FEDERAL COURT OF AUSTRALIA

Applicant ACD13/2019 v Stefanic [2019] FCA 548

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| File numbers: | ACD 13 of 2019 |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 18 April 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for interim relief under s 15 of the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***) seeking a stay to prevent the imposition of any sanction from an ongoing Code of Conduct investigation – whether the applicant has a *prima facie* case that any sanction or other action relating to the investigation would constitute reprisal under s 13 of the PID Act – no *prima facie* case – application for interim relief refused**STATUTORY INTERPRETATION –** meaning of “external disclosure" under s 26 of the *PID Act* – causal connection required within the definition of “reprisal” under s 13 of the *PID Act* – no causal connection established by the evidence  |
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| Legislation: | *Parliamentary Service Act 1999* (Cth)*Public Interest Disclosure Act 2013* (Cth) ss 6, 9, 10, 13, 14, 15, 16, 19, 19A, 20, 26, 29, 36, 43, 47, 48, 52, 61, 73  |
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| Cases cited: | *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618*Independent Corporate Services Ltd v Stevens* [2002] WASC 280  |
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| Date of hearing: | 18 April 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Other Federal Jurisdiction |
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| Category: | Catchwords |
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| Solicitor for the Applicant: | Fitzgerald Naylor Lawyers |
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| Counsel for the Respondents: | Mr P D Herzfeld |
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| Solicitor for the Respondents: | Ashurst Australia |

ORDERS

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|  | ACD 13 of 2019 |
|   |
| BETWEEN: | APPLICANT ACD13/2019Applicant |
| AND: | ROBERT STEFANICFirst RespondentROBERT BRIGDENSecond RespondentCATE SAUNDERSThird Respondent |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 18 April 2019 |

THE COURT ORDERS THAT:

1. The applicant have leave to file the amended originating application and statement of claim filed on 12 April 2019.
2. The application for interlocutory injunctive relief be dismissed.
3. Costs are reserved and should await the outcome of the application for final relief.
4. The parties should within seven days hereof seek to agree orders for the future conduct of the proceeding.
5. The proceeding will be listed in the next callover of the ACT list.
6. Within 7 days hereof the parties are to seek to agree whether any redactions should be made from these reasons for judgment in light of the suppression order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | ACD 13 of 2019 |
|   |
| BETWEEN: | APPLICANT ACD13/2019Applicant |
| AND: | ROBERT STEFANICFirst RespondentROBERT BRIGDENSecond RespondentCATE SAUNDERSThird Respondent |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 18 April 2019 |

THE COURT ORDERS THAT:

1. Pursuant to section 37 AF of the Federal Court of Australia Act 1976 (Cth) (FCA Act), until further order of the Court, and except as stipulated in order 2, publication or other disclosure of:
	1. information tending to reveal the identity of the applicant or any recipient or proposed recipient of a disclosure referred to in (b), (c), (d) or (e);
	2. the contents of the disclosure by the applicant of 28 June 2018;
	3. the contents of the disclosure by the applicant posted on or around 9 October 2018;
	4. the contents of the disclosure by the applicant of 16 October 2018: or
	5. the contents of the disclosure by the applicant of 15 March 2019

is prohibited.

1. Order 1 does not prohibit disclosure:
	1. by a party to the proceeding, for the purposes of the proceeding to: another party to the proceeding; the Court; or that party's legal representatives or any independent expert retained by the party;
	2. for the purposes of any investigation of the disclosures referred to in Order 1 under the *Public Interest Disclosure Act 2011* (Cth);
	3. for the purposes of any process undertaken by the Department of Parliamentary Services to determine whether the applicant breached the Parliamentary Services Code of Conduct and, if so, what if any sanction should follow;
	4. where such disclosure is required to satisfy a request of the Commonwealth Parliament, a Parliamentary Committee or a Commonwealth Minister for information; or
	5. with the consent of the parties.
2. In accordance with s 37AG(2) of the *FCA Act*, Order 1 is
	1. necessary to prevent prejudice to the proper administration of justice (s 37AG(1)(a) of the *FCA Act*); and
	2. to prevent prejudice to the interests of the Commonwealth in relation to national security (s 37AG(1)(b) of the *FCA Act*).
3. The application is hereafter to be referred to in all Court documents as “Applicant ACD13/2019”.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT

GRIFFITHS J:

1. This proceeding concerns the scope and operation of the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***). These reasons for judgment relate to the applicant’s application for interlocutory injunctive relief and not to the broader relief sought by the applicant in the amended originating application. In substance, the applicant seeks a stay to prevent any sanction being imposed upon him arising from two disclosures he made which he contends are protected under the *PID Act*.
2. It is necessary to refer to the applicant and various other persons by pseudonyms. That is because of the terms of s 20 of the *PID Act* which, in brief, make it an offence for a person to disclose “identifying information” which was obtained by any person in that person’s capacity as a public official and is likely to enable the identification of the person who made a public interest disclosure where the disclosure is to a person other than the discloser. Accordingly, the Court made orders in accordance with the amended interlocutory application filed on 5 April 2019 by the respondents. The applicant will be referred to by the pseudonym Applicant ACD13/2019.

