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# Private sector whistleblowing: Issues and options for law reform in Australia

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Enhancing knowledge of governance in Australia and globally

# PERSONS OF THE YEAR



## The Whistleblowers

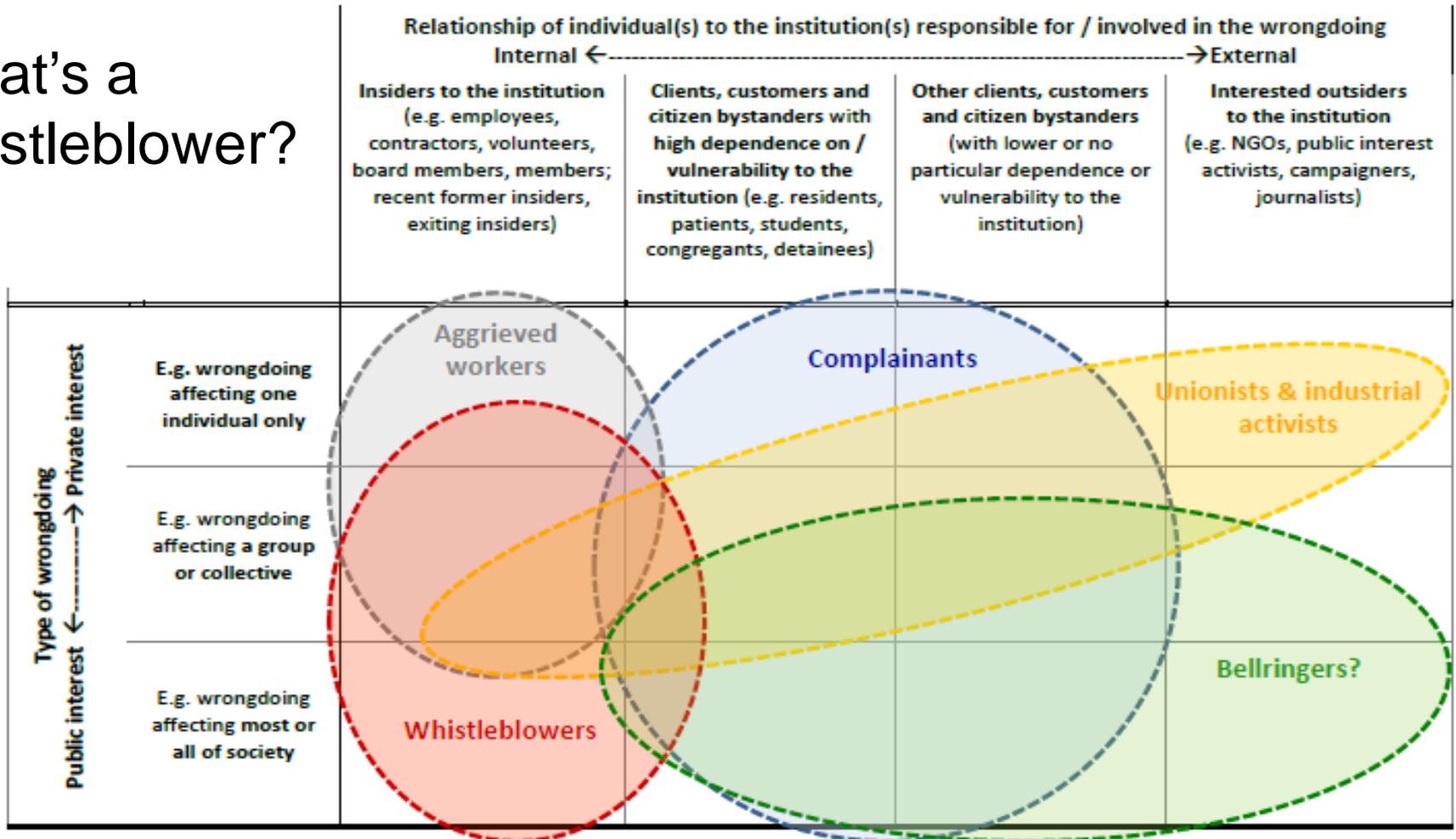
CYNTHIA COOPER OF WORLDCOM    COLEEN ROWLEY OF THE FBI    SHERRON WATKINS OF ENRON



