

Our Ref: MH:PM
Your Ref:

email: [REDACTED]

31 July 2008

PRIVATE AND CONFIDENTIAL

Review of a Whistleblower Complaint by Dr [REDACTED]

I have been asked by Dr [REDACTED], an employee of CSIRO, to review a report that he lodged in June 2007 with the [REDACTED] Officer of CSIRO under the Whistleblower scheme implemented by the CSIRO Board of Directors. I have also been asked to consider and comment upon the responses of Dr [REDACTED] (the [REDACTED] Officer) to the issues raised.

Summary of the complaint

The complainant makes wide-ranging allegations, which include:

- 1) Numerous breaches of applicable laws and legal obligations on the part of certain members of the management team at the CSIRO Division of [REDACTED] in their dealings regarding the spin-off company, [REDACTED]. The allegations include breaches of the *Corporations Act 2001*, the *Trade Practices Act 1974*, the *Commonwealth Authorities and Companies Act 1997*, and *Occupational Health and Safety Acts*, including the *Commonwealth (1991)* and *Victorian Acts (2004)*. Breaches of legal agreements are also alleged with the commercial partner, [REDACTED], a stock exchange listed company.
- 2) A concerted campaign of workplace harassment and bullying against him by certain members of the management team at [REDACTED]. This campaign is said to have commenced upon his [REDACTED] in the CSIRO joint venture company, [REDACTED]. Since lodgement of the original complaint in June 2007, Dr [REDACTED] has provided the [REDACTED] with three further "Addenda" in which he alleges and documents a continuation and an increase in the intensity of management harassment and bullying.
- 3) Numerous breaches of the CSIRO Code of Conduct as well as actions to the detriment of the Commonwealth on the part of the management figures involved.

The Whistleblower report was submitted to the [REDACTED] Officer of CSIRO in June 2007.

Response to the allegations by CSIRO senior management

In response to these allegations, Dr [REDACTED] instituted an investigation under the CSIRO Whistleblower policy. The investigation was formally commenced in mid-November 2007, which was 4½ months after lodgement of the complaint. Dr [REDACTED] of the law firm *Mallesons Stephen Jacques* was appointed to undertake the investigation.

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At the end of February 2008, Dr [REDACTED] provided Dr [REDACTED] with a document that "distilled" and summarized his allegations.

In accordance with the "distilled" allegations, the following matters were excluded from the investigation:

- (1) All alleged criminal and civil breaches of the *Corporations Act 2001*, were excluded from the investigation on the grounds that the alleged contraventions concerned matters that were not under the "official duties" of the person involved. The CSIRO Code of Conduct relates only to official CSIRO duties and does not have regard to duties owed by CSIRO staff to external entities, namely [REDACTED]. In this instance the complaint concerned a CSIRO-appointed director of that company.
- (2) All allegations regarding the "commercial" merits of decisions made by certain management figures in [REDACTED] would be excluded from the investigation, except insofar as they constituted part of a pattern of conduct directed at Dr [REDACTED]. No reason was given for this exclusion.
- (3) Allegations of unfair disciplinary actions against Dr [REDACTED] would not be considered on the grounds that he had already had the opportunity to raise them in his response to the actions themselves. In particular, a potentially incriminating e-mail, which indicated an inappropriate and collective response on the part of [REDACTED] management to earlier complaints by Dr [REDACTED] would be ignored. Allegations of a general disregard for the CSIRO code of conduct in the management team at [REDACTED] would also not be considered.

Response of [REDACTED]

In response, Dr [REDACTED] wrote to Dr [REDACTED] in March 2008 noting the following:

Regarding point (1) above: Dr [REDACTED] supplied a copy of the official CSIRO policy document in respect of CSIRO-nominated company directors. This stated explicitly that such positions were "official" positions and that their duties are "official duties". On this basis, there was no reason to exclude allegations related to breaches of the *Corporations Act 2001*.

