

**Senate Economics References Committee**

**Issues Paper**

**Corporate whistleblowing in Australia: ending  
corporate Australia's cultures of silence**

## Executive summary

Whistleblowers play a critical role in identifying and stopping misconduct in the corporate sector. However, Australia's corporate whistleblowing framework does little to help or encourage whistleblowers to come forward, nor does it provide them with meaningful protections from victimisation when they do decide to 'blow the whistle'.

While legislative protections have existed for public sector whistleblowers in most Australian states and territories since the 1990s, protections for private sector whistleblowers were not legislated until 2004.

Experts contend that while Australia has some of the most robust public sector whistleblower laws in the OECD, our private sector whistleblower laws continue to lag behind other countries, notably the USA's Dodd-Frank Act (2010), and the UK's Public Interest Disclosure Act (1998).

The importance of whistleblowers, and the need to ensure they are protected from retribution, has been highlighted in recent cases of corporate and financial misconduct. Some of these cases were only revealed through the efforts of whistleblowers. For example, the Commonwealth Financial Planning scandal, which this committee examined in depth in its inquiry into the performance of the Australian Securities and Investments Commission, was only revealed because of the efforts of three whistleblowers within that organisation. The committee received evidence from one of those whistleblowers that current whistleblower protections were of little value—given the shortcomings in the current law, the whistleblowers were effectively reconciled to the fact that they had to sacrifice their careers in order to expose greed, dishonesty and gross misconduct within Commonwealth Financial Planning. Similar examples of poor outcomes for whistleblowers are not hard to find. Recent reports, for instance, suggest that a whistleblower inside Australia's largest mining services company, Thiess (a subsidiary of Leighton Holdings, since renamed CIMIC), may have been forced to resign after disclosing possible serious corruption within that organisation.

This situation is unacceptable. No-one should be forced to decide between exposing corporate fraud and misconduct and protecting their careers and broader wellbeing. Australia's whistleblower framework must encourage whistleblowers to come forward, and protect them when they do so.

This issues paper is intended to encourage further public consideration of how Australia's corporate whistleblower framework might be improved. To this end, it includes a series of 'items for discussion', and the committee invites written submissions that respond to these items or otherwise address this important issue.

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## Items for discussion

10 items are set out for discussion below, which are intended to be suggestive, rather than prescriptive. Submissions may respond to items individually or address any combination of the items or of related matters. The committee also welcomes more general commentary on Australia's corporate whistleblowing framework and suggestions for other reforms worthy of consideration.

### Item 1

#### *Preventing and punishing the victimisation of whistleblowers, and whistleblower compensation*

- 1a) Why are the protections in the Corporations Act so rarely used? Is it because the legislation is poorly drafted, or does the problem lie elsewhere?
- 1b) Is the current prohibition against the victimisation of whistleblowers in the Corporations Act adequate? If not, how might it be improved?
- 1c) Similarly, are the penalties that can be applied in the instance a whistleblower is victimised sufficient?
- 1d) Do we need to consider a new approach to compensating whistleblowers who have been victimised for being whistleblowers?

### Item 2

#### *Internal disclosure*

- 2a) Do you believe there is merit in requiring companies to put in place systems for internal disclosure? If so, what form would this requirement take?
- 2b) Some commentators have argued that a statutory requirement for companies to put internal disclosure systems in place would impose an onerous regulatory burden on the corporate sector. Do you agree with this view?

### Item 3

#### *Rewards and other incentives for whistleblowers*

- 3a) Should the Australian government consider introducing mechanisms to provide financial rewards to corporate whistleblowers? If so, what options in particular should the government consider?
- 3b) Do you believe there is an inconsistency between rewarding whistleblowers and Australian culture?

### Item 4

#### *An advocate for whistleblowers*

- 4a) Should the Corporations Act establish a role for ASIC or another body to protect the interests of and generally act as an 'advocate' for whistleblowers? If so, is ASIC the appropriate body to undertake this role?

**Item 5*****Eligibility for whistleblower protections and the scope of protected disclosures***

5a) In its final report on the performance of the Australian Investments and Securities Commission, the committee recommended (recommendation 12) that, consistent with the recommendations made by ASIC, the government develop legislative amendments to:

- expand the definition of a whistleblower in Part 9.4AAA of the Corporations Act 2001 to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners;
- expand the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate; and
- provide that ASIC cannot be required to produce a document revealing a whistleblower's identity unless ordered by a court or tribunal, following certain criteria.

What are your views on the merits of this recommendation?

5b) More generally, do you believe there is a need to expand the definition of who might be considered a whistleblower and the scope of disclosures that attract the whistleblower protections?

**Item 6*****Anonymous disclosures***

6a) Should whistleblower protections in the Corporations Act be extended to cover anonymous disclosures?

**Item 7*****The 'good faith' requirement***

7a) In its final report on the performance of ASIC, the committee recommended the 'good faith' requirement be removed from the Corporations Act, and replaced with a requirement that a disclosure:

- is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or
- shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes.

Do you support this recommendation?

7b) Is there a risk that removing the 'good faith' requirement could result in an increase in spurious allegations being made?

**Item 8*****Disclosure to third parties***

- 8a) Are there circumstances in which whistleblowers should be allowed to make a disclosure to a third party (such as the media, members of parliament, union representatives, and so on)?
- 8b) What are the risks of extending whistleblower protections to cover disclosures to third parties? How might these risks be managed?

**Item 9*****Keeping whistleblowers 'in the loop'***

- 9a) Should the Corporations Act set out how disclosures should be dealt with, and create an obligation to keep whistleblowers informed of the progress of an investigation resulting from a disclosure they have made?

**Item 10*****The Public Interest Disclosure Act 2013 as a template for reform***

- 10a) To what extent do you think the provisions of the *Public Interest Disclosure Act 2013* (PIDA) might serve as template for reforms to whistleblowing legislation as it applies to the private sector?
- 10b) Are there any elements of PIDA in particular that the government should consider for introduction into the Corporations Act?



# Chapter 1

## Corporate whistleblowing laws in Australia and abroad

1.2 Whistleblowers, armed with insider information that is not readily available to regulators and other authorities, are playing a critical role in identifying and stopping misconduct within the corporate sector. Australian law, and in particular the *Corporations Act 2001*, recognises the importance of corporate whistleblowers and seeks to protect them from being victimised as a result of the information they disclose.

1.3 This chapter discusses the importance of whistleblowing in the corporate sector, summarises Australian law in relation to corporate whistleblowers, and briefly examines whistleblower laws internationally, with specific attention given to laws in the United States and the United Kingdom. The strength of the Australian framework for corporate whistleblowing is assessed in the next chapter, and specific areas for reform are considered.

### What is whistleblowing?

1.4 The terms 'whistleblower' and 'whistleblowing' lack a common legal definition, and their usage remains unclear in academic and policy contexts. A whistleblower is commonly understood to be a person with *insider* information of misconduct who makes a decision to report or disclose that information. They are different to a customer, members of the public, or others who have evidence of and report organisational misconduct.<sup>1</sup> A useful definition has been provided by academics Janet Near and Marcia Miceli, in the *Journal of Business Ethics*, who wrote that whistleblowing involves:

...the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.<sup>2</sup>

1.5 Without diminishing the utility of this definition, it should be noted that even to the extent that a broad consensus as to what constitutes whistleblowing can be developed, fundamental questions remain as to who can receive legal recognition as a whistleblower and the circumstances in which they can access whistleblower protections. These questions are central to this issues paper.

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1 Professor AJ Brown, *Submission 343*, p. 2. Brown, in an article co-authored with Paul Latimer, notes that some jurisdictions extend whistleblower protections to 'anyone'. Nonetheless, Brown and Latimer argue in favour of limiting whistleblower protections to people with an institutional or employment connection to an organisation. See Paul Latimer and AJ Brown, 'Whistleblower Laws: International Best Practice', *UNSW Law Journal* 31, No. 3 (2008), p. 775–76.

2 Janet Near and Marcia Miceli, 'Organisational dissidence: the case of whistleblowing', *Journal of Business Ethics* 4 (1985), pp. 1, 4, as cited in Latimer and Brown, 'Whistleblower Laws', p. 768.

## Why whistleblowing is important

1.6 Whistleblowers can often play a critical role in preventing and detecting corporate misconduct. Given the legitimate need for commercial confidentiality, whistleblowers will often have access to information and awareness of misconduct that others, including statutory regulators, do not.<sup>3</sup> As American legal scholar Pamela Bucy has put it, even the most effective and well-resourced public regulatory system 'will always lack the one resource that is indispensable to effective detection and deterrence of complex economic misconduct: inside information'.<sup>4</sup> Underlining the important role whistleblowers play, a 2009 PwC survey found that whistleblowers were one of the most common sources for identification of internal misconduct.<sup>5</sup> Comparable surveys, both in Australia and internationally, have consistently produced similar findings.<sup>6</sup>

1.7 In a submission made to the committee during the inquiry into the performance of ASIC, University of Sydney academic, Dr Peter Bowden, argued that effective corporate whistleblower protection systems also deliver substantial economic and financial benefits. This is because trusted organisations tend to have lower compliance costs and higher profitability than organisations suffering from a deficit of trust.<sup>7</sup> ASIC makes a related point on its website, contending that corporate 'cultures of silence' allow misconduct to continue unhindered, and may have contributed to recent local and international corporate failures. In contrast, systems that protect whistleblowers and encourage them to come forward can help prevent corporate fraud and other misconduct.<sup>8</sup>

1.8 KPMG's *Fraud, Bribery and Corruption Survey 2012: Australia and New Zealand*, offered some insight into just how costly this fraud and misconduct is to the Australian economy. Of 281 survey respondents from a wide sample of Australian and New Zealand public and private sector organisations, 43 per cent indicated they had experienced a loss to fraud in the two-year survey period, with the average loss over \$3 million. Respondents acknowledged their losses were likely even higher still due to

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3 Treasury, *Improving protections for corporate whistleblowers: options paper* (October 2009), [http://archive.treasury.gov.au/documents/1620/PDF/whistleblower\\_options\\_papers.pdf](http://archive.treasury.gov.au/documents/1620/PDF/whistleblower_options_papers.pdf), p. 4.

4 Pamela Bucy, 'Private Justice', *Southern California Law Review* 76(1) (2002), pp. 4–5, as cited in Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty hunters, whistleblower and a new regulatory paradigm', *Australian Business Law Review* 41(5) (October 2013), p. 292.

5 As cited in Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014) [hereafter '*Performance of ASIC*'], p. 198.

6 Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia', *Common Law World Review* 40 (2011), p. 145.

7 Senate Economics References Committee, *Performance of ASIC*, p. 198.

8 ASIC, webpage, 'Whistleblowers: company officeholder obligations', <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/>, accessed 12 November 2015.



unreported and undetected fraud.<sup>9</sup> While KPMG did not claim to be providing a comprehensive study of fraud in Australia, the breadth and quality of the survey leaves little room to doubt that fraud remains a widespread and costly problem in corporate Australia.<sup>10</sup> It is telling, given the committee's recent focus on the financial services sector, that \$322 million of the \$371 million in total losses to fraud reported by survey respondents occurred in financial services organisations.<sup>11</sup>

### **Encouraging insiders to blow the whistle**

1.9 Unsurprisingly, unlocking and optimising the benefits of whistleblowing requires robust systems that encourage whistleblowers to make disclosures and in turn protects them from retribution. CPA Australia made precisely this point in its submission to the committee's inquiry into the performance of ASIC. It further noted that in Australia identifying and rectifying corporate misconduct through whistleblowing was contingent on whistleblowers trusting the corporate regulator to act on disclosures of misconduct. Put simply, would-be whistleblowers are unlikely to actually make a report to ASIC unless they can be confident the information they provide is going to be taken seriously and addressed.<sup>12</sup>

1.10 Dr Bowden has made a related if broader point, arguing that the exposure of misconduct by whistleblowers is not, by itself, sufficient to ensure the misconduct stops. In his view, it is also necessary for a whistleblowing support system to 'ensure that the allegation will be investigated, and that, if found to be true, it will be stopped, and if a crime has been committed, the perpetrator will be punished'.<sup>13</sup> In sum, effective whistleblower schemes, as Clayton Utz partner Nicholas Mavrakis and UNSW legal scholar Michael Legg have pointed out, 'need to encourage persons to come forward, provide protection to the person from reprisals and have processes for evaluating and acting on the information provided'.<sup>14</sup>

### **Existing corporate whistleblowing protections**

#### ***Protections in Part 9.4AAA of the Corporations Act***

1.11 While legislative protections have existed for public sector whistleblowers in most Australian states and territories since the 1990s, protections for private sector

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9 KPMG, *A survey of fraud, bribery and corruption in Australia & New Zealand 2012* (February 2013), p. 4.

