Tony Nikolic – February 2017

Submission to

Parliamentary Joint Committee on Corporations and Financial Services.

Whistleblower Laws and Protections

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'Whistleblower Laws are about Incentivising Integrity'.

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Caveat

None of the matters relating to wrongdoing in this submission are confidential, rather they are all on the public record (either media or Court decisions) and as such they are merely replicated in this submission to assist the Senate.
There is no intention to tarnish the reputation or brand of any organisation.

Foreword:

With respect to the victims, and whilst the connection may indeed be a crude one, Australian Whistleblower laws are in the same position domestic violence and sexual assault laws were in two decades ago – 'everyone knows the victims are targeted, ridiculed and ignored for revealing information, but no one is willing to effectuate a cultural change until the problem can no longer be tolerated by the victims and their families'.

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1. Summary

Whistleblower Laws and Protections

To the Senate,

I would like to thank the Senate for undertaking this task and note that I am pleased that the matter is being ventilated publicly. I welcome the opportunity to meet the committee on a date and time that is convenient to the Committee.

The following submission provides a longitudinal assessment of whistleblower protections and advocates for an incentive based qui tam model mirrored of the *False Claims Act 31 U.S.C §§3729-3733* on the basis that it has proven its effectiveness.

The intent of this submission is to demonstrate that the Senate has many options open to it if it decides to create a law that can seamlessly integrate (qui tam) laws into Australia. By way of example, there are some laws that require amending such as the *Fair Work Act 2009*, *Competition and Consumer Act 2010*, *Human Services (Medicare) Act 1973*, the *Criminal Code 1995 (Cth)* and Civil Procedure Law (to name a few). These laws may require amending to facilitate a smooth but seamless transition.

Background.

This inquiry is important because it represents an important step for Australian law. My submission flows from a book chapter in the (Eds) AJ, Brown, D. Lewis,. R. Moberly,. W. Vandekerckhove *International Handbook of Whistleblower Research* (Edward Elgar, 2014) Chapter 16 – T. Faunce,. T. Nikolic,. K. Crow,. Morgan. Frederick. "*Because they have evidence: Globalizing financial incentives for corporate fraud whistleblowers".*

1. There could not be a better time than now for the Australian legislature to reinforce whistleblower laws to take a more robust role, not only in the protection of whistleblowers, but also in uncovering harmful corporate fraud. Indeed, the cornerstone for any reform in this area consists of the legislature passing laws that can be accessed, available to all people, incentivise people to report wrongdoing, ensure laws are pragmatic rather than idealistic and finally, abolish any gaps that may make parties vulnerable to retaliation.
2. In Australia's present "budget emergency" the focus appears to be on Centrelink frauds, which in comparison to Corporate fraud, are almost negligible in terms of individual claims.
3. Loopholes that deny coverage when it is needed most, either for the public or the harassment of the victim, compromise whistleblower protection laws and undermine the public's confidence in their governments ability to legislate effectively. Thus, seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context, particularly if we are to protect people against any harassment, detrimental action and/or reprisal - all of which could have a chilling effect on themselves and their families in ways that only a defendant's resources can limit.

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

5. 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. 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".

6. In the Senate Economics Committee Issues Paper - Corporate Whistleblowing in Australia: ending Corporate Australia's culture of Silence, (p.33) 'during the ASIC inquiry, 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. 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'*.

7. Asked about this comment, 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.

8. As noted above, and regulators are acutely aware of Australia's shortcomings when it comes to protections. Basically there is allot of '*huffing and puffing*' publicly about bringing information to light, but when it does come to light, the reality is – a whistleblowers life will change in a negative manner from that moment forward. That is why incentive based based models are appealing.

9. 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. 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'.[1]

10. 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. Professor Brown concluded that similar arrangements should be considered if Australian corporate whistleblower protections are to be best practice. 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.[2]

11. 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'.[3]

12. 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[4]:

> *"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 tum 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".*

13. Comparing whistleblower laws to those found in the United States under the *False Claims Act 31 U.S.C §§3729-3733/ SOX/ Dodd Frank* are legitimate questions. The persistent questions about social enforcement and character of individuals in reporting and preventing corporate fraud, corruption and misconduct are at the forefront of current debates and legislative reforms regarding whistleblower incentive programs globally. In 2014, during the G20, it was established that Australia was poorly ranked amongst other member nations with respect to supporting, protecting and incentivising whistleblowers from the private sector. Furthermore, studies from around the world indicated that people no longer wanted to be punished for doing the right thing. What we know from the present

[1] Senate Economics Committee Issues Paper - Corporate Whistleblowing in Australia: ending Corporate Australia's culture of Silence, p27.
[2] Ibid, 27.
[3] Ibid, 27.
[4] Ibid, 27.

literature is that whistleblowers from within the private sector represent one of them most effective and efficient sources of information uncovering fraud and wrongdoing particularly within the pharmaceutical and defence industries. Notwithstanding these facts, whistleblowers from the Australian corporate sector are not encouraged to reveal wrongdoing because laws purporting to shield them are inadequate. If Australia is to give effect to its stance on combatting wrongdoing and at the same time protecting Australian investors and wealth, it must provide a law that incentivises people who have information on wrongdoing to come forward.

14. Australia's fraud, false claims and general wrongdoing detection laws have proven to be inadequate, particularly when compared to some developing and developed nations. To some degree the problem relates to Australia relying predominantly on auditing, internal corporate governance and regulatory oversight as the primary mechanisms to detect, investigate and prosecute frauds and false claims. For some, this position represents a school of thought that suggests peoples moral character will be negatively affected if incentives are provided. However, empirical evidence suggests that whilst a qui tam model law is not perfect, it has proven to be very successful with no real impact upon the moral character of individuals. Secondly, the moral dilemma may best be characterised as a choice between exposing wrongdoing and not exposing wrongdoing. It is contended that when the whistleblowers moral character is brought into question, this is evidence that Australia's 'system' is geared towards focussing on the whistleblower rather than the information they possess.

15. Further weaknesses exist because Australia relies primarily on immunity, without further incentives to bring wrongdoing to light. As we had seen during the Global Financial Crisis ("GFC"), stringent auditing and regulatory procedures failed to detect some of the largest frauds in history because of a focus on internal compliance led to accounting books being manipulated and managers covering up the true extent of their misdeeds. Indeed, there is evidence from qui tam (relators - whistleblowers) that in some cases, the auditors themselves may have been involved in the fraud or failed in their duty to report frauds. Essentially, this culture of keeping things in-house substantially contributed to a corporate culture of deceit. It was not until a whistleblower uncovered the deceit that the matter was revealed.

16. A False Claims Act (qui tam) will provide citizens and law enforcement with a specific legal remedy that will address current gaps, uncertainty and incongruities in Australian law. Gaps, uncertainty and incongruities in legislation combined with depleting resources and moral hazards are increasing the burden upon Australian taxpayers and may be contributing to higher national deficits. These gaps in legislation are compelling citizens of good conscience to take information about wrongdoing from their own country to countries that support whistleblowers who bring wrongdoing to light. For example, recently, whistleblowers from 49 countries (including Australia) reported irregularities from their own nation to U.S authorities. This was in part, because U.S laws provide the best forum and plaintiff friendly legal mechanisms for whistleblowers to report fraud and misconduct with confidence. For example, the Securities and Exchange Commission (SEC) attracted 349 whistleblower tip-offs from 49 countries around the globe. The information provided by a British whistleblower led to a settlement in the USA with a reward being paid for the (qui tam) relator.

17. In 2013, literature supporting the benefits of whistleblowing was published by Campbell in "*Secrecy for Sale: Inside the Global Offshore Money Maze: How ICIJ's Project Team Analyzed the Offshore Files*". On 3 April 2013 the International Consortium of

Investigative Journalists' ("ICIJ") were provided with 260 gigabytes of information from an unknown whistleblower detailing a highly sophisticated international monetary system designed to evade and circumvent laws, audits and regulations. The information supplied on the computer storage unit detailed 250 million files and more than 2 million emails charting the extent and potent growth of the international off-shore trading markets spanning 170 countries worth hundreds of billions or, possibly, trillions of dollars. The whistleblower provided information that "*…included details of more than 122,000 offshore companies or trusts, nearly 12,000 intermediaries (agents or "introducers"), and about 130,000 records on the people and agents who run, own, benefit from or hide behind offshore companies*".

18. The problem is, when matters are kept internal, as we see in the British model, the potential for cover-ups is significantly greater. Furthermore, these sophisticated frauds employ the best professionals who know how to circumvent traditional auditing methods making them difficult to remedy until a catastrophic collapse has occurred placing further economic burdens on innocent taxpayers. Their capacity to shift wrongdoing and disburse its conduct internationally is designed to exploit weaknesses between each countries laws. Just as some people may go forum shopping, sophisticated criminal and terrorist networks seek out countries where they can undertake their tradecraft with little or no impediments.

19. It is highly probable that Australian whistleblowers have information about conduct imperilling the lives of soldiers, patients, the elderly and children with further effects being felt in the environment and finance; however, they lack an adequately supported legal forum where they can provide this information. Thus, it is extremely important, not only for the Australian economy, but Australian community and environment to implement a False Claims Act (qui tam) sooner rather than later.

Two Dominant Models for Whistleblower Laws

20. As indicated in this submission, the two dominant models for whistleblower laws are the British model, which focusses on internal compliance and the U.S model which focuses on exposing the wrongdoing and using that information to improve oversight systems and streamline regulations.

British Model

A. The UK's *Public Interest Disclosure Act 1998* (UK) ('*PIDA*') created the current British whistleblowing system.[5] As with the American model, the *PIDA* and laws based on it permit employees who have discovered corporate wrongdoing to choose between reporting internally or externally to the authorities or the media. The UK whistleblower system provides for a tiered disclosure procedure allowing whistleblowers to make protected disclosures to their employer, regulatory agencies, members of parliament and the media.

B. Unlike the American laws, the British model sets strict requirements for media disclosures which whistleblowers must satisfy to be protected. The *PIDA* does not offer bounties or require companies to establish whistleblowing systems. The stricter requirements for external disclosures implicitly encourage internal reporting and mean that the policy of the (PIDA) is the promotion of good corporate citizenship. This model emphasises the promotion of speedy and "*in-house*" resolution of allegations of wrongdoing. Weight is thus provided to the *corporate interest* in internal and "*quiet*" resolution of reports rather than exposing

[5] Public Interest Disclosure Act 1998 (UK) c 23.

the wrongdoing in the public interest. However, as we have seen in the recent decade with the "LIBOR" mortgage fraud scandal, often the conduct causes catastrophic collapses despite the organisations knowledge of the wrongdoing. Thus, as noted in the American model, the reluctance of adopting an internal approach relates to the fact that auditors and company directors have the ability to cover-up long-standing frauds for a longer period.

C. Whilst the UK PIDA offers uncapped compensation for people who have experienced reprisals, compensation for actual financial loss and aggravated damages. However, unlike the US law, it has not always been successful due to the expense of running whistleblower cases.

D. The PIDA bans settlements, however, in practice, sometimes these settlements occur before a matter is heard in a tribunal. This type of conduct is contentious because whistleblowers are required to sign deeds with 'non-disparaging' clauses that amount to "gag orders" – preventing a whistleblower from making further disclosures about alleged wrongdoing and misconduct. This is unacceptable because this type of conduct is inconsistent the intention of the UK Parliament whereby transparency and openness are the cornerstone of its intended operation.

E. The UK PIDA can provide for meaningful compensation payments, but only if proof can be adduced detailing the damage. Unfortunately, in cases of reprisals/retaliation, the conduct amounting to a reprisal or detrimental action can be subtle or overt, or mixture of both. This makes gathering evidence of such conduct difficult to produce in a Court or tribunal hearing. Thus compensation payments can be heavily influenced by factors outside the control of any Court or tribunal. This shortfall may expose the whistleblower to a false sense of security and act as a disincentive to reporting wrongdoing.

U.S. Model

F. Apart from the *False Claims Act* 31 U.S.C §§3729-3733 (1863), *US-SOX/Dodd-Frank* is the main example of the American model. These statutes permit employees who have discovered actual or even possible corporate wrongdoing to elect to report it through three different channels: to their employer, to a regulator or to the media. For all three avenues of disclosure the protection is equally rigorous, thus the choice between the three is sustained as a genuine one for the potential whistleblower. This means that there is no express or implicit legislative preference for internal reporting as there is with 'softer' approaches such as in the UK and under the *WPA*.

G. The policy emphasis of the American model is more on the reporting of malfeasance to public authorities and the deterrence of wrongdoing and less on the promotion of companies' internal compliance, although the *False Claims Act* does have a positive impact on improving internal compliance because it also incentivises companies by reducing penalties if they self-report. Laws based on this model usually do not require or prioritise internal reporting as doing so is considered to encourage cover-ups, destruction of evidence and recrimination against potential witnesses within the business. The False Claims Act/*US-SOX/Dodd-Frank* principles have been replicated in many whistleblower provisions throughout the US with a steady uptick occurring globally.

H. *False Claims Act, US-SOX/Dodd-Frank* have had some notable successes. Significant instances of fraud have been uncovered. The US Securities and

Exchange Commission ('SEC') received a total of 3,620 whistleblower reports in 2014 under the *US-SOX/Dodd-Frank* regime, including many reports of fraud. ***Within the SEC there is a separate body called the Office of the Whistleblower*** which administers the law, and which has emphasised that the bounty provisions have been relied upon to disclose critical 'inside information' that would not have been revealed but for the bounties offered.

Media Disclosures

21. Any disclosures to the media should take a balanced view. The law should not preclude disclosures to the media, however, a person may receive a reduced incentive/compensation payment for doing so. We must understand that the media plays an important role in modern society (*albeit contentious with representations of loosely applied facts at times*), the media remains to be a necessary beacon of transparency and accountability when reports are accurate.

    A. Nonetheless, disclosures to third parties must be protected because this also provides a powerful incentive for companies to resolve matters expediently if they wish to maintain their reputation and brand. However, if matters relate to sensitive areas such as intelligence and national security, disclosures to the media **must** be limited due to its sensitivity unless war crimes or corruption are identified.

22. Further protections must include precluding claims under equitable doctrines such as (injunctions) not only statute and common law.

