Australian Government
Workplace Ombudsman

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Submission No 69

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M.R.

By post and email

Dear Members of the Committee

Submission of the Office of the Workplace Ombudsman to the Inquiry into whistleblowing protections within the Australian Government sector

I refer to the above.

The House of Representatives Standing Committee on Legal and Constitutional Affairs ('the Committee') has been directed to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector ('the Inquiry').

On 29 September 2008, the Office of the Workplace Ombudsman was invited to make a submission to the Committee on the issues raised in the Committee's terms of reference and:

- the possible role of the Workplace Ombudsman in protecting a person who makes a disclosure;
- how protection from victimisation, discrimination and harassment and prejudicial alteration to a person's employment or contractual arrangements might be best achieved and how assistance might be provided and rights enforced; and

- any necessary legislative changes to achieve any outcomes identified.

I thank the Committee for this invitation and provide the following comments which I hope may be of assistance.

About the Office of the Workplace Ombudsman

The Office of the Workplace Ombudsman is a statutory office established under Part 5A of the *Workplace Relations Act 1996* ('WR Act') and headed by a statutory office holder (together – the 'Workplace Ombudsman'). The Workplace Ombudsman commenced operations in its current form on 1 July 2007. Prior to becoming a statutory office, the Workplace Ombudsman was known as the Office of Workplace Services ('OWS'). Between 27 March 2006 and 30 June 2007, the OWS was an Executive Agency of Government. Prior to 27 March 2006, the OWS was a part of the Department of Employment and Workplace Relations as it was known at that time.

The functions of the Workplace Ombudsman are prescribed in section 166B of the WR Act and include:

- assisting employees and employers to understand their rights and obligations under Commonwealth workplace relations legislation;
- promoting and monitoring compliance with Commonwealth workplace relations legislation and industrial instruments;
- investigating complaints or suspected contraventions of Commonwealth workplace relations laws;
- undertaking litigation to enforce Commonwealth workplace relations legislation; and
- representing employees who are, or might become, a party to proceedings.

The Workplace Ombudsman ensures compliance with workplace relations laws, awards and agreements in a number of ways, for example, by conducting investigations into individual complaints or suspected breaches of industrial instruments or the WR Act. The Workplace Ombudsman also conducts targeted compliance and education activities, usually focussed on particular industries or geographical areas.

The Workplace Ombudsman appoints Workplace Inspectors who are empowered under the WR Act to investigate and enforce compliance obligations under Commonwealth workplace relations laws.

Whistleblowing

Specific whistleblower protection legislation has already been passed in a number of Australian jurisdictions.[1] A range of whistleblower protections has also been enacted in the areas of corporate law, workplace relations law, consumer law, financial regulation and anti-discrimination law.[2] Whilst no common legal definition of whistleblowing exists, a common definition in the literature 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'.[3]

The proper ambit, form and objective of whistleblower protections, however, has been the subject of debate in Australia for some thirty-odd years. The task before the Committee of advising on the best model for a public sector whistleblower protection scheme at the Federal level involves resolving a number of tensions. Principally, it involves determining on the one hand how best to reap the benefits of maximal public interest disclosure as a bulwark against public sector corruption, malpractice, cover-ups and criminal activity, and to help ensure the transparent and ethical governance and informed public that are a precondition to a flourishing democracy. This involves ensuring a wide range of disclosures are protected and that there exist strong sanctions against an organisation taking reprisals against those who make such disclosures.

On the other hand, the task requires ensuring the ambit of protection is not so wide as to dilute the effectiveness of the protection and render it open to abuse. This involves ensuring only genuine public interest disclosures are protected and the protection does not extend to individual workplace and personal grievances.

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[1] For example, see *Whistleblowers Protection Act 1994* (QLD); *Protected Disclosures Act 1994* (NSW); *Whistleblowers Protection Act 2001* (Vic).
[2] Eg, see *Corporations Act 2001* (Cth), *Public Service Act 1999*; see also Paul Latimer and A. J. Brown, *Whistleblower Laws: International Best Practice* (2008) 31 (3) *UNSW Law Journal* 766 at 766.
[3] T.M. Dworkin & Morehead, 'Whistleblowing, MNCs and Peace', William Davidson Working Paper Number 437, February 2002, p3 as quoted in Anne Trimmer, 'Whistleblowing: What it is and what it might mean for incorporated legal practices' *Law Society Journal (NSW)* (2004) 42 (1) LSJ at 66.

This submission addresses the role the Workplace Ombudsman and Commonwealth workplace relations protections play and might play in protecting whistleblowers.

International best practice suggests that whistleblowing protections should:

- Promote internal disclosure to the employer in the first instance;
- Provide for persons or agencies independent of the employer or government to whom disclosures can be made such as Ombudsmen;
- Be supported by workplace relations protections against reprisal for having made a public interest disclosure. [4]

Whistleblowing and the role of the Workplace Ombudsman

The WR Act contains protections which may have the effect of protecting those who make public interest disclosures from certain forms of reprisal by their employer, albeit in very limited circumstances. These protections apply equally to the private and public sectors.

For example, the unfair dismissal provisions of the WR Act prohibit an employer from dismissing an employee in a way which is harsh, unjust or unreasonable in all the circumstances.[5] Dismissal for having made a public interest disclosure may amount to unfair dismissal in some circumstances. However, not all employees are protected by unfair dismissal laws and the disclosure of confidential information may of itself provide a valid reason for dismissal in some situations.

