



# Public interest disclosure procedures

June 2018

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# Public interest disclosure procedures for ACCC/AER

I, Rodney Sims, Chairman, Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER), establish these Procedures under s59 of the *Public Interest Disclosure Act 2013* (the PID Act).

These procedures support our commitment to:

- the highest standards of ethical and accountable conduct
- encouraging and investigating public interest disclosures and
- supporting and protecting persons who make public interest disclosures.

These procedures commence June 2018.

Signed:

Dated:

## Purpose

1. This document outlines the ACCC/AER's procedures for dealing with internal public interest disclosures, as required by the PID Act. Where external and/or emergency disclosure may be required, individuals are encouraged to seek independent (external to the ACCC/AER) legal advice.
2. The PID Act provides that any public official who wishes to make a disclosure of information, and receive the protections afforded by the PID Act, must follow legislative and ACCC/AER procedures.

## Authority

3. 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 Framework.

## Application

4. These procedures apply to persons working in, or with a relevant connection to, the ACCC/AER as legislated under s69 of the PID Act.

## Definitions

### Authorised Officer

5. Authorised Officers are the Principal Officer and 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/AER [Human Resources Delegations and Authorisations](#).

## **Discloser**

6. 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**

7. Disclosable conduct is defined in the PID Act (s29).
  - In summary terms, disclosable conduct is conduct by an Agency or by a public official that:
  - contravenes a law of the Commonwealth, a State or a Territory; or
  - occurs in a foreign country and contravenes a law in force in that country that applies to the agency or public official and that corresponds to a law in force in the Australian Capital Territory; or
  - perverts, or attempts to pervert, the course of justice or involves corruption of any other kind; or
  - constitutes maladministration, including conduct that:
    - is based on improper motives
    - is unreasonable, unjust or oppressive, or
    - is negligent, or
  - is an abuse of public trust; or
  - is fabrication, falsification, or deception in relation to scientific research, or misconduct in relation to scientific work; or
  - results in the wastage of public money or public property or of the money or property of an authority covered by the PID Act; or
  - unreasonably results in a danger to the health and safety of a person or unreasonably results in or increases the risk of a danger to the health and safety of a person; or
  - results in a danger to the environment or results in or increases the risk of a danger to the environment; or
  - is prescribed by the PID Rules; or
  - is engaged in by a public official that:
    - involves abuse of the public official's position, or
    - could, if proved, give reasonable grounds for disciplinary action against the public official.
8. It does not matter whether disclosable conduct occurred before or after 15 January 2014.

It does not matter whether the public official who carried out the alleged conduct has ceased to be a public official since the time the conduct is alleged to have occurred,

but it is necessary that they carried out the conduct in connection with their position as a public official..

### **Investigating Officer**

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

### **Managers and supervisors**

10. A supervisor includes any public official who supervises or manages the discloser (s8).

### **Ombudsman**

11. Means the Commonwealth Ombudsman. The Ombudsman and the Inspector General of Intelligence and Security (IGIS) have oversight of the public interest disclosure scheme. The Ombudsman is able to receive and investigate complaints about the handling of public interest disclosures.

### **Principal Officer**

12. The Principal Officer is the agency head or their delegate. See the [Human Resources Delegations and Authorisations](#).

### **Public interest disclosure**

13. A disclosure 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).

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<b>Type of disclosure</b>	<b>Criteria</b>
<b>Internal disclosure</b>	Must be made to an authorised internal recipient—Principal Officer, Authorised Officer or a supervisor of the discloser. 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.
<b>External disclosure</b>	Must be made to any person other than a foreign public official. May only be made after an internal disclosure has been made, and not dealt with effectively. Further requirements are outlined in the PID Act (s26).
<b>Emergency disclosure</b>	Must be made to any person other than a foreign public official. 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 (s26).
<b>Legal practitioner disclosure</b>	Must be made to an Australian legal practitioner. May be made for the purposes of obtaining legal advice or

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professional assistance regarding making a public interest disclosure. Further requirements are outlined in the PID Act (s26).

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## Public official

14. A public official is defined in s69 of the PID Act and covers persons who were or are currently 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..

## Reprisal

15. 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 (s13(1)).
16. Taking a reprisal is a criminal offence, punishable by imprisonment for two years or 120 penalty units, or both (s19). It is not necessary to prove that a person actually made or intended to make a public interest disclosure (s19(2)): what is relevant is the intention and action (or omission) of the person who took the reprisal.

## Internal disclosure procedures

17. 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?

18. A public interest disclosure may be made by a current or former public official.

### Who can receive a public interest disclosure?

19. A public interest disclosure may be made to the discloser's supervisor, an Authorised Officer of the ACCC/AER, or the Commonwealth Ombudsman.
20. 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 and Authorisations](#). 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.
21. Where a public interest disclosure is made to the discloser's supervisor, the supervisor must inform an Authorised Officer.
22. If an individual believes on reasonable grounds that the relevant issue would be more appropriately investigated by the Ombudsman than internally by the ACCC/AER, the individual may make their disclosure directly to an Authorised Officer of the Ombudsman.

