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Whistleblower protections in the corporate, public and not-for-profit sectors

We refer to the above. We welcome the initiation of an inquiry into the protections for whistleblowers and the processes by which they may make their disclosures.

We are not opposed to there being commonality in principle between the whistleblower protections regimes that apply to the public sector, the private sector and the not for profit sector. In our view, the principles that should underpin a common approach include:

- Protection should be available to all persons in the service of an organisation, as well as those who have been but are no longer in the service of the organisation;
- Protection should be available to persons from the moment they make a disclosure internally (if they choose to do so). It should not be necessary to make a formal external complaint in order to trigger whistleblower protections;
- There ought not be fine, technical distinctions on the types of conduct that can and cannot be the subject of a protected disclosure, as it is important persons considering making a disclosure can have confidence in their protection;
- Whistleblowers should not be deprived of protections merely because they hope or intend that the disclosure of corruption or unlawful conduct which they honestly and reasonably believe has occurred will inflict harm on a person or organisation;
- Workers who wish to make disclosures should be entitled to support in making such disclosures not only by the regulatory authorities but also by their union;
- Disclosures should be permitted to be made anonymously including through lawyers and industrial representatives;
- As with most civil matters that rely on proving reasons for action that are uniquely within the knowledge of the alleged contravener, provisions creating a right of action for reprisal or victimisation should generally contain a statutory presumption in favour of the applicant that the reasons for action included the proscribed reasons.

There are distinguishing features of each type of organisation and the legal environment in which they operate. Accordingly, great care should be taken in translating a principled policy position into legal drafting. For example, many not-for profit and membership based organisations (unions included) function democratically and collectively through their members. A reverse onus provision in relation to reasons for action may cast an oppressive burden if it requires (for example) a union to call evidence from hundreds if not thousands of voting members as to why they chose to vote for or against a particular resolution[1]. In such cases it might be more appropriate to confine the reverse onus provision

[1] See for example *TCFUA v. Huyck Wangner* [2008] FCA 15 at [30]-[35].

or statutory presumption to the reasons that actuated the actions of an officer or a committee of management. In addition, it is important to not raise the burden of internal investigation too high on organisations that lack the legal capacity to compel persons within them to cooperate (for example the absence of a contract of employment may mean an organisation cannot give an enforceable direction to a member or a person in its service to take steps that would assist the investigation).

Recent amendments to the *Fair Work (Registered Organisations) Act*

The *Fair Work (Registered Organisations) Amendment Act* will, upon its commencement, introduce new whistleblower processes and protections into the sector in which our affiliates operate. As is well known, the Bill that resulted in that legislation had a long history and was the subject of numerous inquiries. Reforms to the whistleblower protection regime contained in the *Fair Work (Registered Organisations) Act* formed no part of that Bill until the evening that the Bill was passed. We were not consulted about the reforms, either by the government or by the cross bench Senators that insisted upon them. We consider this surprising and disappointing, given that negotiations to secure those reforms had presumably been underway for considerable period prior to an agreement being reached. There was ample opportunity to consult with stakeholders to fine-tune the approach, but that opportunity was wasted. If, as is rumoured to be the case, the agreement between the government and the cross bench is such that the regime they settled upon for Registered Organisations is to be rolled out to all sectors, the present inquiry is entirely pointless. The triumph of politics over policy is not to be celebrated and we hope such rumours are untrue.

