



# A new era?

## Whistleblower protections in Australia

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“Nobody in Australia much likes whistleblowers...” (attributed to former NSW Police Commissioner Tony Lauer)<sup>1</sup>

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2017 could prove to be a landmark year for a previously neglected aspect of Australian workplace law. Where those who blew the whistle on corporate or public sector wrongdoing once faced retribution without legal protections, recent developments have underscored the need to comprehensively safeguard whistleblowers in this country. While the sentiment expressed by former NSW Police Commissioner Tony Lauer in the 1990s may still reflect the prevailing attitude in Australian workplaces, change is afoot.

Late last year, in a political deal between the Coalition and crossbenchers to pass the double

dissolution trigger legislation, strong protections for union whistleblowers were introduced. As part of the pact, the government also agreed to review public and private sector whistleblower protections with a view to enacting reform by 2018. In January 2017, the first ever case under whistleblower provisions in the *Corporations Act 2001* (Cth) was filed against Origin Energy by their former compliance lawyer.<sup>2</sup> If the applicant is successful, the implications for corporate Australia will be far-reaching. Elsewhere, the *Public Interest Disclosure Act 2013* (Cth) — although far from perfect — has helped facilitate the reporting

of public sector misfeasance and corruption by federal mandarins since coming into force in 2014.

Improvements in this vexing field will inevitably be slow and controversial. It took two decades, six parliamentary inquiries, and a number of unsuccessful bills before the *Public Interest Disclosure Act* was finally passed. But with apparent domestic political will for greater whistleblower protections and impetus from developments in foreign jurisdictions, there is room for optimism — and a need for external lawyers and in-house counsel alike to be aware of the regulatory landscape.

This article will begin by exploring the history of whistleblower protections in Australia, before considering three relevant laws which protect whistleblowers in different sectors. It will then consider the strategic utilisation of whistleblower



legislation in employment litigation and the potential applicability of foreign laws to Australian whistleblowers, before concluding with a discussion of expected developments in the coming years.

## Background

In 1972, American political activist Ralph Nader described whistleblowing as “an act of a man or a woman who believing in the public interest overrides the interest of the organisation he serves, and publicly blows the whistle if the organisation is involved in corrupt, illegal, fraudulent or harmful activity”.<sup>3</sup> At around the same time, the concept began to enter the Australian political lexicon with the Coombs Royal Commission into Australian Government Administration producing discussion papers on whistleblower protections.<sup>4</sup>

The first dedicated statute in this country to protect whistleblowers was introduced in 1993 by the South Australian parliament, aptly-named the *Whistleblowers Protection Act*. Similar legislation soon followed in New South Wales and the Australian Capital Territory, and by 2003 every state had laws to protect public sector whistleblowers (the Northern Territory, though, did not pass its legislation until 2008).<sup>5</sup> At the federal level, efforts to introduce equivalent laws failed — notwithstanding numerous parliamentary committees and three separate unsuccessful bills. While the *Public Service Act 1999* contained narrow protections for Australian Public Service employees who reported breaches of the ‘APS Code of Conduct’ by other public servants, these hardly mirrored the protections at state level.

Nor did the common law provide much assistance for whistleblowers. Employees typically have express and implied limitations on their ability to disclose information relating to the employer. In the 1981 case of *Allied Mills Ltd v Trade Practices Commission*, Sheppard J offered that “the public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will *always* outweigh the public interest in the preservation of private and confidential information”.<sup>6</sup> But the High Court quickly withdrew from this approach, with Gibbs J holding three years later it was “too broad a statement unless ‘iniquity’ is confined to mean serious crime”.<sup>7</sup> Thus a 1993 report from the Senate Select Committee on Public Interest Whistleblowing noted bluntly: “[it cannot be said] that the dicta [in such cases] have provided any degree of certainty in the law for whistleblowers”.<sup>8</sup>

## *Public Interest Disclosure Act*

Given this tortured history, the 2013 passage of the federal *Public Interest Disclosure Act* was a momentous occasion. As independent MP Andrew Wilkie, a former whistleblower himself, commented during the second reading speech: “Those that would blow the whistle need to know they are doing the right thing and will ultimately be protected from reprisals. In essence, I think this bill does achieve that”.<sup>9</sup>