Range of Wrongdoing

23. Due to its broad statutory construction, the *False Claims Act Sox/Dodd Frank* have the capacity to address wrongdoing in any industry or sector that attracts taxpayer funded resources or oversight. The only limitation can be attributed to the imagination of sanguine parties who tend to be very versatile in their capacity draw upon scarce resources and create marketing campaigns about products or services that never existed in the first place. As I will detail below, these can generally include;

    1. Pharmaceuticals
    2. Medical Devices
    3. Healthcare
    4. Financial Services
    5. Housing and Mortgages
    6. Insurance
    7. Construction
    8. Defence Contracting
    9. Stimulus projects
    10. Educational lending
    11. Oil and Gas
    12. Technology
    13. Scientific and Clinical Research
    14. Bid Rigging
    15. Immigration Contracts
    16. Correctional Centre Contracts

17. Escheatment
18. Business Plan Frauds
19. Emissions trading and subsidies.

Cultural Change is consistent with Global Standards.

24. Australia is party to a variety of bilateral and multilateral international trade agreements, conventions and protocols that comport and reflect its social, cultural and legal attitudes towards combatting fraud and wrongdoing against the Government. There are no foreseeable social, cultural and legal impediments that may deter Australia from entering into a bilateral agreement with the USA and perhaps other countries to combat fraud under a proposed False Claims Act (qui tam). Indeed, Australian lawmakers can refer to similar agreements currently on the international stage that support integration at the domestic and international level.

    A. For example, Australia is party to a number of multilateral agreements that hold common values for many nations, in particular the U.S and Australia. These include:

    The *United Nations Convention against Corruption (Multilateral), Agreement for the Establishment of the Anti-Corruption Academy as an International Organisation [2012] ATS 27 Multilateral, Convention on Combating Bribery of Foreign Officials in International Business Transactions [1999] ATS 21 Multilateral, United Nations Convention Against Transnational Organized Crime [2004] ATS 12 Multilateral, United Nations Framework convention on Climate Change [1994] ATS 2 Multilateral*.

25. Applications of the FCA have included: marketing of drug products for uses unapproved by government regulators (often accompanied by kickbacks to doctors to encourage such prescriptions) GlaxoSmithKline fined $3 billion consisting of criminal and civil fine, (Pfizer Pays $2.3 Billion, *New York Times*, 2 September 2009); knowingly or recklessly distributing adulterated or otherwise unsafe drug products (Glaxo Pays $750 Million, *New York Times*, 26 October 2010); custodial sentences for submitting inflated claims to government agencies for reimbursement (Mylan to pay $57 million, *Bloomberg News*, 28 February 2012) and basing such claims on clinical trial research fraud (FDA letter to Borison, RL 2002, pers. comm., 26 November; see also *United States of America v Maria Carmen Palazzo*); data suppression (Breggin, 2006, p. 255) and selective publication of clinical trial outcomes (Turner et al., 2008, p. 252); international bribery (LaCroix, 2011); scientific misconduct (Tavare, 2012, p. 377); bias in drug trials (Rising, Bacchetti & Bero, 2008, p. 1567); ghost-written literature in prominent journals promoting false benefits and risks for healthcare (Healy & Cattell, 2003, p. 22-27); as well as influencing prescribing practices (Healy, 2006, p. 138); custodial sentence for TMI Holdings in F-35 Joint Strike Fighter defence contract.

26. As early as 1885, U.S courts declared that qui tam was a good public policy law because it promoted a participatory public/private enforcement partnership and increased detection and recovery rates for law enforcement. Qui tam's social utility and ancient principles were espoused in - *U.S. v. Griswold, 24 F. 361, 365-366* (D. Or. 1885):

> *"The Statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilisation that one of the least expensive and most effective means of*

preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons ...."

Magnitude of Frauds and Wrongdoing

27. The magnitude of fraud is well documented with literature being available globally and locally. The '*Report to Nations 2010*' reported 1843 cases of fraud from 106 countries amounting to $2.9 trillion of the gross world product of approximately $58.07 trillion. During this period, the distribution of losses indicated that 29.3% involved sums ranging from $100,000 to $499,000, whilst 23.7% of the reported losses exceeded $1 million. In 2011, the gross world product was estimated at $70.28 trillion with a projected loss to 'reported frauds' of more than $3.5 trillion. Offences during this period were spread over 100 countries, stretching across six continents (including Oceania). Despite the total number of organisations reporting fraud decreasing in 2009 from (1843) to (1388) in 2012, the *reported* total amount of money lost to fraud increased from $2.9 trillion to $3.5 trillion respectively.

28. The Australian Institute of Criminology fraud report suggests that the Australian community lost approximately $345.4 million through fraudulent business practices and $977 million through personal fraud. When it came to fraud on the Commonwealth, 152 government agencies responded indicating that public sector frauds amounted to $498 million with increases in internal frauds. An underlying theme from international and domestic fraud statistics suggested that the true figures and value of fraud losses are underrepresented and underreported.

29. The Fraud and Misconduct Survey 2010 by KPMG, identified a number of areas where government departments were experiencing asset misappropriation, false claims for benefits and reverse false claims (false claim to evade a liability), bribes, kickbacks corruption and fraudulent financial statements. These figures from KPMG and the Australian Attorney General's Office, whilst independent of the Report to Nations report on global fraud patterns, tended to point towards a global and domestic increase in fraud, malfeasance, corruption and bribery at various levels of the local and global community.

30. In 2011, the Australian Institute of Criminology (AIC) research in *Counting the Cost of Crime in Australia: A 2011 Estimate* provided an insight into the cost of crime in Australia. This latest report updates previous data and refers to the costs of crime for 2011. The present research suggests that the cost of fraud in Australia is approximately $6 billion. The estimated total cost of crime was estimated at $47.6 billion or 3.4% of Australia's GDP and represents a 49% increase since 2001. Furthermore, it is estimated that only one third of frauds are detected, thus the real amount placed upon fraud could exceed $18 billion.

Risk Comparator

31. If we provided a loose comparison fraud risks between Australia and the US healthcare we see a glaringly obvious problem, particularly given we are moving towards a more privatised healthcare model. By way of example, the Australian government budget posted total revenues of $338.1 billion and total expenditures of $377.7 billion as of 2011-12. Of the total budget, Australian government expenditure on healthcare and pharmaceuticals in general exceeded $130.3 billion in 2010-11. Based on figures from 2012 Central Intelligence Agency (CIA) fact-book and comparing them to Australia's budget, Australia

ranked 13th in the world for government budgets, even though by population it was ranked 55th in the world.

32. By comparison, the population of United States at over 315.7 million is approximately 13.9 times larger than Australia at over 22.9 million. But the government expenditures for healthcare were approximately $878 billion only about 6.7 times that of Australia at just over $130 billion. Public health expenditure as a percentage of total health expenditure for the USA totalled approximately 45.9% or 17.9% Gross Domestic Product (GDP) , while the Australian government spent approximately 69.1% on healthcare or 9% of its GDP.

33. Even where US States of similar populations were compared to Australia, healthcare expenditure is considerably higher in Australia. These comparisons demonstrate that Australia is at a significant risk exposing it to 'wrongdoing'. Even if we were to make a comparison in the literature between healthcare expenditure from Texas (USA) fielding a population of 25.7 million, there are larger disparities. Texas spent $44.2 billion on healthcare and Australia with a population of 22.9 million spent $130 billion. Furthermore, Australia spent almost 3 times more on healthcare programs, despite Texas having 2.8 million more people than Australia. Therefore, it is reasonable to assume that Australia spends more in government health programs than the United States of America (including comparable states), and, as a consequence, Australia has more per person impact from potential frauds on those programs than those in the USA.

Integration of Laws and Cultural Similarities between Australia and USA

34. There are many ways of integrating whistleblower protection laws for the corporate, public and not-for-profit sectors into Commonwealth law. In one respect it may be as simple as mirroring (*to some extent*) and transporting the *False Claims Act 31 U.S.C §§3729-3733 (qui tam)* into Australian law because it provides a well rounded statutory package that provides sections for prosecuting wrongdoers and protecting whistleblowers. This concept is not foreign to Australian law, and history shows that both legal systems have many commonalities that include constitutional and statutory similarities, although direct use of legislations is not a common practice.

35. If the aim of a law is attracting reports of wrongdoing, then it may be wise to give ***proper*** effect to this intention by incentivising participation. Thus, far, this model, whilst not perfect, appears to be the most efficient and effective. By way of example, Australian case law has developed in the area of public interest litigation, however direct use of relator provisions in Australia are rare.

36. As noted in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd (2000) 200 CLR 591* the High Court upheld the capacity of private parties to bring a public action to prevent a violation of a public right or to enforce a public duty.

37. Australia has and continues to provide rewards to whistleblowers in areas of international criminal and local law. Australian jurisdictions have recognised the effectiveness of whistleblower 'tip-off' lines for Crime stoppers, neighbourhood watch and 'dob in a dumper'. For example, the 'dob in a dumper' campaign from Parramatta City Council offers rewards to residents that are prepared to testify and provide evidence in court about people who dump rubbish (trash) in public. This reward scheme provides people with monetary incentives for information leading to a conviction or infringement notice. Moreover, Crime Stoppers has paid more than $100 million (AU) in rewards for information leading to criminal convictions, drug and property recoveries globally.

38. Integrating further protections can occur with the *Fair Work Act 2009* (Cth) because it provides protections for employees under Part 3-1 of the *Fair Work Act 2009* ("FWA"), employees (including federal government employees) are protected from any unlawful 'adverse action' based upon their workplace rights, including initiation of any process or complaint under a work-related law. The term 'Adverse action' is widely defined and includes *dismissal, injuring a person in their employment, prejudicially altering the employee's position and any other conduct that may have an adverse impact upon an employee, either directly or indirectly.* This can be linked with a potential Australian False Claims Act and other related qui tam statutes so plaintiffs can maintain protection and run the qui tam case and reprisal case together.

39. An Australian False Claims Act could create an alternative civil action remedy and criminal sanction for the recovery of public money obtained by fraud and false claims. This may be achieved by amending the *Criminal Code 1995* (Cth) Part 7.3 to include a civil remedy for fraud equivalent to current criminal provisions already found under the *Criminal Code 1995* (Cth) Part 7.3. The *Criminal Code 1995* (Cth) Part 2.5 also applies to corporate criminal responsibility, but does not provide a civil equivalent for the same conduct associated to frauds.

40. Linkages between civil and criminal statutes have already been made for violations occurring under the *Competition and Consumer Act 2010* (Cth) s6AA ("CCA"). Generally, these provisions pertinently provide guidance and scope on the application of the *Criminal Code 1995* (Cth) for offences under the CCA. Thus, the CCA provides the Australian Competition Consumer Commission ("ACCC") with greater prosecutorial flexibility and in some respects its penalty regimes are similar to those found under the *False Claims Act 31 U.S.C §§3729-3733* however they do not possess statutory powers to incentivise whistleblowers to expose wrongdoing such as cartel conduct.

    A. As a key element of this dual system, the civil claim is also accompanied by a "public interest" costs rule – the first of its kind in Australia, and possibly anywhere. As a result, a whistleblower who sues for civil damages in the Federal Court cannot be held liable for the respondent's costs, provided their claim is not legally vexatious and they conduct the litigation reasonably; even though, if they make out their claim, the respondent may be obliged to pay the whistleblower's costs. In part, this matches the *Fair Work Act* system, where each side must bear its own costs; but goes beyond this in recognising that the making of a public interest disclosure is more than a private right, and also constitutes a public good.

<u>Forms of Harassment</u>

41. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from civil liability such as defamation suits, and the most chilling form of retaliation – criminal investigation or prosecution.

        A. Despite the fact that the whistleblower law contains protections from retaliation for whistleblowers, it is widely recognised that such provisions do not protect whistleblowers from the resentment of colleagues, being

effectively blackballed and becoming unemployable in their industry. In high paying industries such as securities and financial industries, this is a powerful disincentive to those who wish to report fraud. The new securities and commodities futures trading fraud provisions in the United States give the whistleblower a greater likelihood of remaining anonymous if the case does not result in trial and particularly if the government does not decide to pursue the litigation.

B. *SOX Criminal Whistleblower Provision* — The False Claims Act and SOX contain both civil and criminal whistleblower provisions. This Honourable Senate can take many of those provisions and apply them into Australian law.

Retaliation - Reprisals

42. Relators (Whistleblowers) have private information about wrongdoing; in the U.S. context, relators typically have and provide information about their employer's wrongdoing. Revealing this wrongdoing tends to place them at direct, indirect and vicarious risks of retaliation by their employer or associates. The benefits of the FCA is that it not only provides prosecutorial powers for addressing violations, but it has a rigid anti-retaliation mechanism, but this must be pursued by the relator. The Government does not typically intervene to provide aid, but prosecutions and retaliation claims under the FCA are filed together to ensure that the information is protected. Anecdotal evidence suggests that the majority of those seeking the protections under the FCA qui tam provisions are former employees rather than current employees, suggesting that current employees weigh up the risk/benefit of blowing the whistle.

43. The Anti-Retaliation provision of the FCA prohibits an employer from retaliating against an employee "*because of lawful acts done by the employee . . . in furtherance of an action*." 31 U.S.C. §3730(h).

A. Prohibited retaliation includes: termination, suspension, demotion, harassment or any other discrimination in the terms and conditions of employment. In order to prevail, an employee must prove:

B. that the employee took action in furtherance of an FCA action;

C. that the employer knew about these acts; and

D. that the employer discriminated against the employee because of such conduct.

44. The World Health Organisation ("WHO") defines retaliation: as a direct or indirect adverse administrative decision and/or action that is threatened, recommended or taken against an individual who has:

1. reported suspected wrongdoing that implies a significant risk; or
2. cooperated with a duly authorized audit or an investigation of a report of wrongdoing.[6]

[6] World Health Organisation eManual Section XII.14.1 Fraud policies and reporting of suspected fraud, para. <http://emanual.who.int/p12/s14/Pages/XII141FraudPoliciesandReportingofSuspectedFraud.aspx> at 29 January 2017.

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Retaliation thus involves three sequential elements:

1. a report of a suspected wrongdoing that implies a significant risk to WHO, i.e. is harmful to its interests, reputation, operations or governance;
2. a direct or indirect adverse action threatened, recommended or taken following the report of such suspected wrongdoing; and
3. A causal relationship between the report of suspected wrongdoing and the adverse action or threat thereof.

45. The Act creates an offence for a person to take detrimental action against another person for someone making a protected disclosure. Detrimental action is defined as conduct that includes:

    A. action causing injury, loss or damage

    B. intimidation or harassment, and

    C. discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action.

46. Reprisal can be defined in many ways. In a whistleblowing context Blacks Law Dictionary (8th Edition, p1329) states that it is: "*Any act or instance of retaliation as by an employer against a complaining employee*". As we can see, the Australian Senate is attempting to utilise a term that is already developed and enshrined in the False Claims Act and other similar qui tam statutes. I recommend remaining with the term "***Retaliation***" as this term appears to be the dominant form of which "reprisal" relates to.

