

Commonwealth and NSW legislation for the disclosure of wrongdoing

Drafted by lawyers for lawyers, not the
persons bound to comply!

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Impenetrable drafting

Even a cursory glance at the provisions of the more recent statutory schemes for the protection of whistleblowers indicates that they were clearly drafted:

- **by** lawyers **for** lawyers,
- not for the people bound to comply with the obligations they impose.

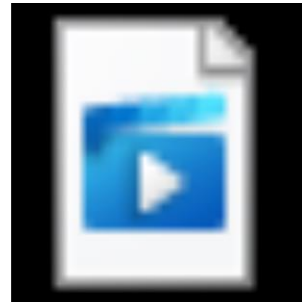
The drafting of many of these provisions can best be described as impenetrable. One or two are almost comical!

An example of impenetrable drafting

*A court may make an order under section 1317AE in relation to **a person** (the **first person**) that is a body corporate if **another person** (the **third person**) engages in conduct (detrimental conduct) that causes any detriment to **a person** (the **second person**) other than the **first person** or the **third person**; or constitutes the making of a threat to cause any such detriment to **a person** (the **second person**) other than the **first person** or the **third person**;*

[formatting in the Act removed]

The Marx Brothers



The Sanity Clause - A Night at the Opera.webm

https://www.youtube.com/watch?v=G_Sy6oiJbEk

[start at 1.20]

Comparisons of the complexity of statutes for the protection of disclosers of wrongdoing

- NSW and the Commonwealth -

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Types of qualifying disclosures	<p>6 types of qualifying disclosures:</p> <ol style="list-style-type: none"> 1. Internal disclosures by actual public officials 2. Internal disclosures by contracted service providers or their employees [s.69]. 	<p>5 types of qualifying disclosures:</p> <ol style="list-style-type: none"> 1. Internal disclosures 2. External disclosures 3. Public Interest Disclosures 4. Emergency Disclosures 5. Disclosures to obtain legal advice/rep. [s.1317AA & AD]. 	<p>5 types of qualifying disclosures:</p> <ol style="list-style-type: none"> 1. Voluntary referral or provision of information '<i>about a corruption issue</i>' to '<i>the</i>' NACC Commissioner or IGIS under Part 5 [s.23(a) & s.32]. 2. Mandatory referral of a PID '<i>concerning a corruption issue</i>' under ss.202 & 203. [s.35]. 	<p>15 types of qualifying disclosures:</p> <ul style="list-style-type: none"> • 12 types of Voluntary PIDs: <ol style="list-style-type: none"> 1. PIDs made to the agency by an employee [ss.24-27]. 2. '<i>Presumed</i>' Voluntary PIDs [s.49(1)(b)] 3. PID's made to the agency by a '<i>contractor</i>' deemed to be a '<i>public official</i>' [s.14(1)(e) & (f)].

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
	<p>3. Internal disclosures by individuals deemed to be public officials [s.70]</p> <p>4. External disclosures</p> <p>5. Emergency disclosures</p> <p>6. Legal practitioner disclosures [s.26].</p>		<p>3. Referral or provision of 'other' information about a corruption issue to the NACC Inspector [s.23(b)].</p> <p>4. Giving evidence, information, documents or things to 'a' NACC Commissioner, IGIS or NACC Inspector.</p> <p>5. Protection for journalists' informants [s.31].</p>	<p>4. PIDs made or referred to the agency pursuant to an 'agency service contract' [s.82 & s.62(1)(b)(ii)].</p> <p>5. PIDs that are anonymous [s.28(1)].</p> <p>6. PIDs made by an agency employee to a Minister or Minister's staff [ss.24(3)(c), 27(1)(d), 52].</p>

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
				<ul style="list-style-type: none"> 7. PIDs made by a 'contractor' to a Minister or Ministers staff [ss.24(3)(c), 27(1)(d), 52]. 8. Voluntary PIDs referred to the agency by an integrity agency or another agency [s.57]. 9. Deemed Voluntary PIDs [s.29]. 10. Purported Voluntary PIDs [s.59(4), Sch. 2, cl.5] 11. Voluntary PIDs not related to the agency [s.56].

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
				<p>12. Voluntary PIDs made to an MP or journalist [s.27(1)(e), s.28].</p> <ul style="list-style-type: none"> • 2 types of Witness PIDs: <ol style="list-style-type: none"> 1. Witness PIDs that are protected from civil and criminal liability [s.22, s.40(1) & cl.26(1), Sch.1, <i>Defamation Act 2005</i>]. 2. Witness PIDs that are not protected from civil and criminal liability [s.22, s40(2) & cl.26(2), Sch.1, <i>Defamation Act 2005</i>] • 1 type of Mandatory PID [s.23].