Had we been given the opportunity to comment upon the reforms before they were foisted upon us, the comments we would have made are as follows:

- The definition of "taking a reprisal" in section 337BA contains no element of intent connecting the detrimental action to the belief (or imputed belief) that a person could or did make a disclosure.[2] Whilst section 337BB, which creates a right of action for whistleblowers in respect of a reprisal, does in subsection (2) deal with the connection between the detrimental action and the reasons which motivated it, subsection (3) thereof contains an exception which is very broad. In the result, section 337BB could in some circumstances permit a whistleblower to seek and recover compensation or other remedies even if the Court makes a positive finding that there is absolutely no connection between the detrimental action suffered by the applicant, the reasons of the person inflicting that detrimental action and making of (or the capacity to make) a disclosure. In this way, a person who blows the whistle on illegal activity with a registered organisation (such as fraud or misuse of expenses) could be shielded from any action being taken against them even if such action is motivated purely by the discovery that the whistleblower has also engaged in a large scale misuse or misappropriation of the organisation's funds. We strongly doubt, given recent events, that this is was the intended outcome of the reforms. The better approach is to create a civil penalty provision with an appropriate reverse onus or statutory presumption as to the reasons for action, and permit the Court to make any order it considers appropriate upon the contravention of that provision (in addition to any order as to a pecuniary penalty).

- Given the potential for such bizzare outcomes, the exception provision in subsection (3) of section 337BB is further problematic in that it creates incentives for organisations to make positive choices to not introduce organisational policies or employment instruments that positively support and protect whistleblowers.

[2] Compare, for example, section 13 of the *Public Interest Disclosure Act* 2013; section 1317AB(3) of the *Corporations Act* 2001

- Whistleblower protections are generally concerned with protecting persons who have "inside knowledge" of an organisation's practices against damage to their reputation or career if they disclose wrongdoing. The inclusion, in section 337A(1)(iv), of persons who have had any "transaction" with an organisation within the class of protected persons extends this scope considerably. A "transaction" could conceivably include any act affecting legal rights, including an industrial agreement reached between an employer and a union. In the sometimes hotly contested area of industrial relations, it is not difficult to imagine proceedings being launched by an employer claiming that protected industrial action organised by the union was itself a form of reprisal in relation to some complaint the employer had in the past made about the union (including one which may have been litigated to finality). This would involve complex and uncertain arguments concerning the implied repeal of the immunity conferred by section 415 of the *Fair Work Act*. In light of the provisions referred to above, a union may be unable to defend itself against such actions given the legal requirement imposed by the *Fair Work Act* that the authorisation of protected industrial only be conducted by way of a secret ballot.

- Any worker, including an employee of a union, should be able to make their disclosure through their union (whether anonymously or not) and benefit from the protections available. The provisions do not provide for this.

For the above reasons, we are strongly of the view that whistleblower protections contained in the *Fair Work (Registered Organisations) Amendment Act* should be the subject of proper consultation before they take effect. There are established protocols for such consultation, not followed in relation to these amendments to date, which permit representatives of registered organisations to provide their views and suggestions directly to the experienced public servants engaged in both the policy and drafting of the legislation in question. If this consultation were to occur, we are confident that the presumed intention of appropriately adapting and improving the regime found in the *Public Interest Disclosure Act* to Registered Organisations would be better executed. That consultation process should not commence until the outstanding matters concerning the *Public Interest Disclosure Act* are addressed.

Protection of whistleblowers in the Public Sector

The *Public Interest Disclosure Act* was a welcome reform to improve whistleblower protections in the public sector and achieved bipartisan support. We note however that it does not provide universal processes and protections where complaints are made about persons in the public sector. For example, disclosures regarding the conduct of Members of Parliament, Ministerial Staff and judges do not attract whistleblower protections. Further, its interaction with section 42 of the *Australian Border Force Act* 2015 has not, to our knowledge, been considered.

An external review of the *Public Interest Disclosure Act* conducted last year[3] did not recommend any major principled shift in the legislation. Its recommendations, for the most part, were more concerned with fine tuning provisions in a technical sense to deal with implementation issues. Notable exceptions to this general approach included recommendations concerning the application of the legislation to Parliamentarians and their staff, the interaction between employment disputes and disclosable conduct and the extension of protection to witnesses. We are unaware of the intended response to the review, however we would expect that any legislative response would be subject to a proper consultation process and we would commend the principles identified at the commencement of this submission for consideration in that process.

