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Submission to the Australian Government Whistleblowing Reforms

Thank you for the opportunity to comment on these important reforms.

The Australian Conservation Foundation (ACF) is Australia's national environment organisation. We are over 700,000 people who speak out for the air we breathe, the water we drink, and the places and wildlife we love. We are proudly independent, non-partisan and funded by donations from our community.

At ACF, we believe in people power. Australia's Constitution assumes the Government is held accountable at the ballot box. To do that, the Australian people need access to timely information. In recent years, whistleblowers have been a critical source of information for shareholders of fossil fuel companies, as well as taxpayers and voters who care about nature and climate—while our transparency laws and a government culture of secrecy and suppression have failed to adequately inform the public.¹

For example, outside the scope of the *Public Interest Disclosure Act 2013* (the PID Act) but nevertheless relevant, the Santos employee turned whistleblower who informed the public of an oil spill which had occasioned the death of dolphins at Varanus Island in Western Australia.² Santos withheld this information from the public and described the event as 'negligible'. This information about Santos' capacity to operate with environmental sensitivity was critical to shareholder engagement group, the Australasian Centre for Corporate Responsibility, in their recommendations on executive remuneration.³ It is also important information for stakeholders being consulted on Santos' proposed developments elsewhere, such as the Barossa Gas field which is currently undergoing controversial consultation with the public.⁴

Another example in that vein is a coal executive turned whistleblower who informed the public of widespread fraud in the coal industry involving the inflation of coal quality in lab reports to cheat Australian exports partners.⁵ The consequence of this fraud is that Southeast Asian power utilities

¹ <https://www.abc.net.au/news/science/2020-09-09/environment-scientists-censored-suppressed-data/12643824>

[https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal and Constitutional Affairs/CommonwealthFOI2023/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CommonwealthFOI2023/Report)

² <https://www.abc.net.au/news/2023-11-04/the-santos-worker-who-blew-whistle-on-dead-dolphins-oil-spill/103056606>

³ <https://www.accr.org.au/news/%E2%80%99Culture-of-avoiding-accountability%E2%80%99D-whistleblower-debunks-santos%E2%80%99-claim-oil-spill-didn%E2%80%99t-kill-dolphins/>

⁴ <https://www.afr.com/companies/energy/santos-secures-drilling-approval-for-barossa-gas-project-20231217-p5eryf>

⁵ <https://www.theguardian.com/australia-news/2022/nov/21/andrew-wilkies-claims-in-parliament-of-coal-industry-concerning-resources-minister-says>



paid more for poor quality coal and had to burn more coal for the equivalent energy, meaning far more carbon emissions which stay in the atmosphere and heat our planet. Climate change is an undeniable election issue and has been for many Australian elections. Countless Australian politicians have spruiked our ‘clean coal’ as the reason we must continue to export our fossil fuels despite the science on climate change. The information the whistleblower provided suggests the Australian public cannot rely on such claims.

More closely related to the *Public Interest Disclosure Act 2013* (the PID Act) is the former Emissions Reduction Assurance Committee Chair turned whistleblower who informed the public that Australia’s carbon credits do not represent material abatement in most cases.⁶ The Government agency responsible for carbon credits, the Clean Energy Regulator, has been actively involved in suppressing science-based criticism of the scheme—if not for the whistleblower risking his career and reputation, we would never have known about these serious problems.⁷

This information led to election commitments from the Australian Labor Party to review Australia’s carbon credit scheme and informed advocacy on the Albanese Government’s major climate policy, the Safeguard Mechanism, which relies on carbon credits to offset the majority of emissions by industry.⁸

We have provided these examples to emphasise the ‘Public Interest’ in the *Public Interest Disclosure Act 2013*. Whistleblowers are providing a service to the public at great personal cost, whether they are coming from private or organisations. We believe strongly that they should be consistently protected and rewarded; further, that the information they have risked everything to disseminate, where possible, should be available to the voting taxpaying public.

While reform of the PID Act is important, whistleblower protections across all sectors should be consistent, easy to access, and protect the full gamut of whistleblowers (for example, consultants blowing the whistle on government conduct). Any reform to the PID Act should constitute a first step, and set the gold standard which is to apply in one single consistent regime through future reform.