The scheme facilitates the making of disclosures by public servants and contractors to authorised internal recipients and, in certain circumstances, even external recipients (defined — in the interests of national security no doubt — as ‘any person other than a foreign



public official').<sup>10</sup> A disclosure qualifies under the statute when the discloser discloses information which they have reasonable grounds to believe shows disclosable conduct.<sup>11</sup> Disclosable conduct is broadly defined, including corruption, maladministration, contravention of Commonwealth, state or territory laws, abuse of public trust, wastage of public funds, conduct that endangers the environment and conduct that, if proved, would result in disciplinary action against the public official.<sup>12</sup> The legislation mandates certain investigation and reporting mechanisms, and imposes confidentiality requirements to ensure the identity of the discloser is protected.

It then provides a shield and a sword. Disclosers have immunity from civil, criminal and administrative liability for making disclosures, including absolute privilege in defamation proceedings.<sup>13</sup> The *Public Interest Disclosure Act* also makes it a criminal offence to take or threaten to take a reprisal against the discloser,<sup>14</sup> with reprisals including any detriment or disadvantage imposed upon the discloser (whether by act or omission) due to their making of the disclosure.<sup>15</sup> Where such reprisals are taken, disclosers can commence proceedings in the Federal Court or Federal Circuit Court seeking compensation.<sup>16</sup>

### *Corporations Act*

Introduced in a 2004 amendment, Part 9.4AAA of the *Corporations Act* was intended “to encourage people within companies, or with special connections to companies, to alert the [Australian Securities and Investments Commission (ASIC)] and other authorities to illegal behaviours”.<sup>17</sup> If 1) a current

officer, employee or contractor of a corporation 2) makes a disclosure to ASIC, the corporation’s auditor, an officer or senior manager or a person otherwise authorised by the corporation to receive disclosures, 3) the disclosure is *not* made anonymously but 4) is made in good faith and 5) the discloser has reasonable grounds to suspect that the corporation, an officer or employee has or may have contravened corporations legislation, the discloser qualifies for protection.<sup>18</sup> As that 78-word sentence demonstrates, this protection is not earned lightly!

Where a discloser satisfies these criteria, they receive complete immunity for civil or criminal liability relating to the making of the disclosure.<sup>19</sup> This expressly extends to contractual and other remedies which might otherwise bar the disclosure, such that a corporation could not sue for breach of confidentiality (in equity or contract) if an employee makes a qualifying disclosure to ASIC. The statute also permits a court to order reinstatement if an employer purports to terminate a discloser following the making of a qualifying disclosure. Moreover, the *Corporations Act* prohibits the taking — and threatened taking — of detrimental actions against the discloser, thereby prohibiting victimisation.<sup>20</sup> The legislation then introduces compensation for victims of contraventions of the preceding sections, and also imposes confidentiality requirements.<sup>21</sup>

Notwithstanding this seemingly robust mechanism for whistleblower protection in the private sector (at least so far as those working for corporations are concerned), its practical implementation has been widely criticised. A 2014

report by the Senate Economics References Committee noted that “[o]verwhelmingly, those witnesses who addressed the issue of Australia’s corporate whistleblower framework were of the view that reform was needed”.<sup>22</sup> The narrow definition of whistleblower, the lack of a requirement for companies to maintain internal disclosure processes and the absence of a mandated role for ASIC in protecting whistleblowers were amongst the complaints. That the recently-initiated Origin Energy dispute is the first case in Australia to litigate Part 9.4AAA since its inception in 2004 is indicative of the legislation’s practical ineffectiveness.

### *Fair Work (Registered Organisations) Act*

To turn to the final piece of legislation for consideration, 2016 amendments to the *Fair Work (Registered Organisations) Act 2009* (Cth) — due to come into force shortly — bolstered existing whistleblower protections for union officials. The revised scheme’s coverage is conceptually not dissimilar to that under the *Corporations Act*, albeit considerably broader in applicability. It protects current and former officers, employees, members and contractors of unions when they make a good faith disclosure (either themselves or via a lawyer) to various specified individuals or institutions on the basis of reasonable grounds for suspicion that the union, officer or employee has or may have contravened a law of the Commonwealth.<sup>23</sup>