10 KPMG, *A survey of fraud, bribery and corruption in Australia & New Zealand 2012*, p. 16.

11 KPMG, *A survey of fraud, bribery and corruption in Australia & New Zealand 2012*, p. 4.

12 Senate Economics References Committee, *Performance of ASIC*, p. 198.

13 Senate Economics References Committee, *Performance of ASIC*, pp. 198–99.

14 Nicholas Mavrakis and Michael Legg, 'The Dodd-Frank Act whistleblower reforms put bounty on corporate non-compliance: Ramifications and lessons for Australia', *Australian Business Law Review* 40 (February 2012), p. 27.

whistleblowers were not legislated until 2004.<sup>15</sup> Specifically, protections for certain whistleblower activities in the private sector were introduced into Part 9.4AAA of the *Corporations Act 2001* by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (CLERP 9).<sup>16</sup> These protections are intended, as ASIC notes, 'to encourage people within companies, or with special connections to companies, to alert ASIC and other authorities to illegal behaviours'.<sup>17</sup>

1.12 The Corporations Act protections were summarised by ASIC in its submission to the committee's inquiry into the performance of ASIC. They include 'protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure that the whistleblower has made'. Part 9.4AAA also prohibits the victimisation of the whistleblower, which is a criminal offence under the Act. A whistleblower has the right to seek compensation if damage is suffered as a result of any victimisation.

For example, under Pt 9.4AAA, a whistleblower whose employment is terminated, or who suffers victimisation as a result of their disclosure, may commence court proceedings to be:

- a) reinstated to their job or to a job at a comparable level; and

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- 15 Pascoe and Welsh, 'Whistleblowing, Ethics and Corporate Culture', p. 145. Legislation in South Australia and Queensland actually extends protections to persons in both the public and private sectors. AJ Brown, *Public interest disclosure legislation in Australia: towards the next generation – An issues paper* (November 2006), p. 15, [https://www.griffith.edu.au/\\_data/assets/pdf\\_file/0015/151314/full-paper.pdf](https://www.griffith.edu.au/_data/assets/pdf_file/0015/151314/full-paper.pdf), accessed 12 November 2015.
  - 16 Pascoe and Welsh explain that, in addition to the protections in the Corporations Act, similar provisions, 'also applying to the corporate sector, have been inserted into employment and financial sector legislation. ... Provisions in the Fair Work Act 2009 (Cth) provide whistleblower protection for members, officials and employees of registered organisations (e.g. trade unions) who report suspected breaches by their organisation to certain designated officials. The Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007 introduced a consistent framework of whistleblower protection across the prudential Acts: Banking Act 1959 (Cth); Insurance Act 1995 (Cth); and Superannuation Industry (Supervision) Act 1993 (Cth).' Pascoe and Welsh, 'Whistleblowing, Ethics and Corporate Culture', p.149n12.
  - 17 ASIC, webpage, 'Whistleblowing', <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>, accessed 12 November 2015. The government first signalled its intention to introduce the whistleblower protections in 2002 with the release of the CLERP 9 discussion paper, *Corporate disclosure: strengthening the financial reporting framework*. ASIC, webpage, 'Whistleblowers—company officeholder obligations', <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/>, accessed 12 November 2015.

b) compensated for any victimisation or threatened victimisation.<sup>18</sup>

1.13 The Corporations Act also includes a confidentiality protection for whistleblowers, making it an offence for a company, the company's auditors, or an officer or employee of the company to reveal a whistleblower's disclosed information or identity.<sup>19</sup>

1.14 Part 9.4AAA also outlines the categories of information disclosures that attract whistleblower protections under the Act, who can qualify as a whistleblower, who the disclosure should be made to, and the conditions in which such a disclosure must be made. In order to receive protection under the Corporations Act as a whistleblower, the person disclosing misconduct within a company must be:

- an officer or employee of that company; or
- have a contract to provide goods or services to that company; or
- be an employee of a person that has a contract to provide goods or services to that company.<sup>20</sup>

1.15 Protections for a whistleblower only apply if they make the disclosure of misconduct to ASIC, the auditor of the company in question, or certain persons within the company.<sup>21</sup> The Corporations Act also provides that, in order to qualify for whistleblower protection, the person making a disclosure cannot do so anonymously, and must provide their name before making the disclosure. Further, the whistleblower must make the disclosure 'in good faith' and have reasonable grounds to suspect that:

- the company has, or may have, contravened a provision of the corporations legislation; or
- an officer or employee of the company has, or may have, contravened a provision of the corporations legislation.<sup>22</sup>

1.16 A whistleblower can only receive protection under the Act if they are reporting breaches of the Corporations Act and the ASIC Act, or any regulations made

18 ASIC, *Submission 45.2*, p. 134. Unless otherwise indicated, references to 'submissions' in this issues paper should be taken to mean submissions to the Senate Economics References Committee inquiry into the performance of ASIC. Submissions are available on the committee's website, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Submissions).

19 Disclosure of this information to ASIC, APRA, a member of the Australian Federal Police or disclosure with the whistleblower's consent is allowed.

20 *Corporations Act 2001*, s. 1317AA(1)(a).

21 *Corporations Act 2001*, s. 1317AA(1)(b).

22 *Corporations Act 2001*, ss. 1317AA(1)(d)–(e). Similar protections are available to a whistleblower in possession of information relating to contraventions of banking, insurance and superannuation legislation, under the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993*. ASIC, *Submission 45.2*, p. 135.

thereunder. ASIC suggests that this limit on the scope of the protections may be less restrictive than it at first appears: in many cases, it writes on its website, 'contraventions of other legislation will involve secondary offences under [the Corporations Act or ASIC Act] because books or records have been falsified or misleading information given to the market or the auditor in an attempt to cover the primary offence'.<sup>23</sup>

### *ASIC's role in relation to whistleblowers*

1.17 ASIC has a central role in relation to whistleblowing in the Australian corporate sector. As noted above, the Corporations Act prescribes that other than internal disclosures and disclosures to a company's auditor, only disclosures made to ASIC are covered by the whistleblower protections within the Act.

1.18 It would appear that ASIC receives a substantial amount of information from whistleblowers. In its submission to the committee's inquiry into the performance of ASIC, the regulator reported that in 2012–13 it received 845 reports of misconduct from people who could potentially be considered whistleblowers under the Corporations Act (ASIC has no role in deciding who qualifies for the whistleblower protections). ASIC provided the following breakdown of the outcome for these reports:

Outcome	Number
Internal referral for further action (compliance, investigation or surveillance)	129
Resolved	105
Not within ASIC's jurisdiction	115
No breach or offence	23
Analysed and assessed for no further action	371
Ongoing activities	10
Merged activities <sup>24</sup>	92

**Source:** Australian Securities and Investments Commission, *Submission 45.2*, pp. 136–37.

1.19 Although the Corporations Act establishes an explicit role for ASIC as a receiver of whistleblower disclosures, it is silent on how the regulator should actually handle the information it receives from whistleblowers. Nor does the Act empower

23 Australian Securities and Investments Commission, webpage, 'Whistleblowers: company officeholder obligations', <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/>.

24 'Merged activities' refers to instances where multiple reports of misconduct raise the same or similar issues, and are merged for further consideration and action.

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ASIC to act on behalf of whistleblowers.<sup>25</sup> This is regarded as a shortcoming in the current legislation by some observers, as discussed in detail in the next chapter.

1.20 While the current legislative framework does not require that ASIC protect or advocate on behalf of whistleblowers, and arguably constrains its ability to do so (as discussed further in the next chapter), the establishment of ASIC's Office of the Whistleblower in late 2014 is a welcome step forward. The Office was established following a recommendation made in the committee's final report on the performance of ASIC (recommendation 13). The committee suggested that an Office of the Whistleblower would help improve ASIC's communications with whistleblowers, and 'embed and advance' steps that ASIC had already taken to improve its handling of whistleblowers and the information they provided.<sup>26</sup> While it is too early to assess the success or otherwise of the Office, the committee believes its creation is an important step in the right direction by the corporate regulator.

### **Whistleblower laws internationally**

1.21 Improving whistleblower protection in legislation is becoming increasingly common internationally. While protections have traditionally been more advanced in the public sector, from the late 1990s protections for private sector whistleblowers have become more common as part of the regulatory response to corporate fraud.<sup>27</sup> While a detailed comparative analysis of whistleblower protections internationally is beyond the scope of this issues paper, it is nonetheless worth highlighting some of the important features of the whistleblower frameworks in the United States and United Kingdom, and efforts in a number of multilateral fora to drive whistleblower law reform. The potential application in Australia of international approaches to whistleblower laws is considered at various points in the next chapter.

#### ***United States***

1.22 While whistleblower protections are included in a wide range of US laws,<sup>28</sup> there are three key pieces of legislation of particular importance to public interest disclosures in the US private sector: the False Claims Act (1863), the Sarbanes-Oxley Act (2002) and the Dodd-Frank Act (2010).

1.23 The False Claims Act, also known as the 'Lincoln Law' (having originally been signed into law by President Lincoln in 1863), imposes liability on persons and companies who defraud government programs. A key feature of the False Claims Act is its *qui tam* provisions—that is, provisions which allow people not affiliated with the government ('relators') to file actions on behalf of the government and receive a portion of any recovered damages. These *qui tam* provisions are intended to

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25 ASIC, *Submission 45.2*, p. 135.

26 Senate Economics References Committee, *Performance of ASIC*, pp. 224–25.

27 ASIC, 'Whistleblowers: company officeholder obligations', <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/>, accessed 12 November 2015.

28 Mavrakis and Legg, 'The Dodd-Frank Act whistleblower reforms', p. 28.

encourage citizens with knowledge of fraud against the government to come forward. It falls to the government to decide whether to intervene and proceed with a case based on a disclosure—if it does intervene, the person who made the disclosure remains a relator to proceedings, and can claim for 15 to 25 per cent of any damages recovered. If the government declines to intervene, the relator can proceed alone, and claim for 25 to 30 per cent of recovered damages (although such actions are typically less successful). Relators are also protected from retaliation in their employment.<sup>29</sup> As one court has put it, in effect Congress has 'let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government'.<sup>30</sup> And there appears no shortage of people willing to take up the deputy's badge: since amendments to the False Claims Act were introduced in 1986, over US\$44 billion has been recovered through lawsuits filed under the Act, with more than US\$30 billion of the total resulting from approximately 10,000 *qui tam* actions. Whistleblowers have been paid in excess of US\$4.7 billion for their role in assisting with the recoveries.<sup>31</sup> In 2014 alone, recoveries from *qui tam* cases totalled nearly US\$3 billion, with whistleblowers receiving US\$435 million.<sup>32</sup>

1.24 The Sarbanes-Oxley Act of 2002, enacted following a number of high-profile corporate scandals—including Enron and WorldCom—established new or enhanced standards for US public company boards, executive management, and public accounting firms. The Act includes a requirement for corporations to develop standardised internal disclosure mechanisms to ensure employees have a recognised method of reporting misconduct within the corporation. The Act also prohibits publicly-traded companies from retaliating against employees who have reported misconduct.<sup>33</sup> In effect, Sarbanes-Oxley provided 'a uniform, national, anti-retaliation

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29 James B. Helmer, Jr., 'False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots', *University of Cincinnati Law Review* 81, No. 4 (2013), p. 1273–74.

30 Helmer, 'False Claims Act', p. 1261.

31 U.S. Department of Justice, 'Fraud Statistics – Overview', 20 November 2014, <http://www.falseclaimsact.com/wp-content/uploads/2015/10/DOJ-FCA-Statistics-2014.pdf>. The Taxpayers Against Fraud Education Fund, a not-for-profit organisation that seeks to 'maintain the integrity and advance the effectiveness of whistleblower reward and private enforcement provisions in the federal and state laws', suggests that the Department of Justice in fact underreports the value of False Claims Act lawsuits by excluding criminal fines and state recoveries from its end-of-year statistics. TAF Education Fund, 'DoJ hides its light under a barrel', 4 December 2012, <http://taf.org/blog/doj-hides-its-light-under-barrel>.

32 U.S. Department of Justice, media release, 'Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014', 20 November 2014, <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

33 Catherine Foti, 'SOX and whistleblowers – any fraud will do', *Forbes*, 13 June 2013, <http://www.forbes.com/sites/insider/2013/06/13/sox-and-whistleblowers-any-fraud-will-do/>.

