Whistleblower Laws: The Other Employment Law

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Introduction

It is less than three decades since the first whistleblower laws were passed in Australia.[1] Since then, whistleblower laws on reporting wrongdoing in relation to the public sector have been introduced by the Commonwealth and every state and territory (**Public Sector Whistleblower Laws**).[2] Meanwhile, the *Corporations Act 2001* (Cth) (**Corporations Act**) and other legislation includes protections for whistleblowers in the private sector (**Private Sector Whistleblower Laws**).[3] While there has been a considerable amount of research and writing on enhancing these laws to encourage whistleblowing,[4] little has been written on the impact these laws have on employers' ability to manage their employees. This is despite the fact that government agencies have criticised some Public Sector Whistleblower Laws on this basis.[5] This paper's aims are twofold. First, to outline how whistleblower laws impose restrictions and duties on employers dealing with alleged employee misconduct. Second, to critically evaluate these restrictions and duties, and determine whether amendments to the laws should be made. For the purposes of this paper, 'employee misconduct' includes any conduct that (absent whistleblower laws) would justify an employer taking disciplinary action against an employee.

Part One addresses the first aim of this paper, by outlining three elements of Australian whistleblower laws,[6] and how they place additional restrictions and duties on employers dealing with alleged employee misconduct. It does not address every nuance of each whistleblower law, but identifies approaches and models adopted by various laws. *First*, 'anti-retaliation' elements of whistleblower laws prohibit retaliatory action against

[1] *Whistleblowers Protection Act 1993* (SA).
[2] *Whistleblowers Protection Act 1993* (SA); *Public Interest Disclosure Act 1994* (NSW); *Public Interest Disclosures Act 2002* (Tas); *Public Interest Disclosure Act 2003* (WA); *Public Interest Disclosure Act* 2008 (NT); *Public Interest Disclosure Act 2010* (Qld); *Public Interest Disclosure Act 2012* (ACT); *Protected Disclosure Act 2012* (Vic); *Public Interest Disclosure Act 2013* (Cth).
[3] Corporations Act Pt 9.4AAA; *Banking Act 1959* (Cth), Pt IVA, Div1; *Insurance Act 1973* (Cth), Pt IIIA, Div 4, Subdiv A; *Life Insurance Act 1995* (Cth) Pt 7, Div 5, Subdiv A; and *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 29A, Div 1.
[4] See, Peter Roberts, AJ Brown, Jane Olsen, *Whistling While they Work* (ANU E Press, 2011); AJ Brown (ed) *Whistleblowing in the Australian Public Sector* (ANU E Press, 2008); AJ Brown, Nerisa Dozo and Peter Roberts, *Strength of Organisational Whistleblowing Processes: Analysis from Australia & New Zealand. Further results of the Whistling While They Work 2 Project* (Griffith University, November 2016); AJ Brown and Sandra A Lawrence, *Further Results: Whistling While They Work 2: Survey of Organisational Processes and Procedures 2016* (Griffith University, July 2017).
[5] See Commonwealth Attorney-General's Department, Submission to the Legislated Review of the Public Interest Disclosure (PID) Act, *Statutory Review of the Public Interest Disclosure Act 2013*, March 2016; Phillip Moss, *Review of the Public Interest Disclosure Act 2013* (15 July 2016).
[6] These categories largely mimic those identified in AJ Brown, 'Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 2(3) *E-journal of International and Comparative Labour Studies* 4, 9.

whistleblowers for blowing the whistle (also known as making a 'disclosure') (**reprisal action**). These provisions are similar to, but expand on, prohibitions in employment laws on taking retaliatory action against employees for exercising workplace rights, such as the adverse action provisions in the *Fair Work Act 2009* (Cth).[7] The 'whistleblowing' protected by these anti-retaliation elements differs substantially between whistleblowers laws, and the different approaches are outlined. *Second*, the 'public' elements of whistleblower laws are an extension of the anti-retaliation elements, in that they provide protections for persons who make disclosures, but specifically protect whistleblowers who have made disclosures *to the public or the media, including indirectly through politicians*. These elements effectively prevent employers taking disciplinary or other action against employees for making public allegations of wrongdoing in relation to the employer. However, there are no public elements in Private Sector Whistleblower Laws, and they only apply in limited circumstances under Public Sector Whistleblower Laws. *Third*, and most significantly for this paper, 'institutional' elements to whistleblower laws, which also only exist in Public Sector Whistleblower Laws, dictate whether and how a disclosure needs to be investigated. This paper outlines different institutional 'models' implemented in Public Sector Whistleblower Laws, and shows that some models profoundly impact how employers must respond to alleged employee misconduct. Some institutional elements force employers to investigate an enormous range of alleged wrongdoing by employees, where other options for dealing with the misconduct, such as informal discussions or mediation, would otherwise be the preferable option.

Part Two outlines the goals of whistleblower laws. These goals will feed into this paper's critical evaluation of the laws, because it can be assessed whether the laws actually assist achieve (or even work against) these goals. Goals that Australian legislatures have pursued, to varying degrees, include ensuring companies engage in 'lawful' conduct, detecting and eliminating 'wrongdoing' in public and private organisations, protecting whistleblowers from reprisal action, and the promotion of informed democracy.

Part Three outlines relevant findings from research on the effectiveness of whistleblower laws, which will also feed into the critical evaluation of these laws. First, it is argued these studies give reason to believe that whistleblower laws do lead to increased levels of whistleblowing. Second, they provide reason to believe whistleblower laws do discourage reprisal action. Third, they show that employee whistleblowers usually have a preference to

[7] Section 340.

reporting internally to their employer, and generally to their supervisor. Fourth, they suggest whistleblowers usually, but not always, prefer that the matter is actually investigated internally, rather than externally.

Drawing on the analysis from Parts One to Three, Part Four assesses whether Australian whistleblower laws inappropriately place restrictions or duties on employers dealing with alleged employee misconduct, argues that some Public Sector Whistleblower Laws do, and recommends amendments. *First*, while the anti-retaliation elements of whistleblower laws are broadly acceptable, it is argued that reforms are needed to some Public Sector Whistleblower Laws, because they do not enable employers to discipline employees for making deliberately false or misleading disclosures. *Second*, on the assumption that legislatures have appropriately placed faith in the public and politicians to appropriately respond to information, no changes are recommended to the public elements of whistleblower laws, except that employers should also be able to discipline employees for making deliberately false and misleading *public* disclosures. *Third*, and most importantly for this paper, it is argued that Public Sector Whistleblower Laws that *require* employers to investigate disclosures inappropriately interfere with employers' ability to respond to allegations of employee misconduct. It is argued that these provisions require employers to go through the 'investigation' process where other forms of management action are preferable; may discourage employees reporting wrongdoing; and impose substantial administrative costs. Drawing on the research from Part Three, various alternatives are canvassed, and it is argued that the best system would provide employers with discretion as to whether to investigate disclosures, except those falling into very serious categories, while also providing employees an option to make disclosures to external investigative agencies.

Part One: How whistleblower laws change the employment law landscape

This Part, first, provides a brief overview of the whistleblower laws and employments laws relevant to this paper. Second, it outlines the anti-retaliation, public and institutional elements of Australian whistleblower laws, and the extent to which they impose additional requirements on employers when managing employees.

A. Relevant laws

i. Whistleblower laws

Public Sector Whistleblower Laws exist in every state and territory, and at the Commonwealth level, consisting of:

- *Whistleblowers Protection Act 1993* (SA) (**SA Whistleblowers Act**)
- *Public Interest Disclosure Act 1994* (NSW) (**NSW PID Act**)
- *Public Interest Disclosures Act 2002* (Tas) (**Tasmanian PID Act**)
- *Public Interest Disclosure Act 2003* (WA) (**WA PID Act**)
- *Public Interest Disclosure Act* 2008 (NT) (**NT PID Act**)
- *Public Interest Disclosure Act 2010* (Qld) (**Queensland PID Act**)
- *Public Interest Disclosure Act 2012* (ACT) (**ACT PID Act**)
- *Protected Disclosure Act 2012* (Vic) (**Victorian PD Act**), and
- *Public Interest Disclosure Act 2013* (Cth) (**Commonwealth PID Act**).

These laws all provide protections for public sector employee whistleblowers, and protections for persons making disclosures about public sector employees. These also have some application to the private sector, discussed further below.

Private Sector Whistleblower Laws also exist, and it is likely that further Private Sector Whistleblower Laws will be implemented soon. Private sector whistleblower provisions exist in:

- the Corporations Act,[8] and
- laws that apply to entities regulated by Australian Prudential Regulation Authority (**APRA**), including the *Banking Act 1959* (Cth) (**Banking Act**)[9], the *Insurance Act 1973* (Cth) (**Insurance Act**)[10], the *Life Insurance Act 1995* (Cth) (**Life Insurance Act**)[11] and the *Superannuation Industry (Supervision) Act 1993* (Cth) (**Superannuation Industry Supervision Act**)[12] (**APRA Laws**).

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (**Enhancing Whistleblower Protections Bill**) is currently before the Commonwealth Parliament, and would expand and strengthen whistleblower protections in the private sector. Aspects of this bill are discussed in this paper.

[8] Corporations Act, Pt 9.4AAA.
[9] Pt VIA, Div 1.
[10] Pt IIIA, Div 4, Subdiv A.
[11] Pt 7, Div 5, Subdiv A.
[12] Pt 29A, Div 1.

ii. Employment laws

While most of Australia's workforce is covered by the *Fair Work Act 2009* (Cth) (**FW Act**), there are relevant exceptions for this paper's purposes. All private sector employers in Australia, except for a small number of private employers in Western Australia, are covered by the FW Act.[13] The public sector of the Commonwealth, Victoria, Australian Capital Territory and Northern Territory are also almost exclusively covered by the FW Act.[14] However, most public sector employees in the other states (Western Australia, South Australia, Tasmania, New South Wales and Queensland) are covered by state employment legislation.[15] As such, the existing applicable employment laws will be different for the public sector in Western Australia, South Australia, Tasmania, New South Wales and Queensland, and a small amount of private employers in Western Australia.

iii. Public sector employment laws

In addition to the above laws, the public sector has particular employment laws applying to it. For example, the *Public Service Act 1999* (Cth) sets out rules for engaging Commonwealth public servants,[16] a 'code of conduct' that sets behavioural standards for employees,[17] and when a public servant can have their employment terminated,[18] amongst other things. All other states and territories have similar laws.[19] The Commonwealth, state and territory public services are all covered by codes of conduct, whether found in law or made under law, that sets standards of conduct for these employees.[20]

