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Ms Lynelle Briggs
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BY: LACA

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Dear Ms Briggs

ATO's Whistleblower Policy – inconsistency with Public Service Act requirements

Some time ago, the Australian Taxation Office changed its Whistleblower Policy and Instructions. We feel those changes either make the Policy non-compliant with the Public Service Act, or complicate and confuse the Policy so that it will have a “chilling” effect on employee’s contemplating reporting suspected breaches of the APS Code of Conduct. Our problems with it are detailed blow.

On 9 April 2008 I drew our concerns about the “scope” of the Policy (see below) to the attention of the Commissioner of Taxation in a meeting with Mr Michael D’Ascenzo, First Assistant Commissioner People and Place, Mr David Diment and the Director of Employee and Industrial Relations, Mr Michael Gaffney.

Mr Diment, who is organizationally responsible for administering the Policy, advised me that the Instructions were not adequate and that he had taken steps to correct them. But to date, Mr Diment has not rectified the problem. I therefore write to you, as I have had reason to bring similar concerns to the attention of the PSC under the previous Tax Commissioner.

I would appreciate your advice about whether you accept our analysis of the Tax Office’s whistleblower policy, and whether you could make suggestions to the Tax Office for their improvement.

I would be happy to discuss this further with you or your representative.

Yours sincerely

Jeff Lapidos

Whistleblower Documentation

The ATO's documentation is

- “Employee reporting of suspected misconduct, and the PS/Tax Office protection arrangements (Whistleblowing)”, Practice Statement PS CM 2006/08 [the “Policy”]
- “Employee reporting of suspected misconduct, and the PS/Tax Office protection arrangements (Whistleblowing)”. Corporate Management Procedures and Instructions 2006/08/01 [the “Instructions”]

Scope

Section 16 of the Act provides that an APS employee must not victimise or discriminate against an employee who reports an alleged breach of the APS Code of Conduct to the Agency Head. Public Service Regulation 2.4 obliges the ATO to have procedures dealing with such reports and related matters.

The ATO Instructions limit the scope of employee reporting.

Firstly:

“4. Employee reporting does not cover all situations of possible inappropriate behaviour that may be observed by an employee. The following would not be considered employee reports:

• an employee complaint or grievance seeking a review of an administrative decision, and

• a complaint or disagreement about government or Tax Office policy.”

A particular request for review of action may not specify that it seeks whistleblower status or clearly or by necessary implication include a statement that another employee may have breached the APS Code of Conduct. But if the request for review does, at least by necessary implication, allege a suspected breach of the APS Code of Conduct, then the ATO's whistleblower policy should apply if the request for review of action is provided to an authorized officer. For example, the request for review may allege that another employee has flagrantly misused their personal information in contravention of the Privacy Act. There is a possibility that the employee could be victimised for doing so. The form of the particular complaint should not be a reason for avoiding the protection of a whistleblower report.

Secondly:

“5. Where the employee making the report is directly affected or linked to the conduct being reported, the report would not generally be taken to be employee reporting. In this instance the employee would normally report the wrongdoing through their manager. Alternatively they could approach Fraud Prevention & Control or ATO concern,”

It is very hard to understand what objective the ATO is seeking here. Employees who are personally affected by wrongdoing are the obvious source for whistleblower complaints, and the most likely to be identified and subsequently victimized. The Whistleblower Protections is intended to protect these very people. Yet the protections of section 16 are seemingly denied them.

Thirdly:

“6. Generally when an employee’s team leader identifies suspected misconduct during the course of normal business, the reporting of this alleged misconduct is not considered employee reporting. It would be reviewed under the Managing Conduct- ATO Procedures for determining breaches of the Code of Conduct.”

We do not agree with paragraph 6 that a team leader who reports a suspected breach of the Code of Conduct is ineligible for whistleblower protection. This proposition leads to the ludicrous inference that employees are free to victimize the team leader for making the report. Individual team members may have friends and allies in influential positions or who may be in a position to victimize or discriminate against the team leader. Team members may resent a report being made against one of their team and seek to victimize the team leader through subtle forms of harassment. Managers should be eligible for whistleblower protection in the circumstances outlined in para 6 of the ATO Instructions, provided their report is received by an authorized officer.

Authorised Persons

Under the heading, ‘Key Roles and Responsibilities’, the Policy provides that certain categories of Tax Officer are authorized to receive whistleblower reports, including Commissioners/SES, Health and People Management Unit, ATO Concern, Fraud Prevention and Control (NB this area is now known as ‘Internal Assurance’).

If it is the case, as we argue above, that the scope of the procedures is too narrow, then the issue arises as to whether the categories of authorized persons are also too narrow. We propose that Directors at the EL2 level ought to be authorized to receive whistleblower reports so it is more practicable for whistleblowers to make a report to an authorized person.

Knowing the outcome

Public Service Regulation 2.4(2)(a) provides that whistleblower procedures should have due regard to procedural fairness. The question then is whether the whistleblower is entitled to be informed of the outcome of their complaint. Regulation 2.4(2)(g) seems to assume that this must be so. But the ATO Instructions provide: “9. ... *There is no obligation to advise the employee reporting suspected misconduct of the actual outcome of any subsequent investigations into the misconduct action.*”

We are aware that the ATO practice is to refuse to reveal actual outcomes. This means that whistleblowers must trust the Agency to do the right thing in response to their report. The alternative is to report to the PSC or MPC that they are dissatisfied with the outcome because they do not know what the outcome is. We see this ATO practice disempowering whistleblowers, keeping them uninformed as to the outcome of the investigation and creating a culture which dissuades the making of whistleblower reports.

