



Whistleblowers Australia

PO Box 129, Wollongong NSW 2500

“All it needs for evil to flourish is for people of good will to do nothing”

Edmund Burke

18 September 2019

Australian Securities and Investments Commission
GPO Box 9827, Brisbane QLD 4001

Attention:

Andivina Uy, Senior Adviser, Strategic Policy

Greg Hackett, Senior Manager, Office of the Whistleblower

email: whistleblower.policy@asic.gov.au

Dear Sir or Madam,

Re: Feedback on the proposed Regulatory Guide (Guide) on Whistleblower Policies (attachment to consultation paper CP 321).

1. The Guide appears to have an overly narrow view of the requirements of the required whistleblower policy.

Part 9.4AAA of the *The Corporations Act 2001* (Cth) (the Act) requires that certain corporations or entities (entities) must have a Whistleblower Policy, but the Act does not limit the Policy to dealing only with the protections, risks and issues specified under the Act.

There is a requirement for a policy. That means more than just a policy related to the Act. It means a policy on whistleblowing and how it will be handled by the entity. Duty of care requires that appropriate warnings should be given about the dangers of criticizing company policies, culture, or seniors in the company. The risks faced by whistleblowers (not just the risks addressed in the Act) and the alternative methods of publicizing wrong doing needs to be addressed in the whistleblowing policy.

The duty of care to inform whistleblowers of the risks of making disclosures has been addressed in a number of Australian cases including *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15, *Wheadon v NSW [Police]*(2001) and *Hayes v State of Queensland* [2016] QCA 191.

In fact, under the Act entities must have a Whistleblower Policy that provides both the employee and the entity's management and lawyers with 'information about how the company will support whistleblowers and protect them from detriment'¹ 'including [but not limited to] protections under this Part [of the Act]'.²

The entity should be encouraged to provide a factually correct, but audience friendly guide to encourage informed participation by the employees by avoiding the problem of most having no legal background or knowledge.

The Act provides a breakdown of the types of wrongdoing that, if reported, triggers protections for staff. But staff can raise a wide range of legitimate and helpful complaints that are outside of the threshold for protection under the Act but which can lead to detrimental action (for example reporting that a colleague is, or has become, incompetent). A whistleblowing policy should inform a potential whistleblower of all the risks and potential detrimental actions that may occur when using various alternative methods of whistleblowing.

The guide appears to take a narrow view with respect to the requirements for an entity's policy. It does cover the requirements to have policy regarding whistleblower protections prescribed in the Act. But an entity's whistleblower policy should cover all aspects of an entity's intentions with regard to all whistleblowing whether it is covered by the Act or not. Using paragraphs early in the Guide:

'A Overview'

The Regulatory Guide (Guide) should encourage the corporation to write a whistleblowing policy that informs the employee (and management) about the entity's own policy on whistleblowing including the entity's own policy on the protections of whistleblowers in addition to informing the employee (and management) of the requirements of the *Corporations Act 2001*. The entity's Whistleblowing Policy should not be limited to information about the whistleblower protections prescribed by the *Corporations Act 2001*.

¹ *Corporations Act 2001* Cth ('CA') s1317AI(5)(c).

² CA s1317AI(5)(a).

‘Summary of our guidance’

As argued in **A Overview** above, it is mandatory to include some ‘additional good practice’ policies in the corporations whistleblower policy.³ The corporation’s policy must include ‘information about how the company will support whistleblowers and protect them from detriment’ *including* ‘protections under this Part’.⁴

‘Table 1: Who the policy applies to’

The Guide appears to take a narrow view with respect to the entity’s policy. As argued above, the policy should not be limited to disclosures that would attract protection under the Act. The corporation’s policy should address all aspects of whistleblowing for the employees, management and lawyers, including the corporation’s own policy on practices, procedures and protections to which the corporation intends to adhere.

RG 000.24 This section is also intended to provide entities with a potential structure from which to develop their own whistleblower policy

The word ‘also’ could be removed from this heading. The entity should develop its own whistleblower policy. And it should cover all aspects of the entity’s intentions with regard to whistleblowing. It should do more than simply include the protections available under the Act.

RG 000.25 ‘consider other standards and guidelines’

This regulatory guideline heading does have a useful wider view. Perhaps references could be given to other standards, guidelines and example policies.⁵

‘Who the policy applies to RG 000.31 An entity’s whistleblower policy should ... who can make a disclosure that qualifies for protection under the Corporations Act’

This is a very narrow view of the requirement under the *Corporation Act 2001* of the required policy and who the policy applies to. As argued above, the policy should be the entity’s policy on whistleblowing, not the entity’s policy limited to who is protected and to what extent they are protected under the Act.⁶

³ CA s1317AI(5)(a) and CA s1317AI(5)(c).

