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Whistleblowers

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SUMMARY

Whistleblowers are people who alert the public or others to scandal, danger, malpractice, corruption or illegal conduct.

Providing statutory protection for whistleblowers of wrongdoing is not new in Australia; whistleblower protection became an issue about 15 years ago with the corruption inquiries of the late 1980s and early 1990s. Public sector whistleblower protection legislation has existed in Australia since the early 1990s. However, the concept of organisations educating employees on whistleblowing and institutionalising the reporting process is a more recent phenomenon.

Recently the topic received renewed interest with the introduction of the Corporate Law Economic Reform Program (CLERP 9) of whistleblower protection into the Corporations Act 2001 (Cth). Some public sector whistleblower protection legislation applies to organisations other than public sector entities – a public interest disclosure includes any disclosure of a substantial and specific danger to the environment from a contravention of certain legislative provisions.

It is now timely to revisit whistleblower protection procedures having regard to the requirements of CLERP 9 and applicable public sector legislation. A policy on whistleblower protection should comply with the various and sometimes inconsistent regulatory requirements. Failure by an individual to recognise that a disclosure or complaint is protected under legislation could have adverse consequences.

This paper summarises the Australian regulatory framework on whistleblower protection affecting private sector organisations and examines some of the issues to consider when developing a whistleblower policy.

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A WHISTLEBLOWER POLICY – THE BASICS

What is a Whistleblower Policy?

A whistleblower policy sets out an organisation's approach when its employees and others report concerns about the conduct of the organisation and provides a framework for investigating and resolving matters. It should be considered an important part of an organisation's strategy to reduce fraud and white collar crime. While traditionally these crimes were seen as the responsibility of law enforcement agencies, organisations are now taking greater responsibility for the investigation of these crimes and protecting those that discover and disclose these crimes. It usually contains a publicly available policy describing the organisation's approach to receiving and investigating reportable conduct. There will also usually be separate procedures prepared for those that are nominated to receive and investigate complaints to assist them in their task.

Why have it?

A whistleblower policy forms part of an organisation's culture of compliance. The aim of the policy is most usually to create an environment where people feel safe and comfortable reporting their concerns about the conduct of the organisation, its employees and consultants. A whistleblower policy is an attempt to try and reverse the natural reluctance within an organisation for individuals to expose inappropriate conduct. It provides a level of protection to all employees, whether they are the whistleblower or the person who is the recipient of the protected disclosure.

Many employees regard disclosing improper conduct as disloyal to an organisation or person. One of the important aims of the policy should be to reverse this view; ie, failure to disclose is disloyal to the organisation and fraud detection is the responsibility of every employee. Information held within an organisation is a valuable asset in assisting the prevention of fraud and misconduct. The most likely way to detect internal fraud is through a "tip" rather than through other more traditional methods, such as audit.[1]

Whistleblower policies are driven by legal and commercial necessity. Although there is no requirement in Australia that mandates a requirement for a whistleblower policy, legally:

- companies with a listing in the United States will need to comply with the *Sarbanes-Oxley Act*, which requires a documented whistleblower policy;
- companies listed in Australia will need to explain whether they comply with the ASX Corporate Governance Council's Recommendations, which recommends a whistleblower policy;

[1] 2002 & 2004 Report to the Nation on Occupational Fraud and Abuse, Association of Certified Fraud Examiners.

- all companies are required to comply with the whistleblower protection provisions in the *Corporations Act;*
- in complying with their duties of care and diligence under the *Corporations Act*, officers of a company will need to consider whether they have an appropriate and effective whistleblower policy, the absence of which may result in an officer failing to satisfy their duty to the company;
- all organisations with operations in Queensland and South Australia will need to comply with relevant legislation in that State protecting whistleblowers who make public interest disclosures.