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provision to protect whistleblowers who exposed their employers' financial and accounting fraud' for the first time.<sup>34</sup>

1.25 The Dodd-Frank Wall Street Reform and Consumer Protection Act (the 'Dodd-Frank Act') was enacted in 2010 after the Global Financial Crisis highlighted an apparent need, as President Obama put it, for a 'sweeping overhaul of the United States financial regulatory system'.<sup>35</sup> The Act created a Securities Exchange Commission (SEC) whistleblower program with three fundamental components—monetary awards, retaliation protection and confidentiality protection.<sup>36</sup> The Dodd-Frank Act provides (through an amendment to the Securities Exchange Act 1934) that the SEC can pay awards to eligible whistleblowers who provide the SEC with original information relating to a violation of securities laws, and where that information leads to an enforcement action yielding monetary sanctions of over US\$1 million. The range of awards for a whistleblower is between 10 and 30 per cent of the total monetary sanction.<sup>37</sup> In its report on the Dodd-Frank Act, the US Senate Committee on Banking, Housing and Urban Affairs stated that the Act's provisions for a monetary reward was a recognition that whistleblowers 'often face the difficult choice between telling the truth and the risk of committing "career suicide"'.<sup>38</sup> In Fiscal Year 2014, nine whistleblowers received awards under the Act, including a single record award of more than US\$30 million.<sup>39</sup> The Dodd-Frank Act also prohibits retaliation by employers against whistleblowers, and provides them with a private cause of action in the event their employment is terminated or they are otherwise discriminated against.<sup>40</sup> In 2014, the SEC exercised its anti-retaliation authority under the Act for the first time, resulting in a firm agreeing to pay US\$2.2 million for having engaged in a series of retaliatory actions against a whistleblower.<sup>41</sup>

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34 Geoffrey Christopher Rapp, 'Beyond protection: invigorating incentives for Sarbanes-Oxley corporate and securities fraud whistleblower', *Boston Law Review* 87, No. 91 (2007), p. 92.

35 President Barack Obama, 'Remarks by the President on 21<sup>st</sup> Century Financial Regulatory Reform', 17 June 2009, <https://www.whitehouse.gov/the-press-office/remarks-president-regulatory-reform>.

36 U.S. Securities and Exchange Commission, *2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2014), p. 1.

37 U.S. Securities and Exchange Commission, Office of the Whistleblower, <http://www.sec.gov/whistleblower>, accessed 12 November 2015.

38 As cited in Mavrakis and Legg, 'The Dodd-Frank Act whistleblower reforms', p. 29.

39 This particular reward, incidentally, went to a whistleblower living in a foreign country. U.S. Securities and Exchange Commission, *2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2014), p. 10.

40 Mavrakis and Legg, 'The Dodd-Frank Act whistleblower reforms', p. 30.

41 U.S. Securities and Exchange Commission, *2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2014), p. 19.

## *United Kingdom*

1.26 Comprehensive protections for both public and private sector whistleblowers in the United Kingdom are provided by the Public Interest Disclosure Act 1998 (UK-PIDA, not be confused with Australian legislation enacted in 2013 with an identical name and acronym, but a different purpose). UK-PIDA forms part of British employment law, inserting relevant provisions into the Employment Rights Act 1996.<sup>42</sup> While UK-PIDA has been criticised by some for failing to ensure whistleblower complaints are properly investigated<sup>43</sup>, the Act is noteworthy for its 'tiered' disclosure systems and the provisions it makes for compensating whistleblowers. In a 2013 report on whistleblowing in the European Union (EU), Transparency International wrote that as well as being the first comprehensive whistleblower law ever passed in the EU, the UK-PIDA 'is widely considered to be the strongest in Europe and among the best in the world'.<sup>44</sup> Transparency International concluded that the United Kingdom was one of only four of the 27 EU countries with 'advanced' whistleblower laws— having 'comprehensive or near-comprehensive provisions and procedures for whistleblowers who work in the public and/or private sectors'.<sup>45</sup>

1.27 Under UK-PIDA, whistleblowers can make protected disclosures to several different parties, including their employer, regulatory agencies, 'external' parties such as members of Parliament, or directly to the media. In effect, UK-PIDA provides a 'tiered' disclosure system, as the standards for accuracy and urgency differ depending on who the whistleblower makes the disclosure to.<sup>46</sup> 'Wider disclosures'—such as to the police, media, MPs, and so on—are allowed in certain circumstances, such as where the whistleblower believed they could be victimised if they raised the matter with the prescribed regulator, where the concern had already been raised with the employer or prescribed regulator, or where the concern was of an exceptionally serious nature.<sup>47</sup>

1.28 Importantly, UK-PIDA imposes a reverse-burden of proof on employers, requiring that they prove that any action taken against an employee or worker was not motivated by the fact the employee became a whistleblower.<sup>48</sup> UK-PIDA also

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42 Blueprint for Free Speech, paper, *United Kingdom – Whistleblowing Protection* (last modified 11 June 2014), <https://blueprintforfreespeech.net/document/united-kingdom>, accessed 12 November 2015.

43 Blueprint for Free Speech, *United Kingdom – Whistleblowing Protection*.

44 Transparency International, *Whistleblowing in Europe: Legal protections for whistleblower in the EU* (2013), p. 10.

45 The other three countries rated 'advanced' were Luxembourg, Romania and Slovenia. Transparency International, *Whistleblowing in Europe*, pp. 8–9.

46 Transparency International, *Whistleblowing in Europe*, p. 83.

47 Public Concern at Work, webpage, 'A guide to PIDA: Public Interest Disclosure Act 1998', <http://www.pcaw.org.uk/guide-to-pida>, accessed 12 November 2015.

48 Transparency International, *Whistleblowing in Europe*, p. 10.



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provides whistleblowers with protection from reprisals, and provides for uncapped compensation if an employee is dismissed for a disclosure. In addition to being able to seek compensation for actual financial losses, a whistleblower can also claim compensation for 'aggravated damages and injury to their feelings'.<sup>49</sup>

1.29 In practice, UK-PIDA's compensation mechanisms have not always worked as well as intended. Due to the expense of running whistleblower cases, many are settled before proceeding to the employment tribunal. Despite being banned by UK-PIDA, settlements often include 'non-disparagement clauses'— which are in effect 'gag orders'—preventing the whistleblower from further disclosures about the alleged misconduct, an outcome hardly consistent with the objective of greater transparency and openness.<sup>50</sup>

1.30 Despite this reported problem, whistleblowers in the United Kingdom can access meaningful sums of compensation in the instance they are victimised. One whistleblower, for example, was awarded compensation of £5 million.<sup>51</sup>

### ***Initiatives undertaken by multilateral bodies and international NGOs***

1.31 Initiatives to improve whistleblower protections have also been pursued at the multilateral level. Of particular note, whistleblower protection, both in the public and private sectors, has been a priority in the financial, economic and regulatory cooperation between G20 countries. The group 'recognised the crucial value of "insiders" to government and companies as a first and often best warning system for the types of poor financial practice, corruption and regulatory failure now proven as critical risks to the global economy'.<sup>52</sup>

1.32 A range of other multilateral organisations have issued standards and guidelines for the development of effective whistleblower laws in recent years, including the OECD, Council of Europe, and Organization of American States. This growing momentum to protect whistleblowers in part reflects that whistleblower protections are increasingly seen 'as a human right worthy of formal international recognition'.<sup>53</sup>

1.33 NGOs have also pushed for improved whistleblower protections in recent years. For example, Transparency International continues to campaign for improved whistleblower protections, and in November 2013 released a report on international

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49 Transparency International, *Whistleblowing in Europe*, p. 10.

50 Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 61.

51 Transparency International, *Whistleblowing in Europe*, p. 83.

52 Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 8.

53 Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 10.

principles for whistleblower legislation.<sup>54</sup> Underpinning Transparency International's work is the view that whistleblowing is not only critical for exposing corruption, fraud and other misconduct, but that it is in fact 'a natural extension of the right of freedom of expression, and is linked to the principles of transparency and integrity'.<sup>55</sup>

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1.34 Increasingly, governments, regulators, the public, press, and companies are developing a stronger appreciation of the important role whistleblowers play in preventing, exposing and stopping fraud and other misconduct in the corporate world. Yet the committee's recent interactions with corporate whistleblowers suggest that current laws are not as effective as they could be in encouraging whistleblowers to come forward, nor are they working very well to protect whistleblowers from retribution. The apparent shortcomings in Australia's corporate whistleblowing framework are considered in the next chapter. A number of specific areas for reform are put forward, in the hope this will help stimulate further discussion on this matter of high importance.

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54 Transparency International, *International principles for whistleblower legislation: best practices for laws to protect whistleblowers and support whistleblowing in the public interest* (2013), available at [http://www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation). For an overview of Transparency International's work on whistleblowing, see Transparency International, webpage, 'Our work on whistleblowing', [http://www.transparency.org/whatwedo/activity/our\\_work\\_on\\_whistleblowing](http://www.transparency.org/whatwedo/activity/our_work_on_whistleblowing), accessed 12 November 2015.

55 Transparency International, *International principles for whistleblower legislation*, p. 2.

## Chapter 2

### Possible reforms to Australia's corporate whistleblowing framework

2.1 This chapter outlines several areas of potential reform to Australia's corporate whistleblower framework. Some of these reforms respond to criticisms that current protections available for corporate whistleblowers are too narrow, and involve changing the definition of who qualifies for legal protection as a whistleblower, and when and how they can make a protected disclosure. Other suggested changes are directed toward improving internal company disclosure systems and attitudes towards whistleblowers in the corporate sector more broadly. Perhaps the most fundamental reform raised for consideration in this paper is the introduction of a compensation-based system for corporate whistleblowers.

2.2 Taken as a whole, the reforms suggested in this paper have the potential to build a whistleblower framework that, as one commentator has put it, creates 'a market of incentives and disincentives which form a market of compliance'.<sup>1</sup>

#### Shortcomings in the existing law

2.3 Witnesses addressing the issue of Australia's corporate whistleblower framework during the committee's inquiry into the performance of ASIC overwhelmingly argued the need for reform. Admittedly, support for reform was neither uniform nor universal. Notably, the Corporations Committee of the Law Council of Australia's Business Law Section maintained there was 'no serious defect in [the Part 9.4AAA] provisions or the way they have operated in practice'.<sup>2</sup> However, this view proved the exception, with most witnesses characterising the current whistleblower regime as out-of-date and inadequate, and in clear need of reform.<sup>3</sup>

2.4 Calls for reform to the whistleblower provisions in the Corporations Act are not new. Even when the whistleblower provisions were added to the Corporations Act in 2004, some suggested further reform would likely be required in the future. Indeed, the Parliamentary Joint Committee on Corporations and Financial Services' (Joint

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1 Kim Sawyer, 'Lincoln's Law: An Analysis of an Australian False Claims Act', paper, School of Historical and Philosophical Studies, University of Melbourne (September 2011), p. 38.

2 Senate Economics References Committee, *Performance of ASIC*, p. 202.

3 Senate Economics References Committee, *Performance of ASIC*, p. 202. While not provided as evidence to the inquiry, an interesting alternative view is offered by Brian Martin, who argues that whistleblower laws, however well-intentioned or designed, can only ever offer the 'illusion of protection'. He argues that energies would be better focused on building employee skills in terms of understanding organisation dynamics, collecting data, writing coherent accounts, building alliances and liaising with the media. Brian Martin, 'Illusions of whistleblower protection', *UTS Law Review*, No. 5 (2003), pp. 119–30.