Experienced Consultants to Assist in Compliance and Education

47. It is necessary that competent professionals, academics and legal representatives with a history in the field act as consultants to assist in education programs and roll-outs.

48. If implemented, there will undoubtedly be a rush from law firms and other professionals claiming to be qualified in the area and if this is not managed correctly, there is a risk that good intentions become blurred by institutionalised bias. Therefore, those professionals with a history of competence in this area should assist the corporate community and public organisations in rolling out education and certification programs.

49. The False Claims Act provides a number of provisions that enhances and promotes its non-punitive and proactive approach to improving compliance. Companies that do business with the Government are provided with an opportunity to minimise their exposure by introducing and carefully managing a compliance program.

50. A strong compliance program is an effective tool to avoid FCA, Dodd Frank and SOX exposure because it may minimise potential liability. Plaintiffs often use a defendants' weak or non-existent compliance programs to support the argument that defendants acted with deliberate ignorance or reckless disregard of the allegedly unlawful conduct. In doing so the plaintiff triggers the operation of the False Claims Act §3729 (1)(a) permissive knowledge requirement that relevantly states *et seq;*

"Knowledge" under the FCA includes reckless disregard and deliberate ignorance, not just actual knowledge.

Competent Counsel and Legal Assistance

51. Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defence funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman, or specialised ASIC whistleblower department with sufficient access to documents and institutional officials can neutralise resource handicaps and cut through draining conflicts to provide expeditious corrective action.

52. Competent Counsel can and do assist relevant departments in assessing those cases that are reasonably likely to succeed. By using trained individuals with a history of experience in this field, they can act as gatekeepers ensuring only those matters likely to succeed are pursued by the Government and if so chosen, by a potential qui tam plaintiff going alone.

53. The *U.S. Whistleblower Protection Act* includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help. The reality is that retaliation appears to be the unwritten code and as such it is important that protections are accompanied with incentives/compensation for those who take the important step to expose wrongdoing. Please See: *Australian Securities & Investment Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 - This case confirms that confidential disclosures from whistleblowers can be of great benefit to regulators and enforcement agencies.

54. By way of example, the Court confirmed that the public interest in protecting informers, and encouraging future informers, is as important to a regulatory agency such as ASIC as it is to police in their traditional role: See - *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 1 ACSR 311, 312.

55. The law should cover all (practicable) common scenarios that could have a distressing effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as "assisting whistleblowers," (to guard against guilt by association), and individuals who are "about to" make a disclosure (to preclude pre-emptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out.

56. To maximise the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognised repeatedly, denying this option creates a severe chilling effect. Confidentiality goes beyond just promising not to reveal a name. It also extends to restrictions on disclosure of "identifying information," because often when facts are known only to a few that information easily can be traced back to the source and are the equivalent of a signature.

57. In theory, immunity can assist someone in coming forward to report a violation. However, as noted by Sunburn, North & Tracey JJ, (*and other highly*

respected professionals mentioned in this submission) - in practice the reality is; more needs to be done in the private sector to provide comprehensive protections. To this end, a whistleblower system that provides incentives or compensation packages that take into account the realistic long-term consequences a whistleblower faces professionally, financially and personally - *including emotionally* should become a priority. These consequences are difficult to quantify and that is why the US based system appears to be of benefit. However, merely insisting that whistleblowers do not need incentives or compensation appears unrealistic given the evidence. Whilst some reports may be received using other models, the "EVIDENCE" suggests that there is a higher probability that incentives/compensation will attract more reports and serve the public interest in much more efficient manner.

58. Any whistleblower law should provide an avenue for person who may not be internally employed by an organisation, but nonetheless, can produce evidence of wrongdoing. Precluding external parties from blowing the whistle merely acts as a limiter on our capacity to address wrongdoing. Thus, the potential exists to develop a model or core elements of a model whistleblower fraud reporting statute for countries to adopt worldwide. When a citizen of one country becomes aware of a fraud that is having international impact, they could file with all countries that have statutes, and many, with only minimal additional resources, could recover based upon one core investigation of the underlying facts.

Defences to False Claims Liability; A Shield – Not a Sword

59. Defendants may use a comprehensive and well-implemented compliance program to demonstrate that even if unlawful conduct did occur, it was carried out by rogue actors and without company knowledge or acquiescence.

Qui Tam Law – Proven Effectiveness that has Stood the test of Time

60. Qui tam as a developed legal doctrine has stood the test of time and perhaps has laid the foundation for how many countries manage frivolous and vexatious proceedings in other jurisdictions. Whilst many may criticise the FCA as attracting vexatious or frivolous claims, these claims appear to be contentious because almost every jurisdiction can attract such cases regardless of jurisdiction.

    A. In "*The Third Part of the Institute of the Laws of England* 1911, 194 (1628)", Lord Coke devoted a chapter proposing reforms for the qui tam law in relation to vexatious litigants, or as Lord Coke referred to them - '*parasitic*' litigants, '*viperous vermin*' and *turbidium hominem genus* (a class of unruly men).

    B. By approximately 1768, (a century and half later), successful legislative reforms led to later commentaries on *qui tam's* ability to manage vexatious and frivolous claims by Lord Blackstone to be positive and without criticism, because English Common Law had developed sufficiently to manage such claims.

61. The United States experience since the 1986 FCA Amendments and under the *Fraud Enforcement and Recovery Act 2009* has demonstrated that it is critical to the success of such a statute that the statute provide a significant minimum range of incentive to whistleblowers and those who fund their litigation in order to make it worth the effort and someone funding the costs of litigation. In addition, significant risks of retaliation and blackballing in the industry often come with whistleblowing, even when there are legal protections. A strong financial upside is necessary to induce corporate insiders to take these risks as well as to induce others to fund the litigation. The system of

allocating a percentage of the recovery to the whistleblower has worked well both to insure that the reward is related to the value of the value of the information brought forward and provides an incentive to whistleblowers to continue to work to support and expand investigations into complex areas so as to maximize the government's (and their own) recovery. A flat monetary cap would undermine such a symbiotic relationship.

A. However, the statute should also, however, explicitly give the government adequate discretion to determine within a reasonable range the appropriate share a particular whistleblower should receive, taking into account the overall size of the recovery as well as the whistleblower and their counsel's contribution to the effort and other equitable factors, so as not to overcompensate at the high end from very large recoveries. A broader range, such as a range between 10-30%, would allow the government more discretion to award higher percentages in relatively small recoveries and smaller percentage recoveries in the largest ones, when appropriate.

Global Solutions to Global Problems

62. In the global economy, fraud is also global. By adopting similar or model like statutes, countries could benefit from conducting parallel proceedings or filing in one country and joining other parties (countries) to address wrongs. By doing this, signatory nations will in effect be on 'the same page' when it comes to combatting wrongdoing. Indeed, this approach makes sense when frauds are global, that is, if we want to make an impact on reducing the prevalence of global fraud, we need to implement global solutions.

63. In the United States, the federal statute provides an incentive to states that adopt FCA to prevent frauds on own programs and has resulted in adoption of fundamentally similar statutes in over twenty states. As a result, when one state or federal government identified nationwide fraud, individual states can recover pro rata share of impact, even if did not devote any resources to investigation other than to calculate share of losses. The United States uses national coordinating committees for states to make sure state shares are recovered and correctly allocated among states. American cities now are also following along and collecting after large settlements for impact on their municipal worker's health care programs. This type of legal integration is important in an environment where global trade and business transcends common borders.

Yours Faithfully

Tony Nikolic

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2. Terms of Reference

That the following matters be referred to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report by 30 June 2017:

a. the development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, taking into account the substance and detail of that contained in the Registered Organisation Commission (ROC) legislation passed by the Parliament in November 2016;
b. the types of wrongdoing to which a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors should apply;
c. the most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law;
d. compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America;
e. measures needed to ensure effective access to justice, including legal services, for persons who make or may make disclosures and require access to protection as a whistleblower;
f. the definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability;
g. the obligations on corporate, not-for-profit and public sector organisations to prepare, publish and apply procedures to support and protect persons who make or may make disclosures, and their liability if they fail to do so or fail to ensure the procedures are followed;
h. the obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures;
i. the circumstances in which public interest disclosures to third parties or the media should attract protection;
j. any other matters relating to the enhancement of protections and the type and availability of remedies for whistleblowers in the corporate, not-for-profit and public sectors; and
k. any related matters.

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Submission to

Parliamentary Joint Committee on Corporations and Financial Services.

Whistleblower Laws and Protections

An Australian False Claims Act (Qui Tam): Whistleblower Laws that Provide 'Global Solutions to Sophisticated Global Wrongdoing'.

3. Overview of False Claims Act and its Successes in Protecting the Public Interest

When introducing the False Claims Bill to the US Congress in 1863 in response to rampant frauds against the government, Senator Henry Wilson of Massachusetts stated:

"…This bill is reported for the purpose of ferreting out and punishing these enormous frauds upon our Government; and, for one, my sympathies are with the Government, and not with the men who are committing these frauds...I trust that the Senate will pass this bill, or some bill that will put fraudulent contractors in a position where they may be punished for their frauds..."[7]

Implementing the False Claims Act in the Australian Setting

There could not be a better time than now for the Australian legislature to reinforce whistleblower laws to take a more robust role, not only in the protection of whistleblowers, but also in uncovering harmful corporate fraud. Indeed, the cornerstone for any reform in this area is that it is available, pragmatic rather than idealistic and abolishes gaps that make parties vulnerable.

Loopholes that deny coverage when it is needed most, either for the public or the harassment of the victim, compromise whistleblower protection laws and undermine the public's confidence in their governments ability to rule equitably and transparently. Thus, seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context, particularly if we are to protect people against any harassment, detrimental action and/or reprisal - all of which could have a chilling effect on themselves and their families in ways that only a defendant's resources can limit.

Comparing whistleblower laws to those found in the United States under the *False Claims Act 31 U.S.C §§3729-3733* is a legitimate question.[8] The persistent questions about social enforcement and character of individuals in reporting and preventing corporate fraud, corruption and misconduct are at the forefront of current debates and legislative reforms

[7] Senator Henry Wilson of Massachusetts, 1863 - Congressional. Globe 37th Congress 3d Session, 952, (1863), p956 <http://memory.loc.gov/cgi-bin/ampage> viewed 31 March 2013.
[8] Sawyer, K, R. "Courage Without Mateship" (28 November, 2004) Paper Presented at the National Conference of Whistleblowers Australia, p1.

regarding whistleblower incentive programs globally.[9] In 2014, during the G20, it was established that Australia was poorly ranked amongst other member nations with respect to supporting, protecting and incentivising whistleblowers from the private sector. Furthermore, studies from around the world indicated that people no longer wanted to be punished for doing the right thing.[10] What we know from the present literature is that whistleblowers from within the private sector represent one of them most effective and efficient sources of information uncovering fraud and wrongdoing particularly within the pharmaceutical and defence industries. Notwithstanding these facts, whistleblowers from the Australian corporate sector are not encouraged to reveal wrongdoing because laws purporting to shield them are woefully inadequate.

Research shows that money lost to contractor fraud and false claims against the Australian Commonwealth may represent at least 10% of the total budget. The implications of deregulated corporate governance policies and inadequate legal mechanisms has left auditing as the primary means for detecting fraud and wrongdoing. Studies on significant frauds demonstrate that the greater part of fraud and corruption flies under the radar because it remained invisible to auditors. In some cases, the auditors themselves were implicated in some of the largest frauds recorded. Hence there is a gap in the law that prevents detection of frauds beyond those measures found in auditing and Australia's statutory regimes. The aim of this submission is to demonstrate that the gap between industry frauds and false claims detected by auditors and those not detected at all can be addressed by implementing an Australian False Claims Act with (qui tam) or provisions similar to this Act.

Australia's involvement in the international community has exposed it to a plethora of international threats that are difficult to detect, investigate and prosecute under current laws. Its integration in global defence projects such as the F35 joint strike fighter[11], emissions trading markets[12], energy sector and pharmaceutical products[13] makes it an ideal candidate for exploitation from unscrupulous entities that seek to deplete scarce public resources. The solution presented by Professor Faunce suggests that Australia should implement a *False Claims Act with qui tam* or similar qui tam laws to those found in the USA.

Fraud Detection in Australia affecting the Budget

Australia's fraud, false claims and general wrongdoing detection laws have proven to be inadequate, particularly when compared to some developing and developed nations.[14] To some degree the problem relates to Australia relying predominantly on auditing, internal corporate governance and regulatory oversight as the primary mechanisms to detect, investigate and prosecute frauds and false claims. Further weaknesses exist because Australia relies primarily on immunity, without further incentives to bring wrongdoing to light. As we had seen during the Global Financial Crisis ("GFC"), stringent auditing and

[9] Dworkin, T.M 'Whistleblowing MNCs, and Peace'. (2002) 35, Vanderbilt Journal of Transnational Law, 457.
[10] Wolfe, S., Worth, M., Dreyfus, S., Brown, A.J. 'Whistleblower Protection Rules in G20 Countries: The Next Action Plan', (Public Consultation Paper - Draft) G20 Conference - Brisbane, (June, 2014), 2 < http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf> at 29 November 2014.
[11] Parliament of the Commonwealth of Australia, "Review of Defence Annual Report 2006-2007: Joint Standing Committee on Foreign Affairs, Defence and Trade". (December 2008) http://webcache.googleusercontent.com/search?q=cache:Yb_oue_VnF0J:www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees%3Furl%3Djfadt/defenceannualreport_2006_2007/report/full%2520report%25201.pdf+Defence+annual+report+2006-2007&cd=3&hl=en&ct=clnk&gl=au [Chapter 3] viewed 21 April 2013.
[12] Gilbertson, T. "Fraud and scams in Europe's Emissions Trading System" (5 May, 2011) http://climateandcapitalism.com/2011/05/05/fraud-and-scams-in-europes-emissions-trading-system/ viewed 22 April 2013.
[13] The Federal Accountability Initiative for Reform, 'What's Wrong with Canada's Federal Whistleblower Legislation: An analysis of the Public Servants Disclosure Protection Act (PSDPA)' (9 April, 2012), 3 http://fairwhistleblower.ca/files/fair/docs/psdpa/whats_wrong_with_the_psdpa.pdf viewed 26 June 2012.
[14] Ibid.

regulatory procedures failed to detect some of the largest frauds in history. Indeed, there is evidence from qui tam (relators - whistleblowers) that in some cases, the auditors themselves may have been involved in the fraud or failed in their duty to report frauds.

