DLA PIPER

WHISTLEBLOWER PROTECTIONS
THE INQUIRY

Briefing paper on the Parliamentary Inquiry into Australia's whistleblower protections.

October 2017

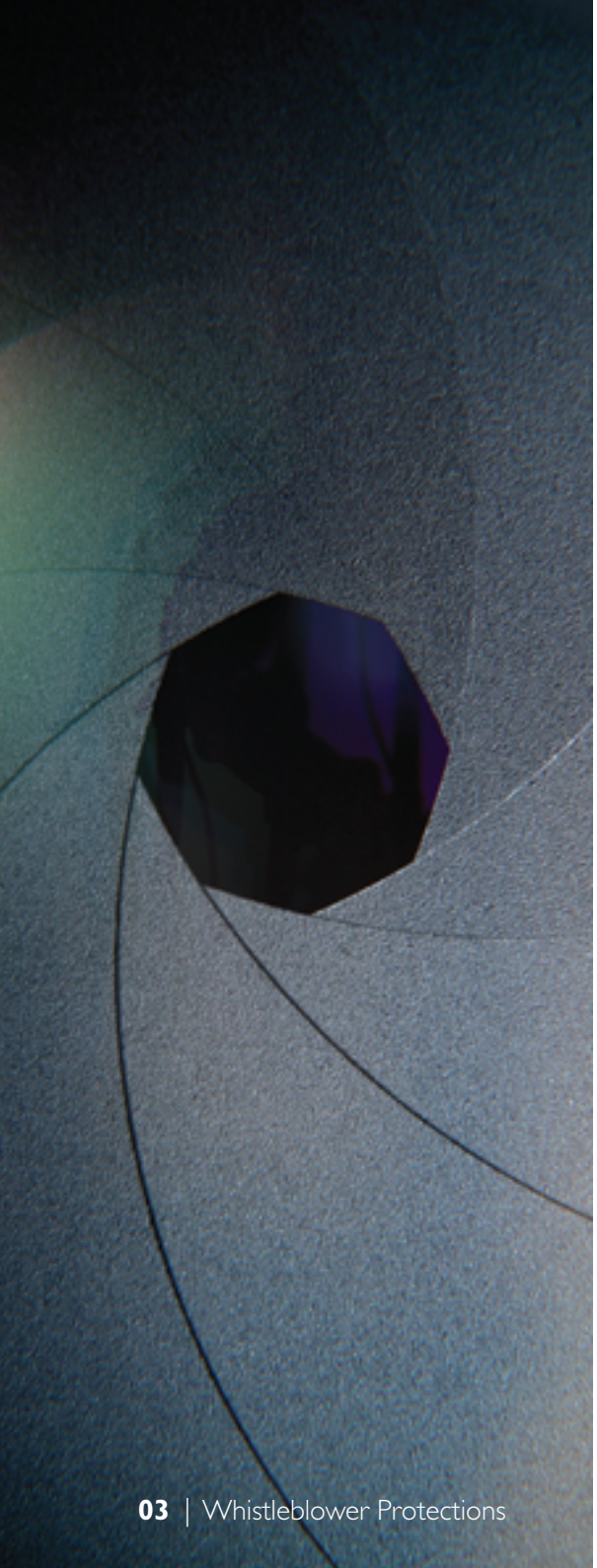
INTRODUCTION

On 14 September 2017, the Parliamentary Joint Committee on Corporations and Financial Services (the **Committee**) reported to the Senate its recommendations for reform to Australia's whistleblower protections in the corporate, public and not-for-profit sectors (the **Report**). That Report followed an inquiry referred to the Committee in November 2016 (the **Inquiry**), which received submissions from over 70 organisations and individuals, including DLA Piper, held five separate public hearings, and received responses to additional questions on notice issued by the Committee. Rani John, Partner at DLA Piper, appeared at one of the hearings.

