

PUBLIC INTEREST DISCLOSURE RULES 2019

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

Authority

The Public Interest Disclosure Rules 2019 (the PID Rules) are made under the *Public Interest Disclosure Act 2013* (the PID Act). Section 83 of the PID Act enables the rule-maker, the Attorney-General, to make rules prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

The PID Rules are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act), and accordingly, are subject to its disallowance and sunset provisions.

Overview of the PID Act

The PID Act, which commenced in January 2014, established a framework for agencies in the Commonwealth public sector to disclose allegations of misconduct. It has application across a broad range of agencies, including Commonwealth departments, parliamentary departments, the Australian Defence Force, corporate Commonwealth entities and intelligence agencies. Its objectives include encouraging and facilitating the making of public interest disclosures by public officials, protecting public officials who make disclosures from liability, and ensuring the proper investigation of alleged misconduct in the Commonwealth public sector.

The PID Act enables current and former public officials to make disclosures about ‘disclosable conduct’ engaged in by an agency, by a public official in connection with their position as a public official, or by a contracted service provider for a Commonwealth contract, in connection with entering into, or giving effect to, that contract. A disclosure can be made anonymously and does not need to be in writing. ‘Disclosable conduct’ is defined broadly in section 29 of the PID Act and includes fraud, serious misconduct and corrupt conduct, contraventions of a law, as well as minor wrongdoing.

The PID Act provides a range of protections and immunities to persons who have made disclosures, including immunity from civil, criminal or administrative liability or contractual action for making a disclosure (with some exceptions), and a right to apply to a federal court for compensation, injunction, reinstatement and other orders if a discloser suffers ‘reprisal’ action (or in the alternative, a right to any remedy under the *Fair Work Act 2009*). The PID Act also includes provisions making it an offence for a person to take or threaten to take reprisal action (with a penalty of imprisonment for up to two years or 120 penalty units, or both), and to use or disclose the identity of a discloser, subject to limited exceptions (with a penalty of imprisonment for up to six months or 30 penalty units, or both).

The Act provides for ‘internal’, ‘external’, ‘emergency’ and ‘legal practitioner’ disclosures, according to the nature of the information and the agency with which the disclosable conduct is connected. To make an ‘internal disclosure’ a public official needs to disclose information to an authorised officer or their supervisor that tends to show, or the discloser believes on reasonable grounds tends to show, ‘disclosable conduct’. In certain circumstances, disclosures can also be made to Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS).

An ‘external disclosure’ can be made to any person other than a foreign public official where certain criteria are met, including that an internal disclosure has been made but the investigation is not completed in the prescribed time or the discloser believes on reasonable grounds the investigation is inadequate, and external disclosure is on balance not contrary to the public interest. Disclosures that involve intelligence information, including sensitive law enforcement information, cannot be made externally, and can only be made to an intelligence agency to which the disclosure relates or the IGIS.

An ‘emergency disclosure’ can be made without first going through an internal disclosure if the public official considers that the information concerns a substantial and imminent danger to the health or safety of one or more persons, or the environment. A ‘legal practitioner disclosure’ can be made by a public official to a legal practitioner for the purpose of obtaining legal advice in relation to a public interest disclosure they have made, or are proposing to make.

The PID Act also imposes obligations on various public officials to receive, allocate, investigate and make findings in respect of allegations of disclosable conduct. Authorised officers are responsible for receiving and allocating a disclosure for investigation. Generally, a disclosure will be allocated to the agency to whom the disclosure relates. Principal officers (defined under the PID Act to include heads of Commonwealth public sector agencies) are responsible for investigating disclosures once they have been allocated, and preparing a report of the investigation. This investigative function can be delegated to appointed investigators. The PID Act also makes provision for disclosers to be notified of certain key steps in the public interest disclosure process, including the allocation and investigation of a public interest disclosure. A discloser must also be provided a copy of the investigation report. These notification requirements do not apply to the extent that contacting the discloser is not reasonably practicable.

The Commonwealth Ombudsman has oversight functions in relation to the PID Act, which includes publishing guidance material and annual reports on the operation of the Act. The IGIS also has oversight functions under the PID Act in respect of intelligence agencies, including assisting intelligence agencies in relation to the operation of the Act and conducting educational and awareness programs.

