Submission #5 – Whistleblower Protections

Who will protect the Whistleblower?

Executive Summary

Under current arrangements whistleblower protection laws are not worth the paper they are written on since regulatory agencies such as ***ASIC*** are not about to protect people who have caused then embarrassment.

ASIC even admits as much.

Current whistleblower protection laws are actually worse than having none at all since whistleblowers may be tempted to rely on their private rights in seeking to enforce whistleblower protection laws and then be bankrupted in the process.

There have been no examples regulatory agencies enforcing whistleblower protection laws but there is at least one example of a whistleblower losing $0.75 million in legal costs attempting to rely on his private rights after being sacked as a likely whistleblower.

The unfortunate reality is that Australia really is a '***paradise***' for white-collar criminals as was stated by the Chairman of ***ASIC*** who should know.

Until serious reforms are undertaken, the best advice for any would-be whistleblower is – just do not bother you will not be able to beat the corrupt system.

This submission therefore makes the following recommendations:

(i) Existing whistleblower protection laws be remove from the statute books;

(ii) The enforcement of whistleblower protection laws to be taken out of the hands of the regulatory agency that is being embarrassed by whistleblowers and placed in the hands of an independent agency such as a ***Whistleblower Triage Centre*** or an employment tribunal;

(iii) Enact *'tiered'* similar disclosure provisions as provide by UK-PIDA so that whistleblowers have alternative disclosure avenues apart from the prescribed regulator who may be subject to ***Regulatory Capture***.

Introduction

As mentioned in **submission #1** whistleblowing has been defined as follows:

> "The disclosure by a person, usually an employee in a government agency or private enterprise, to the public or to those in authority, of mismanagement, corruption, illegality, or some wronging."

Whistleblowing is not a trivial exercise and should not be treated as such. White-collar crime is often difficult to detect and successfully prosecute.

stated the following when sentencing the white-collar criminal involved in the **Trio Capital Superannuation Fraud** {***Regina v Shawn Darrell Richard*** [2011] NSWS 866:

> In *R v Pantano* (1990) 49 A Crim R 328 at 330, Wood J (Carruthers J agreeing) said:
>
> "...those involved in serious white collar crime must expect condign sentences. The commercial world expects executives and employees in positions of trust, no matter how young they may be, to conform to exacting standard of honesty. It is impossible to be unmindful of the difficulty of detecting sophisticated crime of the kind here involved, or of the possibility for substantial financial loss by the public. Executives and trusted employees who give way to temptation cannot pass the blame to lax security on the part of management. The element of general deterrence is an important element of sentencing for such offences: *Glenister* [1980] 2 NSWLR 597."

For this reason whistleblowers play a vital role in uncovering white-collar crime and its successful prosecution.

Whistleblower Protections

Item (a) in the Terms of Reference is:

> "the development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, taking into account the substance and detail of that contained in the Registered Organisation Commission (ROC) legislation passed by the Parliament in November 2016;

Improved legislative provisions for whistleblowers were included in the ***Fair Work (Registered Organisations) Amendment Act 2016*** (**Appendix B**}.

However laws are not worth the paper they are written unless there is the will to enforce the law.

This enactment is specifically targeted at misconduct by union officials even thought employer organisations are included as a "*Registered Organisation*".

If a union member makes a disclosure about a union official he or she is unlikely to be sacked by his or her employer and suffer an economic loss.

Of course there may be threats made against the whistleblower by the union official or associates which are another matter.

However if an employee makes a disclosure of serious misconduct about his or her employer that employee will most likely to be sacked which will cause an immediate economic loss plus consequential losses such as lose of some superannuation entitlements. Without a reference the whistleblower will find it difficult to get other employment. He or she will be labelled a troublemaker for life.

Seeking re-instatement is not a viable option.

Item (i) in the Terms of Reference is:

> "the obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures;

So who will go into bat for the whistleblower who has been sacked by his employee for "***blowing the whistle***"?

The subject of the proper investigation of whistleblower disclosures was covered in **Submission #3.**

Whistleblower Case Study #1

Following the Pension Scandal in the early 1990s where "*misappropriated*" £454 million {around **A$ 2 billion** in today's money} from the pension funds of his employees in the United Kingdom, the Parliament of Australia included the "***equal representation rule***" into the ***Superannuation Industry (Supervision) Act 1993*** that requires members of employer sponsored superannuation funds to elect half the directors of the corporate trustee.