SNAPSHOT

This briefing paper provides an overview of the key recommendations from the Committee's Report as they relate to corporate sector reforms, against the backdrop of the terms of reference for the Inquiry (the **Terms**), and the main themes from the submissions, hearings and responses to questions on notice received by the Committee. We also provide our views on the likely next steps following the Report.

Should you or your organisation require assistance navigating the Report's recommendations or prospective changes to Australia's private sector whistleblower protection framework, please contact DLA Piper.



BACKGROUND

While the *Corporations Act 2001* (Cth) (**Corporations Act**), and subject specific legislation such as the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Life Insurance Act 1995* (Cth) provide protection to individuals in the private sector who blow the whistle on corporate and financial services misconduct, those protections have long been criticised as inadequate.

In November 2016, the Australian Senate passed amendments to the *Fair Work (Registered Organisations) Act 2009* (Cth) (**ROC Legislation**), providing enhanced protections for whistleblowers (although applicable only to trade unions and employer associations). The passage of this legislation was secured by an agreement reached with minority senators led by Senator Xenophon. The agreement included a broader commitment by the Liberal Government for extended whistleblower protections for both the public and private sectors, and the Government's support for a parliamentary inquiry to examine whistleblower protections. On 30 November 2016, this culminated in the Senate referring the Inquiry to the Committee for report.

TERMS OF REFERENCE

The Terms for the Inquiry provided a series of issues for consideration. They contemplated review of Australia's current legislation governing whistleblower disclosures, and recommendations on how to improve whistleblower systems and the protections afforded to whistleblowers. Our overview of the Terms can be found here.

SUBMISSIONS AND THE REPORT

A total of 75 written submissions (as well as additional information in response to questions on notice) were received by the Inquiry from a broad range of organisations and individuals, including government departments and agencies, academics, industry bodies, law firms and not-for-profit organisations. In this briefing paper, we've summarised recommendations and comments from the submissions relevant to the corporate sector, in the context of key recommendations found in the Report. Our analysis of those key recommendations can be found here.

WHAT'S NEXT

Following release of the Report, the Government has established an eight-person expert advisory panel to consider the Report's recommendations. We expect the Government (after taking into account the views of the expert advisory panel) to introduce legislation implementing at least some of the recommendations made by the Committee, particularly those consistent with the 2016 amendments to the ROC Legislation, by March 2018, and a vote on that legislation by mid-2018 or slightly later. Our views on the more likely candidates for inclusion in that legislation are here.

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TERMS OF REFERENCE

The Terms provided specific topics for consideration by the Inquiry, including:

- the development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, taking into account the amendments made to the ROC Legislation in November 2016;
- the types of wrongdoing to which a whistleblower protection regime should apply;
- the most effective ways of integrating whistleblower protections into Commonwealth law;
- compensation arrangements in whistleblower legislation across different jurisdictions, including the United States;
- the measures needed to ensure effective access to justice, including legal services, for whistleblowers;
- obligations on organisations to apply internal procedures to support and protect whistleblowers, and their liability if they fail to do so;
- obligations on regulators to protect whistleblowers and investigate their disclosures;
- the circumstances in which public interest disclosures to third parties or the media should be protected; and
- any other matters relating to the enhancement of protections and the type and availability of remedies for whistleblowers.

While looking generally at the current scope of whistleblower laws and protections, the Terms particularly focused on potential barriers to whistleblowing and ways to encourage whistleblower disclosures, apparently responding to widespread criticisms of the scope and effectiveness of the current whistleblower provisions in the *Corporations Act*.

In addition to considering the Terms, submissions were also invited to consider the Senate Economics Committee issues paper "Corporate whistleblowing in Australia: ending corporate Australia's culture of silence" released on 21 April 2016.

