Chapter 5

Definition of disclosable conduct

5.1 This chapter considers various definitions of disclosable conduct. It begins by comparing the current definitions across the PID Act, the FWRO Act and the Corporations Act. It then examines potential reforms for the public and private sectors.

Current arrangements

5.2 The definition of disclosable conduct in whistleblower legislation currently varies between the PID Act (public sector regime), the regime under the FWRO Act, and other private sector legislation such as the Corporations Act.

5.3 For example, under the Corporations Act, disclosable conduct is limited to contraventions of a provision of the corporations legislation.[1] The recent additions of the whistleblower protections to the FWRO Act provide a much broader definition of disclosable conduct than exists elsewhere in the private sector. Section 6 of the FWRO Act defines disclosable conduct as an act or omission that:

> (a) contravenes, or may contravene, a provision of the FWRO Act, the FW Act) or the CC Act; or
>
> (b) constitutes, or may constitute, an offence against a law of the Commonwealth.[2]

5.4 To be eligible for protection, a whistleblower would have to satisfy subsection 337A(1c) of the FWRO Act by having reasonable grounds to suspect that disclosable conduct as defined in section 6 had occurred. As a result, whistleblowing that does not meet the threshold set out in section 6 is not afforded protection.

5.5 By contrast, the PID Act includes several provisions that set a lower threshold for disclosable conduct, including: contraventions of a Commonwealth, state, or territory law, corruption, abuse of public trust, wastage of public resources and danger to health, safety or the environment.[3]

5.6 To assist consideration of potential reforms to definitions of disclosable conduct, the committee examined the definitions of disclosable conduct in the PID, FWRO and Corporations Acts against the seven levels set out in Table 5.1.

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1 Corporations Act, section 1317AA(d).

2 FWRO Act, section 6.

3 PID Act, section 29.

Table 5.1: Potential definitions for disclosable conduct ranging from narrowest definitions at the top to the broadest definitions at the bottom of the table

Possible levels for definitions of disclosable conduct	**Responsibility for conducting investigations**	**PID Act** Section 29	**FWRO Act** Section 6	**Corporations Act** Section 1317AA(d)
1) May be a Commonwealth Criminal offence	AFP only	Yes	Yes	Contravention of Corporations Act only
2) May be a Commonwealth Civil offence	AFP and the Commonwealth regulatory agencies responsible for that Act	Yes	Yes	Contravention of Corporations Act only
3) May contravene a Commonwealth law	Commonwealth regulatory agencies responsible for relevant Acts	Yes	FWRO Act, Fair Work Act or Competition and Consumer Act	Contravention of Corporations Act only
4) May contravene a Commonwealth, state or territory law	AFP, state and territory police and the Commonwealth, state and territory regulatory agencies responsible for that Act	Yes		
5) Breaches of registered or mandatory professional standards and codes of conduct	Regulators and bodies responsible for standards and codes of conduct	Yes		
6) Breaches of voluntary professional standards and codes of conduct	Bodies responsible for standards and codes of conduct	N/A		
7) Broad range of criteria including maladministration, corruption, abuse of public trust, wastage, danger to health, safety or the environment	Organisation and regulators	Yes		

Note: The shaded rows indicate the level of disclosable conduct that the committee is recommending should apply to all private sector organisations or businesses that are subject to the *Privacy Act 1988*. Source: Acts as indicated in the table.

5.7 Table 5.1 shows the very broad coverage of the PID Act as well as the broader coverage of the FWRO Act when compared to the Corporations Act. An important question for the committee was where the threshold for disclosable conduct should be set in order to target the most serious integrity risks. The following section summarises information on disclosures that have been made under current laws.

Types of disclosures that have been made

5.8 This section summarises the types of disclosure that have been received under the PID Act and the Corporations Act. As the FWRO Act whistleblower protections only came into effect in May 2017, statistics for that are not yet available.

5.9 The Ombudsman's 2015–2016 Annual Report provides information (shown in Table 5.2) on the types of conduct that has been disclosed under the PID Act. The figures indicate that 33 per cent of disclosures relate to a breach of a Commonwealth, state or territory law and that the remaining 67 per cent cover a broad range of disclosures, many of which are below the threshold of contravening a law.[4]

Table 5.2: Types of public sector disclosable conduct reported in 2015–2016

Type of disclosable conduct	**Number of Instances (%)**
Contravention of a law of the Commonwealth, state or territory	232 (33%)
Conduct that may result in disciplinary action	170 (24%)
Maladministration	137 (19%)
Wastage of Commonwealth resources (including money and property)	45 (6%)
Conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons	36 (5%)
Conduct engaged in for the purpose of corruption	25 (4%)
Abuse of public office	21 (3%)
Perversion of the course of justice	16 (2%)
Abuse of public trust	14 (2%)
Other (conduct in a foreign country that contravenes a law; fabrication, falsification, plagiarism or deception in relation to scientific research; and conduct that endangers, or risks endangering the environment)	11 (2%)
Total	707 (100%)

Source: Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 73.