Practically:

- it is an important tool in minimising corruption and fraud within an organisation, providing the potential for these matters to be identified and controlled prior to entering the public domain;
- it assists in educating staff that compliance is regarded as fundamental to the long term success of the organisation and that they have an important role to play in that success;
- it assists in identifying and addressing systemic problems within the organisation where there are reporting patterns.

HISTORY AND LEARNING

History

A research note prepared this year by the Federal Parliamentary Library entitled "Whistleblowing in Australia – Transparency, Accountability … but above all, the truth", provides an excellent summary of the development of the policy and legislation on whistleblowing in Australia to date.[2] In summary, it concludes that protection for whistleblowers first arose as an issue in Australia approximately 15 years ago with the corruption inquiries of the 1990s, including, for example, the Fitzgerald Inquiry in Queensland. This brought to public attention the need for whistleblowers to be protected. Throughout the 1990s, many States and Territories adopted public interest disclosure legislation.

In 1998 the Australian Competition and Consumer Commission (ACCC) published a guideline dealing with cooperation and lenience in enforcement, followed in 2002 by its published *Cooperation policy for enforcement matters* and in 2003 by its *Leniency Policy*. The various policies provide potential immunity from prosecution for whistleblowers of cartel conduct and leniency in prosecution for whistleblowers of other contraventions of the *Trade Practices Act 1974* (Cth).

[2] Parliament of Australia, Department of Parliamentary Services, Parliamentary Library Research Note, 14 February 2005, no 31, 2004-05, ISSN 1449-8456.

In the same year, the ASX Corporate Governance Council released its *Principles of Good Corporate Governance and Best Practice Recommendations*. They recommended the establishment of a code of conduct to guide key executives as to the responsibility and accountability of individuals for reporting and investigating reports of unethical practices and suggested protection be provided for those who report violations in good faith. The ASX requires all listed entities to report on their compliance with the recommendations.

Last year, the CLERP 9 amendment to the *Corporations Act 2001* (Cth) introduced a new Pt 9.4AAA – *Protection for whistleblowers*, which established a framework designed to encourage employees, officers, and subcontractors (and their employees) engaged by a company to report suspected breaches of the corporations law to either a regulatory authority or internally within the company.

Learning

A review of persons convicted of serious fraud offences indicated that they tended to be in their mid-40s, male, directors or involved in accounting duties, enjoy relatively stable employment and act alone in the commission of the offence.[3]

To date, two important insights have emerged in the operation of whistleblower protection policies. Although these features have been informed the historical operation of the public interest disclosure legislation, they are none the less relevant to private sector organisations.

Firstly, evidence indicates employees and others will only be prepared to report wrong doing if certain essential elements exist in either the company's policy or in legislation.[4] Those essential elements are:

- legislated protection from victimisation and retribution in relation to the report.[5] In order for whistleblowers to be satisfied of this, they must be aware of the level of protection that is afforded to them and they must obtain comfort that their employer is also aware of the protection that must be afforded to them;
- the ability to provide their report confidentially and anonymously. This is described as being one of the most important factors in encouraging the reporting of wrongdoing;
- guidance on the evidence they require before making a protected report.

[3] "Serious Fraud in Australia and New Zealand", Australian Institute of Criminology and PricewaterhouseCoopers, 2003.

[4] Monitoring the impact of the NSW Protected Disclosures Act 1994, Phases 3&4 NSW Public Sector Employee attitudes to reporting corruption, Independent Commission Against Corruption; Queensland Whistleblower Study, 1993; Senate Select Committee on Public Interest Whistleblowing.

[5] In the ICAC Report, Note 2 at 8, 76% of respondents said they would be unlikely to, or would definitely not, report corruption without legal protection.

Secondly, much of the case law relating to the public interest disclosure legislation and whistleblower protection in the United States relates to employees alleging unjust dismissal on the basis of a whistleblower report they had made. The employer maintained the dismissal was not related to the making of the report. It is not within the scope of this paper to review the case law in this area. However, it is to be expected that litigation of this nature from employees is likely to continue to remain a risk and cost to the organisation of implementing an effective whistleblower policy.