AT A GLANCE

THE REPORT: KEY RECOMMENDATIONS

The key recommendations of the Report include:

- **Consolidation:** Consolidating all Commonwealth private sector whistleblowing legislative protections into a single Act, and harmonising whistleblowing legislation across the Commonwealth, States and Territories.
- **Broader protections for whistleblowers:**
  - Expanding the definition of reportable wrongdoing, including to cover contraventions of any Commonwealth, State or Territory law.
  - A broader definition of whistleblowers than currently exists in the *Corporations Act*, extending protections to former as well as current staff, contractors and volunteers.
  - Replacing the current requirement that a whistleblower be acting in 'good faith' in order to receive protection, with a requirement that the whistleblower have a reasonable belief of the existence of disclosable conduct.
  - Protecting the confidentiality of disclosures and extending protection to anonymous disclosures.
  - Extending protections to disclosures to a broader range of persons internally; and to disclosures to unions, Federal Members of Parliament or the media in limited circumstances and where disclosures to regulators have not been actioned after a reasonable period of time.
  - Stronger sanctions for those involved in victimising whistleblowers, and improved compensation arrangements for actual and potential whistleblowers suffering damage as a result of victimisation.
  - Ensuring that regulators who receive whistleblower disclosures regularly update the whistleblower on whether the allegations are being pursued (but not provide the whistleblower information that would prejudice an investigation).
- **Rewards for whistleblowers,** calculated as a proportion of any penalty imposed against the whistleblower's employer for the reported wrongdoing. Rewards would be at the discretion of the Court or other body imposing the penalty.
- **Establishing a Whistleblower Protection Authority** that can support whistleblowers, assess whistleblowing allegations, investigate reprisals, and set standards for internal disclosure procedures in the private sector.

We discuss these recommendations in more detail below, including the support or otherwise reflected for them in the submissions made to the Inquiry, as well as some topics discussed in the submissions which have not been addressed by the Report.

KEY RECOMMENDATIONS

1 CONSOLIDATION OF WHISTLEBLOWER PROTECTIONS

Current position in Australia

Development and implementation of Australia's whistleblowing protections have been somewhat fragmented, with separate whistleblower regimes applying to the public and private sector (both at State and Federal level), and multiple private sector regimes.

Part 9.4AAA of the *Corporations Act*, introduced in 2004, provides protections for private sector whistleblowers relating to alleged breaches of that Act or the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

Protections in the banking and insurance sectors are also contained in the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth). The whistleblower protections under prudential legislation are, for the most part, similar to the provisions of the *Corporations Act*. More recently, the ROC Legislation has provided protections for whistleblowers in connection with trade unions and employer associations.

Public sector whistleblowing is addressed in the *Public Interest Disclosure Act 2013* (Cth) (**PIDA**). Each of the Australian States and Territories also have in place their own legislation applying to public interest disclosures within the boundaries of the State or Territory.

What the submissions said

Most of the submissions received by the Inquiry which considered the issue, including submissions from regulators such as ASIC and the ACCC, were in favour of establishing a comprehensive private sector whistleblower protection regime under new stand-alone legislation. Doing so was seen as beneficial to both whistleblowers and organisations dealing with their allegations, by creating a clearer and more comprehensive framework for protecting whistleblowers, and reducing confusion, complexity and overlap in whistleblower protection regimes. Some submissions argued that this stand-alone legislation should additionally be consistent with PIDA, to harmonise the approach across the public and private sectors.

Report recommendations

After observing broad support in the submissions (including those made by DLA Piper) for a single Act addressing private sector whistleblowing, the Committee recommended that course, proposing a single Commonwealth Act containing whistleblowing protections in relation to alleged contraventions of any Commonwealth law, or of State or Territory laws. The Committee has also recommended that the Government consider ways in which public and private sector whistleblowing protections can be aligned, potentially including both as separate parts to a single Act.

2 TYPES OF DISCLOSURES AND INDIVIDUALS COVERED

Current position in Australia

Whistleblower protections under the *Corporations Act* provide disclosers with protection from civil liability or reprisal to which they may be exposed as a result of a disclosure.

