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Senate Economics References Committee Secretariat

Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Sent by email to [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Secretary

### **Inquiry into Australian Securities and Investments Commission investigation and enforcement**

1. We have research and practical interests in whistleblowing regulation in Australia. Vivienne Brand is a corporate law academic and a company director; her research work focuses on regulation of companies with an emphasis on corporate responsibility and she has published on whistleblowing in particular.<sup>1</sup> Jordan Tutton is an Adjunct Research Associate at Flinders University, and practises as a government lawyer.
2. Our work considers the extent to which enhanced whistleblowing regulatory structures in Australia could assist corporate regulation. We believe effective corporate whistleblowing approaches are relevant to several of the specific references in the current inquiry but especially Term of Reference (d), being 'the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes'.
3. In particular we wish to comment on the capacity for enhanced corporate whistleblowing systems to support the work of the Australian Securities and Investments Commission (ASIC) as part of a well-designed corporate regulatory system.

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<sup>1</sup> Vivienne Brand is an Associate Professor in the College of Business Government and Law at Flinders University. Relevant publications include Vivienne Brand, 'Corporate Whistleblowing, Smart Regulation and Regtech: The Coming of the Whistlebot?' (2020) 43(3) *UNSW Law Journal* 801; Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice and Design* (Springer, 2020); Sulette Lombard and Vivienne Brand, 'Whistleblowing and Corporate Governance: Regulating to Reap the Governance Benefits of "Institutionalised" Whistleblowing' (2018) 36(1) *Company & Securities Law Journal* 29; Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty Hunters, Whistleblowers and a New Regulatory Paradigm' (2013) 41(5) *Australian Business Law Review* 292.

### *The role of whistleblowing in corporate regulation*

4. Whistleblowing is an important part of the corporate regulatory puzzle. Research on the detection of corporate misconduct,<sup>2</sup> and perceptions of superior courts and professional investigators,<sup>3</sup> emphasise that insiders – especially employees of companies – are often the best placed to detect instances of misconduct.
5. Modern regulatory approaches utilise instruments beyond formal, state-based controls as pieces of the puzzle. Smart regulation theory, for example, identifies the significant role of non-state, ‘surrogate regulators’ in influencing the conduct of business.<sup>4</sup> Whistleblowers can fulfil this ‘surrogate regulator’ role as part of a less resource-intensive, more effective regulatory strategy.<sup>5</sup>

### *The 2019 reforms to Australian corporate whistleblowing laws*

6. Australia’s corporate whistleblower laws were examined by the Parliamentary Joint Committee on Corporations and Financial Services in 2017. The Committee’s report emphasised that corporate whistleblowers can and ought to perform that role in a well-designed corporate regulatory system.<sup>6</sup> The Committee recommended a range of reforms to whistleblowing laws, which were partially enacted through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). In particular, Part 9.4AAA of the *Corporations Act 2001* (Cth) was amended to expand whistleblower protections.
7. On the one hand, there is some evidence to suggest the 2019 reforms had a positive influence on the corporate regulatory environment. The reforms, which commenced on 1 July 2019, coincided with a substantial increase in whistleblower disclosures to ASIC from 278 disclosures (2018–19) to 644 disclosures (2019–20). From a three-year perspective, one may observe:
  - from July 2016 to June 2019 (under the previous laws), ASIC received on average 227 disclosures each year. Further action was not required for about 94% of disclosures; and

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<sup>2</sup> Alexander Dyck, Adair Morse and Luigi Zingales, ‘Who Blows the Whistle on Corporate Fraud?’ (2010) 65(6) *Journal of Finance* 2213 at 2214–5, 2226; AJ Brown et al, *Clean as a Whistle* (Report, Griffith University, August 2019) at 8 (Figure 3).

<sup>3</sup> See, for example, Association of Certified Fraud Examiners, *Report to the Nations: 2020 Global Study on Occupational Fraud and Abuse* (2020) 18–19; KPMG Forensic, *Understanding Corporate Misconduct: In Pursuit of a Compliance Culture* (Report, 2019) at 12; *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637 at [220]–[226]; *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 at [1751]; *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [176]–[179], [184]; cf *R v Jacobs Group (Australia) Pty Ltd* [2022] NSWCCA 152.

<sup>4</sup> Neil Gunningham and Darren Sinclair, ‘Smart Regulation’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133. See also Senate Economics References Committee, Australian Parliament, *Performance of the Australian Securities and Investments Commission* (Report, June 2014) at [4.17]–[4.19].