## Introduction

1. The applicant has been employed for many years by the Department of Parliamentary Services (**DPS**) as a security officer. The first, second and third respondents are senior officers in the DPS. In his amended statement of claim, the applicant claims to have made the following disclosures for the purposes of the *PID Act*:
2. an “internal public interest disclosure” on 25 June 2018; and
3. an attempted “external public interest disclosure” on 9 October 2018, when he attempted to send documents in an envelope to a particular Member of Parliament (the **Parliamentarian**).
4. The applicant claims that the envelope was cleared through the Parliament House postal security system for delivery to the Parliamentarian, but that it was wrongfully intercepted on 15 October 2018 by the second and third respondents who prevented it from being delivered to the Parliamentarian. The applicant pleads that when the second and third respondents wrongfully intercepted the envelope they were aware that it had been sent by him to the Parliamentarian and also that he had made an internal public interest disclosure on 25 June 2018, with the consequence that the interception constituted a reprisal (within the meaning of s 13 of the *PID Act*)against the applicant for both public interest disclosures.
5. Shortly after the envelope was intercepted, an investigation into the applicant’s conduct was initiated by the DPS under relevant provisions of the *Parliamentary Service Act 1999* (Cth) (***PS Act***) into whether the applicant had breached the Parliamentary Services Code of Conduct under s 13 of the *PS Act* (**Code** **of Conduct**), in relation to the attempted disclosure by him to the Parliamentarian in October 2018.
6. The applicant pleads that, on or about 16 October 2018, the second respondent formed a “preliminary view” that in sending the envelope to the Parliamentarian, the applicant had “been involved in disclosure of Commonwealth Information to a third party” and imposed work restrictions upon him. He complains that these work restrictions, including his suspension from duty from 26 October 2018, constitute reprisals against him for his attempted public interest disclosure to the Parliamentarian and have caused him detriment.
7. On or about 26 October 2018, the applicant received notice of allegations that he had breached the Code of Conduct. Around 25 February 2019, he received a redacted version of a report dated 25 February 2019 which had been prepared by Ms Barbara Deegan from Ashurst Lawyers. The applicant contends that a determination was made in this report that the applicant had breached the Code of Conduct by seeking to disclose the material in the envelope to the Parliamentarian (the **Report**). I interpolate, however, that in fact, as is made clear in the body of the Report, Ms Deegan merely made recommendations and not any determinations as alleged by the applicant.
8. The applicant pleads that this finding in the Report is wrongful and that both it and the notice constitute reprisals against him within s 13 of the *PID Act*. He also contends the findings in the Report are contrary to law.
9. The applicant further complains that around 29 March 2019 he received notice of a Determination by a senior officer of the DPS, Mr Dominic Stokes, that he had breached the Code of Conduct. He was told that a delegate of the Secretary to the DPS would now consider what sanction is to be imposed upon him. The applicant complains that the Determination dated 29 March 2019 that he had breached the Code of Conduct constitutes a reprisal against him for his public interest disclosure to the Parliamentarian and has caused him detriment.
10. The applicant further pleads that any action to impose a sanction upon him in relation to the matters set out above would also constitute a reprisal for both his internal public interest disclosure and his attempted public interest disclosure to the Parliamentarian and would cause him detriment.
11. In his amended originating application, the applicant claims various final relief, including the setting aside of various findings, decisions and determinations, as well as declaratory and final injunction relief. He also seeks apologies and other orders pursuant to ss 15(1) and (2) of the *PID Act*. Finally, he seeks compensation under s 14 of the *PID Act*, as well as costs.
12. As emphasised above, these reasons for judgment relate solely to the applicant’s claim for interlocutory injunctive relief against the Secretary of the DPS or any delegate from imposing any sanction arising from Mr Stokes’ Determination dated 29 March 2011 that the applicant has breached the Code of Conduct. That Determination arises from the recommendations made in the Report referred to in [7] above. That Report resulted from an investigation carried out by Ms Deegan into the question whether the applicant had breached the Code of Conduct by attempting to send the envelope to the Parliamentarian. Although the applicant raised the application and operation of the *PID Act* in the course of that investigation, it is important to appreciate that Ms Deegan’s investigation was not a formal investigation under Pt 3 of the *PID Act*. Rather, as noted above, it was an investigation into the question whether the applicant had breached the Code of Conduct.
13. For completeness, and also by way of contrast, it should be noted that a separate investigation is being conducted by Mr Ian Temby from Maddocks Lawyers under Pt 3 of the *PID Act* in relation to the June disclosure. That investigation is continuing and has been on foot since October 2018.

