

WHISTLEBLOWER PROTECTIONS

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Legal Briefings - By **Andrew Eastwood, Elizabeth Macknay, Michael Gonski and Amanda Lyras**

The Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) has proposed widespread reform to whistleblowing legislation in Australia.

In a report published on 13 September 2017, the Committee has made a number of recommendations, including (amongst other things):

- streamlining existing whistleblower legislation;
- implementing a reward system for whistleblowers;
- establishing a statutory Whistleblower Protection Authority;
- broadening existing legislative protections for whistleblowers; and
- providing for enhanced remedies to whistleblowers in line with the *Fair Work Registered Organisations Act 2009*.

It remains to be seen whether these recommendations will become law, but they signal the direction that any legislative reform may take.

LEGISLATIVE HARMONISATION

To streamline current whistleblower legislation in Australia, which is fragmented and contained in over 20 different statutes, the Committee has recommended that all current private sector whistleblower legislation be consolidated into a single act, and there be a separate act to govern public sector whistleblowing.

The Committee has also recommended bringing private sector protections into line with the public sector in a number of areas, in order to strengthen the protection offered to private sector whistleblowers. These include allowing anonymous disclosures to be made and broadening the categories of persons internally to which a whistleblowing disclosure can be made, including anyone in the management chain for the whistleblower.

REWARDS FOR WHISTLEBLOWERS

To motivate whistleblowers to come forward, the Committee has recommended the implementation of a reward system, which could see whistleblowers awarded a percentage of any penalty ultimately imposed on a “wrongdoer” as a result of information provided by the whistleblower.

In order to mitigate against perceived negative consequences of a US style bounty system, the Committee has proposed that any rewards be determined by a Court taking into account certain specified factors, including (amongst other things) the degree to which the information disclosed led to the imposition of a penalty and whether the whistleblower disclosed the matter to the media without disclosing the matter to a law enforcement agency or allowing adequate time for that agency to investigate the issue.

The Committee has noted that, where a whistleblower has been involved in criminal conduct for which a penalty was imposed, a reward would be regarded as a proceed of crime and the appropriate incentive for the whistleblower should only be immunity or a reduced penalty.

ESTABLISHMENT OF A GOVERNING AUTHORITY

The Committee has recommended the establishment of a one-stop shop Whistleblower Protection Authority (**WPA**) to cover both the public and private sectors. The WPA would be an investigative agency with the power to investigate criminal reprisals against whistleblowers and take non-criminal matters to workplace tribunals or courts on behalf of whistleblowers or the WPA’s own motion to remedy reprisals.

The Committee has recommended that the WPA, in consultation with relevant law enforcement agencies, be able to approve the payment of a wage replacement to a whistleblower suffering adverse action or reprisals. This would be commensurate to a whistleblower’s current salary as an advance of reasonably projected compensation until the resolution of any compensation or adverse action claim brought by the whistleblower. This has been proposed in the context of whistleblowers advising the Committee they felt ‘deep pocketed’ by their agency or employer in the Fair Work Commission or court process and as a result were unsuccessful in their claim.

The Committee has also recommended that the WPA report annually to Parliament on the effective operation of whistleblower laws in both the public and private sectors.

EXTENSION AND STRENGTHENING OF PROTECTIONS AND REMEDIES

The Committee has recommended extending legislative protections so that they apply to a broader category of whistleblowers (including both former and current staff that could make a disclosure or are suspected of making a disclosure) and potential breaches of any Commonwealth state or territory law. The Committee has also recommended abolishing the 'good faith' test as a requirement for protection.

As expected, the Committee has recommended that protections and remedies available to a whistleblower mirror those in the *Fair Work (Registered Organisations) Act 2009*. These include broad protections against harassment, harm (including psychological harm) and damage to property and reputation, remedies such as exemplary damages and sanctions (such as civil penalties) for reprisals.

The recommendations have not addressed some of the practical difficulties associated with investigating whistleblower disclosures whilst at the same time complying with the strict confidentiality requirements contained in whistleblower legislation.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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