The purpose of the PID Rules

The purpose of the PID Rules is to bring the Australian Securities and Investments Commission (ASIC) back within the framework of the PID Act. The Rules will ensure that ASIC staff can make disclosures relating to Commonwealth public sector misconduct, and in doing so, obtain the PID Act’s protections, including protections from civil, criminal, and administrative liability and acts of reprisal.

ASIC was previously a ‘prescribed authority’ for the purpose of the PID Act because it was a ‘statutory agency’ (as defined in the *Public Service Act 1999* (Public Service Act)) under paragraph 72(1)(a). This meant that ASIC staff fell within the scope of the PID Act, obtaining the protections available under the PID Act, and being subject to the obligations imposed under the Act in respect of the receipt, allocation and investigation of a disclosure. The *Treasury Laws Amendment (Enhancing ASIC’s Capabilities) Act 2018* (Treasury Laws Amendment Act) made a range of amendments to the *Australian Securities and Investments Commission Act 2001*, including removing ASIC as a statutory agency for the purposes of the Public Service Act. An unintended consequence of this amendment is that ASIC staff are no longer covered by the PID Act. The Treasury Laws Amendment Act commenced on 1 July 2019.

To ensure that ASIC staff are provided the PID Act’s protections for making disclosures relating to public sector misconduct, and are subject to the PID Act obligations for receiving, allocating and investigating disclosures, the PID Rules will reinstate ASIC as a ‘prescribed authority’ under section 72 of the PID Act. Paragraph 72(1)(p) of the PID Act provides that a body can be a ‘prescribed authority’ where two criteria are satisfied. Firstly, the body must be established by a law of the Commonwealth. Secondly, the body must be prescribed by the PID Rules. ASIC is already established by a law of the Commonwealth under the ASIC Act. Accordingly, the further prescription

of ASIC under the PID Rules by the Attorney-General (as rule-maker) will have the effect of satisfying the requirements of paragraph 72(1)(p). The prescription of ASIC as a ‘prescribed authority’ will restore the operation of the PID Act, including its protections and obligations, in respect of ASIC staff.

CONSULTATION

Before the Rules were issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Attorney-General’s Department (the department) consulted the Treasury and ASIC, as affected agencies, on the policy objective of the PID Rules and a draft of the Rules in September 2019. The department also consulted the Office of the Commonwealth Ombudsman, which has an oversight role under the PID Act and may receive disclosures from ASIC staff, and the IGIS. No objections were raised in respect of the Rules.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) advised that because the PID Rules contain measures that are minor or machinery in nature, a Regulation Impact Statement is not required. The OBPR identification number is 25623.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

The Public Interest Disclosure Rules 2019 (the Rules) are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

The Parliamentary Joint Committee on Human Rights considered the compatibility with human rights of the *Public Interest Disclosure Act 2013* (PID Act) when it reviewed the Public Interest Disclosure Bill 2013 (Sixth Report of 2013). In the context of that Bill, the following human rights were identified as being engaged:

- the right to freedom of expression (Article 19 of the International Covenant on Civil and Political Rights (ICCPR))
- the right to privacy (Article 17 of the ICCPR)
- the right to be presumed innocent (Article 14(2) of the ICCPR), and
- the right to work and to just and favourable conditions of work (Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)).

The Public Interest Disclosure Rules 2019 (PID Rules) broadly reengage these rights to the extent that they bring the Australian Securities and Investments Commission (ASIC) back within the scope of the PID Act. The PID Rules will promote the rights identified above. Providing protections under the PID Act to ASIC staff who disclose allegations of misconduct, and the imposition of obligations under the PID Act in respect of the receipt, allocation and investigation of allegations of misconduct promotes public sector integrity and accountability. To the extent these rights are subject to restrictions, these restrictions achieve legitimate objectives and do so in a reasonable and proportionate manner.

Right to freedom of expression

The right to freedom of expression is contained in Article 19 of the ICCPR. Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression and that this right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice. This right may be subject to certain restrictions, but these should be provided by law and necessary. Paragraphs 19(3)(a) and (b) provide that restrictions on the freedom of expression may be imposed for the purpose of respecting the rights and reputation of others, and for the protection of national security, public order, public health and morals.