## The two disclosures

1. It is appropriate to now describe in more detail the two disclosures which give rise to these proceedings. Those descriptions will not be as detailed as might ordinarily be the case because, on application by the respondents, the Court made suppression orders in respect of some material. Some material was suppressed on the basis that it relates to sensitive security arrangements at Parliament House.
2. The 25 June 2018 disclosure was made by the applicant to an email address operated by the DPS, which was designed to receive public interest disclosures. Public interest disclosures sent to this address were provided to a senior officer of the DPS for consideration. A copy of the disclosure was also sent to the Commonwealth Ombudsman. The applicant stated in his email to the designated email address that he was making a disclosure under the *PID Act*. He contended that there was maladministration by certain DPS officers in their investigation and handling of a threat of physical violence made on 25 June 2016 against an unidentified DPS staff member by that person’s DPS supervisor. The applicant claimed that the threat had been reported to DPS managers and had been witnessed by another unidentified DPS staff manager. In essence, the applicant claimed that a senior officer of DPS had sought to cover up the alleged threat and to avoid formal processes being followed in relation to the matter. The applicant contended that these matters involved “multiple breaches of the DPS COC [Code of Conduct] including deception by providing and attempting to provide false, misleading and deliberately incomplete evidence to Senate Estimates Hearings and answers to questions on notice”, as detailed in the applicant’s email. Finally, in his email, the applicant drew attention to “more current actions” by the identified senior DPS officer and “DPS, PSS Managers” whom, it was alleged, on “multiple occasions… have rapidly expedited COC investigations against all PSS Officers and have had a completely opposite approach when the application or allegations are against PSS Supervisors or DPS Managers”. The applicant alleged that these “applications or allegations are kept from independent/external scrutiny because they are reviewed at a local branch level and if they are referred to HR for review they are then referred back to Security Branch Managers to make the assessment”. The applicant claimed that the identified DPS senior officer “currently employs the same methods to veto applications against DPS, PSS Managers as he did in the incident 25 June 2016 (sic)”.
3. The October 2018 attempted disclosure comprised the envelope and approximately 80 pages of enclosed material. On page 1 of the material the applicant described it as information to support an independent Senate inquiry into various parts of the DPS. The materials included a copy of what was described as “an open letter” which had been sent to a senior officer of the DPS on 9 June 2018 with the claimed support of the majority of PSS officers. The material also contained extensive references to various questions and answers given in Senate Estimates proceedings relating to a particular security incident. It is unnecessary to describe all the information. It should be noted, however, that it contained allegations by the applicant concerning DPS investigations and review processes, as is reflected in the following extract [at 119] (without alteration):

**8. Applications for Investigations and review processes.**

The double standards legitimised by spurious guidelines that are invoked in Security Branch in favour of supervisor level or above allowing formal Code of Conduct (CoC) investigation applications to be shunted back to the 'local branch level' in Building and Security Division even after the application has been referred to HR. HR resides under the authority of the Chief Operating Officer (COO) Division. The implementation of these spurious guidelines enables Security Branch Managers to adjudicate on CoC applications that have been lodged against there colleges (sic) within the Security Branch after preliminary investigation or what DPS refers to as a 'fact finding mission' has been carried out by HR. In some instances the "finding" is handed back to the head of Security Branch for there assessment and adjudication.

This process is not afforded to PSS officers PSL 1-2. DPS Security Branch with the support of HR have recommended many applications for CoC investigations against PSS officers sometimes without the knowledge of the officer and in most cases it goes to a full investigation process assigned to an external independent investigator and on multiple occasions secondary investigations are required after scrutiny of the original investigation identifies the mis-management of the original investigation process.

To my knowledge DPS have only initiated one application for a CoC investigation against a Security Branch Manager or anyone at the level of Supervisor or above that has been properly investigated. This was after it was referred to in the Senate Estimates and the individual that was investigated was found to have been in breach of the DPS CoC.

## Relevant provisions of the *PID Act* summarised

1. In a somewhat understated submission, the respondents described the *PID Act* as involving “a number of complex interlocking substantive provisions and definitions”. The legislation might more accurately be described as technical, obtuse and intractable. This may reflect the multiple compromises which have been struck in weighing the competing public and private interests. Those competing interests are reflected in the objects of the *PID Act*, as set out in s 6. They are:
2. to promote the integrity and accountability of the Commonwealth public sector;
3. to encourage and facilitate the making of public interest disclosures by public officials;
4. to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and
5. to ensure that disclosures by public officials are properly investigated and dealt with.
6. It is acknowledged that reconciling these competing objects is not an easy exercise and is one for the Parliament. But the outcome is a statute which is largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy.
7. There is a simplified outline of Div 1 of Pt 2 in s 9:

**Simplified outline**

The following is a simplified outline of this Division:

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| An individual is not subject to any civil, criminal or administrative liability for making a public interest disclosure. It is an offence to take a reprisal, or to threaten to take a reprisal, against a person because of a public interest disclosure (including a proposed or a suspected public interest disclosure). The Federal Court or Federal Circuit Court may make orders for civil remedies (including compensation, injunctions and reinstatement of employment) if a reprisal is taken against a person because of a public interest disclosure (including a proposed or a suspected public interest disclosure). It is an offence to disclose the identity of an individual who makes a public interest disclosure |

Note 1: Division 2 sets out the kinds of public interest disclosures.

Note 2: The principal officer of an agency has a duty to protect a public official who belongs to the agency from detriment that relates to a public interest disclosure made by the public official (see section 59).

### (a) Protection for disclosers

1. Section 10 provides protection to an individual who makes a public interest disclosure (as defined in s 26, which is described in [27] ff below):

**Protection of disclosers**

(1) If an individual makes a public interest disclosure:

(a) the individual is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure; and

(b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the individual on the basis of the public interest disclosure.

(2) Without limiting subsection (1):

(a) the individual has absolute privilege in proceedings for defamation in respect of the public interest disclosure; and

(b) a contract to which the individual is a party must not be terminated on the basis that the public interest disclosure constitutes a breach of the contract.

