

Navigating the Legal Frontier: Revamped Australian Public Interest Disclosure Act

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1. Introduction

The recent changes to the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) are part of a broader effort by the Australian government to enhance Commonwealth integrity and address ongoing concerns related to integrity within the public sector.

The *Public Interest Disclosure Amendment (Review) Act 2023* (Cth) (**Amendment Act**), in conjunction with the commencement of the National Anti-Corruption Commission (**NACC**), represents a significant shift in the landscape of public interest disclosures in Australia. These reforms aim to not only complement the establishment of the NACC but also to address the recommendations stemming from the Moss Review¹ conducted in 2016, which evaluated the PID Act.



2. Disclosable Conduct and Personal Work-Related Conduct

One of the primary criticisms of the PID Act has been its frequent use by employees to report grievances that could be more appropriately addressed through internal misconduct procedures. To address this issue, the Amendment Act revises the definition of "disclosable conduct" to expressly exclude personal work-related conduct.

Under the new provisions outlined in section 29A of the PID Act, personal work-related conduct now encompasses matters such as interpersonal conflicts, bullying, harassment, and decisions related to disciplinary actions or employee transfers and promotions. Such matters will generally not qualify as disclosable conduct under the PID Act unless they involve reprisal actions or have significant implications for an agency, potentially eroding public confidence in the organisation. The practical application of this threshold remains to be seen, and agencies will need to exercise discretion in determining whether conduct meets these criteria.

3. Disclosable Conduct: Heightened Severity Requirement

The Amendment Act raises the threshold for work-related conduct to be classified as disclosable conduct under the PID Act. To qualify, the conduct must now be sufficiently serious that it could reasonably warrant the termination of the official's employment. This adjustment marks an increase in the standard compared to the previous threshold, which only required that the conduct might result in disciplinary action.

Similar to the carve-out for personal work-related conduct, this exception to the definition of

¹ <https://www.ag.gov.au/sites/default/files/2020-06/Moss%20Review.PDF>

disclosable conduct necessitates agencies to exercise discretion when evaluating whether conduct warrants termination, especially considering that a breach of the APS Code of Conduct is a valid ground for termination under the *Public Service Act 1999* (Cth). Agencies, particularly authorised officers responsible for determining public interest disclosures (**PIDs**), should prepare for the implementation of this standard.

4. Extension Concerning Protections to Witnesses

Part 3 of the Amendment Act clarifies and extends the protections granted to witnesses involved in PIDs but not the original disclosers. It accomplishes this by:

- a) Extending immunity provisions to individuals who "provide assistance in relation to a public interest disclosure," safeguarding them from civil, criminal, or administrative liability.
- b) Explicitly extending protection from reprisal actions to witnesses, addressing a long-standing gap in the PID Act.
- c) Expanding the non-exhaustive definition of reprisal action to specify instances of conduct, providing additional clarity.

New section 12B introduces exceptions to witnesses' immunity, including instances where witnesses provide knowingly false or misleading statements. Notably, witnesses who provide evidence related to their own conduct are not immune, allowing agencies to take disciplinary actions against them if their conduct is questioned during a PID investigation.

5. Extension of Obligations Imposed on Principal Officers, Authorised Officers, and Supervisors

Principal Officers, Authorised Officers, and Supervisors now bear additional obligations under the Amendment Act. These obligations include:

- a) Ensuring support and encouragement for the submission of PIDs.
- b) Safeguarding public officials from reprisals.
- c) Providing ongoing training and education to public officials, authorised officers, and supervisors on making PIDs and their associated protections.

These training requirements must be fulfilled "within a reasonable time after their appointment." These changes underscore the importance of agencies ensuring that their personnel understand and meet these obligations.

6. NACC Requirements and Interactions

The Amendment Act introduces a new category of PID: a "NACC disclosure" defined in the National Anti-Corruption Commission Act 2022 (Cth) (**NACC Act**). It covers situations where information regarding a corruption issue is presented to the NACC, either through referrals or the provision of information or evidence under the NACC Act.

Notably, a NACC disclosure pertains exclusively to information concerning a "corruption issue," as defined in the NACC Act. This includes conduct that may adversely affect the impartial exercise of a public official's powers, breaches of public trust, abuse of office, and misuse of information by public officials. Some of these elements overlap with the definition of "disclosable conduct" in the PID Act, leading to questions about how to allocate complaints that fall into both categories.

The NACC Act mandates that agency heads refer "serious or systemic" corrupt conduct by current or former staff members to the NACC. This collaboration between the NACC and agencies prevents duplication in investigations and ensures streamlined processes for addressing corruption issues.

7. Impact on the Private Sector

Although these recent changes mostly concern the public sector, they shall have fundamental consequences for private sector entities trading with the public sector, including Australian corporations substantially controlled by foreign corporations. Some of these implications are outlined and examined below.

Private Sector Entities Contracting with the Public Sector

Private sector organisations that contract with the federal government or provide services on behalf of government agencies may be subject to the requirements of the PID Act. This means that private sector employees working on government contracts may have obligations under the PID Act to report wrongdoing they witness during the course of their work.

Additional Whistleblower Protections

Where private sector employees are working in a capacity related to government contracts or providing services of public interest, they may be afforded whistleblower protection under the PID Act if they report misconduct or wrongdoing occurring within the scope of those contracts or services.

Reputation and Compliance

Private sector organisations that engage in government contracts or services may be indirectly influenced by the PID Act's provisions. These organisations must be aware of these provisions to ensure compliance and protect their reputation within the market. This can include implementing whistleblower protection policies and procedures.

Potential Investigations

Where a disclosure of wrongdoing within the scope of a government contract or service involving a private sector entity is made under the PID Act, it could trigger investigations or inquiries that involve the private sector organisation, potentially impacting its operations and reputation.

Awareness and Training

Private sector organisations that deal with the federal government or provide public services should educate their employees about the PID Act's existence and implications, especially if they may become whistleblowers under certain circumstances.

8. Conclusion

These amendments signify a significant shift in the landscape of public interest disclosures, reinforcing the need for any entities contracting with the Australian public sector to remain vigilant and proactive in adapting to these changes. If you have any questions or require further clarification on how these amendments may impact your organisation, please do not hesitate to contact our legal team.

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