## Private sector whistleblowing law reform – a long history

- Gibbs Committee – Review of Commonwealth criminal law, 1987
- South Australian legislation, 1993
- Senate Select Committee on Public Interest Whistleblowing, 1994
- Australian Standard 8004-2003 – Whistleblower Protection, 2003
- *Corporations Act 2001 - Part 9.4AAA*, 2004
- Treasury Review (incomplete) 2009
- Public Interest Disclosure Act 2013 (Cth)  
*Public sector, but including all Commonwealth contractors*  
*Review by Philip Moss AM, 2016*
- Senate Economics Committee – Performance of ASIC, 2014  
– Discussion Paper, 2016
- Rewards & incentives? Tax transparency reforms announced 2016
- Banking and finance transparency & accountability reforms, 2016
- Public interest defences for disclosure (non-wrongdoing):  
*Crimes Act 1914, Section 70 - Immigration service providers, 2015;*  
*Australian Law Reform Commission Report 112, 2010;*  
*NBN Co employees, Xenophon commitments, 2016.*
- Open Government Partnership – Australia’s first National Action Plan, 2016

# What's a whistleblower?



Source: A J Brown, 'Towards Ideal Whistleblowing Laws? Some Lessons from Recent Australian Experience', *E-Journal of International and Comparative Labour Studies*, Vol 2, No 3, pp.153-182 at p.162.



## *So what kind of regime?*

### *Legislative models / approaches to whistleblowing*

- **Remedies** for employees who suffer as the result of having made a public interest disclosure (especially direct reprisals...  
cf. damage flowing from other organisational failures)  
*(anti-retaliation / cost-benefit / organisational justice models)*
- **Reward** strategies  
*(bounty / financial incentives / cost-benefit model)*
- **Better operational systems** for recognising and managing internal and regulatory whistleblowing, including oversight  
*(structural model)*
- Recognition and regulation of **public** whistleblowing  
*(common law public interest / reputational risk models)*

**Table 2.** G20 countries – public sector laws

**Rating** **1** Very / quite comprehensive    **2** Somewhat / partially comprehensive    **3** Absent / not at all comprehensive



	S. Ar	Mex	Tur	Arg	Rus	It	Ger	Brz	Jpn	Indo	S. Af	Fra	Chn	India	Kor	UK	Can	US	Aus	Total	
	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	3
Internal disclosure procedures	3	3	3	3	2	2	3	3	3	3	3	3	2	3	3	3	1	2	1	13	
Anonymity	3	3	3	2	3	3	2	3	3	3	3	3	2	3	3	3	3	1	2	14	
External reporting channels (third party / public)	3	3	3	3	3	2	3	2	2	3	1	3	3	3	3	2	2	2	2	11	
Transparency	3	3	3	3	3	3	3	3	3	3	2	2	3	2	1	2	1	1	1	11	
Oversight	3	2	3	3	3	2	3	3	3	2	3	2	2	1	1	3	1	1	1	9	
Confidentiality	3	3	2	2	3	2	3	2	3	3	3	3	2	1	1	2	1	1	1	8	
Sanctions	3	2	2	2	3	3	3	3	3	2	3	2	2	2	1	2	1	1	1	7	
Remedies	2	3	3	3	3	3	2	3	2	3	1	2	2	2	1	1	1	2	2	7	
Thresholds	3	3	3	3	3	2	2	2	1	2	2	2	2	1	2	1	1	1	1	5	
Wrongdoing	3	3	3	3	2	2	3	2	1	2	1	2	1	2	1	1	1	1	1	5	
Breadth of retaliation	3	3	2	3	3	1	2	2	1	2	2	2	2	1	1	1	1	2	1	4	
Coverage	3	3	3	3	2	1	1	2	1	2	1	2	1	1	1	2	2	1	2	4	
Definition of whistleblowers	3	2	2	2	2	3	3	2	2	2	2	2	1	1	1	2	2	1	1	3	
Reporting channels (internal & regulatory)	3	3	2	2	2	3	2	2	2	2	2	2	2	2	1	1	2	1	1	2	

## State of reform - Australian whistleblowing legislation

Jurisdiction	Date	Original	1. Effective system & oversight	2. Public disclosure	3. Effective remedies
SA *	2016?	1993	4?	Missing/partial	NKTW
CTH +	2013	1999	2?	2	1?
ACT	2012	1994	2	1	NKTW
VIC	2012	2001	3?	Missing	NKTW
WA	2012	2003	3	2	NKTW
NSW	2010-11	1994	1	3	NKTW
QLD *	2010	1994	2	2	NKTW
TAS	2009	2002	2	Missing	NKTW
NT	--	2008	2	Missing	NKTW
<b>Corps Act *</b>	<b>???</b>	2004	Missing	Missing	NKTW