The unlawful termination provisions may provide a remedy where an employee or independent contractor is terminated for filing a complaint or participating in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.[6] However, this protection only extends to complaints made to external bodies with the right capacity, that is, a court, tribunal, or recourse to 'competent administrative authorities'. The term 'competent administrative authorities'

[4] See Paul Latimer and A. J. Brown, 'Whistleblower Laws: International Best Practice' (2008) 31 (3) *UNSW Law Journal* 766 at 766.
[5] See Part 12, Division 4 of the WR Act.
[6] See s659(2)(e) of the WR Act; see also Joe Catanzariti, 'Blowing the whistle on the private sector', (2004) 42 (11) *Law Society Journal* (NSW) 44 at 45 for a discussion of whistleblowing and s170CK(2)(e) of the WR Act, the predecessor provision to s659(2)(e).

remains little tested and employees who complain to the wrong body will not be protected against reprisal from their employer.[7]

The freedom of association provisions in Part 16 of the WR Act also have the potential to provide some protection in a narrow range of circumstances, for example where a union member is discriminated against in his or her employment for being dissatisfied about his or her conditions or for furthering the industrial interests of his or her union.[8] Matters of this nature will not normally be of the kind to constitute a public interest disclosure, the provisions being directed largely toward industrial disputes and the realisation of industrial entitlements. However, such matters may enter the realm of public interest matters if the disclosure concerns industrial issues which are systemic, industry-wide or also corrupt or criminal in nature. Whilst providing some protection against reprisal, the freedom of association provisions do not authorise the disclosure of confidential information or protect the person making the disclosure from civil liability.

Workplace Inspectors may investigate any of the above breaches of the WR Act but they do not have standing to file proceedings in relation to unfair dismissal or unlawful termination claims.

It is for these reasons that current workplace relations protections and the Workplace Ombudsman have the potential to play only an ancillary role in protecting public interest disclosures.

Changes to workplace relations protections

The Committee may wish to consider how any Federal whistleblower model may interact with workplace protections under the workplace relations changes proposed by the *Fair Work Bill 2008* ('the Bill'), which is intended to replace the WR Act. The Bill is currently before the Australian Senate.

Proposed Division 3 – 1, for example, contains workplace rights provisions which are broader than the current freedom of association protections. Proposed section 340 prohibits a person from taking adverse action against another person because the other person has a

[7] See *CSR Viridian Limited (formerly Pilkington Australia Limited)* v *Claveria* [2008] FCAFC 177 (30 October 2008), one of the few decisions to consider the ambit of the term.
[8] See, for example, Wilcox J's discussion of the application of the former freedom of association provisions to a bank employee/ union representative who was disciplined for making comments to the media about problems in the banking industry in *Finance Sector Union of Australia v Australia and*

workplace right or has or has not or proposes to or proposes not to exercise a workplace right. The term 'workplace right' is defined broadly to include where a person is able to make a complaint or inquiry in relation to his or her employment as well as rights arising from industrial entitlements.[9] The term 'adverse action' is also defined broadly.[10]

Under the planned changes outlined in the Bill, Workplace Inspectors and the Workplace Ombudsman would be replaced by Fair Work Inspectors and the Fair Work Ombudsman. Fair Work Inspectors would have standing to issue proceedings in relation to breaches of the workplace rights provisions.

Whilst the proposed workplace rights provisions may provide more protection against reprisals taken against persons who make public interest disclosures than the current freedom of association provisions, they are not designed, or adequate, for this purpose. For example, workplace rights arise out of workplace entitlements and complaints about an individual's own employment. Matters of corruption, malpractice and the like may not fall into this category if they do not relate to workplace entitlements or the whistleblower's own employment. Further, the workplace rights protections do not provide immunity against civil liability for breach of contract due to disclosing confidential information. Hence the Fair Work Ombudsman, like the Workplace Ombudsman, is likely to play only a peripheral role in protecting public interest disclosures.

Recommendations

It is recommended that in developing any federal model for whistleblower protection regard be given to the following:

1. the ancillary role of workplace protections. The current and proposed workplace relations provisions protect public interest disclosures in only very specific circumstances;

2. international best practice suggests a dedicated external body or bodies is/are necessary to receive whistleblower complaints. This submission concurs with that of the Office of the Commonwealth Ombudsman that the Commonwealth Ombudsman or the Australian Public Service Commission is well placed to serve such a role.

New Zealand Banking Group Ltd [2002] FCA 631 (17 May 2002); see also 'Freedom of speech and employees: a new application for section 298K?' (2002) 8(7) *Employment Law Bulletin* 57.

[9] See clause s341(1) of the Bill.

3. complaints about public interest matters made to bodies like the Workplace Ombudsman, however, ought to engage the same whistleblower protection as complaints made to the external agency who is to deal with such complaints under the proposed Scheme. This will ensure that whistleblowers are protected from reprisal for having made a public interest disclosure, regardless of whether it was made to the correct body in the first instance.

Should you have any questions regarding the above, please contact me on 03) 9954 2902 or at michael.campbell@wo.gov.au.

Yours faithfully,

Michael Campbell
EXECUTIVE DIRECTOR – EXTERNAL AFFAIRS BRANCH
WORKPLACE OMBUDSMAN
9 January 2009

[10] See clause s342(1) of the Bill.