



## Whistleblowing in Australia— transparency, accountability ... but above all, the truth

In combating cartels, the Treasurer will rely in the future on whistleblowers. Recently, he announced changes to the *Trade Practices Act 1974* (Trade Practices Act) to protect those who blow the whistle on cartel conduct in Australia.<sup>1</sup>

Whistleblowers have been called ‘canaries in the coalmine’.<sup>2</sup> They have been accused of ‘commit[ting] the truth’.<sup>3</sup> And some commentators have argued that whistleblowers could hold the key to internal organisational control of multinational companies in the context of globalisation.<sup>4</sup> However, in Australia, the problems surrounding whistleblowing are manifold and the legal issues are vexed. The concept of ‘mateship’ has been identified as an additional layer of discouragement, hindering the development of a robust whistleblower culture.<sup>5</sup> Further, it has been argued that laws may not offer the best protection for whistleblowers.<sup>6</sup>

This brief will provide an overview of the last 15 years of developments in respect of whistleblower legislation in Australia and looks at some of the legal issues surrounding the topic.

### Whistleblowing: a definition

There is no globally accepted definition of ‘whistleblowing’. Rather, there are a number of different definitions and descriptions which try to distinguish whistleblowing from other forms of disclosure, such as informing or spying. A comprehensive discussion of various definitions and descriptions can be found in the 1994 report, *In the Public Interest*, prepared by the Senate Select Committee on Public Interest Whistleblowing (SCPIW 1994).<sup>7</sup> A commonly accepted definition specifies that ‘whistleblowing’ is:

... the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action.<sup>8</sup>

### A brief outline of 15 years of developments

In Australia, whistleblower protection became an issue around 15 years ago, when inquiries into corruption scandals exposed the difficulties that whistleblowers faced as a result of their actions. The difficulties arose because the common law was ill-adapted to deal with the issue. It was unable to provide employees with a right to disclose confidential or even non-confidential information about the

workplace. Under common law, a duty of trust was implied in the contractual employment relationship. Employees disclosing workplace-related information faced the risk that their disclosure might be construed as an undermining of this duty that might cause their employer to take legal action against them.

### 1989 to 2000

The highly publicised corruption inquiries of the late 1980s and the early 1990s meant that corruption and whistleblowing were squarely on the political agenda. These inquiries considered that whistleblowing could be an effective measure to expose administrative or corporate wrongdoing, especially at an early stage. For example, in 1989, the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry) brought to light the difficulties people faced in disclosing information. The inquiry emphasised the need for whistleblowers to be protected from reprisals and stated the need for whistleblowing legislation.

In 1991, the Review Committee of Commonwealth Criminal Law accepted the broad principle that:

... in a democratic society, the public should have access to as much information as to the workings and activities of government and its servants as is compatible with the effective functioning of that Government.<sup>9</sup>

As a result of these inquiries, all Australian states and the ACT adopted some form of whistleblowing or public interest disclosure protection legislation. Most state legislation covers only the public sector and does not apply to the corporate, unincorporated or charitable sectors. There are also quite significant state legislative differences in relation to the measures protecting whistleblowers.

The Federal Parliament conducted two inquiries: the SCPIW 1994 and the Senate Select Committee on Unresolved Whistleblower Cases in 1995. There were also several unsuccessful attempts at federal level to introduce whistleblower legislation.<sup>10</sup>

### Since 2000

Experience with whistleblower legislation overseas shows that many statutory efforts to protect whistleblowers were deficient and needed significant strengthening. In Australia, several states reviewed the effectiveness of their whistleblower legislation. For example, the New South Wales Committee on the Office of the Ombudsman and the

Police Integrity Commission noted in its *Second Review of the Protected Disclosures Act 1994* that unless improvements were made to the statutory regime, the protection:

... available to persons who wish to report misconduct will be less effective and hence the likelihood of disclosures being made will be reduced.<sup>11</sup>

One of the central recommendations was the establishment of an independent Protected Disclosures Unit.

