ACTU Submission to the Senate Economics Legislation Committee

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

23 February 2018

ACTU
australian council of trade unions

Australian Unions
Join. For a better life.

Contents

Introduction

The Australian Council of Trade Unions ('**ACTU**') is pleased to make a submission to this Inquiry. The ACTU is the peak body representing working Australians through 43 affiliated Australian unions and trades and labour councils.

The ACTU welcomes efforts to improve laws for whistleblower protection. We are grateful for the opportunity to comment on the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*. We note that we were not afforded that opportunity in relation to the whistleblower provisions that were introduced into the *Fair Work (Registered Organisations) Act.*

Our position on whistleblower protections was articulated in our submission and evidence to the inquiry by the Joint Committee on Corporations and Financial Services into "Whistleblower protections in the corporate, public and not for profit sectors". In short, our view is:

- All sectors should have whistleblower protections that reflect the same principled approach, however each type of organisation and the legal environment in which they operate may necessitate differences in how those principles are translated into legislation;
- Protection should be available to all persons in the service of an organisation, as well as those who have been but are no longer in the service of the organisation;
- Protection should be available to persons from the moment they make a disclosure internally (if they choose to do so). It should not be necessary to make a formal external complaint in order to trigger whistleblower protections;
- There ought not be fine, technical distinctions on the types of conduct that can and cannot be the subject of a protected disclosure, as it is important that persons considering making a disclosure can have confidence in their protection;
- Whistleblowers should not be deprived of protections merely because they hope or intend that the disclosure of corruption or unlawful conduct which they honestly and reasonably believe has occurred will inflict harm on a person or organisation;
- Workers who wish to make disclosures should be entitled to support in making such disclosures not only by legal representatives and the regulatory authorities but also by their union;
- Disclosures should be permitted to be made anonymously including through lawyers and industrial representatives;
- As with most civil matters that rely on proving reasons for action that are uniquely within the knowledge of the alleged contravener, provisions creating a right of action for reprisal or victimisation should generally contain a statutory presumption in favour of the applicant that the reasons for action included proscribed reasons;
- A whistleblower's motivations may not always be exclusively pure, however that should not disqualify them from protection against reprisals. At the same time, a whistleblower should not

become unconditionally immune from any action being taken against them in the event they too are proven to have had a role in corrupt conduct;

- It is important to not raise the burden of internal investigation too high on organisations that lack the legal capacity to compel to cooperate with those investigations. For example, the absence of a contract of employment may mean an organisation cannot give an enforceable direction to a member or a person in its service to take steps that would assist the investigation;
- Legal frameworks should facilitate disclosures within organisations and/or (where this is inappropriate) to the regulator. In exceptional cases, protections should be afforded where disclosures are made to Members of Parliament or the media;
- Whistleblower protections should apply to broad categories of corrupt conduct, to avoid a circumstance where a whistleblower loses their protection merely because the conduct they disclose does not amount to a contravention of one of few listed laws in the relevant protection provisions;
- Regulators should have some capacity to offer financial and other support to whistleblowers on compassionate grounds in recognition of the inability of the Court system to ever fully compensate a person for the ordeal of making a disclosure or prosecuting a claim for reprisal; and
- A national anti-corruption body would support a well functioning whistleblower protection regime, including as an agency which may receive protected disclosures.

The reforms proposed in this Bill go some way towards implementing many of these principles. However, in our submission more needs to be done. Further, the opportunity has not been taken in the Bill to address the important failings in provisions that were applied to Registered Organisations.

Proposed Amendments to the *Corporations Act*.

We have previously identified several failings in the existing whistleblower provisions in the *Corporations Act*, including:

- They apply only to current officers, employees and contractors of the company;
- It is not possible to initiate anonymous disclosures (through a representative or at all);
- The protections are only triggered if the disclosure relates to a breach of the "Corporations Legislation" by the Company, an officer or the employee of the company. The term "Corporations Legislation" limits the scope of protected disclosures to disclosures concerning breaches of the *Corporations Act,* the *Australian Securities and Investments Commission Act* and related rules of court;
- There is no reverse onus or statutory presumption in favour of the applicant in the anti-victimisation provisions.

Each of those failings is addressed in some way by the Bill.

