

Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
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Dear Committee Secretary

Submission to the Inquiry into Whistleblowing Protections in the Australian Government Public Sector

This submission is made on behalf of the Australian Council of Trade Unions ('ACTU').

First, we would like to support the submissions made by our affiliate unions and State councils: the ANF, ASU, CPSU, MEAA, and QCU.

Secondly, we would like to raise one further specific issue for the Committee's consideration.

Disclosure of Information to, and by, Trade Unions

Trade unions often receive information from their members (or from non-members) relating to the affairs of their employer. Examples include:

- complaints about management decisions (either decisions affecting individual employees or decisions affecting groups, such as the introduction of new workplace policies);
- concerns about planned business changes (mergers, restructures, redundancies);
- reports of difficulties at work (for example, related to the introduction of new technologies).

When unions receive these reports, they typically raise the matter with management. However, in some circumstances, the matter cannot be resolved through negotiation. This includes cases where management simply refuses to deal with the union. In these cases, unions typically wish to:

- report the problem to other members at the workplace (for example, through a posting on the union noticeboard at work);
- report the problem to other members at other workplaces (for example, through an article in the union bulletin);
- discuss the problem with other unions or the ACTU; and/or
- publish the report in the public domain, with a view to exposing the practice in question and/or convincing management to reverse or alter its decision (or to consult with unions and employees, etc).

In our view, each of these activities is a legitimate activity of a trade union in a democratic and open society. The disclosure and discussion of the problem in question is in the public interest, on either or both of the following grounds:

- *Direct public interest*: where the decision or practice in question is so questionable that it ought to be revealed, in the public interest; or
- *Indirect public interest*: where the decision or practice in question affects the members' interests, and where there is a public interests in the members being able to pursue their collective interests in the public domain.

In relation to this second public interest ground, we submit that it is almost *always* in the public interest that members are able to prosecute their collective interests in the public domain (provided they have first attempted to raise the issue with management), considering that:

- There is an internally-recognised worker's right, and public interest, in members being able to act collectively to pursue common ends;
- If members were restricted to pressing their claims upon their employer, and could not discuss their grievances in public, their right to act collectively would be rendered nugatory; and
- In a democratic society, it is important that workers are able to freely discuss important matters that affect them at work, and to freely criticise their employer's decisions. This right to free speech is particularly important in relation to public sector employers, but also in relation to large private sector employers who wield considerable economic power in the community.

Unfortunately, the law of Australia does not currently protect this important public interest in workers' or unions' disclosure of information about working conditions.

First of all, if employees pass information about their workplace onto their union:

- they may be in breach of their contracts of employments, which may result in disciplinary action including dismissal (and/or which can be enforced through injunctions and damages);¹
- if a workplace agreement applies and contains a confidentiality obligation – they may be in breach of the agreement, which may result in a penalty of up to \$6,600;²
- if the information is protected by statute (eg government information³) – they may be in breach of the statute, which may be punished by fines or imprisonment. A public servant may also be liable to the government under the tort of misfeasance in public office, which can be 'punished' through the award of exemplary damages;

¹ See also *Public Service Act 1999* (Cth) ss 13(6) and 14.

² See *Workplace Relations Act 1996* (Cth) s 719.

³ See, eg, *Crimes Act 1914* (Cth) s 70.

- if the information is ‘confidential’ – they may be liable for a breach of confidence, which equity will remedy through injunctions and damages;
- if the information is not correct (even if by accident) – they may be liable under the torts of defamation (although corporate employers cannot generally sue under this tort⁴) and/or negligent misstatement, the remedy for which is damages;
- if the worker made the disclosure in order to stop their employer from dealing with a third party – they may be liable under the tort of interfering in contractual relations; and
- if the worker warned their employer they were going to speak to their union – they may be liable under the tort of intimidation; and
- if the worker acted collectively with other workers – they may be liable under the tort of conspiracy.

Secondly, if a union passes this information on to a third party, then:

- the union may be liable as a co-defendant to any of the tort claims above;
- the union may be liable as an accessory to any of the crimes or statutory breaches above; and
- if the information is not correct (even if accidentally)– the union may be liable to compensate an injured person under the statutory (strict liability) prohibition upon misleading and deceptive conduct,⁵

To our knowledge, no reported Australian case has directly dealt with the question of whether there is a defence (on public interest grounds) to these torts and offences in cases of disclosure of information about an employer to, or by, a trade union.⁶ The only recorded statement made by a superior court on the matter, obiter dicta, is that:

it may well be that the publication of a trade union or trade association journal to members of organisations responsible for advancing and protecting the interests of those members is published on an occasion of qualified privilege [to the tort of defamation].⁷

On the other hand, many cases have noted that defences to tortious conduct on public interest grounds ‘rarely succeed’.⁸

In light of the absence of any express defence at common law for disclosures to, or by, a trade union, we submit that it is appropriate that the government consider establishing a statutory protection for employee disclosures to trade unions where:

- the disclosure is made by a member of a trade union (or a person eligible to become a member); and
- the information disclosed relates to the person’s working conditions.

There should also be a statutory defence for trade union disclosures of information where:

- the information has been obtained in a lawful manner (including through an authorised employee disclosure, as proposed above);

⁴ See, eg, *Defamation Act 2005* (Vic) s 9.

⁵ Eg *Trade Practices Act 1976* (Cth) s 52.

⁶ Cf cases involving communications to members about the union’s internal affairs: *Hay v Australasian Institute of Marine Engineers* (1906) 3 CLR 1002.

⁷ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, [42] (McHugh J).

⁸ *Builders Workers’ Industrial Union of Australia v ODCO Pty Ltd* (1991) 29 FCR 104, [115].

- the disclosure is made for the purposes of advancing the interests of the union's members; and
- it was reasonable to disclose the information (having regard, for example, to whether the trade union attempted to resolve the matter in private discussions with the employer).

It appears that it is within the Terms of Reference for the present Inquiry to support these recommendations in relation to disclosures about working conditions in the Australian public service.

Further, if the Committee were convinced of the merits of these statutory protections, we would urge it to recommend to the Attorney-General and the Minister for Employment and Workplace Relations that similar statutory protections be enacted for *all* employees and trade unions operating within the federal industrial relations system.

We will raise this proposal separately with State and Territory governments in relation to employees who fall outside the federal industrial relations system.

We thank the Committee for the opportunity to make a submission to the Inquiry. If you have any queries, please do not hesitate to contact me on _____ or by email at _____.

Yours sincerely

Joel Fetter
Legal & Industrial Officer