Regarding point (2) above: Dr [REDACTED] noted that exclusion of the "commercial" merit of decisions had the practical effect of excluding from investigation, potentially serious breaches of "business judgement" provisions in various pieces of commercial legislation (including the *Commonwealth Authorities and Companies Act*, the *Corporations Act*, and the *Trade Practices Act*). He requested an explanation for this exclusion.

Regarding points (3) above, Dr [REDACTED] noted that, the opportunity to comment on disciplinary actions is limited to the action itself and not to its relative fairness (that is, to whom else is disciplined). Dr [REDACTED] noted that an official complaint in respect of unfair disciplinary actions had been lodged with the Chief Executive of CSIRO, Dr Garrett. Dr Garrett had referred this complaint in writing to the Whistleblower enquiry presided over by Dr [REDACTED] for investigation. In effect therefore, Dr [REDACTED] was refusing to consider a legitimate complaint referred to him by the head of CSIRO. This complaint specifically included the contested email that was to be ignored. Dr [REDACTED] further noted that, if application of the Code of Conduct was to be strictly limited to persons on "official duties", he could not have been disciplined since he was, at the time, on [REDACTED] from CSIRO and therefore not on "official duties".

The Scope of the Whistleblower Investigation and Subsequent Events

In April 2008, Dr [REDACTED] responded to Dr [REDACTED]. In his response Dr [REDACTED] indicated that the scope of the investigation would remain as set out in the Summary of Allegations document which had been provided in February 2008. No explanation was provided for the refusal to investigate the merit of commercial decisions. Allegations regarding breaches of the *Corporations Act* were, according to Dr [REDACTED], private matters consequent upon a shareholders agreement between CSIRO and [REDACTED] and these had nothing to do with Dr [REDACTED]. Dr [REDACTED] went on to inform Dr [REDACTED] that all information he had provided under the Whistleblower action was confidential to CSIRO and could not be made available to third parties.

In the months following this response (March to mid-July 2008), the investigator interviewed the respondents and obtained their statements regarding the allegations. I understand that a document detailing their responses was completed in mid-July 2008 and that Dr [REDACTED] will shortly take receipt of these responses.

During the period of March – July 2008, Dr [REDACTED] alleges a continuation and an increase in the intensity of the management harassment and bullying. In mid June 2008, he supplied Dr [REDACTED] with a further addendum (the third such one submitted since the original report). This addendum alleged (and documented his contention) that certain members of the [REDACTED] management team had consistently and for an extended period of time blocked and frustrated attempts to commercialise inventions of his research group (most of which he had co-invented). These same members then used the opportunity of recent minor budget cuts in CSIRO to drastically diminish the research group (and exclude him from it in the future), citing insufficient external income on the part of the group as the reason for this decision.

By letter dated 4 July 2008, Dr [REDACTED] responded to these new allegations. He indicated that they would be investigated separately and only if required, after completion of the present investigation. A separate assessment of the new allegations would be made prior to their investigation.

Review of the Complaint and the Response

The evidence presented by Dr [REDACTED] in his complaint is detailed and extensive. A Court would need to test this evidence and hear evidence from all relevant parties, however I am satisfied that, *prima facie*, there is a case for the allegations, which would, in my opinion, be made out in the absence of accepted contradictory evidence. (S)

I am satisfied that there are grounds for his allegations of breaches of applicable laws and contractual obligations. I accept his contention that there may have been criminal breaches of the *Corporations Act 2001* and the *Commonwealth Authorities and Companies Act 1997*. There also appear to have been *prima facie* civil breaches of the aforementioned Acts, as well as the *Trade Practices Act 1974*. Serious questions are raised regarding commercial practices at [REDACTED].

I am further satisfied that Dr [REDACTED] has reasonable grounds to believe he has been, and is being subjected to a campaign of workplace harassment and bullying by management figures in [REDACTED]. I accept his *prima facie* contentions that this campaign has intensified and become more extreme following the complaints laid by him and that it continues to the present time.