The PID Act provides for ‘internal’, ‘external,’ ‘emergency’ and ‘legal practitioner’ disclosures. The PID Act is broadly premised on the approach that disclosures relating to public sector misconduct should first be reported internally within Government. For example, an ‘external disclosure’ can only be made where certain criteria are satisfied, including that an internal disclosure has been made but the investigation is not completed in the prescribed time or the discloser believes on reasonable grounds that the investigation is inadequate, and external disclosure is on balance, not contrary to the public interest. While ‘emergency’ and ‘legal practitioner’ disclosures can be made without an internal disclosure first being made, such disclosures may only be made in limited circumstances – in the case of a ‘emergency disclosure’ there must be a substantial and imminent danger to the health or

safety of one or more persons or the environment, and in the case of ‘legal practitioner’ disclosure, these may only be made to a lawyer.

While the freedom of expression may be considered to be limited through the PID Act’s preference for internal disclosures in the first instance, the rationale for this approach is that Government agencies are best placed to investigate allegations of misconduct, having awareness of the legislative frameworks that apply to their conduct and being able to more readily access the information required to conduct a public interest disclosure investigation efficiently. Furthermore, the internal investigation of allegations of misconduct achieves the legitimate objective under paragraph 19(3)(a) of the ICCPR of preserving the rights and reputation of individuals who may be the subject of misconduct allegations that are later proven to be unfounded or false.

The PID Act also promotes the right to freedom of expression by providing a broad range of protections to persons who make disclosures consistent with the PID Act, including:

- immunity from civil, criminal, administrative action or contractual action for making a disclosure (with some exceptions)
- a right to apply to a federal court for compensation, injunction, reinstatement and other orders if a discloser suffers ‘reprisal’ action, and
- provisions making it an offence for a person to take or threaten to take reprisal action, or to use or disclose the identity of a discloser subject to limited exceptions.

The application of the PID Act to ASIC staff promotes the freedom of expression. To the extent that the PID Act contains restrictions on the freedom of expression, these restrictions achieve the legitimate objective of protecting the rights and reputation of others. The PID Act achieves this legitimate objective in a manner that is reasonable and proportionate.

Right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy may be engaged through the prescription of ASIC as a ‘prescribed authority’ for the purposes of the PID Act.

The PID Rules interact with and promote the right to privacy insofar as they ensure that there are restrictions on the use of ‘identifying information’. Identifying information is defined in paragraph 20(1)(b) of the PID Act as information that is obtained by an individual in that person’s capacity as a public official and is likely to enable the identification of the individual who made a public interest disclosure. Section 20 of the PID Act creates offences for the disclosure and use of identifying information. These offences carry a maximum penalty of up to six months imprisonment, or 30 penalty units, or both. Subsection 20(3) provides limited exceptions to this offence, including disclosure or use of identifying information for the purpose of the PID Act. These offences ensure that the personal information of ASIC staff who make public interest disclosures are protected, and that such information is only revealed under limited circumstances circumscribed by the Act.

Section 65 of the PID Act provides that it is an offence for an individual who has obtained information in the course of conducting a public interest disclosure investigation or in connection with their performance of functions under the PID Act (protected information) to provide that information to another person or to use that information. This offence carries a maximum penalty of up to two years imprisonment, 120 penalty units, or both. Subsection 65(2) provides limited exceptions to this offence, including where the disclosure or use of that information is for the purposes of the PID Act or where it is used in connection with an individual’s performance of their functions under the Act. This

offence also protects an individual's right to privacy by protecting information that has been obtained in the course of considering a public interest disclosure made by a public official.

To the extent that the offences in sections 20 and 65 of the PID Act contain exceptions that permit the disclosure or use of identifying or protected information, these limitations on the right to privacy are not arbitrary. These exceptions are narrowly confined and clearly established by law. The exceptions also achieve the legitimate objective of ensuring that relevant information can be shared to promote the purposes of the PID Act and enable staff to perform functions under the PID Act.

Accordingly, the application of the PID Act to ASIC staff through the PID Rules staff promotes the right to privacy. Where the PID Act imposes restrictions on the right to privacy, these limitations are prescribed by law, and represent a reasonable and proportionate means of achieving the legitimate objectives of the PID Act.

