
# SUBMISSIONS ON WHISTLEBLOWER PROTECTION IN AUSTRALIA

The Australian Italian Lawyers Association (**AILA**) is pleased to make the following submissions on the review of tax and corporate whistle-blower protection in Australia:-

## I. INTRODUCTION

1. AILA is of the view that there is a need to reform the law relating to Whistle-Blowers.
2. Whilst *The Corporations Act 2001* (Cwth) contains provisions dealing with the subject, history indicates that those provisions have not been effective. One of the criticisms that Whistle-blowers have expressed is their concern with the lack of protection that has been afforded to them.[1]
3. Whistle-blowers perform a vital function in exposing wrongful conduct by corporate entities. As insiders, they are in a unique position to discover and expose misconduct and they have access to information that is often out of reach for the regulatory bodies.
4. Corporate fraud has been reported as being widespread and costing the community millions of dollars.[2]
5. Although Whistle-blower protection in Australia is found in a number of statutes,[3] Australia does not have uniform legislation that protects whistle-blowers. AILA is of the opinion that this is part of the problem. AILA proposes that legislation be enacted to "cover the field" and that the various provisions found in the several acts dealing with whistle-blowing be repealed. In so far as some are state issues, the states should confer such power to the Federal Government in order to insure uniformity throughout Australia. AILA submits that a new approach is required and propose the following:

## II. SUBMISSIONS

### Mandatory reporting

a. AILA is of the opinion that many of the problems could be overcome by legislating to make it mandatory for people with information of corporate wrongdoing to report such to the new body proposed below[whistle-blower complaint authority WCA]] for the following reasons:

[1] Senate Economics Reference Committee, Performance of ASIC, p.202.
[2] KPMG, Survey of Fraud, bribery and corruption in Australia& New Zealand, 2012 p.4-16.
[3] See for e.g. Part 9.4AAA of the Corporations Act 2001; the Banking Act1959; The insurance Act 1973.

(i) The major problem with this area is that it is voluntary. Individuals are encouraged but not compelled to disclose information relating to wrongful conduct;

(ii) Because it is voluntary, it means that individuals who choose to disclose are categorised as "traitors" or finks and are open to attack not only from within the organisation but from third parties who are recruited by the organisation to defend it;

(iii) The problem is similar to the issue of child abuse where for many years persons who had information about children being abused refrained from reporting it because they feared reprisals;

(iv)The passage of legislation making it mandatory to report child abuse resulted in an increase of reports and facilitated the taking of measures to deal with it. A similar approach, may achieve a similar result in relation to whistle-blowers. It would also eliminate the problem of people remaining silent.

(v) Mandatory reporting would counteract the culture of silence that may be operating within an organisation. Recent examples have shown that the response of the organisation is to try and contain the information and persuade the whistle-blower to be a team player rather than acting on the information and seeking to verify the complaint.

**Threshold for mandatory reporting**

b. The threshold for mandatory reporting should be based on reasonable belief. To that extent, any person who reasonably believes that wrongdoing has been committed should report that to the WCA which should be empowered to investigate it.

c. Also, anonymous reports should be received and investigated. The proposal would eliminate the controversy over the subject matter of protected information. What is envisaged is that any information tending to establish wrongdoing must be reported, regardless of the motive of the person. No useful purpose would be served by trying to assess the motive of the person reporting. Such a process would be inimical to the aim of encouraging people who have information to disclose it to the WCA AILA recognises that some may be concerned about the impact of false reports. AILA proposes that the legislation contain sanctions for wilful false reports. Other than such there should not be any deterrence against reporting.

**Protecting the whistle-blower**

d. The legislation should protect the whistle-blower by empowering the WCA receiving the information to take action against the entity if it tries to dismiss or punish the whistle-blower. Such right should include the right to claim damages on behalf of the whistle-blower, as well as the seeking of injunctions against the entity.
e. The legislation should also provide that the whistle-blower has the right to take action against the reported entity if the WCA refuses or is unable to do so. This will cover the situation where the WCA may decide that its resources can be better utilised in some other area.

f. Where the WCA refuses, or is unable, to take action it should provide reasons to the whistle-blower and be bound to provide assistance to him/her in prosecuting the action. The legislation should also provide that the whistle-blower be kept informed of the progress of the investigation.