By contrast, whistleblowers in the USA using the *False Claims Act §§3729-3733* (qui tam) provisions exposed numerous frauds and false claims that were missed through strict auditing procedures. Whilst the law itself is not "perfect" (*as no law is*), the evidence suggests that it attracts more reports and recovers losses due to its capacity to accommodate qui tam principles.

Currently, the literature suggests that global defence and healthcare agreements attracting Australian taxpayer investments have been the subject of ***alleged*** transnational frauds. However, unlike the U.S taxpayers, Australian taxpayers did not receive a portion of the settlements, despite the agreement from the Department of Justice suggesting the settlements were 'global'. Whilst Australian auditors are missing these frauds, they are not going unnoticed because the Australian Federal Police Association (AFPA) have indicated that a False Claims Bill should be implemented to address frauds within the pharmaceutical industry.[15]

Unfortunately, whistleblower laws in Australia appear to be in the same position sexual, child abuse and domestic violence laws were 30 years ago. We all know it happens, we know who the dominant perpetrators are, but few actually report and take action to address wrongdoing because the substantiative protections do not exist or they are just "poor".

Integrating laws in this manner is not foreign to legislative reforms in Australia. Multilateral Agreements

Australia is party to a variety of multilateral agreements, conventions and protocols that comport and reflect its social, cultural and legal attitudes towards combatting fraud and wrongdoing against the Government. There are no foreseeable social, cultural and legal impediments that may deter Australia from entering into a bilateral agreement with the USA and perhaps other countries to combat fraud under a proposed False Claims Act (qui tam). Indeed, Australian lawmakers can refer to similar agreements currently on the international stage that support integration at the domestic and international level.

For example, Australia is party to a number of multilateral agreements that hold common values for both nations. These include:

The *United Nations Convention against Corruption (Multilateral), Agreement for the Establishment of the Anti-Corruption Academy as an International Organisation [2012] ATS 27 Multilateral, Convention on Combating Bribery of Foreign Officials in International Business Transactions [1999] ATS 21 Multilateral, United Nations Convention Against Transnational Organized Crime [2004] ATS 12 Multilateral, United Nations Framework convention on Climate Change [1994] ATS 2 Multilateral*.

Cultural Shift in Australia

The implementation and application of globally consistent whistleblower laws modelled or mirroring those from the USA can assist in applying a cultural shift for Australian society and businesses to the extent that (qui tam) relators are viewed as persons of good conscience, not rogues or snitches. Generally, Australia requires whistleblower laws that go beyond

[15] Australian Federal Police, "Government Continues to take seriously AFPA argument for a Qui Tam False Claims Bill for Australia" (12 November, 2012) < https://www.afpa.org.au/sites/default/files/publications/1085.pdf > viewed 16 January 2017.

'symbolic' or perceived protections[16]; they must be pragmatic laws with purpose that support openness and integrity through private/public partnerships with law enforcement bodies who diligently investigate all matters.[17]

> "*It is important for whistleblower laws to promote a culture where honest disclosures are respected, valued, and even rewarded. A failure to support whistleblowers equates to the promotion of the protection of misconduct and wrongdoing. In recent years, Australian whistleblowers have experienced remarkable hardship for uncovering crimes and potential breaches of National Security*."[18]

One way Australian lawmakers can increase reporting of fraud, corruption, waste and wrongdoing is to provide law enforcement and regulatory bodies with the capacity to deputise and incentivise private citizens to provide inside information about fraudulent activities against the public purse.[19]

Attorney General Developing Clearer Laws.

A key responsibility of the (Attorney General) in Australia is developing clearer laws. Developing clearer laws are considered to be an essential part for a legally obliged society to ensure citizens and law enforcement has an accessible avenue to uphold the 'rule of law'. In accordance with Attorney General's guidelines, legislations will ideally be simple and clear having regard to consumers (citizens, companies and law enforcement) having access to justice in the public interest.[20] Indeed, an Australian False Claims Act (qui tam) will reduce legislative complexity because it will provide alternative causes of action in addition to the ones currently available. Essentially, this approach will give all consumers (plaintiffs and defendants) of legal services greater certainty and guidance.[21] Moreover, this alternative allows (qui tam) plaintiffs and their legal counsel to select which law they wish to prosecute under thereby filling gaps and loopholes often exploited by fraudsters.

The implications of having ambiguous laws provides further safe havens for fraudsters and makes other otherwise honest parties appear fraudulent. For example, in *Safeco Insurance Company of America v Burr*[22], Safeco interpreted the *Fair Credit Reporting Act* in a way that contributed to a relator action being brought against it. However, after being assessed by the court objectively, it was held that Safeco did make false claims but under an assumption that it was following the *Fair Credit Reporting Act*. By contrast, there are other cases[23], when assessed objectively, suggest that some may rely on ambiguous laws to present false claims. Therefore it is important that legislators clarify laws and close as many loopholes as possible to prevent exploitation. Indeed, as we can see from cases in the USA, the False Claims Act provides parties with an equitable remedy regarding liability when viewed objectively.

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[16] Martin, B. "*Illusions of Whistleblower Protection*" (2003) 5:119, University of Technology Sydney.
[17] Criminally prosecuted Australian customs whistleblower revealed that nothing will change "if the culture does not permit an honest person to come forward and call their bluff, blow the whistle as it were, then no, nothing will ever change, it needs root and branch reforms". ABC NEWS, "Customs whistleblower must be pardoned: Xenophon" (21 December, 2012) http://www.abc.net.au/news/2012-12-21/whistleblower-xenophon/4439782 17 April 2013. Another of Australia's most significant whistelblowers who uncovered massive corruption and drug dealings in the police force stated "*I survived, Fascism, I survived, Communism, But (Australian) democracy is killing me*" see Sawyer, K, R. "Courage Without Mateship" (28 November, 2004) Paper Presented at the National Conference of Whistleblowers Australia, p1.
[18] Latimer, P. Brown, A.J, "*WHISTLEBLOWER LAWS: INTERNATIONAL BEST PRACTICE*" (2008) 31:3 University of New South Wales Law Journal, p768 see also Kessing Case above n 12.
[19] Latimer, P. Brown, A.J, "*WHISTLEBLOWER LAWS: INTERNATIONAL BEST PRACTICE*" (2008) 31:3 University of New South Wales Law Journal, p788.
[20] Australian Government – Attorney Generals Department "*Causes of Complex Legislation and Strategies to address these*" http://www.ag.gov.au/LegalSystem/ClearerCommonwealthlaws/Documents/ClearerLawsCausesofcomplexlegislationandstrategiestoaddressthese.pdf viewed 10 April 2013.
[21] Australian Government – Attorney Generals Department, Above n39, p1.
[22] 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045, 20 A.L.R. Fed. 2d 803 (2007)
[23] *U.S v Science Applications International Corporation*., 653 F Supp. 2d 87 (D.D.C 2009).

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Incongruities and Gaps in Law

A False Claims Act (qui tam) will provide citizens and law enforcement with a specific legal remedy that will address current gaps, uncertainty and incongruities in Australian law. Gaps, uncertainty and incongruities in legislation combined with depleting resources and moral hazards are increasing the burden upon Australian taxpayers and may be contributing to higher national deficits. [24] These gaps in legislation are compelling citizens of good conscience to take information about wrongdoing from their own country to countries that support whistleblowers who bring wrongdoing to light. For example, recently, whistleblowers from 49 countries (including Australia) reported irregularities from their own nation to U.S authorities. This was in part, because U.S laws provide the best forum and plaintiff friendly legal mechanisms for whistleblowers to report fraud and misconduct with confidence. For example, the Securities and Exchange Commission (SEC) attracted 349 whistleblower tip-offs from 49 countries around the globe. The information provided by a British whistleblower led to a settlement in the USA with a reward being paid for the (qui tam) relator.[25]

It is highly probable that Australian whistleblowers have information about conduct imperilling the lives of soldiers, patients, the elderly and children with further effects being felt in the environment and finance; however they lack an adequately supported legal forum where they can provide this information. Thus, it is extremely important, not only for the Australian economy, but Australian community and environment to implement a False Claims Act (qui tam) sooner rather than later.

Correcting Uncertainty and Ambiguity

By implementing an Australian False Claims Act (AFCA) the Australian Attorney General has an opportunity to simplify laws creating certainty for consumers and practitioners. As is evident with current laws, Australia possesses a fragmented legislative approach, meaning that laws are scattered in many different instruments found under the *Therapeutic Goods Act 1989* (Cth); *Therapeutic Goods Regulation 1990 (false claims)*; *Competition and Consumer Act 2010 (formally Trade Practices Act 1974 (TPA) (civil and criminal penalties); Human Services (Medicare) Act 1973 (recovery); Corporations Act 2001 (whistleblower protections); Human Rights Act 2004 and Criminal Code Act 1995* just to name a few. These laws along with the many others can be applied only serve to increase costs and complicate case management procedures which invariably increase impact upon the courts and people.

Each one of the legislations cited above provides elements that can be found in the False Claims Act USA. Therefore, while some may argue that Australian law does not comport with the False Claims Act, there is no support for such a claim empirically.

[24] See Honorable Jason Clare "*New warning - Serious investment fraud*" [Minister for Home Affairs] http://www.ministerhomeaffairs.gov.au/Mediareleases/Pages/2012/Third%20Quarter/9July2012-Newwarning-seriousinvestmentfraud.aspx viewed 15 April 2013.

[25] Drummond, S. "*Australians respond to US tip-off reward scheme*" (22 November, 2012) Financial Review, http://www.afr.com/f/free/markets/capital/cfo/australians_respond_to_us_tip_off_0XimSmUU5qkZoSIa2J43fN viewed 19 April 2013.

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4. Overview of the English and the U.S. Models -

When it comes to whistleblower laws, the world appears to be split into two camps, the British Model and U.S model. In the following I summarise both models and conclude that whistleblower laws that provide incentives under the ancient principles of qui tam have proven to be the most pragmatic, efficient and comprehensive laws in operation. Australia can learn from the *False Claims Act 31 U.S.C §§3729-3733* and related statutes if we are to implement rigorous laws to address wrongdoing.

The US False Claims Act – 'Lincoln's Law'

The collapse of Enron and other massive private sector frauds at the turn of the century alerted Americans to the importance of corporate whistleblowing. The US enacted the *Sarbanes-Oxley Act of 2002* ('*US-SOX*'), an unprecedentedly wide-ranging market regulation and corporate governance framework.[26] *US-SOX* contains whistleblower provisions which were later supplemented by the *Dodd- Frank Wall Street Reform and Consumer Protection Act* (together '*US-SOX/Dodd- Frank*').[27] These laws forbid reprisals against employees who blow the whistle and impose severe punishments for retaliations. Additionally, these statutes facilitate detection by requiring the establishment of internal whistleblowing systems and encourage it by offering financial incentives ('bounties') to whistleblowers.

Apart from the *False Claims Act* 31 U.S.C §§3729-3733 (1863), *US-SOX/Dodd-Frank* is the main example of the American model. These statutes permit employees who have discovered actual or even possible corporate wrongdoing to elect to report it through three different channels: to their employer, to a regulator or to the media. For all three avenues of disclosure the protection is equally rigorous, thus the choice between the three is sustained as a genuine one for the potential whistleblower. This means that there is no express or implicit legislative preference for internal reporting as there is with 'softer' approaches such as in the UK and under the *WPA*.

The policy emphasis of the American model is more on the reporting of malfeasance to public authorities and the deterrence of wrongdoing and less on the promotion of companies' internal compliance, although the *False Claims Act* does have a positive impact on improving internal compliance because it also incentivises companies by reducing penalties if they self-report. Laws based on this model usually do not require or prioritise internal reporting as doing so is considered to encourage cover-ups, destruction of evidence and recrimination against potential witnesses within the business.[28] False Claims, *US-SOX/Dodd-Frank* principles have been replicated in many whistleblower provisions throughout the US with a steady uptick occurring globally.[29]

False Claims Act, US-SOX/Dodd-Frank have had some notable successes. Significant instances of fraud have been uncovered. The US Securities and Exchange Commission ('SEC') received a total of 3,620 whistleblower reports in 2014 under the *US-SOX/Dodd-Frank* regime, including many reports of fraud. ***Within the SEC there is a separate body called the Office of the Whistleblower*** which administers the law, and which has emphasised that the bounty provisions have been relied upon to disclose critical 'inside information' that would not have been revealed but for the bounties offered. Since 2011 over $50 million has been paid as bounties to 18 whistleblowers; the most recent payment was $3 million announced in July 2015.25 The largest bounty so far was $30 million announced in 2014,

[26] *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, §§806, 116 Stat 745, 802-4 (2002).
[27] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, §922, 124 Stat 1376, 1842-50 (2010) ('Dodd-Frank').
[28] Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar Publishing, 2012) 239.
[29] Ibid, 152.

which was awarded to a whistleblower outside the US, confirming the international reach and importance of these laws.[30]

In the USA, transparency has become a cornerstone of its culture, so much so that it is enshrined in a raft of legislations that promote and incentivise whistleblowers to expose fraud, corruption, wrongdoing and waste against the public purse. Predominately, whistleblower laws such as the *False Claims Act 31 U.S.C §§3729-3733* act as public defence mechanisms and facilitate in holding large corporations, contractors and government departments accountable for almost any conduct that involves the use of public money. By contrast, Australia does not have similar legislations to protect taxpayer funds and because of this, Australian taxpayers remain vulnerable to fraud, wrongdoing and false claims because they remain hidden from regulators and enforcement bodies.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last three decades has revealed numerous lessons learned, which have steadily been solved on the U.S. federal level through amendments to correct mistakes and close loopholes.