At a federal level, the Public Interest Disclosure (Protection of Whistleblowers) Bill 2002, which was aimed at providing protection for persons who disclosed conduct adverse to the public interest in the public sector, was introduced in the Senate.<sup>12</sup> In 2004, Part 9.4AAA was inserted into the *Corporations Act 2001* (Corporations Act), providing a certain immunity and protection from retaliation for any company employee who reports a suspected violation of the Corporations Act.<sup>13</sup> Also in 2004, Parliament passed the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004*, introducing whistleblower protection into the *Workplace Relations Act 1996*. Further, in 2005, the Government announced changes to the Trade Practices Act to encourage whistleblowers to assist in exposing cartels.<sup>14</sup>

### External and internal disclosure structures

Most Australian state jurisdictions provide that, for whistleblowers to be protected, the information is to be disclosed internally or to a 'proper' or 'investigating' authority. Such authorities include the relevant Ombudsman, police, including the Police Complaints Authority and the Anti Corruption Branches, the Police Integrity Commission, Auditors-General or, where permitted, the media or a member of parliament.<sup>15</sup>

Internal disclosure structures can be implemented within an entity. A template for such structures is the recent Australian Standard AS 8004 *Whistle-blower protection programs for entities* (AS 8004). It provides elements for establishing, implementing and managing effective whistleblower protection programs and can be applied within corporations, government agencies and not-for-profit entities.

After the July 2004 amendments to the Corporations Act, corporations complying with the legislation may resort to internal or external disclosure structures. External disclosure structures can include Australian Securities and Investment Commission, the company's auditor or a member of an audit team conducting an audit of the company. Internal disclosure structures may include a director or senior manager of the company authorised to receive disclosures of that kind. The Parliamentary Joint Committee on Corporations and Financial Services (the PJCCFS) originally criticised the proposed changes to the Corporations Act for failing to require corporations to establish internal structures.<sup>16</sup>

### Selected legal issues

The central aspects of whistleblowing legislation are the scope of such legislation, encouraging whistleblowing and protecting whistleblowers from reprisals. Each aspect raises significant legal issues.

#### Who should be covered by whistleblower legislation?

In Australia, whistleblower legislation is generally limited to government entities and their agencies. There are two notable exceptions: South Australia, where the whistleblower legislation extends to the private sector, and Part 9.4AAA of the Corporations Act, which extends whistleblower protection to officers and employees of companies and subcontractors throughout Australia.

The limited scope of whistleblower legislation has been criticised, and a comprehensive application to all sectors, including the private, unincorporated or the charitable sectors has been championed.<sup>17</sup> However, such comprehensive regulation is difficult to achieve, because:

- some professions have already flagged their reservations since whistleblowing is seen to be in conflict with the professional privileges applicable to client-professional relationships, and
- constitutional constraints prevent the Commonwealth from implementing comprehensive nationwide legislation.

#### Distribution of power: constitutional issues

The Federal Parliament lacks a general power to implement comprehensive whistleblower legislation covering the public and private sectors. However, the Federal Parliament has used its constitutional powers to provide for whistleblower protection mechanisms in specific areas. For example, it used its corporations power (paragraph 51(xx) of the Constitution) to legislate a framework to encourage whistleblowing in relation to suspected breaches of the Corporations Act. This legislation applies to any 'constitutional corporation', that is, any incorporated body.

To reach unincorporated associations including charities, which otherwise are under state jurisdiction, the Commonwealth could, for example, use the taxation power (paragraph 51(ii) of the Constitution). With respect to charities, the government could prescribe that tax exemptions may only be available if internal whistleblower protection standards such as AS 8004 are established, or if the charity became part of an external whistleblowing scheme.

Comprehensive and fully uniform legislation would require either cooperation between the states to enact uniform legislation or the referral of power from the states to the Commonwealth under paragraph 51(xxxvii) of the Constitution. A referral of power on this issue is unlikely.

## Encouraging whistleblowing

Encouraging people to blow the whistle on wrongdoing and protecting them from reprisals afterwards are two tightly connected issues: any increase in protection has the potential to encourage people to disclose wrongs and must set out measures to prevent reprisals or provide for appropriate compensation schemes where reprisals occur.

### The role of financial inducements

In the past, attempts have been made to use financial inducements as a motivation for whistleblowers to run the risk of reprisals. However, the payment of financial inducements to encourage whistleblowing has been criticised by scholars who argue that:

- any scheme of financial rewards is difficult to devise and maintain outside the public service, and
- whistleblowing should be considered as a public good which is not to be associated with personal gain or private interests.<sup>18</sup>

It has been pointed out that encouragement is best achieved by devising a legislative framework that creates a positive environment for whistleblowing by providing protection, not money.<sup>19</sup> However, providing inducements must be distinguished from providing just compensation for retaliation. This will be discussed below.