⁴ Ibid

⁵ See, eg, Ombudsman NSW, *Public Interest Disclosures* (2019) <<https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures>>; Ombudsman NSW, *Model Internal Reporting Policies* (2019) <<https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures/model-internal-reporting-policy-local-government-public-interest-disclosures>>; Ombudsman Queensland, *Model Public Interest disclosure procedure* (2019) <<https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/public-interest-disclosure-resources/model-public-interest-disclosure-procedure>>.

⁶ Ibid.

In addition, it should be acknowledged that the definition of a whistleblower in the legislation is just the legislation's definition of a whistleblower. There are other excellent definitions of a whistleblower, for example, '[a] *whistleblower* is a person who has discovered actual or suspected illegal behaviour, misconduct, or other forms of wrongdoing and discloses information about the discovery in the public interest'.⁷

'Matters the policy applies to RG 000.37 An entity's whistleblower policy should identify the types of wrongdoing that can be reported under the policy: see s1317AI(5)(b). In addition, it should outline the types of matters that are not covered by the policy.'

Although this regulatory guideline is useful, and is required, it is a narrow view of the requirement under the Act for a corporation to provide 'information about how the company will support whistleblowers and protect them from detriment' 'including [but not limited to] protections under this Part'.⁸

2. Potential benefits of whistleblowing

In December 2017 the US Department of Justice announced that it collected USD 3.7 billion in settlements and judgements just from cases brought by whistleblowers under the False Claim Act (FCA) alone. This amount did not include savings to the US public and government from whistleblowing to the tax office, the police, crime stoppers, social services, governmental regulators and directly to US companies and corporations and that did not make a claim under the False Claim Act. Pro rata on the basis of national GDP this would suggest whistleblowing would result in a saving to Australia of well in excess of A\$360 million a year.⁹ In addition to saving the public money, public interest disclosures promote transparency, integrity and loyalty

3. Qualification of persons who are to be 'eligible recipients'

There are two issues. Firstly, eligible recipients must be qualified to receive and investigate disclosures. An important component of which is completing a 'discloser risk assessment' as suggested by Brown.¹⁰

Secondly, the eligible recipient should have a legal separation from the entity's management. Human Resources (HR) staff are not suitable because they are employed to satisfy the management.¹¹ Many of the detriments suffered by whistleblowers are the entity's own

⁷ Inez Dussuyer, Russell G Smith, Anona Armstrong and Kumi Heenetigala, 'Understanding and responding to victimisation of whistleblowers' (Report to the Criminology Research Advisory Council, May 2018) 1,5 <<http://crg.aic.gov.au/reports/1718/23-1314-FinalReport.pdf>>.

⁸ CA s1317AI(5)(a) and CA s1317AI(5)(c).

⁹ 2017, US GDP 19.4 trillion, Australian GDP 0.25 trillion, USD/AUD rate 0.69.

¹⁰ Brown AJ, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations* (Canberra, ANU Press, 2008) 1. 305 <<https://press-files.anu.edu.au/downloads/press/p8901/pdf/book.pdf>>; Brown, A J et al, *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government* (Brisbane, Griffith University, 2019) 1, 18 <http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf>.

¹¹ Inez Dussuyer, Russell G Smith, Anona Armstrong and Kumi Heenetigala, 'Understanding and responding to victimisation of whistleblowers' (Report to the Criminology Research Advisory Council, May 2018) 1,27 <<http://crg.aic.gov.au/reports/1718/23->

policies used as blunt weapons by the human resources staff as part of their HR employment duties on behalf of management. Examples include extensive delays, placing whistleblowers on performance improvement plans, disciplinary investigations, restructuring moves and constructive dismissal.

Whistleblowers Australia has suggested that a public interest disclosure agency (PIDA) should be established to protect and support whistleblowers and prosecute claims of reprisal.¹² This suggestion would provide the necessary separation of interests of the discloser, the entity and the entity's regulator. A separation between the discloser and the regulator may have been beneficial, for example, in the matters finally investigated by the Banking Royal Commission.

4. External disclosure should be encouraged as normal and expected

Under the Act external disclosure to ASIC or APRA carries the least risk for the discloser. It provides a reliable paper trail and provides legal separation from management. And maximal protection under the Act is limited to external disclosure. If there is wrongdoing that triggers the discloser's sense of integrity and loyalty to the entity and to the public, then the discloser will not be able to overcome obstruction and retribution by the entity's management and HR department without difficulty unless the disclosure has been made to ASIC or APRA in the first place.¹³

In fact, former whistleblowers and academics believe that whistleblowers should be protected under the Act when disclosing matters to the public from the start.¹⁴ Disclosure of wrongdoing should be by any means including to the media and members of Parliament. If it is acknowledged that whistleblowing is a valuable service which discloses wrong doing by culpable actors, thereby saving the government and the public from large losses, then there is no reason to limit the whistleblower's direct disclosure to the public. This is especially so since it is generally acknowledged that previous whistleblower protections have been fatally

[1314-FinalReport.pdf](#)>.

