

Parliamentary Joint Committee on Corporations and Financial Services

QUESTIONS ON NOTICE

Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

Department of Employment Question No. 1

Ms Butler asked on 28 April 2017 on proof Hansard page 41

Question

Ms BUTLER: Is there anything that would preclude the parliament from legislating to allow the court to direct that the penalties be paid to the whistleblower rather than to consolidated revenue?

...

Ms BUTLER: So something analogous [to the situations in the Fair Work Act where penalties can be paid to applicants rather than to the Commonwealth] could be possible in the Fair Work (Registered Organisations) Act?

Answer

The Department is not aware of any legal impediment that would preclude the Parliament from legislating to allow a relevant court to direct that penalties for infringement of the *Fair Work (Registered Organisations) Act 2009* (Cth)(RO Act) civil penalty provisions be paid to a whistleblower rather than to the Consolidated Revenue Fund.

Parliamentary Joint Committee on Corporations and Financial Services

QUESTIONS ON NOTICE

Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

Department of Employment Question No. 2

Ms Butler asked on 28 April 2017 on proof Hansard pages 41–43

Question

Ms BUTLER: So something analogous could be possible in the Fair Work (Registered Organisations) Act? Again, you will want to take that on notice, so I will not press for an answer at this point. I note that the new reprisal provision, which is section 337BA, has a bit of a change from the previous whistleblower provisions. Previously, in order to be actionable, the reprisal had to be taken because of the whistle being blown. But now the provisions use the word 'when' rather than 'because'. So instead of there being a causal link between the whistleblowing and the reprisal, you just have to have known about the whistleblowing when you took action that was detrimental to the whistleblower. Can you see what I am talking about? I think it is in subsection (2).

...

Ms BUTLER: Previously, as I understand the whistleblowing provisions in the registered organisations act, the word 'because' was used rather than 'when'. Now there is just a correlation in time, whereas previously there was a causal link.

Ms Volzke: As we have already answered, these were provisions that were negotiated with Senator Xenophon in terms of the exact wording. But my understanding is that that particular provision, I am pretty sure, actually follows, word for word, the PID Act equivalent provision, including the words that are used there.

Ms BUTLER: Can you take that on notice, because the previous whistleblowing provision, and most of the whistleblowing provisions I have ever looked at, have a causal link between—

...

Ms BUTLER: I am asking about who has to prove it. If the applicant brought proceedings, the provisions seem to indicate that the applicant does not have to prove the causal nexus; it is for the respondent to prove the absence of a causal nexus. If you want to take that on notice, I would completely understand.

Ms Volzke: I think I will take that on notice; thank you.

Answer

The Department confirms that section 337BA of the RO Act is modelled on section 13 of the *Public Interest Disclosure Act 2013(Cth)* (PID Act) and similarly utilises the concept of 'when' reprisal is taken rather than 'because' (see paragraph 13(1)(b) of the PID Act).

The causal connection between the disclosure and the reprisal is provided in the substantive remedial provisions that follow section 337BA.

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Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

Department of Employment Question No. 3

Ms Butler asked on 28 April 2017 on proof Hansard page 43

Question

Ms BUTLER: Could you also take this on notice. I am interested in the situations that might arise as a consequence of this—for example, assume you are an employer association and you have found out that a senior manager has been misusing their credit cards. You immediately start putting that person under investigation, so that you can ask them to show cause why they should not be terminated, if in fact it turns out that they have been misusing their credit cards. During the course of that process the senior manager blows the whistle on some other misconduct happening within your organisation. What sort of immunity is then attached to that person? Are you prevented from dismissing the person for misuse of their credit cards?

Ms Volzke: I am happy to take that on notice. But I would reiterate what I said previously. There still needs to be a link in the reprisal that is taken and, I guess, the motivation, and if they are motivated for a reason that has completely got nothing to do with a disclosure—for example, in relation to the example you gave on credit card misuse—then I would find it difficult to see how there would be liability attached under those provisions in those circumstances.

Ms BUTLER: Under the provision you just drew my attention to [s 337BB] It would be for the employer organisation to prove that the fact that this person had exposed some other misconduct had nothing whatever to do with their termination.

Ms Volzke: I am happy to take on notice.

Answer

The new whistleblower protections in the RO Act will not prevent a registered organisation from dismissing a discloser who has misused or misappropriated the organisation's funds, provided that the action is motivated by the discloser's wrongdoing rather than the disclosure (in whole or in part).

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QUESTIONS ON NOTICE

Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

Department of Employment Question No. 4

Ms Butler asked on 28 April 2017 on proof Hansard page 45

Question

Ms BUTLER: Who has standings in the proceedings in the court for a contravention of the reprisal provisions? I am specifically interested in whether the whistleblower can personally go off to a court and seek compensation if reprisals have been taken against them?

Ms Volzke: Yes. Under 337BB(4) it provides that the application for compensation, or any other order, can include the target.

Ms BUTLER: At this stage, they cannot go off and seek civil penalties? I do not know. Can they go off and seek civil penalties be ordered against the—

Ms Volzke: I will take that one on notice. I am not sure.

Answer

Section 310 of the RO Act, as amended by Schedule 1 of the *Fair Work (Registered Organisations) Amendment Act 2016*, provides that applications for a civil penalty order may only be made by the Registered Organisations Commissioner or the General Manager of the Fair Work Commission, or a person authorised in writing by either of those officers to make the application. On this basis, unless authorised in writing by either the Commissioner or General Manager, a whistleblower may not seek to have civil penalties imposed for reprisal action.