

ACCC Response to QoNs: Whistleblowers Inquiry

1. Give two examples of circumstances in which enhanced whistleblower protection would improve the ACCC's capacity to do its work.

ACCC v Coles Pty Ltd and Grocery Holdings Pty Ltd [2014] FCA 1405

- In 2014 the Federal Court imposed pecuniary penalties of \$10 million against Coles for engaging in unconscionable conduct towards its suppliers.
- The ACCC experienced significant difficulty and delay during the Coles investigation due, at least in part, to the lack of adequate whistleblower protections under the *Competition and Consumer Act 2010* (Cth).

Investigative difficulties

- The ACCC received a number of anonymous complaints from supermarket suppliers alleging unconscionable conduct. The ACCC Chairman took the unusual step of making a public appeal to suppliers to come forward, giving his assurance that all approaches would be kept confidential, to the extent permitted by law.
- The information provided confidentially by suppliers, allowed the Chairman to form the requisite reason to believe to use the ACCC's compulsory information gathering powers on Coles to obtain information and documents.
- In order to maintain the Chairman's commitment to keep the identity of those suppliers that voluntarily approached the ACCC confidential, the ACCC did not use any evidence provided by them in its proceedings. Instead, the ACCC approached suppliers identified by Coles in the response to the compulsory notice and obtained fresh evidence.
- Obtaining fresh evidence was difficult and time consuming. Suppliers approached by the ACCC were very fearful to talk to the ACCC even in the context of a compulsory interview (where the supplier could say to Coles that they were compelled to cooperate) and fewer still were willing to provide affidavit evidence that the ACCC could rely on in Court. Distribution to Coles' retail stores was a significant proportion of the sales of most of these suppliers and maintaining the commercial relationship with Coles was essential to the future viability of their businesses.
- There were a number of suppliers that refused to provide affidavit evidence for fear that it would jeopardise their commercial relationship with Coles.

ACCC v Woolworths Ltd [2016] FCA 1472

- Broadly, the ACCC alleged in December 2015 that Woolworths had acted unconscionably in seeking money from its suppliers when it had no contractual right to do so under Woolworths' "Mind the Gap Scheme" (MGS).

Investigative difficulties

- The ACCC investigations were informed by confidential approaches and media references as to concerns of anonymous suppliers. Like the Coles matter, some suppliers were reluctant to assist the ACCC on the record.

Outcomes

- Justice Yates dismissed the claim that Woolworths had engaged in unconscionable conduct.

- Key aspects of his judgment include:
 - The Court was unable to have regard to 'all the circumstances' of the matter as required by the unconscionable conduct provisions of the Australian Consumer Law because of the insufficient evidence provided by the ACCC;
 - The MGS was not qualitatively different to Woolworths' typical commercial dealings with its suppliers, during which all parties intend to maximise profits;
 - Woolworths did not need a contractual or other legal right to approach its suppliers and enter into negotiations;
 - 'Asking' for payments within a short time frame did not amount to 'demanding';
 - Because the ACCC did not relate Woolworths' percentage share of grocery products sold to the products supplied by the particular suppliers, there was no basis to assume a substantial difference in bargaining power; and
 - There was no evidence that those suppliers who refused to comply with the MGS were penalised by Woolworths because of their refusal.

It can be expected that stronger whistleblower protections, of the kind discussed in response to question 2 below, would have greatly increased the likelihood of witnesses being willing to come forward and give evidence.

While the ACCC can take steps to protect confidentiality, such as public interest objections to releasing information, we are not able to guarantee potential witnesses the comfort that:

- They will not be sued for disclosing confidential information
- They will not be sued for defamation (in the event the allegations made were not found to amount to a breach of the law)
- If retaliatory action was taken against them, the ACCC is able to assist them in protecting their rights and recovering damages (e.g. for loss of income arising from a refusal to renew a supply contract).

2. What are the ACCC's views on what amendments might assist the ACCC if the proposed "whistleblower" protections in the Fair Work Registered Organisations Act were extended to apply across the economy rather than retaining their focus on registered organisations?

The ACCC considers that there are a number of elements that are essential to the creation of an effective economy-wide whistleblower scheme:

- The class of persons that can qualify for protection under the whistleblower scheme should be broad:
 - The scheme should apply to any person that provides or who proposes to provide information to a regulator or law enforcement body that could assist a government agency in its investigation of potential breaches of the law.
 - The scheme should not be limited to persons that have or have had a commercial relationship with the disclosed upon entity.
 - Protection should be linked to the type of information disclosed not the state of mind or beliefs of the discloser.
 - The scheme should apply to information provided about potential breaches of a Commonwealth or State or Territory law.
 - The scheme should not require the discloser to ensure that they provide the information to the *correct* regulator or law enforcement body before the discloser can qualify for protection.
- The scheme should protect whistleblowers from all consequential loss, including criminal and civil penalties, breach of contract, breach of confidentiality, defamation etc.
- The scheme should provide protection to whistleblowers for positive acts of retribution as well as *omissions (e.g. a refusal to renew a contract for reason of assistance being given to authorities) and threats.*
- The scheme should provide discretion for the regulator or law enforcement body to take action on behalf of the discloser.