To qualify for protection, a whistleblower must be either a current officer or employee of the company in question, or a contractor (including an employee of the contractor) to the company. Only disclosures made to a specified list of persons (company officers, auditors and ASIC) are protected. Further, whistleblower protections apply only to information disclosed that relates to an alleged breach of the *Corporations Act* or its regulations, or of the *ASIC Act* or its regulations.

What the submissions said

The majority of submissions to the Inquiry considered the current scope of the whistleblower protections under the *Corporations Act* to be too narrow, both in terms of the categories of people who qualify for whistleblower protections, and the types of wrongdoing to which the whistleblower protection regime

applies. Most submissions advocated for whistleblower protections to be extended to:

- former officers and employees;
- unpaid workers (or volunteers); and
- former contractors who provided services to the company in question.

A small number of submissions advocated for an even broader scope, suggesting that whistleblower protections extend to financial service providers (such as accountants and tax advisers), independent auditors, clients and business partners of a company.

The submissions were also overwhelmingly in favour of a broadening of the categories of wrongdoing to which whistleblower protection should apply. Broadly, there were two different approaches proposed:

- a whistleblower protection regime that applied where the information provided relates to an offence which meets a certain punitive threshold. For example, one of the submissions suggested that the appropriate threshold for protection should be a disclosure relating to any offences against a Commonwealth law which attract a maximum penalty of imprisonment and/or 5 or more penalty units.
- a whistleblower protection regime applying where the information provided relates to a defined list of wrongdoings. All of these submissions considered that the regime ought to apply to more than just breaches of the *Corporations Act* and the *ASIC Act*. Some submissions listed a raft of legislation to which the whistleblower regime should apply, while others argued that the whistleblower regime apply to any corporate activity that breached Commonwealth legislation. Two submissions went further, proposing that whistleblower protections also extend to any breaches of internal company codes of practice or of accepted industry wide codes of practice.

A number of submissions also considered ways to ensure whistleblower protection laws were effective for multinational corporations with significant management structures outside Australia. Their suggestions included encouraging robust internal disclosure regimes; protecting disclosures made domestically about conduct in a foreign country; including offences of a foreign country in the definition of 'disclosable conduct' to protect whistleblowers in Australia reporting corporate wrongdoing in that foreign country; and/or following the approach taken in other legislation with clear international implications (such as foreign bribery regulation).

Report recommendations

The Committee recommended that the definition of 'disclosable conduct' be expanded to include:

- a contravention of any law of the Commonwealth, or of any law of a State or a Territory where the disclosure relates to the whistleblower's employer which is an entity covered by the ROC Legislation or relates to a constitutional corporation; or
- any breach of an industry code or professional standard that has force in law or is prescribed in regulations under a Whistleblowing Protection Act.

Additionally, the Committee recommended that protections extend to:

- current and former staff, contractors and volunteers;
- threats or actual reprisals against people who have, could, propose to or may be suspected of making a disclosure; and
- recipients of disclosures, including any person within the whistleblower's management chain, any current officer of the company, or that company's Australian or ultimate parent, and any person specified in a policy published and distributed by the whistleblower's employer.

However, the Committee did not make any recommendations about ensuring that whistleblower protection laws are effective for multinational corporations.

3 REMOVAL OF THE 'GOOD FAITH' REQUIREMENT

Current position in Australia

In order to qualify for protections under the *Corporations Act*, a whistleblower must make the disclosure in 'good faith'. The good faith provisions were initially included to ensure that only genuine whistleblowers are protected, not those with vexatious motives.

What the submissions said

There was almost unanimous support for removal of the good faith requirement from the current legislative framework. Justifications for abandoning the good faith requirement included that:

- the primary focus should be identification of misconduct and the accuracy of that information, not the whistleblower's intention;
- the subjective motive(s) of a whistleblower can be difficult to determine and may change throughout the whistleblowing process; and
- the good faith requirement is inconsistent with the approach taken by the Australian public sector whistleblowing legislation and best practice legislative approaches elsewhere.