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Categories of persons who can make disclosures	<p>Current or former '<i>public officials</i>' [s.26], including:</p> <ul style="list-style-type: none"> employees and persons in the service of the Commonwealth (broadly defined), individuals who are '<i>contracted service providers</i>', officers or employees of, '<i>contracted service providers</i>' [s.69]. 	<p>Current or former:</p> <ul style="list-style-type: none"> directors & officers, employee's associates, contractors, and any of their relatives and dependents [s.1317AAA]. 	<p>Any person [s.32(1)].</p>	<p>Current '<i>public officials</i>' [s.25], including:</p> <ul style="list-style-type: none"> employees & persons in the service of an agency persons having official functions or acting in a public official capacity, persons or entities providing services or exercising functions on behalf of an agency, including contractors and subcontractors, partners, officers or employees of contracting entities & volunteers [s.14].

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Definition of contracted service providers	<p>A person who is a party to a Cth. contract (or subcontract):</p> <ul style="list-style-type: none"> under which goods/services are or were to be provided to, for or on behalf of the Cth. in connection with its functions or powers, and is responsible for the provision of those goods/services. 	N/A	<p>Any person acting for and on behalf of an MP or a staff member of a Commonwealth agency or a staff member of the NACC is also a <i>public official</i> [s.10].</p>	<p>Any contractor, subcontractor or volunteer, and any employee, partner or officer of an entity, providing services on behalf of or exercising functions of an agency [s.14].</p>

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Subject matter of disclosures that are protected		<p>Information:</p> <ul style="list-style-type: none"> • that '<i>concerns misconduct or an improper state of affairs and circumstances</i>' [s.1317AA(4)]. • about conduct that constitutes a range of offences [s.1317AA(5)] • Concerning a substantial and imminent danger to health or safety or the natural environment [s.1317AAD(2)]. 		

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Categories of persons and entities within jurisdiction	<ul style="list-style-type: none"> • Agencies • Public officials in connection with their official position • Contracted service providers in connection with entering into or giving effect to a commonwealth contract [s.29]. 	<p>Includes:</p> <ul style="list-style-type: none"> • Regulated entities (including companies, Constitutional corporations, general insurers, life companies, superannuation entities). • Officers or employees of regulated entities [s.1317AAB]. 	<ul style="list-style-type: none"> • Any public official or former public official • Any person whose conduct has or could adversely affect the honest or impartial exercise of any public official's powers, functions or duties as a public official [s.8]. 	<ul style="list-style-type: none"> • Agencies • Public officials in connection with their official position. • Persons providing services on behalf of or exercising functions of an agency [s.14].

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Subject matter of disclosures that are protected	<p>Conduct relating to:</p> <ol style="list-style-type: none"> 1. contravention of an Australian law. 2. contravention of an applicable law of a foreign country that corresponds to an ACT law, 3. corruption, 4. maladministration, 5. abuse of public trust, 6. scientific research, 7. wastage of 	<p>Information concerning:</p> <ol style="list-style-type: none"> 1. <i>'misconduct or an improper state of affairs and circumstances'</i> [s.1317AA(4)]. 2. conduct that constitutes a range of offences [s.1317AA(5)] 3. a substantial and imminent danger to health or safety 4. a substantial and imminent danger to the natural environment [s.1317AAD(2)]. 	<ul style="list-style-type: none"> • Referral or provision of information about a corruption issue to the Commissioner. • Cth agencies referring corruption issues to the Commissioner 	<p><i>'Serious wrongdoing'</i> that is:</p> <ol style="list-style-type: none"> 1. <i>'serious maladministration'</i>, 2. <i>'corrupt conduct'</i>, 3. <i>'government information contravention'</i>, 4. <i>'privacy contravention'</i>, 5. <i>'serious and substantial waste of public money'</i> [s.13].

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Required basis for belief about the substance of the disclosure	The discloser 'believes on <u>reasonable grounds</u> the information shows or tends to show disclosable conduct [s.26(1)].	The discloser 'has <u>reasonable grounds to</u>': <ul style="list-style-type: none"> 'suspect that the information <i>concerns</i>' [s.1317AA(4)] 'suspect that the information <i>indicates</i>' [s.1317AA(5)] 'believe that the information <i>concerns</i>' [s.1317AAD(2)] 	The discloser: <ul style="list-style-type: none"> 'gives evidence or information, or produces a document or thing', under the Act, OR 'refers, or provides <i>other information about, a corruption issue</i>' [s.23]. 	<p>Voluntary PIDs: The discloser 'honestly, and on <u>reasonable grounds</u>, <i>believes the disclosure shows or tends to show</i>' serious wrongdoing [s.26(1)].</p> <p>Witness PIDs:</p> <ul style="list-style-type: none"> a disclosure in an investigation into 'serious wrongdoing' that meets the show or tend to show requirement for a Voluntary PID, a disclosure of any other information in such circumstances [ss.22 & 40(2)] <p>Mandatory PIDs: A disclosure of 'serious wrongdoing' by a public official as part of their role/function or under a legal obligation [s.23].</p>

