

AUSTRALIAN INSTITUTE OF CRIMINOLOGY CONFERENCE

“Crime in the Professions”
University of Melbourne

*“The Professions and Whistleblower
Protections”*

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Introduction

I appreciate that the focus of this conference is on “Crime in the Professions”. I also note that the Macquarie dictionary defines “whistleblowing” as “...the activity of blowing the whistle on or exposing the corrupt practices of others” and “whistleblower” as “... someone who alerts the public to some scandalous practice or evidence of corruption on the part of someone else.” For the purposes of this paper I regard “whistleblowing” as a reference to disclosure of conduct which amounts or could amount to breaches of the civil law as well as to conduct which could amount to a criminal offence in the strict sense.

Whilst the need to be vigilant regarding the maintenance of the role of the Rule of Law in our society may be perennial – it is also true to say that the Rule of Law is a crucial foundation that characterises our society. The community regards law and order and hence observance of the law as a fundamental matter of concern to it. Compliance with the law is a matter of significant public interest. In my view this extends well beyond just the criminal law. For example, it certainly extends to compliance with Australia’s competition and consumer protection laws. This can be readily seen from the object of the *Trade Practices Act 1974* (“the Act”) which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (see s.2 of the Act). This view is further supported by the significant consequences for contravention of Part IV of the Act (or the equivalent *Competition Codes* of the States and Territories). For example, civil pecuniary penalties of up to \$10 million per contravention for corporations and up to \$500,000 per contravention for individuals.

Whilst there may not be a universally accepted definition of ‘a profession’, the following is considered appropriate for present purposes:

“Within the Australian Council of Professions, a profession is defined as:

- a disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interests of others; and
- inherent in this definition is the concept that the responsibility for the welfare, health and safety of the community shall take precedence over other considerations.”¹

Legislative support for “Whistleblowing” about the Act?

In Australia, the Act, expressly deals with the issue of protection of a person who provides information or documents to the Commission or to the Australian Competition Tribunal. The relevant provision is s.162A which is headed “Intimidation etc” and provides as follows:

“A person who:

- (a) threatens, intimidates or coerces another person; or
- (b) causes or procures damage, loss or disadvantage to another person;
for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission or to the Tribunal or for or on account of the other person proposing to appear or having appeared as a witness before the Tribunal is guilty of an offence punishable on conviction;
- (c) in the case of a person not being a body corporate – by a fine not exceeding \$2,000 or imprisonment for 12 months; and
- (d) in the case of a person being a body corporate – by a fine not exceeding \$10,000.

So the Act does not specifically focus on whistleblowers. However, the Australian position regarding whistleblowers in respect of the Act is to protect them by creating a criminal offence. The provision has not yet been tested before the Courts.

ACCC Approach to Assistance from the Public

In its enforcement of the competition and consumer protection laws the Commission is certainly concerned to ensure that an environment that supports and protects people who come forward with information regarding possible contraventions, is created and maintained. That is, an environment that encourages genuine complaints and provides some confidence to complainants through a practise of preserving confidentiality and a leniency or indemnity policy, that disclosure of their identity and or information they have provided will be preserved on a confidential basis. Until of course, disclosure becomes necessary for the proper performance of the Commission's duties or functions.

The Commission endeavours to encourage people who may have engaged in conduct that amounts to a contravention or being involved in a contravention in an 'accessorial' capacity to come forward and disclose the conduct. On numerous occasions the Commission has granted an indemnity from legal proceedings to people who agree to provide full and frank disclosure to the Commission. For example, note *TPC v CC (NSW) Pty Ltd & Ors* (1994) ATPR 41-352. Even after proceedings have been instituted against an individual the Commission has been prepared to support the individual for providing full and frank information regarding the contravention which assists the Commission in enforcing the Act including by joining key parties against whom evidence may not have been available to the Commission. This approach has had judicial support. For example, in *ACCC v Alice Car & Truck Rentals Pty Ltd & Others* (1997) ATPR 41-582 the Commission took proceedings against a number of car rental companies and their individual managers for price fixing in contravention of the Act. The following comments from Mansfield J's judgment usefully sets out what happened in respect of one of those managers.

"In the case of Mr Hunter, I should note the following. In May 1997 after the trial date had been set, Mr Hunter approached the Commission and admitted being knowingly concerned in making the arrangement and putting it into effect. He then had a number of lengthy meetings with the Commission, during which he fully and frankly detailed his role in the contravening conduct and that of the other respondents to his knowledge. I accept that his evidence was then the basis upon which the Commission subsequently joined the eighth and ninth respondents to the proceedings. They have each subsequently admitted that conduct. Accordingly since May 1997 he has fully cooperated with and assisted the Commission and its legal advisers in relation to these proceedings and it was proposed that he would give evidence for the Commission at any trial. The Commission's view is that his information and his assistance and cooperation were substantial factors in the decisions of all the other respondents not to contest these proceedings and to admit the contraventions set out in the further amended statement of claim. I accept the view put by the Commission, with the support of Mr Hunter, that there is a considerable public benefit in recognising and encouraging persons with relevant information to approach and assist the applicant in enforcing the Act. Mr Hunter's actions are properly so characterised.