1. Sections 13 to 19A provide protections to disclosers from other persons “taking a reprisal”, as defined in s 13(1). Because of its significance to the present proceeding, it is appropriate to set out the full terms of s 13:

**13 What constitutes taking a reprisal**

(1) A person (the ***first person***) takes a reprisal against another person (the ***second person***) if:

(a) the first person causes (by act or omission) any detriment to the second person; and

(b) when the act or omission occurs, the first person believes or suspects that the second person or any other person made, may have made or proposes to make a public interest disclosure; and

(c) that belief or suspicion is the reason, or part of the reason, for the act or omission.

(2) ***Detriment*** includes any disadvantage, including (without limitation) any of the following:

(a) dismissal of an employee;

(b) injury of an employee in his or her employment;

(c) alteration of an employee’s position to his or her detriment;

(d) discrimination between an employee and other employees of the same employer.

(3) Despite subsection (1), a person does not take a reprisal against another person to the extent that the person takes administrative action that is reasonable to protect the other person from detriment.

1. The Court is empowered to grant compensation for loss suffered as a result of a person taking a reprisal (s 14); to grant injunctions, require apologies or make other orders if satisfied that another person has taken or has threatened to take a reprisal (s 15); and to order reinstatement if a reprisal consists of terminating a person’s employment (s 16). It should also be noted that s 19 provides that a person commits an offence (the penalty for which is stipulated as imprisonment for two years or 120 penalty units, or both) if a person “takes a reprisal” against another person.
2. Section 20 is an important provision. It provides part of the basis for the suppression orders which were made by the Court. Offences are created under s 20 in relation to the use or disclosure of what is described as “identifying information”, as defined in s 20(1)(b). In substance, it is an offence punishable by imprisonment for six months or 30 penalty units or both for a person to disclose “identifying information” which was obtained by any person in that person’s capacity as a public official and is likely to enable the identification of the person who made a public interest disclosure where the disclosure is to a person other than the discloser. It is also an offence for a person to use “identifying information” in circumstances which do not fall within any of the exceptions set out in s 20(3).

### (b) PID Act investigations

1. The investigation of public interest disclosures is provided for in Pt 3. Relevantly, the effect of s 43(1) is that if a person within an agency discloses information to an “authorised officer” of an agency or to a supervisor of the discloser who then gives the information to the authorised officer, the authorised officer “must allocate” the handling of the disclosure to one or more agencies. The term “authorised officer” is defined in s 36 to mean the “principal officer” of the agency and, in the case of a Department, this means the Secretary of the Department (s 73). There is no requirement to allocate the handling of the disclosure to an agency if the authorised officer is satisfied on reasonable grounds that there is no reasonable basis on which the disclosure could be considered to be an “internal disclosure” (s 43(2)). An authorised officer must use his or her best endeavours to decide whether or not to make an allocation within 14 days after the disclosure is made to the authorised officer (s 43(5)).
2. Once a disclosure is allocated to an agency, the principal officer of the agency must investigate the disclosure (s 47). There is, however, a discretion not to investigate or to discontinue an investigation in specified circumstances (s 48). On completing an investigation, the principal officer is required by s 61 to prepare a report of the investigation and to give a copy of the discloser unless it is not reasonably practicable to do so.
3. The investigation must be completed, by preparing a report, within 90 days after the disclosure was allocated to the agency (s 52(1)). An investigation is “completed” when the principal officer has prepared the report of the investigation (s 52(2)). That period may be extended by the Ombudsman under s 52(3) by such additional period as the Ombudsman considers appropriate. As noted above, the investigation carried out by Ms Deegan is not an investigation under Pt 3 of the *PID Act*, but the other investigation being carried out by Mr Ian Temby purports to be such an investigation.