A consolidated approach to whistleblowing will be cheaper, simpler, more predictable and most importantly, easier for whistleblowers who already face significant barriers to doing the right thing.

⁶ <https://www.theguardian.com/environment/2022/mar/23/australias-carbon-credit-scheme-largely-a-sham-says-whistleblower-who-tried-to-rein-it-in>

⁷ <https://www.theguardian.com/australia-news/2022/dec/02/david-pocock-criticises-officials-inappropriate-conduct-after-she-confronted-scientific-group-over-carbon-credit-evidence>

⁸ <https://www.theguardian.com/australia-news/2022/jun/29/chris-bowen-to-announce-review-of-carbon-credits-system-after-expert-labelled-it-a>
<https://esdnews.com.au/critics-slam-weak-safeguard-mechanism-reforms/>



1. Who should be protected for public sector whistleblowing under the PID Act?

Protections should be expanded to include:

- Parliamentary and ministerial staff.
- Private sector employees blowing the whistle on the public sector, not limited to protecting contractors in respect of their contract with the Commonwealth.
- Public sector employees blowing the whistle on conduct anywhere in the public service.

2. What, if any, additional pathways should be created to provide ways for a public sector whistleblower, including those from intelligence agencies, to make a disclosure and receive protections?

3. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure within government?

- Whistleblowers should not be expected to understand the appropriate agency to report wrongdoing. Disclosures to agencies which could reasonably be expected to receive a report of wrongdoing should be immediately protected by the PID Act. This should include investigating agencies and agencies with an integrity function.
- Once a disclosure has been made to an agency, that agency should have a positive duty under the PID Act to disclose the information to the appropriate agency.
- Anonymity or bureaucratic failures, such as not explicitly referring to the PID Act in a disclosure, should not preclude whistleblowers from protection under the PID Act.

4. In what circumstances should public sector whistleblowers be protected to disclose information outside of government? Are there circumstances where information should not be disclosed outside of government?

- The disclosure of wrongdoing is inherently in the public interest. If the information provided by the whistleblower is misguided, this can generally be resolved out in the open. For example, contrary opinions on the integrity of carbon credits have been publicly aired since the whistleblower (mentioned earlier in this submission) made his external disclosure. The debate has been important to the public and advocacy groups forming their own view on the matter and has been a fruitful democratic process.
- In that vein, the public interest test should be removed from the PID Act and the grounds for third party disclosure should be expanded.



- The expansion should prioritise the rights and welfare of the whistleblower – it should include disclosures to lawyers and support persons.
- The expansion should also prioritise the public interest in accountability and transparency (pillars of Australia’s democracy). Circumstances for third party disclosure should include circumstances when a disclosure has not been dealt with expediently or adequately, and where the whistleblower could not reasonably disclose internally (for fear of safety or due to the nature of the allegation).

6. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure outside government?

- Disclosures to parliamentary inquiries and committees should immediately and explicitly enjoy protection under the PID Act.
- The language of the PID Act should be more intuitive. Internal disclosures should be those made within an agency, external disclosure should be to another government agency, and public disclosures should be those made outside of government.

7. What reforms to the PID Act should be considered to ensure public sector whistleblowers and witnesses have access to effective and appropriate protections and remedies?

- The onus of proof should be placed on the agency or the individual responsible for the alleged harm when whistleblowers seek civil remedies (such as compensation). This should be consistent with international best practice.
- The failure to fulfil a duty, including the positive duty we suggest at points 2 & 3, should be sufficient grounds for compensation.
- Legal aid support should be guaranteed for whistleblowers for the full suite of actions they may take, from disclosures to seeking compensation.
- There should also be additional incentives for pro bono support for whistleblowers to supplement the above measure. We note that the Attorney General has asked the Department to develop further incentives for firms to undertake pro bono generally.⁹ The Department should consider how specific incentives could be introduced which would reward firms for assisting whistleblowers on a pro bono basis, such as allowing the hours worked to be reported at time and a half for such clients.