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[13] See, for discussion on why this is the case, Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) [5.11]; FW Act s 26.
[14] This is a consequence of *Fair Work Act 2009* (Cth) s 26; *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 5(1)(c)-(g); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 6(a)-(g); *Fair Work (Commonwealth Powers) Act 2009* (SA) s 6(a)-(g); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas)s 6.
[15] See, for discussion on why this is the case, Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5th ed, 2010) [5.08].
[16] Section 22 and see *Australian Public Service Commissioner's Directions 2016* (Cth), Part 3.
[17] Section 13.
[18] Section 29.
[19] *Public Sector Management Act 1994* (ACT); *Public Sector Employment and Management Act 2002* (NSW) and *Government Sector Employment Act 2013* (NSW); *Public Sector Employment and Management Act* (NT); *Public Service Act 2008* (Qld) and *Public Sector Ethics Act 1994* (Qld); *Public Sector Act 2009* (SA); *State Service Act 2000* (Tas); *Public Sector Management and Employment Act 1998* (Vic) and *Public Administration Act 2004* (Vic); *Public Sector Management Act 1994* (WA).
[20] ACT Public Service Code of Conduct (ACT) <http://www.cmd.act.gov.au/__data/assets/pdf_file/0017/363230/codeofcond2012_2013edit_wtables.pdf> (accessed 4 July 2017); Public Service Commissioner Direction No 1 of 2015 (NSW), and The Code of Ethics and Conduct for NSW government sector employees < file:///C:/Users/Zoe%20and%20Liam/Downloads/PSC%20Code%20of%20Ethics%20and%20Conduct.pdf> (accessed 4 July 2017); *Public Sector Employment and Management Act* (NT) s 49; Queensland Government, Code of Conduct for the Queensland Public Service (1 January 2011) <https://www.forgov.qld.gov.au/about-code-conduct> (accessed 4 July 2018); Commissioner for Public Sector Employment (SA), Code of Ethics for

B. Anti-retaliation elements

This sub-part outlines the protections for whistleblowers that exist outside of whistleblower laws (the employment law framework); the anti-retaliation elements of Australian whistleblower laws; and how the anti-retaliation elements impose additional restrictions and obligations on employers responding to employee misconduct. For clarity, the public elements of whistleblower laws also provide protections for whistleblowers for making public disclosures, but they are considered separately and not as part of the 'anti-retaliation' elements of this paper.

i. The employment law framework

In the absence of whistleblower laws, employment laws would still provide some protections for employee whistleblowers from reprisal action. Section 340(1) of the FW Act prohibits a person taking 'adverse action' against another person 'because' the other person has, has exercised, proposed to exercise, or has at any time proposed to exercise, a 'workplace right' or similar reasons. 'Adverse action' is defined to include a broad range of detrimental conduct, including altering the position of the employee to their prejudice.[21] If whistleblowing involves exercising a workplace right, then it would be unlawful to take action against an employee for whistleblowing.

However, if whistleblower laws did not exist, whistleblowing would often *not* involve exercise of a workplace right under s 340, meaning it would not be protected by these provisions. A workplace right is defined to include a person being able to make a complaint or inquiry 'in relation to his or her employment', or being entitled to the benefit of, or having a role or responsibility under, a workplace law or workplace instrument.[22] As Dodds-Streeton J stated, when considering the application of s 340 in relation to whistleblowers:

> The ability to make a complaint does not arise simply because the complainant is an employee of the employer. Rather, it must be underpinned by an entitlement or right.

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the South Australian Public Sector < https://publicsector.sa.gov.au/wp-content/uploads/20180411-Code-of-Ethics-for-the-South-Australian-Public-Sector.pdf> (accessed 4 July 2018); *State Service Act 2000* (Tas) s 9; see the various codes that apply in Victoria at: Victorian Public Sector Commission, *Code of Conduct for Employees* (Updated 16 April 2018) https://vpsc.vic.gov.au/resources/code-of-conduct-for-employees/ (accessed 4 July 2018); Public Sector Commission (WA), *Commissioner's Instruction No. 7 – Code of Ethics* <https://publicsector.wa.gov.au/sites/default/files/documents/commissioners_instruction_07_code_of_ethics_08_17.pdf> (accessed 4 July 2018).

[21] FW Act s 342(1), Item 1, Column 2.

[22] FW Act s 341.

> The course of such entitlement would include, even if it is not limited to, an instrument, such as a contract of employment, award or legislation.[23]

It follows that, for whistleblowing to be the exercise of a 'workplace right', there needs to be some source of this entitlement, such as in a contract, enterprise agreement, modern award or legislation. Where whistleblowing by an employee is not 'underpinned' by such an entitlement, it will not be protected by s 340 of the FW Act. In the absence of whistleblower laws providing workplace rights to make a disclosure,[24] employees would need to point to some other 'right' to make a disclosure. Such rights would rarely exist in enterprise agreements, which focus on employment rights,[25] and employers would typically try to avoid giving such a right to employees in contract. As such, it appears likely that, absent whistleblower laws, s 340 would often not provide protections from reprisal action for whistleblowers.

Except in Queensland, the protections under state employment laws for whistleblowers are weaker than those protections under the FW Act. In Queensland, the *Industrial Relations Act 2016* (Qld) effectively replicates the adverse action provision in the FW Act. [26] However, anti-victimisation protections in other state laws, being under the *Industrial Relations Act 1996* (NSW),[27] *Fair Work Act 1994* (SA),[28] *Industrial Relations Act 1979* (WA),[29] and *Industrial Relations Act 1984* (Tas),[30] are all narrower than the FW Act adverse action provisions, with generally a stronger focus on protecting employees from victimisation for engaging in industrial activity or associated reasons. While these laws may provide some protections for whistleblowers, given their focus is on protecting person for engaging in industrial activity rather than disclosing wrongdoing more generally, they are not well-designed to do so.

In addition to these laws on retaliatory conduct, without limiting the possible claims available in specific instances, the following claims provide potential avenues of relief for whistleblowers:

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[23] *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346, [625].
[24] See, for example, the Commonwealth PID Act, ss 22 and 22A, which expressly provides that this act creates workplace rights for the purposes of the FW Act.
[25] See FW Act ss 172(1) and 253(1)(a).
[26] Chapter 8, Part 1.
[27] Section 210.
[28] Chapter 4, Pt 1.
[29] Pt IVA.
[30] Section 86.

a. Contractual claims based on employment policies. It may be argued that an employer policy provides protection for whistleblowers and this policy forms part of the employment contract.[31] Nonetheless, employers typically attempt to avoid incorporating policies into contracts, meaning these claims will typically be difficult to make out.
b. If the employee suffered an injury as a result of reprisal action, contractual claims and/or claims in tort may be made out on the basis that an employer breached their duty of care to take all reasonable steps to ensure the health and safety of the employee.[32] Clearly, this would only be limited to cases involving breach of this duty to health and safety, and where loss is made out.
c. A claim under unfair dismissal laws, under which persons who have been dismissed may apply to a tribunal for compensation or reinstatement on the basis a dismissal was 'harsh, unjust or unreasonable'.[33] If successful, they may be eligible for compensation or reinstatement.[34] Indeed, if an employee were dismissed for whistleblowing, it seems likely they would usually have a good case the dismissal was harsh, unjust or unreasonable.[35] However, not all employees are eligible for unfair dismissal remedies. While eligibility varies slightly under state and territory employment laws, under the FW Act, to be eligible for unfair dismissal, the employee needs to have been employed for a minimum period and, usually, to not earn above the high income threshold.[36] Of course, the fact this only provide remedies for persons who are dismissed, and it only applies to some employees, are major limits on this protection.
d. Some public sector employees will be able to seek judicial or merits review of employment decisions, such as to demote them or discipline them, made in respect of their employment.[37] Clearly, this is limited by the fact it only applies to public

[31] For discussion on whether policies form part of the employment contracts, see *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177.
[32] See *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Wheadon v State of NSW* (Unreported, District Court of NSW, 2 February 2001).
[33] See the FW Act, Pt 3-2; *Industrial Relations Act 1996* (NSW) Pt 6; *Industrial Relations Act 2016* (Qld) Pt 2, Div 2; *Fair Work Act 1994* (SA) Pt 6; *Industrial Relations Act 1984* (Tas) s 30; *Industrial Relations Act 1979* (WA) s 23A.
[34] See, for example, FW Act ss 391-2.
[35] See the leading discussions on when dismissal will be for a 'valid' reason under unfair dismissal laws: *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373.
[36] FW Act s 382. Although, someone may earn above the high income threshold and be eligible for unfair dismissal if they are covered by an enterprise agreement or modern award.
[37] See, for example, the *Public Service Act 1999* (Cth) s 33; for example of judicial review, *Rahman v Commissioner of Taxation* [2015] FCA 988.

sector employees, only applies in respect of reviewable decisions, and does not provide a right to compensation – rather, there is just a right to have the decision reviewed.

In sum, without whistleblower laws, there would be some protections for employee whistleblowers, but the coverage would be ad hoc and incomplete.

ii. The anti-retaliation elements of Australian whistleblower laws

Where a disclosure *is* 'protected' (discussed below) all Australian whistleblower laws provide similar protections for persons who make, or proposed to make, a protected disclosure. These can be divided into provisions that:

a. Prohibit individuals taking or threatening reprisal action against a whistleblower or potential whistleblower, and impose criminal and/or civil penalties for doing so.[38]
b. Enable whistleblowers to take legal action seeking remedies, including compensation, against persons for taking reprisal action against them for making a disclosure.[39]
c. Provide that whistleblowers are not subject to any civil or criminal liability for making disclosures, and no contractual or other remedy can be enforced, or contractual or other right exercised, against a whistleblower on the basis of the disclosure.[40]

Except for the SA Whistleblowers Act, which does not impose criminal or civil penalties for reprisal action, all public and private whistleblower laws contain provisions to the same, or very similar, effect as those summarised in a. to c. above.[41] These protections are all designed to prevent persons taking retaliatory action against whistleblowers for making disclosures,

[38] See, ACT PID Act s 40; Banking Act s 52C; Commonwealth PID Act s 19; Corporations Act s 1317AC(2); Insurance Act s 38C; Life Insurance Act s 156C; NSW PID Act s 20; NT PID Act s 15; Queensland PID Act s 41; SA Whistleblowers Act s 9; Superannuation Industry Supervision Act s 336C; Tasmanian PID Act s 19; Victorian PID Act s 45; WA PID Act s 14.
[39] See, ACT PID Act ss 41 and 42; Banking Act s 52D; Commonwealth PID Act s 14; Corporations Act s 1317AD; Insurance Act s 38D; Life Insurance Act s 156D; NSW PID Act s 20A and 20B; NT PID Act s 16 and 17; Queensland PID Act s 42; SA Whistleblowers Act s 9; Superannuation Industry Supervision Act s 336D; Tasmanian PID Act ss 20-22; Victorian PID Act s 46 and 47; WA PID Act ss 15A-16.
[40] See, ACT PID Act ss 35-36; Banking Act s 52B; Commonwealth PID Act s 10; Corporations Act s 1317AB; Insurance Act s 38B; Life Insurance Act s 156B; NSW PID Act s 21; NT PID Act s 14; Queensland PID Act s 36; SA Whistleblowers Act s 5(1); Superannuation Industry Supervision Act s 336B; Tasmanian PID Act s 16; Victorian PID Act s 39; WA PID Act s 13.
[41] See above n 38, 39 and 40.

even where a person would otherwise have a legal right to do so (for example, under a contract or defamation).

iii. What whistleblowing is protected?