\* Some private sector coverage

+ Not whole public sector covered

**NKTW:** Not known to work

**Table 3** G20 countries – private sector laws

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	Rus	It	Can	S. Ar	India	Mex	Brz	Arg	Aus	Ger	Tur	Indo	Jpn	Chn	Fra	S. Af	Kor	UK	US	Total
	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	3
Anonymity	3	3	3	3	3	3	3	2	3	2	3	3	3	2	3	3	3	3	1	15
Internal disclosure procedures	3	3	3	3	2	3	2	3	3	3	3	3	3	2	3	2	3	3	2	14
Transparency	3	3	3	3	3	3	3	3	3	3	3	3	3	3	2	2	1	2	1	14
External reporting channels (third party / public)	3	3	3	3	3	3	2	3	3	3	3	3	2	3	2	1	3	2	2	13
Oversight	3	3	3	3	3	2	3	3	3	3	3	2	3	2	2	3	1	3	1	13
Confidentiality	3	3	3	3	3	3	2	2	2	3	2	3	3	2	3	3	1	2	1	11
Sanctions	3	3	3	3	3	2	3	2	3	3	2	2	3	3	2	3	1	2	1	11
Remedies	3	3	3	2	3	3	3	3	2	2	3	3	2	3	2	1	1	1	2	10
Coverage	3	3	3	3	3	3	3	3	2	3	3	2	1	2	2	1	1	1	1	10
Wrongdoing	3	3	3	3	3	3	3	3	3	2	3	2	1	2	2	1	1	1	1	10
Thresholds	3	3	3	3	3	3	3	3	2	2	3	2	1	2	2	2	2	1	1	9
Breadth of retaliation	3	3	2	3	3	3	3	3	3	2	2	2	1	3	2	2	1	1	2	9
Definition of whistleblowers	3	3	3	3	3	3	2	2	3	3	2	2	1	1	2	1	2	1	1	8
Reporting channels (internal & regulatory)	3	2	3	3	3	3	3	2	2	3	2	2	2	2	1	1	2	1	1	7

# Key issues for Australia's approach

## 1) Piecemeal or comprehensive?

*US: 47* different federal regulatory laws, including 12 new laws since 2000 (not including public sector) (Devine and Massarani, 2011, *The Corporate Whistleblower's Survival Guide*, San Francisco: p.151).

## 2) What areas of regulation?

including interface with State regulation

## 3) What types of wrongdoing?

Not just breaches of law, regulatory requirements... codes?

## 4) Mandatory procedures?

Or at least incentivised procedures?

AS 8004–2003  
(Incorporating Amendment No. 1)

**Australian Standard™**

# Whistleblower Protection Programs for Entities

 Standards Australia

**In 2006-2007, only 5 out of 175 federal and state public sector agencies had ‘reasonably strong’ procedures measured against the Standard:**

***Whistling While They Work 1***

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[WWTWadmin@griffith.edu.au](mailto:WWTWadmin@griffith.edu.au)*

## Whistling While They Work 2

### Improving managerial responses to whistleblowing in public & private sector organisations

- Surveying Australian or NZ-based organisations with >10 employees  
**Public sector, private sector, and not-for-profit**
- *Phase 1: Survey of Organisational Processes & Procedures conducted April-July 2016*
- *Phase 2: Staff survey & organisational benchmarking package Integrity@WERQ (Workplace Experiences & Relationships Questionnaire) fielding October 2016 – April 2017*

[www.whistlingwhiletheywork.edu.au](http://www.whistlingwhiletheywork.edu.au)

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## Key issues *continued*

- 5) How best to use employment law remedies and systems, including Fair Work Act?

*UK:* Public interest disclosure provisions of Employment Relations Act 1996, ss. 49, 103A, 123-4: uncapped damages.

- 6) Unscrambling criminal and civil / employment remedies  
Thresholds and burdens
- 7) Regulatory oversight, audit & enforcement?
- 8) Making compensation and legal support accessible  
A penalty-funded advice and support service?  
(In addition to coordinated system of incentives/rewards)  
A joint independent support & oversight agency?

# Process for reform?

- 1) Parliamentary committee inquiry?
- 2) States / Council of Australian Governments?
- 3) Expert panel or inquiry?
- 4) Extra stakeholder consultation (unions, business)