The *Fair Work (Registered Organisations) Act* prohibits victimisation of protected disclosers, introducing civil and criminal

offences for taking or threatening to take reprisals. The amendment expands the potential remedies available to a whistleblower to include compensation, an apology, reinstatement, an injunction and even exemplary damages.<sup>24</sup> Courts can also make orders against those who fail to fulfil a duty to protect a discloser.<sup>25</sup> Those entitled to bring proceedings under the statute now includes the Fair Work Ombudsman and the newly-created Registered Organisations Commissioner, in addition to the whistleblower themselves.<sup>26</sup>

Of the numerous changes from the legislation's previous iteration, three deserve particular attention. The ability to make a disclosure through a lawyer is a welcome development, allowing whistleblowers to remain anonymous. The basis for a disclosure has also expanded considerably, from suspicions of a breach of the *Fair Work Act* or *Fair Work (Registered Organisations) Act* to now any laws of the Commonwealth. Finally, the extension of the orders a court can make — including the availability of exemplary damages — sets the tone for legislation that should be implemented to the benefit of the whistleblower. While these changes are too recent to permit analysis of their efficacy, the amendment's design should be applauded.

### Strategic use in employment litigation

On one hand, it may seem foolhardy to comment on the strategic utilisation of whistleblower protections in employment litigation when not one substantive

decision has been delivered under the *Public Interest Disclosure Act*, whistleblower aspects of the *Corporations Act* or the *Fair Work (Registered Organisations) Act*.<sup>27</sup> But as every lawyer knows, judicial pronouncements are only the tip of the litigious iceberg. Even if the lack of case law casts uncertainty on operation of these whistleblower schemes, which can be off-putting for potential litigants, they can nevertheless be powerful strategic tools in employment disputes.

In our experience, a whistleblower reprisal action is often brought as one element of a broader employment claim. The poor treatment of an employee who discloses wrongdoing usually gives rise to industrial remedies beyond solely those contained in dedicated legislation — for example, if the reprisal takes the form of termination, unfair dismissal relief is typically available. The case currently before the court involving Origin Energy, meanwhile, has three prongs: breach of contract, *Fair Work Act 2009* (Cth), and the *Corporations Act* whistleblowing claim.

Additionally, disclosures made under the *Public Interest Disclosure Act* constitute the exercising of a workplace right for the purposes of the *Fair Work Act*.<sup>28</sup> Federal public servant whistleblowers are thus given two avenues for seeking redress if they suffer retribution: the reprisal provisions under the *Public Interest Disclosure Act* or the *Fair Work Act*'s adverse action mechanism. While they cannot pursue both,<sup>29</sup> this legislative quirk offers tactical flexibility in pursuing an employment claim.

Where a whistleblowing claim is brought alongside other proceedings, the question of costs can take on

strategic significance. Since the Full Court of the Federal Court's definitive judgment in *Melbourne Stadiums v Sautner*, it has been confirmed that statutory costs protections also 'cover' common law claims when brought in the same proceedings.<sup>30</sup> It is in this context that the federal *Public Interest Disclosure Act* offers a noteworthy advantage, and this feature was recently copied by the *Fair Work (Registered Organisations) Act*. While the *Corporations Act* is an adverse costs jurisdiction, and previously the *Fair Work (Registered Organisations) Act* operated on a no-cost basis, section 18 of the *Public Interest Disclosure Act* protects applicants from adverse costs orders but *not* respondents.<sup>31</sup> The Explanatory Memorandum explained: "For a respondent party, it is intended that the [Court] could exercise its ordinary jurisdiction to award costs".<sup>32</sup> Section 337BC of the newly-amended *Fair Work (Registered Organisations) Act* has the same effect.

The strategic advantage of this unusual costs protection is dulled somewhat by the identity of the respondent in *Public Interest Disclosure Act* cases: the deep-pocketed Commonwealth. However, should this scheme be applied more widely in future whistleblowing reform, as its introduction to the *Fair Work (Registered Organisations) Act* suggests, it will become particularly shrewd to plead a whistleblower claim in combination with other employment claims.