**The definition issue**

g. Legislators should provide for a wide definition of whistle-blower. AILA submits that the definition should include employees, suppliers, contractors, clients or any individual who somehow becomes aware of illegal activities taking place in a business either through witnessing the behaviour or being told about it. The aim here is to ensure that anyone who has information relating to wrongful conduct be empowered to report it.

**Who should receive the information**

h. AILA submits that a 'new body' should be established to receive reports of wrongdoing. Such a body would instil confidence in persons reporting wrongdoing and ensure that the report would be processed and investigated as objectively as possible.

**Internal reporting model**

i. AILA submits that that there is not any utility in encouraging individual entities to establish whistle-blower protection within their own organisations. History shows that such provisions are no guarantee of disclosure or protection to individual whistle-blowers. The Olympus scandal in japan highlights the problem of expecting an organisation to act properly in such circumstances[4].More recently a former employee has alleged wrongdoing in an Australian company.[5] Other examples include:

- Brian Hood, the whistle-blower who exposed an alleged national bribery scandal linked to the Reserve Bank;
- former Football Federation Australia corporate affairs manager Bonita Mersiades who blew the whistle on the FFA's use of dubious and overpaid overseas consultants as it sought in 2010 to win the backing powerful FIFA officials for the right to host the World Cup.

  Like Hood, Mersiades lost her job.

The issue occurs across the field. In relation to health care whistleblowing it has been shown that internal mechanisms did not result in proper outcomes[6].

j. That is why an independent body is a more preferable option as the recipient of complaints. Further, a system that requires a person to report wrongdoing internally is flawed because the almost inevitable response will be to cover up or to persuade the individual to "support the team" and if that fails, to take steps to destroy the credibility of the individual.

[4] After almost 20 years of concealing the fraud, a new ceo was dismissed when he tried to have the issue disclosed and dealt with. See Woodford Exposure Penguin 2014.
**5** Sally McDow see Australian Business Review 2 January 2017 Ben butler "Origin Energy whistle-blower Sally McDow Nick McKenzie Richard Baker **"**Should Australian whistle-blowers earn multimillion-dollar bounties?" the Sydney Morning Herald December 30 2016.

[6] Thomas A Faunce and Stephen N C Bolsin 'Three Australian whistleblowing sagas:
lessons for internal and external regulation" MJA • Volume 181 Number 1 • 5 July 2004 p.44-47

**The reward issue**

k. AILA submits that whistle-blowers should not be rewarded for reporting wrongful conduct. If reporting is mandatory, then it should be seen as an individual's duty to report wrongful conduct. However, as discussed above, AILA believes that the greatest protection possible should be accorded a whistle-blower in relation to any retaliation by the organisation the subject of the report. To that end, it may be seen as appropriate to increase the level of civil penalties that can be imposed on an organisation that has committed a breach. Such civil penalties may be used to compensate the whistle-blower if he is unable to obtain compensation because the company has been wound up or does not have the assets to meet any damages order awarded. The aim is to ensure that the whistle-blower is not penalised as a consequence of performing his duty.

**The confidentiality issue**

l. The identity of the whistle-blower should be kept confidential until the WCA has investigated the complaint and decided on a course of action. If the investigation results in the WCA commencing proceedings against the reported entity, then disclosure of the information should be permitted to the extent necessary to pursue the proceeding.

As with other issues, AILA believes that mandatory reporting will diffuse the issue of confidentiality.

AILA is of the view that the above proposals will best serve to encourage disclosure of information and protect individual whistleblowers.it will also ensure that one body is responsible for processing the complaint and allow existing bodies to perform their more traditional functions.

Dated the 7 February 2017.

Joseph Carbone

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Secretary of AILA.