REGULATORY FRAMEWORK

There is no legislation within Australia that provides comprehensive protection for whistleblowers of wrong doing within the non-government sector or mandates the requirements for a whistleblower policy. There is federal and State legislation that provides some form of protection for limited types of disclosure.

Federal Legislation

Corporations Act 2001 (Cth)

The *Corporations Act 2001* (Cth) provides protection to whistleblowers of breaches of the corporations law.[6] To attract protection, a whistleblower must be an officer, employee or contractor (including employees of a contractor) of a company.[7] Whistleblowers are protected from victimisation by the corporation where they make a disclosure that meets the following conditions (*protected disclosure*):

- the disclosure is made to the Australian Securities and Investments Commission (ASIC), the corporation's auditors, a director, secretary, senior manager[8] or the corporation's authorised whistleblower officer;
- the whistleblower first discloses their name to the person to whom the disclosure is made (anonymous disclosures are not protected);
- the whistleblower has reasonable grounds to suspect that the information indicates that the corporation, an officer or employee has, or may have, contravened the *Corporations Act 2001* (Cth) or the *Australian Securities and Investments Commission Act 2001* (Cth); and
- the whistleblower makes the disclosure in good faith.

6 *Corporations Act 2001*, Pt 9AAA.

7 The protection provisions do not apply to officers, employees, contractors (including employees of contractors) of other bodies such as unincorporated associations or partnerships.

8 Meaning a person other than a director or company secretary of the corporation, who makes or participates in making, decisions that affect the whole or a substantial part of the business of the corporation, or has the capacity to significantly affect the corporation's financial standing.

Where a whistleblower meets the conditions above, then:

- the whistleblower is not subject to criminal or civil liability for making the disclosure;
- no contractual or other remedy can be enforced against the whistleblower on the basis of the disclosure;
- the corporation cannot terminate the whistleblower's employment, as a result of making the disclosure;
- the corporation cannot act in a way to cause, or threaten to cause, detriment to the whistleblower because of the disclosure (*victimisation*); and
- the person to whom disclosure is made can only disclose the information to ASIC, the Australian Prudential Regulatory Authority (APRA), the Australian Federal Police (AFP) or a third party with the consent of the whistleblower.

If a party receives details of protected disclosure from a third party, and they know that the third party has breached their duty of confidence to a whistleblower, that party will also be under a duty of confidence in respect of the information the subject of the protected disclosure. The information that is protected from disclosure is the information itself and the identity of the whistleblower or information that is likely to lead to the identification of the whistleblower.

ASIC has published an information sheet on protection for whistleblowers. In order to ensure protection under these provisions, it is not necessary that the whistleblower be aware of or even utilise a specific protection policy of the organisation – the statutory protection is afforded regardless of the existence of an internal policy.

The scope of the protection has the potential to apply in more circumstances than might otherwise be considered relevant. Other unlawful conduct may also involve unlawful conduct under this legislation. For example, in cases of employee theft and fraud, the employee is likely to have breached s 182 of the *Corporations Act 2001* (Cth), which prohibits an employee from improperly using their position to gain and advantage for themselves or someone else or to cause detriment to the corporation. Books or records may also have been falsified.

Confidentiality is paramount, as it is an offence for any protected disclosure to be revealed to a third party (other than ASIC, APRA or AFP) until the consent of the discloser has been given. This will have serious implications if the discloser does not give consent – particularly if the offending conduct is ongoing or poses substantial risk. Clearly consent should always be sought. If consent is not granted, the information cannot be placed in employment records because it will then be revealed to other persons. Disclosure records must be kept confidential and if necessary, sealed.