The majority of submissions (including DLA Piper's) advocated that protection should be available provided one of the following conditions was met, considering them to be adequate safeguards against malicious disclosures:

1. The person making the disclosure holds an honest and reasonable belief that the disclosure shows proscribed wrongdoing (a subjective test); or
2. The disclosure does show, or tends to show, proscribed wrongdoing, irrespective of the person's belief (an objective test).

Report recommendations

The Committee, reflecting that majority position, recommended that the good faith test be removed and that instead, a whistleblower be required to have a reasonable belief of the existence of disclosable conduct, in order to receive protections under a Whistleblowing Protection Act.

4 STATUTORY PROTECTION FOR ANONYMOUS WHISTLEBLOWERS

Current position in Australia

Currently, potential whistleblowers who wish to remain anonymous do not qualify for protection under the *Corporations Act*.

What the submissions said

There were mixed views about whether whistleblowers wishing to remain anonymous should nevertheless qualify for protection. Among those advocating extension of protection to anonymous whistleblowers, the most favoured approach was to require the whistleblower to reveal their identity to a regulator, but allow that regulator to avoid answering a subpoena or a request to produce documents where doing so might reveal the identity of a whistleblower.

Some also supported the inclusion of an absolute requirement of confidentiality, consistent with the approach in PIDA and the ROC Legislation.

In its submission, DLA Piper raised the concern that broadly drawn confidentiality requirements can operate to impede effective internal investigation of whistleblower disclosures.

Report recommendations

The Committee has recommended that private sector whistleblowing legislation provide protection for anonymous disclosures, consistent with public sector legislation. It has also recommended that confidentiality protections be made consistent across the public and private sectors by drawing together the best features of PIDA (including provisions which prevent a private sector whistleblower from being identified in court or tribunal hearings) and other Acts, including making it an offence to disclose a whistleblower's identity or use identifying information.

The Committee did not address the potential for confidentiality obligations to impede internal investigation of disclosures.

5 PROTECTION FOR INTERNAL AND EXTERNAL DISCLOSURES

Current position in Australia

Currently, the *Corporations Act* only protects qualifying disclosures made to a select group: ASIC, the company's auditor, a director, secretary or senior manager of the company, or a person authorised by the company to receive disclosures. Whistleblowers who make disclosures to third parties such as the media do not currently qualify for protection.

What the submissions said

The majority of submissions which considered this issue recommended that protections be extended to disclosures made to a broader range of persons internally than currently specified by the *Corporations Act*. They also supported protection of disclosures to specified third parties or the media, provided specific circumstances are met. Arguments made to support that approach included:

- the need to be able to report externally in circumstances where an employer fails to create appropriate conditions for disclosures or fails to respond reasonably to a disclosure; and
- where there are circumstances that make disclosure internally or to a regulatory agency either impossible or unreasonable (examples given included a serious and immediate threat to public health or a person's safety; or where the conduct involves criminality).

As to the suggested regime for disclosures to third parties, recommendations included a modified version of the *Protected Disclosures Act 1994* (NSW), requiring a potential whistleblower to first pursue official channels and then wait a specified amount of time before disclosing to third parties. Others supported a regime similar to that in place in the United Kingdom, where third party disclosures are permitted for conduct of an exceptionally serious nature so long as certain conditions are met. Those include that the whistleblower making the disclosure reasonably believes that the information disclosed, and any allegation contained in it, is substantially true; the disclosure is not made for purposes of personal gain; and it is reasonable to make the disclosure in the circumstances (for example, where a disclosure was previously made to a whistleblower's employer, but that employer has not taken any action).[1]

The submissions opposing extension of protections to third party disclosures (including DLA Piper's submissions) emphasised that:

- extending protections to disclosures to third parties such as the media may undermine internal reporting regimes;
- there was a high risk that disclosures to the media could be misused as a vehicle for politics or to air grievances rather than addressing misconduct; and
- while third parties such as the media, a union or a Member of Parliament may have capacity to bring to bear pressure and attention to the alleged misconduct identified by the whistleblower, they are far less well placed to conduct a forensic and procedurally fair investigation, compared to a regulator.