I note that workplace harassment and bullying is dealt with under the obligations owed by an employer to its employees as set out in the *Commonwealth Occupational Health and Safety Act 1991*. CSIRO is obliged to maintain a safe working environment under the terms of this Act.

I do not believe that CSIRO's response to the allegations of workplace harassment and bullying has been sufficient. According to my understanding, no attempt has been made to effect an administrative separation of the antagonists in the workplace, either temporarily or permanently, and thereby eliminate any possibility of workplace bullying. I believe that the respondents remain responsible for CSIRO's interactions with [REDACTED] and the commercialisation of Dr [REDACTED] inventions. Moreover, the investigation does not seem to have been undertaken with all due urgency (as is required by the Whistleblower policy). The 4½ month delay at the start of the process and the 4½ month period taken to interview the respondents and document their response, appear excessive. I am unaware of any explanation having been given for these periods of time.

Moreover, I do not accept that the new allegations provided by Dr [REDACTED] in June 2008 should be investigated in a separate process, subject to further lengthy delays and the outcome of the foregoing case. The new allegations are part of the same series of events and appear to support his case. They clearly form part of his case.

The Whistleblower Scheme relates to the reporting of a breach or alleged breach in relation to the CSIRO Code of Conduct (including unethical behaviour, scientific fraud, or criminal activity).

The CSIRO Code of Conduct is broad ranging. It includes the obligation of an employee to perform "official duties with skill, care, and diligence, using your authority in a fair and unbiased way".

In addition, the Code of Conduct includes the following:

"fairness, honesty, equity and all legal requirements are to be observed by CSIRO staff in the conduct of official duties and during interactions with clients and members of the public ..."

I am consequently surprised and concerned by the inclusion of the following in the "distillation" of the allegations supplied to Dr [REDACTED] in February 2008:

"Some allegations concern 'commercial decisions' made by employees of CSIRO. While the commercial merits are beyond the scope of the investigations, the investigation will include complainants allegations that these decisions constitute part of a pattern of conduct directed at him which may have breached the Code"

It does seem to me that the allegations as to commercial decisions and the implications of those decisions ought to be investigated. Failure to investigate these allegations will, indeed, exclude from the Whistleblower process, potentially serious breaches of "business judgement" provisions in various pieces of commercial legislation. This includes allegations of breaches of section 22 of the *Commonwealth Authorities and Companies Act*, section 180 of the *Corporations Act*, and section 51AC of the *Trade Practices Act*. It potentially also leaves in place existing commercial procedures that may be flawed and that may stand to the future detriment of the CSIRO. Flawed practices could lead to future claims against the Commonwealth.

I am also surprised at the decision to exclude allegations of breaches of sections 180-184 of the *Corporations Act*. While most of these allegations involve civil obligations, I note that one allegation refers to section 184 of the Act, which is a criminal provision governing the dishonest use of information available to an individual in their capacity as a director. It does not seem to me that allegations of criminal conduct should be excluded from the investigation, especially since the CSIRO Whistleblower policy is specifically intended to address "criminal activity" and thereby improve corporate governance (both "in perception" and "reality"). Moreover, the CSIRO Code of Conduct states that staff are to observe "all legal requirements" in the course of their official duties. This includes both civil and criminal obligations, meaning that all aspects of alleged breaches of the *Corporations Act* should be investigated. I consider that CSIRO policy indicates the respondent to the particular allegations involving the *Corporations Act* was on "official duties" at the time of the relevant conduct.

The failure to conduct such an investigation appears to be contrary to the Whistleblower scheme and raises questions about the intentions of persons restricting the scope of the investigation.

I note that sections 180-184 of the *Corporations Act* are essentially duplicated in section 22, 23, 24, and 26 of the *Commonwealth Authorities and Companies Act 1997 (CAC Act)*. If the respondent is "an officer" of a Commonwealth Authority, then those provisions of the CAC Act would apply to him. I note, however, that "officer" is defined under section 5 of the CAC Act, in relation to a Commonwealth Authority, to mean:

- (a) a director of the authority, or
- (b) any person who is concerned in, or takes part in, the management of the Authority.