4 Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 73.

5.10 Of the 612 disclosures under the PID Act, decisions were taken not to investigate 145 (23 per cent) disclosures. The reasons for not undertaking investigations include:

- the information does not concern serious disclosable conduct (37 per cent);
- the conduct has been or is already being investigated (27 per cent);
- the discloser does not wish an investigation to be pursued (eight per cent); and
- the disclosure was frivolous or vexatious (three per cent).[5]

5.11 The Moss Review noted that between 2013 and 2015, 1080 disclosures were made, of which a number of instances identified significant wrongdoing, such as:

- inappropriate pressure from an organisation's CEO to falsify financial reporting;
- allegations of corruption within departments and portfolio bodies, including 'kick backs' for using preferred suppliers;
- serious criminality, including drug trafficking and theft of departmental IT equipment; and
- systemic patterns of wrongdoing amongst a group of public officials posted together, such as allocating responsibilities to untrained staff, consumption of alcohol while on duty, and fraudulently recording hours.[6]

5.12 ASIC's annual reports provide statistics on public interest disclosures received by ASIC under the Corporations Act. In 2015–2016 ASIC received 146 disclosures. After preliminary inquiries, 80 per cent of disclosures were assessed as requiring no further action, often due to insufficient evidence (36 per cent) or other investigations or processes already being underway (35 per cent).[7]

5.13 In its submission ASIC provided further detail, covering the period from February 2014 to June 2016, as shown in Figure 5.3 below. The most common type of disclosure was about corporate governance (72 per cent), which includes insolvency matters, insolvency practitioner misconduct, contractual issues, and directors' duties.[8]

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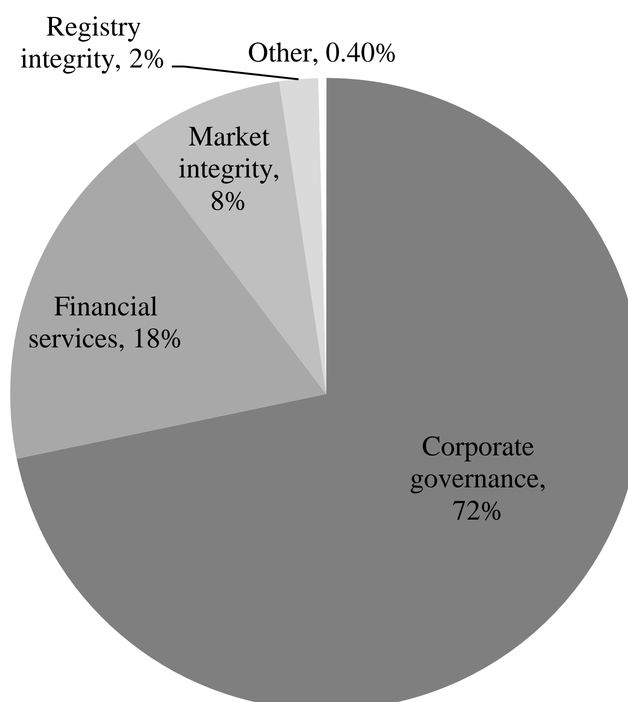
5 Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 75.

6 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30.

7 Australian Securities and Investments Commission, *Annual Report 2015–2016*, p. 96; Australian Securities and Investments Commission, *Submission 51*, p. 12.

8 Australian Securities and Investments Commission, *Submission 51*, p. 11.

Figure 5.3: Types of whistleblower reports received by ASIC



Source: ASIC, *Submission 51*, p. 11.

Public sector

5.14 This section discusses potential reforms to the threshold for disclosable conduct in the public sector.

Disclosures about personal employment related matters

5.15 An area of concern with the PID Act as currently drafted is an apparent over-representation of minor personal employment related matters that may be better dealt with through dispute resolution or merits review mechanisms rather than being treated as a public interest disclosure.