Report recommendations

Despite acknowledging the need to maximise the ability of a whistleblower to first internally disclose misconduct and then disclose to a regulatory authority, the Committee has recommended that whistleblowers should be protected for disclosures to an authorised external recipient in the following limited circumstances:

- where there is a risk of serious harm or death; or
- where a disclosure has been made to an Australian law enforcement agency and, after a reasonable length of time, no action has been taken by the agency.

On this basis, the Committee has recommended that the existing whistleblower protections for external disclosures in PIDA be simplified (to include a more objective test for the grounds for external disclosures), extended to disclosures to unions, federal Members of Parliament or their offices, and be included in a Whistleblowing Protection Act for the private sector (except the provisions relating to intelligence functions which should continue to apply to the public sector only).

[1] s 43H *Employment Rights Act 1996 (UK)*.

6 ENHANCED PENALTIES FOR VICTIMISATION; REWARDS FOR WHISTLEBLOWERS

Current position in Australia

Whistleblowers who make qualifying disclosures cannot be subject to civil or criminal liability for those disclosures. The *Corporations Act* also prohibits the causing or threatening of detriment to the whistleblower; provides for fines and/or imprisonment for those who engage in victimisation of whistleblowers, and makes those engaging in victimisation liable to compensate the victim for damage caused as a result.

Unlike the United States of America, there is currently no incentive based "reward" scheme in Australia for whistleblowers.

What the submissions said

Few submissions considered the adequacy of penalties for those engaging in victimisation of whistleblowers. However among those that did, there was consensus that current penalties were an inadequate deterrent. Those submissions unanimously supported the introduction of harsher penalties for companies and individuals who victimise or threaten whistleblowers, including making employers vicariously liable for the actions of employees who did so.

The majority of submissions strongly opposed the introduction of a US-style bounty system in Australia. The concerns about such a system included that:

- it would encourage unreliable and speculative claims by those motivated by economic gain;
- it could lead to the system being abused by "serial submitters", as experienced in the United States. This could make it more difficult for regulators to identify and deal with wrongdoing economically and efficiently;
- if reward eligibility requirements were structured in the same way as the United States, it would only benefit a small portion of whistleblowers who would be disproportionately rewarded;
- financial incentives undermine internal reporting systems, by deterring employees from raising their concerns internally as they seek a financial reward. This would prevent companies from being able to effectively investigate and respond to issues themselves. Some submissions discussed potential solutions to this issue, such as making internal reporting in the first instance a prerequisite to eligibility for a whistleblowing reward;
- it might incentivise a whistleblower to delay the reporting of wrongdoing so as to allow further wrongdoing and an increase in the potential penalty imposed on the company, leading to an increase in the size of their financial reward; and
- the expense and resources required to implement and maintain a bounty system would be significant.

The submissions opposing bounty-style awards instead generally advocated for a more equitable compensation scheme for any loss suffered by a whistleblower as a result of coming forward. There were varying views about the structure and extent of the compensation. Many suggested that the whistleblower should be compensated for their loss of future earnings. Some proposed a broader safety net, potentially including exemplary damages, medical and legal fees, relocation costs (if the whistleblower had to relocate due to threats to their personal safety) and non-financial remedies such as a formal apology from the company. Some also proposed that potential whistleblowers involved in wrongdoing be offered immunity or leniency from prosecution. Additional suggestions included reversing the burden of proof onto the alleged perpetrator, once the whistleblower established the necessary elements of actual or threatened victimisation on the balance of probabilities (similar to the approach in the United Kingdom).

The minority of submissions which supported a reward system for whistleblowers argued that:

- a bounty system would encourage employees to act as whistleblowers, despite the risk of reprisals;
- the bounty system in place in the United States has resulted in an increase in the number of disclosures; and
- a bounty system could incentivise good behaviour within companies by putting those contemplating wrongdoing on notice.