The joint submission of the Commission and Mr Hunter proposes that no penalty be imposed on him. It will not be common for the Court to be satisfied that that is an appropriate order but in the particular circumstances and for the reasons identified in the joint submission which I accept, and which I have briefly referred to above, I am prepared to so conclude in this instance. In particular in my view there is considerable public benefit in persons with relevant information concerning breaches of the Act to provide that information to the Commission. I have also had regard to Mr Hunter's personal circumstances in reaching that view."ⁱⁱⁱ

The Commission currently deals with the issue of leniency and indemnity for individuals or corporations on a case by case basis. It has published flexible guidelines on the issue because the policy continues to evolve in the light of Commission experience and marketplace changes. The guidelines are attached as a schedule to this paper.

Professions and Whistleblowing

The traditional role, perception and standing of the learned professions can be gleaned from the following comments of Dr John Southwick in a paper delivered as part of a conference entitled “Can the Professions Survive under a National Competition Policy?” In presenting the view of the Australian Council of Professions, Dr Southwick as President of the Council said:

“The elevated position of professionals in the community did not occur by accident. It was because of the function of individual professionals in banding together and agreeing amongst themselves to adopt high standards of entry and to observe high standards of performance that the community came to respect and trust persons providing those services.

Self-regulation and autonomy were an integral part of the development of those standards and it was in the interest of the members of the professions that those standards be maintained. From the point of view of the community it helped to ensure the quality of the services being provided.

The public interest in maintaining the highest standards in the provision of professional services and in the behaviour of those professionals was given effect to by statutes empowering professional associations, or in some cases licensing boards consisting mainly of the professionals, to set criteria for entry, to control conduct of members and, where appropriate, to exclude from professional practices those whose standards fall below acceptable levels.”ⁱⁱⁱ

Also relevant is the nature of the relationship between a professional and client. Is it a fiduciary one? In Australia there are certain relationships that the law recognises as fiduciary relationships, these are relationships of trustee and beneficiary; agent and principal; solicitor and client; employee and employer; director and company; and partners.^{iv} However, it cannot properly be said that a relationship between any professional and his or her client is a “fiduciary relationship”. As was pointed out by Dawson and Toohey JJ in the recent High Court of Australia case of *Breen v Williams*.

...The law has not, as yet been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another.^v

The High Court has decided that in Australia the relationship between a doctor and patient is not a fiduciary relationship, but essentially a contractual relationship whereby the doctor undertakes to treat and advise the patient and to use reasonable skill and care in so doing.^{vi} Importantly, the High Court noted that it is of significance that a fiduciary acts in a representative character in exercising his or her responsibility.^{vii}

As to fiduciary duties or obligations the High Court recognised that notwithstanding the fact that a doctor-patient relationship is not a fiduciary one, fiduciary duties may be superimposed or concurrent with contractual obligations.^{viii} Fiduciary duties or obligations arise from either of two possible sources – agency or a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other.^{ix}

Even where there is a fiduciary relationship between a professional and a client (for example, as between a solicitor and his or her client) it is important to acknowledge and bear in mind

that the fiduciary obligations do not extend over the entire relationship. As Chief Justice Brennan (as he then was) pointed out in *Breen v Williams*.

It is erroneous to regard the duty owed by a fiduciary to his beneficiary as attaching to every aspect of the fiduciary's conduct, however, irrelevant that conduct may be to the agency or relationship that is the source of fiduciary duty.^x

To similar effect is the statement of Dawson and Toohey JJ:

Whilst duties of a fiduciary nature may be imposed upon a doctor, they are confined and do not cover the entire doctor-patient relationship.^{xi}

So although not all relationships between a professional and client are fiduciary relationships it is clear that some are and others may have fiduciary duties superimposed on them. To the extent that fiduciary duties arise from "a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other" it would seem likely that there will be a community expectation that the profession and its members will act in the public interest first and foremost. That is, ahead of the interests of the members of the profession.

A couple of key issues in respect of contraventions of the law by a professional merit consideration. First, given the definition of a profession as set out earlier (in particular the emphasis on ethics and on putting the welfare health and safety of the community ahead of other considerations) would it be fair to say that a profession as a whole supports and encourages whistleblowing? Secondly, given the importance of self-regulation as a characteristic of the professions how do professions or their regulating associations encourage whistleblowing from within the profession and support or protect professionals who engage in whistleblowing?

In respect of the first issue one could suggest that governing professional associations have a major role in ensuring and maintaining the public's confidence of that profession by adopting a formal and public policy on whistleblowing. That is, a clear statement of the particular professions' commitment to comply with applicable laws and to report conduct that might be in breach of the law. Since ethical behaviour and putting the community's welfare ahead of other interests is the hallmark of a profession – such a leadership approach to the issue of whistleblowing should be regarded as consistent with the core attributes of a profession. Views of this kind have been expressed in relation to the conduct of the accounting and legal professions. For example, Jane Baker Jones in an article entitled "Whistleblowing – No longer out of tune."^{xii} said:

"The accounting profession, in adopting a code of ethics and undertaking a measure of self-regulation, has indicated to society that it see its members as operating ethically and within the law. It is expected that they will do more than their supervisors require, and will be prepared to assume responsibility. While they are not expected to become martyrs, accountants are expected to respond appropriately to behaviour that breaches the law.