In the past thirty years, the United States government has recovered more than $30 billion dollars and punished and deterred fraud in a wide variety of government programs under a whistleblower statute known as the *False Claims Act, 31 U.S.C. 3729-3733* ("FCA"). Since the 1986 version of the FCA was passed, with bipartisan support in both houses of the United States Congress, fraud recoveries in the United States have risen dramatically. Not only has the "FCA" contributed to greater recoveries, the cost benefit of using public/private prosecution models yields greater efficiency in terms of transactional compliance. An analysis of recoveries in the health arena found that the United States government gets back $20 for every $1 invested in False Claims Act investigations and prosecutions.[31]

In the fiscal year of 2012, the United States recovered nearly $5 billion in False Claims Act cases, including $3 billion from a health care fraud and $1.4 billion for housing and mortgage fraud.[32]

The False Claims Act's harnesses a public-private partnership between whistleblowers, their attorneys, and the government to promote efficient and effective law enforcement across any sector that relies on public funds to manage contracts and projects. The former Assistant Attorney General of the United States Tony West describes the False Claims Act as "*quite simply, the most powerful tool that we have to deter and redress fraud*."[33]

Even large states in the United States, which have populations similar to that of Australia, such as *California, Texas, New York and Florida*, now have their own False Claims Acts and have recovered hundreds of millions of dollars for their state governments.[34] In the last

[30] US Securities and Exchange Commission, 'SEC Announces Largest-Ever Whistleblower Award' (Press Release, 2014-206, 22 September 2014) <https://www.sec.gov/News/PressRelease/Detail/ PressRelease/1370543011290>.
[31] Meyer, J, A., "Fighting Medicare and Medicaid Fraud: The Return on Investment from False Claims Act Partnerships" Taxpayers Against Fraud Education Fund (TAF), (October, 2013) <http://www.taf.org/public/drupal/publications/reports/TAF-ROI-report-October-2013.pdf> accessed 1 November 2014.
[32] www.justice.gov/opa/pr/2012/December/12-ag-1439.html.
[33] Seewww.justice.gov/opa/pr/20120/deember/12--1439; www.money.cnn.com/2012/12/04/news/ economy/justice-whistleblowers/index.html.
[34] *See generally*, www.taf.org/press-releases/record-year-false-claims-act-recoveries.

several years, the United States has also extended whistleblower financial incentives into the areas of securities and commodities fraud.[35]

General principles of the False Claims Act

The False Claims Act provides that those who knowingly submit, false claims for payment of government funds are liable for up to three times the government's damages plus civil penalties of $5,500 to $11,000 for each false claim. The statute contains what are called *qui tam* provisions, which allow people with evidence of fraud against the government to sue on behalf of the Government. People who sue under the False Claims Act are called "relators" or "whistleblowers," and are eligible for 15 to 30 percent of the amount recovered.

These financial incentives empower citizens to help police crime and aid law enforcement because whistleblowers alert the government to fraud and wrongdoing in a wide variety of complex industries. The whistleblowers assist in saving the Government money during investigations because they provide a roadmap to evidence and detail how the wrongdoing was planned and perpetuated, potentially saving the government years of effort and millions in investigations costs.

Basic Example of a False Claims Act Case

For example, if an employee of a pharmaceutical company discovered that their boss was defrauding the government by submitting false claims about a successful clinical trial that led to a medication being subsidised by the taxpayer, the employee could file a False Claims Act qui tam suit against the employer. After filing the suit, the Department of Justice (or authorised enforcement body), in consultation with the local Attorney Generals Office using the Australian Government Solicitor ("AGS"), might choose to intervene. Then, if the plaintiff wins, the plaintiff could be entitled to between 10% and 30% of the government's award depending on level of involvement between parties and the information imparted.

False Claim Act relators are entitled to whistleblower protections from retaliation under the *False Claims Act* 31 U.S.C §3730(h)(1) and (2).

History of the False Claims Act

There is a large amount of literature on the U.S False Claims Act and associated State statutes. A product of antiquity, the False Claims Act utilising its qui tam provisions have endured many amendments, partial repeal, later re-enactment and criticisms, however it remains as one of the most potent anti corporate and versatile frauds laws in the world.

The first records relating to qui tam being used as a law enforcement mechanism can be traced back to 695 England. In 695, King Whitred of Kent relied upon qui tam principles to encourage citizens to come forward and provide information about wrongdoing throughout his kingdom. As a result of providing the information and assisting the King in administering justice across the Kingdom, qui tam relators (whistle-blowers) were provided monetary incentives. Hence transactional legal market principles emphasising the integration of private and public law enforcement partnerships were at the forefront of practices designed to detect, investigate and remedy wrongdoing. In essence, it was recognised that monetary rewards were one of the most effective ways to ferret out wrongdoing. The first records of whistleblower incentive programs have been traced back to 695 in England. At this time, the

[35] *See* Securities Whistleblower Incentives and Protection provisions of Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. ' 78u-6 (July 2010).

legal literature demonstrates that King Whitred of Kent declared: "*If a freeman works during the forbidden time [i.e. the Sabbath], he shall forfeit his 'healsfang', and the man who informs against him shall have half the fine, and [the profits] from the labour*". [I have provided a snapshot illustrating the chronological development of the False Claims Act from 695 to its present form. (*please see figure 1 annexed to this literature review*)].

Commenting on forfeitures, Lord Blackstone in the III BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 68 - (transliteration supplied);

"*But, more usually these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor and then the suit is called a qui tam action, because it is brought by a person 'qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur . If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a qui tam, or popular, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws ...* "

According to Doyle, records of qui tam laws being transported to the American colonies can be traced back to (1686). A review of this literature suggests that qui tam provisions dot the progressive landscape of laws throughout the American colonies[36], the first U.S congress[37] and later judicial cases. By way of example: in 1803 with *United States v Simms, 5 U.S (1 Cranch) 252 (1803)* and *Adams v Woods, 6 U.S. (2 Cranch) 336 (1805)* where it was confirmed that qui tam law was in principle a remedial one, not punitive. Therefore, not only is there a substantial history of common law principles that Australia can rely upon when implementing a potential FCA, but there is a substantial body of longitudinal evidence that demonstrates its utility as a potent enforcement tool.

The concept of private enforcement of public rights was later implemented in 10 of the 14 statutes passed by the first American Congress. In 1863, Abraham Lincoln introduced the FCA into Congress and it was subsequently passed as the *Act of March 2, 1863, 12 Stat, 696 (1863)*. Because Abraham Lincoln introduced the law, it is sometimes referred to as 'Lincoln's Law'. As enacted, the specific purpose of the FCA was to address various frauds against the Government, including presenting false claims, false oaths, theft, embezzlement, omissions to undertake obligations (reverse false claims provisions) and conspiracy.

[36] Doyle, C., 'Qui Tam: The False Claims Act and related Federal Statutes' (BiblioGov, 2009), p3 - "**Colonial Laws of Massachusetts** 8 (1686) (penalties for Fraud in the sale of bread to be distributed one third to inspector who discovered the fraud and the remainder for the benefit of the town where the offence occurred) and (penalties for catching Mackerel out of season to be distributed one half to the informer and one half to the town where the offence occurred). **Statutes of Connecticut** 531 (1672) (penalties of 10 shillings for permitting a night-time disorderly assembly under one's roof to be distributed half to the town and half to the individual who filed the complaint."

[37] Doyle, above n5, p2 – Example: "Section 3 Act of March 1, 1790, 1 Stat. 101, 102 (1790); Section 4, Act of July 20, 1790, 1 Stat. 131, 133 (1790); Section 3 Act of July 22, 1790, 1 Stat. 137, 138 (1790); Section 44, Act of March 2, 1791, 1 Stat. 198, 209 (1791) .

"Lincoln's Law" – A revolution in Law Enforcement

"Lincoln's Law" (in Honour of President Abraham Lincoln) was implemented to protect the public purse from fraud, wrongdoing, waste and abuse affecting the Union army procurement process during the American Civil War.[38] Lincolns Law was enacted by President Abraham Lincoln in response to Civil War suppliers who sold substandard ammunitions, pack animals and other items to Union army purchasers and provided the government with a means of recovering funds lost through fraud, waste and abuse in military programs.[39]

Of equal importance, Congress was concerned that the faulty or defective goods were imperiling the lives of U.S Army soldiers and its citizens. For example, instead of purchasing operating muskets - the Union army was sold boxes of sawdust, dilapidated donkey's were presented as horses, "*for sugar it got sand, for leather it got brown paper and other non- proven experimental ideas marketed and promoted by sanguine inventors*".[40]

From its original implementation, the FCA has undergone numerous amendments in 1943, 1986 and 2009.[41] (*I have annexed a figure outlining the chronology of the False Claims Act (qui tam) and historical developments traced through England to the USA. See figure 1*).

False Claims Act 31 U.S.C §§3729-3733

The False Claims Act, as amended by the *Fraud Enforcement and Recovery Act of 2009*, P.L. 111- 21 (S. 386), 123 Stat. 1617 (2009), now proscribes:

(*1) presenting a false claim;*

(2) making or using a false record or statement material to a false claim;

(3) possessing property or money of the U.S. and delivering less than all of it;

(4) delivering a certified receipt with intent to defraud the U.S.;

(5) buying public property from a federal officer or employee, who may not lawfully sell it;

(6) using a false record or statement material to an obligation to pay or transmit money or property to the U.S., or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the U.S.;

(7) conspiring to commit any such offense.[42]

Incentivising Corporate Compliance under the False Claims Act Self Disclosure rules.

Not only does the False Claims Act incentivise or compensate citizens for bringing wrongdoing to the attention of enforcement agencies, but it also incentivises integrity in the

[38] See Haron D.L, Dordeski M.V and Lahmann L.D, "Bad Mules: A Primer on the Federal and Michigan False Claims Acts" (Nov 2009) Michigan Bar Journal 28, <http://www.michbar.org/journal/pdf/pdf4article1590.pdf> at 18 March 2013.
[39] See Haron D.L, Dordeski M.V and Lahmann L.D, "Bad Mules: A Primer on the Federal and Michigan False Claims Acts" (Nov 2009) Michigan Bar Journal 28, <http://www.michbar.org/journal/pdf/pdf4article1590.pdf> at 18 March 2013.
[40] Sylvia, C.M., "The False Claims Act: Fraud Against The Government" (Thompson Reuters, 2nd Ed, 2010, Updated 2014) p43.
[41] The social utility of a public/private enforcement principle were espoused in - U.S. v. Griswold, 24 F. 361, 365-366 (D. Or. 1885): "The Statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilisation that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons …."
[42] Charles Doyle, 'Qui Tam: The False Claims Act and related Federal Statutes' (BiblioGov, 2009).

corporate sector because it rewards self disclosure. It does this by reducing damages and sanctions if a company provides information about a violation in a timely manner and providing no other enforcement processes have begun.

If a company discovers conduct that might give rise to FCA liability, it should consider self-disclosure. The FCA reduces damages where the person or company committing the violation furnishes all information regarding the violation within 30 days of obtaining it, and cooperates fully with the government investigation (*31 U.S.C. § 3729(a)(2)*). In these cases, the court may assess double, instead of treble, damages. However, reduced damages are only available if at the time of self-disclosure, no criminal prosecution, civil or administrative action has yet commenced. A company considering self-disclosure is under significant time constraints to: Conduct a quick, but thorough, investigation. Implement corrective action to terminate and remedy any improper conduct.

Disclose the improper conduct to the appropriate agency or US Attorney's Office. Despite these constraints, self-disclosure has various benefits when compared to the prospect of facing FCA prosecution. In addition to reduced fines, self-disclosure can curtail a whistleblower lawsuit, which may be dismissed if the company has already publicly disclosed the information. Moreover, some self-disclosures may be mandatory under parallel laws and regulations.

For example: *The Patient Protection and Affordable Care Act* (PPACA) (known as Obama Care) amended the *Social Security Act (US)* to require companies to report and return overpayments to the government within 60 days (Pub. L. No. 111- 148 § 6402(a)).

Government contractors subject to the *Federal Acquisitions Regulations* (FAR) are required to "timely disclose" to the Inspector General or their contracting officer whenever the contractor has "credible evidence" of a violation of federal criminal law involving fraud, conflicts of interest, bribery or gratuities, or a violation of the FCA (48 C.F.R. § 521.203-13). A company or its officers may be excluded, suspended or disbarred from government programs if these mandatory PPACA and FAR disclosures are not made in timely manner.

Because of the complex considerations and requirements for self-disclosure and a tight timeline, a company should seek the advice of counsel as soon as it considers any self-disclosure to the government.

The British Model

The UK's *Public Interest Disclosure Act 1998* (UK) ('*PIDA*') created the current British whistleblowing system.[43] As with the American model, the *PIDA* and laws based on it permit employees who have discovered corporate wrongdoing to choose between reporting internally or externally to the authorities or the media. However, unlike the American laws, the British model sets strict requirements for media disclosures which whistleblowers must satisfy to be protected. The *PIDA* does not offer bounties or require companies to establish whistleblowing systems.[44]

The stricter requirements for external disclosures implicitly encourage internal reporting and mean that the policy of the (PIDA) is the promotion of good corporate citizenship. This model emphasises the promotion of speedy and "*in-house*" resolution of allegations of wrongdoing. Weight is thus provided to the *corporate interest* in internal and "*quiet*" resolution of reports rather than exposing the wrongdoing in the public interest. However, as we have seen in the recent decade with the "LIBOR" mortgage fraud scandal, often the

[43] Public Interest Disclosure Act 1998 (UK) c 23.
[44] Elletta Sangrey Callahan, Terry Morehead Dworkin and David Lewis, 'Whistleblowing: Australian, UK, and US Approaches to Disclosure in the Public Interest' (2004) 44 *Virginia Journal of International Law* 879, 904-5.

conduct causes catastrophic collapses despite the organisations knowledge of the wrongdoing. Thus, as noted in the American model, the reluctance of adopting an internal approach relates to the fact that auditors and company directors have the ability to cover-up long-standing frauds for a longer period.

The Senate should note that there is anecdotal evidence that whistleblowers from the U.K are disclosing information in the USA because the protections and incentives are greater.

Australian Law – A Dismal Record for Whistleblower Protections

Part 9.4AAA of Australia's *Corporations Act 2001* (Cth) ('*Corporations Act*') purportedly protects whistleblowers who report breaches of this legislation from civil and criminal liability that may arise from the disclosure if such reports are made in good faith. The Australian system is a hybrid, combining features of both the American and British models. For example, pt 9.4AAA contains one simple evidentiary requirement of 'reasonable grounds' for all disclosures[45] (a feature of the American model) but it does not require the establishment of whistleblower systems or offer bounties to whistleblowers (both central to the American model). As reports of wrongdoing other than breaches of the *Corporations Act* are not covered (not counting the *Public Interest Disclosure Act 2013*), the protection afforded is very narrow indeed. In principle, even a report of criminal activity would not be protected if that activity did not also breach the *Corporations Act*.

The Australian record has been dismal. Virtually no use has been made of the *Corporations Act 2001* whistleblower provisions; in-fact whistleblowing in corporate Australia has been and remains rare.[46]

The approach of the Australian Securities and Investments Commission ('ASIC') to corporate whistleblowing was the subject of a Senate inquiry after revelations that ASIC took nearly 18 months to act on whistleblowers' reports alleging serious misconduct at Commonwealth Financial Planning Limited, a part of the Commonwealth Bank group.[47] The *Public Interest Disclosure Act 2013* (Cth), which protects public sector whistleblowers, took effect from January 2014, and reignited debate about whether revamped private sector whistleblower laws are needed in Australia.