Proposals for funding rewards for whistleblowers generally pointed to recoveries from enforcement actions which resulted from whistleblower disclosures.

Report recommendations

The Committee recommends that sanctions for reprisals be aligned with the ROC Legislation (which contains a broad definition of what may constitute reprisal). It has also recommended overhauling the current compensation arrangements and aligning these with the remedies in the ROC Legislation, including protection from harassment and harm, and providing for exemplary damages. The Committee has also recommended that provisions of PIDA relating to the options for courts/tribunals in apportioning liability for compensation between individuals and organisations be applied to the private sector.

In perhaps its most controversial recommendation, and contrary to the position advocated in the majority of the submissions, the Committee has recommended that rewards be available for whistleblowers. It proposes that any reward be conferred by a whistleblower protection body or prescribed law enforcement agency, at its discretion, following the imposition of a penalty against a wrongdoer by a Court (or other body). The reward would be a percentage of the penalty imposed (within a legislated range), determined taking into account relevant factors, including:

- the extent to which the whistleblower's information led to the imposition of the penalty;
- the timeliness of the disclosure;
- whether there was an appropriate and accessible internal whistleblowing procedure;
- whether the whistleblower was involved in the conduct disclosed; and
- whether the whistleblower disclosed the protected matter to the media without first disclosing the matter to an Australian law enforcement agency.

7 AGENCIES PROTECTING WHISTLEBLOWERS AND INVESTIGATING WHISTLEBLOWER DISCLOSURES; KEEPING WHISTLEBLOWERS INFORMED

Current position in Australia

In 2014, following criticisms of how ASIC had dealt with past whistleblowers, ASIC established an Office of the Whistleblower, aimed at ensuring that appropriate weight is given to information received from whistleblowers, that such information is handled appropriately, and that regular communication is maintained with whistleblowers as the investigation process progresses. ASIC's submissions to the Inquiry stated that this office makes contact with whistleblowers who have provided information to ASIC, at a minimum, once every four months.

However, neither ASIC nor any other law enforcement agency is currently empowered to act as an advocate for whistleblowers, provide them with legal advice, or bring action on behalf of a whistleblower who has been victimised or who is seeking compensation for damage resulting from victimisation.

More generally, neither the *Corporations Act* nor the *ASIC Act* address how ASIC should handle information that is provided to it by whistleblowers, or how it should enforce whistleblower protections.

Nor is there currently any legal obligation on regulators to keep whistleblowers informed of the progress of their disclosures.

What the submissions said

The majority of the submissions addressing this issue agreed that whistleblowers currently lacked appropriate support when making a disclosure. Shortfalls identified included:

- a lack of available free legal advice and guidance on reporting avenues;
- a lack of support for those who feel victimised after making a disclosure;
- statutory whistleblower protections not being properly enforced; and
- whistleblowers not being kept informed of the progress of the investigation following from their disclosure.

Most recommended establishing a new body to provide support to overcome these issues. DLA Piper's submissions emphasised the need for such a body to be separate to ASIC, noting the potential for conflict of interest between ASIC's primary role to receive and investigate misconduct reported by whistleblowers, and advocating for the whistleblower.

There were mixed views about whether this new body should have its own investigatory powers (either for the disclosed matter, or for alleged reprisals against the whistleblower), or rather refer disclosed matters to an appropriate regulator for investigation.

There were also differing views on the topic of keeping whistleblowers informed. One recommended that that obligation be mandated by revisions to the *Corporations Act* while another suggested that an independent body be tasked with keeping whistleblowers up to date.

DLA Piper, noting the formation of ASIC's Office of the Whistleblower as a positive development to address previous concerns about ASIC's failures to effectively communicate with whistleblowers, recommended that ASIC continue to develop and execute a communications regime through that office. It considered that regime should strike a balance between keeping the whistleblower informed and maintaining the integrity of its investigatory functions (including not pre-emptively prejudicing alleged wrongdoers).

