actually made or intended to make a public interest disclosure (s 19(2)): what is relevant is the intention and action (or omission) of the person who took the reprisal.

INTERNAL DISCLOSURE PROCEDURES

This section discusses how to make a public interest disclosure; who the disclosure should be directed to; and the protections available to disclosers under the PID Act, as well as the limits of those protections.

Who can make a public interest disclosure?

Under the PID Act, a public interest disclosure may be made by a public official. A public official is defined in section 69 of the PID Act and covers persons working in, or with a relevant connection to, the Commonwealth public sector, including individuals who are contracted service providers for a Commonwealth contract, or employees of a contracted service provider and who provides services for the purposes of the Commonwealth contract.

Who can receive a public interest disclosure?

Under the PID Act, a public interest disclosure may be made to the discloser's supervisor, an Authorised Officer of the ACCC, or the Commonwealth Ombudsman.

A list of Authorised Officers for the purposes of the PID Act can be found at Attachment A to Schedule 2 of the Human Resources Delegations on the Corporate Portal. Authorised Officers are also responsible for explaining to a potential discloser how to make a disclosure in such a way as to ensure the discloser is protected by the PID Act.

Where a public interest disclosure is made to the discloser's supervisor, the supervisor must inform an Authorised Officer.

If an individual believes on reasonable grounds that the relevant issue would be more appropriately investigated by the Commonwealth Ombudsman ("the Ombudsman") than internally by the ACCC, the individual may make his or her disclosure directly to an Authorised Officer of the Ombudsman.

How is a public interest disclosure made?

A person who wishes to make a public interest disclosure ("the discloser") can make that disclosure either to his or her supervisor, or to an Authorised Officer.

There is no required form of a public interest disclosure; it can be made orally or in writing. Potential disclosers are encouraged to include as much supporting information as possible, so the merits of the disclosure can be appropriately assessed. Without sufficient supporting information, the Principal Officer may use his or her discretion not to investigate the disclosure.

A discloser does not need to identify his or her disclosure as a 'public interest disclosure' for the purposes of the PID Act.

Disclosures may be made by:

- contacting an Authorised Officer directly
- contacting your supervisor, who will then contact an Authorised Officer
- emailing PID@acc.gov.au. This email address is only accessed by Authorised Officers (Directors, Human Resources).

- ACCC internal mail, marked In-confidence to: 'Director, Workplace Relations – Public Interest Disclosure'

Anonymity

All individuals have the right to make a public interest disclosure anonymously.

Protection for disclosers

The PID Act provides immunity from civil, criminal or administrative liability for disclosers.

The PID Act also makes it an offence to take a reprisal or threaten to take a reprisal against a person because of a public interest disclosure, whether that disclosure has been made, or merely proposed or suspected. A reprisal can involve dismissal of an employee, injury, alteration of a position, or discrimination between employees, but does not include administrative action taken to protect a discloser from detriment.¹The PID Act also makes it an offence to disclose the identity of a discloser, without their consent. This includes making information public which could reasonably identify a discloser. A penalty of imprisonment for 6 months or 30 penalty units, or both, applies.

The Principal Officer must take reasonable steps to protect public officials who belong to the agency from detriment, or threats of detriment, relating to public interest disclosures by those public officials.

What is not Reprisal?

Administrative action that is reasonable to protect the discloser from detriment is not a reprisal (s 13(3)). For example, where a person has made a disclosure in relation to practices in their immediate work area, it may be appropriate to transfer them to another work area to ensure they are not harassed or victimised. It is important to ensure there is no perception that they are being punished for having made a disclosure.

Making a disclosure also does not exclude the discloser from reasonable management action for any unsatisfactory performance or wrongdoing on their part – such action is not a reprisal.