Committee) report on the Corporate Law Economic Reform Program (CLERP) 9 Bill characterised the whistleblower provisions as 'sketchy in detail', even if their intention was clear. The committee concluded that the whistleblower provisions would ultimately require 'further refinement'.<sup>4</sup>

2.5 Specific concerns raised by the Joint Committee included the limited scope of the definition of protected disclosures, the lack of any requirement for companies to establish internal processes to facilitate whistleblowing, and the fact the proposed protections did not clarify what role, if any, ASIC had in preventing reprisals against whistleblowers, or acting to protect whistleblowers when reprisals took place. The Joint Committee also criticised the fact that the whistleblower protections did not extend to cover anonymous disclosures. It further recommended replacing the requirement that a whistleblower be acting in 'good faith' with a threshold test wherein a whistleblower needed to have 'an honest and reasonable belief' that an offence has or would be committed. (All of these issues are discussed further below.) The Joint Committee concluded that the proposed whistleblowing provisions were a step in the right direction, but 'only a first step' and not a particularly ambitious one at that.<sup>5</sup> Tellingly, the Joint Committee foreshadowed the future need for a comprehensive review of Australia's whistleblower framework:

Once the proposed whistleblower provisions come into operation, answers to the questions that it poses may become clearer. Indeed the longer term solution may be found in the development of a more comprehensive body of whistleblower protection law that would constitute a distinct and separate piece of legislation standing outside the Corporations Act and consistent with the public interest disclosure legislation enacted in the various states.<sup>6</sup>

2.6 Australia's corporate whistleblower protections were more recently the subject of a 2009 Treasury options paper, *Improving protections for corporate whistleblowers*. The paper suggested that the current corporate whistleblower regime did not appear to be working as intended, and noted that only four whistleblowers had ever used the whistleblower protections to provide information to ASIC.<sup>7</sup>

2.7 Despite the concerns raised in the options paper, after a brief series of consultations the review process stalled in early 2010. Treasury has advised the committee that the comment received in response to the options paper 'provided no

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4 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003, Part 1: Enforcement, executive remuneration, continuous disclosure, shareholder participation and related matters*, June 2004, Parliamentary Paper No. 122/2004, p. xxii.

5 PJCCFS, *CLERP 9 Bill*, June 2004, p. 29.

6 PJCCFS, *CLERP 9 Bill*, June 2004, p. xxii.

7 Treasury, *Improving protections for corporate whistleblowers: options paper*, October 2009, [http://archive.treasury.gov.au/documents/1620/PDF/whistleblower\\_options\\_papers.pdf](http://archive.treasury.gov.au/documents/1620/PDF/whistleblower_options_papers.pdf), p. iv.

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strong consensus on reforming protections for whistleblowers', and as such 'the issue was not taken further by the previous government'.<sup>8</sup>

2.8 Underlying the apparent inadequacies of Australia's current corporate whistleblower framework, it appears whistleblowers have made almost no use of the Part 9.4AAA protections.<sup>9</sup> In a 2013 article in the *Australian Business Law Review*, Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick highlighted the fact that 'virtually no use' has been made of the Part 9.4AAA protections, and suggested:

In part this may be because the whistleblower provisions under the Corporations Act offer protection under limited circumstances only, as discussed above. It may also be as a result of the fact that the negative implications of whistleblowing continue to outweigh potential benefits. The reasons why individuals do not blow the whistle, or regret it when they do, are many, but include reprisal, loss of employment if the employer consequently implodes, black-listing, publicity, psychological and emotional stress, and potential liability for contractual breaches. In the absence of clear incentives to disclose fraud, the regulatory value of private individuals as informants is heavily curtailed. It may be that not enough is currently being done to overcome disincentives and to encourage whistleblowing in the Australian corporate environment, and the failure of existing systems to protect Australian corporate whistleblowers sufficiently has been identified as offering evidence of the need for a different approach.<sup>10</sup>

Introducing incentives for whistleblowers and the adequacy of current whistleblower protections are considered in greater detail below.

2.9 During the committee's inquiry into the performance of ASIC, the regulator made several recommendations for improving the legislative protections for corporate whistleblowers. These recommendations, reproduced in Table 2.1, relate to the definition of 'whistleblower', the range of disclosures covered by whistleblower protections and clarifying when ASIC may resist orders for the production of information that might reveal a whistleblower's identity.

2.10 These recommendations were not considered to be contentious during the inquiry. The committee decided to reproduce ASIC's recommendations in its final report (recommendation 12).<sup>11</sup> However, the government simply 'noted' the

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8 Treasury, *Submission 154*, p. 11.

9 Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 295. The fact that no one appears to have been punished under the law for victimising a whistleblower is discussed further below, in the section 'Preventing and punishing the victimisation of whistleblowers'.

10 Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 297.

11 Senate Economics References Committee, *Performance of ASIC*, pp. 210, 224.

recommendation in its response to the report.<sup>12</sup> In the absence of any action by the government to reconsider the recommendation, the committee welcomes further discussion on its merit, and in particular whether expanding the definition of who might be considered a whistleblower and the scope of disclosures that attract the whistleblower protections is warranted.

**Table 2.1: ASIC's options for change regarding whistleblowers**

<i>Issue</i>	<i>Regulatory change options for consideration by government</i>
The definition of 'whistleblower' does not cover all of the people who may require whistleblower protections	<i>Expanding the definition</i> —expanding the definition of whistleblower in Pt 9.4AAA of the Corporations Act to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners
The whistleblower protections do not cover information relating to all of the types of misconduct ASIC may investigate	<i>Expanding the scope</i> —expanding the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate
The whistleblower protections are not sufficiently clear as to when ASIC may resist the production of documents that could reveal a whistleblower's identity	<i>Protecting whistleblower information</i> —amending the legislation so that ASIC cannot be required to produce a document revealing a whistleblower's identity unless ordered by a court or tribunal, following certain criteria

Source: ASIC, *Submission 45.2*, p. 13.

2.11 The remainder of this chapter considers other potential areas of reform for Australia's corporate whistleblower framework, including:

- the extent to which Australian Commonwealth law in relation to whistleblowers in the public sector can serve as a template for reforms to legislation applying to whistleblowers in the private sector;
- the possible introduction of reward-based whistleblower incentives or *qui tam* arrangements, similar to those that exist in the United States;

12 Government response presented out of sitting on 23 October 2014, and tabled on 27 October 2014, p. 9, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Additional_Documents).

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- strengthening the prohibition against and penalties for victimising whistleblowers;
  - enhancing or clarifying ASIC's ability to act as an advocate for whistleblowers, or appointing another body to fulfil this role;
  - recognising the importance whistleblowers generally place on being informed of actions undertaken in relation to matters they make a disclosure about;
  - extending corporate whistleblower protections to cover reports from anonymous whistleblowers;
  - removing the requirement that whistleblowers need to make their disclosure in 'good faith';
  - legislative and regulatory changes to encourage or require better internal disclosure systems and processes in Australian companies; and
  - extending whistleblower protections to cover external disclosures (for example, to the media) in certain circumstances.

### **The Australian *Public Interest Disclosure Act 2013*: A template for reform?**

2.12 In contrast to the lack of reform in the last decade in relation to corporate whistleblowing law, Australia's Commonwealth public sector whistleblowing framework recently underwent a major reform process. In 2008–09, the House of Representatives Standing Committee on Legal and Constitutional Affairs undertook an inquiry into whistleblowing protections within the Australian Government public sector. The committee released its final report, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, in February 2009. The government's response to the committee's recommendations in turn formed the basis for the reforms given effect by the *Public Interest Disclosure Act 2013* (AUS-PIDA).<sup>13</sup>

2.13 A number of experts told the committee during the inquiry into the performance of ASIC that in many respects AUS-PIDA represented a best-practice approach to whistleblower legislation, and recommended that it be used as a template for corporate whistleblower reform. For example, the charity 'Blueprint for Free Speech' wrote that AUS-PIDA was a 'world-leading protection regime for whistleblowers' in the public sector<sup>14</sup>, and argued that elements of the protection regime for public sector whistleblowers that might also be considered for the private sector, including:

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13 Parliamentary Library, Bills Digest No. 125, 2012–13, *Public Interest Disclosure Bill 2013* (3 June 2013), pp. 4–6. It might be noted that most Australian states and territories have also enacted public interest disclosure legislation to provide a framework for public sector whistleblowers. See Latimer and Brown, 'Whistleblower Laws', p. 770n18.

14 Blueprint for Free Speech, *Submission 165*, p. 4.

- the requirement for government departments to have a designated 'disclosure officer' to receive disclosures;
- better and easier access to compensation for whistleblowers in cases where they suffer reprisals;
- extension of whistleblower protections to allow external disclosures (for example, to the media) in situations where the whistleblower believes that an internal or ASIC investigation was inadequate;
- cost protections, so that in instances where a whistleblower seeks to enforce their rights through legal action, the costs of that action are only payable by the whistleblower where the action was brought vexatiously;
- protections for anonymous whistleblowers; and
- the existence of a dedicated Ombudsman with powers to investigate and hear the complaints of whistleblowers.<sup>15</sup>

Flinders Law School academic Dr Sulette Lombard notes that AUS-PIDA provides some guidance to whistleblowers and others as to what happens with information provided by whistleblowers, whereas the Corporations Act is silent on this.<sup>16</sup>

2.14 The contrast between Australia's relatively strong legislative protections for public sector whistleblowers and deficiencies in the law relating to private sector whistleblowers was highlighted in a September 2014 report on whistleblower protection laws in G20 countries. The report assessed whistleblowing laws against 14 best practice criteria (as set out in Appendix A), using three rating levels:

- 'very / quite comprehensive'
- 'somewhat / partially comprehensive', and
- 'absent / not at all comprehensive'.

Notably, Australia's public sector whistleblowing legislation received the highest rating for 11 of 14 criteria, and the middle rating for the three remaining criteria. In contrast, Australia's private sector whistleblower legislation received the middle rating for only five criteria, and the lowest rating for nine criteria.<sup>17</sup> The authors of the report avoided ranking G20 countries, on the grounds that the different criteria might carry different weight in terms of their importance.<sup>18</sup> The study nonetheless suggests that Australia's public sector whistleblowing laws are among the most comprehensive in

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15 Blueprint for Free Speech, *Submission 165*, pp. 4–5

16 Dr Sulette Lombard, *Proof Committee Hansard*, 10 April 2014, p. 52.

17 Wolfe et al., *Whistleblower protection laws in G20 countries*, pp. 6–7.

18 Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 12.



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the G20, yet Australia is very much in the middle of the pack in terms of its 'considerably weaker' private sector whistleblowing laws.<sup>19</sup>

2.15 The logic of treating public sector whistleblowers differently to whistleblowers in the private sector has been questioned by some observers. When Australia's public sector whistleblowing regime was reviewed by the House of Representatives Standing Committee on Legal and Constitutional Affairs in 2008, ANU law Professor Thomas Faunce told the committee:

[If] you are trying to develop a comprehensive and effective system of whistleblowing protections it is quite an artificial distinction to be simply looking at the public sector employees as if they operate in isolation from the private sector.<sup>20</sup>

In its final report, the House committee did not recommend covering public sector and private sector whistleblowing within the same legislative framework. It did, however, acknowledge that the legislative protections for private sector whistleblowers appeared 'piecemeal', and suggested that these protections might be usefully reviewed in the future.<sup>21</sup>

2.16 While not rejecting the value of PIDA-like arrangements in the private sector, Griffith University Professor AJ Brown has cautioned that 'detailed consideration' would need to be given to how such arrangements may need to be adjusted to ensure that they operate effectively in the private sector.<sup>22</sup> In contrast to Faunce's line of argument, in a 2006 paper Professor Brown argued against combining public and private sector whistleblowing legislation within the same law, at least in the 'foreseeable future', noting that difficulties include: the complexity and specificity of the regulatory regimes whistleblower laws are drafted in relation to; sectoral differences as to what constitutes a 'public interest' disclosure; and the fact that in Australia's federal system the public sector falls under nine separate jurisdictions, whereas much of the regulation of the private sector is now undertaken at the Commonwealth level.<sup>23</sup>

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19 Wolfe et al., *Whistleblower protection laws in G20 countries*, pp. 24–25. An important qualification attached to these findings is that the report only analysed the content of written law related to whistleblower protection in each country, not each country's actual implementation of the law or other factors (for instance, cultural and other norms) that may 'indirectly assist in practical protection of whistleblowers'. Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 12.

20 As cited in Thomas Faunce et al., 'Recovering fraudulent claims for Australian federal expenditure on pharmaceuticals and medical devices', *Journal of Law and Medicine* 18(2) (December 2010), p. 314.

21 Faunce et al., 'Recovering fraudulent claims', p. 314.

22 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 52.