<sup>5</sup> Brand, ‘Corporate Whistleblowing, Smart Regulation and Regtech’ (n 1) at 804–806, 808–811; Janet Austin and Sulette Lombard, ‘The Impact of Whistleblowing Awards Programs on Corporate Governance’ (2019) 36 *Windsor Yearbook of Access to Justice* 63 at 76–83. Compare Christine Parker, Suzanne Le Mire and Anita Mackay, ‘Lawyers, Confidentiality and Whistleblowing: Lessons from the McCabe Tobacco Litigation’ (2017) 40(3) *Melbourne University Law Review* 999 at 1008–1010.

<sup>6</sup> See Parliamentary Joint Committee on Corporations and Financial Services, Australian Parliament, *Whistleblower Protections* (Report, September 2017).

- from July 2019 to June 2022 (under the 2019 reforms), ASIC received on average 745 disclosures each year. Further action was not required for about 92% of disclosures.<sup>7</sup>

Importantly, while the number of disclosures has increased, disclosures requiring ‘further action’ has increased proportionately. These data suggest the reforms have increased the amount of valuable information being received by ASIC.

8. On the other hand, another reform – the requirement for certain Australian corporations to have whistleblower policies<sup>8</sup> – may not have had the desired effect. In 2020, ASIC undertook a review of compliance with the legislation. From a sample of 102 whistleblower policies, ASIC found that ‘some policies addressed the requirements’.<sup>9</sup> However, it further found that the majority of policies were non-compliant, including policies that offered ‘unclear, incomplete or inaccurate information’ to potential whistleblowers.<sup>10</sup>

### ***Realising the regulatory potential of whistleblowing***

9. There were some recommendations in the Parliamentary Joint Committee’s report that the Government neither agreed nor disagreed with. Rather, the Government stated that it:

supports a post-implementation review of whistleblower protections. This will provide an opportunity to assess the merit and cost case of [the recommended reform] when the present reforms have had a reasonable time to operate and further information is available.<sup>11</sup>

10. A similar response was provided to the Parliamentary Joint Committee’s recommendation to introduce an ‘incentive’ regime for paying corporate insiders where disclosures contribute to successful enforcement actions.<sup>12</sup>
11. Since the 2017 report, further evidence has been published to inform consideration of whether an incentive regime would be a useful regulatory tool, and to assess its possible contribution to good market outcomes.
12. First, there is significant data on comparable regimes in the United States and Canada. These data suggest incentive regimes generate valuable information, leading to detection of corporate wrongdoing and contributing to enforcement outcomes.

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<sup>7</sup> Statistics have been taken from ASIC’s annual reports.

<sup>8</sup> See *Corporations Act 2001* (Cth) s 1317AI.

<sup>9</sup> ASIC, ‘[Whistleblower Policies](#)’ (Letter to CEOs of public companies, large proprietary companies, and corporate trustees of registrable superannuation entities, 13 October 2021) at 1; see also Sean Hughes, ‘[Whistleblower Policies and the Compliance Gap](#)’ (Speech at the 3<sup>rd</sup> Australian National Whistleblowing Symposium, Thursday 11 November 2021).

<sup>10</sup> ASIC, ‘Whistleblower Policies’ (n 9) at 2.

<sup>11</sup> See, eg, Australian Government, *Response to Parliamentary Joint Committee on Corporations and Financial Services report into whistleblower protections in the corporate, public and not-for-profit sectors* (April 2019) at 16.

<sup>12</sup> Parliamentary Joint Committee on Corporations and Financial Services (n 6) at [11.54]–[11.59]. Incentives regimes have long been controversial, as raising ethical concerns amongst others: Vivienne Brand, ‘[The Ethics of Corporate Whistleblowing Rewards](#)’ in Sulette Lombard, Vivienne Brand Jane Austin (eds), *Corporate Whistleblowing: Theory, Practice and Design* (Springer, 2020) 37.

