

Corporate and Commercial Newsletter

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CLERP 9 Reforms - Whistleblowing

BY NORMAN DONATO, PARTNER

The CLERP 9 Act (*Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*) come into force on 1 July 2004.

The changes introduced by the CLERP Act are wide ranging and include auditor independence; a cooling off period before an auditor can take a senior position with one of his clients; in certain case there is a requirement to rotate auditors; disclosure of senior managers remuneration and performance conditions; management certification and sign off on financial statements; the establishment of the Financial Reporting Panel and whistleblowing protection.

In this edition of our Corporate Update we focus briefly on the new whistleblowing protection provisions (ie what is the scope of the new reforms and what should you be doing about them).

The CLERP Act introduced a framework for employees, officer and contractors engaged by a company to report suspect breach of the Corporations legislation to the ASIC. To fall within the protections afforded by the reforms a "protected disclosure" must be made.

The reforms do not impose a duty to disclosure but deal with the consequence of disclosure.

What type of disclosure is afforded the protection under the new reforms?

4 criteria must be satisfied to qualify for the protection of the new whistleblowing reforms.

- (a) The Whistleblower – The person making the disclosure must be:
 - (i) an officer or employee of the company;
 - (ii) independent contractors, supplying goods or services, to the company; or
 - (iii) any employee of the above mentioned independent contractor.
- (b) The Recipient of the disclosure - The information needs to be disclosed to:

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- (i) ASIC;
 - (ii) the company's auditors;
 - (iii) director, company secretary, senior manager of the company; or
 - (iv) a person specifically designated by the company to receive such disclosures.
- (c) No anonymity - The person making the disclosure cannot remain anonymous. His or her identity must be disclosed before making the relevant disclosure.
- (d) Certainty and Bona fides - The whistleblower must:
- (i) have reasonable grounds to suspect a breach or possible breach of the Corporations legislation by the company or an officer or employee of the company; and
 - (ii) make the disclosure in good faith.

What protection is given to whistleblowers?

Generally, if the disclosure is a protected disclosure, the whistleblower is not subject to any civil or criminal liability for the disclosure. The whistleblower will be protected against:

- (a) actions for breach of contract or other remedies (eg breach of confidentiality agreements);
- (b) actions for defamation (in the absence of malice in making the disclosure);
- (c) termination of contract for breach; and
- (d) demotions, reduction in conditions of employment or other workplace victimization or abuse.

The protection is however limited to the actual disclosure and does not extend or give immunity for any illegal act or wrong to which the whistleblower was a party to.

Protection against victimisation

In addition to being protected against the above consequences of whistleblowing, a whistleblower has a right to be compensated for any damage caused by a contravention of the prohibitions against victimisation.

Section 1317AA provides that a whistleblower cannot be victimised because of his or her whistleblowing activity. One cannot undertake conduct that:

- (a) causes detriment to the whistleblower or another person; or
- (b) amounts to threats to cause detriment.

Offence carry fines and/or up to 6 months imprisonment. Corporate offenders faces fines of up to \$13,750 for each offence.

Confidentiality

Any person to whom a protected disclosure is made must treat:

- (a) the disclosed information;
- (b) the identity of the whistleblower and any information that is likely to identify the whistleblower,

as confidential information. Failure to keep such information confidential is an offence under the reforms. Naturally such confidential information may be released to:

- (a) the ASIC;
- (b) APRA; or
- (c) a member of the Australia Federal Police.

The release of the information may also be consented to by the whistleblower in certain circumstances, such as where the company has a whistleblowing protection program.

What do you need to do about these new reforms?

How and to what extent these new whistleblowing reforms may affect your company will depend on a number of factors including whether you have instituted a whistleblowing program.

It is beyond the scope of this brief summary of the changes to discuss the policy and problems behind these recent reforms. Suffice to state that there are some challenges for boards and senior management to ensure that the prohibitions against victimisation and retribution are adhered to; procedures to investigate disclosures are in place and that confidential information can be passed on to people in the organisation that need to know or investigate the information.

In addition, the reform package is not without some serious concerns for potential whistleblowers. Any person considering whistleblowing needs to ensure that the disclosure is "protected disclosure" otherwise the protections will not apply.