23 Brown, *Public interest disclosure legislation in Australia*, p. 15.

2.17 ASIC took a cautious view of the extent to which PIDA-style provisions might be applied in the private sector in responses to questions on notice from the committee during the inquiry into the performance of ASIC. It suggested, on the one hand, that there might be 'some elements' of the public sector reforms that could be considered in a review of corporate whistleblower protections. However, ASIC added that:

...there may also be some different considerations applying to disclosures about private institutions than public institutions, including the greater need to balance privacy and confidentiality considerations.<sup>24</sup>

2.18 In its report on the performance of ASIC, the committee noted that the AUS-PIDA protections are regarded by many as world's best-practice. The committee recommended that a comprehensive review of Australia's corporate whistleblower framework should consider to the provisions in AUS-PIDA, and give detailed consideration to whether similar provisions might help improve Australia's corporate whistleblowing framework.<sup>25</sup> Given that there has not been any reform to Australia's corporate whistleblowing laws since the release of its report, the committee would welcome evidence on the merits of its recommendation in this regard.<sup>26</sup>

### **Reward-based incentives for whistleblowers**

2.19 Some observers have suggested that Australia should consider introducing rewards or other monetary incentives for corporate whistleblowers, drawing as appropriate on reward-based systems internationally, such as those in the United States (as outlined in the previous chapter). For example, renowned Australian lawyer Professor Bob Baxt told the committee that a system of rewarding whistleblowers with appropriate safeguards in place could potentially deliver several benefits. Regulators, he argued, would get 'better results which means that people will get better recovery regimes and the government will get a bit of money, because it will recover fines'.<sup>27</sup>

2.20 In his submission, Professor Brown highlighted the success of *qui tam* and reward-based disclosure incentives in other countries, including the United States, in helping detect corporate misconduct. He suggested allowing a whistleblower a percentage of money recovered from fraud or of the penalty imposed, had 'been at the heart of a significant expansion of attention on whistleblowing' by the SEC.<sup>28</sup> Professor Brown concluded that similar arrangements should be considered if

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24 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 24.

25 Senate Economics References Committee, *Performance of ASIC*, p. 207.

26 See, in particular, the 'committee view' at p. 42 and recommendation 15 at p. 225 of Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014).

27 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 15.

28 Professor AJ Brown, *Submission 343*, p. 9.

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Australian corporate whistleblower protections are to be best practice.<sup>29</sup> Similarly, Dr Brand, Dr Lombard and Mr Fitzpatrick have recently argued:

Empirical evidence provides some support for the argument that offering financial incentives for the supply of 'insider' information that would not otherwise come to light increases effective prosecution rates, at least in relation to enforcement of breaches of capital markets provisions.<sup>30</sup>

Dr Bowden has also argued that Australia should consider the adoption of a reward-based scheme for whistleblowers similar to that in place in the United States. In his view, concerns that reward-based schemes tend to negate the moral position of the corporate whistleblower were not necessarily well-founded, given the 'ultimate result is that the wrongdoing is stopped'.<sup>31</sup>

2.21 Dr Brand, Dr Lombard and Mr Fitzpatrick have noted that in an Australian context, commentators often argue that in the absence of underlying cultural change in the corporate sector, any enhanced whistleblower protections will be ineffective. While acknowledging the value of cultural change, they have argued that in light of the intransigence of many organisations, bounties may offer a 'credible alternative' to achieving change:

By contrast with the need to achieve internal cultural change, bounties allow for the harnessing of existing internal cultural preferences to achieve more effective information flows from whistleblowers to external regulators. In private enterprise corporate environments it might be expected organisational values would emphasise profits and financial rewards ahead of public duty, limiting the effectiveness of whistleblower programs. Bounties offer the opportunity to turn this dissonance neatly on its head, by relying on existing internal cultural emphasis on profits and monetary reward's to work to the advantage of external regulators. As such the 'bounty model' offers an alternative and potentially very fast-acting mechanism for achieving changed practices.<sup>32</sup>

2.22 Mr Jeff Morris, the whistleblower who was integral in exposing the Commonwealth Financial Planning Limited [CFPL] scandal, has previously suggested to the committee that a system which rewarded whistleblowers, like the system in the United States, would help to improve compliance in the Australian financial service industry:

I think what would clean up this industry overnight would be some form of financial compensation for whistleblowers that would allow them to move on with their lives and would encourage people to come forward, as we did.

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29 Professor AJ Brown, *Submission 343*, p. 9.

30 Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 298.

31 Dr Peter Bowden, *Submission 412*, p. 2.

32 Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 302.

In [the CFPL] case, the compensation paid to victims so far is in the order of \$50 million. If the institution at fault, as part of whistleblowing provisions, then had to pay the whistleblower, say, a certain percentage based on the actual compensation paid to victims—so that is established malfeasance, I suspect you would have a lot more whistleblowers coming forward. I would suspect you would find the institutions would have to improve their behaviour overnight if literally any employee could bring them down when they were doing the wrong thing with some sort of incentive—not necessarily a huge incentive, like in the United States, but some reasonable basis to allow people to move on with their lives.<sup>33</sup>

2.23 Asked if he was advocating a scheme to reward whistleblowers who disclosed corporate misconduct, Mr Morris answered that he would like to see either incentives or a compensation scheme introduced:

The last time I saw the person at ASIC he basically said to me in as many words, 'Thanks for sacrificing yourself.' It is not a very attractive prospect for anybody else to want to emulate what we did.<sup>34</sup>

2.24 Whistleblower 'bounty' systems are not without their critics. Perhaps the most basic objection to reward-based systems is that they risk encouraging unreliable or speculative claims by people motivated by potential monetary gain.<sup>35</sup> Other commentators argue that rewards are simply not effective, with insiders more likely to blow the whistle due to a sense of outrage about misconduct, rather than because of the existence of any reward. The rewards available through legislation such as the Dodd-Frank Act, these critics contend, constitute an 'unnecessary and misguided securities fraud deterrent'.<sup>36</sup>

2.25 Another common concern is that reward-based systems can potentially undermine the integrity of internal reporting mechanisms. For example, some observers in the United States have suggested the Dodd-Frank Act provides an incentive to whistleblowers to report misconduct to the SEC in the first instance, rather than report internally. To the extent a corporation could potentially remain ignorant of the alleged misconduct, its ability to take action (and do so quickly) could be diminished. As Susan Hackett, senior vice president and general counsel of the US-based Association of Corporate Counsel has put it, bounties create a risk that whistleblowers are actually 'working against the interests of compliance because their

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33 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 42.

34 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 43.

35 Mavrakis and Legg, 'The Dodd-Frank Act whistleblower reforms', p. 34.

36 Quote from Dave Ebersol, 'Blowing the Whistle on the Dodd-Frank Whistleblower Provisions', *Ohio State Entrepreneurial Business Law Journal* 6(213) (2011), pp. 138–39, as cited in Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 304.

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motivation doesn't become, "Let's fix it", or "This is wrong". It becomes "How can I collect?"<sup>37</sup>

2.26 While the Dodd-Frank rewards-system does not mandate internal reporting prior to a disclosure to the SEC, it does incorporate elements intended to encourage whistleblowers to utilise internal disclosure processes. The three main elements have been summarised by Mavrakis and Legg:

First, the criteria for determining the amount of an award provide that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award, and a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.

Secondly, the final rules provide that a whistleblower can receive an award for reporting original information to an entity's internal compliance and reporting systems, if the entity reports information to the SEC that leads to a successful SEC action. All the information provided by the entity to the SEC will be attributed to the whistleblower, which means that the whistleblower will get credit and potentially a greater award for any additional information generated by the entity in its investigation.

Thirdly, the final rule extends the time for a whistleblower to report to the SEC after first reporting internally and still be treated as if he or she had reported to the SEC at the earlier reporting date. The SEC originally proposed a 'lookback period' of 90 days after the whistleblower's internal report, but in the final rules extended this period to 120 days.<sup>38</sup>

2.27 Critics have also suggested that reward-based and *qui tam* systems could attract lawyers specialising in the aggressive pursuit of whistleblower claims. While some suggest that the actual prevention of misconduct becomes secondary to chasing legal fees, the rise of a specialist legal sub-profession is not without its merits. As Dr Brand, Dr Lombard and Mr Fitzpatrick have explained:

[America's] *qui tam* provisions have been credited with attracting the brightest and most able legal talent, bringing with them advanced skills in the handling of complex and difficult cases. While this trend has at times been criticised for its potential to result in the "risk of a gold rush of socially inefficient enforcement effort", recent empirical evidence is available to suggest development of such a specialised sub-profession can enhance regulatory enforcement activity. Australian commentators have pointed to the possibility of aggressive contingency fee-chasing lawyers in the United States entering a whistleblowing market, and it has been predicted that the quality of tips provided by whistleblowers will rise as they compete for "a piece of the awards pie", and as sophisticated counsel

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37 As cited in Mavrakis and Legg, 'The Dodd-Frank Act whistleblower reforms', pp. 36–37. Also see Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 299.

38 Mavrakis and Legg, 'The Dodd-Frank Act whistleblower reforms', p. 35.

begin to recruit potentially lucrative tipsters. All these factors taken together indicate the power of a bounty system to change the fundamentals of the whistleblowing environment.<sup>39</sup>

2.28 A common criticism is that the possible introduction of a reward-based 'bounty' system is inconsistent with Australian culture. According to Mr Medcraft, ASIC had itself weighed how a rewards-based system might be received by the Australian public, and the issue needed to be considered from a 'cultural perspective':

Are we are bounty hunter culture? Is it the Australian ethos to go after money in the same way? That is really a matter for community debate.<sup>40</sup>

2.29 Professor Baxt advised the committee that he disagrees that a reward-based system would be inconsistent with Australian culture, suggesting such approaches should be given serious consideration.<sup>41</sup>

2.30 Mr Medcraft acknowledged that compensation might provide would-be whistleblowers with some comfort that, if they lost their jobs or damaged their careers as a result of their disclosure, they would nonetheless receive some compensation. At the same time, Mr Medcraft explained that before an effective bounty reward system for corporate whistleblowers could be implemented in Australia, it would likely be necessary to increase the civil penalties Australian corporations were subject to:

Senator, on your question about the payment of a bounty, one of the issues, when we looked at it, is that the penalties are really low in Australia and the way that the system works in the States is that you get a percentage, and so would it actually be meaningful to have that? I guess it is a bit of a chicken-and-egg situation. If the penalties were more realistic then paying a percentage of them actually might then become an incentive. So I think you need to look at the issue with the penalties in mind as well.<sup>42</sup>

2.31 In its report on the performance of ASIC, the committee noted that the introduction of rewards for whistleblowers would constitute a 'fundamental shift in approach to corporate law enforcement in Australia'. The committee was advised that 'reward-based and *qui tam* systems appear to have improved rates of whistleblowing, and by extension the detection of corporate misconduct'. It therefore recommended that, as part of a broader review of Australia's current corporate whistleblowing

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39 Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', pp. 299–300.

40 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 25. See also ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 23.

41 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 16.

42 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 25. Whether the current penalty amounts and approach to corporate penalties should be reviewed was examined in chapter 23 of the committee's report on the performance of ASIC.

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framework, the government explore options for reward-based incentives for corporate whistleblowers.<sup>43</sup> In response, the government simply noted the recommendation.<sup>44</sup>

2.32 It is the committee's hope that this issues paper will help prompt renewed discussion about the possible merits of reward-based incentives for corporate whistleblowers.

### **Preventing and punishing the victimisation of whistleblowers, and compensating whistleblowers who are victimised**

2.33 As noted in the first chapter, the Corporations Act makes it a criminal offence to victimise a whistleblower because of a protected disclosure made by the whistleblower. The Act further provides that in the instance a whistleblower suffers material damage due to victimisation, he or she can claim compensation for that damage from the offender.<sup>45</sup>

2.34 However, the existence of such provisions do not assure they will be effective. A number of experts have questioned the usefulness of the Corporation Act's prohibition against and penalties for victimising whistleblowers. Melbourne University academic Kim Sawyer notes that there have been no prosecutions under the existing whistleblowing legislation for retaliation against whistleblowers, casting serious doubt on the deterrence effect of the law.<sup>46</sup> Monash academics Dr Janine Pascoe and Associate Professor Michelle Welsh similarly report that, as at the time of their research in August 2010:

...there had been no reported cases of any person seeking compensation for damages caused by a contravention of the victimization provisions, nor had there been any reported cases of criminal prosecutions alleging contravention of either the confidentiality or victimization provisions. There is no evidence of any enforcement activity of the whistleblower provisions by ASIC.<sup>47</sup>

2.35 In part, this might be attributed to the fact that it is often difficult to establish whether a whistleblower was victimised because they became a whistleblower or for an unrelated reason. ASIC acknowledges this difficulty in the general information it provides for whistleblowers on its website:

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43 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014), pp. 224 – 226.

44 Government response presented out of sitting on 23 October 2014, and tabled on 27 October 2014, p. 9, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Additional_Documents).