Protection against reprisal

A person who makes a public interest disclosure is protected from reprisal in the following ways:

- it is a criminal offence to cause detriment to a person because it is suspected or believed that they have made or will make a public interest disclosure
- a discloser has the right to apply for an injunction to prevent a reprisal
- a discloser has the right to apply for compensation for loss, damage or injury suffered from a reprisal.

Limits

Disclosers are only protected by the PID Act if their public interest disclosures are made as required by the PID Act. The requirements are outlined briefly above.

If you wish to make a public interest disclosure you can seek legal advice about your obligations under the PID Act.

¹ This may include, for example, moving a discloser into a different division within the Agency.

An individual is not protected from liability for knowingly making a false or misleading statement in the course of making a public interest disclosure.

Making a public interest disclosure about a course of conduct will not protect an individual if they themselves engaged in that conduct.

INVESTIGATION PROCEDURES

This section outlines the procedures taken by the ACCC upon receipt of a public interest disclosure, and how an investigation into a disclosure will be conducted.

Allocation of a disclosure

When a public interest disclosure has been made to an Authorised Officer of an agency, the Authorised Officer must allocate the handling of the disclosure to one or more agencies (which may be or include the recipient agency) unless the Authorised Officer is satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure. The Authorised Officer will endeavour to allocate a disclosure within 14 days after the disclosure is made.

When an allocation is made to one or more agencies, the Authorised Officer must inform the Principal Officer of each agency to which the allocation is made:

- the allocation to the agency
- the information that was disclosed
- the suspected disclosable conduct (if any)
- the discloser's name and contact details, if known, and whether the discloser consents to the principal officer being informed.

The Authorised Officer must also inform the Ombudsman of the allocation, and if the matter is allocated to an intelligence agency, the Inspector General of Intelligence and Security (IGIS).

The Authorised Officer must prepare a written record (refer to Corporate Portal for template) including the following information:

- the decision to allocate the disclosure (including the name of each agency to which the disclosure is to be allocated)
- the reasons for the decision
- the consent provided by the agency to which the allocation is made.

The Authorised Officer must also inform the discloser, as soon as reasonably practicable, the allocation of the disclosure or, if the matter was not allocated, the reasons why the disclosure has not been allocated and any other courses of action that might be available to the discloser under other Commonwealth laws. An appropriate record (refer to Corporate Portal for template) is to be kept of this notification to the disclosure, including:

- the day and time the discloser was notified
- the means by which the discloser was notified
- the content of the notification.

Initial Receipt

After a public interest disclosure has been allocated to the Agency, the Principal Officer or their delegate ("the Investigating Officer") will decide whether or not to investigate the disclosure. The Investigating Officer has discretion not to investigate the disclosure if:

- The discloser is not, and has not been, a public official.
- The information does not concern serious disclosable conduct.
- The disclosure is frivolous or vexatious.
- The information is the same (or substantially the same) as information currently under investigation or which has been previously investigated.
- The information concerns conduct which is being otherwise investigated under another Commonwealth law or the Commonwealth's executive power, and
 - it would be inappropriate to conduct a PID Act investigation concurrently
 - the Investigating Officer is satisfied there are no further matters which warrant investigation.
- The discloser has informed the Investigating Officer that the discloser does not want the matter to be pursued, and the Investigating Officer is satisfied there are no further matters which warrant investigation.
- It is impracticable to investigate the matter because
 - the discloser's name and contact details are unavailable
 - the discloser refuses or fails to assist the investigation
 - of the age of the information.

Notification

Within 14 days of a disclosure being allocated to the Agency, the Investigating Officer must inform the discloser of the Investigating Officer's powers to:

- decide not to investigate the disclosure
- decide not to investigate the disclosure further or
- decide to investigate the disclosure under a separate investigative power.

As soon as possible after receiving a public interest disclosure, the Investigating Officer will inform the discloser:

- if an investigation will occur, the estimated length of the investigation
- if an investigation will not occur, the reasons for the decision and other actions available to the discloser.

An anonymous discloser will not receive this notification.