ACCC Leniency Policy

The Leniency Policy of the ACCC provides some immunity from prosecution to wrong doers who are whistleblowers of contraventions of the *Trade Practices Act 1974* (Cth). It does not provide statutory protection against victimisation of whistleblowers in the same way as the *Corporations Act*. In order to be eligible for immunity, the discloser must:

- be the first person to disclose the existence of the cartel (full immunity) or be the first to make an application for immunity where the ACCC is aware of the cartel but has insufficient evidence (immunity from pecuniary penalty);
- give full and frank disclosure;
- cooperate fully on a continuous basis and expeditiously throughout the ACCC's investigation and ensuing proceedings;
- cease its involvement in the cartel;
- not have coerced other persons to participate in the cartel or been the clear leader of the cartel;
- for corporations, the admissions and cooperation must be corporate acts; and
- for corporations, where possible, the corporation must make restitution to injured parties.

For other breaches of the *Trade Practices Act 1974* (Cth) the policy describes the basis upon which leniency will be afforded to whistleblowers.

State Legislation

Both Queensland and South Australia have enacted legislation which provides statutory protection to any person who discloses certain types of conduct including substantial danger to the environment. Any organisation who victimises an employee as a result of the disclosure can be liable for damages and commits an offence.

Queensland

In Queensland, the *Whistleblowers Protection Act 1994* (Qld) provides protection from reprisals to any person who discloses information that satisfies the following conditions:

- the disclosure is made to a public sector entity (which includes a department, a local government, a university and a Commission) about anything the whistleblower reasonably believes that entity has the responsibility or power to investigate or remedy; and
- the whistleblower honestly believes on reasonable grounds that the information tends to show:

(i) a substantial and specific danger to the environment from contraventions of, or of conditions under, provisions of specified parts of certain legislation (including the *Environmental Protection Act 1994* (Qld), *Fisheries Act 1994* (Qld), *Forestry Act 1959* (Qld), *Mineral Resources Act 1989* (Qld), *Nature Conservation Act 1992* (Qld) and *Water Act 2000* (Qld));

(ii) a substantial and specific danger to the health or safety of a person with a disability; or

(iii) relates to a reprisal taken against anybody as a result of a public interest disclosure.

Unlike the *Corporations Act 2001* (Cth), this legislation protects whistleblowers who make anonymous disclosures.

A reprisal in respect of a public interest disclosure occurs if someone causes or attempts or conspires to cause detriment to any person because of the disclosure. It is sufficient if the public interest disclosure is a substantial ground for the act or omission that is the reprisal, even if there is another ground.

If the disclosure is protected, then:

- the whistleblower is not subject to criminal or civil liability for making the disclosure;
- no disciplinary action can be taken against the discloser for making the disclosure;
- any person who takes a reprisal can be liable in damages to anyone who suffers detriment as a result; and
- the discloser can obtain an injunction against a reprisal requiring the person to take action to remedy any detriment caused or to prevent further reprisals.

It is an offence if a person intentionally gives information that is false or misleading in a material particular intending it to be acted on as a public interest disclosure.

South Australia

In South Australia, the *Whistleblowers Protection Act 1993* (SA) provides protection from victimisation to any person who discloses information that satisfies the following conditions:

- the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure (including a member of the police force for illegal activity or to a department, agency or Local Government for a matter falling within the sphere of responsibility of that organisation);
- the information tends to show that a person or body corporate is or has been involved in an illegal activity or in conduct that causes a substantial risk to public health or safety or to the environment; and

- the whistleblower believes, on reasonable grounds, that the information is true or may be true, and is of sufficient significance to justify disclosure.

This legislation also protects whistleblowers who make anonymous disclosures.

A victimisation refers to a person causing detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure. Detriment includes injury, damage or loss, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to a person's employment or threats of reprisal.

If the disclosure is protected, then:

- the whistleblower is protected from civil or criminal liability (including disciplinary action) in respect of the disclosure; and
- the victimisation may be dealt with as if it were an act of victimisation under the *Equal Opportunity Act 1984* (SA) or alternatively, may be dealt with as a tort of victimisation.