45 ASIC, *Guidance for whistleblowers*, <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>.

46 Sawyer, 'Lincoln's Law', pp. 2, 38.

47 Pascoe and Welsh, 'Whistleblowing, Ethics and Corporate Culture', p. 152.

The [Corporations Act] requires that the victimisation be the result of a protected disclosure. In many cases, particularly in the context of private employment, there may be arguments as to whether the conduct involved was victimisation as a result of the disclosure by the whistleblower or was done due to some other cause.<sup>48</sup>

2.36 Concerns have also been raised about the adequacy of provisions in the Corporations Act for the compensation for whistleblowers who have been victimised. In his submission to the committee's inquiry into the performance of ASIC, Professor Brown argued that the compensation provisions in Part 9.4AAA of the Corporations Act are limited and vague, providing no clear guidance about how an application for compensation can be made, the potential relief from costs risks, the situation regarding vicarious liability, the burden of proof.<sup>49</sup>

2.37 In the committee's experience, reprisals against whistleblowers are rarely direct, and the committee is not aware of a case where a whistleblower was terminated expressly because they became a whistleblower. The problem is compounded by the fact that acts of retaliation against whistleblowers often take forms more subtle than termination of employment or formal disciplinary action. As Dr Pascoe and Associate Professor Welsh have written, reprisals often occur in the form of 'petty harassment, the spreading of rumours, ostracism or the setting up of employees to fail'. Moreover, while the whistleblower's fight against victimisation is typically a lonely one, large and powerful organisations have extensive resources that can be used to defeat whistleblower claims of victimisation.<sup>50</sup>

2.38 Faced with such odds, it is perhaps not surprising that whistleblowers are typically unable or reluctant to seek remedy when they are victimised. For this reason, the committee believes the efficacy of the existing legal prohibition against victimising whistleblowers, the adequacy and enforceability of the penalties for doing so, and the availability of compensation for whistleblowers who are victimised, remain critical issues for consideration.

### **The need for an advocate for whistleblowers**

2.39 As noted in the previous chapter, following the release of the committee's report on the performance of ASIC, ASIC established an Office of the Whistleblower. While the establishment of the Office is a welcome step forward in ASIC's communications with whistleblowers and its handling of the information it receives from them, ASIC does not have a legislative mandate to act as an advocate for whistleblowers. ASIC's own website clearly sets out the limits of its role in relation to

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48 ASIC, *Guidance for whistleblowers*, <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>, accessed 12 November 2015.

49 Professor AJ Brown, *Submission 343*, p. 7.

50 Pascoe and Welsh, 'Whistleblowing, Ethics and Corporate Culture', p. 154.



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whistleblowers. It notes that the protections in the Corporations Act do not give ASIC any special standing or special power to:

- act for a whistleblower who is the subject of litigation;
- bring an application on behalf of a whistleblower whose employer has terminated their employment as a result of disclosure; or
- bring an action seeking compensation for a whistleblower for damage caused by victimisation.

2.40 ASIC further notes that it is not empowered to determine who is and is not a whistleblower, cannot provide a whistleblower with legal advice, and has no role in enforcing whistleblower protections.<sup>51</sup> As ASIC has previously advised the committee, whistleblowers 'will generally have to enforce their own rights' if seeking to rely on the statutory protections in the Corporations Act.<sup>52</sup>

2.41 During the ASIC inquiry, Mr Jeff Morris advised the committee that in deciding to 'go public' on the CFPL matter, he and two of his colleagues were effectively reconciled to losing their jobs. Mr Morris recalled that when the whistleblowers met with ASIC for the first time on 24 February 2010 (16 months after providing ASIC with an anonymous report) they were told by an ASIC official that from that day forward they had whistleblower protection, but that 'wouldn't be worth much'.<sup>53</sup> Asked about this comment, Mr Morris told the committee that he believed the ASIC officer in question was 'just being frank' about the limitations of the whistleblower protections:

[T]he whistleblower protections basically, as he said, [are] not worth much. But I think we had made a decision. We recognised at the outset that we would be giving up our jobs by what we were doing.<sup>54</sup>

2.42 Mr Morris and his colleagues also had little expectation that ASIC would be able to protect them. He noted that if a company intended to 'get rid of a whistleblower', they were unlikely to do it on the basis that a person had become a whistleblower.<sup>55</sup>

2.43 In a newspaper article by journalist Adele Ferguson, Mr Morris advised that he was essentially left to negotiate his own exit from CBA when he raised concerns with ASIC about death threats he believed had been made. He reported that:

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51 ASIC, website, *Guidance for whistleblowers*, <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>, accessed 12 November 2015.

52 ASIC, *Submission 45.2*, p. 136,

53 Mr Jeffrey Morris, *Submission 421*, p. 28.

54 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 41.

55 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 41.

...I was told by my ASIC contact in a rather offhand manner, 'It's probably bullshit, but if you're worried, go to police.'<sup>56</sup>

2.44 ASIC does not have a clear substantive role in protecting the interests of whistleblowers. This should not be taken to suggest that ASIC is negligent in its handling of whistleblowers—although admittedly some observers have suggested this—but it does point to a potential need to consider redefining ASIC's statutory role in regard to whistleblowers. As the Governance Institute has suggested to the committee, 'ASIC can only do so much in the narrow legislative regime that it has at the moment'. A clear need remains for:

...a more extensive regime giving much, much better protection not only to the regulator, which I think is what ASIC is focused on, but also to the whistleblower concerned.<sup>57</sup>

Alternatively, the government could consider whether there is a need for other structures to support whistleblowers, or to appoint a body other than ASIC to advocate on behalf of whistleblowers and ensure their interests are protected.

2.45 These concerns are not new. In its 2004 report on the CLERP 9 Bill, the Joint Committee noted that while the Bill made causing, or threatening to cause, detriment to a whistleblower a contravention of the Corporations Act:

...it does not specify whether ASIC or the company have a role in preventing reprisals from taking place and if they do what action they should take. In other words, it is unclear whether the onus rests solely on the whistleblower who has been subject to unlawful reprisal to defend his/her interests or whether the agency receiving the report should assume some responsibility for protecting the whistleblower.<sup>58</sup>

2.46 In light of this, the Joint Committee recommended that 'a provision be inserted in the Bill that would allow ASIC to represent the interests of a person alleging to have suffered from an unlawful reprisal'.<sup>59</sup> However, the Joint Committee's recommendation was not accepted by the government of the day. The government argued that in instances where a company violates the whistleblowing provisions, whistleblowers could pursue compensation under the statute:

Existing section 50 of the ASIC Act already provides ASIC with the ability in certain circumstances to commence civil proceedings in a person's name to recover damages. Where it is in the public interest, this would generally permit ASIC to represent a whistleblower in a claim for damages. However, this provision would not permit ASIC to conduct a criminal prosecution or

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56 Adele Ferguson, 'ASIC "asleep on the job" over CBA', *Sydney Morning Herald*, 6 August 2013.

57 Mr Douglas Gratton, Director, Governance Institute of Australia, Proof Committee Hansard, 10 April 2014, pp. 62–64

58 PJCCFS, *CLERP 9 Bill*, June 2004, p. 27.

59 PJCCFS, *CLERP 9 Bill*, June 2004, p. 28.

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to represent a whistleblower in an action for reinstatement. The Government considers that an ability for ASIC to represent a person in this sort of action is not necessary.<sup>60</sup>

2.47 During the ASIC inquiry several expert witnesses suggested to the committee that the lack of an advocate for whistleblowers was a major flaw in Australia's corporate whistleblowing framework. Professor Brown, for example, argued that ASIC needed the ability to investigate and remedy alleged reprisals regardless of whether the primary alleged misconduct is being investigated.<sup>61</sup> In his appearance before the committee, Professor Brown underlined the importance of this issue:

[T]he crucial question is: whether or when or which Commonwealth regulator, whether it is ASIC or whether it shared, should have a responsibility for being able to, more or less, intervene and seek remedies or take injunctions or step in in the management of and in the fates of individual whistleblowers before it gets any worse. Or if it has already got to the stage of being something which is compensable damage, stepping in to make sure that the action is taken that would lead to that compensation being paid. So the questions are about who should provide the real glue in the system to make protection and/or compensation real. Those are very important questions. Somebody has to do it, otherwise it will not happen.<sup>62</sup>

2.48 Professor Brown subsequently explained that in the absence of an overarching system for protecting all corporate whistleblowers, ASIC should have a responsibility to protect its own whistleblowers. However, he suggested there was ultimately a need to:

...think about creating an infrastructure whereby that responsibility can be satisfied more effectively, whether it is by the Fair Work Ombudsman or through the Fair Work system, or more generally, or a separate office that covers whistleblower protection right across all employers, so that ASIC does not have to do it and can retain its core focus on corporate regulation and enforcement of corporate law.<sup>63</sup>

2.49 In its report on the performance of ASIC, the committee questioned whether ASIC had the resources or expertise necessary to act as an effective advocate for whistleblowers. Partly for this reason, the committee recommended the establishment of an ASIC Office of the Whistleblower, which could 'provide a dedicated point for all whistleblowers to contact ASIC, ensuring that specialist staff are managing and protecting whistleblowers'.<sup>64</sup> The committee would welcome input on whether there

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60 Australian Government response to Parliamentary Joint Committee on Corporations and Financial Services, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003* [hereafter Government response to PJCCFS CLERP 9 report], March 2005, p. 5.

61 Professor AJ Brown, *Submission 343*, pp. 11–13.

62 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 57.

63 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 58.

64 Senate Economics References Committee, *Performance of ASIC report*, p. 224.

is, in fact, a need to create clearer structural supports for whistleblowers and, if so, if it would be appropriate for ASIC or another a government agency to fulfil this role.

### **Acting on disclosures and keeping whistleblowers 'in the loop'**

2.50 In a submission to the committee, Dr Brand and Dr Lombard noted that the Corporations Act provides little or no guidance in terms of keeping a whistleblower informed of actions taken in relation to the information they provide. This serves, they argued, to dissuade would-be whistleblowers from making disclosures. In contrast, PIDA outlines how disclosures should be dealt with and imposes a general obligation to investigate disclosures. Further, where a decision is made not to investigate a disclosure, PIDA:

...creates a statutory requirement to inform the whistleblower of the reasons why, and requirements are imposed in relation to the length of any investigation, as well as an obligation to give the whistleblower a copy of the report of the investigation.<sup>65</sup>

2.51 When asked about Dr Brand and Dr Lombard's suggestion, ASIC responded that whereas PIDA was directed towards the inherent public interest in the transparency of public institutions, different considerations may need to be weighed in regard to the private sector. ASIC acknowledged the interest whistleblowers have in how ASIC has acted on the information they have provided, and reiterated that it had updated its approach to communicating with whistleblowers. At the same time, ASIC told the committee that there were limitations on the amount of information it could provide to whistleblowers:

Whistleblowers are not themselves subject to confidentiality obligations, and they may have different or additional motives to those of ASIC. In general, it can be difficult for ASIC to be as open about our investigations as we would like to in all cases, including because this could jeopardise the success of the investigations or future legal proceedings. These factors would all need to be considered in deciding whether to include such requirements in Pt 9.4AAA.<sup>66</sup>

2.52 The committee acknowledges the legitimacy of such concerns, and agrees that any statutory requirement to keep whistleblowers 'in the loop' would need to be weighed against the difficulties this might create in terms of ongoing investigation. Nevertheless, the committee believes such a statutory requirement may have merit, and suggests the issue is worthy of further discussion.

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65 Dr Vivienne Brand and Dr Sulette Lombard, *Submission 419*, pp. 2–3. The same argument is presented in Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory system', p. 295.

66 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 23.

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## Protecting anonymous disclosures

2.53 The whistleblower protections in the Corporation Act do not currently cover anonymous disclosures. Some experts have questioned the wisdom of excluding anonymous disclosures from the protections, and argued the need for reform in this area.