### (c) “Public interest disclosures”

1. The concept of a “public interest disclosure” is at the heart of the legislation. Section 26 provides that a disclosure of information is a public interest disclosure if the disclosure is made by a person who is, or has been, a “public official”, the recipient of the information is a person of the kind referred to in column 2 of an item of the table which is set out in s 26 and the further requirements set out in column 3 of that item are also met.
2. It is undisputed that the applicant in this proceeding is a “public official” for the purposes of the *PID Act*.
3. Item 1 of the table in s 26 deals with “internal disclosure”, while Item 2 deals with “external disclosure”.
4. As noted above, the information disclosed by the applicant on 25 June 2018 is said by him to be an “internal disclosure”, which is a disclosure where the recipient is an “authorised internal recipient” or a “supervisor” of the discloser and where the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of “disclosable conduct”. The term “disclosable conduct” is defined as conduct of the kind set out in s 29. It is unnecessary to say anything further about that term in circumstances where the respondents accept that the application for interlocutory injunctive relief should be determined on the basis that the applicant believed on reasonable grounds that the information disclosed by him in both June and October 2018 tends to show one or more instances of disclosable conduct, as defined in s 29.
5. Under s 26, “external disclosure” it is defined as a disclosure where:
6. the recipient is any person other than a foreign public official;
7. the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct; and
8. further specified requirements set out in column 3 of the table in s 26 are met which, relevantly, include that:
	1. on a previous occasion, the discloser made an internal disclosure of information that consisted of, or included, the information now disclosed (Item 2(b));
	2. a disclosure investigation relating to the internal disclosure was conducted under Pt 3, and the discloser believes on reasonable grounds that the investigation was inadequate (Item 2(c)(i)); or
	3. the *PID Act* requires an investigation relating to the internal disclosure to be conducted under Pt 3 and that investigation has **not** been completed within the time limit under s 52 (Item 2(c)(iii)).
9. It is appropriate to now highlight some undisputed matters which are relevant in this proceeding to the operation of some of the provisions summarised above, as set out in an affidavit dated 26 March 2019 by the respondents’ instructing solicitor, Ms Elissa Speight. Although the June disclosure was made on 25 June 2018, it was not until 6 July 2018 that it was provided to a particular DPS officer for assessment and investigation. There was then an even lengthier delay before that officer decided on 11 October 2018 to make an allocation of the June disclosure to a senior officer of the DPS. Part of the reason for the delay of more than three months in making that allocation determination relates to multiple exchanges of correspondence between the applicant and the particular DPS officer regarding matters of process, as well as leave being taken by the particular DPS officer during that period. It is to be recalled that, under s 43(5), a person in the position of the particular DPS officer must use his or her best endeavours to decide whether or not to make an allocation within 14 days after the relevant disclosure is made to that person. Equally significantly, the 90 day time limit for completing an investigation under Pt 3 is 90 days after the relevant disclosure was allocated (s 52(1)), unless that time is extended. Self-evidently, therefore, any delay in making the allocation could add significantly to the time taken to complete a report of the investigation, as required by s 52(2). As will shortly emerge, the time limit is one of the matters relied upon by the respondents in resisting the applicant’s claim for interlocutory relief with reference to the requirement in Item 2(c)(iii) of s 26.

## The proceedings in this Court

1. The applicant’s application for interlocutory relief was originally scheduled to be heard on 3 April 2019. Until shortly before that date, the applicant represented himself. He relied upon an originating application dated 25 February 2019. He also relied on a document titled “Statement of Claim” dated 25 February 2019 in which he pleaded the events relating to the June and October 2018 disclosures. He claimed that the current Code of Conduct investigation constituted a “reprisal” and “detriment” against him in relation to the June disclosure, that the second respondent was aware of the information in the June disclosure and that the second and third respondents’ conduct in opening the October envelope occurred when the second respondent became aware that the applicant was the sender of the envelope. The applicant claimed that they decided to open the envelope to cause him detriment and injury engendered by the subsequent Code of Conduct action against him.
2. Shortly before the interlocutory hearing initially scheduled for 3 April 2019, the applicant obtained legal representation. The applicant then sought an adjournment of the interlocutory hearing so that consideration could be given to the need to amend his originating application and statement of claim and to determine whether he wished to file additional evidence in support of his application for interlocutory relief. This unopposed application was granted and the Court made orders with a view to the application for interlocutory relief being heard in Canberra on 18 April 2019.
3. As noted above, the applicant has filed an amended originating application and an amended statement of claim.

### (a) The applicant’s evidence summarised

1. The applicant relied upon three affidavits sworn by him, most of which merely attached many of the relevant documents to these proceedings and which are described elsewhere. In his affidavit dated 2 April 2019, the applicant also gave his account of what occurred on 15 October 2018 with the opening of the envelope. He also gave evidence of his financial and family circumstances which is relevant to the question of the balance of convenience.

### (b) The respondents’ evidence summarised

1. The respondents relied upon two affidavits dated 26 March 2019 and 17 April 2019 respectively by their instructing solicitor, Ms Elissa Speight. In the first of those affidavits, Ms Speight described the events surrounding the June and October disclosures and the two investigations in relation to those matters. She explained that, in the case of the Code of Conduct investigation arising from the October disclosure, if the investigation finds that the applicant breached that Code, any sanction to be imposed would be determined by a sanction delegate and only after the applicant was given an opportunity to respond to any proposed sanction. She said that this process will not conclude before 8 April 2019 at the earliest. I accept that latter evidence.
2. Ms Speight deposed that she was instructed by the second respondent (Mr Brigden) that the envelope containing the October disclosure was already open when it was seen by him for the first time on 15 October 2018. Mr Brigden also instructed her that although he was aware at that time that the applicant had made a public interest disclosure in June 2018, he was not aware of the substance of that disclosure when he inspected the contents of the envelope on 15 October 2018. Further, Mr Brigden’s instructions were that, when he inspected the contents, the identity of the sender of the envelope had not yet been established and that his actions in inspecting the contents were not related to the applicant’s June disclosure or because Mr Brigden suspected or believed that the applicant was attempting to, or proposed to make, a public interest disclosure. Finally, Mr Brigden’s instructions to Ms Speight were that Mr Stefanic had no involvement in the inspection of the contents of the envelope.
3. Ms Speight deposed that she was instructed by the third respondent (Ms Saunders) that she was not aware that the applicant had made a public interest disclosure in June 2018 when she inspected the contents of the envelope on 15 October 2018. Further, Ms Saunders’ instructions were that none of her actions on 15 October 2018 were taken because the applicant had previously made a public interest disclosure or because she suspected or believed that the applicant was attempting to, or proposed to make, a public interest disclosure.
4. In her supplementary affidavit, Ms Speight made reference to parts of her earlier affidavit and to the Report dated 25 February 2019 by Ms Deegan. She deposed that she was instructed by Ms Deegan that, subject to one qualification, none of Ms Deegan’s actions or decisions in relation to her Report were taken because the applicant had previously made a public interest disclosure (including the June disclosure) or that Ms Deegan suspected or believed that the applicant was attempting to make a public interest disclosure within the meaning of the *PID Act* when he attempted to send the envelope to the Parliamentarian. The qualification is that Ms Deegan said that she had considered the applicant’s solicitor’s contention that the sending of the envelope involved the making or attempted making of an external public interest disclosure within the meaning of the *PID Act*, but her instructions to Ms Speight were that she was not satisfied that it was such a disclosure.
5. Ms Speight further deposed that she was instructed by the Mr Stokes (who made the Determination dated 29 March 2019) that none of the preliminary findings set out in his letter dated 1 March 2019 to the applicant or the findings in his Determination dated 29 March 2019 were made because:
6. the applicant had previously made a public interest disclosure, including the June disclosure; or
7. Mr Stokes suspected or believed that the applicant was attempting to, or proposed to make, a public interest disclosure within the meaning of the *PID Act* when he sent the envelope to the Parliamentarian.