It is an offence for a person to make a statement that they know is false or if they are reckless about whether it is false, intending it to be acted on as a public interest disclosure.

Discrimination Legislation

If a whistleblower is victimised as a consequence of alleging a person has breached any State or federal discrimination legislation, the person or company involved in the victimisation will commit an offence and be liable to statutory penalties or potentially, in the case of individuals only, imprisonment. A company may also be vicariously liable for any victimisation engaged in by its workers.

United States

The *Sarbanes-Oxley Act 2002,* HR 3763 was introduced in the United States in 2002 in response to the financial scandals of Enron and others. The legislation applies to all companies that trade on the stock exchange. The legislation not only provides for employment-based protections for whistleblowers, it also mandates that publicly traded corporations establish procedures dealing with internal complaints, requires lawyers to become internal in-house whistleblowers and criminalises retaliation.[9] A corporation is also required to establish an independent hotline for reporting suspected incidents of fraud or misconduct. A whistleblower is protected even if they make their disclosures anonymously.

[9] Stephen M Kohn, *Corporate whistleblowers: the whistleblower provisions of Sarbanes – Oxley; corporate whistleblower protection overview and analysis* (2 Oct, 2002), http://www.kkc.com/corporate.isp

ASX Corporate Governance Council's Recommendations

Every company that is listed on the Australian Stock Exchange (ASX) is required to disclose the extent to which they have followed the ASX Corporate Governance Council's Recommendations.

Principle 3 requires an organisation to promote ethical and responsible decision-making. Recommendation 3.1 is that a code of conduct be established guiding the directors, the chief executive officer, the chief financial officer and other key executives as to the responsibility and accountability of individuals for reporting and investigating reports of unethical practices.

Principle 10 requires an organisation to recognise the legitimate interests of stakeholders. Recommendation 10.1 is that a code of conduct be established and disclosed guiding compliance with legal and other obligations to legitimate stakeholders. In particular, the code of conduct should enable employees to alert management and the board in good faith to potential misconduct without fear of retribution, and should require the recording and investigation of such alerts. The Recommendations refer organisations to the Australian Standard Whistleblower Protection Program for guidance.

It would be difficult for a listed organisation to justify the absence of a whistleblower protection policy.

PREPARING A WHISTLEBLOWER POLICY – SOME ISSUES TO CONSIDER

Practical Steps to Implement a Policy

A good place to commence preparation of a whistleblower policy is with Australian Standard 8004-2003, Whistleblower protection programs for entities.

The scope and size of the policy will, by necessity, vary from organisation to organisation. Generally, a whistleblower policy will protect disclosure of any wrongdoing by a broad range of persons who have dealings with the organisation.

Consider the following steps as a guide to preparing a whistleblower policy:

1. Assess the current culture within the organisation to reporting wrong doing
2. Seek board and executive support for the policy
3. Develop the policy
4. Identify resources required to implement the policy and its potential impact
5. Develop investigation procedures
6. Implement the policy

7. Educate staff and management
8. Review the policy regularly and re-educate regularly.

Developing the Policy

Compliance with applicable legislation

In developing the policy and the investigation procedures, they should be prepared so that they are not inconsistent with any applicable legislation. For example, if the policy provides for anonymous reporting, employees should be advised in the policy that protection under the *Corporations Act 2001* (Cth) is only provided to persons who first disclose their name when reporting the conduct.

At a minimum, training should be provided to those nominated or eligible to receive protected disclosure on how to handle them in compliance with the policy and relevant legislation. It is critical that disclosures that qualify for protection under legislation are identified as such. Inappropriate use of protected disclosure can result in a breach of the *Corporations Act 2001* (Cth).

Who is covered by the policy?

The persons who can disclose reportable conduct under the policy should be considered. It should at least cover that class of person afforded legislative protection under the *Corporations Act 2001* (Cth). It could conceivably cover reportable conduct disclosed by any person. It is possible, for example, that persons related to employees would have details of improper conduct.

