



8 December 2009

Corporate Whistleblowing Discussion Paper
Corporations and Financial Services Division
The Treasury
Langton Avenue
Parkes ACT 2600

Dear Sir/Madam

The Rule of Law Association of Australia wishes to make a submission on the Corporate Whistleblowing Discussion Paper of October 2009.

For your information the Association is an independent not for profit body formed to foster the rule of law in Australia. It aims to promote discussion on the importance of the principles which underpin the rule of law. In doing this, the Association has held its first joint conference with the NSW Bar Association. The conference was chaired by Chief Justice Spigelman and the speakers included the Hon Justice David Hammerschlag, David McLeod, Richard McHugh SC, Senator George Brandis SC, the Hon Justice Margaret Stone, Professor David Weisbrot AM and myself. As you might note from our web site (www.ruleoflawaustralia.com.au), our objectives include the following ideals:

- To have laws applied by Australian Federal and State Governments, and Government departments and agencies objectively, fairly, rationally, predictably, consistently, impartially and promptly.
- To have investigations and prosecutions carried out in respect of any Australian objectively, with justice, fairness and promptness, and to have investigators and prosecutors treat the person being investigated or prosecuted as they would want to be treated if the roles were reversed.
- To champion laws in Australia and their administration which protect and advance individual Australians, not oppress nor intimidate them

We note that paragraph 63 of the Paper has a focus question and an option which, in effect, removes the requirement that informers be protected only if they have acted in good faith. As the Paper

notes, it is therefore possible that informers with malicious intent might be afforded protection under this option.

The Association believes that there is a strong argument for the retention of the bona fide requirement. We do so for the following reasons.

The 2009-09 ASIC Annual Report to Parliament makes not a single mention of whistleblowers or whistleblower protection during a period of possibly unrivalled market instability during which there were several high profile corporate failures. Rather, the report catalogues the success that ASIC has achieved in market supervision and enforcement, and advises the Parliament of the effective mechanisms and arrangements which it believes will bolster market integrity in coming years.

The APRA 2009 Annual has similar comments (and no reference to whistleblower provisions):

“APRA prefers to take a collaborative approach to resolving prudential issues with boards and management of the institutions it supervises. However, enforcement actions are an important part of APRA’s supervisory armoury when an institution is unable or unwilling to observe its prudential requirements.”

The ACCC Annual Report also is silent on both the operation of whistleblower provisions and on whether reforms to the good faith requirement is necessary to assist their enforcement.

Another item of good public policy guidance can be found in the Report of the House of Representatives Committee on Legal and Constitutional Affairs on public sector whistle blowing (Feb 2009). One of the dot points in Recommendation 2 states that ‘people have a responsibility to raise those concerns in good faith’. If this is the most recent non-partisan view of the parliament, following an evidence based and extensive inquiry, in relation to public servants it is difficult to conclude that the rule should not also apply to those in the private sector.

The same Report includes a commonsense and workable definition of acting in good faith which has been taken from the Commonwealth Ombudsman Work Practice Manual 2006, viz:

“**Good faith** — an action is taken in good faith if it is done honestly, even if it is done negligently or ignorantly. Thus a person who makes a false or misleading complaint, but does so with an honest belief in its truth, even if ‘honestly blundering and careless’, will be acting in good faith. Conversely, an act made with knowledge of the deception and with intent to defraud/deceive or to achieve a collateral outcome is not made in good faith.¹⁶”

Encouraging possibly malicious informants is counterproductive to the grain of good corporate culture and governance which has a number of key characteristics:

- Requirement for compliance plans, compliance officers and reporting to ASIC and ASX by compliance officers – hence ASIC’s position in its most recent Annual Report.
- Widespread establishment of grievance procedures in companies to thereby minimise the existence of unresolved conflict – this is an example of a commonsense management practice to build a harmonious and efficient work environment.

If there is to be retrograde change to remove the good faith provisions then a new body of law to protect those might be adversely by false accusations of malicious whistleblowers will also need to be enacted. First, there is no protection to those who are maliciously reported to ASIC. Why should they be assumed to be guilty, particularly when the informer is acting maliciously? Further, it is not unheard of for an employee to be required to resign immediately on commencement of an ASIC investigation, or to have his or her career path put on hold. The investigation may take several years. How, and who compensates that person and his family for the time, cost and worry of a fruitless investigation?

Second, the proposed statutory protection will no doubt gratify the malicious informer. But why should the statutory change of law stop there. Why not reward an informer with a financial reward i.e. \$100,000 for a conviction on insider trading, and so on (in the US informing the IRS on your neighbour or fellow worker now entitles the informer to up to 30% of the tax thereby collected). Then, from rewarding the informer, the logical statutory progression is to change the law so as to punish those employees who do not inform on their fellow workers.

There is no empirical evidence which demonstrates a failure of the good faith provisions. Obviously the absence of informers is no evidence of any failure; if it were otherwise, the failure to report any outbreak of cholera in Australia in the last 25 years, could likewise be put down to a deficit in reporting.

The question is what sort of society Australians want. Is it one in which informing on your fellow worker, neighbour or employer for reward (financial or personal gratification) is encouraged?

For the above reasons we support the retention of the provisions which require whistleblowers to be responsible by acting in good faith.

Yours sincerely



Robin Speed

President of the Rule of Law Association of Australia: www.ruleoflawaustralia.com.au.

Tel: (02) 9251 8000

rspeed@sslaw.com.au