Globally, legislative regimes specifically covering corporate whistleblowing have existed for less than two decades (except USA) and as such there is limited research into their effectiveness. In any case, the significance of recorded malfeasance is difficult to gauge because it is obvious that only a fraction of wrongdoing is detected or reported.[48] Estimates of the proportion of reported cases to the total number vary enormously. Existing data to date paints a rather mixed picture of the effectiveness of private sector whistleblower laws, for example, the American laws are utilised much more than most others, including the Australian, English and Japanese laws, and are far more rigorous.[49]

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[45] *Corporations Act 2001* (Cth) s 1317AA(1)(d). See also Janine Pascoe, 'Corporate Sector Whistleblowing in Australia: Ethics and Corporate Culture' (2009) 27 *Company and Securities Law Journal* 524, 527 .

[46] Sulette Lombard and Vivienne Brand, 'Corporate Whistleblowing: Public Lessons for Private Disclosure' (2014) 42 *Australian Business Law review 351, 351-352*.

[47] Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) ch 8.

[48] Amitai Etzioni and Derek Mitchell, 'Corporate Crime' in Henry N Pontell and Gilbert Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer, 2007) 187, 188.

[49] See Zenichi Shishido and Sadakazu Osaki, 'Reverse Engineering SOX versus J-SOX: A Lesson in Legislative Policy' in Zenichi Shishido (ed), *Enterprise Law: Contracts, Markets, and Laws in the US and Japan* (Edward Elgar Publishing, 2014) 349, 349–51; Rachel Beller, 'Whistleblower Protection Legislation of the East and West: Can it Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China' (2011) 7 *NYU Journal of Law & Business* 873, 878–80; Jason MacGregor and Martin Stuebs, 'The Silent Samaritan Syndrome: Why the Whistle Remains Unblown' (2014) 120 *Journal of Business Ethics* 149; Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook, 18th ed, 2016) 546.

Notwithstanding the inconclusive evidence at a global level on the question of effectiveness, private sector laws are increasingly being enacted around the world.[50] This increase is due partly to evidence that whistleblowing is a major reason — perhaps ***the*** major reason — that corporate fraud is uncovered. This represents a paradigm shift in Australian thought, particularly after the corporate scandals that contributed to one of histories largest global financial collapses, of which the taxpayers bore the burden and continue to do so. Indeed, upon reflection, internal compliance, international shifting and auditing methods were proven to be ineffective. However, the American model was able to clawback money lost by making recoveries under various whistleblower statutes that possessed the qui tam provisions.

Benefits of an Australian False Claims Act

If implemented correctly, an Australian False Claims Act will have the potential to deter, detect, investigate, prosecute and recover substantial amounts of public funds that would have otherwise been lost.

The report of nations estimates that organisations lose approximately 5% of their total revenue to fraud.[51] The U.S government sources estimate public funded programs managed by government agencies may lose 10% or more to fraud, waste, abuse and wrongdoing.[52]

The Australian government budget posted total revenues of $338.1 billion in 2011-12.[53] Placing this into context, 5% losses to fraud could cost the Australian taxpayer approximately $16.9 billion, whilst 10% amounts to approximately $33.8 billion in losses. Thus, if Australia was $18 billion in deficit, it is probable that a correctly implemented Australian False Claims Act may reduce, if not go a significant way towards eliminating national deficits because of its recovery provisions.[54]

Repairing the Budget is Good Governance

Essentially, the small cost of providing an incentive has the potential to yield a substantial benefit to our national security, healthcare, government contracts and financial sectors. Not only will governments be seen to be addressing wrongdoing at a corporate level as well as the individual level, but they will also be seen by the electorate as a fiscally responsible Government intent of repairing the budget.

The Problem with Auditing in Detecting Fraud

A significant problem exists because the greater part of fraud and corruption flies under the radar because it is invisible to those charged with auditing and regulatory compliance. The early part of the new millennium demonstrated that auditing was not capable of detecting fraud and wrongdoing. Examples of such conduct were far reaching and included ***allegations*** against some of the worlds largest auditing firms such as Arthur Anderson with Enron, KPMG and Price Waterhouse Coopers. At the same time, we learned that whistleblowers were the ones that exposed the massive compliance irregularities and frauds, not auditors or regulators. Hence, the thesis focuses on developing and enhancing a body of knowledge that

[50] Vaughan, above n12, 239.
[51] Association of Certified Fraud Examiners, "The Report to the Nations on Occupational FRAUD and ABUSE: Global Fraud Study" (2010) http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf viewed 28 April 2013.
[52] Scammell, H., "Giant Killers" (Grove Press, 2004) foreword.
[53] Australian Government, "Budget 2011-12" http://www.budget.gov.au/2011-12/content/fbo/html/part_1.htm viewed 18 April 2013.
[54] Sloan, J,. "Wayne Swan is just a shadow of great treasurers past" (6 July 2013) The Australian Newspaper, http://www.theaustralian.com.au/opinion/wayne-swan-is-just-a-shadow-of-great-treasurers-past/story-e6frg6zo-1226674753693 viewed 8 July 2013.

will fill the gap between substantiative and pragmatic fraud detection and augmented auditing methods.

Despite being implicated by virtue of allegations, Price Waterhouse Coopers (PWC), amongst one the world's best known auditing firms described '*whistleblower tipoffs as the single most effective source of detecting and rooting out corporate criminal activity*".[55] Internal statistics from the Department of Justice Civil Fraud Division established that whistleblowers were able to detect and report more fraud in government programs than all the government enforcement agencies combined.[56] Actually, whistleblowers proved that frauds were global, widespread and more readily detected in countries where incentives and protections are available.[57]

Auditing

Auditing in this submission is not used only in its common accounting context but also covers a systematic and independent examination of primary data, how it was generated and reported. The purpose of an audit from a compliance standpoint is to provide third party assurances to stakeholders that the subject matter is free from material misstatement and complies with laws and regulations.[58]

In order to understand how frauds are perpetuated, they have to be unpacked, some in a multidisciplinary way. By unpacking them in this way, we can determine that the most effective way to combat fraud and corruption is to fill the gap between stated positions and true positions. This submission suggests that the *False Claims Act* with its qui tam provisions provides the most effective way to bridge the gap.

Because the frauds are so sophisticated and spread throughout the world, it is almost impossible to detect frauds using auditing and compliance mechanisms alone. Moreover, as we had seen during the Global Financial Crisis ("GFC"), even where stringent auditing and compliance mechanisms were in place, frauds continued undetected until they became exposed by whistleblowers who themselves pointed out that the auditing process was a contributing factor to the frauds in some cases.[59]

Auditing Limitations

There is extensive literature detailing the benefits and limitations of auditing. The literature is diverse and can be found in commerce articles, accounting, commentary on law and indeed case law. Auditing plays an integral role in maintaining the integrity of financial and other capital markets. An auditor's role is one of utmost importance because they are meant to be gatekeepers assisting regulatory bodies in protecting the integrity of business systems such as finances, healthcare and procurement processes. Indeed, it was recognised over a century

[55] Khon, S, M. "The Whistleblowers Handbook: A Step by Step guide to doing what's right and Protecting Yourself" (Lyons Press - Globe Pequot Press, USA, 2011),p xv.
[56] Khon, S, M. "The Whistleblowers Handbook: A Step by Step guide to doing what's right and Protecting Yourself" (Lyons Press - Globe Pequot Press, USA, 2011), p xv.
[57] Rapp, G, C. "BEYOND PROTECTION: INVIGORATING INCENTIVES FOR SARBANES-OXLEY CORPORATE AND SECURITIES FRAUD WHISTLEBLOWERS" (2007) 87:91 Boston Law Review, p113.
[58] Garner, B, A. Blacks Law Dictionary, (West, 2004), 140.
[59] Cited in Sutherland, E, H., White Collar Criminality, (February, 1940), 5, (1), American Sociological Review. See also In 1998, Bill Clinton made a speech at New York University and stated that "corporate managers, auditors and analysts were taking part in a game of nods and winks" see e.g. Jackson, D, C., 'A history of audit failures', Reuters (United States), 11 November, 2011, <http://blogs.reuters.com/david-cay-johnston/2011/11/11/a-history-of-audit-failures/>.

ago, that the role of an auditor was more akin to that of a '*watchdog rather than a bloodhound*'.[60]

Almost a century later during the (1970's), the case of *Pacific Acceptance Corporation Ltd v Forsyth* ("Forsyth") examined the role of auditing. The idea of an auditor merely remaining alert like a 'watchdog' was abandoned in favour of promoting a proactive role in joining forces with regulatory bodies in detecting anomalies.[61] In part, the auditor's role began to assume greater standards of care largely because of the failures known to exist in auditing systems. The idea for policy makers and the courts was to increase the liability of auditors so they would remain vigilant towards transactions that indicated wrongdoing, mismanagement, misrepresentation or fraud. In essence, auditing inspections were designed to be undertaken with due diligence having regard to accurately assessing a company's degree of compliance with regulatory procedures.

In 'Forsyth', Moffit J held that "*In planning and carrying out his work an auditor must pay due regard to the possibility of error or fraud*".[62] At this point, judicial commentary suggests that auditors were now required to seek information beyond management, employees and executives and apply a high degree of skepticism to tasks. In essence, they were required to undertake a 'complete assessment of the business' having regard to misstatements, error and fraud.

One factor that may have affected the audit quality was its capacity to engage in fraud detection effectively. Dechow et al, (1996)[63] reported that auditors were less likely to have detected accounting and compliance problems in the absence of strong corporate governance policies. Indeed, the manipulation of earnings and data appears to be motivated by a company's commercial desire to attract external financing at a low cost. Hence, earning manipulations tended to be correlated with conditions where

(1) boards were controlled by managers;

(2) Executive officers simultaneously serve as chair of the board,

(3) less likely to have an audit committee and less likely to have auditors that are independent. Indeed, when augmented into scenarios where regulatory capture has occurred, the resulting conclusions may not be in the public interest.

Benito Arrunada (2004) concedes that auditing failures of the previous decade contributed significantly towards the global financial crisis.[64] In response to the profound financial difficulties that followed with accompanying litigations, policymakers introduced more regulations into what Arrunada claims was an already over-regulated discipline. Arrunada suggests newer and more regulations may not be the answer because they may restrict the free market, rather what may be required are more effective processes. Arrunada advocates for a position that would see natural auditing processes continue with a view to adopting solutions that are conducive to maintaining compliance in an evolving market.[65] Whilst these auditing processes refer to the financial industry, the purpose of my reference to them is to

[60] Re Kingston Cotton Mill Co (No2) [1896] 2 CH 279 at 288-289.
[61] (1970) 92 WN (NSW) 29 at 73.
[62] (1970) 92 WN (NSW) 29.
[63] Dechow, P., Sloan, R. & Sweeney, A. Causes and Consequences of Earnings Manipulation: An Analysis of Firms Subject to Enforcement Actions by the SEC (Spring, 1996), Contemporary Accounting Research, 1–36.
[64] Arrunada, B., Audit and the Crisis of Auditing, (2004), 5(4), European Business Organisation Law Review, 635-645.
[65] Ibid, 2.

demonstrate that auditing as a discipline (*as important as it is*) has profound limitations regardless of the industry and circumstances upon which they are applied. Even if auditing was provided with aggressive and rigorous regulatory support, it will remain limited in its ability to detect fraud and wrongdoing.

In 2011, Reuters news correspondent David Cay Johnston provided a snap-shot of auditing failures.[66] Johnston provides a series of examples detailing how companies such as Olympus Corp falsified financial reports for over decade, and its auditor failed to detect the fraud. According to Johnston, the failures of auditors to detect fraud represented a cancer in the accounting industry. Further examples suggest:

> *"The failures go back years. How about Al Dunlap's manufactured numbers at Sunbeam in 1998? Or teenage con man Barry Minkow's ZZZZ Best, which turned out to be a Ponzi scheme and collapsed in 1987? Or Equity Funding, with its computer program to fabricate life insurance policies, in 1973? Or the National Student Marketing "pooling of interests" fraud in 1970, which gave birth to the Financial Accounting Standards Board? Or the 1938 McKesson & Robbins scandal, which gave us the first American audit standards? Or Ivar Kreuger's 20 percent dividends Ponzi scheme in 1932?"*

On 13 December 2014, *The Economist* ran a media article titled "*The Dozy Watchdogs: Some 13 years after Enron, auditors still can't stop managers cooking the books: Time for some serious reforms*". The article details significant accounting and compliance scandals that have emerged after the lessons from the Global Financial Crisis ("GFC"). The significance of this article is that it demonstrates that auditing remains limited in its ability to detect wrongdoing and fraud. As a consequence billions of dollars from investors are being siphoned through scandalous corporate practices. Some of these scandalous practices involve claims about companies owning portions of forests (Sino-Forest) that did not exist in the first place.[67]

> *"And although accountants have largely avoided blame for the financial crisis of 2008, at the very least they failed to raise the alarm. America's Federal Deposit Insurance Corporation is suing PwC for $1 billion for not detecting fraud at Colonial Bank, which failed in 2009. (PwC denies wrongdoing and says the bank deceived the firm.)*
>
> *This June two KPMG auditors received suspensions for failing to scrutinise loan-loss reserves at TierOne, another failed bank. Just eight months before Lehman Brothers' demise, EY's audit kept mum about the repurchase transactions that disguised the bank's leverage".*[68]

Based upon the evidence attained through literature of global auditing practices and Australia's reliance on auditing, there is an obvious gap in legal remedies that impede and consequently support the perpetuation of, or at the least act as enablers to wrongdoing.

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[66] Jackson, D, C., 'A history of audit failures', Reuters (United States), 11 November, 2011, <http://blogs.reuters.com/david-cay-johnston/2011/11/11/a-history-of-audit-failures/>.
[67] N.A, "The Dozy Watchdogs: Some 13 years after Enron, auditors still can't stop managers cooking the books: Time for some serious reforms" (13 December, 2014) The Economist. <*http://www.economist.com/news/briefing/21635978-some-13-years-after-enron-auditors-still-cant-stop-managers-cooking-books-time-some*> at 24 December 2014.
[68] Ibid.

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5. Legislative Change "MUST" be Practical to achieve High Transactional Compliance Rates.