5.16 For example, in its 2014–2015 Annual Report, the Commonwealth Ombudsman stated that enquiries to the Ombudsman indicate:

> Enquiries to our office indicate an over-representation of PIDs that are about conduct relating to relatively minor personal grievance matters, many of which are employment related and/or have already been through other processes available to the discloser.
>
> The Commonwealth PID scheme is not alone in this regard as other Australian PID oversight bodies have observed a similar trend with schemes in other jurisdictions.[9]

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9 Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 78.

The Moss Review

5.17 A statutory review of the PID Act conducted by Mr Philip Moss (Moss Review) in 2016 was, amongst other things, tasked with considering 'the breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act'.[10]

5.18 In examining this matter, the Moss Review found that:

> Submissions received from agencies noted that the overwhelming majority of disclosures concerned issues like workplace bullying and harassment, forms of disrespect from colleagues or managers, or minor allegations of wrongdoing.[11]

5.19 However, the Moss Review also noted that it is difficult to identify clearly within the Commonwealth Ombudsman's annual report what proportion of disclosures primarily relate to interpersonal conflicts at work or a personal employment-related grievance.[12]

5.20 Furthermore, the Ombudsman's Annual Report indicates that in 2013–2014, 38 per cent of the 223 investigations conducted across the Commonwealth public sector, concerned disclosures about an employment or code of conduct related matter, which can be investigated under the *Public Service Act 1999* or the FW Act.[13]

5.21 The Moss Review argued that the PID Act was ill-suited as a mechanism for resolving conflict over minor personal employment-related matters:

> The PID Act does not provide resolution for grievances, and the allocation and investigation process (which, under the statutory framework, may take up to 104 days to complete in total and longer if the Commonwealth Ombudsman or the IGIS grants the agency an extension) can prolong the discloser's exposure to the situation that they have reported.[14]
>
> …the PID Act's processes and procedures are not well adapted to resolving allegations of less serious disclosable conduct. For example, the extensive protections against reprisal and secrecy offences can have an adverse effect upon best practice conflict-management solutions that emphasise alternative dispute resolution or merits review processes, rather than formal investigation.[15]

5.22 As a consequence, the Moss Review concluded that the PID Act threshold should be targeted at the most serious integrity risks, such as fraud, serious

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10 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 2.

11 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30.

12 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30, see for example submissions to the review from the AFP, APSC, Department of Defence, and Department of Immigration and Border Protection.

13 Commonwealth Ombudsman, *Annual Report 2013–2014*, p. 73.

14 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 31.

15 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30.

misconduct or corrupt conduct. The Moss Review advocated that solely personal employment related grievances should be excluded from the PID Act unless they relate to systemic issues or reprisals.[16]

5.23 However, the Moss Review added an important caveat to the above finding by recognising that there are cases where a personal employment matter is bound up with a matter that may properly be the subject of a public interest disclosure. In these circumstances, the Moss Review found that the public interest matter should still qualify for disclosure under the PID Act:

> These amendments will need to ensure that in cases when a disclosure that includes both an element of personal employment-related grievance, as well as an element of other wrongdoing, the latter element could still be the subject of a PID.[17]

5.24 Alternative approaches to dealing with the issue of minor personal employment matters were put forward to the Moss Review. For example, some submitters to that review recommended the inclusion of a public interest criterion for a disclosure to be accepted as a public interest disclosure.[18]

The powers of the Commonwealth Ombudsman

5.25 One of the areas where there appears to be a misconception amongst some submitters to this inquiry relates to the powers of the Commonwealth Ombudsman under the PID Act.

5.26 Under the PID Act the Commonwealth Ombudsman is included in the definition of an 'investigative agency'.[19] However, the Commonwealth Ombudsman noted that it is not authorised to investigate action taken with respect to a person's employment in an agency or prescribed authority:

> This limits the Ombudsman's capacity to comprehensively review how agencies deal with public interest disclosures about most employment-related conduct. In such cases, the Ombudsman can generally only investigate whether agencies applied the procedural requirements of the PID Act in dealing with the disclosure. The Ombudsman is precluded from investigating and/or forming a view about the adequacy or outcome of the agency's investigation of the substantive disclosure.[20]

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16 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 30–32.

17 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 32.

18 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, see for example submissions to the review from the Department of Defence, Department of Immigration and Border Protection.

19 PID Act, section 8.

20 Commonwealth Ombudsman, *Submission 15 to the Moss Review of the Public Interest Disclosure Act 2013 (Cth)*, March 2016, p. 13.