Scope of protected persons

Proposed section 1317AAA of the Bill introduces the concept of an eligible whistleblower. This concept functions as a welcome expansion of the classes of people who are able to make a disclosure and gain protections when doing so. In our view, it is also an improvement compared to the classes of person who are permitted to make a disclosure under section 3337A of the *Fair Work (Registered Organisations) Act*. In particular:

- The Bill, by using the expression "individual", confirms that protections are only available to natural persons, whereas the the *Fair Work (Registered Organisations) Act* confers protections on all legal persons at 3337A(1) (a)(iv)-(v)
- The Bill is less ambiguous in its treatment of past and present contractors that the *Fair Work (Registered Organisations) Act.* The latter applies to any "person who has or had ...any other transaction with" a union or its officers or employees, where "transaction" is not a defined term. Accordingly, an legal entity that had some interaction with a Registered Organisation (such as employer with whom it was bargaining) could gain protection for a disclosure, potentially as a tactic to discourage the taking of protected industrial action.

Subject to the below, the superior drafting of these provisions in the *Bill* in this respect ought to be considered as a foundation for amendments to the corresponding provisions in the *Fair Work (Registered Organisations) Act*.

Proposed subsection 1317AA(3) appears to be the only provision which seeks to deal with representation. It in effect provides that a disclosure of information by an individual qualifies for protection if it is made to a legal practitioner for the purpose of getting advice or representation (irrespective of whether the person is an eligible discloser and irrespective of whether or not the conduct disclosed to the lawyer is capable of being protected under the provisions of the Bill). This is a sensible provision. However, our view (as set out above) is that lawyers and unions ought to be able to represent whistleblowers in making a disclosure. In addition, there is a need to afford protection for disclosures made by the individual as well as by the representative in performing their representative role. This might be achieved by a combination of deeming provisions (e.g. s.337A(2) of the *Fair Work (Registered Organisations) Act*) and an addition to proposed section 1317AAA to ensure that the legal or industrial representative who is representing the eligible whistleblower is also protected.

Identity and anonymity

The provisions protect the identity and anonymity of disclosures, in some sections implicitly and in some sections explicitly. We consider that it would be desirable for the Note and the end of proposed section 1317AA be converted (and adapted as necessary) to form the opening subsection of that provision, even if for no other reason than to give some assurance to readers of the right to make an anonymous disclosure.

The confidentiality provisions in proposed section 1317AAE provide some protection of the identity of a whistleblower where a disclosure is not made anonymously. Some further consideration is needed about how this provision interacts with proposed section 1317AAC ("eligible recipients") and the assumption implicit in proposed sub-paragraphs 1317AI(5)(c)-(e) that companies will conduct investigations where matters are disclosed internally:

- One the one hand, proposed section 1317AAC requires that disclosures be made to particular persons as a pre-requisite to obtaining protections. Those persons (for example a Director of the company or the line manager of the employee) might not be best placed to themselves carry out an investigation of the alleged misconduct; however
- Section 1317AAE – sensibly – prohibits the distribution of confidential information through the management structure.

The current provisions therefore seem to prohibit eligible recipients (with in the meaning of 1317AAC) from referring disclosures to one another. The solution to this may be to explicitly permit eligible recipients to refer disclosures to one another where necessary for the purposes of carrying out an investigation, or alternately to provide guidance outside of the legislation for companies to appoint an external investigator to receive and investigate complaints (under section 1317AAC(1)(d)) and advise of this in their policy promulgated pursuant to section 1317AI.

Scope of protected recipients

The scope of protected recipients is appropriate. Noting that ASIC is one such recipient, one matter that might demand further consideration - at least administratively - is how these provisions might interact with the investigation, prosecution and evidence gathering activities of ASIC in the usual way. ASIC may, in the course of its usual activities, take statements from informants to assist a prosecution or an investigation, wherein the matters that the witness deposes to constitute a protected disclosure by operation of law (even if it is not witnesses intention to avail themselves of the whistleblower provisions) as well as a confession as to their own role in illegality. How this situation interacts with the immunity provided in proposed section 1317AB(1)(c) should be carefully considered.