## Application of foreign protections in Australia

In light of the relative underdevelopment of Australian protections, whistleblowers and their advisers should also be cognisant of the potential application of foreign laws. The most notable example is the United States of America, where a range of legislative schemes exist to protect, empower and reward whistleblowers. In addition to providing some of the strongest and most lucrative whistleblower protections around the globe, these American laws also have broad extra-territorial reach. The reporting of corporate misdeeds occurring in Australia, or taken by an Australian company in a third jurisdiction, can therefore potentially be protected by United States law.

This state of affairs was highlighted last year by the Securities and Exchange Commission (SEC), America's corporate watchdog, paying USD\$3.75 million to an Australian who had blown the whistle on alleged misconduct at BHP Billiton.<sup>33</sup> The *Sydney Morning Herald's* headline was damning: "Americans pay millions to whistleblower at BHP; we hound them out of their jobs".<sup>34</sup> That case, which was ultimately settled for a substantial financial penalty without admission of guilt, had involved the mining company's entertainment of government officials at the 2008 Olympics Games. Despite BHP being dual-listed in Sydney and London, that its shares were traded on the New York Stock Exchange brought the company within the SEC's remit. The nexus requirements under relevant

American laws are broadly drafted, such that many internationally-active companies could be subject to these whistleblower schemes.<sup>35</sup>

While this 'globalisation' of whistleblower protections remains in a formative stage, the scope it provides for those who do not feel adequately protected under national regimes is not illusory. In 2016, 464 tips from foreign individuals were received by the SEC as part of its financially-incentivised whistleblowing program. There are of course significant practical and financial barriers to an Australian whistleblower availing themselves of American protection, and the large bounty paid in the BHP case is very much the exception rather than the rule. Yet "[w]ith thousands of financial transactions crossing national borders every minute and human capital becoming increasingly mobile, the globalisation of whistleblower protection is unlikely to slow".<sup>36</sup>

## Conclusion

In return for their support of amendments to the *Fair Work (Registered Organisations) Act*, several cross-benchers exacted an undertaking from the Coalition to pursue wider whistleblower reform. The first stage of this involved the creation of a parliamentary inquiry to examine the implementation of union-equivalent whistleblower protections in the corporate and public sectors. The inquiry, due to report by 30 June this year, was also instructed to consider compensation arrangements in other jurisdictions (including the potential adoption of the American financial incentivisation model),





the interaction between civil and criminal liability and avenues for internal disclosures. If the inquiry recommends new laws to strengthen whistleblower protections (which seems almost inevitable), the government has agreed to pass such legislation by 30 June 2018.

These promising developments coincide with moves towards reform in other jurisdictions. In the United Kingdom, for example, British regulators are considering extensions to whistleblower rules in the financial sector,<sup>37</sup> while a Canadian province recently investigated the potential implementation of American-style laws. Recurring international bribery scandals, many with ties to Australia,<sup>38</sup> underline a growing public acceptance here and overseas of the need for stronger anti-corruption regulation and associated whistleblower laws.

Late in the evening of Monday 21 November 2016, while the Senate was midway through debating the amendment bill which improved protections for union whistleblowers, Senator Nick Xenophon rose to speak. The South Australian Senator has been a vocal advocate for whistleblowers, and was an important actor in securing the government's commitment for reform.

Speaking to a largely empty chamber, Xenophon orated passionately:

“These are momentous changes to whistleblower protection laws, which the government has committed to extending to the corporate and public sectors ... these amendments, if passed, will see Australia go from some of the worst whistleblower protection laws in the world to arguably the

best. It will be a momentous leap forward.”<sup>39</sup>

Politicians are prone to rhetoric, and it will be some years before we can assess whether Australia does indeed have world-leading whistleblowing laws. If history provides any indication, there will be many more hurdles on the path to that lofty aspiration. For whistleblowers and their legal counsel, though, light has finally pierced the horizon after a long night.