If such an employee who was representing the interests of his fellow employees were to be sacked for "***blowing the whistle***" on maladministration of the employees' superannuation fund by his or her employer, that employee was supposed to be protected by whistleblower protections that were included in **Section 68** of the ***Superannuation Industry (Supervision) Act 1993 (SIS Act).***

Section 68 provides both criminal and civil penalties.

Employees who volunteer for an unpaid role of a director on the trustee of the employees' superannuation fund might believe that they will be protected if they become whistleblowers.

They would be very wrong to do so.

In the case of one of Australia's oldest occupational superannuation schemes a employee volunteered to become an employee-elected director and after his election he voiced concerns about the investment practices of previous directors of the corporate trustee and sought access to certain fund documents so that he could raise this as an issue for further investigation at his first Board meeting.

However this member-elected director was sacked by his employer with one day's notice, effective the day before the scheduled Board meeting.

The regulator ***APRA*** refused to go into bat for this sacked would-be whistleblower who had not even gained access to the evidence that would have allowed him to "***blow the whistle***" he had merely raised concerns of maladministration before gaining access to the evidence.

Instead the would-be whistleblower believed he would be protected by the civil penalty section of **Section 68** of the ***SIS Act*** and commenced proceedings in the Supreme Court of Victoria.

Now the trap is **subsection 68(5):**

> (5) In civil proceedings arising out of this section:
>
> (a) it is not necessary for the plaintiff to prove the defendant's reason for the alleged action; and
>
> (b) it is a defence if the defendant proves that the action was not motivated (whether in whole or in part) by the alleged reason.

All the employer had to do was come up for another reason for why the member-elected director had been sacked. In this case the would-be whistleblower had been on study leave after leaving a role in Tasmania to return to Melbourne head office.

The employer simply told the Supreme Court that no position was available at head office for this experience manager who had previously been on the "***fast track***" for promotions within the company.

In the proceedings in the Supreme Court of Victoria material evidence was concealed from the Court that would have vindicated the would-be whistleblower as confirmed by latter proceedings in the ***Victorian Legal Profession Tribunal*** { ***Legal Ombudsman*** v [Name Redacted] [Case Ref Redacted]}

However this would-be whistleblower who did not even get to the stage of being able to "*blow the whistle*" lost **$0.75 million** in legal costs as well as losing his job.

This is the reality of whistleblower blower protection legislation as it exists in Australia – Regulators simply refuse to go into bat for whistleblowers, let alone would-be whistleblower who are sacked for

merely voicing a concern of wrongdoing even before they have the chance to obtain evidence and submit a formal disclosure to a Regulator such as ***APRA***.

The evidence that would have vindicated this would-be whistleblower was unlawfully concealed from the Supreme Court of Victoria, however the Victorian Legal Services Commissioner refused to take any disciplinary action against the lawyers involved in this dishonest and unprofessional conduct.

Whistleblower Case Study #2

The definition of whistleblowing provided above is:

> "The disclosure by a person, usually an employee in a government agency or private enterprise, to the public or to those in authority, of mismanagement, corruption, illegality, or some wronging."

Now the general assumption is that the wrongdoer has contravened at least one law (if not several) and if evidence can be produced confirming the contravention of the law, then the whistleblower will be vindicated and then qualify for protection under whatever whistleblower protection laws that might apply.

But what is the case if "*some wrongdoing*" is unethical conduct that does not contravene any existing law.

A case in point is the ***CommInsure Scandal*** where exposed the practice of CommInsure using out-of-date medical standards to assess claims and a system where medical reports favourable to claimants would go "*missing*" from the document management system.

have sought to have ***ASIC*** and ***APRA*** enforce the anti-victimisation provisions of **Section 156C** of the ***Life Insurance Act 1995***, however both Regulators have declined to take any regulatory action.

CommInsure denies any wrongdoing and claims that was sacked for breaking company policy by sending policyholder information to his personal email account.

So in the eyes of the law is a Whistleblower or just a disgruntled former employee who was sacked for breaching a company policy?

Laws Not Worth the Paper they are Written On

Any would-be whistleblower should take the position that whistleblower protection laws are simply not worth the paper they are written on.