Private Sector. The Corporations Act protects a relatively narrow class of whistleblowing. For a whistleblower employee to be protected by the Corporations Act, amongst other things, his or her disclosure must be:

1. Made to the Australian Securities and Investments Commissioner (**ASIC**); auditors of the company; a director, secretary or senior manager of the company; or a person authorised by the company to receive disclosures;
2. The disclosure must contain information that the disclosure believes on reasonable grounds indicates that the company or an officer or employee of the company, has, or may have, contravened the Corporations Act, the *Australian Securities and Investments Commission Act 2001* (Cth), or certain court rules (**Corporations Legislation**);[42] and
3. Made in good faith.[43]

There is no requirement for the whistleblower to state they are making a disclosure under the Corporations Act, for it to be protected. Nonetheless, given this is only targeted specifically at reporting breaches of Corporations Legislation, it has relatively narrow scope.

Under the APRA Laws, a broader amount of whistleblowing is protected. Under this legislation, for a whistleblower to be protected, amongst other things, his or her disclosure must be:

1. Made to APRA, auditors, a director or senior manager of the body corporate or some related bodies corporate, or a person authorised by the body corporate to receive disclosures;
2. The information in the disclosure must be about *"misconduct, or an improper state of affairs or circumstances"*, in relation to the body corporate, and the disclosure must consider the information assists the person to whom it is

[42] Corporations Act ss 9 and 1317AA(1).
[43] Ibid s 1317AA(1)(e).

disclosed perform their function or duties in relation to he boy corporate or relevant related body corporate;[44] and

3. Made in good faith.[45]

There is no requirement for the whistleblower to state they are making a disclosure under the relevant law, for it to be protected. In this way, this legislation captures disclosures about a wide range of conduct (about misconduct, or an improper state of affairs of circumstances, which are undefined), but the allegations must be made to one of these persons listed above to be protected.

Finally, whistleblower protections for some private sector employees are provided by some Public Sector Whistleblower Laws. *First*, if private sector entities consult with the public sector or similar circumstances exist, in some circumstances (depending on the precise legislation) persons (including employees of the consultant or public service) who make disclosures in relation to the public sector or the consultant company, will be protected in the same way as persons who make disclosures in relation to the public service (discussed below).[46] *Second*, under two Public Sector Whistleblower Laws, the Queensland PID Act and SA Whistleblowers Act, there is also the specific capacity to make disclosures in relation to private persons, even when disconnected from the public sector.[47] However, these only apply in a very narrow set of disclosures, regarding serious conduct (for example, some criminal conduct) and it must have been made to a 'proper authority', in Queensland[48], or an 'appropriate authority' in South Australia.[49]

If the Coalition Government's Enhancing Whistleblower Protections Bill passes through Parliament, it will widen amount of disclosures protected by Private Sector Whistleblower Laws. This will amend the Corporations Act to protect disclosures made to a similar range of persons currently identified, but the disclosure will also be protected if it contains information that the whistleblower has reasonable grounds to believe 'concerns misconduct, or an improper state of affairs or circumstances, in relation to' the employer

[44] Banking Act s 52A(2); Insurance Act s 38A(2); Life Insurance Act s 156A(2); Superannuation Industry Supervision Act s 336A(2).
[45] Banking Act s 52A(2)(d); Insurance Act s 38A(2)(d); Life Insurance Act s 156A(2)(d); Superannuation Industry Supervision Act s 336A(2)(d).
[46] See ACT PID Act s 8(2); NSW PID Act ss 11-14; Tasmanian PID Act s 3; Victorian PID Act s 5; Commonwealth PID Act s 29(1).
[47] Queensland PID Act, s 12; SA PID Act s 4, definition of 'public interest information'.
[48] Queensland PID Act s 12(2).
[49] SA Whistleblowers Act s 5(3).

company or a related boy corporate.[50] In this way, it would largely mimic the APRA laws, but apply to a much wider range of employees. For completeness, it is noted that it will also create a new class of 'disclosure' where the disclosures is made to a legal practitioner for the purposes of obtaining legal advice in relation to the operation of this legislation.[51]

Public Sector. The definition of a 'protected disclosure' varies substantially between different Public Sector Whistleblower Laws:

a. Most Public Sector Whistleblower Laws protect 'disclosures' about a broad range of misconduct or maladministration,[52] but require that it must be made to a specific person or one of several person within the employer, or some external bodies/authorities.[53]
b. In additional, under the Commonwealth PID Act and ACT PID Act, a 'protected disclosure' will be made if an employee makes the disclosure *to their supervisor*.[54] As this captures reporting a wide range of misconduct or maladministration to one's supervisor, many disclosures would be protected under this legislation.
c. Under 'narrower laws', such as under the Victorian PD Act, to be a protected disclosure, the disclosure must usually be about more serious misconduct and made to an external agency.[55]
d. Some laws also specifically protect disclosures to be made to legal practitioners for the purposes of obtaining legal advice in relation to making a public interest disclosure.[56]

No Public Sector Whistleblower Laws require whistleblowers to state they are making a disclosures under the relevant legislation, for it to be protected. As such, for some employers covered by Public Sector Whistleblower Laws, protected disclosures will be a common occurrence, and for others it will not.

[50] Enhancing Whistleblower Protections Bill 2017, sch 1, Part 1, cl 2 (proposed s 1317AA(4)).
[51] Enhancing Whistleblower Protections Bill 2017, sch 1, Part 1, cl 2 (proposed s 1317AA(3)).
[52] NSW PID Act s 8; Queensland PID Act s 13; SA Whistleblowers Act s 4 (definition of 'public interest information'); the Tasmanian PID Act s 3 (definition of 'improper conduct'); WA PID Act s 5(2).
[53] NSW PID Act s 11(1); Queensland PID Act ss 14-16; SA Whistleblowers Acts 5(4); Tasmanian PID Act s 7; WA PID Act s 5(3).
[54] See, for example, the Commonwealth PID Act ss 28(3) and 29(1); ACT PID Act ss 8(1), 15 and 16(1)(c).
[55] See, for example, the Victorian PD Act, ss 4(1), 12-20. Notably, in the Northern Territory, there is a specific exemption where disclosures 'cannot be based solely or substantially on … an employment related grievance (other than an act of reprisal) or other personal grievance': NT PID Act s 10(2).
[56] See, for example, the Commonwealth PID Act s 26(1), Item 4.

Public Sector Whistleblower Laws vary on whether false or misleading disclosures are expressly protected. The ACT PID Act is clear, stating a public interest disclosure does not include a disclosure of information by a person 'that the person knows is false or misleading'.[57] On the other hand, without needing to delve into the precise issues of interpretation, the Commonwealth Attorney-General's department has stated it is not clear whether an employer could take reprisal action against an employee under the Commonwealth PID Act for making false and misleading statements.[58] Meanwhile, under all the other Public Sector Whistleblower Laws, there are prohibitions on making deliberately false or misleading disclosures (slightly different language is used in each statute), but there is no exception allowing persons (for example, employers) to take reprisal action against whistleblowers (for example, employees) for making a false or misleading disclosure. While creative arguments may be made that false or misleading disclosures are not captured by the definition of 'protected disclosure',[59] the lack of a clear exception creates uncertainty for employers about whether they can take action against employees for making false and misleading disclosures.

iv. Impact of anti-retaliation elements on employers handling misconduct

While employers should be aware of the anti-retaliation elements of Private Sector Whistleblower Laws, their impact on dealing with allegations of employee misconduct is minor. As discussed above, some (albeit ad hoc and incomplete) protections for whistleblowers already exist under adverse action laws, unfair dismissal laws, and under contracts. The Corporations Legislation adds further 'ad hoc' protections, by protecting whistleblower employees in relation to allegations of breaches of certain legislation. The APRA Laws are more comprehensive, covering disclosures made about a broader range of misconduct, made to specific persons within an organisation. Employers should be aware of these protections, because a whistleblower does not need to state they are making a disclosure for it to be protected – and if an employer intentionally cause a detriment to the employee (eg disciplines the employee) because the employee made a protected disclosure, the employer will be criminally liable. Nonetheless, these laws should only seem to apply employers handling alleged misconduct if they act highly unreasonably. Given the protections only

[57] ACT PID Act s 7(2)(a).
[58] Commonwealth Attorney-General's Department, Submission to the Legislated Review of the Public Interest Disclosure (PID) Act, *Statutory Review of the Public Interest Disclosure Act 2013*, March 2016, [42].
[59] See the Commonwealth Attorney-General's Department's consideration of this in the Commonwealth context: Submission to the Legislated Review of the Public Interest Disclosure (PID) Act, *Statutory Review of the Public Interest Disclosure Act 2013*, March 2016, [42].

apply to disclosures made in good faith, it is difficult to imagine a good reason for an employer taking reprisal action against an employee for making a protected disclosure. Rather, taking retaliatory action against an employee for making a good faith disclosure of wrongdoing would generally be seen as unjust. In this way, while employers should be aware of Private Sector Whislteblower Laws, they only have a minor impact on employers' handling alleged employee misconduct - prohibiting highly unreasonable conduct.

The impact of the anti-retaliation elements of some Public Sector Whistleblower Laws (including their application to the private sector) are greater. As discussed, Public Sector Whistleblower Laws vary considerably in what is defined as a protected disclosure, but most laws cover disclosures of a wide range of misconduct, and some cover such disclosures when made to supervisors.[60] Importantly, under the anti-retaliation elements of most Public Sector Whistleblower Laws, there is no clear exception for false and misleading complaints. Therefore, an employee who makes a false complaint of minor misconduct by another employee to their supervisor may be protected by some laws, meaning the employer could not discipline them for making this false allegation. Employers may be caught unaware that they are breaching Public Sector Whistleblower Laws by disciplining employees for making false and misleading allegations against other employees. In this way, unlike Private Sector Whistleblower Laws, the anti-retaliation elements of some Public Sector Whistleblower Laws may have a significant impact on employers' dealing with alleged misconduct.

C. Public Elements

i. The employment law framework

In the absence of whistleblower laws, employers would often be within their rights to take disciplinary action against employees for making allegations of wrongdoing regarding the employer to the media, politicians or the public. Employment contracts contain an implied duty upon the employee to serve the employer 'with good faith and fidelity'.[61] Making public allegations of misconduct regarding one's employer may not always be a breach of good faith and fidelity, [62] but employer would at least usually have a good position that an employee

[60] Commonwealth PID Act ss 26(1), Item(1) and 29(1); Commonwealth Attorney-General's Department, Submission to the Legislated Review of the Public Interest Disclosure (PID) Act. Statutory Review of the Public Interest Disclosure Act 2013, March 2016.
[61] *Robb v Green* [1895] 2 Q.B. 315 at 320.
[62] See, in the government context, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC Report 112 (2008) 3.14. See also *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334.

should have tried to handle the matter internally or through other channels first. This is because the duty requires 'loyalty' and acting in the employer's 'best interests',[63] and making *public* allegations in particular may be inconsistent with these requirements. Further, employees have an implied duty to not reveal the confidential information of their employers,[64] and revealing allegations of wrongdoing may breach this duty. Finally, of course, there may be express terms in contract or policies that employees are lawfully and reasonably directed to abide by, which require employees to raise issues of wrongdoing internally and not externally to the media, politicians or the public. Breach of such a contractual provision, or a reasonable and lawful direction to not report externally in the first instance,[65] would provide employers with grounds to discipline an employee. As such, while there may be exceptions, employers would often have grounds to discipline employees for making public allegations of wrongdoing about the employer.