This poses some problems for the profession which, having promoted its integrity, needs to prepare for whistleblowers in its ranks. Procedures will be needed for whistleblowers to use. Businesses and governments are often involved, sometimes inadvertently, in illegal or unethical practices. Accountants often know of such practices. To be effective as whistleblowers, they will need to tell people either inside or outside the organisations involved (Barnett, Cochrane and Taylor, 1993, p127)."

and

"While the accounting profession prominently encourages ethical behaviour, it has yet to set up such mechanisms or to start changing the culture of its public practices. Unless this happens, accountants face increasing risk of prosecution or criticism for failing to report or prevent illegal behaviour within its own practices and by their clients' businesses. Accountants may not always be able to prevent

illegal behaviour by their clients, but by failing to report it or failing to comment on it to the client, they are silently condoning it, and thus have to accept some responsibility for it.”

Similarly, Professor Stephen Corones has recently observed and advised as follows:

“Lawyers are frequently involved in negotiations by their clients. They frequently have knowledge about their clients’ affairs and the nature of their clients’ businesses. If during the course of negotiations, they are aware that their client makes a misrepresentation and they do nothing to correct the misrepresentation, they will be ‘involved in’ the contravention of s.52 by their client and incur an ancillary liability under the Act.”^{xiii}

and

“If a client makes a false statement during negotiations in the presence of a solicitor, the solicitor should take the client to one side and counsel the client to correct the misleading information. If the client refuses to do so, an ethical and prudent solicitor will cease to act for the client and should correct the misinformation.”^{xiv}

As to the second key issue identified above considerable effort will be required by the professional association to balance some possibly competing tensions. To put in place an effective whistleblowing policy a profession either at the professional association level or individual firm level would need to look at a series of important issues including – resources; guarantees of confidentiality; mechanisms for keeping the whistleblower informed of investigation outcomes; incentives to come forward; mechanisms for distinguishing genuine from non-genuine whistleblowers; whether the reporting or disclosure should be internal or external (if external who would the disclosure be to – an appropriate enforcement agency or to the media or other person/body); and mechanisms for reviewing the policy on a periodic basis. It is acknowledged that a professional association’s practise or role in speaking out publicly on behalf of the profession may of course create tensions with implementation of any whistleblowing policy.

Conclusion

Given the pace and stresses of modern life and the fact that despite the high degree of learned training, professions are made up of human beings, it is inevitable that a small percentage of professionals may engage in illegal conduct or be involved in illegal conduct by others. A couple of recent examples include – the circumstances leading to the death of Solicitor Max Green and the loss of large sums of money from trust funds; and also the enquires and referral to the Director of Public Prosecutions of numerous Magnetic Resource Imaging contracts for possible legal action against Radiologists.

In my view the challenge for the professions, professional associations and individual professional firms to maintain the public’s confidence and trust in the professions is to take a leadership role, in the public interest, of adopting and publicly committing the profession and its members to support a whistleblowing policy including protection of whistleblowers. Leading by example in this way would clearly demonstrate the concern of professionals for high ethical standards and putting the community’s interest before other interests.

Endnotes

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ⁱ See paper by Dr John Southwick, President, Australian Council of Professions entitled "Australian Council of Professions' view" delivered at a joint conference on competition law and the professions 'Can the professions survive under a national competition policy?' 11 April 1997 Perth, Western Australia. Papers published May 1997 by Australian Government Publishing Service refer page 36 published papers.

NB In 1997 membership of Australian Council of Professions Ltd comprised: Australian Medical Association Ltd; The Institution of Engineers Australia; The Royal Australian Institute of Architects; Australian Dental Association Inc; The Australian Veterinary Association Ltd; Australian Society of Certified Practising Accountants; The Institute of Chartered Accountants in Australia; The Institution of Surveyors Australia Inc; Pharmaceutical Society of Australia; The Institute of Actuaries of Australia; The Australian Institute of Quantity Surveyors; Australian Physiotherapy Association; The New South Wales Council of Professions.

ⁱⁱ at p44,051

ⁱⁱⁱ see Endnote 1 above at page 36.

^{iv} See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96; *Breen v Williams* (1996) 186 CLR 71 at 92 and 107.

^v (1996) 186 CLR 71 at 92.

^{vi} See (1996) 186 CLR 71 at 78 per Brennan CJ; 89-90 per Dawson and Toohey JJ; 102 per Gaudron and McHugh JJ.

^{vii} Ibid at 92-93; 101 and 113.

^{viii} Ibid at 83; 89; 93-94; 107; 132-133.

^{ix} Ibid at 82; 134.

^x Ibid at 82.

^{xi} Ibid at 92.

^{xii} Australian Accountant, August 1996 at pp56-57

^{xiii} (1998) 72 ALJ 775

^{xiv} Id at 784