There is no reason to believe that the whistleblower protections incorporated into the ***Fair Work (Registered Organisations) Amendment Act 2016*** will be any different.

Whistleblowers cause embarrassment to regulators like ***ASIC*** and so the regulators are not about to devote time and resources to protect someone who has caused them embarrassment.

This is ***ASIC's*** position:

> We can also look into allegations that whistleblowers have been victimised. However, the protections under the Corporations Act consist mostly of private rights that the effected individual needs to take up independently.

Should a whistleblower seek to enforce whistleblower protection laws by way of a private their "***private rights*"?**

Good luck with that since this could easily cost a whistleblower around $1 million in their own and their former employer's legal costs, since key evidence will be withheld from the court.

The reality is that the Chairman of ***ASIC*** is right – Australia is a '***paradise***' for white-collar criminals.

Recommendation #7

Existing whistleblower protection laws to be removed from the Statute Books.

There has never been a successful prosecution of existing whistleblower laws and these laws a positively dangerous since they provide a false sense of protection to would-be whistleblowers.

The most likely outcome for any whistleblower who seeks to pursue his or her private rights under current laws is bankruptcy in addition to the loss of their job and future employment prospects.

Whistleblower Protection and the Registered Organisations Commission

Extensive whistleblower protection provisions were included in the ***Fair Work (Registered Organisations) Amendment Act 2016 {Appendix B}.***

The Act provides protection against detrimental conduct as follows:

(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.

However the primary purpose of this enactment is to control misconduct by union officials even though employer associations are also include.

It is very unlikely that an employer would sack an employee for disclosing misconduct by union officials – that employee is more likely to receive a promotion!

Therefore detrimental conduct under items (a) to (d) are essential irrelevant for this legislation.

In any event there is the "*employers' friend clause*" at **Section 337BB**:

> (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.

Employers can generally readily find an excuse to sack a troublesome employee.

While the Royal Commission into trade union governance and corruption did find examples of abuse of position by union officials and misapplication of union funds the amounts misapplied on a per union member basis were relatively minor and were not life altering on union members.

This must be contrasted with malfeasance in the corporate sector and especially the banking and financial services sector where malfeasance has cost hundreds of thousands of Australians their life savings, their superannuation entitlements and even their own homes.

White-collar crime in the financial services sector is difficult to detect and whistleblowers have an essential role to play.

Employees of banks and financial services organisations are those best placed to "***blowing the whistle***" on white-collar criminals operating at all levels of management.

However these same employees are also most likely to be sacked if they "*rock the boat*" and bring misconduct to the attention of senior management.

There is no reason to believe that including the whistleblower protection provisions recently added to the ***Fair Work (Registered Organisations) Amendment Act 2016*** into the ***Corporations Act 2001*** would change the behaviour of ***ASIC*** which routinely "*throws whistleblowers under the bus*".

The 2015-2016 ***ASIC*** Annual Report confirms that it is standard operating procedure for ***ASIC*** to file whistleblower disclosures into the wastepaper bin and ***ASIC*** can demonstrate no formalised procedure for assessing whistle blower disclosures similar if not better than those employed by the **Superannuation Complaints Tribunal {**Refer to **Submission #3}** .

That is ***ASIC*** is an agency subject to ***Regulatory Capture*** with a cover-up culture and no amount of legislative amendments is going to change that.

Section 337BB includes the following remedy:

> (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

This is living in fairy land to include such a remedy as a protection for whistleblowers working for banks or other financial institutions. If a whistleblower who has caused embarrassment to senior managers were to be reinstated what would be the quality of their working life?

Would the whistleblower ever be promoted ? Would they be retrenched in a year's time due to a departmental restructure? Would they be given any real work to do?

The following remedy is more realistic:

> a) an order requiring the respondent to compensate the target for loss, damage or injury as a result of the reprisal or threat

However few whistleblowers have the financial resources to undertake legal proceedings against their employer in the Federal Court and they risk bankruptcy if they lose they case on a legal technicality even if their case has merit.

ASIC does not come to the aid of whistleblowers who embarrass ***ASIC*** and its clients at the moment and there is no reason to believe that will change any time soon.