Of course, this does not rule out that, in the absence of whistleblower laws, employees who have suffered retaliatory action for making a public disclosure may have some legal recourse. For example, *first*, unfair dismissal remedies may provide some protection for employees. If, for example, an employee was dismissed for making a public disclosure of egregious misconduct that was damaging to the public, and the employer had known about the misconduct and done nothing, this may well mean the dismissal was 'unfair'. *Second*, as discussed above, making a public disclosure will not always involve a breach of good faith and fidelity, and employers could be estopped from disciplining an employee for doing so. *Finally*, in exceptional circumstances, there may be some 'workplace right' under a legislative instrument or policy to make a public disclosure, which would mean an employer could not take adverse action against the employee for exercising this workplace right,[66] but this seems unlikely.

ii. The public elements of Australian whistleblower laws

While there are currently no public elements in Private Sector Whistleblower Laws, the government's Enhancing Whistleblower Protections Bill would introduce some, very limited, public elements. Under this bill, a protected disclosure may be made to a member of parliament or journalist where:

[63] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735, [26].
[64] See *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326.
[65] *R v Darling Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601, 621-2.
[66] FW Act s 340.

a. the whistleblower has previously made a disclosure of that information,
b. a 'reasonable period' has passed since that disclosure,
c. after this period, the whistleblower has given the body to which they made a disclosure written notification with sufficient information to identify the previous disclosure and stating the whistleblower intends to make 'an emergency disclosure';[67] *and*
d. the whistleblower must have *'reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately'*.[68]

Applying these provisions, even if there was an imminent risk of serious harm or danger to publc health and safety, or the financial system, if the information is not acted in immediately, this will generally *not* be sufficient reason to publicly disclose it – the employee must have gone through the steps outlined in a. to c. above first. Clearly, therefore, the public elements of this law would only apply in a very limited set of circumstances.

The public elements of Public Sector Whistleblower Laws vary considerably. Some do not contain any (the NT PID Act, Tasmanian PID Act, and Victorian PD Act[69]). For those that do, there are then three types of 'public elements' variously adopted.

a. Disclosures may be made to journalists after a disclosure of the same information has been made to some other specified authority, and the authority has not investigated it or has completed the investigation and not recommended taking any action in response (and sometimes other conditions) (the ACT PID Act, Commonwealth PID Act, NSW PID Act, Queensland PID Act and WA PID Act).[70]
b. In some jurisdictions, disclosures may be made to politicians in the first instance. Under the ACT PID Act and SA Whistleblowers Act, disclosures can be made to Ministers in the first instance,[71] and in Queensland, disclosures can be made to members of the Legislative Assembly in the first instance.[72] These politicians may then make such disclosures public, including under protections of Parliamentary

[67] Enhancing Whistleblower Protections Bill Sch 1, cl 2 (proposed s 1317 AAD).
[68] Ibid.
[69] NT PID Act s 11(1)(a); Tasmanian PID Act s 7(4); Victorian PD Act s 19.
[70] WA PID Act s 7A; Queensland PID Act s 20; NSW PID Act s 19; ACT PID Act s 27; Commonwealth PID Act s 26(1), Item 2, Column 3.
[71] ACT PID Act s 15(1)(b); SA Whistleblowers Act s 5(4).
[72] Queensland PID Act s 14.

privilege, which, amongst other things, acts to prevent members of parliament being sued for statements they make in the course of parliamentary business.[73]

c. The Commonwealth PID Act also allows for 'emergency disclosures' to protect substantial and imminent risks to health and safety.[74] This would, clearly, only apply in very limited circumstances.

In sum, except for in the ACT PID Act, SA Whistleblowers Act and Queensland PID Act, if Public Sector Whistleblower Laws enable public disclosures at all, they are treated as a secondary option, after there is an opportunity to deal with the disclosure internally or by a specified authority, or only as an 'emergency' option.

iii. Impact of public elements on employers handling misconduct

As discussed, there are currently no public elements of Private Sector Employment Laws. Even if the provisions adopted in the Enhancing Whistleblower Protections Bill were enacted, given the restrictions on the making of public disclosures under this bill described above, these laws would apply in such a small amount of circumstances that it is doubtful they would impact upon employers' handling misconduct in any material way.

The impact of the public elements of Public Sector Whistleblower Laws on employers' handling alleged misconduct varies between laws, but is usually highly limited. Clearly, no impact is felt where there are no public elements. For employers covered by the ACT PID Act, SA Whistleblowers Act and Queensland PID Act, whistleblowers may make disclosures to politicians in the first instance, where it may have been a breach of contract or a lawful and reasonable direction for them to do this without these laws. These can be seen as having a reasonably significant impact, as they make it easy to make public disclosures where employees may otherwise have been disciplined for doing so. Most Public Sector Whistleblower Laws, however, only allow employees to make public disclosures after they have made the disclosure internally or to some authority first. This effectively provides the employer with a 'first go' to deal with the matter quietly, prior to the matter going public. This 'protection' for employees suggests the impact on employers' is not very significant. Of course, the potential to make 'emergency disclosures' is also highly limited. As such, except in the ACT PID Act, SA Whistleblower Act and Queensland PID Act, the impact of the public elements of employers' handling alleged misconduct is highly limited.

[73] See *Parliament of Queensland Act 2001* (Qld) s 8; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Constitution Act 1934* (SA) ss 9 and 38.
[74] Commonwealth PID Act s 26(1), Item 3.

D. Institutional elements

i. The employment law framework

In the absence of whistleblower laws, if an employee were to make a disclosure to an employer of wrongdoing, various legal duties may effectively require the employer to investigate the wrongdoing or take some action in response. Relevant duties include:

a. Employers' duty of care to their employees, arising under contract, tort and work health and safety laws, to take all reasonable steps to ensure employees' health and safety, as well as duties of care to other persons (for example, persons who receive the employers' goods and services).[75] If a disclosure alleges misconduct that threatens employees' or others', health and safety, the employer may effectively have a duty to investigate or take some other action in response.
b. specific regulations apply to employers in different industries. For example, banking, real estate, agriculture, the legal profession, and any other number of industries have specified laws and rules applying to them. If information suggests these regulations are being breached, this may effectively require the employer to investigate the misconduct or take other action in response.
c. employers will sometimes have implemented policies, which can form part of the employment contract, effectively requiring them to investigate disclosures.[76] Depending on their content, these policies may require an employer to investigate misconduct or take other action in response to allegations of misconduct.

Except for any specific contractual duties, these duties are not specific duties to investigate, but rather require employers to make a judgment call as to the best way to respond in light of them.

Nonetheless, the view these duties may effectively require an employer to investigate allegations of misconduct is supported by the NSW District Court case of *Wheadon v State of NSW*.[77] In this case, a police officer made a statement alleging corruption by a senior officer. The officer who made the allegation experienced victimisation as a result. However, importantly for the purposes of this paper, the Court found the respondent breached its duty

[75] See the Model Work Health and Safety Act, s 18, which has largely been implemented by the Commonwealth and all states and territories except Victoria and Western Australia; *Occupational Health and Safety Act 2004* (Vic) s 20; *Occupational Health and Safety Act 1984* (WA) s 19; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301.
[76] See, for discussion on when policies form part of the employment contract, *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177.
[77] (Unreported, District Court of NSW, 2 February 2001).

of care by failing to properly and adequately investigate the allegations made by the plaintiff. This shows that courts are willing to find, in specific instance, that employers' duty of care extends to investigating allegations of wrongdoing.[78]

Statute-based costs of conduct exist in the public service inform, but do not dictate, when misconduct should be investigated. In the public sector context, codes of conducts, which are contained in legislation or made under legislative powers,[79] set out standards of conduct for public servants to comply with. However, guidelines in relation to these codes generally emphasise the discretionary nature of the decision on whether to formally investigate breaches of them. For example, in the Commonwealth public sector, the APS Code of Conduct in the *Public Service Act 1999* (Cth) sets high levels of required conduct for Commonwealth public servants, including requiring them to act 'honestly and with integrity', 'with care and diligence', and to 'treat everyone with respect and courtesy'.[80] Breaches of these standards may be formally investigated under procedures established under the Act.[81] However, the Australian Public Service Commissioner's Directions 2016 (Cth) expressly recognise that some conduct may both breach the APS Code of Conduct or be a performance management issue, and before investigating it as a breach of the APS Code of Conduct, agencies must consider guidance by the Australian Public Service Commissioner on this issue,[82] which states:

> *Not all suspected misconduct needs to be dealt with under … [misconduct] procedures. Other approaches such as performance management, counselling, or alternative dispute resolution, such as mediation, may be the most effective way to address behaviour that is minor misconduct.*[83]

These guidelines go on to list several factors to be considered in determining whether to deal with an incident by way of a misconduct investigation, including the seriousness of the conduct, the likelihood the employee will respond constructively to performance

[78] See Chris Wheeler (NSW Deputy Ombudsman), 'Making the Disclosure Process Work' (Speech delivered at the PSIC Senior Officers Workshop (Canada), 5-6 October 2010) < https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0020/6248/SP_PSIC_SeniorOfficersCanada-5Oct10.pdf> (accessed 4 July 2018); AJ Brown et al, 'Best-Practice Whistleblowing Legislation for the Public Sector: The Key Principles' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 261, 273-274.
[79] See above at Part 1.Aiii.
[80] Public Service Act 1999 (Cth) s 13.
[81] Public Service Act 1999 (Cth) s 15.
[82] Public Service Commissioner's Directions 2016 (Cth) s 40.l
[83] Australian Public Service Commissioner, *Handling misconduct: a human resource manager's guide* (2015) 5.1.2.

management, and the extent to which the suspected behaviour is within the employee's control.[84] Similar guidance, emphasising the need for supervisors to exercise discretion over whether to formally investigate misconduct, exists in other jurisdictions.[85] These guidelines show that, while statutory codes of conducts set standards of conduct, public sector employers still exercise significant discretion when determining the best way to enforce these standards – there is no requirement to formally investigate each instance of suspected misconduct.

ii. The institutional elements of Australian whistleblower laws

Under Private Sector Whistleblower Laws, there are no institutional elements. The Corporations Act and the laws regulated by APRA focusses on providing protections for whistleblowers, but do not require employers to investigate disclosures.[86] Indeed, even if the Enhancing Whistleblower Protections Bill does pass into law, it will not require employers to investigate disclosures.