2.54 Debate emerged when the protections were first introduced. The PJCCFS's 2004 report on the CLERP 9 Bill recommended that the government consider extending whistleblower protections for anonymous disclosures. It argued that a requirement that a person making a disclosure must have 'an honest and reasonable belief' that an offence has or will be committed (the PJCCFS's preferred alternative to the 'good faith' test that was ultimately legislated) would provide a safeguard against vexatious anonymous disclosures.<sup>67</sup>

2.55 The government of the day rejected the PJCCFS's recommendation, arguing that extending the whistleblower protections to cover anonymous disclosures:

...may encourage the making of frivolous reports, and would generally constrain the effective investigation of complaints. Allowing anonymity would also make it more difficult to extend the statutory protections to the relevant whistleblower.<sup>68</sup>

2.56 In the course of the committee's inquiry into the performance of ASIC, the regulator also cautioned that in instances where a whistleblower chose to remain anonymous, this could complicate ASIC's investigate role. Asked if whistleblower protections should be extended to cover anonymous disclosures, ASIC responded:

We understand that potential whistleblowers may wish to remain anonymous for fear of reprisal, reputational damage or other negative consequences of their whistleblowing. Nevertheless, it can be important for ASIC to know the identity of a whistleblower for practical purposes, including to substantiate their claims and progress the investigation.<sup>69</sup>

2.57 Due to the risk of frivolous reports and the need to substantiate allegations, it is generally accepted that it is preferable for a whistleblower to identify themselves properly when making a disclosure, either internally or to an external regulator. In providing an overview of international best practice in whistleblower laws, Associate Professor Paul Latimer and Professor AJ Brown have suggested that, 'as a matter of policy, anonymous whistleblowing should be seen as a last resort'. However, they also argued that while requiring identification might introduce some accountability into the process, it could also discourage disclosure. In this sense, precluding the

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67 PJCCFS, *CLERP 9 Bill*, June 2004, p. xxix.

68 Government response to PJCCFS CLERP 9 report, p. 4.

69 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 21.

possibility of anonymous disclosure entirely was inconsistent with best practice, which:

...aims to maximise the flow of information necessary for accountability and to provide reliable protected channels for anonymous disclosures.<sup>70</sup>

2.58 A 2014 report on whistleblower laws in G20 countries pointed to what the authors considered a pressing need for 'clear rules that encourage whistleblowing by ensuring that anonymous disclosures can be made, and will be protected.'<sup>71</sup> The ability for whistleblowers to make an anonymous disclosure is often critical is encouraging them to take the first step in contacting auditors or regulators:

Research and experience shows that whistleblowers will often identify themselves, and provide invaluable information, if first afforded the facility to make an anonymous disclosure or enquiry, in the knowledge that, if later identified, protection will extend to their original disclosure.<sup>72</sup>

2.59 While some commentators have argued that protecting anonymous whistleblowers presents practical difficulties, Professor Brown has pointed out that such difficulties were unlikely to arise, as:

...the protections and other obligations are only triggered if or when the identity of the whistleblower is subsequently revealed, and confirmed to be within the statutory definition above.<sup>73</sup>

2.60 In its report on the performance of ASIC, the committee recommended extending legal whistleblower protections to cover anonymous disclosures. In its work since, the committee has received evidence from a number of parties—including whistleblowers—which has served to demonstrate how important anonymity can be to a whistleblower, particularly when they first decide to make a disclosure. While the committee remains of the view that anonymous disclosures should be eligible for whistleblower protections, it invites interested parties to provide further advice on the matter.

### **Should the 'good faith' requirement be removed?**

2.61 As noted earlier, in order to qualify for the whistleblower protections in the Corporations Act, a person must make a disclosure in good faith. In its guidance for whistleblowers, ASIC explains that this means:

... your disclosure must be honest and genuine, and motivated by wanting to disclose misconduct. Your disclosure will not be 'in good faith' if you have any other secret or unrelated reason for making the disclosure.<sup>74</sup>

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70 Latimer and Brown, 'Whistleblower laws', p. 774.

71 Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 2.

72 Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 20.

73 Professor AJ Brown, *Submission 343*, p. 4.

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The explanatory material for the CLERP 9 Bill explained that the requirement was intended to 'discourage malicious or unfounded disclosures being made to ASIC'.<sup>75</sup>

2.62 The objective of the 'good faith' requirement is itself in keeping with international best practice: as Associate Professor Latimer and Professor Brown have written, 'whistleblower laws should not protect disclosure of *false* information actuated by personal grievance, malice or vindictiveness, and whistleblower best practice does punish persons with such inadmissible motives'.<sup>76</sup> However, while it is not contentious to suggest that whistleblower laws should seek to discourage (and ideally prevent) disclosures of spurious information, many experts argue that a disclosure motivated by a personal grievance or other less than pure intentions can still be useful. What ultimately matters, these experts argue, is not the whistleblower's motivation, but rather the veracity of the information disclosed. In this sense, the 'good faith' requirement, in seeking to discourage false and frivolous disclosures, may in fact be serving as a barrier to corporate whistleblowing in Australia.

2.63 The PJCCFS's 2004 report on the CLERP 9 Bill had, for this reason, recommended that the 'good faith' requirement be removed for the proposed protections:

[T]he veracity of the disclosure is the overriding consideration and the motives of the informant should not cloud the matter. The public interest lies in the disclosure of the truth.<sup>77</sup>

2.64 The then-government did not accept the recommendation, responding that the 'good faith' requirement would help minimise vexatious disclosures and ensure persons making disclosures did not have 'ulterior motives'. The removal of the 'good faith' requirement could, it argued:

...give rise to the possibility that a disgruntled employee might attempt to use the [whistleblower] provisions as a mechanism to initiate an unnecessary investigation and thereby cost the company time and money.<sup>78</sup>

2.65 Echoing the PJCCFS's concerns about the 'good faith' requirement, in the course of the inquiry into the performance of ASIC a number of witnesses questioned the value of the requirement and argued for its removal. For instance, Professor Brown argued that the 'good faith' requirement is 'out of date and inconsistent with the

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74 ASIC, webpage, *Guidance for whistleblowers*, <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>, accessed 12 November 2015.

75 ASIC, webpage, *Whistleblowers: company officeholder obligations*, <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/>, accessed 12 November 2015

76 Latimer and Brown, 'Whistleblower Laws', pp. 767–68 (emphasis added).

77 PJCCFS, *CLERP 9 Bill*, June 2004, p. 21.

78 Government response to PJCCFS CLERP 9 report, March 2005, pp. 3–4.

approach taken by Australia's public sector whistleblowing legislation, as well as best practice legislative approaches elsewhere':<sup>79</sup>

For several reasons, 'good faith' is not a useful concept to appear at all in whistleblowing legislation. Motives are notoriously difficult to identify and may well change in the process of reporting, for example, when an internal disclosure is ignored or results in the worker suffering reprisals. Because it is such a subjective and open-ended requirement, the likely effect of a good faith test is negative—that workers simply choose not to report their suspicions about wrongdoing, because they are unsure whether or how this test would be applied to their circumstances.<sup>80</sup>

2.66 Professor Brown suggested that the only proper test was that which applied in PIDA: that a disclosure must be based on an honest belief, on reasonable grounds, that the information shows or tends to show defined wrongdoing; or does show or tends to show such wrongdoing, on an objective test, irrespective of what the discloser believes it to show.<sup>81</sup> Similarly, the Blueprint for Free Speech suggested that the 'good faith' requirement had the unhelpful effect of shifting the focus from the importance of the information disclosed to the motives of the whistleblower.<sup>82</sup>

2.67 Dr Bowden explained why he believed the 'good faith' requirement should be removed by way of example:

[I]f you were under a supervisor who consistently pushes the envelope on his ethical behaviour and eventually you end up by blowing the whistle on something that you think is going to get through, are you acting in good faith or not? It is hard to tell. But if you pointed out a wrongdoing, that is enough for me. My own belief is that the good faith requirement should be scrapped entirely. It is whether they have revealed a wrongdoing and a clear wrongdoing at that, a provable wrongdoing at that.<sup>83</sup>

Dr Brand supported Dr Bowden's reasoning, telling the committee that the key issue was the 'quality of the information' provided, rather than the motivation for providing the information. Lombard added that while it was reasonable to want to prevent vexatious whistleblowing, there were better ways to achieve this than the current 'good faith' test.<sup>84</sup>

2.68 Professor Brown explained that all the research on why people became whistleblowers indicated that a decision to make a disclosure basically involved a judgement on whether anybody was going to be interested in receiving the

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79 Professor AJ Brown, *Submission 343*, p. 4.

80 Professor AJ Brown, *Submission 343*, p. 4.

81 Professor AJ Brown, *Submission 343*, p. 4.

82 Blueprint for Free Speech, *Submission 165*, p. 3.

83 Dr Peter Bowden, *Proof Committee Hansard*, 10 April 2014, p. 54.

84 Dr Sulette Lombard, *Proof Committee Hansard*, 10 April 2014, p. 54.



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information, and whether the discloser would receive support and recognition for making the disclosure. Professor Brown explained that 'those very basic messages':

...are influenced very strongly as soon as you introduce things like a good faith requirement. The classic example was that, previously, I think in around 2007 or 2008, on the ASIC website there was specific guidance to anybody who was seeking to use part 9.4AAA that they would have to reveal the information in good faith. At that time, the advice on the ASIC website was to the effect that that would not include information that was malicious. All good investigators—and I have my own investigation background—know that information that is provided for malicious reasons can be just as useful and important and revealing as other information. It does not mean that it is not information which should be revealed.<sup>85</sup>

2.69 According to Professor Brown, the lack of precision as to what was meant by 'good faith' also left whistleblowers vulnerable to accusations that they had an ulterior motive in making a disclosure. As such, would-be whistleblowers might conclude that it was not worth making a disclosure on the grounds that no one would take them seriously.<sup>86</sup>

2.70 The committee's conclusion in its report on the performance of ASIC was that the 'good faith' requirement 'serves as an unnecessary impediment to whistleblowing, and should be removed from the Corporations Act'.<sup>87</sup> As such the committee recommended that the requirement be removed, and replaced with a requirement that a disclosure:

- is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or
- shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes.

The committee would welcome feedback from interested observers as to the merits of replacing the 'good faith' requirement with such a requirement.

### **Improving internal disclosure**

2.71 The committee's recent inquiries have demonstrated the importance of corporations fostering cultures of openness that support and encourage employees to report internal misconduct. Equally, corporations should implement internal disclosures system that provide employees with the confidence that reports of

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85 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 55.

86 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 55.

87 Senate Economics References Committee, *Performance of ASIC*, p. 223.

misconduct will be treated with appropriate seriousness and, where necessary, properly investigated and resolved without harm to the whistleblower.<sup>88</sup>

2.72 In addition to providing company officeholders and auditors with advice as to their legal obligations in regard to whistleblowers under the Corporations Act, ASIC also provides advice to companies on how they should handle revelations from a whistleblower and the procedures they might consider establishing in this regard.<sup>89</sup>

2.73 Standards Australia, Australia's peak non-government standards development and approval body, also has an Australian Standard (AS 8004-2003) on whistleblowers. The standard is intended to 'provide guidance for entities seeking to implement a whistleblower protection program'.<sup>90</sup> Compliance with the standard is voluntary. The Australian Securities Exchange's Corporate Governance Council *Corporate Principles and Recommendations* ('the ASX Principles') includes advice regarding internal whistleblowing processes. Specifically, the ASX Principles suggest that organisations identify the measures they have in place to encourage disclosures of unlawful and unethical behaviour, potentially including how whistleblowers are protected. The ASX Principles also refer organisations to AS 8004-2003 for guidance on whistleblower programs.<sup>91</sup> Similar to the Australian Standard, the ASX Principles are not mandatory, and their use and influence may be limited.<sup>92</sup> Research by Dr Pascoe and Associate Professor Welsh found that as of June 2010 only 31.5 per cent of ASX 200 companies had developed whistleblower policies and procedures that are compliant with the ASX Principles and AS 8004-2003.<sup>93</sup>

2.74 While it is hardly controversial to suggest that corporate cultures of openness and robust internal disclosure systems are beneficial, a number of experts have suggested that lawmakers have a role to play in promoting these outcomes. In the

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88 A similar point is made in KordaMentha, *Blowing the whistle: Protection for whistleblowers in Australia* (September 2014), p. 3, <http://www.kordamentha.com/docs/default-source/for-publications/issue-14-05-protection-for-whistleblowers-in-australia.pdf>.

89 ASIC, Whistleblowers: company officeholder obligations', <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/>.

90 Standards Australia, *Submission 16* (August 2008), House Standing Committee on Legal and Constitutional Affairs, Inquiry into whistleblowing protections within the Australian Government public sector.

91 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 3<sup>rd</sup> Edition (2014), p. 20.

92 Brand, Lombard and Fitzpatrick, 'Bounty hunters, whistleblowers and a new regulatory paradigm', p. 295.

93 21.5 per cent of ASX 200 companies had whistleblowing 'arrangements' that fell short of being developed whistleblowing policies and procedures; 2 per cent were in the process of developing whistleblowing policies and procedures; 19 per cent had no such policies and procedures; for 22.5 per cent of companies it was unclear what arrangements they had in place. Pascoe and Welsh, 'Whistleblowing, Ethics and Corporate Culture', pp. 164–66.