With one reservation, we welcome in the inclusion of the "emergency disclosure" provisions in proposed section 1317AAD and note that the combined effect of that section and proposed section 1317AAE will be to permit journalists (and MP's) to refuse to disclose the identity of their sources in Court proceedings. That provision in effect affords protection to whistleblowers where they make disclosures to journalists or the media in the public interest if they have already made a disclosure to the regulator (as opposed to an "eligible recipient" within the organisation), *provided* sufficient time has elapsed and the regulator has been put on notice. Our reservation is that journalists who work for electronic services that are not operated for profit are excluded from the emergency disclosure provisions, as are those who work for an electronic service that is not sufficiently "similar to a newspaper, magazine or television broadcast". We acknowledge the intent as expressed in the Explanatory Memorandum "..to ensure that public disclosures on social media or through the provision of material to self-defined journalists are not covered by the protection". However, we urge the drafters to consider an alternative and more targeted formulation to give effect to that intention, rather than one that could potentially confuse whistleblowers and exclude journalists working (for example) exclusively on online content for the Australian Broadcasting Corporation or news organisations funded predominantly on philanthropic grants.

Scope of conduct in relation to which disclosure is protected

The outer limits of conduct the disclosure of which may be protected are "misconduct, or an improper state of affairs or circumstances". Whilst a question arises as to whether the authorities to whom disclosures may be made are empowered to (or should) investigate the range of conduct that might be captured within those undefined terms, there is little harm done where the primary purpose of the provision is to afford protections to persons who wish to report wrongdoing. We do consider however that it would be appropriate to specifically include the *Work Health and Safety Act,* the *Fair Work Act* and the *Competition and Consumer Act* among the list (in proposed paragraph 1317AA(5)(c)) of Commonwealth laws which disclosures of suspected contraventions can be made about (and also include the corresponding regulators in proposed paragraph 1317AA(1)(b)). The *Work Health and Safety Act* and the *Competition and Consumer Act* both regulate safety and the latter also regulates consumer well being and corporate

behaviour. The *Fair Work Act* is, notwithstanding its flaws, a critical law for worker protection and economic redistribution which is being systematically evaded in important industries and supply chains. We add that the fact that the *Fair Work Act* and the Competition *and Consumer Act* also regulate Registered Organisations was apparently seen as a fitting basis to include it among the list of laws that disclosures of suspected contraventions could be made about in the definition of "disclosable conduct" inserted in section 6 of the *Fair Work (Registered Organisations) Act*.

Nature of protections

The Bill proposes amendments to the protection contained in section 1317AB of the *Corporations Act.* That provision currently, among other things, contains a power for a Court to order a re-instate an employee if their employment is terminated on the basis of their disclosure. That power is to be removed from this provision and moved elsewhere (see below). Instead, section 1317AB will provide prohibitions and immunities without remedies (except perhaps when read in conjunction with s. 23 of the *Federal Court of Australia Act*).

Apart from ensuring that a person cannot be subject to an administrative liability for making a disclosure, the prohibitions and immunities remain unaltered save for a new proposed paragraph 1317AB(1)(c). That paragraph provides that where a person makes a disclosure that qualifies for protection to the regulator (as opposed to an internal "eligible recipient") - and if they also then make an "emergency disclosure" - then "the information" is not admissible against the whistleblower in civil or criminal proceedings other than proceedings in respect of the falsity of the information. There are two curious features of that provision. Firstly, there is no evident reason for a difference in the level of protection provided to those who make their disclosure to the regulator versus those who make their disclosure internally as prescribed in an the Bill and in any workplace policy promulgated in compliance with the Bill. Secondly, by conferring the immunity not on "the disclosure" but on "the information", it seems that the whistleblower automatically gains the benefit of a complete immunity – including a derivative use immunity – in respect of all information forming part of a disclosure. There is no space left for judicial or even prosecutorial discretion as to the grant of such an immunity, irrespective of how egregious the personal conduct of the whistleblower might be compared to that they have disclosed in relation to others.

It is understandable that immunity is forensically valuable in so far as it deprives a witness of their privilege against self incrimination or self-exposure to a penalty, however we strongly question the "one size fits all" approach adopted in these provisions. Further, we repeat our concern regarding the potentially complex interaction between ASIC's usual information gathering procedures and the fact that disclosures qualify for protection under the Bill by operation of law at the time they are made. A confession should not result in absolute immunity in all cases.

Enforcement of protection

The Bill contains substantial amendments improving on the anti-victimisation provisions. However, we note that, unlike the position in both the *Public Interest Disclosure Act* and the *Fair Work (Registered Organisations) Act*, the perpetrator needs to "engage in conduct" in order to contravene the provision rather than merely cause "any detriment" by "act or omission" (emphasis added). The later formulation is preferable as it confers wider protection. Amendments should be made to proposed sections 1317AC(1)(c)-(d) and 1317AD(1)(a)-(d) as well as section 1317AC(1)(a)-(b) of the *Corporations Act* to adopt that formulation.