Who is the information reported to?

Organisations should nominate a senior person to whom disclosure can be made. The seniority of the position is likely to impact on employees' views of the importance of the policy to the organisation. Consideration should also be given to nominating a person external to the organisation to receive disclosures. This could include, for example, a solicitor or auditor. Consideration should be given to whether this should be a member of a current service provider to the organisation, or should be someone independent of the organisation.

What steps does the whistleblower take to ensure protection?

The policy should clearly explain the steps the whistleblower needs to take to be eligible for protection, including the requirements of any applicable legislation. For example, they should be advised that protection will only be available under the *Corporations Act 2001* (Cth) if they provide their identity prior to providing their report.

What evidence does a whistleblower require to ensure protection?

In order to be protected, the whistleblower should have reasonable grounds to believe there has been reportable conduct and makes the disclosure in good faith. Employees should be given practical guidance on the type of information that, if disclosed, will ensure they will receive protection. In order to have reasonable grounds, it is not necessary that the basis would be able to be used as evidence in a court of law. For example, an overheard conversation (hearsay) may be enough to warrant protected disclosure.

What will amount to reportable conduct?

Consideration should be given to the type of conduct that will be reportable. Commonly, policies include conduct that the whistleblower considers (acting in good faith) to be dishonest, fraudulent, corrupt, illegal, in breach of any legislation or contrary to any code of conduct or administrative procedures of the organisation.

What does a person do when they receive a protected disclosure?

In the case of protected disclosures under the *Corporations Act 2001* (Cth), a person who receives the information can only provide details of the information to ASIC, APRA or AFP, unless they have the consent of the whistleblower. A separate system for recording whistleblower reports will therefore need to be maintained and, unless consent is granted, information cannot be transferred to employees' employment records. Consent to disclosure to appropriate people within the organisation and for the purpose of investigating the report should always be sought.

Best practice dictates that the rules of natural justice should be followed in investigating a report and that the wrongdoer should, if possible, be given the opportunity to respond to the report.

Will an investigation be guaranteed?

There is no statutory requirement to investigate reportable conduct. Best practice currently dictates that the organisation commit to investigating reports and this is recommended as part of the *ASX Corporate Governance Council's Recommendations* and the Australian Standard.

Investigation procedures should be developed in addition to and consistent with the whistleblower policy for the assistance of those who will be responsible for investigating reports.

If the conduct is protected under the *Corporations Act 2001* (Cth), whistleblowers will need to be advised that investigations cannot be conducted unless they provide their consent. If the whistleblower does not consent to the disclosure of their identity or the conduct reported on, the ability to effectively investigate the report is likely to be limited.

What protection will be granted to whistleblowers and others?

The level of protection that will be granted to whistleblowers needs to be articulated in the policy. Consideration may need to be given to extending the persons to whom protection is afforded, depending on the persons that can report conduct under the policy. For example, if any person can report conduct, protection may need to be afforded to relations of the whistleblower (who are employees) as well as the whistleblower themselves.

Will internal rights of appeal and external rights of appeal exist for whistleblowers who believe they have been victimised as a result of the protected disclosure?

A description of the rights of the whistleblower to request positive action by the organisation to protect them should be disclosed; for example, will the organisation facilitate relocation of the whistleblower on request in appropriate circumstances?

Who is responsible for guaranteeing the protection of whistleblowers? Current best practice dictates that a senior person be appointed with responsibility for guaranteeing protection for whistleblowers and that this person should be a separate person to the person charged with responsibility for investigating reports.

Confidentiality and privacy issues

Will the policy allow anonymous reporting? If the whistleblower provides their identity, will confidentiality be guaranteed if requested? In the case of a protected disclosure under the *Corporations Act 2001* (Cth), a person who receives the information can only provide details of the information to ASIC, APRA or AFP, unless they have the consent of the whistleblower.