We have provided a number of comments about the Fair Work (Registered Organisations) Act (ROA) setting out where it meets or fails to meet the above elements.

1. The class of persons that can make and the class of persons that can receive protected disclosures under the ROA are too narrow for an effective economy-wide scheme

The ROA only provides protection to a specified list of disclosers or when disclosure is made to a specified list of persons. For a whistleblower scheme to be effective for our purposes, the class of persons that can make a protected disclosure should be broadened to **any person** (regardless of their relationship to the disclosed upon entity) that provides or who

proposes to provide information to a regulator or law enforcement body that could assist a government agency in its investigation of potential breaches of the law.

This would ensure protection extended to disclosers where i. they disclose information to the 'wrong' agency and/or where ii. they disclose information relevant to the role of more than one regulatory or law enforcement body, where it could assist a government agency in its investigation of potential breaches of the law.

This is to be contrasted with the ROA, which:

- *Limits whom the disclosure can be made to:* The ROA specifies that disclosure must be made to specified people or government agencies. The ACCC considers whistleblowers should be protected regardless of the government agency they report to. The scheme should not require the discloser to ensure that they provide the information to the *correct* regulator or law enforcement body before the discloser can qualify for protection.
 - We note that the ROA provides that an official to whom disclosure is made *must* refer the matter to police if it is punishable by life or more than 2 years' imprisonment (subs.337CD(2)). The ACCC recommends such a provision be reconsidered in the event of an "economy wide ROA", noting the ACCC is the leading Commonwealth entity for investigation of cartel conduct which attracts a maximum penalty of 10 years imprisonment.
- *Requires a certain form of relationship between the discloser and the disclosed upon entity:* The ROA defines 'discloser' as either: an officer, an employee or a member of a registered organisation. While a third party may be an officer, employee or member of a registered organisation (as listed within ROA subs.337A(1)), there are likely to be many situations where this is not the case if a whistleblower protection regime expanded beyond its current focus involving registered organisations.
- *Provides protection based on the disclosers state of mind:* The ROA provides protection to whistleblowers based on whether they had 'reasonable grounds to suspect' the information they would disclose indicates a breach of the law (ROA para 337A(1)(c)).¹ This may introduce a high degree of uncertainty for potential whistleblowers on whether they will be protected if they come forward and raises the prospect of the receiving agency having to give greater weight to the discloser's state of mind in providing the information than the type / value of the information. An objective test of whether the information could assist a government agency in its investigation of potential breaches of Commonwealth, State or Territory law would give primacy to the information given.

While the level of protection afforded to whistleblowers under the ROA is much stronger than that provided under *Competition and Consumer Act* the multiple filters in place under the ROA may limit the assistance that can be obtained by the ACCC to encourage whistleblowers to come forward and to protect and support them when they do.

2. The ROA protects whistleblowers from all consequential loss

The ROA provides for civil and criminal immunity for whistleblowers who disclose information to the Fair Work Commission, Fair Work Ombudsman and other specified entities, including civil immunity for breach of contract and breach of confidentiality. The ROA provides a

¹ A similar test can be found in subs.155(1) of the *Competition and Consumer Act* in relation to the issuing of notices by the Commission, ACCC Chairperson or Deputy Chairperson, requiring persons to provide evidence on a compulsory basis. Such notices are grounded upon 'a reason to believe that a person is capable of furnishing information... relating to a matter that constitutes, or may constitute, a contravention of the Act'. Staff provide briefings to the decision maker on whether a reason to believe may be validly held prior to such notices being issued.

whistleblower that makes a qualifying disclosure with qualified privilege in respect of the disclosure in a proceeding for defamation, and is not liable to an action for defamation in the absence of malice on the discloser's part. Importantly, the ROA also provides for a broad prohibition against causing 'detriment' or 'threatening a reprisal'.

The ACCC would support inclusion of broad civil and criminal immunity and prohibition against causing detriment similar to what is set out in the ROA. This would provide greater certainty to whistleblowers that their disclosure to a law enforcement body or regulator will not make them liable for legal proceedings or subject them to retaliatory action.

This is likely to remove one of the strong disincentives for whistleblowers to come forward with information.

3. The ROA provides for the Fair Work Commission take action on behalf of the discloser

The ROA provides that the Fair Work Commission (or specified officers there in) can commence a proceeding for compensation for a discloser for detriment they may have suffered.

The ACCC considers that the ability for a regulator or law enforcement agency to take action on behalf of the discloser is highly desirable. Placing the onus on a whistleblower to successfully seek, or to even attempt to seek compensation, when they have already suffered loss as a result of retaliation is likely to be perceived as strong disincentive to blow the whistle.

The ACCC believes having the ability to seek compensation on a discloser's behalf protects whistleblowers and more strongly deters retaliation, as the likelihood of negative consequences for the disclosed upon entity is significantly higher.