Under Public Sector Whistleblower Laws, there are a plethora of different 'institutional' approaches, some of which require investigations into disclosures. For the purposes of this paper, these approaches can be usefully divided into the following Models:

a. Discretionary Model (reflecting the NSW PID Act and SA Whistleblowers Act)
b. Serious External Investigations Model (reflecting the Victorian PD Act and, to a lesser extent, NT PID Act)
c. Mandatory Internal Investigations Model (reflecting the Commonwealth PID Act and, to a lesser extent, the ACT PID Act and WA PID Act)
d. Mixed Models (reflecting Tasmanian PID Act and, to a lesser extent, the Queensland PID Act).

Each of these Models is described below (without describing the precise nuances in each law).

[84] Australian Public Service Commissioner, *Handling misconduct: a human resource manager's guide* (2015) 5.1.8.
[85] See, for example, Victoria State Government, *Guidelines for Managing Complaints, Misconduct and Unsatisfactory Performance in the VPS* (2017) pp 17-18; Public Sector Commission (Government of Western Australia), *A guide to disciplinary provisions contained in Part 5 of the PSM Act* (2011) p 16; Queensland Government, *Taking management or disciplinary action* https://www.forgov.qld.gov.au/take-management-or-disciplinary-action (accessed 1 July 2018).
[86] See Banking Act Pt VIA, Div 1; Corporations Act Pt 9.4AAA; Insurance Act Pt IIIA, Div 4, Subdiv A; Life Insurance Act Pt 7, Div 5, Subdiv A; Supervision Industry Supervision Act Pt 29A, Div 1.

Under the *Discretionary Model*, the anti-retaliation and public elements apply, but there is no obligation to investigate a disclosure under the whistleblowers laws. [87]

Key features of the *Serious External Investigations Model* include:

a. Relative to the Mandatory Internal Investigations Model (discussed below), ***the disclosable conduct is more serious***, such as 'corrupt conduct' or conduct that would, if proven, constitute a criminal offence. [88]
b. The disclosure must usually be made to a ***specialist external agency***.[89] Under some laws, it may be made to senior people in the organisation where the conduct occurred.[90]
c. The investigation is usually conducted by a specialist external agency.[91]
d. There is a ***duty to investigate, with exceptions***, that vary from broad under some jurisdictions that effectively grant a discretion to investigate,[92] to narrow in others.[93]

This Serious External Investigations Model is similar to, but not perfectly aligned, to a 'prosecutions' model, where an external body is given the responsibility to investigate wrongdoing alleged by third parties.

Key features of the *Mandatory Internal Investigations Model* include:

a. ***A wide definition of disclosable conduct***. [94] As the Commonwealth Attorney-General's department stated in relation to the Commonwealth PID Act, ''disclosable conduct' captures almost any misbehaviour by an [Australian Public Service] employee'.[95] For example, under the Commonwealth PID Act, disclosable conduct includes conduct engaged in by a public official in that capacity that is 'unreasonable,

[87] See the NSW PID Act and SA Whistleblowers Act.
[88] Victorian PD Act s 4(1). In the Northern Territory, the conduct 'cannot be based solely or substantially on … an employment related grievance (other than an act of reprisal) or other personal grievance': NT PID Act s 10(2).
[89] Victorian PID Act ss 12-20.
[90] In the Northern Territory, for employees, unless the disclosure relates to a member of the Legislative Assembly, the disclosure must be made to the Commissioner for Public Interest Disclosures or, 'person responsible for the administration or management of the public body in which the public officer is employed': NT PID Act s 11.
[91] NT PID Act s 21, Victoria PID Act, Part 2, Div 2, *Independent Broad-based Ant-Corruption Commission Act 2011* (Vic) (**IBAC Act**) ss 7, 51 and 58.
[92] In Victoria, the exceptions are broad and include if 'in all of the circumstances, the conduct does not warrant investigation': IBAC Act ss 65(2)(g), 68.
[93] NT PID Act s 21.
[94] Commonwealth PID Act s 29(1); WA PID Act s 3 (definition of 'public interest information); The ACT PID Act is arguably slightly narrower: ACT PID Act s 8(1).
[95] Commonwealth Attorney-General's Department, Submission to the Legislated Review of the Public Interest Disclosure (PID) Act, Statutory Review of the Public Interest Disclosure Act 2013, March 2016, [6].

unjust or oppressive; or … negligent', or conduct that 'contravenes a law of the Commonwealth, a state of a territory', which appears to include the Code of Conduct in the *Public Service Act 1999* (Cth).[96]

b. If an employee provides information to their supervisor [97]or some other authorised recipient that 'tends to show' or the whistleblower 'believes on reasonable grounds tends to show', disclosable conduct, the supervisor or authorised recipient ***must refer the matter for investigation***[98] (subject to some minor exceptions), which usually occurs ***internally***.[99]
c. There is a ***duty to investigate, with some exceptions***. Examples of exceptions include where the disclosure does not, to any extent, concern serious disclosable conduct; the disclosure is frivolous and vexatious; and where the disclosure has already been investigated under another law[100]
d. The investigating agency must provide specified information about the investigation to a central agency.[101]

This model thus places a duty for an employer to formally investigate a wide range of alleged wrongdoing, even when the whistleblower does not request it.

Mixed Models are a combination of the Mandatory Internal Investigations Model and Serious External Investigations Model. For example, in Tasmania, disclosures can be made internally or to external bodies,[102] and the bodies are generally able to refer the disclosures to more appropriate bodies.[103]

iii. Impact of public elements on employers handling misconduct

Whistleblower laws that apply the Discretionary Model or the Serious External Investigations Model have little impact on the employers when managing employees. When an employer in this scenario receives allegations of misconduct, the employer will be able to exercise the

[96] Commonwealth PID Act s 29(1).
[97] This is not the case in WA PID Act, see s 5(1) and (3).
[98] Commonwealth PID Act s 26(1); ACT PID Act s 7(1)(a).
[99] Commonwealth PID Act s 43(3)(a)(i); ACT PID Act s 18(1). The WA PID Act does not have this 'referral' process'.
[100] See, generally, Commonwealth PID Act s 48(1) and WA PID Act s 8(2). In the ACT, the exceptions include if "there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure" (ACT PID ACT s 20(g)), which is so broad this paper treats is as departing, in this respect, from the *Mandatory* Internal Investigations Approach.
[101] ACT PID Act ss 25 and 28; Commonwealth PID Act s 50A.
[102] Tasmanian PID Act ss 3(2) and 7.
[103] Tasmanian PID Act ss 29A, 29B, 42, and 68.

same discretion they would otherwise have to deal with the misconduct, subject to the normal constraints outlined above.

This contrasts strongly with the Mandatory Internal Investigations Model (and Mixed Models to the extent it they reflect this model). Under this model, every time a supervisor or authorised recipient receives information that tends to show, or the whistleblower believes on reasonable grounds tends to show, almost any form of misbehaviour, it needs to be referred for investigation. If it falls within an exception (which vary substantially between different laws), there is no duty to investigate. If not, the investigator must investigate it. Complying with these laws would radically change management practices away from the discretionary approach to dealing with misconduct allegations in light of legal duties (described above), to a model requiring formal investigations in a range of instances. The change in practice is recognised by Commonwealth Merit Protection Commissioner's website, which states that 'options' for addressing issues raised in complaint and disputes include 'respectful informal discussions', 'alternative dispute resolution' and 'formal review', but then states:

> *If employees have invoked statutory processes such … a public interest disclosure, options are reduced.*[104]

Given the Commonwealth PID Act is 'invoked' in such a wide arrange of circumstances, if the it were complied with, this 'reduction' in options would occur very frequently.

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It is useful to briefly summarise the key points arising from Part One here. *First*, the anti-retaliation elements of Australian whistleblower laws can be seen as an 'extension' upon similar protections in employment laws, but employers should be aware of the further conduct caught by these protections. This is particularly the case under those Public Sector Whistleblower Laws where there is a broad definition of 'disclosable conduct' and there is no exception for taking reprisal action for deliberately false and misleading disclosures. *Second*, public elements do not exist in Private Sector Whistleblower Laws, and where they exist in Public Sector Whistleblower Laws they prevent employers taking disciplinary action against employees for making public allegations of misconduct, even where they would have a contractual right to do so. However, except under the ACT PID Act, SA Whistleblowers Act

[104] Office of the Merit Protection Commissioner, Strategically managing complaint and disputes <https://meritprotectioncommission.gov.au/home/i-want-information-about/strategically-managing-complaints-and-disputes?SQ_DESIGN_NAME=all_questions>(accessed 1 July 2018).

and Queensland PID Act, under which disclosures can be made to politicians in the first instance, the public elements only apply in highly limited circumstances. *Third*, and most importantly for this paper, the impact of the institutional elements of whistleblower laws on employers managing employees varies from virtually nothing (in the case of the Discretionary Model and the Serious External Investigations Model) to profound (in the Mandatory Internal Investigations Model).

Part Two: The goals of whistleblower laws

The part outlines the various goals pursued by whistleblower laws. It does not outline the precise extent to which each legislature has pursued these different goals. The goals identified in this part will feed into the critical evaluation of these laws in Part Four.

A. Stated objectives

The stated objectives of whistleblower laws have limited value in revealing the goals underlying them. Private Sector Whistleblower Laws exist in legislation covering large topics (such as the governance of corporations, in the Corporations Act), and do not contain objectives specific to whistleblowing. AJ Brown described the stated objectives of Public Sector Whistleblower Laws as AJ Brown 'relatively consistent',[105] and summarised them as:

- *"To support public interest whistleblowing by facilitating disclosure of wrongdoing*
- *To ensure that public interest disclosures are properly assessed and, where necessary, investigated and actioned, and*
- *To ensure that a person making a public interest disclosure is protected against detriment or reprisal."*[106]

There are some minor variations to these objectives, some of which are discussed later in this part. While these objectives may be satisfactory for the purposes of assisting in statutory interpretation, they are unsatisfactory for the purpose of determining the end 'good' the legislature seeks. The above objectives lead to the question, why do legislatures want to 'support public interest whistleblowing'; ensure disclosures are properly assessed,

[105] AJ Brown et al, 'Best-Practice Whistleblowing Legislation for the Public Sector: The Key Principles' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 261, 263.; citing NSW Ombudsman, *The adequacy of the Protected Disclosure Act to achieve its objectives*, Issues paper, (2004).
[106] Ibid.

investigated and actioned; or ensure the persons making PIDs are protected against detriment or reprisal?

B. Detecting and eliminating wrongdoing

It is likely that the primary goal of most legislators[107] in supporting Public Sector Whistleblower Laws is to detect and eliminate 'wrongdoing' in the public sector. In the Commonwealth PID Act, in addition to the objectives listed above, there is an objective to 'promote the integrity and accountability of the Commonwealth public sector'.[108] In the Minister's second reading speech to the Public Interest Disclosures Bill 2013 (Cth), Mark Dreyfus selected this objective alone for discussion, and stated:

> *The bill will achieve this [purpose] by establishing a single comprehensive scheme to support inquiry into wrongdoing in the Commonwealth public sector and those who report it.*[109]

This emphasis on promoting 'integrity' and inquiring into 'wrongdoing' supports the view this legislation is about supporting detecting and eliminating wrongdoing. Indeed, this would be consistent with early consideration of whistleblower laws, with the 1994 Senate Select Committee on Public Interest Whistleblowing's requiring in its definition of a whistleblower that the person had made the disclosure to a person capable of 'facilitating the correction of wrongdoing'.[110] Much research into the impact that whistleblower laws have on the prevalence of whistleblowing,[111] which has been cited by Parliamentary committees,[112] suggests that the legislatures and the public are indeed interested in actually eliminating wrongdoing in the public service through these laws. Indeed, while there may be other goals, such as protecting whistleblowers, without this primary goal, these goals would make little sense – why protect whistleblowers if we do not want people to blow the whistle? Ultimately, the goal of detecting and eliminating wrongdoing in the public sector underpins these other goals.