We ask that you advise the ATO to amend their policy documents to ensure whistleblowers are advised of the outcome of the investigation of their report.

An obligation to report suspected breaches of the Code?

What is the evidence for the statement in paragraph 1 of the ATO Policy, that ATO employees “*have a statutory and ethical obligation to report suspected ... misconduct*”?

We think that this statement overstates the contractual obligations of employees and their statutory obligations. It seems to mean that an employee has breached the Code of Conduct if they fail to make a formal report each time they suspect that another employee may not be complying with the Code. The proposition leads to silly theoretical consequences, for example the idea that if an employee shouts in the office, every other officer in earshot is obliged to make report, and could be disciplined for not doing so.

Similarly, is it the case that ATO employees “*must support the reporting of suspected misconduct*”? [para 3 of the ATO Policy] Perhaps it is not so much a question of “support” (the other employee may disagree that the conduct is inappropriate), but rather “not obstruct the reporting of suspected misconduct”.

Paragraph 12 also says: “*Employees must report suspected fraud or misconduct that is not in the public interest to an authorised person.*”

Does this mean the ATO Policy is that its employees do not have to report suspected fraud or misconduct that is in the public interest? What is suspected fraud or misconduct that is in the public interest? How can employees reasonably tell the difference? Should the words “that is not in the public interest” remain in the policy? We submit not, subject to our concern about whether there is an obligation to report.

Management accountability

One of the purported protections in paragraph 8 of the Policy is “*the Tax Office's corporate governance program (which holds management accountable for the promotion of an harassment-free workplace)*”.

ATO employees are not told of the detail or outcomes of the governance program. It is not clear whether the governance program holds senior management personally accountable for failures to implement section 16.

We do not see how this purported protection is real. If it is, the ATO should explain how this is so.

Need to know

Paragraph 8 of the Policy also mentions that the names of whistleblowers will “*be kept confidential on a ‘need to know’ basis where practicable*”. The problem is “where practicable”. These words will automatically give rise to the suspicion in the minds of potential complainants that ATO management will not be bound to keep their complaints confidential. For example, does this mean that there are occasions when the ATO will release the name of the whistleblower to people who do not need to know the name? Is the alleged wrongdoer one of the persons who has a ‘need to know’? As it stands, this statement does not give comfort to potential whistleblowers.

Protection for all whistleblowers

The diagram of the process in paragraph 16 of the Policy raises the question of the protection of an employee who reports suspected misconduct in good faith, but the ATO decides that there is no case to investigate. This might occur if the questioned conduct would not be contrary to the Code even if the alleged facts were true.

Should the reporting employee be entitled to the protections of section 16? There is certainly a possibility that the employee reported on may feel aggrieved that their conduct has been questioned by another, especially if the allegation was without lawful foundation. That is, there is the potential for victimization of an employee who makes an honest but mistaken report. It seems to us that the section 16 protection is provided to all persons who provide reports, provided the report is not vexatious or frivolous. We seek a correction of this aspect of the Policy.

An obligation to investigate

We submit the Policy and the Instructions do not make it sufficiently clear that all whistleblower reports that are not vexatious or frivolous must be investigated. We are also concerned that it is not sufficiently clear who has the responsibility to investigate.

Regulations 2.4(2)(d) and (e) provides that the agency must investigate a report unless it is considered frivolous or vexatious.

The ATO Policy does not so specify and the process chart in paragraph 16 seems to indicate that some reports may not be subject to ‘formal investigation’ regardless of whether they are frivolous or vexatious. The reference to ‘an inquiry’ into the employee report differs from the statutory requirement to investigate, and seems to throw light on the meaning of ‘formal investigation’ in the para 16 process.

Dealing with the findings of the investigation

The ATO Policy does not implement Regulation 2.4(2)(h) that findings of an investigation are dealt with as soon as practicable.

The Policy is confusing by defining “Investigation” as part of the formal process of determining whether an employee has breached the Code, rather than as the process of deciding whether there are matters of concerns arising out of the employee’s report.

We submit this section of the Policy requires reconsideration so it complies with the Regulations.

Primary complaints to PSC / MPC

The ATO policy does not implement Public Service Regulation 2.4(2)(c) (although the Regulation is noted in the “Context” of the Policy). The Policy seems to contradict the Regulation by stating that “• *once the decision is made whether or not to invoke the procedures for determining suspected breaches of the Code of Conduct, the inquiry under these procedures is complete.*” (page 3)

This aspect of the Policy requires reconsideration.

Review by PSC / MPC

Regulation 2.4(2)(g) provides that the ATO policy should enable an employee who is not satisfied with the outcome of an investigation to refer the report to the PSC or MPC. Whilst the “Context” of the Policy mentions the Regulation in passing, the Policy only provides that the ATO will inform employees of their right to seek review to the PSC or MPC in the event that the ATO decides not to investigate the compliant. It should make clear whistleblower’s right to make a reference to the PSC/MPC.