ASIC will continue to play the whistleblowers are able to pursue their own private rights game

ASIC will simply point to **Section 337BF** if these whistleblower protection provisions are included in the ***Corporations Act 2001***:

> "To avoid doubt, a person may bring civil proceedings under section 337BB, or civil proceedings for a contravention of subsection 337BD(1) or (3), in relation to the taking of a reprisal, or the threat to take a reprisal, even if a prosecution for a criminal offence against section 337BE in relation to the reprisal or threat has not been brought, or cannot be brought"

Investigation of Disclosures

Section 337CA of the ***Fair Work (Registered Organisations) Amendment Act 2016*** which is titled ***"Investigation of disclosures"*** is basically an invitation for corruption.

The only procedures prescribed are:

- The authorised official must investigate the disclosure {337CA(1)};
- However the authorised official may decide not to investigate the disclosure under circumstances prescribed in the regulations {337CA(2)};
- The authorised official may obtain information from such persons and make such inquiries as the authorised official thinks fit {337CA(5)}.

There is no prescribed methodology for dealing with or prioritising disclosures - it is all subject to the whim of the "***authorised official***".

Clause 1.19 in the Senate Economic Reference Committee – ***Issues Paper: Corporate Whistleblowing in Australia: ending corporate Australia's culture of silence*** noted:

> "Although the Corporations Act establishes an explicit role for ASIC as a receiver of whistleblower disclosures, it is silent on how the regulator should actually handle information it receives from whistleblowers. Nor does the Act empower ASIC to act on behalf of whistleblowers"

The 2015-2016 Annual Report confirms that ***ASIC*** filed 80% of whistleblower disclosures received in the waste paper bin. There are over 100 white-collar criminals who are very pleased with this filing arrangement.

Nothing has been learned and the **Registered Organisation Commission** will be an ineffective clone of ***ASIC***.

Even when whistleblower provisions were added to the Corporations Act in 2004 the Parliamentary Joint Committee on Corporations and Financial Services report on the ***Corporate Law Economic Reform Program (CLERP) 9 Bill*** characterised the whistleblower provisions as '*sketchy in detail*', even if their

intention was clear. The committee concluded that the whistleblower provisions would ultimately require '*further refinement*'.

Tellingly, the Joint Committee foreshadowed the future need for a comprehensive review of Australia's whistleblower framework:

> Once the proposed whistleblower provisions come into operation, answers to the questions that it poses may become clearer. Indeed the longer term solution may be found in the development of a more comprehensive body of whistleblower protection law that would constitute a distinct and separate piece of legislation standing outside the Corporations Act and consistent with the public interest disclosure legislation enacted in the various states.[6]

6 PJCCFS, *CLERP 9 Bill*, June 2004, p. xxii.

These shortcoming are also evident in the ***Fair Work (Registered Organisations) Amendment Act 2016***

What if the alleged wrongdoer refuses to provide information and conceals evidence?

Why should any would-be whistleblower place their financial security and physical safety in the hands of an "***authorised official***" who is well placed to cut a secret deal with the alleged wrongdoer?

There is no watchdog looking over the **Registered Organisation Commission** just as there is no watchdog looking over ***ASIC***.

If the "***authorised official***" decides not to investigate a disclosure there are no avenues of appeal.

Why would any would-be whistleblower even bother to step forward when all the cards are stacked against him or her?

What is the background and training of the "*authorised official*" who becomes privy to information provided in the disclosure? Why should such an official necessarily act in the ***best interests*** of the whistleblower?

Public servants will always put their own interests ahead of those they are meant to serve.

How transparent and auditable are the procedures, if any, for dealing with whistleblower disclosures?

Will the **Registered Organisation Commission** become subject to ***Regulatory Capture*** over time just as ***ASIC*** has been captured by the ***Big End of Town*** financial institutions?

To gain an understanding of how unions operate the **Registered Organisation Commission** will employee former union officials and unions will seek to gain an understanding of how the **Registered Organisation Commission** operates by offering jobs to former ***"authorised officials*"**.

This is rational behaviour when substantial statutory powers are placed in the hands of public servants including the imposition of criminal sanctions. The unions just need to follow the playbook of the major banks.

There are no provisions in the ***Fair Work (Registered Organisations) Amendment Act 2016*** to prohibit such incestuous cross employment which is a hallmark of ***Regulatory Capture*** and where ***The Art of the Deal*** replaces ***The Rule of Law.***

The fate of whistleblowers is to be "***thrown under the bus***" when they embarrass both the regulated and the regulator.