If, in his capacity as a Director of [REDACTED] the respondent was not "an officer" as defined in the CAC Act, he could not breach the CAC Act. The absence of a consideration of allegations under section 180 - 184 of the *Corporations Act* would then be a significant exclusion from the investigation. In effect, by excluding possible breaches of the *Corporations Act*, the investigation of the relevant conduct would necessarily be incomplete.

Regarding the relationship between the Whistleblower enquiry and previous misconduct enquiries: I am of the view that the circumstances in which the misconduct finding came to be made should properly be grounds raised in the Whistleblower complaint. There is no reasonable explanation for the exclusion of the contended email from the investigation. Nor can the decision to exclude consideration of unfair disciplinary actions be justified.



I am also concerned at Dr [REDACTED] explicit reminder to Dr [REDACTED] in his letter of April 2008, of his confidentiality obligations to CSIRO. I note that Dr [REDACTED] has provided more than one such reminder to Dr [REDACTED] with an implicit warning of legal action in the event of disclosure to a third party. While such statements do not, in themselves, constitute threats, their effect, when accompanied by a refusal to investigate possible illegal conduct reported by the complainant, may be interpreted as an attempt to coerce the complainant into a conspiracy of silence regarding these allegations. This may be construed as amounting to workplace bullying and harassment with the possible intention of suppressing and concealing illegal actions.

Summary

Taking the above in concert, it appears to me that there are significant problems with the current Whistleblower investigation of Dr [REDACTED] allegations. These include

- (I) The length of the investigation (13 months) without any attempt to separate the antagonists in the workplace. This may have led to a continuation of the harassment and bullying and an increase in its intensity. Indeed, such incidents may be occurring at a faster rate than they can be investigated using the present procedures. This seems to me to be an unsustainable response to the allegations made by Dr [REDACTED]. As I understand it, CSIRO policy requires that managerial staff take action to prevent the possibility of workplace harassment and bullying.
- (II) The refusal to investigate legitimate grievances raised by Dr [REDACTED] in accordance with the provisions of CSIRO's Whistleblower and other policies. CSIRO policy explicitly recognizes workplace bullying to include a refusal to consider legitimate grievances.
- (III) Implicit threats of legal action against Dr [REDACTED] in the event he makes disclosures to third parties under circumstances where his allegations of civil and criminal breaches of the law will not be investigated at all. These may be construed as an attempt to coerce and bully Dr [REDACTED] into silence and conceal illegal acts.
- (IV) an apparent refusal to investigate the merits of commercial decisions made by management figures in CMHT under circumstances where this is pertinent to the matters at hand and appears to be in the interests of CSIRO and the Commonwealth

In summary, the Whistleblower process that Dr [REDACTED] has been subjected to does not seem to have been consistent with the obligations of CSIRO under the *Occupational Health and Safety Act* requiring a safe workplace. Indeed, it could be construed as having contributed to the alleged harassment and bullying of Dr [REDACTED].

Moreover, it appears to be further flawed by the fact that it does not follow, in some respects, the CSIRO Whistleblower policy.

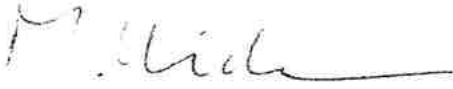
These are matters of concern that have potentially serious implications.

Recommendations

I consider that it is appropriate and desirable to contact the Board of Directors of CSIRO and inform them of the situation, drawing their attention to the possible legal issues and the need for a new process.

I suggest that the Board should consider the following possible actions in response:

- (a) the appointment of an independent committee or individual to oversee this case and protect the interests of all parties involved, including the Commonwealth, Dr [REDACTED], the CSIRO, and its Directors,
- (b) the separation of the antagonists in the workplace and the establishment of a hearing on these matters as a more rapid and timely response to the unfolding situation.



Matthew Hicks
Partner

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