Report recommendations

In line with the majority of submissions, the Committee recommended that a one-stop shop Whistleblower Protection Authority be established to provide advice and assistance to whistleblowers. That Authority would:

- have power to investigate reprisals against whistleblowers, and make recommendations to the Australian Federal Police or a prosecutorial body where those reprisals were criminal in nature;
- take action in workplace tribunals or courts on behalf of whistleblowers, or on the Authority's own motion, to remedy reprisals;
- in consultation with relevant law enforcement agencies, approve the payment of a wage replacement (commensurate to the whistleblower's current salary) to a whistleblower suffering adverse action or reprisal, as an advance of reasonably projected compensation, until resolution of any such compensation or adverse action claim (where, if compensation was awarded to the whistleblower, such advance payment would be repaid to the Whistleblower Protection Authority);
- have oversight functions for the private sector (excluding the functions relating to the Inspector-General of Intelligence and Security). Those functions would extend to setting standards for internal disclosure procedures, which may include mandatory internal disclosures in organisations above a prescribed size, and recommended approaches for others.

As regards keeping whistleblowers informed, the Committee has recommended that where a whistleblower discloses a protected matter to an Australian law enforcement agency, that agency (not the proposed Whistleblower Protection Agency) be required to provide regular updates to the whistleblower about whether or not it is pursuing the matter, including where it transfers the matter to another law enforcement agency, in which case obligations to keep the whistleblower informed are transferred to that agency. However, nothing that would prejudice an investigation is to be disclosed.

NEXT STEPS

WHAT NEXT?

With the release of the Inquiry's final report, it now rests with the Government to decide which recommendations will be implemented. The Government has, following release of the Report, established an expert advisory panel to consider its recommendations. The agreement with minority senators led by Senator Xenophon which was the genesis of the Inquiry contemplated legislation improving whistleblower protections by mid-2018. Consistent with that agreement, we expect the Government (taking into account the views of the expert advisory panel) to introduce legislation implementing at least some of the recommendations made by the Committee (particularly those consistent with the amendments to the ROC Legislation) by March 2018, and a vote on that legislation by mid-2018 or slightly later. A potential wildcard is Senator Xenophon's recently announced resignation from the Senate – it remains to be seen whether this will impact the path of reform.

DLA Piper encourages you to consider your own internal whistleblower program in advance of legislative reform. If you'd like our assistance in assessing how these potential reforms could impact you, please contact us.

MOST LIKELY CANDIDATES FOR REFORM

The agreement with minority senators which led to the Inquiry specified, among other things, that the Government commits to implementing legislation which improves whistleblower protections and, as a minimum, supports the substance and detail of the whistleblower protection and compensation regime contained in the ROC legislation. Accordingly, we expect that the Committee's recommendations that reflect the ROC Legislation are the most likely candidates for implementation. With reference to the issues highlighted within the submissions, Questions on Notice, public hearings and the Committee's recommendations, we expect that Parliament will give particular attention to the following potential areas of reform:

- broadening the types of disclosures entitled to protection, and the categories of people who can make protected disclosures;
- expanding the compensation scheme for whistleblowers who suffer loss as a result of making a disclosure;
- increasing penalties and sanctions for corporations or individuals who victimise whistleblowers;
- removing the requirement for whistleblower disclosures to be made in 'good faith' in order to attract protection; and
- establishing a standalone body responsible for supporting and advocating for whistleblowers, investigating reprisals against whistleblowers and providing guidance for internal disclosure regimes.

The more controversial recommendations, such as providing rewards to whistleblowers, and extending protections to disclosures made to the media or other third parties in certain circumstances, may face greater opposition. However, we expect that at least the latter will find its way into legislation proposed by the Government, given the precedent set by PIDA in the public sector.

DLA Piper will be tracking Parliament's consideration of the recommendations closely and will provide regular updates to interested clients and on its website www.dlapiper.com.

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