Using Law to Promote Transactional Compliance

Kim Sawyer supports the implementation of a False Claims Act in Australia on the basis that it is cost effective and self-sustaining. Sawyer provides a unique perspective of the FCA because he sees the practice of law in the community as occurring in a market place where products and services are bought and sold at rates that are sustainable, effective and efficient. She calls this the "*transactional compliance market*".[69] Sawyer's aim is to justify the False Claims Act on the basis that if it is implemented and modelled on the U.S FCA, it will have a positive cost benefit affect similar to that of the U.S model. The theory espoused by Sawyer suggests that economic principles can provide an insight into just how effective and efficient a law can be in practice.

Sawyer suggests that prosecutions become the vehicle upon which transactions and efficiency of a particular law can be measured. The cost of the prosecution is the transaction cost, whilst the transaction price is the penalty imposed by the case. Hence, it is the amount of prosecutions that determines the efficiency and effectiveness of a particular law. For example, if prosecution numbers are high they are effective in meeting their intended goals of disincentivising and deterring wrongdoing. Indeed, by contrast, if prosecution numbers are low the prosecution costs become high. According to Sawyer these factors indicate that a laws operational effectiveness and efficiency is low. Sawyer notes, as of 2011, there was no literature indicating Australian whistleblower laws being used successfully to defend whistleblowers.

Sawyer's model draws upon terminology such as 'liquidity' from the financial/economic sector to explain how the transactional compliance market operates. Liquidity in the financial sense is the "*degree to which an asset or security can be bought and sold in the market without affecting its price. Liquidity is characterised by a high level of trading activity" and possess the "ability to convert an asset into cash quickly*".[70] When whistleblowers are rewarded for their information, the cost of the reward becomes a part of the transaction cost while the fine imposed upon the violating entity becomes the transaction price. The successful prosecution will invariably result in a fine or other sanction, thereby turning '*information' provided by the whistleblower into 'cash*' (liquidity).

Furthermore, the information used to acquire the penalty is enhanced further because it provides the basis for maximising future deterrence of wrongdoing, thereby contributing to lower costs to the community in the long-term. According to Sawyer, an Australian False Claims Act will be efficient and effective if implemented properly. As it stands, the transactional efficiency ratio of the U.S FCA is returning $20 for every $1 spent on enforcement. Australia may attract similar returns on investment and settlements if a *False Claims Act* and associated models are implemented in a manner that mirrors the U.S whistleblower laws.

[69] Sawyer, K., 'Lincoln's Law: An Analysis of an Australian False Claims Act' (September, 2011), School of Historical and Philosophical Studies, University of Melbourne <http://www.bmartin.cc/dissent/documents/Sawyer11.pdf>, at 2 November 2014.
[70] The Financial Dictionary, "Liquidity" The Free Dictionary. <http://financial-dictionary.thefreedictionary.com/liquidity> at 12 December 2014.

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6. Types of Wrongdoing for which Whistleblower Protections Should Apply?

Question B states*:* **"The types of wrongdoing to which a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors should apply".**

"Whistleblowers not only alert the government to fraud, but they also provide a roadmap to evidence, saving the government years of effort and millions in investigations costs".[71]

Summary of the types of wrongdoing addressed by a False Claims Act.

Due to its broad statutory construction, the *False Claims Act Sox/Dodd Frank* have the capacity to address wrongdoing in any industry or sector that attracts taxpayer funded resources or oversight. The only limitation can be attributed to the imagination of sanguine parties who tend to be very versatile in their capacity draw upon scarce resources and create marketing campaigns about products or services that never existed in the first place. As I will detail below, these can generally include;

20. Pharmaceuticals
21. Medical Devices
22. Healthcare
23. Financial Services
24. Housing and Mortgages
25. Insurance
26. Construction
27. Defence Contracting
28. Stimulus projects
29. Educational lending
30. Oil and Gas
31. Technology
32. Scientific Research
33. Bid Rigging
34. Emissions trading and subsidies.

List of largest Settlements in the Pharmaceutical industry going under the radar in Australia due to gaps in law.

I have provide a list of the largest settlements reached between the United States Department of Justice and pharmaceutical companies from 1991 to 2012, ordered by the size of the total settlement (See Table 1).

The settlement amount includes both the civil (False Claims Act) settlement and criminal fine. Glaxo's $3 billion settlement included the largest civil, False Claims Act settlement on record, and Pfizer's $2.3 billion settlement including a record-breaking $1.3 billion criminal fine. Legal claims against the pharmaceutical industry have varied widely over the past two decades, including Medicare and Medicaid fraud, off-label promotion, and inadequate manufacturing practices. With respect to off-label promotion, specifically, a federal court recognized off-label promotion as a violation of the False Claims Act for the first time in *Franklin v. Parke-Davis*, leading to a $430 million settlement.

[71] Assistant Attorney General (U.S) Tony West cited in Taxpayers against Fraud "*the 1986 False Claims Act Amendments: A look at twenty-five Years of Effective Fraud Fighting in America*" http://www.taf.org/public/drupal/TAF-fca-25anniversary_12%281%29.pdf viewed 13 May 2013.

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Versatility of the whistleblower laws that incentivise people to reveal wrongdoing.

The False Claims Act's qui tam provisions have been adopted in other statutes including State laws (*that we have included in schedule 1 and 2 of this submission*)[72], they have also spread to other Federal Statutes where transparency is critical;

Securities and Investment

1. In 2010, Congress passed the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which, among other things, established whistleblower reward programs within the **Securities and Exchange Commission (SEC)** and the **Commodity Futures Trading Commission (CFTC)**. Whistleblowers who report violations of the securities laws or the Commodity Exchange Act can receive rewards of 10 to 30 percent of the amount the government collects in successful enforcement actions over $ 1 million (*including penalties, disgorgement and restitution*).

Securities and Exchange Commission ("SEC") Provisions

1. *Foreign Corrupt Practices Act 1977 ("FCPA")* provides an additional incentivised whistleblower program for individuals who provide the Government with information concerning violations of foreign corrupt practices that fall under the "SEC's" jurisdiction.

   The FCPA addresses the problem of international corruption in two ways:

   a. The Anti-Bribery provisions, which prohibit the bribing of foreign government officials to obtain or retain business and

   b. The Accounting provisions, which impose record-keeping and internal control requirements, and prohibit individuals and companies from knowingly falsifying books and records.

   The U.S Department of Justice and the SEC share FCPA enforcement authority.

   In actions brought by the SEC, the statute of limitations is set by 28 U.S.C. §2462, which provides for a five-year limitation, which begins to rub "*when the first claim accrued*."

   Whilst the five-year limitations period does prevent the SEC from seeking civil penalties for violations pre-dating the five-year period, the SEC may still seek causes of action that include disgorgement of ill-gotten gains.

Sarbanes-Oxley Act 2002

1. The *Sarbanes-Oxley Act 2002* ("SOX" Act) expanded requirements for all U.S. public company boards, management and public accounting firms. The Act includes a number of pro-active statutory obligations that also apply to privately held companies and corporate officers. For example, "SOX" proscriptions include;

   a. The willful destruction of evidence to impede a Federal investigation.

[72] See ***Schedule 2*** of this submission for a list of U.S States where a False Claims Act is operating.

b. Holding corporate officers personally liable if certifications are held to be false and misleading. This provision makes corporate officers keenly aware that they risk imprisonment.

c. 'SOX" provides 'compensation claw-back provisions' that allow the 'SEC' to force company CEO's and/or CFO's to disgorge any compensation, commission from stock sales or bonus packages earned within a year the misconduct occurred.

The "SOX" Act includes a number of pro-active vigilance programs that assist the Government in monitoring and enforcing violations. The genesis for these provisions came about after numerous corporate and accounting scandals that included Enron, WorldCom. As a consequence, these scandals proved to be the tip of an 'ice-berg' that led to the 'Global Financial Crisis' ("GFC") and subsequent collapse of public confidence in financial markets and corporate reputations.

2. Section 1107 of the "SOX" Act provides whistleblower protections in pertinent part stating;

> *"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this title, imprisoned not more than 10 years, or both".*[73]

3. The whistleblower protection provisions found in the *Sarbanes-Oxley Act 2002* §1107 are mirrored in the *Crime and Criminal Procedure U.S.C Title 18* §1513(e).

Taxation

2. In 2006, Congress passed the *Tax Relief and Health Care Act 2006*, which established a robust rewards program for individuals who have knowledge of and provide information about violations of the tax laws to the Internal Revenue Service ("IRS"). In order to qualify for a reward under **26 USC § 7623**, the whistleblower must provide information about tax fraud exceeding $2 million, and, if the whistleblower is making allegations against an individual, the individual's annual gross income must exceed $200,000. If these conditions are met, Section 7623 establishes a reward of 15-30% of the total amount collected by the IRS in administrative or judicial actions based upon the whistleblower's information and allows for lesser awards in other specified circumstances. The law also created a Whistleblower Office within the IRS dedicated to working with whistleblowers and administering the reward program.

   In August 2014, the Treasury Department issued **final regulations** to implement 26 U.S.C. § 7623.

   The IRS Commissioner **called** the IRS Whistleblower Program "an important tool for improving tax administration."

[73] The provisions in *Sarbanes-Oxley Act 2002* §1107 are mirrored in the *Crime and Criminal Procedure U.S.C Title 18* §1513(e) See also general commentary on whistleblower protections in Stephen M. Kohn, Michael D. Kohn, and David K. Colapinto. *Whistleblower Law: A Guide to Legal Protections for Corporate Employees* (Praeger Publishers, 2004).

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Investment Frauds, International Money Shifting and Abuse

Australia's involvement in the international community has increased its susceptibility to fraud domestically and from abroad. In July 2012, the Australian Minister for Home Affairs and Minister of Justice Jason Clare released a report and warning regarding the threat of serious and organised investment fraud in Australia had affected more than 2,600 Australians with reported losses of more than $113 million in the last five years.[74] Echoing the warnings of the Minister for Justice, in February 2013, Australian treasurer the Hon Wayne Swan (MP) warned international Financial Ministers of the G20 that '*global action was required by June 2013'* to counter international money shifting and tax avoidance schemes causing havoc on international money markets.[75] Wayne Swan indicated that much more was required to ensure international laws kept up with the "*changing nature of global commerce*". For example, in the USA, it was estimated that almost 10% of their budget was being lost through, fraud, abuse, waste and other wrongdoing.

A Risk Comparator of Healthcare Costs – USA versus Australia

By way of example, the Australian government budget posted total revenues of $338.1 billion and total expenditures of $377.7 billion as of 2011-12. Of the total budget, Australian government expenditure on healthcare and pharmaceuticals in general exceeded $130.3 billion in 2010-11. Based on figures from 2012 Central Intelligence Agency (CIA) fact-book and comparing them to Australia's budget, Australia ranked 13th in the world for government budgets, even though by population it was ranked 55th in the world.

By comparison, the population of United States at over 315.7 million is approximately 13.9 times larger than Australia at over 22.9 million. But the government expenditures for healthcare were approximately $878 billion only about 6.7 times that of Australia at just over $130 billion. Public health expenditure as a percentage of total health expenditure for the USA totalled approximately 45.9% or 17.9% Gross Domestic Product (GDP) , while the Australian government spent approximately 69.1% on healthcare or 9% of its GDP.

Even where US States of similar populations were compared to Australia, healthcare expenditure is considerably higher in Australia. These comparisons demonstrate that Australia is at a significant risk exposing it to 'wrongdoing'. Even if we were to make a comparison in the literature between healthcare expenditure from Texas (USA) fielding a population of 25.7 million, there are larger disparities. Texas spent $44.2 billion on healthcare and Australia with a population of 22.9 million spent $130 billion. Furthermore, Australia spent almost 3 times more on healthcare programs, despite Texas having 2.8 million more people than Australia. Therefore, it is reasonable to assume that Australia spends more in government health programs than the United States of America (including comparable states), and, as a consequence, Australia has more per person impact from potential frauds on those programs than those in the USA.

Reverse False Claims – Failing to fulfil an "Obligation" to pay Government

A violation of the *False Claims Act 31 U.S.C §3729* generally occurs when (*inter alia*) somebody knowingly presents (or causes to be presented) to the federal government a false or fraudulent claim for payment. For example, the *False Claims Act 31 U.S.C §3729* (1) (A to

[74] *See* Honourable Jason Clare "New warning - Serious investment fraud" [Minister for Home Affairs] http://www.ministerhomeaffairs.gov.au/Mediareleases/Pages/2012/Third%20Quarter/9July2012-Newwarning-seriousinvestmentfraud.aspx viewed 15 April 2013.

[75] Tingle, L. "*Swan urges G20 action on tax cheats: Global Crackdown*" (14 February 2013) Australian Financial Review. http://www.afr.com/p/national/swan_urges_action_on_tax_cheats_etlPFt6f1KkFywolggYttN viewed 09 May 2013.

F) relevantly provides remedies for violations of the FCA for conduct that has already attracted a payment from the Government.

By contrast, under *False Claims Act 31 U.S.C §3729* (1)(G), a violation occurs when somebody:

"*knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government*".

Therefore, the "reverse" false claims provisions are triggered when there is an "obligation" to pay the Government money and there was some form of deception used to hide, refuse to pay or lie about that obligation.

The term "obligation" means you must demonstrate that the Government was owed money and assuming some form of deception was used to trigger the operation of §3729(1)(G).

Protecting Patients and Stopping Abuse of Patient Care:

The FCA can protect lives by discouraging companies from selling unsafe medical equipment and technologies. In addition to that, it provides remedies for conduct that involves doctors and hospitals performing unnecessary surgeries, investigations and procedures.

Health Care Frauds and False Claims

The model I refer to as "*privatised profits whilst socialising costs*" is one that will invariably attract both legitimate businesses who have an interest in promoting transparency and good governance, and on the other hand, it will attract unscrupulous parties that seek to defraud or abuse Australia's scarce resources.

Whilst it is well known that the Australian healthcare system and U.S healthcare systems are different, in recent years Australia has begun to move towards privatisation of some services with the lion-share of funding being subsidised by the taxpayer. This move towards privatisation presents Australia with risks of wrongdoing that are also experienced in the U.S. As a consequence, as more health services and products are migrated towards a privatised model, the risk of wrongdoing may increase proportionally and it is therefore critical that legal counterbalances are implemented to ensure transparency is maintained in the private sector.

Not only is the U.S a leading manufacturer, supplier and transporter of medical products, services and medical devices, but its Medicare and Medicaid systems have experienced more false claims criminal and civil settlements than any other sector. While the False Claims Act (U.S) has seen many successful cases where taxpayer dollars were clawed back as a result of fraud and anti-competitive behaviour, the same cannot be said for Australia who invariably sell the same medications from the same manufacturers and suppliers.