13. In the United States, the Securities and Exchange Commission's Dodd-Frank Whistleblower Program has operated since 2012. On average between 2019 and 2022, in each year the Program:

- received 9,164 tips; and
- awarded USD\$257 million across 78 awards.<sup>13</sup>

14. The number of tips and awards has consistently increased over ten years. Further, the Securities and Exchange Commission Whistleblowers Office has emphasised the benefits to investors and public that has arisen from the receipt of whistleblower disclosures:

Whistleblowers have played a critical role in the SEC's enforcement efforts in protecting investors and the marketplace. Enforcement actions brought using information from meritorious whistleblowers have resulted in orders for more than \$6.3 billion in total monetary sanctions, including more than \$4.0 billion in disgorgement of ill-gotten gains and interest, of which more than \$1.5 billion has been, or is scheduled to be, returned to harmed investors.<sup>14</sup>

15. The Ontario Securities Commission's Whistleblower Program commenced in 2016. Last year, the commission reported:

We marked the fifth year of our Whistleblower Program, which has helped to identify misconduct and advance our enforcement investigations. Each year we have received more tips than the year before. In total, the program has led to enforcement actions resulting in the imposition of approximately \$44 million of monetary sanctions and voluntary payments, and the award of nearly \$9 million to whistleblowers.<sup>15</sup>

16. Both jurisdictions require resources be dedicated to administer the programmes. However, it is apparent – particularly having regard to the enforcement outcomes noted by each regulator – that these resources have been used effectively to detect corporate misconduct. The statistics indicate that the regulatory potential of whistleblowers has been realised by directly addressing prospective whistleblowers' fear of retaliation (rather than solely providing doctrinal protections from retribution).

17. Second, there is now important empirical research on how 'cash for information' programmes enhance regulators' capacity to detect corporate misconduct.<sup>16</sup> The studies suggest these programmes (which may differ from that specifically proposed in 2017) do have a positive impact for markets, investors and the public, and can reflect an 'optimal' regulatory approach.<sup>17</sup>

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<sup>13</sup> Statistics have been taken from the annual reports on the Dodd-Frank Whistleblower Program. Averages have been given for consistency with the ASIC data presented above, although do not reflect the substantial increase in tips received in the last two years.

<sup>14</sup> Office of the Whistleblower, US Securities and Exchange Commission, '[SEC Whistleblower Office Announces Results for FY 2022](#)' (Media Release, 15 November 2022) at 1.

<sup>15</sup> Ontario Securities Commission, '[Annual Report 2021–2022](#)' at 7.

<sup>16</sup> See, for example, Aiysha Dey, Jonas Heese and Gerardo Pérez-Cavazos, '[Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers](#)' (2021) 59(5) *Journal of Accounting Research* 1689 at 1721; Philip G Berger and Heemin Lee, '[Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud](#)' (2022) 60(4) *Journal of Accounting Research* 1337 at 1372.

<sup>17</sup> For discussion on 'optimal' approaches to corporate whistleblower laws, see Usha R Rodrigues, '[Optimizing Whistleblowing](#)' (2022) 94(2) *Temple Law Review* 225.



### *Matters for consideration*

18. Having regard to the developments since the Parliamentary Joint Committee's 2017 report, we believe the time may be ripe to reconsider incentives here as part of a carefully managed and designed corporate regulatory system.
19. ASIC have emphasised that '[w]histleblowing is a key part of transparent, accountable and safe workplace culture. Whistleblowers provide early warning and visibility of issues, and can help identify and call out misconduct and harm to consumers and the community.'<sup>18</sup> At the same time, ASIC have pointed to their concerns about a level of shortcoming in response to the 2019 reforms. The current review is a timely opportunity to garner perspectives on what might be done to assist with that issue.<sup>19</sup>

### *Conclusion*

20. Prior parliamentary reviews of Australia's corporate whistleblowing regime have introduced significant reforms, in recognition of the important role whistleblowing can play in a well-designed corporate regulatory system. As the date for a mandatory legislative review approaches,<sup>20</sup> the opportunity to review the effectiveness of those changes arises. Further, as part of that review process it was recommended that consideration be given to the implementation of an incentives framework. While this recommendation was not acted on as part of the 2019 reforms, new data and more extensive overseas regulatory experiences offer new insight on this regulatory tool and its effectiveness. An opportunity exists to employ enhanced corporate whistleblowing systems to support the work of the ASIC as part of a well-designed corporate regulatory system.

We would be happy to answer any questions you may have in relation to our submission.

Yours faithfully

Associate Professor Vivienne Brand

Jordan Tutton

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<sup>18</sup> Joe Longo, 'ASIC's Corporate Governance Priorities and the Year Ahead' (Speech at the Australian Institute for Company Directors Governance Summit, 3 March 2022).

<sup>19</sup> Notably, the Parliamentary Joint Committee (n 6) considered that an incentive system 'will motivate companies to improve internal whistleblower systems and deal more proactively with illegal behavior': at [11.55].

<sup>20</sup> *Corporations Act 2001* (Cth) s 1317AK.