Comparisons of statutory schemes

	Cth. PID Act 2013	Corp. Act Whistleblower Protections	NACC Act 2022	NSW PID Act 2022
Required basis of belief about whether a person has or may make a disclosure	A belief or suspicion is 'part of the reason' for the conduct [s.13].	A belief or suspicion is 'part of the reason' for the conduct [s.1317AC(1)(d)].	A belief or suspicion is 'part of the reason' for an act or omission causing detriment [s.29(1)].	A belief, suspicion or awareness is a 'contributing factor' for the conduct [s.33(1)(b)].
Restrictions on disclosure of identifying information	<ul style="list-style-type: none"> The restriction on the use or disclosure of identifying information has 6 exceptions A breach is a criminal offence [s.20]. 	<ul style="list-style-type: none"> The confidentiality provision has limited practical exceptions. The most relevant exception for investigators does not authorise the disclosure of the identity of the discloser [s.1317AAE(4)] A breach is a criminal offence [s.1311(1)]. 	<ul style="list-style-type: none"> No specific reference to the identity of persons who made disclosures. Protections for the identity of witnesses and disclosure of inf. about notices and summonses. A breach is a criminal offence [ss.99 & 101] 	<ul style="list-style-type: none"> The restriction on disclosure of identifying information has 9 exceptions A breach is not a criminal offence [s.64].

Conflict of laws

- All jurisdictions -

Corporations Act 2001 – possible application to State entities that are ‘*Constitutional corporations*’.

- These *Whistleblower Protection* provisions apply to all companies registered under the *Corporations Act 2001*, **AND all corporations to which the Commonwealth Constitution applies.**
- Such ‘*Constitutional corporations*’ include trading or financial bodies incorporated under State or Territory legislation if their trading or financial activities are a sufficiently significant proportion of their overall activities. Given the case law, it appears that a number of State/Territory entities would be ‘*Constitutional corporations*, including transport bodies, Universities, large Councils, etc.

Corporations Act 2001 – possible application to State entities that are ‘*Constitutional corporations*’.

Those Corp. Act provisions could impact on such entities in the following ways:

- Broadening the subject matter of disclosures (e.g. to include “*misconduct or an improper state of affairs and circumstances*”).
- Expanding who can make disclosures.
- Increasing the number of positions/bodies to whom such disclosures can be made.
- Expanding the circumstances in which a disclosure can be made to the media.
- Possibly substantially increasing the value of compensation payments for detrimental action [assuming an order to pay compensation is not a “*pecuniary penalty*”, which is presumably a reference to a fine], etc.

Corporations Act 2001 – possible application to State entities that are ‘Constitutional corporations’.

Luckily for NSW, the new *Public Interest Disclosures Act 2022* (assented to on 13 April, but not yet commenced) contains the following provision:

‘12 Corporations legislation

An agency [broadly defined] is declared to be an excluded matter for the purposes of the Corporations Act 2001 of the Commonwealth (the Corporations Act), section 5F in relation to the Corporations Act, section 1317AAB [the definition of ‘regulated entities]’

The implications for 'mixed content' disclosures

- A particular problem that arises where there are very prescriptive provisions and very restrictive confidentiality requirements is where a disclosure includes both a personal grievance and an allegation of serious wrongdoing.
- The methodologies for addressing grievances and allegations of wrongdoing are different, as are the likely outcomes.
- Dealing with an allegation of wrongdoing under some whistleblowing legislation requires confidentiality, with only limited exceptions.
- Dealing with a personal grievance generally involves identifying the person with the grievance. For 'mixed content' disclosures, long experience has found that identifying the person with the grievance in such circumstances will very often identify the discloser.

Performance management of employees

It can be expected that disclosures that include a valid serious or public interest issue may well also involve a personal issue.

The *WWTW2* research has found that:

- only **20%** of reporters alleged purely public interest wrongdoing;
- around **33%** alleged a purely personal grievance;
- close to **50%** reported both public interest and a personal grievance.

Performance management of employees

In the late 1990's two Cornell University researchers looked into earlier studies suggesting that ignorance of standards of performance is behind a great deal of incompetence.

Dunning and Kruger found that for a given skill, incompetent people:

- will tend to overestimate their own level of skill;
- will fail to recognize genuine skill in others;
- will fail to recognize the extremity of their inadequacy;
- may recognize and acknowledge their own previous lack of skill, *if* they are exposed to training for that skill.

The Dunning-Kruger Club!

The first rule of the Dunning-Kruger club is you don't know you're a member of the Dunning-Kruger club.



Conclusions

- Over the past 2/3 decades the focus has been on trying to improve the statutory protections for whistleblowers. Over that time the importance of facilitating internal disclosures has been widely recognised within organisations.
- In my view, the nature and scope of the protections in the more recent legislation have improved immeasurably. However, because of the way such legislation is drafted the potential for some people to use these protections as a weapon instead of a shield has increased considerably.
- It is now time to review such legislation with the aim of:
 - simplifying their provisions and moving away from complex prescriptive drafting towards a greater focus on principles with flexible application to the particular circumstances of each case,
 - increasing the ability of oversight bodies to monitor how disclosures are dealt with.