By dealing with some of these issues in a whistleblowing protection program companies may minimise some of the risks and uncertainty introduced by the new changes, and yet encourage the benefits intended by the changes.

Unconscionability under section 51AC of the *Trade Practices Act 1974 (Cth)*

By Amy Chu, Solicitor

The concept of unconscionability has been a feature of many cases in Australia over the years. The common law notion of unconscionability has been codified in the *Trade Practices Act 1974 (TPA)*.

In 1998, the notion of unconscionability was extended to small business in the guise of section 51AC of the TPA.

Section 51 AC

Section 51AC relates to conduct after 1 July 1998 and prohibits conduct in business transactions which is, 'in all the circumstances, unconscionable' by:

- (a) a corporation in connection with the supply or acquisition, or possible supply or acquisition, of goods or services to or from a person; and
- (b) a person in connection with the supply or acquisition, or possible supply or acquisition, of goods or services to or from a corporation.

The limitations to the application of section 51AC are that:

- (a) the supply or acquisition must be in trade and commerce;
- (b) the weaker party must not be a publicly listed company; and
- (c) the value of the transaction must be less than \$3 million.

Section 51AC sets out several factors the court can consider in deciding whether conduct was unconscionable. They include, but are not limited to:

- (a) the relative bargaining strength of the parties;
- (b) whether the stronger party imposed conditions that were not necessary to protect their legitimate business interest;
- (c) the use of undue influence, pressure or unfair tactics;

- (d) whether the weaker party could obtain supply on better terms elsewhere;
- (e) whether the stronger party made adequate disclosure to the weaker party;
- (f) the willingness of the stronger party to negotiate;
- (g) the extent to which each party acted in good faith; and
- (h) the requirements of any relevant industry code.

These factors are not exhaustive and in determining whether an unconscionable act has occurred the court will consider the conduct as a whole, including other factors that have not been listed above.

For section 51AC, the Court cannot take into account any circumstances of the alleged unconscionable conduct that were not reasonably foreseeable at the time of the relevant contravention.

Remedies available to private parties

Parties who choose to take private action may seek redress in the form of an injunction and/or certain 'other orders'. These 'other orders', which must be sought within six years of the contravention, may take any form that appears to the court to be appropriate and include:

- (a) compensating a person for loss or damage;
- (b) declaring a contract void in whole or in part;
- (c) varying a contract or arrangement;
- (d) requiring a refund of money or return of property; or
- (e) requiring that specified services be performed.

Under section 82 of the TPA, damages may also be available in the case of a business consumer who suffers loss or damage by the actions of another in breach of section 51AC.

Remedies available to ACCC

The ACCC may take either administrative or court action against a party that has engaged in unconscionable conduct covered by section 51AC.

Administrative action may take a number of forms. For example, the ACCC might request a party to cease certain conduct by altering the terms in standard form of contracts or

changing particular trading practices. In more serious instances the ACCC might negotiate and make public an enforceable undertaking from the company concerned.

Apart from the 'other orders' listed above, the ACCC can also seek injunctions, orders for corrective advertising, criminal sanctions and fines. Applications for 'other orders' must be made within six years of the contravention.

Once ACCC has begun proceedings it may seek orders to prevent the dissipation of property or money. Once a contravention of the TPA has been shown, the ACCC may apply for redress on behalf of one or more individuals named in the application. Once again, such an application must be made within six years of the contravention.

What should businesses do?

To avoid contravening section 51AC of the TPA, when negotiating with other parties in commercial transactions, businesses should:

- (a) be careful when the business is in a substantially stronger bargaining position than the other party;
- (b) disclose clearly all important terms;
- (c) ensure the other part is able to seek independent advice;
- (d) provide an opportunity to negotiate the terms and conditions;
- (e) comply with industry codes;
- (f) use appropriate dispute resolution clauses in contracts; and
- (g) implement clear and simple despite handling policies and procedures.

Further Information

If you have any questions regarding any article appearing in this newsletter please contact Norman Donato, Partner, on (02) 92339031 or send an email to ndonato@makdap.com.au

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