

Whistleblowers protection Act 2001

Ruth Goonan, Minter Ellison

Cultural mores in Australia have long focused on concepts of mateship and solidarity which have militated against the idea of 'dobbing in' ones mates and 'ratting on' fellow workmates. Those who have moved beyond accepted practice by speaking out about corruption or mismanagement have done so at great expense and risk to themselves.¹ The actions of such 'whistleblowers' however, help reduce inefficiency and corruption in the public sector.² Recognising this, the Victorian Government has followed the example of some other States,³ and has provided protection for whistleblowers by enactment of the Whistleblowers Protection Act 2001 (Vic) ("Act").

The primary aim of the Act is the promotion of accountability of public officers and public bodies. This is achieved by encouraging the disclosure of information of improper conduct and providing for the protection of the discloser and the investigation of matters disclosed.⁴

Triggering the protection of the Act

To trigger the protection of the Act, a whistleblower must be a natural person who makes a 'protected disclosure',⁵ based on a belief on reasonable grounds that a public officer or public body has engaged in 'improper conduct' or has taken detrimental action against a whistleblower in reprisal for a protected disclosure.⁶ Such disclosure may be made to the Victorian Ombudsman or to the public body who is, or whose official is, the subject of the disclosure,⁷ and may be made anonymously.⁸ The Act does not, however, protect a whistleblower from liability arising from his or her own conduct.

'Protected Disclosure'

The primary requirement that the disclosure be a 'protected disclosure' – revealing a public officer or body has engaged in 'improper conduct' – may, in fact, be difficult to achieve. According to the Act, 'improper conduct' includes corrupt conduct, substantial mismanagement of public resources, conduct involving substantial risk to public health or safety, or substantial risk to the environment. To be a 'protected disclosure' the Act further requires that the conduct, if proved, constitutes a criminal offence or reasonable ground for termination of employment.⁹ The Office of the Ombudsman of Victoria has advised that 'improper conduct' will be interpreted narrowly, requiring an element of dishonesty.¹⁰

Furthermore, the onus to substantiate the occurrence of 'improper conduct' rests squarely on the whistleblower.¹¹

Protection Obtained

If it is determined by either the public body to whom the disclosure is made, or the Ombudsman, that the disclosure is a 'protected disclosure', the whistleblower will receive protection in accordance with Part 3 of the Act. He or she will not be subject to civil or criminal liability, or liability arising from an administrative process.¹² Nor will the whistleblower breach section 95 of the *Constitution Act 1975* regarding confidentiality.¹³ Protection from defamation action¹⁴ and reprisal is also provided.¹⁵ Furthermore, a penalty of \$6,000 or 6 months imprisonment applies if information received as a result of a protected disclosure is disclosed by the recipient.¹⁶ However, if the disclosure is not 'protected', no protection is provided at all to the whistleblower.

Further Action

To obtain further protection or benefits under the Act, the public body to whom the disclosure was made,¹⁷ or the Ombudsman, must determine the 'protected disclosure' is also a 'public interest disclosure'. This term is not defined by the Act. Some guidance may be found in section 24 of the Act which provides that the Ombudsman must be satisfied that the 'public interest disclosure' discloses 'improper conduct' has been engaged in.

Conclusion

The *Whistleblowers Protection Act* admirably attempts to protect whistleblowers in a culture in which 'ratting' on ones mates has long been discouraged. As such, it represents a step towards encouraging individuals to 'blow the whistle' on misconduct in the public sector, acknowledging

the impacts on those who attempt to combat corruption. While the legislation fails to define essential terms such as 'public interest disclosure', it is clear in the protection it provides, establishing harsh penalties for those who breach its requirements. As such, the *Whistleblowers Protection Act 2001* provides a long needed framework for the recognition of the contribution of whistleblowers and the protection of such individuals, in a society in which 'dobbing' is, and may always be, disdained.

1. For an analysis of the cost of disclosure and retribution taken against whistleblowers, see William De Maria and Cyrelle Jan, 'Eating Its Own: The Whistleblower's Organization in Vendetta Mode' (1997) 1 *Australian Journal of Social Issues* 34; Sue Streets, 'Legislation to protect whistleblowers in Victoria' (2001) 29 *Australian Business Law Review* 424.

2. Discussed in Streets, above n 1, 424.

3. See, for example, *Whistleblowers Protection Act 1994* (Qld); *Protected Disclosures Act 1994* (NSW).

4. *Whistleblowers Protection Act 2001* (Vic) s 1.

5. *Ibid*, Part 2.

6. *Ibid*, s 5.

7. *Ibid*, s 6(1).

8. *Ibid*, s 7.

9. *Ibid*, s 3.

10. John Benson, 'Whistleblowers Protection Act 2001: The Ombudsman's View' 3.

11. In an analysis of this problem, William De Maria and Cyrelle Jan suggest that a reverse onus should apply in such situations. That being, that those alleged to be guilty of 'improper conduct' be required to prove their innocence, rather than the whistleblower bear this onus: above n 1, 43. Thanks also to Frances Anderson, of Minter Ellison Lawyers, for her discussion of this issue.

12. *Ibid*, s 14.

13. *Ibid*, s 15.

14. *Ibid*, s 16.

15. *Ibid*, s 18.

16. *Ibid*, s 22.

17. This action must be taken within 45 days of receipt of the disclosure and the whistleblower informed of this decision in accordance with *ibid*, s 28.