### (c) Summary of applicant’s submissions

1. The applicant proffered the usual undertaking as to damages. He contended that the evidence established the following *prima facie* case:
2. the applicant made an internal public interest disclosure on 25 June 2018 and attempted to make an external public interest disclosure on 9 October 2018;
3. the attempted external disclosure (which the applicant contends satisfies Item 2(b) and falls into either Items 2(c)(i) or (iii) of s 26) was wrongfully intercepted by the second and third respondents;
4. the respondents initiated adverse employment sanctions against him as a result of the interception of the envelope which was intended for the Parliamentarian;
5. the Determination that the applicant has breached the Code of Conduct constitutes a reprisal within s 13 of the *PID Act* for the applicant’s internal public interest disclosure and his attempted external public interest disclosure; and
6. any sanction imposed as a consequence of the Determination would constitute a reprisal against the applicant for his actions in making and attempting to make public interest disclosures and would, therefore, be contrary to law and cause him detriment within the meaning of the *PID Act*.
7. As to the balance of convenience, the applicant contended that, because he is currently suspended, the balance fell in his favour. Moreover, he submitted that his proffered undertaking as to damages is a sufficient answer to any prejudice raised by the respondents.

### (d) Summary of respondents’ submissions

1. The respondents filed a written outline of submissions. It related to the case as originally advanced by the applicant. The respondents also made oral submissions.
2. The respondents submitted that, for the following reasons, there is no *prima facie* case to warrant the grant of interlocutory relief.
3. First, they contended that s 10 of the *PID Act* does not prevent the attempted October disclosure providing the basis for the Code of Conduct investigation because that disclosure was not a public interest disclosure. That is so, they contend, because the following two requirements under s 26 are not met.
4. The applicant did not make any internal disclosure of information that consisted of, or included, the information sought to be disclosed in the October disclosure. Although the respondents accepted that the June disclosure was an internal disclosure, they contended, contrary to the position asserted by the applicant, that the June disclosure did not contain the information which the applicant sought to disclose in the attempted October disclosure. The respondents assert that the contents of the June and October disclosures relate to “entirely different events, issues and periods of time”.
5. Even if, contrary to the above, the June disclosure was an internal disclosure of information that consisted of, or included, the information sought to be disclosed in the attempted October disclosure, at that time the time limit for investigating the June disclosure under s 52 of the *PID Act* had not expired. (Indeed, on one view, it had not even commenced as will be discussed below). This was because the 90 day time limit only commenced when the June disclosure was allocated by the particular DPS officer to the Secretary of the DPS, which occurred on 11 October 2018. The respondents contended that the 90 day time period in s 52 is not dependent upon the 14 day time period in s 43(5). The respondents further emphasised that the 14 day period for allocation under s 43(5) is expressed in terms of requiring the authorised officer to use his or her best endeavours to decide the allocation within 14 days after disclosure is made to that officer. The respondents’ simple point is that in circumstances where the time period in s 52 has been extended twice by the Ombudsman (i.e. on 9 January 2019 the 90 day period was extended to 23 February 2019 and on 22 February 2019 it was further extended to 19 April 2019), the October disclosure cannot qualify as an “external disclosure” under Item 2(c)(iii) because the time limit for completing Mr Temby’s investigation had not expired when the applicant attempted to make the disclosure to the Parliamentarian in October 2018.
6. Secondly, as to the applicant’s reliance on Item 2(c)(i), the respondents submitted that this criterion cannot be met here because the Pt 3 investigation has not yet been completed and this provision operates on the basis of any such investigation having been conducted and completed.
7. Thirdly, the respondents contended that there was no proper evidentiary foundation for the applicant’s claim that the first and second respondents decided to open the October envelope in order to cause the applicant detriment and injury engendered by the subsequent Code of Conduct investigation against him.
8. Fourthly, the respondents contended that there was no evidentiary foundation for the applicant’s claim that the current Code of Conduct process constitutes a “reprisal” and “detriment” against him for the June disclosure. Rather, the respondents asserted that the “obvious reasons for that investigation was the applicant’s conduct relating to the October disclosure”. In contrast, they said that the June disclosure was being processed by the DPS in accordance with the *PID Act*.
9. Fifthly, because the October disclosure was not a public interest disclosure, the respondents contended that the Code of Conduct investigation cannot constitute a reprisal within the meaning of s 13 in respect of that disclosure.
10. Finally, the respondents contended that if, contrary to the above, there was a *prima facie* case, it is of the “barest kind” and is based on speculation and assertion. They contended that this and other considerations favour refusing an interlocutory injunction. The other considerations were said to be as follows:
11. Any ultimate sanction which is imposed on the applicant as a result of the Determination that he has breached the Code of Conduct may be something less than termination of his employment.
12. If it eventuates that the applicant’s employment is terminated, the Court can order reinstatement and compensation in appropriate circumstances. This is to be contrasted with the position if interlocutory relief were granted because the DPS would be required to continue the applicant’s suspension on full pay until a final judgment and such payments are unlikely to be recovered.
13. The applicant has adequate final relief available to him if he makes good his claims on a final basis.