5.27 The committee notes that section 22 of the PID Act already provides for a public interest disclosure to be treated as a workplace right under the FW Act. The Commonwealth Ombudsman noted that:

> This gives an employee access to the Fair Work Commission for remedies in the case of adverse action by their employer linked to them having made a public interest disclosure.[21]

Committee view

5.28 Given the findings of the Moss Review, the committee considers it important to ensure that any changes to whistleblower protections remain focussed on the most serious integrity risks.

5.29 However, the committee remains concerned that the most likely forms of reprisal are employment related. Therefore any amendments should ensure that employment related reprisals can still be dealt with under the PID Act.

5.30 In addition, the lack of clear information on what proportion of disclosures are actually related to personal employment matters is of concern. The committee considers the data should be collected and assessed before any legislative changes are made.

Recommendation 5.1

5.31 The committee recommends that, in implementing the Moss Review recommendation regarding employment related matters care is taken to ensure that:

- **allegations of reprisal action taken against a person that has made a public interest disclosure can still be dealt with under a Whistleblowing Protection Act; and**
- **data is gathered and assessed in a national database on the proportion of disclosures that are personal employment related, but that this not have to occur before any legislative changes are made as recommended in this report.**

Private sector

Definition of disclosable conduct in the private sector

5.32 This section summarises evidence provided to the committee on the definition of disclosable conduct for the private sector. In brief, the majority of submitters that addressed this matter argued that the current definition of disclosable conduct in the private sector should be broadened. At a minimum, these submitters argued that disclosable conduct under any proposed legislation for the private sector should include potential breaches of any Commonwealth, state or territory law.

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21 Commonwealth Ombudsman, *Submission 15 to the Moss Review of the Public Interest Disclosure Act 2013 (Cth)*, March 2016, p. 14.

5.33 For example, the ACCC argued for disclosable conduct to include potential breaches of a Commonwealth, state or territory law.[22]

5.34 The AICD suggested that the definition of disclosable conduct should be extended in the context of corporate entities to include:

- contraventions of the Corporations Act; and
- offences against any Commonwealth, state or territory law.[23]

5.35 The AICD explained that the reason it considers disclosable conduct should be as broad as any Commonwealth or state or territory law is that a whistleblower cannot be expected to be an expert on the Corporations Act and that they should not have to consult a piece of legislation before they make a report:

> If a whistleblower is a witness of serious corporate wrongdoing, they should feel confident in making a disclosure to their company or to an appropriate regulator, without fear that it might fall outside the definition because of a technicality.[24]

5.36 Several submitters were of the view that private sector whistleblowing legislation should include, in some form, the law of foreign countries within the definition of disclosable conduct. The GIA favoured broadening the definition of disclosable conduct to include 'conduct that contravenes a law of the Commonwealth, a state or a territory', as well as some conduct that contravenes foreign laws.[25] Similarly, the AICD suggested that disclosable conduct include offences against the law of a foreign country that is also in force in Australia.[26]

5.37 A key concern for several submitters and witnesses was the potential inability of the proposed legislation to encourage the disclosure of significant wrongdoing that was clearly unethical and harmed consumers, but was not necessarily illegal, if the definition of disclosable conduct was restricted to breaches of any Commonwealth, state or territory law.

5.38 For example, ASIC suggested that the scope of information protected by the whistleblowing provisions in the Corporations Act should be broadened to cover any misconduct that ASIC may investigate.[27]

5.39 Similarly, Mr Dennis Gentilin pointed out that the definition of disclosable conduct would need to include unethical but not necessarily illegal behaviour if the

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22 Australian Competition and Consumer Commission, *Answers to questions on notice*, 27 April 2017, (received 19 May 2017).

23 Australian Institute of Company Directors, *Submission 53*, p. 5.

24 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 27.

25 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 24.

26 Australian Institute of Company Directors, *Submission 53*, p. 5.

27 Australian Securities and Investments Commission, *Submission 51*, p. 18.

disclosure of the conduct unearthed in recent financial scandals is to be protected by private sector whistleblowing legislation:

> …my understanding is that a disclosure must relate to conduct that '(a) contravenes, or may contravene, a provision of this Act, the Fair Work Act or the Competition and Consumer Act 2010; or (b) constitutes, or may constitute, an offence against a law of the Commonwealth.' My concern is that this is not sufficiently broad.[28]
>
> In many instances whistleblowers expose wrongdoing that is clearly unethical but not necessarily illegal or in contravention of the aforementioned Acts. The recent events at CommInsure provides one example of this. Although the wrongdoing in that organisation clearly caused hardship to consumers and was unethical, a recent investigation by ASIC did not find any of the conduct to be illegal. If possible legislation must also protect whistleblowers in these types of scenarios.[29]

