ACTU Submission

Public Interest Disclosure Bill 2013

unions australia

SECURE JOBS BETTER FUTURE

The Australian Council of Trade Unions (**ACTU**) welcomes the opportunity to comment on the above Bill. We welcome the introduction of measures which seek to protect the interests of public service workers who make a public interest disclosure (**PID**).

We broadly support the Bill and the submissions of our affiliate the Community and Public Sector Union and we make the following comments for your consideration.

Interaction with the general protections provisions of the Fair Work Act

The Bill seeks to ensure that the protections currently afforded to workers pursuant to the general protections provisions contained in Part 3-1 of the *Fair Work Act 2009* (Cth) (**FW Act**) are afforded to public officials. Clause 22 of the Bill provides that the legislative instrument is to be considered as workplace law and that the making of a PID would be a process or proceeding under a workplace law for the purposes of the FW Act.

However, we note that while the Bill provides that the making of a PID is a process or proceeding under a workplace law, it appears to provide protections only for employees. Section 341(1)(b) of the FW Act provides that both employees and independent contractors have access to the general protections provisions in relation to a process or proceeding under a workplace law. We note that the Bill states that its intention is not to limit the operation of the FW Act, therefore we submit that clause 22 requires clarification to ensure that both employees and independent contractors can be certain that they have access to the general protections provisions in the FW Act should they make a PID.

We support clause 18 of the Bill which provides, in effect, that workers cannot "double dip" and make an application under the Bill and the FW Act concurrently. This is a sensible approach.

The proposal that should an application under either the FW Act or the Bill be discontinued, or fail for want of jurisdiction, a worker can then make an application in the alternative jurisdiction provides welcome and reasonable protections.

We ask that consideration be given to creating a "no costs" jurisdiction, as is the case with the FW Act, to encourage employees seeking damages to make an application without fear of incurring the respondent's legal bill should they be unsuccessful. We would recommend excluding vexatious applications, applications without reasonable cause, or applications with no reasonable prospects of success. Please refer to section 611 of the FW Act for guidance.

Immunity

We recommend that clause 11 of the Bill be redrafted to provide that only people who knowingly or recklessly make a statement that is false or misleading are deprived of the protections afforded by clause 10. This will go some way to encourage people who have an honest belief that their PID is true to make a PID in good faith. The inclusion of the words "knowingly or recklessly" will not detract from the intention to deny protection to people who deliberately make false or misleading PIDs.

Vicarious liability

We support the inclusion of the vicarious liability provisions in clause 14. This will provide a strong incentive for employers to ensure that whistleblowers are protected and that the aims of the Bill are adhered to. We imagine that the "reasonable precautions" defence for the respondent employer will be informed by the jurisprudence from existing discrimination and occupational health and safety decisions.

Criminal and civil protections

We submit that the Bill should make a clear distinction between requirements to meet the standard of proof in civil and criminal proceedings. Clause 23 should be drafted to make it clear that a person does not have to satisfy both the civil standard of proof and the criminal standard of proof when seeking protection if they are only bringing a civil action.

Coverage of workers

We welcome the inclusion of former public officials in the scope of protection in clause 7(1). We say that the objects of the Bill, as set out in clause 6, are complimented by this provision.

Conduct covered

We welcome the application of the protections afforded by the Bill to conduct which may have occurred prior to, or has been occurring since, the commencement date of the legislation. We refer to subclause 29(3).

Further, we welcome the wide range of conduct covered in clause 29, in particular conduct which unreasonably results in a danger to, or increases the risk of danger to, the health and safety of one or more persons. This will provide added protections for workers who will be more likely to speak up about health and safety at work. It will complement existing work health and safety laws and it attempts to remove any uncertainty about a public official's capacity to raise such concerns.

Who disclosures can be made to

Clause 34 of the Bill provides that PIDs can be made to the Ombudsman, a prescribed investigative agency, or the Inspector General of Intelligence and Security (**IGIS**), rather than to the authorised officer of the particular agency concerned. This is in our view appropriate and prudent. This will likely encourage more PIDs and will provide a less confrontational way for a worker to make a PID.

Role of the Ombudsman and the Inspector General of Intelligence and Security

The ACTU believes that the Bill could be strengthened by giving the Ombudsman and the IGIS the ability to oversee and/or review any investigation conducted by an agency as a result of a PID having been made. This power could be invoked by the Ombudsman or IGIS on their own motion, or by a person who has made a PID.

The Ombudsman and IGIS should also have the ability to inform themselves, in any manner they see fit, as to whether any recommendations which were made as a result of an investigation have been followed, and have the ability to require that an agency implement any recommendations, or seek reasons for why recommendations have not been followed. This would make the Ombudsman and IGIS more active participants in the legislative scheme.

Specifics of drafting

We call on the Department and Ombudsman to prepare and disseminate guidance notes for areas of the Bill which are open to varied interpretations. This would provide some added comfort to any worker considering whether to make a PID as they would be able to seek more definitive advice from their representative as to whether the PID would be protected or not.

Finally, the ACTU recommends that provisions which have been drafted broadly are revisited to ensure that provisions achieve their intended purpose and do not have an unintentionally broader operation.

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