⁹ <https://www.afr.com/companies/professional-services/dreyfus-to-name-and-shame-pro-bono-laggards-20230827-p5dzoz>



- 8. Should the Act prescribe additional statutory minimum requirements for agency procedures under the PID Act?**
- The PID Act should at the very least include the same requirements as the Corporations Act.
 - Commonwealth contractors should be required to have procedures for whistleblowing. The PID Act should protect disclosures made under such procedures.
- 9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?**
- Protections should apply broadly to actions relating to the disclosure which are necessary or reasonable—it should explicitly include preparatory acts.
- 10. Do you have any other views on reforms for protecting public sector whistleblowers who make a disclosure under the PID Act, and remedies for when protections fail?**
- Civil remedies should be available for negligent or ‘collateral’ damage which was preventable. Civil remedies currently require mental elements of knowledge and/or intent in failures to protect whistleblowers. This places a high bar on civil actions, creates a difficult evidentiary task for the whistleblower which places the onus on them, and leaves out of scope a significant amount of detriment suffered by whistleblowers.
- 11. Should the PID Act establish other incentives for public sector whistleblowers, and if so, what form should such incentives take?**
- The Commonwealth should establish a reward scheme for all whistleblowers. This would provide an appropriate counterbalance against disincentives to disclose, recognise the service whistleblowers provide, appropriately value accountability and transparency in Australian institutions and rectify the significant financial and personal losses that whistleblowers suffer.
- 14. Do any gaps exist in the current oversight and whistleblower protection functions of agencies, the Commonwealth Ombudsman and the IGIS? Who is best-placed to take on additional responsibilities to fill these gaps?**
- Currently the Ombudsman does not have the power or a duty to independently investigate detrimental actions taken against whistleblowers; nor to take legal action or make orders against agencies; nor is resourced or capable of performing these functions. It currently has a reactive complaint handling function.



16. Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?

- A Whistleblower Protection Authority should be established. It should be an accessible and centralised agency for all whistleblowers to seek protection, regardless of sector. The key functions, purposes and powers of such a body should be those set out in the consultation paper.¹⁰

17. If established, is there an existing agency where it might be appropriate for an additional independent body to be located?

- The body must protect whistleblowers in all sectors, it must be independent, it must be capable of receiving and acting on information about *any* Australian institution and must have protected resourcing – this means it would be difficult to host it within an existing agency. If the body were to be located within an existing agency, protections would need to be strict around independence and guaranteed resourcing.

18. If an additional independent body is established, do you have any views on its operation, for example in relation to referral pathways, who should be able to make a referral, intersection with the external disclosure process, or the impact, if any, on available remedies for individuals that use the independent body?

- The Whistleblower Protection Authority should be a central place for all whistleblowers to seek advice, protection and to be referred, where appropriate, to the correct investigating agency. The Authority should maintain an active role in referrals, monitoring progress at the receiving agency.
- The Authority should have the power to directly investigate allegations of detriment or reprisal and have appropriate coercive powers to facilitate the production of documents, taking of statements and searches of relevant premises.

19. How would the role of an additional independent body differ from and intersect with other existing oversight agencies? Are there risks associated with establishing an additional integrity body alongside existing agencies – for example, duplication of functions, stakeholder confusion or delays ...?

¹⁰ Another example to be drawn on,

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report



- The Authority will simplify the whistleblower-facing aspect of existing oversight significantly. It will ease the burden on existing agencies and will not add any greater risk than already exists with many agencies already working together on these issues.

20. What should be the overarching purposes of the PID Act? Are these currently reflected in the objects outlined in section 6 of the PID Act?

- The current objects are satisfactory however the object of supporting and protecting public officials who make disclosures must explicitly take priority.

21. What changes could be made to the PID Act to make it less complex and easier to understand and comply with?

22. Should a principles-based approach to regulation be adopted in the PID Act? If so, to what extent? What risks might be associated with adopting this approach?

23. What, if any, measures in the PID Act should remain prescriptive if a principles-based approach were to be adopted?

- The PID Act should take a simple and explicit principles-based approach – technical hurdles to eligibility and protection should be removed where possible. Where technical requirements are necessary, they should be detailed in subordinate legislation or through more flexible guidance, rather than prescribed in the Act.

24. Do you have any other views on reforms to improve the clarity of the PID Act?

- As previously mentioned, the Commonwealth should take a comprehensive approach to whistleblower reform across all sectors. A simple, consistent and predictable approach will help institutions appreciate the risks of harming whistleblowers, will make whistleblowing accessible and appropriately protected and will be more efficient.

For more information:

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and act for a world where reefs, rivers, forests and wildlife thrive.*
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