Presumption of innocence

Article 14(2) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proven beyond a reasonable doubt.

The offences contained in the PID Act do not reverse the onus of proof as guilt is not presumed. However, the offences and immunities under the PID Act may reverse the evidential burden. For instance, in cases where a person is seeking to claim an immunity in respect of a public interest disclosure due to the operation of the protections in section 10, the person claiming the immunity bears the onus of adducing or pointing to evidence that suggests a reasonable possibility that the claim is made out (paragraph 23(1)(a)). Similarly, the offences in section 20 of the PID Act relating to the use or disclosure of identifying information requires the defendant to adduce evidence that suggests a reasonable possibility that the defences for such conduct contained in subsection 20(3) are applicable.

The reversal of the evidential burden is appropriate because the evidence supporting the claim that the person made a qualifying public interest disclosure, or that their conduct was within an exception to an offence, would be peculiarly within the knowledge of that person, and as such it would be significantly more difficult and costly for the prosecution to disprove than for the person to establish that matter. For instance, the person may be able to avail themselves of the immunity in section 10 through providing email correspondence of the steps taken by them to disclose a matter consistently with the processes under the PID Act. Once the person has adduced this information, it is for the prosecution to disprove the applicability of the immunity in section 10 beyond a reasonable doubt.

Accordingly, the PID Act, and its application to ASIC staff, does not reverse the presumption of innocence. Where the PID Act contains a reversal of the evidential burden, this reversal is appropriate in the context of the PID Act.

Right to work and rights in work

The right to work, the rights in work and the right to enjoy safe and healthy working conditions are contained in Articles 6(1) and 7 of the ICESCR. These rights encompass the right not to be unjustly deprived of work, or be subject to unfair dismissal. The PID Act contains provisions that protect individuals who make public interest disclosures from reprisals, including workplace reprisals. The PID Act prohibits the dismissal of an employee, alteration of an employee's position to his or her

detriment, or discrimination between an employee and other employees, in relation to the making of a public interest disclosure. The PID Act also provides remedies if any of these reprisals occur, including reinstatement of a terminated employee.

Accordingly, the PID Rules, through its application of the PID Act to ASIC staff, promote rights to work, the rights in work and promote a safe and healthy working environment.

Conclusion

The PID Rules are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act. To the extent there are any limitations on the rights and freedoms identified above, these restrictions achieve a legitimate objective and do so in a manner that is reasonable and proportionate.

NOTES ON SECTIONS

Section 1 – Name

This section provides that the title of the instrument is the *Public Interest Disclosure Rules 2019* (PID Rules).

Section 2 – Commencement

This section provides that the PID Rules commence on the day after the instrument is registered.

Section 3 – Authority

This section provides that the authority for making the instrument is the *Public Interest Disclosure Act 2013* (PID Act).

Section 4 – Definitions

This section provides that any reference to *Act* in the instrument are a reference to the PID Act.

Section 5 – Prescribed authorities

This section provides that the Australian Securities and Investments Commission (ASIC) is a ‘prescribed authority’ for the purposes of subparagraph 72(1)(p)(ii) of the PID Act.

The effect of this section is to bring ASIC within the scope of the PID Act. This will ensure that from the commencement of the PID Rules, ASIC staff will be able to make disclosures relating to Commonwealth public sector misconduct (known as ‘disclosable conduct’ under the PID Act) and obtain the PID Act’s protections for making such disclosures. These protections include:

- immunity from civil, criminal, administrative action or contractual action for making a disclosure (with some exceptions)
- a right to apply to a federal court for compensation, injunction, reinstatement and other orders if a discloser suffers ‘reprisal’ action, and
- provisions making it an offence for a person to take or threaten to take reprisal action, or to use or disclose the identity of a discloser subject to limited exceptions.

Relevantly, subsection 29(3) of the PID Act provides that it is immaterial whether the ‘disclosable conduct’ that is the subject of a public interest disclosure occurred before or after the commencement of the PID Act (the Act commenced in January 2014). Accordingly, ASIC staff will be able to make public interest disclosures relating to disclosable conduct that occurred at any time, including before the commencement of the PID Act, and the period that ASIC was temporarily outside the scope of the Act.