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[107] It is accepted that seeking 'legislative intention' in a literal sense is a fiction. But this does not mean one cannot search for the actual legislature intent of legislators. See Stephen Gagelar 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1.
[108] Commonwealth PID Act s 6(a).
[109] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2013, 6407 (Mark Dreyfus).
[110] Senate Select Committee on Public Interest Whistleblowing, Commonwealth, *The Public Interest Revisited* (October 1995) para 2.2.
[111] See AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008), especially chapters 3 and 10.
[112] See, for example, in the Economics Legislation Committee, Commonwealth, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (March 2018), 29.

As they currently stand, Private Sector Whistleblower Laws mostly have a narrower goal than eliminating wrongdoing, with a focus on just eliminating unlawful conduct. Under the Corporations Act, for a disclosure to be protected, the whistleblower must have reasonable grounds to suspect the information disclosed indicates the company the whistleblower works for or an officer or employee of the company, has or may have contravened a provision of Corporations legislation.[113] This suggests the Corporations Act are not concerned with wrongdoing broadly, but just *unlawful* conduct. On the other hand, laws that apply to entities regulated by APRA shows concern for a broad range of wrongdoing. To be a protected disclosure under this legislation, the information must concern 'misconduct, or an improper state of affairs or circumstances, in relation to the' employer,[114] and the terms 'misconduct' and 'improper state of affairs or circumstances' are not defined. As such, these laws appear to aim to detect and eliminate a broader range of 'wrongdoing' than just unlawful conduct, even if the extent to which they do so is somewhat ambiguous.

Indeed, while the Corporations Act only focusses on 'unlawful conduct', the tide appears to be turning, with the Coalition Government proposing amendments to cover a broader range of wrongdoing. As discussed in Part One, the Enhancing Whistleblower Protections Bill would protect whistleblowers who have reasonable grounds to suspect information in their disclosure concerns 'misconduct, or an improper state of affairs or circumstances' in relation to a corporation.[115] Again, the terms 'misconduct' and 'improper state or affairs or circumstances' are undefined, but could potentially capture a wide variety of wrongdoing, such as breach of employer policies or breach of some community standards. Certainly, as with the laws covering entities regulated by APRA, the intention of the laws is clearly to go beyond merely preventing 'unlawful' conduct. The Senate Economics Legislation Committee, when considering the Enhancing Whistleblower Protections Bill 2017, stated:

> *The reason for government interest in protecting whistleblowers is that:*

[113] Corporations Act s 1317AA.
[114] Banking Act s 52A(2); Superannuation Industry Supervision Act s 336A; Life Insurance Act s 156A; Insurance Act s 38A.
[115] Enhancing Whistleblower Protections Bill Sch 1, Pt 1 (proposed s 1317AA(4)).

> *… the prevention of corruption, waste, tax evasion or avoidance and fraud relies upon appropriate protections for people who report these wrongdoings*[116]

This further supports the view that this legislation is designed to capture a broader range of 'wrongdoing' than just unlawful conduct. With the primary criticisms of this bill being that it does not go far enough,[117] it appears likely that the days of Private Sector Whistleblower Laws focussing only on unlawful conduct, rather than a broader concept of wrongdoing, are soon to be over.

C. Providing 'justice' for whistleblowers

A secondary goal of whistleblower laws is the desire to promote 'justice' for whistleblowers, by preventing reprisal action and providing compensation for them when reprisal action occurs. The ability of whistleblowers to claim 'compensation' for losses suffered by retaliation against them,[118] rather than just having civil penalties imposed for those who do so, suggests the legislatures wanted to ensure whistleblowers receive compensatory justice for any retaliatory conduct they suffer. This goal is suggested in Senator Corman's second reading speech to the Enhancing Whistleblower Protections Bill 2017, where he stated:

> *The Bill also makes it easier for a whistleblower to seek redress for detriment or damage that is caused as a result of a disclosure.*[119]

While this is a separate goal from detecting and eliminating wrongdoing, it is complimentary to this goal. That is, whistleblower protections provide justice for whistleblowers and also may support the detection and elimination of wrongdoing, and these goals will not be in conflict.

D. Promoting Informed Democracy

Some writers consider whistleblower laws should be designed to promote informed democracy. Paul Latimer and AJ Brown stated that 'An informed society underpins a democratic society, and a democratic society must encourage, support and protect whistleblowers'. [120] Indeed, Latimer and Brown go on to state 'Disclosure to the media and

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[116] Economics Legislation Committee, Commonwealth, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (March 2018) 1, citing Department of Prime Minister and Cabinet, *Australia's first Open Government National Action Plan 2016-18*, 12.
[117] Economics Legislation Committee, Commonwealth, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (March 2018) 29-47.
[118] See discussion above at Part 1.B.ii.
[119] Commonwealth, *Parliamentary Debates*, Senate, 7 December 2017, 10098.
[120] Paul Latimer and AJ Brown, 'Whistleblower Laws: International Best Practice' (2008) 31(3) *UNSW Law Journal* 766, 769.

parliament should be one of the foundations of a democratic society, and should be encouraged and protected'.[121] On this view, whistleblowing is a way to inform politicians and the public of wrongdoing, at least partly in order for politicians and the public to decide how to respond.

However, given that Private Sector Whistleblower Laws do not currently contain any public elements, and the Enhancing Whistleblower Protections Bill only proposes to allow for public disclosures in a very narrow set of 'emergencies',[122] legislatures do not appear to wish to promote informed democracy through Private Sector Whistleblower Laws in any meaningful way. Perhaps this is because it is considered society has less of a right or interest in knowledge of the functioning of private entities, as opposed to public ones.

On the other hand, some Public Sector Whistleblower Laws can be seen to promote informed democracy. Clearly, those Public Sector Whistleblower Laws that do not contain public elements do not do so. Further, those that require the disclosures to be made internally or to some other authority, who is given an opportunity to investigate first, [123] only promote informed democracy to a limited extent. The requirement to report internally or to another authority first suggests there is a preference to deal with the issue *without* informing the public or politicians in the first instance. On the other hand, the ACT PID Act, SA Whistleblowers Act and Queensland PID Act, can be seen to promote informed democracy, in that they enable public interest disclosures to be made to politicians in the first instance, who may then act upon it, including by making it public under parliamentary privilege.[124] Indeed, even if politicians to not make the disclosure public, by informing elected officials of these issues, this may be seen to promote informed democracy.

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It is useful to summarise the key findings of Part Two. *First,* the primary goal of whistleblower laws is to detect and eliminate wrongdoing. While the Corporations Act only focusses on unlawful conduct, the tide appears to have turned, and even Private Sector Whistleblower Laws are likely soon to all be focussed on wrongdoing more broadly. *Second,* whistleblower laws also pursue the complimentary goal of pursuing justice for

[121] Paul Latimer and AJ Brown, 'Whistleblower Laws: International Best Practice' (2008) 31(3) *UNSW Law Journal* 766, 781.
[122] See discussion above at Part 1.B.ii.
[123]ACT PID Act s 27; Commonwealth PID Act s 26(1) Item 2; NSW PID Act s 19; Queensland PID Act s 20; WA PID Act s 7A.
[124] ACT PID Act s 15(1)(b); SA Whistleblowers Act s 5(4); Queensland PID Act s 14.

whistleblowers who have been subjected to reprisal action. *Third*, while some commentators think it is appropriate for whistleblower laws to pursue informed democracy, and the ACT PID Act, SA Whistleblowers Act and Queensland PID Act do so, the other Public Sector Whistleblower Laws only pursue this goal in a very limited way or do not pursue it at all, and Private Whistleblower Laws do not do so at all.

Part Three: Relevant findings from research on whistleblower laws

This Part examines some relevant findings from Australian research on whistleblowing, which will feed into the critical evaluation of whistleblower laws in Part Four.

A. Whistleblower laws may encourage whistleblowing

While there is no conclusive evidence, there is good reason to believe that whistleblower laws do, in fact, encourage whistleblowing. A study by Peter Roberts on Australian public sector employees did *not* find a statistically significant correlation between employees' whistleblowing reporting behaviour, and their belief that they were covered by whistleblower laws.[125] However, this is not a good indication on whether these laws actually increase rates of whistleblowing, because laws may increase rates of whistleblowing indirectly. For example, if whistleblower laws meant more employers adopted whistleblower policies or discussed whistleblowing with employees, and these policies or discussions led to higher rates of whistleblowing, the laws would also have led indirectly to higher rates of whistleblowing. Indeed, in the same study, Roberts found a positive relationship between agencies having more comprehensive whistleblower procedures and whistleblowing.[126] It seems likely that employees covered by whistleblower laws are more likely to have comprehensive whistleblower policies – apart from the fact it would be more relevant for them, it is also mandated under some laws.[127] As such, whistleblower laws may indirectly lead to more whistleblowing in this way. And this is only one way that they may do so It may reasonably be supposed that whistleblower laws lead to multiple actions by employers regarding whistleblowing (eg presentations and discussions) that may lead to higher rates of whistleblowing. While not conclusive, and further research would be helpful, this gives good reason to currently operate on the basis that whistleblower laws do in fact lead to increased rates of whistleblowing.

[125] Peter Roberts, 'Evaluating agency responses: the comprehensiveness and impact of whistleblowing procedures' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 233, 239.
[126] Ibid 256.
[127] See, for example, Commonwealth PID Act s 59(1).

B. Anti-retaliation elements may discourage reprisal action

There is reason to believe that whistleblower laws, when combined with information about the laws in employee policies, may promote better treatment of whistleblowers by other employees and management. The Roberts study found that having more comprehensive whistleblower procedures led to significantly lower amounts of employees rating treatment by management as bad or extremely bad.[128] It also specifically found that having information about the laws in procedures substantially correlated with improved treatment by employees and management of whistleblowers.[129] Therefore, this gives reason to believe that having whistleblower laws, combined with providing information about these whistleblower laws in policy, may actually promote better treatment of whistleblowers by employees and management.