Like the *Public Interest Disclosure Act*, the Bill:

- Does not propose that a right of action in victimisation or reprisal arises merely where the defendant "should have known that the second person or another person made, may have made, proposes to make or could make a disclosure that qualifies for protection...";
- Does not enable the Court to impose a remedy where the reasons for an act or omission causing detriment are entirely disconnected from the belief or suspicion that the disclosure was/may have been/could be or was proposed to be made.

This leaves the provisions at s. 337BA(1)(b)(ii) and 337BA(3) of the *Fair Work (Registered Organisations) Act* (which attracted criticism from us after they were introduced) as distinct outliers. This Bill should remove them.

The onus provisions appearing at proposed section 1317AE(2) ought to be introduced (with appropriate consequential amendments) into the *Public Interest Disclosure Act*. If our suggestions above are adopted, this will harmonise the relevant onus provisions in each of the *Public Interest Disclosure Act*, the *Fair Work (Registered Organisations) Act* and the *Corporations Act*.

Whilst the orders a Court may make in a victimisation case are broad, we remain of the view that regulators should also be given some explicit power to make financial and other support available to whistleblowers in recognition of the toll their actions may have taken on them. Court processes are far from optimal vehicles for putting persons in a comparable position to that they were in before the events the subject or proceedings occurred and in any event a remedy (outside of an interim or interlocutory injunction) does not arise until well after the damage is done.

We also note there is a lack of clarity around standing for the enforcement of civil penalties for contraventions of proposed section 1317AC and the bringing of compensation orders under proposed sections 1317AD and 1317AE. Given that no amendments are proposed to section 1317J, it appears the ASIC is sole party who may make an application for a civil penalty to imposed for breach of section 1317AC. This is an undesirable limitation. Further, it is unclear who is permitted to bring an application for a compensation order under proposed sections 1317AD and 1317AE. This should be clarified. Our view

is that Registered Organisations as well as whistelblowers ought to be among the class of persons who can enforce and seek compensation for their members under these provisions.

Investigation of disclosures

The Bill makes no particular provision for the investigation of disclosures, presumably on the basis that each of the regulators already has sufficient regulatory powers. This is unobjectionable. However, by requiring companies to introduce whistleblower policies, and allowing disclosures to be made internally, many questions arise about how internal investigations may be conducted. We would suggest that some guidance materials be made available, including model or template policies which conform with the legislation. The availability of such material would presumably also alleviate the supposed need for the small business exemption from policy the obligation, which is in any event questionable.

Proposed Amendments to the *Taxation Administration Act*.

The proposed Amendments to the *Taxation Administration Act* adopt much of the drafting used in the proposed amendments to the Corporations Act. Whilst we welcome the long overdue development of a legislative regime for the protection of tax whistleblowers, some of the matters we raise above in relation to the proposed amendments to the *Corporations Act* are equally applicable to these provisions. In particular:

- Lawyers and unions ought to be able to represent a person making a disclosure, and they ought to be protected when doing so;
- The right to make an anonymous disclosure should be clear and explicit;
- Consideration be given as to how the usual information gathering, investigative and prosecutorial functions of the Commissioner might be complicated by the receipt of information through those channels being deemed by operation of law to be disclosures that qualify for protection under the Bill;
- There is no clear rational basis for persons who disclose internally to receive a different immunity from those who disclose directly to the Commissioner, and, in any event, the immunity is too broad;
- Victimisation should be able to be constituted and actionable where it is effect by an act or omission, rather than "conduct";
- Standing to bring proceedings for civil penalties and compensation orders should be conferred on persons including the whistleblower and their union (Registered Organisation); and
- The Commissioner should be empowered to provide financial and other support to whistelblowers.

In addition, an "emergency disclosure" provision of the type contained in Part 1 of Schedule 1 of the Bill (noting our suggested improvements) ought to be included in some modified form so as to guard against the potential compromise of investigations and the tax secrecy of individuals.

ADDRESS
ACTU
365 Queen Street
Melbourne VIC 3000

PHONE
1300 486 466

WEB
actu.org.au

D No: 37/2018