The Investigating Officer must also notify the Ombudsman of any decision not to investigate, and the supporting reasons.

Conduct of Investigation

Investigations will be carried out in the manner best suited to each disclosure, as the Investigating Officer sees fit. Each investigation is subject to a statutory time limit of 90 days (though this time limit may be extended upon application to the Ombudsman by either the discloser or the Investigating Officer; or on the Ombudsman's own initiative).

The Investigating Officer may obtain information and interview people as he or she sees fit for the purposes of the investigation. The Investigating Officer may appoint a staff member to investigate on their behalf. All investigations must be conducted in accordance with the Public Interest

Disclosure Standard 2013, Commonwealth Fraud Control Guidelines, or any procedures established under s15(3) of the *Public Service Act 1999*,² insofar as those Guidelines or procedures relate to the conduct in question. Investigative processes must be kept confidential.

Information gathered in the course of an investigation may not be disclosed or used, except as allowed for by the PID Act. Disclosure or use of the information in any other circumstance constitutes an offence.

The investigation will be complete when a final report has been prepared by the Investigating Officer. The report will set out:

- matters considered in the course of the investigation
- the duration of the investigation
- any findings
- any actions that have been, are being, or are recommended to be taken, and
- any claims made about, and any evidence of, detrimental action taken against the discloser and the agency's response to those claims and that evidence.

The report must also, where relevant:

- identify whether there have been one or more instances of disclosable conduct
- identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct relates
- explain the steps taken to gather evidence, and
- set out a summary of the evidence, as well as any findings and recommendations made based on that evidence.

As part of the investigation, an Investigating Officer must assess any risks of reprisal against the discloser, and provide consideration of those risks in his or her final report.

Disclosers to receive outcome of investigation

A copy of the final investigation report will be provided to the discloser within a reasonable time after the report is prepared, unless the discloser is anonymous.

² Relating to alleged breaches of the Code of Conduct.

ROLES AND RESPONSIBILITIES

This section provides a summary of the obligations of ACCC staff when dealing with a public interest disclosure. All staff in the ACCC have responsibilities in relation to public interest disclosures. Some responsibilities are listed in the PID Act, while others reflect good corporate governance and ethical behaviour.

An individual who wishes to make a public interest disclosure within the ACCC must:

1. Notify his/her supervisor, or an Authorised Officer
2. Provide as much information as possible with his/her disclosure.

All employees and officers of the ACCC must use best endeavours to assist any investigation being carried out under the PID Act, whether conducted by the ACCC Chairperson, a delegate, or the Ombudsman.

Investigations must:

1. be completed within 90 days of receipt of a public interest disclosure
2. remain confidential
3. be finalised with a report, which will be provided to the discloser.

Commonwealth Ombudsman

The Ombudsman must prepare a report to Parliament each year on the operation of the PID Act (s 76). This report must include the following information for the financial year from agencies (s 76(2)):

- the number of public interest disclosures received by Authorised Officers of the agency
- the kinds of disclosable conduct to which those disclosures relate
- the number of disclosure investigations the agency conducted
- the actions that the agency has taken in response to recommendations in reports relating to those disclosure investigations
- the number and nature of the complaints made to the Ombudsman about the conduct of agencies in relation to public interest disclosures
- information about the Ombudsman's performance of its functions under s 62 and the IGIS's performance of its functions under s 63.