5.40 The AIST argued for the definition of disclosable conduct to include actual or suspected contravention of applicable statutory provisions, or a law of the Commonwealth, fraud, gross mismanagement, and financial misconduct including misappropriation of funds.[30]

5.41 Professor A J Brown identified the definition of disclosable conduct as the most important reform priority. He argued that the private sector definition of disclosable conduct needed to encompass ethics if whistleblower protections were to cover the corporations and financial services issues which have attracted the attention of the committee during this and previous parliaments.[31]

5.42 Professor Brown was of the view that the definition of disclosable conduct in the FWRO Act would substantially increase the likelihood that protection could be offered to whistleblowers involved in recent scandals in the financial services sector. However, he noted that while breaches of the law might be suspected, the evidence may only emerge after disclosures have been made based on breaches of professional standards, operating procedures or ethical standards.[32]

5.43 Professor Brown also considered that there were unlikely to be any constitutional limitations to broadening the definition of disclosable conduct, provided that the definition:

> …can be safely characterised as laws with respect to the proper governance of corporations (i.e. 'constitutional corporations' under section 51(xx) of

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28 Mr Denis Gentilin, *Answers to questions on notice*, 28 April 2017 (received 12 May 2017).

29 Mr Denis Gentilin, *Answers to questions on notice*, 28 April 2017 (received 12 May 2017).

30 Australian Institute of Superannuation Trustees, *Submission 24*, p. 12.

31 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 1.

32 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

the Constitution), or to the employment or working conditions of employees or officers of corporations, or as incidental to the enforcement or implementation of other valid Commonwealth laws or regulations.[33]

Low level and personal employment-related matters

5.44 As with the public sector, concerns were expressed about designing a scheme for the private sector with sufficient care so that solely personal employment-related matters did not unnecessarily become the subject of public interest disclosures.

5.45 For example, Ms Louise Petschler, General Manager of Advocacy for the AICD pointed out that a whistleblowing framework within an organisation would likely capture a broad range of lower-level matters such as employee-manager disputes, and employment grievances. She therefore suggested that internal whistleblower procedures would need to be set up so that disclosures which met the criteria were dealt with, while lower-level matters and personal employment grievances were managed appropriately.[34]

Committee view

5.46 The vast majority of the evidence to the committee from a broad range of submitters and witnesses argued that the current private sector definitions of disclosable conduct are too narrow for the effective identification of misconduct and protection of whistleblowers.

5.47 Based on the evidence before it, the committee considers that there is support for the definition of private sector disclosable conduct to be broadened to include any contravention of a law of the Commonwealth or the states or territories where:

- the disclosure relates to the employer of the whistleblower and the employer is an entity covered by the FW Act; or
- the disclosure relates to a constitutional corporation;
- but not where the disclosure relates to a breach of law by the public service of a state or territory; and
- further, disclosable conduct should also include any breach of an industry code that has force in law or is prescribed in regulations under a Whistleblowing Protection Act.

Recommendation 5.2

5.48 The committee recommends, in relation to whistleblower protections for the private sector, including the corporate and not-for-profit sectors, that disclosable conduct be defined to include:

33 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

34 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 27.

- **a contravention of any law of the Commonwealth; or**
- **any law of a state, or a territory where:**
    - **the disclosure relates to the employer of the whistleblower and the employer is an entity covered by the *Fair Work Act 2009*; or**
    - **the disclosure relates to a constitutional corporation; and**
- **any breach of an industry code or professional standard that has force in law or is prescribed in regulations under a Whistleblowing Protection Act;**
- **but not where the disclosure relates to a breach of law by the public service of a state or territory.**

5.49 While noting that the above definition of disclosable conduct is broader than current definitions for the private sector in most cases, the committee is concerned that the definition recommended above may still be insufficient to provide protection to whistleblowers who may be involved in disclosing conduct similar to that revealed in many of the financial sector scandals in recent years.

5.50 The committee therefore recommends that the government examine the feasibility of broadening the above definition of disclosable conduct. The committee notes, however, that within the scope of its own inquiry, it has had a limited capacity to examine the constitutional capacity of the Commonwealth to legislate beyond any breach of a law of the Commonwealth, states or territories.

Recommendation 5.3

5.51 The committee recommends that the government examine whether the Commonwealth has the constitutional power to include additional lower thresholds for disclosable conduct that would adequately protect whistleblowers such as those involved in scandals in the financial service sector in recent years.