## How is a public interest disclosure made?

23. The discloser can make a disclosure either to their supervisor, or to an Authorised Officer.
24. 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. The Principal Officer has discretion not to investigate the disclosure in certain circumstances (s48).
25. A discloser does not need to identify his or her disclosure as a 'public interest disclosure' for the purposes of the PID Act.
26. Disclosures may be made by:
  - contacting an Authorised Officer directly
  - contacting your supervisor, who will then contact an Authorised Officer
  - contacting People and Culture Directors who can forward the information to an Authorised Officer. Use:
    - emailing [PID@accc.gov.au](mailto:PID@accc.gov.au) . or
    - ACCC/AER internal mail, marked In-confidence to: 'Director, HR operations - Public Interest Disclosure'

## Anonymity

27. All individuals have the right to make a public interest disclosure anonymously although this may make it impracticable for the disclosure to be investigated.

## Protection for disclosers

28. The PID Act provides immunity from civil, criminal or administrative liability for disclosers.
29. 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<sup>1</sup>. The 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.
30. 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.

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

## What is not reprisal?

31. Administrative action that is reasonable to protect the discloser from detriment is not a reprisal (s13(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.
32. 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

33. 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.
34. The Authorised Officer and/or investigator will conduct a reprisal risk assessment and should encourage the discloser to maintain confidentiality to reduce the risk of reprisal and to contact the Authorised Officer if they think the risk of reprisal has changed.

## Limits

35. 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 above.
36. If you wish to make a public interest disclosure you can seek legal advice about your obligations under the PID Act.
37. An individual is not protected from liability for knowingly making a false or misleading statement in the course of making a public interest disclosure.
38. Making a public interest disclosure about a course of conduct will not protect an individual if they themselves engaged in that conduct.

## Investigation procedures

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

## Allocation of a disclosure

40. When a public interest disclosure has been made to an Authorised Officer, 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 to them.

41. 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 if the discloser consents to the Principal Officer being informed.
42. 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).
43. The Authorised Officer must prepare a written record 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
  - where it is allocated to another agency, the consent provided by the agency to which the allocation is made.
44. 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 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

45. 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 that has been previously investigated
  - the information concerns conduct which is being 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 that 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 that 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

46. 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.
47. 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.
48. An anonymous discloser will not receive this notification.
49. The Investigating Officer must also notify the Ombudsman of any decision not to investigate, and the supporting reasons.

## Conduct of investigation

50. 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).
51. 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 an employee or external provider to investigate on their behalf. All investigations must be conducted in accordance with the Public Interest Disclosure Standard 2013, Commonwealth Fraud Control Framework, or any procedures established under s15(3) of the Public Service Act 1999<sup>2</sup>, insofar as those Guidelines or procedures relate to the conduct in question. Investigative processes must be kept confidential.

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<sup>2</sup> Relating to alleged breaches of the Code of Conduct.

52. 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 Investigating Officer must advise all participants in the investigation process, including the discloser, that they are to maintain confidentiality.
53. 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.
54. 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.
55. 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

56. 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.

## Roles and responsibilities

57. This section provides a summary of the obligations of ACCC/AER employees when dealing with a public interest disclosure. All employees in the ACCC/AER 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.
58. All employees and officers of the ACCC/AER must use best endeavours to assist any investigation being carried out under the PID Act, whether conducted by the ACCC/AER Chairperson, a delegate, or the Ombudsman.

## Authorised Officers

59. 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 (s26)
- deeming a person to be a public official to facilitate the making of a public interest disclosure (s70)
- 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 s8) that may affect disclosure (s60)
- assessing reported information to determine if there are no reasonable grounds to believe the information could be considered to be a public interest disclosure (s43(2))
- making any preliminary inquiries necessary to make an allocation decision (s43(4))
- allocating all or part of the disclosure to the Principal Officer of their agency and/or another agency, with that agency's consent (ss43(1), (6))
- informing the Principal Officer of each relevant agency, and the Ombudsman or IGIS as appropriate, of allocation decisions and associated information (ss44(1), 44(1A))
- informing the discloser of the allocation decision (s44(2))
- consenting to the allocation of a disclosure by an Authorised Officer of another agency (s43(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 (s44(3)).

## Managers and supervisors

60. 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 (s60A).
61. 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 employees who wish to raise concerns
  - holding awareness sessions or discussion forums for their employees
  - ensuring employees undergo available training
  - confronting any workplace prejudices about making a disclosure
  - supporting an employee 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 employees.

## Principal Officer

62. 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 (s59(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 (s59(3)(a))
  - appointing Authorised Officers (s36)
  - 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 (ss59(3)(b),(c))
  - notifying the discloser and the Ombudsman or IGIS as appropriate at various stages in handling a disclosure (ss50, 50A, SI(4))
  - ensuring disclosures are properly investigated (ss47,53)
  - preparing an investigation report (s51) and taking appropriate action in response to the report (s59(4))
  - providing information and assistance to the Ombudsman and IGIS, including in relation to PID Act annual reporting (s76(3)).
63. The Principal Officer can delegate any or all of those functions or powers to a public official who belongs to the agency (s77(1)).

## Further information

64. You will find further information on:
- [Public Interest Disclosure Act 2013](#)
  - <http://www.ombudsman.gov.au/about/making-a-disclosure>
  - [pid@ombudsman.gov.au](mailto:pid@ombudsman.gov.au) or the PID hotline (02) 62763777.
  - [Public interest disclosure \(whistle-blowing\)](#) on the intranet
  - People and Culture Branch or [pid@accg.gov.au](mailto:pid@accg.gov.au).
65. 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

66. 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.