The manner in which the *Privacy Act 1988* (Cth) regulates information disclosed is complicated, and will turn on whether the whistleblower is an employee and whether the improper conduct relates to an employee.

Information disclosed by an employee about an employee would form part of the employment records of both employees (even if not forming part of their official employment record) and will not therefore be regulated under the *Privacy Act 1988* (Cth). If the whistleblower is not an employee or the improper conduct does not relate to an employee, the impact of this legislation will need to be carefully considered. In summary, the information will need to be treated confidentially and not used for unrelated purposes. The legislation expressly allows use or disclosure for the investigation of seriously improper conduct or unlawful activity or disclosure authorised by another law. Otherwise, it can only be used for the purpose for which it was collected and there is a requirement that certain disclosure is made. The information must be disclosed to the person that it relates to (for example, the employee that has engaged in the alleged improper conduct). Most small business operators (less than $3M turnover) are exempt from complying with the *Privacy Act 1988* (Cth).

A written whistleblower policy will assist in providing clarity of the purpose for which the information may be used. If the information is disclosed by the whistleblower in confidence, the information can only be disclosed to a third party if authorised by law or if the disclosure is to investigate unlawful conduct.

Officer's duties – are you required to have a policy?

The *Corporations Act 2001* (Cth) requires an officer to exercise that degree of care and diligence that a reasonable person would exercise if they:

- were a director or officer of a corporation in the corporation's circumstances; and
- occupied the office held by and had the same responsibilities within the corporation, as that officer.

An officer will have exercised care and diligence if they satisfy the business judgment rule. That requires the officer to, relevantly, have informed themselves about the matter on which judgment is being exercised to the extent they consider reasonable and that they rationally believe the judgment is in the company's best interests. A judgment will be rational unless no reasonable person could hold the belief.

Every company should consider whether they require a whistleblower policy. If a decision is taken that the organisation does not require such a policy, officers, if challenged, will seek to establish that they had a rational belief that their judgment in this regard was in the company's best interests. Having regard to the requirements of the *Corporations Act 2001* (Cth) and the *ASX Corporate Governance Council's Recommendations* establishing this is likely to present a considerable challenge.

Impact on subsequent dealings with whistleblowers

An organisation may be entitled to discipline a person under the terms of their employment arrangements for inappropriate disclosure, being disclosure made in bad faith or dishonestly or for which the discloser does not have reasonable grounds to suspect inappropriate conduct.

Additionally, the organisation can discipline the whistleblower for their role in any misconduct. In these circumstances, the disciplinary action must be taken solely in relation to the underlying conduct and not in relation to the fact that the whistleblower has made a protected report.

It is sometimes the case that whistleblowers have a heightened sensitivity to workplace conduct which is likely to make dealing with any performance issues particularly challenging.

CONCLUSION

A whistleblower policy is an important tool in assisting reducing and minimising corruption and fraud within an organisation and provides an avenue for these matters to be identified and controlled prior to entering the public domain. It also assists management and the board in assessing the compliance health of an organisation.

Current legislation in Australia is ineffective in providing adequate protection for whistleblowers. Having regard to recent events, including the recent changes to the *Corporations Act 2001* (Cth), there is an expectation that organisations will voluntarily choose to implement an effective whistleblower policy. Unfortunately, while current legislation remains ineffective, there is a real risk that we will experience a tragedy, like the suicide of David Kelly, the Oxford educated microbiologist who was an expert in arms controls. He was sufficiently well respected to have been nominated for a Nobel peace prize. He claimed the British Government had applied pressure to "sex up" Iraq's weapon capacity and advised the BBC of this. He appeared before the house of commons foreign affairs committee and was aggressively questioned. Two days later, he was found dead. His wife attributed his suicide, at least in part, to his disclosure.

Now is an appropriate time for organisations to implement or revisit their whistleblower policy.

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