A "Tiered" Disclosure System

The United Kingdom ***Public Interest Disclosure Act 1998*** (**UK-PIDA**) is noteworthy for its '*tiered*' disclosure systems.

Under **UK-PIDA**, whistleblowers can make protected disclosures to several different parties, including their employer, regulatory agencies, '*external*' parties such as members of Parliament, or directly to the media.

In effect, **UK-PIDA** provides a "*tiered*' disclosure system, as the standards for accuracy and urgency differ on who the whistleblower makes the disclosure to. '*Wider disclosures'* –such as to the police, media, MPs and so on – are allowed in certain circumstances, such as if the prescribed regulator fails to take appropriate action, where there was reason to believe that evidence would be concealed or destroyed, or where the concern was of an exceptionally serious nature {***A guide to PIDA: public Interest Disclosure Act 1998***}.

Is there a Solution?

The enforcement of whistleblower protections needs to be taken out of the hands of the regulatory agency that the whistleblower has embarrassed – that is not rocket science.

If a ***Whistleblower Triage Centre*** was established to register whistleblowers and to assist them lodge formal whistleblower disclosures, such an agency would be well placed to enforce whistleblower protection laws, since the whistleblowers would not have caused that agency any embarrassment.

Also if rewards are to be provided to successful whistleblowers, then again the ***Whistleblower Triage Centre*** would not have a conflict of interests when it comes to granting awards and administered the fund from which whistleblowers across sectors are to be paid.

Recommendation #8

The enforcement of whistleblower protection laws to be taken out of the hands of the regulatory agency that is being embarrassed by whistleblowers and placed in the hands of an independent agency such as a ***Whistleblower Triage Centre*** or an employment tribunal.

Recommendation #9

Enact similar '*tiered*' disclosure provisions as provide by UK-PIDA so that whistleblowers have alternative disclosure avenues apart from the prescribed regulator who may be subject to ***Regulatory Capture***.

Summary

Under current arrangements whistleblower protection laws are not worth the paper they are written on since regulatory agencies such as ***ASIC*** are not about to protect people who have caused then embarrassment.

ASIC even admits as much.

This supports the need for '*tiered*' disclosure provisions as provide by UK-PIDA so that whistleblowers have alternative disclosure avenues apart from the prescribed regulator who may be subject to ***Regulatory Capture.***

The whistleblower protection laws included in the ***Fair Work (Registered Organisations) Amendment Act 2016*** are unlikely to be tested since an employer is unlikely to sack an employee who makes a disclosure involving misconduct by a union official.

Most whistleblowing involves employees or former employees blowing the whistle on their employer.

External whistleblowers such as , the financial analyst who blew the whistle on the **Trio Capital Superannuation Fraud**, do not require any whistleblower protection

Current whistleblower protection laws are actually worse than having none at all since whistleblowers may be tempted to rely on their private rights in seeking to enforce whistleblower protection laws and then be bankrupted in the process.

There is also a naive expectation by lawmakers that "***authorised officials***" will be paragons of virtue who will act in the ***best interests*** of whistleblowers and not in their own ***best interests***.

Large sums of money and reputations are at stake with serious whistleblower disclosures and this provides an opportunity for "***authorised officials***" to exploit if allowed to do so.

There have been no examples of regulatory agencies enforcing whistleblower protection laws but there is at least one example of a whistleblower losing $0.75 million in legal costs attempting to rely on his private rights after being sacked as a likely whistleblower.

The unfortunate reality is that Australia really is a '***paradise***' for white-collar criminals as was stated by the Chairman of ***ASIC*** who should know.

Whistleblowing is a serious business and it need to the treated as such.

The best advice anyone can give to a would-be whistleblower at the moment in Australia is just do not bother – just look at the experience of other whistleblowers.

This is what , stated before the United States Congress' House Financial Services Committee investigating the Fraud:

> *"Government has coddled, accepted, and ignored white-collar crime for too long," he testified. "It is time the nation woke up and realized that it's not the armed robbers or drug dealers who cause the most economic harm, it's the white collar criminals living in the most expensive homes who have the most impressive resumes who harm us the most. They steal our pensions, bankrupt our companies, and destroy thousands of jobs, ruining countless lives.*