[3] https://www.dpmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf

We are of the view that the *Public Interest Disclosure Act* could thereafter form a model for whistleblower protections in all sectors. However, as we alluded to above, no model should be slavishly adopted universally where sector specific considerations indicate that doing so will not meet the underlying objectives of the model.

Protection of whistleblowers in the Private Sector

The gaps in the coverage of the whistleblower protections under the *Corporations Act* are well known[4]:

- They apply only to current officers, employees and contractors of the company;
- It is not possible to initiate anonymous disclosures (through a representative or at all);
- The protections are only triggered if the disclosure relates to a breach of the "Corporations Legislation" by the Company, an officer or the employee of the company. The term "Corporations Legislation" limits the scope of protected disclosures to disclosures concerning breaches of the *Corporations Act,* the *Australian Securities and Investments Commission Act* and related rules of court;[5]
- There is no reverse onus or statutory presumption in favour of the applicant in the anti-victimisation provisions.

It is possible, to a limited extent, for unions to use the industrial relations laws to support whistleblowers who wish to disclose and have remedied instances of wrongdoing at their workplace:

- The *General Protections* provisions in Part 3-1 of the *Fair Work Act* protect an employee from adverse action being taken against them because they are able to make a complaint in relation to their employment[6], but generally only after a reprisal has taken place or is threatened. The ambit of the phrase "in relation to their employment" is uncertain, and there is some doubt as to whether an employee would be protected if their complaint related to matters at the workplace that were entirely remote from their own employment responsibilities and obligations;
- Enterprise agreements must contain dispute resolution procedures, and whilst there are minimum standards that such procedures must meet[7], there is no outer limit save that they apply only in matters pertaining to the relationship between the employer and the employees covered by the agreement; or pertaining to the relationship between the employer and the union covered by the agreement. Again, therefore, there is the necessity for some nexus between the employment of the employee covered by the agreement and the circumstances complained of. We have made the point elsewhere (and repeatedly) that there ought to be no limitations on the scope of matters that workers and employers may include in a collective agreement that operates above the safety net.

A more fulsome framework to support and protect whistleblowers in the private sector is clearly required. Employees are particularly vulnerable due to their economic dependence on their employer. This is heightened in the case where the employee is a visa holder as their employer may be in a position to take action which results in the employee being compelled to leave Australia. All workers should be fully supported when reporting suspected corruption or other unlawful behavior both internally and to appropriate authorities. They are the human agents through which their employer acts and accordingly are in a position to report on compliance not only with "Corporations Legislation" but also obligations under taxation, industrial relations, competition and other laws.

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[4] See "Issues Paper - Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence" and "The performance of the Australian Securities and Investments Commission" from the Senate Economics References Committee of the 44th Parliament.

[5] See *Corporations Act*, s.9

[6] See s. 340, 341

[7] See *Fair Work Act* s. 186(6).

Completing the picture

Our movement abhors corruption in all its forms. Insufficient whistleblower protections allow a culture of cover-up to flourish and discourage individuals from coming forward to hold corrupt wrongdoers to account. To this end, we are on the record as supporting calls for the establishment of a national anti-corruption body.

Such a body would be capable of addressing and preventing corruption in the public sector, the private sector and the not for profit sector, without exception. Such a body should, in our view, have the expertise to train, integrity test and review corruption prevention strategies in any organisation. It would also have an investigative function albeit one focused on continuous improvement rather than headline grabbing: adverse findings might be made in relation to particular individuals and referrals made to appropriate authorities, however these would merely be necessary and important steps in serving a function centered on discovering on what might have been done differently at an organisational level (public or private) to prevent or reduce the risk of such conduct occurring. Thirdly, such an agency would conduct reviews of investigations and prosecutions of corruption conducted by other agencies, such as where the agency concerned had failed to secure the outcome that it had sought, or where the Director of Public Prosecutions had recommended that the matter not be pursued. This could boost the capacity of regulatory agencies collectively over time and may inform the process of law reform.

Yours faithfully,

Ged Kearney
President

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