C. A preference for disclosing internally

The research suggests that Australian whistleblowers typically report misconduct internally, and particularly to their direct line of management. A study by Marika Donkin, Rodney Smith and AJ Brown researched how whistleblowers report misconduct, with 'whistleblowers' being defined as generally including persons who reported public interest matters, not in the course of their 'role' (ie, it was not their role to report it), and not persons who reported 'only personal and workplace grievances'.[130] This study found that 'the bulk of whistleblowing recorded by the employees survey started (97 per cent) and ended (90 per cent) as an internal process'.[131] Additionally, supervisors were the initial recipient of 65.7 per cent of whistleblower complaints, and senior managers received 15 per cent of complaints.[132] Indeed, 'few officials (less than 10 per cent of public interest whistleblowers) went outside the management chain to use specialist internal whistleblowing procedures'.[133] This shows a strong preference for reporting conduct internally, and to direct line of management.

Indeed, while the high rates of whistleblowing to supervisors and managers in the first instance may be partly a result of poor knowledge of other available options, there is good reason to believe that most, but not all, whistleblowers have a preference for reporting internally, even if they know they have the option to report externally. In a survey of NSW

[128] Peter Roberts, 'Evaluating agency responses: the comprehensiveness and impact of whistleblowing procedures' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 233, 256.
[129] Ibid 258.
[130] Marika Donkin, Rodney Smith and AJ Brown, 'How do officials report? Internal and external whistleblowing' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 83,87.
[131] Ibid 83.
[132] Ibid 88.
[133] Ibid 5.

public servants, 54 per cent of respondents said 'they would feel most comfortable reporting corruption to someone internal to their organisation in the first instance.'[134] Meanwhile, one-third of respondents said they would prefer to make a report externally in the first instance.[135] This provides reason to believe that, while the majority of whistleblowers may prefer to make disclosures internally, a substantial amount would prefer to report at least some conduct externally.

D. Preference for internal investigations

Indeed, there is reason to believe that many whistleblowers would prefer to not only make disclosures to a person internally, but also have the complaint investigated internally. As Donkin, Smith and Brown state, external investigations 'can involve intense conflict between an organisation and its members and throw substantial parts of its management into turmoil'.[136] A study by Margaret Mitchell found that Australian public sector whistleblowers' level of satisfaction with both the progress and outcome of whistleblower complaints was lowest when it was conduct by a union/professional association, and second lowest when conducted by an external government agency.[137] There were seven internal investigations categories in this study (for example, by supervisors, CEOs (or equivalents), ethical standard units etc), and all these received higher levels of satisfaction.[138] It may be that having an external body investigate was isolating and less supportive, or it may be that these bodies were simply less effective in this instance. Regardless, this result gives good reason to consider, in the current context, internal investigations leave whistleblowers feeling better supported and with more preferable outcomes.

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Findings from Part Thee include, *first*, while it is not conclusive, there is good reason to believe whistleblower laws do, in fact, encourage whistleblowing. *Second*, there is reason to believe that the anti-retaliation elements, combined with information about the laws in employee procedures, leads to lower rates of reprisal action. *Third*, most, but not all, employees appear to have a preference for making disclosures internally, and through their

[134] Lisa Zapparo, 'Encouraging Public Sector Employees to Report Workplace Corruption' (1999) 58(2) *Australian Journal of Public Administration* 83, 85.
[135] Ibid 85.
[136] Marika Donkin, Rodney Smith and AJ Brown, 'How do officials report? Internal and external whistleblowing' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 83, 94.
[137] Margaret Mitchell, 'Investigations: improving practice and building capacity' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 181, 187.
[138] Ibid.

direct line of management. *Fourth*, some research suggests that whistleblower employees report better outcomes when investigations are conducted internally, rather than externally.

Part Four: A call for reform

Drawing on Parts One to Three, this Part critically evaluates the restrictions and duties Australian whistleblower laws impose on employers dealing with alleged employee misconduct, and considers whether amendments to the laws should be made. In the end, no calls to amend Private Sector Whistleblower Laws are made, but somereforms to Public Sector Whistleblower Laws are argued for.

A. The anti-retaliation elements

The anti-retaliation elements are essential to promoting the goals of whistleblower laws. First, they likely promote the primary purpose of whistleblower laws, of detecting and eliminating wrongdoing. While Part Three did not find conclusive evidence Australian whistleblower laws increase levels of whistleblowing, it gave reason to believe that they do. By providing protections for whistleblowers, the anti-retaliation elements likely encourage further whistleblowing. Second, anti-retaliation elements assist achieve the secondary goal of whistleblower laws, of providing justice for whistleblowers by preventing reprisal action and providing compensation when reprisal action occurs. Part Three found there is reason to believe that the anti-retaliation elements, in combination with comprehensive policies, encourage better treatment of whistleblowers. Clearly, anti-retaliation elements also provide the means of obtaining compensation. It is no coincidence that the first whistleblower law in Australia, the *Whistleblower Protection Act 1993* (SA) focussed exclusively on anti-retaliation measures – they are essential features of whistleblower laws.

Further, subject to there being an exception for deliberately false or misleading disclosures, the requirement for employers to not take retaliatory conduct against employee's whistleblowing can hardly be objected to as too burdensome of employers. Part One of this paper explained that some anti-retaliation elements of whistleblower laws are much broader than others, because a wider range of 'disclosable conduct' is caught. However, even where whistleblower laws cover reporting of very minor wrongdoing, unless the report was false or misleading, there is no good reason why employers should seek to discipline employees for reporting any disclosable conduct. Indeed, the case may be made, as Minister Corman did, [139] that whistleblowing helps employers by assisting them detect and eliminate wrongdoing in

[139] Commonwealth, *Parliamentary Debates*, Senate, 7 December 2017, 10098.

their organisation. As such, even in cases where the anti-retaliation elements protect a wide range of disclosures, so long as there is an exception to false and misleading disclosures, there is no good case that they inappropriately restrict or place duties upon employers when responding to allegations of employee misconduct.

All whistleblower laws, however, should contain a clear exception allowing for reprisal action for making false or misleading disclosures. As discussed in Part One, Private Sector Whistleblower Laws only protect whistelblowers where they have made a disclosure in 'good faith', which would likely exclude deliberately false and misleading disclosures from protection. However, most Public Sector Whistleblower Laws are less clear. Providing protections for employees who make false and misleading disclosures would not promote the primary purpose identified in Part Two, being the detection and elimination of wrongdoing. Contrary to this, it would *enable* wrongdoing to occur, as employees could make false and misleading allegations with impunity. Making false or misleading accusations against a person can seriously impact upon their career and wellbeing, as well as an organisations' wellbeing, and should be capable of being subject to disciplinary action. Any fears this exception would be 'exploited' by employees should be ameliorated when it is considered that employers face serious consequences for taking unlawful reprisal action, including possible criminal sanctions. This would likely discourage employers from taking reprisal action unless they are confident the disclosure was actually false or misleading.

While some reviews of whistleblower laws have taken a different view on this issue, the arguments (or lack of arguments) they have put are not convincing. First, a review of the Commonwealth PID Act by Phillip Moss (**the Moss Review**) did not make any recommendation regarding this issue or discuss it in the report, despite it being raised in submissions.[140] Obviously, it is not clear why this approach was taken. Second, NSW previously included an exception to the prohibition on reprisal action where the disclosure was deliberately false or vexatious.[141] However, the Committee on the Independent Commission Against Corruption recommended this be repealed (and it subsequently was) on the basis:

a. it required a subjective inquiry into the whistleblowers' motivation, and

[140] Phillip Moss, *Review of the Public Interest Disclosures Act 2013* (15 July 2016); Commonwealth Attorney-General's Department, Submission to the Legislated Review of the Public Interest Disclosure (PID) Act, *Statutory Review of the Public Interest Disclosure Act 2013*, March 2016.
[141] *Protected Disclosures Act 1994* (NSW) (as it then was) s 16.

b. there were other provisions that were 'sufficient to strike the balance' between encouraging disclosures and 'discouraging false information that is provided maliciously'[142] These included provisions that made it an offence to make a false statement to, or mislead, the person/authority investigating the disclosure, and provisions that provided disclosures made with the aim of avoiding disciplinary action are not protected.

The first reason is not convincing. Employers may often discipline employees for 'deliberate dishonesty' or deliberately providing misleading information. While sometimes difficult to prove, deliberate dishonesty or deliberately providing misleading information may be established on the evidence. For example, an easy case may be if a whistelblower stated they saw a person took an action, and video footage shows something very different. This would likely establish to a satisfactory degree they made a deliberately false or misleading statement. The second reason is also unconvincing. If an employee had made a deliberately false or misleading allegation about another employee under whistleblower laws, there is no guarantee a prosecution will be made, and an employer should be able to take disciplinary action against the employee for making the false or misleading allegation. To not allow such disciplinary action (and just leave it to prosecution) would leave an employer powerless to adequately respond, even in a situation where the law recognises what the employee has done is wrong (by prohibiting it). As such, these reviews do not provide a convincing reason to take a different approach from that recommended above.

B. Public elements

Determining the 'ideal' public elements of whistleblower laws engages some difficult issues, which are beyond the scope of this paper, which focusses on the restrictions and duties placed on employees dealing with alleged employee misconduct. Determining the ideal 'public' elements inevitably deals with the extent of one's faith in the public and politicians to appropriately handle information provided to them. High levels of faith in the public and politicians to respond appropriately would generally lead to the view that whistleblowers should be able to make their allegations public in the first instance, whereas lower levels of faith in the public and politicians to respond appropriately would lead to tight restrictions over the public elements of whistleblower laws. As noted in the introduction, this paper goes

[142] Committee on the Independent Commission Against Corruption, NSW Parliament, *Protection of public sector whistleblower employees* (2009) 158-159; *Public Interest Disclosure Act 1994* (NSW) s 27.

on the assumption that legislatures have appropriately placed faith in the public and politicians to appropriately respond to information.

On the presumption that the public and politicians will respond appropriately to publicly disclosed information, none of public elements in whistleblower laws can be objected to on the basis they inappropriately interfere with employers dealing with alleged employee misconduct, except to the extent they should allow reprisal action because of false or misleading disclosures. While studies suggest that only a very small fraction of whistleblowing is done publicly,[143] these public elements are central to whistleblower laws. First, the threat of public exposure may motivate employers to take action, and thereby assist achieve the primary purpose of the laws, being the detection and elimination of wrongdoing. Second, depending on their scope, they may assist in promoting informed democracy, by providing the public with information on the inner workings of organisations. On the presumption one has faith in politicians to appropriately handle the information provided to them, the public elements in the ACT PID Act, Queensland PID Act and SA Whistleblowers Act, which allow disclosures to be made to politicians in the first instances, can also hardly be objected to.

The single change that this paper recommends is made to the public elements is the same change recommended for the anti-retaliation elements (the public elements being an extension of the anti-retaliation elements). That is, for the reason described earlier in this Part, employers should be able to take reprisal action against employees for making deliberately false or misleading disclosures.

C. The institutional elements

As described above in Part Three, under the Discretionary Model and the Serious External Investigations Model, there is no duty to investigate disclosures, such that there can be no objection that these inappropriately restrict or place requirements upon employers responding to employee misconduct. However, under the Mandatory Internal Investigations Model (and some Mixed Models), investigations are required. This sub-part first outlines the disadvantages of this approach, and then outlines options for reform.