## Consideration and determination

1. For the following reasons, I am not persuaded that there is a *prima facie* case to be tried. First, focussing upon the applicant’s contention that the attempted October disclosure qualifies as an “external disclosure” within the meaning of s 26, I accept the respondents’ submission that the mandatory requirement in Item 2(b) is not satisfied. That requirement is that, on a previous occasion, the discloser has made an internal disclosure of information that consisted of, **or included**, the information now disclosed. Although it would be open to conclude that the June disclosure is a subset of the attempted October disclosure, that is not the relevant test. The relevant test, as applied to the circumstances here, is whether the October disclosure is a subset of the June disclosure. It plainly is not.
2. Secondly, and in addition, there are fundamental problems with the applicant’s reliance on either Items 2(c)(i) or (iii) of the *PID Act*, either of which must also be satisfied for the attempted October disclosure to quality as an “external disclosure”. As to the first of those matters, I consider that (i) requires the disclosure investigation relating to the internal disclosure to have been completed. This is evident having regard to the expression “was conducted” in that provision. That construction is also supported by the terms of Items 2(c)(ii) and (iii), both of which operate by reference to an investigation which has been completed. The difficulty for the applicant is that even if he believes on reasonable grounds that the ongoing Pt 3 investigation into his June disclosure was inadequate, that investigation has not yet been completed and the item contemplates that the belief as to inadequacy relates to a completed investigation.
3. As to applicant’s reliance on Item 2(c)(iii) of the *PID Act*, there is no arguable case that this provision is satisfied here. For the attempted October disclosure to qualify as an “external disclosure” under this particular Item, it would need to be shown that the Pt 3 investigation into the June disclosure (i.e. the internal disclosure) has **not yet been completed** **within the time limit under section 52**. But that is not the case as matters stand at present.
4. Under s 52, an investigation must be completed within 90 days after the relevant disclosure was **allocated** to the agency concerned. The 90 day time period commenced here on 11 October 2018, when the matter was allocated to the agency. The delay is explained above. Absent an extension of time to complete the investigation, the investigator should have prepared a report 90 days after 11 October 2018.
5. In the events that occurred, however, two extensions were granted. It is evident from [31] of Ms Speight’s first affidavit that the Ombudsman granted Maddocks an extension of time on 9 January 2019 to 23 February 2019. Further, on 15 February 2019, Maddocks raised with the applicant the prospect of the need for a further extension of time, which the applicant did not oppose. On 22 February 2019, the Ombudsman approved a second extension of time under s 52(3) to 19 April 2019.
6. There is an apparent dispute between the parties as to whether the relevant date on which the attempted October disclosure was made was 9 October 2018 or 15 October 2018 (when the envelope was intercepted and opened). It is unnecessary to resolve that dispute for this interlocutory proceeding. That is because, whichever date is used, the attempted October disclosure cannot qualify as an “external disclosure”. That is because, if the relevant date is 9 October 2018, the 90 day time limit for completing the investigation had not even commenced. That occurred two days later. If the relevant date is 15 October 2018, although the time period had commenced to run for the completion of that investigation, the extended expiry date is 19 April 2019. Under either scenario the further requirement in Item 2(c)(iii) in s 26 is not satisfied with the consequence that the attempted October disclosure is not an “external disclosure” for the purposes of the *PID Act*.
7. Thirdly, as to the applicant’s claims of reprisals with specific reference to the June 2018 internal disclosure (which is accepted by the respondents for the purposes of this application as being an “internal disclosure” for the purposes of the *PID Act*), those claims do not present a *prima facie* case for the following reasons. There is no adequate evidentiary foundation, even for the purposes of this interlocutory hearing, that the actions complained of by the applicant arguably constitute “reprisals” within the meaning of s 13 of the *PID Act*. In brief, that is because the evidence as it currently stands (which is principally the evidence given on information and belief by Ms Speight as to the relevant officers’ states of mind and beliefs) does not support the applicant’s claim that there is a relevant causal connection between the actions he complains of and the relevant officers’ states of mind when they took those actions. This evidence is to the following effect.
8. Ms Speight deposes in [39] of her first affidavit that Mr Brigden’s instructions to her are that the envelope had already been opened when he saw it for the first time on 15 October 2018 and that although he was aware then that the applicant had made a public interest disclosure in June, he was not aware of the substance of that disclosure when he inspected the envelope. Nor did he did consider at that time that the sending of the envelope was an attempt to make a public interest disclosure. Moreover, his instructions were that none of his actions in inspecting the envelope were taken because the applicant had previously made a public interest disclosure or because Mr Brigden suspected or believed that the applicant was attempting to or proposed to make a public interest disclosure.
