

1. Corporate sector

- a. *What are your views on which of the best practice criteria should be considered in any reforms for corporate sector whistle blowing legislation in Australia?*

Whilst the FSU believes that each of the 14 criterion detailed in the G20's best practice criteria for whistleblowing legislation should be included within Australian whistle blowing legislation, the union believes priority should be given to the following criteria:

2. Broad definition of reportable wrongdoing
10. Broad protections against retaliation
11. Comprehensive remedies for retaliation
1. Broad coverage of organisations
5. External reporting channels (third party / public)
12. Sanctions for retaliators
14. Transparent use of legislation

- b. *Are there aspects of the recent Fair Work Registered Organisation amendments (ROC amendments) to legislation for whistleblowing that would be appropriate to include in corporate sector reforms?*

The FSU shares the concerns detailed in the submission made by the Australian Council of Trade Unions (ACTU) with respect to the process undertaken by the Australian government in drafting the changes and the inclusion of the changes within the Fair Work Registered Organisation Act.

Notwithstanding these concerns the union would support the inclusion of the following provisions:

337BA 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:
 - (i) believes or suspects that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part; or
 - (ii) should have known that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part.
- (2) In this Part, detriment includes (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;
 - (e) harassment or intimidation of a person;
 - (f) harm or injury to a person, including psychological harm;
 - (g) damage to a person's property;
 - (h) damage to a person's reputation.

337BB Civil remedies

(1) If the Federal Court or Federal Circuit Court is satisfied, on the application of a person mentioned in subsection (4) (the applicant), that another person (the respondent) took or threatened to take, or is taking or threatening to take, a reprisal against a person (the target), the Court may make any one or more of the following orders:

- (a) an order requiring the respondent to compensate the target for loss, damage or injury as a result of the reprisal or threat;
- (b) an order granting an injunction, on such terms as the Court thinks appropriate, to prevent, stop or remedy the effects of the reprisal or threat;
- (c) an order requiring the respondent to apologise to the target for taking, or threatening to take, the reprisal;
- (d) if the target is or was employed in a particular position with the respondent and the reprisal wholly or partly consists, or consisted, of the respondent terminating, or purporting to terminate, the target's employment—an order that the target be reinstated in that position or a position at a comparable level;
- (e) if the Court thinks it is appropriate—an order requiring the respondent to pay exemplary damages to the target;
- (f) any other order the Court thinks appropriate.

(2) However, the Court must not make an order under subsection (1) if the respondent satisfies the Court that the belief or suspicion mentioned in subparagraph 337BA(1)(b)(i) is not any part of the reason for taking the reprisal.

(3) Notwithstanding subsection (2), the Court may make an order under subsection (1) if satisfied that:

- (a) the target made, may have made, proposed to make or could have made a disclosure that qualifies for protection under this Part; and
- (b) the respondent was under a duty to prevent, refrain from, or take reasonable steps to ensure other persons under the respondent's control prevented or refrained from, any act or omission likely to result in detriment to the target; and
- (c) the respondent failed in part or whole to fulfil that duty.

(5) If the reprisal wholly or partly consists, or consisted, of the respondent terminating, or purporting to terminate, the target's employment, the Court must, in making an order mentioned in paragraph (1)(a), consider the period, if any, the target is likely to be without employment as a result of the reprisal. This subsection does not limit any other matter the Court may consider.

(6) If the Federal Court or Federal Circuit Court has power under subsection (1) to make an order against a respondent in relation to conduct that constituted or constitutes taking or threatening to take a reprisal against a target, the Court may make any other orders that it thinks appropriate against any other person who has:

- (a) aided, abetted, counselled or procured the conduct; or
- (b) induced the conduct, whether through threats or promises or otherwise; or
- (c) failed to fulfil a duty to prevent, refrain from, or take reasonable steps to ensure other persons under the person's control prevented or refrained from, the conduct; or
- (d) been in any way (directly or indirectly) knowingly concerned in or a party to the conduct; or
- (e) conspired with others to effect the conduct.

337BE Criminal offences Taking a reprisal

(1) A person commits an offence if:

- (a) the person takes a reprisal against another person; and
- (b) the person's belief or suspicion that a person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part is the reason, or part of the reason, for taking the reprisal. Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that a person made, may have made, proposed to make or could have made a disclosure that qualifies for protection under this Part. 15 Threatening to take a reprisal

- (3) A person (the first person) commits an offence if:
 - (a) the first person makes a threat to another person (the second person) to take a reprisal against the second person or a third person; and
 - (b) the first person:
 - (i) intends the second person to fear that the threat will be carried out; or
 - (ii) is reckless as to the second person fearing that the threat will be carried out; and
 - (c) the first person's belief or suspicion that a person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part is the reason, or part of the reason, for making the threat. Penalty: Imprisonment for 2 years or 120 penalty units, or both.
- (4) For the purposes of subsection (3), the threat may be:
 - (a) express or implied; or
 - (b) conditional or unconditional.
- (5) In a prosecution for an offence under subsection (3), it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

c. Are any additional provisions necessary to ensure that whistleblowing laws are effective for multinational corporations, with significant management structures outside Australia?

The FSU's initial submission detailed its position regarding the changes the union believes should be made to Australia's whistle blowing laws. The union's position was based upon its experiences in dealing with whistle blowers within the finance industry as well as its exposure to internal whistle blowing regimes.

4. PIDA Agency, harmonisation and consistency

- a) Some submitters and witnesses have commented on the idea of establishing a Public Interest Disclosure Agency (PIDA) agency as an independent body to receive disclosures, provide advice to whistle blowers and a clearing-house for initial investigations (e.g. Submissions 32, 22). What do you consider to be the potential advantages and disadvantages of such an approach?*

The FSU supports the creation of an independent statutory body empowered to receive, investigate and determine all matters relating to whistle blower disclosures and the protections that should apply to those making the disclosures.

The union supports this approach because it does not have confidence in the existing internal whistle blowing regimes with finance industry and believes the ability for employees (both current and former) to lodge their disclosures with an independent and external party will encourage more employees to report unlawful and unethical behaviours.

- b) What do you consider to be the advantages and disadvantages of putting all whistleblower protection laws in a single Act versus the current situation where the laws are spread over at least four Acts?*

The FSU supports containing all of Australia's whistle blower protection laws in a single Act.

- c) To what extent should there be harmonisation (not replication, but consistency and difference where appropriate) of whistle blower provisions across the public, corporate and not-for-profit sectors?*
- i. What arrangements should be in place for companies or not-for-profit organisations that undertake contracts or work for the public sector to ensure that they or their staff or whistle blowers are not subject to conflicting arrangements?*

The FSU believes that the core of Australia's whistle blowing laws should apply to all sectors, including the not for profit sector whether they provide services to the public sector or not.

The union's position is that the 14 criterion detailed in the G20 best practice criteria for whistleblowing legislation could be the basis of the common laws.