[143] Marika Donkin, Rodney Smith and AJ Brown, "How do officials report? Internal and external whistleblowing' in AJ Brown, *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 83, 83.

i. Disadvantages of mandatory internal investigations

The most obvious disadvantage of the Mandatory Internal Investigations Model is that it requires formal investigations of wrongdoing where there are preferable ways of dealing with it. As described in Part One, public sector agencies typically emphasise the discretionary nature of the decision on whether to formally investigate misconduct. Supervisors or managers need to weigh various factors to determine what the best course is, including the seriousness of the conduct, and how the person is likely to respond to different forms of action. It may be that dealing with an issue by way of an informal conversation, or by way of mediation, is the best way to quickly resolve a workplace issue. A formal investigation may cause unnecessary delay, stress and ill-will. The Commonwealth Attorney-General's department stated in submissions to the Moss Review that:

> *Anecdotally, we understand that some agencies have taken the approach of not giving such training [in the Commonwealth PID Act] on the assumption that this will minimise the number of PIDS that are required to be dealt with as such.*[144]

Apart from the obvious rule of law issues this raises, this suggests Commonwealth agencies do wish to deal with some misconduct in a more informal manner. Indeed, the Moss Review found that the investigation processes under the Commonwealth PID Act were 'not well adapted to resolving allegations of less serious disclosable conduct' and recommended a greater focus on more serious conduct (this recommendation and the government response is discussed further below under 'Alternative Option Five').[145] Forcing formal investigations in such a wide range of circumstances inevitably forces supervisors and managers to formally investigate matters where it is not the most appropriate course of action.

A second disadvantage of this approach is that it may discourage persons from reporting wrongdoing to their supervisors and other authorised persons. Employees may wish to report wrongdoing to their supervisors, but not go through the stress of a formal investigation. They may even just want to talk to their supervisor about an issue, without any action being taken against an employee. For example, they may be concerned about workplace bullying, and want to discuss possible options such as mediation or changed workplace duties. Under the Mandatory Internal Investigations Model, however, if the employee in the course of the discussion with their supervisor provides information that tends

[144] Commonwealth Attorney-General's Department, Submission to the Legislated Review of the Public Interest Disclosure (PID) Act, *Statutory Review of the Public Interest Disclosure Act 2013*, March 2016, [17].
[145] Phillip Moss, *Review of the Public Interest Disclosures Act 2013* (15 July 2016), [64].

to show, or that the employee believes on reasonable grounds tends to show, bullying, the supervisor would need to refer it for investigation under the whistleblower law. An employee armed with this knowledge of the whistleblower law, and who does not want the matter formally investigated, may decide not to discuss it with their supervisor at all, thus leaving the issue unrecognised and not dealt with.

A third disadvantage of this approach is the obvious administrative costs associated with formal investigations. Formal investigations of wrongdoing can take considerable time, with time spent gathering information, drafting allegations letters, reporting to the Ombudsman (or other oversight body), reviewing responses, and deciding upon final outcomes. Indeed, they may often even lead to expenses on legal or investigator fees. The fact some government departments have specialist PID teams[146] itself speaks to the fact there are significant administrative costs of this Mandatory Internal Investigations Model. If a formal investigation is not appropriate, then these costs are unnecessary and would have been better spent elsewhere within an organisation.

Despite these issues with the Mandatory Internal Investigations Model, it is accepted that some may see an advantage in its guarantee that matters will be investigated. Indeed, AJ Brown, Paul Latimer, John McMillan and Chris Wheeler have argued that there is a need for whistleblower laws to move passed the emphasis on protection for whistleblowers to rather than "effective operational system for managing whistleblowing as and when it occurs".[147] This consideration is one factor to be balanced, in considering the alternative options below.

ii. Alternative Model One – Broader exceptions

One option would be to adopt the ACT's model, whereby there is a duty on supervisors and other authorised recipients to refer disclosures for internal investigations, but there is a wide discretion for the 'investigating agency' not to investigate. One circumstance an 'investigating agency' can decide not to investigate a matter under the ACT PID Act is if 'there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure'.[148] This would effectively cover the situation where, for example, some less serious disclosable conduct is disclosed and it is best to deal with it other than by formal investigation (for example, dealing with it by informal discussion or mediation). However,

[146] The author has personal knowledge of this.
[147] AJ Brown, Paul Latimer, John McMillan and Chris Wheeler, "Best Practice whistleblowing legislation for the public sector: the key principles" in AJ Brown, *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 261, 262.
[148] ACT PID Act s 20(f).

the decision to not investigate cannot be made by the supervisor or authorised recipient – rather, the supervisor/authorised recipient would still need to refer the disclosure for investigation, and it is the 'investigating agency' who decides whether there is a more appropriate means of dealing with it. Hence, this model still has disadvantages in that:

- Supervisors cannot immediately determine whether to deal with a disclosure in a way other than by investigation. That is, it still somewhat hampers the supervisor's discretion over minor workplace issues, and may delay dealing with these issues.
- Employees may still be deterred from making a disclosure where they know the matter must be referred to a person they do not know, to determine if it needs to be investigated.

In this way, having broader exceptions available to investigate ameliorates, but does not resolve, the issues identified above regarding the Mandatory Internal Investigations Model.

iii. Alternative Model Two – Discretionary approach

A second alternative is to adopt the Discretionary Model, whereby whistleblower laws include ani-retaliation elements, but do not require investigations into wrongdoing. However, as foreshadowed above, some may object to this approach as it does not guarantee that disclosures of wrongdoing will be actioned. Indeed, while Part One outlined various duties that already exist on employers that may motivate them to investigate wrongdoing, these duties are not comprehensive, and there will not always be a duty to deal with a disclosure.

iv. Alternative Model Three – Serious External Investigations Model

A third alternative is the External Investigations Model, whereby whistleblowers are usually dealt with by an external body, which, subject to exceptions, will have a duty to investigate. This would hold the advantage over the Discretionary Model, in that it would still provide some guarantee that reports of wrongdoing will be investigated. It also hold the advantage of not requiring employers to formally investigate wrongdoing where another approach would be more appropriate – the employer would be able to deal with the alleged wrongdoing as it sees fit, and the external agency would conduct their own investigation.

On the other hand, the research referred to in Part Three suggests that only having the external whistleblowing option model may have disadvantages. As described in Part Three, research suggests most (but not all) employees would prefer to report wrongdoing internally, and that most would in fact prefer it be investigated internally. Additionally, as outlined in Part Three, having comprehensive internal procedures for dealing with whistleblowing was

found by Roberts to increase levels of whistleblowing, suggesting having a good internal process, rather than leaving it to an external agency for dealing with whistleblowing, may be desirable.[149] Therefore, only having an external process for investigating whistleblower complaints does hold disadvantages.

v. Alternative Model Four – Moss Review

Another alternative model would be to adopt the following 'recommendation' of the Moss Review of the Commonwealth PID Act, in July 2016:

> *To strengthen the PID Act's focus on significant wrongdoing like fraud, serious misconduct, and corrupt conduct in order to achieve the integrity and accountability aims. To this purpose, personal employment related grievances would be excluded from the PID Act unless they relate to systemic issues or reprisal … Such issues are better investigated or resolved through other existing dispute resolution processes.*[150]

In September 2017, the Parliamentary Joint Committee on Corporations and Financial Services responded to this recommendation stating that they accepted the legislation should focus on 'the most serious integrity risks', but it considered more data on the proportion of disclosures that are 'actually related to personal employment matters' should be 'collected and assessed' before any legislative changes are made.[151] It is not clear why the committee thought it was necessary to know the proportion of disclosures that fell in this category before making a decision, but, with two years having passed since the release of the Moss Review's final report, it is clear any reforms are on the backburner. In any respect, in reality, the recommendation of the Moss Review above contains two recommendations – to focus on more serious wrongdoing, and to exclude 'personal employment related grievances' from coverage, unless they relate to systemic issues or reprisal – that should be considered.

Only requiring investigations into serious wrongdoing (but maintaining protections for whistleblowers regardless) would have significant advantages. While management options such as dealing with matters informally and mediation are viable options for dealing with some wrongdoing, it can hardly be argued that more formal investigations are not required into very serious wrongdoing, such as fraud and criminal activity. The precise line to be drawn involves a difficult balancing exercise, but balance to be struck between the

[149] Peter Roberts, 'Evaluating agency responses: the comprehensiveness and impact of whistleblowing procedures' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (ANU Press, 2008) 233.
[150] Phillip Moss, *Review of the Public Interest Disclosures Act 2013* (15 July 2016) 7.
[151] Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth, *Whistleblower Protections* (2017), 5.28-5.30.

disadvantages outlined above of mandating investigations, with the need to provide some assurance that investigations will occur when they are necessary.

The second element of the recommendation, of excluding 'personal employment related grievances' is, however, not justified. First, no attempt was made by Moss to define 'personal employment related grievances'.[152] This is an ambiguous term and would lead to considerable uncertainty. Does it mean any grievance an employee experiences and they are personally involved with in any way? Or does the grievance have to have some 'employment law' element to it? Second, and more fundamentally, a 'personal employment related grievance', even if not reprisal action or a 'systemic issue', may involve serious wrongdoing. For example, a single threat of physical harm by one employee to another may require formal investigation. Moss appears to use 'personal employment related grievances' as 'proxy' to decide that a disclosure does not involve serious wrongdoing, where it is not clear this is the case. Therefore, this second elements of Moss's recommendation is not justified.

vi. Alternative Model Five - A mixed approach

A final alternative model, taking the best elements of the above alternatives, would be to only require internal investigations of serious wrongdoing, and to provide employees with an alternative option of external reporting. This model would:

a) avoid the unnecessary investigation of the less serious matters, which may be best dealt with by other means;
b) maintain internal investigations, which employees appear to prefer in most instances; and
c) also provide the option of external reporting, for employees who would prefer an external agency investigate a matter.

If the government did not want to commit to spending on an external reporting option, this model would still work satisfactorily without the external reporting option. This model would avoid the pitfalls of the Mandatory Internal Investigations Model, and draw on the advantages of the above alternatives.

Conclusion

There are a plethora of whistleblower laws in Australia. These now form part of the Australian employment law framework, particularly in the public sector, and appear certain to

[152] See the NT PID Act, which also excludes from the definition of disclosure 'an employment related grievance (other than a grievance about an act of reprisal) or other personal grievance' (s 10(2)(b)).

become a more prominent feature of private sector employment laws also. In developing these laws, understandably, the emphasis has been on promoting whistleblowing, protecting whistleblowers from reprisal action, and ensuring that disclosures of wrongdoing are investigated. But no law should pursue one goal in isolation. These laws also have an impact on organisations' efficiency, by limiting employers' ability to appropriately respond to employee misconduct. This paper has argued these laws inappropriately interfere with employers dealing with employee misconduct in some instances. It recommends including a clear exemption allowing for employers to take disciplinary and other action against employees for making false or misleading disclosures, and to reform some institutional elements of Public Sector Whistleblower Laws in the manner described in Part 4. Legislatures that care about the efficiency of both private and public sectors will place close attention to drafting these laws appropriately in the future.

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