9. At [42] of her first affidavit, Ms Speight says that she obtained similar instructions from Ms Saunders.
10. At [43], Ms Speight refers to Ms Saunders’ instructions that Mr Stefanic had no involvement in inspecting the contents of the envelope on 15 October 2018.
11. At [48] Ms Speight says that Mr Brigden’s instructions are that the Mr Stefanic had no involvement in the decision to commence an investigation into the Code of Conduct and that Mr Brigden had no involvement other than briefing another senior DPS officer.
12. At [51], Ms Speight deposes that Mr Brigden’s instructions are that none of his actions in relation to the Code of Conduct investigation were taken because the applicant had previously made a public interest disclosure or because Mr Brigden suspected or believed that he had or was attempting to do so.
13. At [59], Ms Speight deposes that Mr Brigden has instructed her that the sanction delegate, who will determine any sanction to be imposed on the applicant for his breach of the Code of Conduct, has no knowledge of the June disclosure.
14. At [9] of the supplementary affidavit, Ms Speight says that Ms Deegan instructs her that none of her actions or decisions in relation to the investigation into the Code of Conduct allegations was taken because the applicant had previously made a public interest disclosure (including the June disclosure) or because Ms Deegan suspected or believed that in attempting to send the envelope in October 2018, the applicant was attempting to, or proposed to make, a public interest disclosure as defined in the *PID Act*.
15. Ms Speight further deposes at [10] of her supplementary affidavit that Ms Deegan’s instructions to her was that while she understood that the applicant was contending in the course of her investigation that he was attempting to make an external public interest disclosure as defined in the *PID Act*, she was not satisfied that there was in fact such a disclosure for the purposes of *PID Act*.
16. At [13], Ms Speight states that her instructions from Mr Stokes (who made the Determination dated 29 March 2009), is that his conduct in sending the letter dated 1 March 2019 in which he advised the applicant that he had formed a preliminary view regarding the alleged breaches of the Code of Conduct was not taken because the applicant had previously made a public interest disclosure, including the June disclosure or because he suspected or believed that in attempting to send the envelope in October 2018, the applicant was attempting to, or proposed to make, a public interest disclosure within the meaning of the *PID Act*. Moreover, his instructions were that his Determination dated 29 March 2019 was not made because the applicant had previously made a public interest disclosure, including the June disclosure, or because Mr Stokes suspected or believed that in sending the envelope the applicant was or was attempting to make a public interest disclosure as defined by the *PID Act*.
17. This evidence, which is unchallenged, should be accepted for the purposes of this interlocutory application. The applicant has adduced no evidence to provide an evidentiary foundation for his claims concerning reprisals in respect of the June disclosure.
18. I accept the respondents’ submission that, for the purposes of this interlocutory proceeding, the relevant test is to ask whether the plaintiff has made out a *prima facie* case, “in the sense that if the evidence remains as it is there is a probability at the trial of the action that the plaintiff will be held entitled to relief” (see *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-623 per Kitto, Taylor, Menzies and Owen JJ). The present evidence of the respondents is flatly inconsistent with the applicant’s claims of reprisal. It may be that that evidence would not be sufficient to overcome a *prima facie* case which relied solely on inferences from documents (see *Independent Corporate Services Ltd v Stevens* [2002] WASC 280 at [67] per Roberts-Smith J), but no such inference arises from any of the documents which are before the Court in the present proceedings. Of course, the evidence may well change for the purposes of the final hearing. But, as matters stand at present, the applicant’s claims are not sufficiently arguable.
19. In short, on the basis of the evidentiary material presently before the Court, it is not reasonably arguable that the events in October 2018 constitute an “external disclosure”. As to the June disclosure, and the applicant’s claims of reprisals having been taken in relation to his conduct in making the June disclosure, there is an absence of evidence, even on a interlocutory basis, to connect the various adverse actions that have been taken in relation to the Code of Conduct investigation into the attempted October disclosure and the earlier internal disclosure in June 2018 (which is still under investigation). Accordingly, there is no evidentiary foundation for the causal connection which needs to be established for the purposes of s 13 of the *PID Act*.
20. For these reasons, although I accept that in the light of the applicant’s evidence referred to above, the balance of convenience is in his favour (taking also into account his proffered undertaking as to damages), I am not persuaded that there is a *prima facie* case or serious question to be tried. Indeed, for the reasons given above, I consider that in the light of the existing evidence (which may well change in the final proceeding), the applicant’s claims are very weak.

## Conclusion

1. For these reasons, the application for interlocutory injunctive relief will be dismissed. Costs should be reserved and await the outcome of the applicant’s application for final relief. The parties should seek to agree orders for the future conduct of the proceeding. The proceeding will be listed for the next callover of the ACT list.

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| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 18 April 2019