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broadest sense, international best practice in whistleblower laws, as Brown and Latimer have explained, 'promotes, protects and respects internal disclosure and resolution by disclosure in the first instance' through internal channels.<sup>94</sup> More specifically, some commentators have argued for the introduction of a statutory requirement for companies to establish internal whistleblower systems. Such a requirement, it is argued, would provide the catalyst for creating more open, transparent corporate cultures. For instance, Dr Pascoe and Associate Professor Welsh have written that a 'positive statutory obligation would signal that the protection of whistleblowers ought not to be a discretionary matter under corporate governance guidelines'.<sup>95</sup>

2.75 The possibility of a statutory requirement for corporations to establish internal disclosure systems was addressed in the Joint Committee's 2004 report on the CLERP 9 Bill. The PJCCFS recommended that:

...a provision be inserted in the Bill that would require corporations to establish a whistleblower protection scheme that would both facilitate the reporting of serious wrongdoing and protect those making or contemplating making a disclosure from unlawful retaliation on account of their disclosure.<sup>96</sup>

The Joint Committee noted that in the United States the Sarbanes-Oxley Act requires that every public company in the United States establish mechanisms which allow employees to provide information anonymously to the company's board of directors. Sarbanes-Oxley also stipulates that disclosures made through this internal reporting mechanism constitute protected whistleblower activity.<sup>97</sup>

2.76 The then government did not accept the recommendation, on the grounds that:

Prescribing particular systems which all companies must implement in order to facilitate whistleblowing could prove to be overly rigid and unsuitable for particular companies in the Australian market.<sup>98</sup>

2.77 Addressing concerns about the potential regulatory burden of a statutory requirement of this sort, Professor Brown explained to the committee during the inquiry into the performance of ASIC that the overwhelming majority of whistleblower complaints in the private sector (over 90 per cent) were made internally in the first instance. In cases where an internal disclosure was dealt with quickly and properly, Professor Brown reasoned, the entire whistleblower system worked more efficiently and the burden on ASIC was reduced.<sup>99</sup> Professor Brown

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94 Brown and Latimer, 'Whistleblower Laws', pp. 776–77.

95 Pascoe and Welsh, 'Whistleblowing, Ethics and Corporate Culture', p. 153.

96 PJCCFS, *CLERP 9 Bill*, June 2004, p. xxii.

97 PJCCFS, *CLERP 9 Bill*, June 2004, p. 12.

98 Government response to PJCCFS CLERP 9 report, March 2005, p. 2.

99 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 59.

added that a requirement for companies to have internal whistleblower arrangements in place could work in the interest of a company, and such a requirement should:

...incentivise businesses to adopt whistleblower protection strategies by offering defences or partial relief from liability, for itself or its managers, if the business can show (a) it had whistleblower protection procedures of this kind, (b) that the procedures were reasonable for its circumstances, and (c) that they were followed (i.e. that the organisation made its best efforts to prevent or limit detriment befalling the whistleblower).<sup>100</sup>

Professor Brown also noted that this approach appeared to be working in the United States.<sup>101</sup>

2.78 The lack of a 'mandated requirement for Australian corporates to institute internal structures to facilitate whistleblowing' was a point of concern in the submission to the ASIC inquiry made by Dr Brand and Dr Lombard. Such a requirement, they argued, would improve the incidence of whistleblowing, with evidence suggesting that 'the level of whistleblowing activity in a corporation is positively associated with the level of internal support for whistleblowing'. Also, rather than increasing the regulatory burden on ASIC, good internal systems 'have the potential to ensure tips are "screened", thus reducing pressure on the public regulator (i.e. ASIC) and preserving resources'.<sup>102</sup>

2.79 Dr Brand and Dr Lombard further noted that AUS-PIDA appears to recognise the advantages of internal reporting systems, inasmuch as external disclosures are generally only permitted after an internal disclosure has been made. In this way, they argued:

...PIDA offers a model for increased activity within corporations in relation to whistleblowing handling and response, with the possibility of concomitant increases in the level of whistleblowing activity, and the potential for reduced demand on ASIC's resources.<sup>103</sup>

2.80 Discussing the potential regulatory burden of a requirement for companies to establish and maintain internal whistleblower systems, Dr Brand emphasised that the internal compliance requirements that might be imposed on companies should be 'part of a positive message', and undertaken in a 'light touch' manner. Such an approach might include:

...saying the directors' annual report needs to refer to whether there is an internal whistleblowing system and whether there was ever an occasion in a given 12-month period where the timelines for response were not met, or where the matter was referred externally because the whistleblower was not

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100 Professor AJ Brown, *Submission 343*, pp. 5–6.

101 Professor AJ Brown, *Proof Committee Hansard*, 10 April 2014, p. 59.

102 Dr Vivienne Brand and Dr Sulette Lombard, *Submission 419*, pp. 1–2.

103 Dr Vivienne Brand and Dr Sulette Lombard, *Submission 419*, p. 2.

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happy with the response they got, which is the public interest disclosure model. We think even a little thing like that could make a big difference...<sup>104</sup>

2.81 While a requirement for companies to put in place certain internal disclosure mechanisms might be regarded by some as onerous, the committee's work in recent years has shown just how costly an absence of effective disclosure systems can be for a company. As explored at length in the committee's report on the performance of ASIC, the CBA failed comprehensively in its response to and handling of reported misconduct in its financial planning division. While this failure delayed action to end the misconduct and compensate victims, the entire episode has also proved very expensive for the CBA. Prior to the launch of the current Open Advice Review Program (OARP) in July 2014, the CBA had already paid approximately \$52 million in compensation to more than 1,100 customers; since then, another 110 offers of compensation totalling nearly \$1.8 million have been made under the OARP.<sup>105</sup> In the committee's view, it is highly likely that the cost to both victims of the misconduct and to the CBA itself would have been lower had the CBA had better internal disclosure systems in place at the time.

2.82 In its report on the performance of ASIC, the committee did not make any recommendations regarding a statutory requirement for companies to establish and maintain internal whistleblower systems. However, the committee did express the view that consideration should be given to mechanisms that encourage or require companies to implement proper whistleblower systems and processes. The benefits of any requirement for companies to implement such systems, the committee added, should be 'weighed against the regulatory burden this might impose on Australian businesses'.<sup>106</sup> Still, in light of continuing reports to the committee of failures in whistleblowing systems in the corporate sector, the committee would be pleased to receive recommendations on how the internal disclosure systems and processes of Australian corporations might be improved.

### **Protecting disclosures to third parties, such as the media**

2.83 While there is a strong rationale for encouraging and protecting internal disclosures, many experts argue there is also a need to provide whistleblowers with clear avenues to disclose information to third parties in certain circumstances. For instance, Professor Brown told the committee during the inquiry into the performance

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104 Dr Vivienne Brand, *Proof Committee Hansard*, 10 April 2014, p. 56.

105 Mr Ian Narev, Chief Executive Officer of the Commonwealth Bank, media release, 3 July 2014, <https://www.commbank.com.au/about-us/news/media-releases/2014/statement-to-our-customers-from-ian-narev.html>, accessed 16 November 2015; Correspondence from the CBA to the Senate Economics References Committee, 2 November 2015, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Scrutiny\\_of\\_Financial\\_Advice/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice/Additional_Documents).

106 Senate Economics References Committee, *Performance of ASIC report*, p. 223.

of ASIC that the fact that the Part 9.4AAA protections do not extend to corporate whistleblowers who take their disclosure to the media or other third parties is a 'major gap'. There were circumstances, Professor Brown argued, in which it was widely accepted that this approach was reasonable; for example, where an internal disclosure or disclosure to the regulator was not acted on, or where it was impossible or unreasonable to make an internal disclosure or disclosure to ASIC.<sup>107</sup>

2.84 In evidence given to this committee, ASIC itself appeared open to the idea of extending whistleblower protections to cover disclosure to third parties in certain situations. Asked whether the whistleblower protections should be extended to cover external disclosures to the media, ASIC responded:

There may be circumstances where a person suffers reprisal following their making external disclosures to third parties, such as the media, and it may be useful to consider extending the whistleblower protections in such a situation.<sup>108</sup>

2.85 An important consideration in this respect is that an ability for whistleblowers to raise their concerns with a third party—be it the media, members of parliament, NGOs or unions—creates a powerful incentive for companies to ensure their internal disclosure systems are highly effective. As the manager of compliance at Phillip Morris International, Bob Ansell, once explained, the possibility that a whistleblower might take their information to a third party created 'a compelling case' for companies like his to ensure they were quick to identify misconduct within the company: 'I would much rather people speak to me than a newspaper or *Today Tonight*'.<sup>109</sup>

2.86 In recent years, the committee has received testimony from whistleblowers who justifiably felt it was neither safe nor effective for them to make a disclosure within their organisation, or had confronted serious obstacles in doing so. Other whistleblowers, for a variety of reasons, felt unable to approach ASIC with their information, or were unsatisfied with ASIC's handling of their disclosure. In light of evidence received during the inquiry into the performance of ASIC and its experience in recent years with whistleblowers, the committee reiterates the recommendation made in its performance of ASIC report that whistleblower protections be extended to cover external disclosures to third parties in limited circumstances.

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2.87 The potential reforms outlined above are clearly broad-ranging, and at first blush may even seem rather disparate. However, each of the reforms is directed either separately or in combination to encourage and assist whistleblowers to make disclosures, protect their interests once they make a decision to blow the whistle, and ensure companies and regulators take whistleblower disclosures seriously and act to

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107 Professor AJ Brown, *Submission 343*, p. 9.

108 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 21.

109 As quoted in Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 20.

end reported misconduct. In short, the while each of the reforms addressed above might be considered in isolation, the committee believes such reforms are best considered with a view to the larger objective of a more effective framework for corporate whistleblowing in Australia.

2.88 Items for discussion are set out at the start of this issue paper. In addition to the individual items listed, the committee is also keen to receive evidence on the 'bigger picture' of corporate whistleblowing in Australia.

2.89 Finally, while the committee considers there is merit in implementing reforms in each of the areas covered above, it maintains an open mind on these matters, and hopes to hear a wide variety of perspectives subsequent to the publication of this paper. It should be reiterated at this point that this issues paper is first and foremost intended to stimulate renewed debate on the adequacy and efficacy of the existing framework for corporate whistleblowing in Australia.

2.90 The committee looks forward further discussion on this issue of critical national importance.





## Appendix A

### Summary of best practice criteria for whistleblowing legislation

#	Criterion short title	Description
1	Broad coverage of organisations	Comprehensive coverage of organisations in the sector (e.g. few or no ‘carve-outs’)
2	Broad definition of reportable wrongdoing	Broad definition of reportable wrongdoing that harms or threatens the public interest (e.g. including corruption, financial misconduct and other legal, regulatory and ethical breaches)
3	Broad definition of whistleblowers	Broad definition of “whistleblowers” whose disclosures are protected (e.g. including employees, contractors, volunteers and other insiders)
4	Range of internal / regulatory reporting channels	Full range of internal (i.e. organisational) and regulatory agency reporting channels
5	External reporting channels (third party / public)	Protection extends to same disclosures made publicly or to third parties (external disclosures e.g. to media, NGOs, labour unions, Parliament members) if justified or necessitated by the circumstances
6	Thresholds for protection	Workable thresholds for protection (e.g. honest and reasonable belief of wrongdoing, including protection for “honest mistakes”; and no protection for knowingly false disclosures or information)
7	Provision and protections for anonymous reporting	Protections extend to disclosures made anonymously by ensuring that a discloser (a) has the opportunity to report anonymously and (b) is protected if later identified
8	Confidentiality protected	Protections include requirements for confidentiality of disclosures
9	Internal disclosure procedures required	Comprehensive requirements for organisations to have internal disclosure procedures (e.g. including requirements to establish reporting channels, to have internal investigation procedures, and to have procedures for supporting and protecting internal whistleblowers from point of disclosure)

10	Broad retaliation protections	Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action, harassment)
11	Comprehensive remedies for retaliation	Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was not related to disclosure)
12	Sanctions for retaliators	Reasonable criminal, and/or disciplinary sanctions against those responsible for retaliation
13	Oversight authority	Oversight by an independent whistleblower investigation / complaints authority or tribunal
14	Transparent use of legislation	Requirements for transparency and accountability on use of the legislation (e.g. annual public reporting, and provisions that override confidentiality clauses in employer-employee settlements)

Source: Wolfe et al., *Whistleblower protection laws in G20 countries*, p. 3.