¹² Whistleblowers Australia, Submission No 059 to Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower protections in the corporate, public and not-for-profit sectors, 15 February 2017, 8 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

¹³ If, after a period of time, an internal disclosure is thwarted, then taking the matter forward requires disclosure to ASIC or APRA, a 90 day wait, a notification to the original recipient (ASIC or APRA) that must include the words 'public interest disclosure' and a delay awaiting acknowledgement of the notification (unless sent by registered mail); CA s1317AAD.

¹⁴ Whistleblowers Australia, Submission No 059 to Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower protections in the corporate, public and not-for-profit sectors, 15 February 2017, 4

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>; Brown, A J et al, *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government* (Brisbane, Griffith University, 2019) 1, 50 <http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf>.

flawed and whistleblowers have lost their careers, mortgages, marital partners and mental health. The detriment to whistleblowers can be enormous.¹⁵

In addition, a whistleblower policy should indicate that a superior should not be involved in handling a disclosure from a subordinate. In that case there should be a prescribed pathway for external assessment and investigation by the regulator or a legal firm retained by the entity, as directed by the discloser.

5. Disclosure and the Public Interest

The whistleblower policy should also make the connection between 'making the disclosure' and the wider public's interest in open and accountable corporate behaviour. All disclosures should be seen as an act of integrity and loyalty. Other policies, including codes of conduct, should reflect these values.

6. Feedback to whistleblowers

It is important that whistleblowers receive timely feedback about their disclosures, the investigation and the outcomes. If it is acknowledged that whistleblowing is a valuable service which discloses wrong doing by culpable actors, thereby saving the government and the public from large losses, then there is good reason to believe that whistleblowers should be valued and deserve acknowledgement and informative feedback in real-time.

7. The failure of previous legislated whistleblower protection

There is a duty of care to disclose the risk of whistleblowing as noted above.¹⁶ That includes disclosing that whistleblower protection legislation has largely been a failure in Australia and that protections and policies suggested by former whistleblower survivors and academics have not yet been incorporated into this Act.¹⁷ Employees are generally wary of making disclosures and do not view company policies as beneficial to, or protective of, themselves.¹⁸ Only 28 percent who had observed 'very or extremely serious wrongdoing', had formally reported it.¹⁹

¹⁵ Inez Dussuyer, Russell G Smith, Anona Armstrong and Kumi Heenetigala, 'Understanding and responding to victimisation of whistleblowers' (Report to the Criminology Research Advisory Council, May 2018) 1,8 <<http://crg.aic.gov.au/reports/1718/23-1314-FinalReport.pdf>>.

¹⁶ *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15, *Wheaton v NSW [Police]* (2001) and *Hayes v State of Queensland* [2016] QCA 191.

¹⁷ Whistleblowers Australia, above n 14; Brown, above n 14;

¹⁸ Inez Dussuyer, Russell G Smith, Anona Armstrong and Kumi Heenetigala, 'Understanding and responding to victimisation of whistleblowers' (Report to the Criminology Research Advisory Council, May 2018) 1,8,9, 48 <<http://crg.aic.gov.au/reports/1718/23-1314-FinalReport.pdf>>; Roberts P, Brown AJ and Olsen J, 'Whistling while they work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations', (Canberra, ANU E-Press, 2011); Griffith University, 2017. 'Whistling while they work 2. Improving managerial responses to whistleblowing in public and private sector organisations' (Brisbane, Griffith University, 2017) <<http://www.whistlingwhiletheywork.edu.au/>>.

¹⁹ Brown AJ, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, (Canberra, ANU Press, 2008) 1. 106 <<https://press-files.anu.edu.au/downloads/press/p8901/pdf/book.pdf>>.

8. Alternative means of disclosure

Until legislated whistleblower protection is adequate there is a duty of care to warn and advise potential disclosers about the risks and benefits of alternative methods of alerting the public, in the public interest, to detrimental wrong doing. These methods include direct anonymous or encrypted disclosures to the media, members of Parliament or online. These methods do require a degree of knowledge and sophistication, which is limiting, but can be very effective and low risk if done with care, in the public interest.²⁰

Trade Unions and professional bodies were seen as being indifferent or ineffective to whistleblowers' concerns.²¹ These bodies probably do not have sufficient budget to deal with the uncertainties of whistleblowing.

Yours sincerely,

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<sup>20</sup> See, eg, Government Accountability Project, *Resources* (2019) <<https://www.whistleblower.org/resources/>>; ExpressVPN, *Whistleblowing Guide: How to stay Anonymous while Blowing the Whistle* (16 June 2017) <<https://www.expressvpn.com/blog/anonymous-whistleblowing-guide/>>.

<sup>21</sup> Inez Dussuyer, Russell G Smith, Anona Armstrong and Kumi Heenetigala, 'Understanding and responding to victimisation of whistleblowers' (Report to the Criminology Research Advisory Council, May 2018) 1,27 <<http://crg.aic.gov.au/reports/1718/23-1314-FinalReport.pdf>>.