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**Endnotes**

1. Quoted in Chris Wheeler, 'Review of Administrative Conduct and Decisions in NSW Since 1974 – An Ad Hoc and Incremental Approach to Radical Change' (2012) 71 *Australian Institute of Administrative Law Forum* 34, 50.
2. Adele Ferguson, 'Origin Energy denies cover-up after accusation in explosive lawsuit', *The Sydney Morning Herald* (online), January 24 2017 <<http://www.smh.com.au/business/energy/origin-energy-denies-cover-up-after-accusation-in-explosive-lawsuit-20170124-gtxhxx>>.
3. Ralph Nader, quoted in David Lewis, 'Employment Protection for Whistleblowers: On What Principles Should Australian Legislation Be Based?' (1996) 9 *Australian Journal of Labour Law* 1, 1.
4. John Goldring, 'Administrative Law: Blowing the Whistle' (1992) 17 *Alternative Law Journal* 298, 298.
5. A J Brown, 'Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 2 *E-Journal of International and Comparative Labour Studies* 4, 6.
6. (1981) 55 FLR 125, 166.
7. *A v Hayden (No 2)* (1984) 156 CLR 532, 545.
8. Senate Select Committee on Public Interest Whistleblowing, Parliament of Australia, *In the Public Interest* (1994) 125.
9. Commonwealth, *Parliamentary Debates*, Federation Chamber, 19 June 2013, 6404.
10. *Public Interest Disclosure Act* s 26.
11. *Ibid*.
12. *Ibid* s 29.
13. *Ibid* s 10.
14. *Ibid* s 19.
15. *Ibid* s 13.
16. *Ibid* s 14.
17. Australian Securities and Investments Commission, *Whistleblowing* (15 December 2016) <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>>.

18. *Corporations Act* s 1317AA.
19. *Ibid* s 1317AB.
20. *Ibid* s 1317AC.
21. *Ibid* ss 1317AD, 1317AE.
22. Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) 201.
23. *Fair Work (Registered Organisations) Act* s 337A (this and the following references are based on the legislation as it will be when the amendments take effect).
24. *Ibid* s 337BB(1).
25. *Ibid* s 337BB(3).
26. *Ibid* s 337BB(4).
27. The only case to date which has considered the *Public Interest Disclosure Act* dismissed the claim because the alleged disclosures were made two decades prior to the legislation taking effect: *Clement v Australian Bureau of Statistics* [2016] FCA 948 (12 August 2016).
28. *Public Interest Disclosure Act* s 22.
29. *Ibid* s 22A.
30. *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20 (26 February 2015).
31. For more on this point see our article in the September 2016 edition of *Ethos*: John Wilson and Kieran Pender, "The Litigious Lottery": Costs Orders in Employment Litigation' (2016) 241 *Ethos: Journal of the ACT Law Society* 30, 31-2.
32. Revised Explanatory Memorandum, *Public Interest Disclosure Act 2013* (Cth) 10.
33. Nick McKenzie, Michael Bachelard and Richard Baker, 'Americans pay millions to whistleblower at BHP; we hound them out of their jobs', *The Sydney Morning Herald* (Online), 29 August 2016 <<http://www.smh.com.au/business/americans-pay-millions-to-whistleblower-at-bhp-we-hound-them-out-of-their-jobs-20160824-grob6a.html>>.
34. *Ibid*.
35. This topic is explored more extensively in a forthcoming paper co-authored by an author of this article. See Neil Getnick, Gregory Krakower and Kieran Pender, 'Whistleblowers Beyond Borders: The Globalisation of Whistleblower Protection' in Katherine Hall (ed), *Anti-Corruption Compliance: Navigating Global Enforcement Trends* (International Bar Association, forthcoming).
36. *Ibid*.
37. See, eg, Financial Conduct Authority (United Kingdom), 'Whistleblowing in UK branches of overseas banks' (Consultation Paper, CP16/25, September 2016).
38. The opening paragraph of an article last year from the Australian Strategic Policy Institute is deeply troubling: "The recent bribery allegations made against an offshore arm of Leighton Holdings in Iraq and Tabcorp in Cambodia shouldn't be taken lightly in Australia. They come on the back of the Australian Wheat Board (AWB) oil-for-food scandal, and Securrency International and Note Printing Australia bribery charges. In the background, Australia has dropped six places in the Transparency International Corruption Perception Index from seventh equal place in 2012 to thirteenth equal in 2015"; Cesar Alvarez and Simon Norton, 'Overcoming Australia's fear of whistleblowing', *The Strategist* (Online), 5 May 2016 <<https://www.aspistrategist.org.au/overcoming-australias-fear-of-whistleblowing/>>.
39. Commonwealth, *Parliamentary Debates*, Senate, 21 November 2016, 2745.