Authorised Officers

Authorised Officers have a range of decision-making, notification and other responsibilities under the PID Act, including:

- receiving disclosures from current or former public officials about disclosable conduct (s 26)
- deeming a person to be a public official to facilitate the making of a public interest disclosure (s 70)
- informing a person who may be unaware of the PID Act requirements that information that the Authorised Officer reasonably believes could concern disclosable conduct could be treated as an internal disclosure, explaining the requirements of the PID Act and advising the person of any designated publication restrictions (as defined in s 8) that may affect disclosure (s 60)

- assessing reported information to determine if there are no reasonable grounds to believe the information could be considered to be a public interest disclosure (s 43(2))
- making any preliminary inquiries necessary to make an allocation decision (s 43(4))
- allocating all or part of the disclosure to the Principal Officer of their agency and/or another agency, with that agency's consent (ss 43(1), (6))
- informing the Principal Officer of each relevant agency, and the Ombudsman or IGIS as appropriate, of allocation decisions and associated information (ss 44(1), 44(1A))
- informing the discloser of the allocation decision (s 44(2))
- consenting to the allocation of a disclosure by an Authorised Officer of another agency (s 43(6))
- advising the discloser of a decision not to allocate, the reasons why and any other course of action that may be available under Commonwealth law (s 44(3)).

Managers and supervisors

If the supervisor or manager believes that the information given to them concerns, or could concern, disclosable conduct, they must give that information to an Authorised Officer of the agency as soon as reasonably practicable (s 60A).

Managers and supervisors also have a key role in ensuring that the workplace culture supports the making of public interest disclosures. They can help to do so by:

- being knowledgeable about the PID Act and agency procedures, particularly in relation to confidentiality requirements (information which identifies, or may tend to identify, a discloser must NOT be disclosed without the discloser's consent)
- being approachable to staff who wish to raise concerns
- holding awareness sessions or discussion forums for their staff
- ensuring staff undergo available training
- confronting any workplace prejudices about making a disclosure
- supporting a staff member who they know has made a public interest disclosure and ensuring they are protected from reprisal
- increasing management supervision of the workplace if necessary (for example, if workplace conflict occurs because a disclosure has been made or an investigation is under way)
- ensuring identified problems in the workplace are corrected
- setting an example for staff.

Principal Officer

The Principal Officer has specific responsibilities under the PID Act, including:

- establishing procedures for facilitating and dealing with public interest disclosures relating to the agency (s 59(1)) - these procedures must include assessing risks that reprisals may be taken against a person who makes a disclosure, and providing for confidentiality of investigative processes
- taking reasonable steps to protect public officials who belong to the agency from detriment or threats of detriment (s 59(3)(a))
- appointing Authorised Officers (s 36)
- ensuring there are sufficient Authorised Officers to be readily accessible to public officials who belong to the agency and that public officials are aware of their identity (ss 59(3)(b), (c))

- notifying the discloser and the Ombudsman or IGIS as appropriate at various stages in handling a disclosure (ss 50, 50A, 51(4))
- ensuring disclosures are properly investigated (ss 47, 53)
- preparing an investigation report (s 51) and taking appropriate action in response to the report (s 59(4))
- providing information and assistance to the Ombudsman and IGIS, including in relation to PID Act annual reporting (s 76(3)).

The Principal Officer can delegate any or all of those functions or powers to a public official who belongs to the agency (s 77(1)). See the Human Resources Delegations available on the Corporate Portal.

Further Information

The Public Interest Disclosure Act 2013 is located on the [ComLaw website](#) .

The [Commonwealth Ombudsman](#) is responsible for promoting awareness and understanding of the PID Act and monitoring its operation. The [Commonwealth Ombudsman](#) has published a number of information sheets relating to the PID Act on its website including:

- Responsibilities of Principal Officers of Commonwealth agencies
- How to make a public interest disclosure
- Agency Guide to the Public Interest Disclosure Act 2013.

The ACCC's Corporate Portal page contains advice for Authorised Officers and Templates to be used during the PID investigation. General advice may also be sought from Workplace Relations staff in the HR Branch.

Individuals seeking further information on their rights or obligations under the PID Act are encouraged to seek advice from a legal practitioner.

Evaluation and monitoring

These procedures will be reviewed every 2 years, or following any significant change affecting process, such as changes to legislative requirements or associated guidelines. The review should consider the ongoing effectiveness of the procedures.

Dealing with an internal disclosure - flowchart