### The issue of a whistleblower's motive

There is also discussion about whether legislative responses should consider a whistleblower's motive. Supporters argue that the whistleblower's motive should be relevant to the decision whether or not to investigate a matter, suggesting that an inquiry into motive will prevent malicious or bad faith disclosures. Proponents of the contrary view note that wrongdoing will exist independently of a whistleblower's motive.<sup>20</sup> In addition, introducing motive as a relevant statutory requirement raises, for example, significant evidentiary problems and can act as strong discouragement. In Australia, most state jurisdictions did not introduce inquiries into the whistleblower's motive into their legislation, but chose a scheme under which:

- the discloser must have reasonable grounds to believe that the information provided is true, and
- the knowing or reckless provision of false information is deemed to be an offence.

However, on a federal level, the Corporations Act provides that a whistleblower must make a disclosure in good faith. This requirement has been implemented contrary to Recommendation 4 made by the PJCCFS and may act as a potential deterrent for corporate whistleblowers.<sup>21</sup>

### Effective protection for whistleblowers

One key concern is that whistleblowers are subjected to retaliatory measures. For example, the *Queensland Whistleblower Study*, conducted in 1997, found that 71 per

cent of whistleblowers suffered official reprisals and 94 per cent were the subject of unofficial reprisals.<sup>22</sup> Arguably, the Constitution itself may provide some protection by virtue of the implied freedom of political communication.<sup>23</sup>

However, the following 'shields' have been identified as providing the most effective protection for whistleblowers:

- anonymity
- immunity from legal action, and
- protection against reprisal.

### Anonymity

Arguably, one of the most successful ways to protect whistleblowers is by keeping their identity anonymous. Anonymity can be achieved, for example, by:

- providing disclosure regimes which operate on the basis of anonymously provided information
- excluding the identity of the whistleblower as a subject of investigation, or
- imposing a duty upon the recipient of the disclosed information not to reveal the discloser's identity.

Most state jurisdictions choose one or other of these methods, with some variations, such as in South Australia, where the whistleblower's identity can be disclosed by consent.

The Corporations Act affords protection by making it an offence to disclose the information provided by the whistleblower, the identity of the discloser, or any information that is likely to lead to the identification of the discloser. However, although criticised by the PJCCFS, the Corporations Act also obliges whistleblowers to reveal their identity prior to their claims being investigated.<sup>24</sup>

None of the above methods is able to guarantee absolute anonymity to whistleblowers, and possible identification will remain an issue. Other measures are necessary to protect whistleblowers comprehensively.

### Immunity from legal action

Providing immunity from legal action can also provide good protection and could therefore prove to be a powerful incentive for whistleblowers. All state jurisdictions in Australia afford whistleblowers who make 'protected disclosures' at least some kind of protection against subsequent civil or criminal action. Examples include providing protection:

- against actions by way of disciplinary proceedings, or
- against defamation proceedings, by specifying that the protected disclosure attracts the defence of absolute or qualified privilege.

The Corporations Act provides that the immunity from legal action is only available where the disclosure was made in good faith. It introduces again the issue motive,

and possibly creates a strong deterrent for people to come forward and disclose wrongdoing.

### Protection against reprisal

There are two predominant approaches in Australia in response to the issue of reprisal against the whistleblower:

- making it a criminal offence to take detrimental action against another person on the ground that the person has made a protected disclosure, or
- specifying that detrimental action taken against a whistleblower is deemed to be victimisation which may give rise to legal action, for example under equal opportunity legislation.

In the United States, whistleblowers receive further protection from the financial impact that their disclosure may have on their lives as a result of reprisals. Under the False Claims Act (US), a whistleblower ‘may be awarded “all relief necessary to make the employee whole,” including reinstatement, back pay, two times the amount of back pay, litigation costs, and attorney fees’.<sup>25</sup>

Whistleblowers receive a percentage of the recovered illegally obtained financial advantages, which is distinct from providing financial inducements and is a highly effective tool to encourage whistleblowing.

### Conclusion

Much has been achieved in the last 15 years. Much is still left to be done. Certainly, more effective whistleblower protection measures need to be implemented at the state and federal levels. However, this may not be enough. A very important key to effective whistleblowing is the realisation that whistleblowing is not betrayal nor disloyalty but a service to society.

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**Thomas John  
Law and Bills Digest Section  
Information and Research Service**

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