Fraudulent Marketing in Healthcare

Between 2001 and the present, pharmaceutical and medical device companies in the United States have paid the government more than $10 billion for fraudulent marketing practices.[76] For example, in 2012, GlaxoSmithKline agreed to pay $3.4 billion for fraudulent marketing of its products, among other things, including false and misleading claims as to blockbuster drugs Advair, Paxil, Wellbutrin, and Avandia, among others.

[76] *See, e.g.*. www.justice.gov/opa/pr/2012/July/12-civ-842.html.

Moreover, not only did these pharmaceutical company cases result in substantial payments but also radical changes in the way drugs were marketed and sold at these major companies within and across the US pharmaceutical and device industry. The consequences of these actions fostered targeted compliance guidelines, state and national transparency statutes, none of which is in force in other countries.

As part of these settlements, each company agreed to transform certain problematic business practices as part of a corporate integrity agreement. For example, fifteen companies were required to agree to publish on their own website the payments to physicians in the United States[77] demonstrating a shift away from concealing payments to making payments transparent as mandated by a new federal law called the *Physician Payments Sunshine Provisions in the Patient Protection and Affordable Care Act of 2009, H.R. 3590, ' 6002* (The "Sunshine Act").

Business Plan Frauds and False Claims

In the USA, False Claims litigations have addressed sophisticated schemes that involve business plan frauds. In some cases whistleblower suits have identified and provided strong evidence of complex large frauds that are "business plan" frauds, that is, frauds designed by top corporate management in order to boost sales or profits. [78]

Generally, business plan frauds include marketing plans and may exist in various forms across many industries. Business plan frauds have been predominately identified in litigations against pharmaceutical companies.

The types of frauds include *knowingly installing or producing defective products; inflating prices; over billing for laboratory tests, fraudulent promotion of pharmaceutical products, under-paying oil and gas royalties and falsely certifying services when they do not*.[79]

For example, business plan frauds in the pharmaceutical industry can include companies knowingly manufacturing products that are no better than a placebo, the medication is approved for use in children when it is not or certifying that a medication addresses 'chemical imbalances'.[80]

The frauds can begin through the research and clinical trials and be further enhanced and manipulated through the internal and external marketing and promotion stages. This can be achieved by over-emphasising a drug's effectiveness, or alternatively marketing the medications for off-label use to induce market penetration. By relying on scientific journals and ghost-written articles, they manage to infiltrate the medical community providing a biased but potentially dangerous outlook about their product and their target population with potentially dangerous consequences. As was the case of GSK distributing an internal marketing memo that their antidepressant "Paxil" demonstrated "***REMARKABLE EFFICACY***" in the treatment of Major Depressive Disorder (MDD) when in fact, the clinical trial and two others failed to demonstrate safety of efficacy. Unfortunately, this marketing strategy continues until their medication has a significant market share. Once the product has

[77] Gregory E. Demske., 'Physician Payment Reporting Provisions in Corporate Integrity Agreements' (12 Septmeber 2012) [Statement of Record] *United States Senate Special Committee on Aging Roundtable: "Let the Sunshine In: Implementing the Physician Payments Sunshine Act"* <www.oig.hhs.gov/testimony/docs/2012/Demske_statement> at 17 January 2017.
[78] *Taxpayers Against Fraud, "*the 1986 False Claims Act Amendments: A Look at Twenty-Five years of Effective Fraud Fighting in America*" http://www.taf.org/public/drupal/TAF-fca-25anniversary_12(1).pdf 31 May 2013, p13.*
[79] Taxpayers Against Fraud, "the 1986 False Claims Act Amendments: A Look at Twenty-Five years of Effective Fraud Fighting in America" http://www.taf.org/public/drupal/TAF-fca-25anniversary_12(1).pdf 31 May 2013, p13.
[80] *Kirsch, I, "*The Emperor's New Drugs: Exploding the Antidepressant Myth*". (Basic Books, 2010),p 4.*

market share, any litigations that may flow from it becomes the 'cost of doing business'.[81] This becomes problematic in Australia, because the Australian division may be able to legitimately claim they are not responsible for the fraud, despite being beneficiaries of large sums from the Pharmaceutical Benefits Scheme ("PBS") subsidy programs that relied on the fraud or false claims. These gaps are a grave concern in an environment where citizens are being prosecuted for $12,000.00 welfare matters, yet corporations who defraud the Government to the tune of hundreds of millions or billions are ignored.

– Whistleblower

the former vice president of Pfizer's global operations turned whistleblower stated:

"It is scary how many similarities there are between this industry and the mob. The mob makes obscene amounts of money, as does this industry. The side effects of organized crime are killings and deaths, and the side effects are the same in this industry. The mob bribes politicians and others, and so does the drug industry …The difference is, all these people in the drug industry look upon themselves - well, I'd say 99 percent, anyway - look upon themselves as law-abiding citizens, not as citizens who would ever rob a bank … However, when they get together as a group and manage these corporations, something seems to happen … So there's something that happens to otherwise good citizens when they are part of a corporation. It's almost like when you have war atrocities; people do things they don't think they're capable of. When you're in a group, people can do things they otherwise wouldn't, because the group can validate what you're doing as okay."[82]

Protecting Soldiers and Veterans

The FCA can discourage government contractors from supplying guidance systems that do not guide, weapons that do not fire, helicopters that crash and military jets that go over budget and do not meet specifications. Indeed, the FCA can help ensure that soldiers, airmen and sailors have equipment that operates in the field at the critical points in time that they are required. Therefore, the False Claims Act saves lives and makes us a stronger nation whilst at the same time it also punishes and/or deters those who seek to take advantage of Australia's veterans from diverting or diluting benefits intended for the care of veterans.

F-35 JSF – FCA Litigations USA

Lockheed Martin & BAE Systems

In 2002 Lockheed Martin Corporation[83] and BAE Systems settled a $ 6.2 million False Claims suit brought by [redacted] involving components found in the F/A 18

[81] Melanie Newman, 'BITTER PILLS FOR PHARMA'. (25 September, 2010) British Medical Journal, Volume 341, 632 http://www.bmj.com/content/341/7774/Feature.full.pdf, p25 viewed 10 May 2013.

[82] Rost P. The whistleblower: confessions of a healthcare hitman. (New York: Soft Skull Press, 2006) cited in Gotzsche, P, C. Corporate crime in the Pharmaceutical industry is common, serious and repetitive (14 December, 2012), 7-8, Nordic Cochrane Centre <http://www.cochrane.dk/research/corporatecrime/Corporate-crime-long-version.pdf> at 27 November 2014.

[83] "Lockheed Martin Corporation principally researches, designs, develops, manufactures, integrates, operates and sustains advanced technology systems and products, and provides a broad range of management, engineering, technical, scientific, logistic and information services. We serve customers in domestic and international defense and civil markets, with our principal customers being agencies of the U.S. Government. We were formed in 1995 by combining the businesses of Lockheed Corporation and Martin Marietta Corporation. We are a Maryland corporation. In 2006, 84% of our net sales were made to the U.S. Government, either as a prime contractor or as a subcontractor. Our U.S. Government sales were made to both Department of Defense (DoD) and non-DoD agencies. Sales to foreign governments (including foreign military sales funded, in whole or in part, by the U.S. Government) amounted to 13% of net sales in 2006, while 3% of our net sales were made to commercial and other customers." United States Securities and Exchange Commission *"ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934: Lockheed Martin Corporation" (December, 2006) http://www.contractormisconduct.org/ass/contractors/38/cases/711/804/lockheed-martin-2006-form-10k.pdf (open in PDF, viewed 20 June 2013.*

Hornet.[84] In 1993 Martin Marietta Corporation purchased General Electrics operations in Johnson City, New York. Later Martin Marietta joined with Lockheed Corporation to make Lockheed Martin.[85] Following this purchase, BAE Systems purchased Lockheed Martin's operations in Johnson City. The case alleged that GE and Martin Marietta manufactured and delivered substandard accelerometers assemblies for the F/A 18 Hornet that did not comply with electromagnetic interference requirements as set out in the contractual arrangements. The components play an integral role in the flight controls for the F/A 18 Hornets rudders. The F/A 18 Hornet is currently Australia's first line defensive military aircraft and is set to be replaced by the F-35 Joint Strike Fighter ("JSF") if and when it comes into production.

TMI Holdings

In March 2012, two whistleblowers exposed conduct in the F-35 JSF and F-22 fighter programs that led to successful FCA prosecutions in the USA. Lockheed Martin paid $15.85 million to settle allegations that it mischarged the government for perishable tools.[86] The DOJ alleged, from 1998 to 2005 Tools and Metal Inc (TMI), acting as a subcontractor for Lockheed Martin inflated costs for military aircraft tools used on the F-22 and JSF and then passed these inflated costs on to the government. In December 2005 former president Todd B Loftis pleaded guilty and was sentenced to seven years imprisonment for his role in the scheme.[87] Acting Assistant Attorney General Stuart F. Delery, stated: "*It is troubling that a large defense contractor with long-established contractual ties with the United States failed to undertake appropriate measures to ensure the integrity and validity of the costs it submitted to the United States*".

(Qui Tam) Case.

filed a qui tam suit against Lockheed Martin corporation alleging that the software being developed for the JSF was not being developed according to Lockheed Martin's internal guidelines and the guidelines sponsored by the United States Department of Defence.[88] The allegations include Lockheed Martin developing corrupt software that could be dangerous for the JSFs flight systems and its pilots. The notion that corrupt software is being developed is a concern because the JSF was marketed on the basis that it will have the ability to use its sophisticated computers to fly, engage and communicate under high threat battle conditions.[89] It follows that if the software is flawed, this can imperil the lives the of pilots and affect the security of Australia.

Chinook Helicopters

In 2000, Boeing settled a case for $54 million that involved the knowing installation of defective gears in the U.S. Army's heavy-lift Chinook transport helicopter. Catastrophic failure of gears resulted in several helicopter crashes, and 15 soldiers and two Boeing engineers were killed.

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[84] *Department of Justice "*LOCKHEED MARTIN & BAE SYSTEMS CONTROLS TO PAY U.S. $6.2 MILLION TO SETTLE FALSE CLAIMS ACT CASE*" (18 September 2002) http://www.justice.gov/opa/pr/2002/September/02_civ_533.htm viewed 22 May 2012.*

[85] Department of Justice "LOCKHEED MARTIN & BAE SYSTEMS CONTROLS TO PAY U.S. $6.2 MILLION TO SETTLE FALSE CLAIMS ACT CASE" (18 September 2002) http://www.justice.gov/opa/pr/2002/September/02_civ_533.htm viewed 22 May 2012.

[86] U.S. ex rel. Becker, et al. v. Tools & Metals, Inc., et al., Civil Action No. 3:05-CV-0627-L. see also Media release: Department of Justice., "Lockheed Martin Corporation Reaches $15.85 Million Settlement with U.S. to Resolve False Claims Act Allegations" (23 March, 2012) http://www.justice.gov/opa/pr/2012/March/12-civ-367.html viewed 22 April 2013.

[87] *Department of Justice., "*Lockheed Martin Corporation Reaches $15.85 Million Settlement with U.S. to Resolve False Claims Act Allegations*" (23 March, 2012) http://www.justice.gov/opa/pr/2012/March/12-civ-367.html viewed 22 April 2013.*

[88] *Trimble, S., "*Former F-35 worker sues Lockheed, alleges software lapses*" (17 July, 2009) http://www.flightglobal.com/news/articles/former-f-35-worker-sues-lockheed-alleges-software-lapses-329819/ viewed 13 July, 2013.*

[89] Kopp, C., "Assessing Progress on the Joint Strike Fighter Program" (17th May, 2008) http://www.ausairpower.net/APA-2008-03.html viewed 12 May 2013 see also Trimble, S., "Former F-35 worker sues Lockheed, alleges software lapses" (17 July, 2009) http://www.flightglobal.com/news/articles/former-f-35-worker-sues-lockheed-alleges-software-lapses-329819/ viewed 13 July, 2013.

It should be noted that Australia operates the Chinook heavy lift helicopter, which has been in service since the Vietnam War.

Military Marketing Practices

Problematic marketing practices and dubious representations during the concept stage may have been used to entice international governments to invest in the F-35 JSF program without first testing its actual capabilities.[90] According to Peter Goon of Air Power Australia, the JSF program was influenced by representations of overzealous marketers using Thana Marketing strategies.

"*Thana-Marketing refers to the systematic, covert, and (initially) profitable maltreatment of target customers through the use of misleading and deceptive marketing practices"*.[91] Thana Marketing strategies comprise a set of hidden business plan strategies that involves "*management conduct and philosophy that corrupts the marketing process and underpins societies contempt for marketing and immoral business practices*".[92] Indeed, within the context of controversial marketing principles, deception characteristically relies upon strategies that alter an opponent's perceptions in order to gain an advantage over a target audience.[93]

According to Carlo Kopp, commercial marketing methods have evolved to include complex deception techniques that can be modelled using mathematical information and game theoretic techniques. [94] These deception techniques are based upon a set of canonical strategies designed to engage victims in a deception game where the intention is to subvert, deny, corrupt, deceive by omission, saturate and spin information to distort perceptions and create a positive outlook on the product or services.[95]

Thus, modern marketing and advertising can often incorporate information warfare techniques previously employed only in times of war, but now being used in peacetime marketing and advertising. These techniques are being designed to generate deceptive messages with the intention of influencing target audiences to purchase, accept or invest in products and services. [96] Despite these practices being profoundly obvious in some areas,

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[90] Peter Goon - Australian Government Joint Standing Committee on Foreign Affairs, Defence and Trade "*Review of the Defence Annual Report 2010-2011 - APA Submission No 4 to the JSCFADT Hearings into the JSF - Thana Marketing, KPIs and the JSF Program" cited in "F-35 JSF Program: Evidence to Parliament Thana Marketing, KPIs and the JSF Program Air Power Australia*" (27 March 2012) Air Power Australia, http://www.ausairpower.net/APA-NOTAM-270312-2.html viewed 10 May 2013.

[91] *Peter Goon - Australian Government Joint Standing Committee on Foreign Affairs, Defence and Trade "*Review of the Defence Annual Report 2010-2011 - APA Submission No 4 to the JSCFADT Hearings into the JSF - Thana Marketing, KPIs and the JSF Program*" cited in "*F-35 JSF Program: Evidence to Parliament Thana Marketing, KPIs and the JSF Program Air Power Australia*" (27 March 2012) Air Power Australia, http://www.ausairpower.net/APA-NOTAM-270312-2.html viewed 10 May 2013.*

[92] Wickham, M., "THANA-MARKETING STRATEGY: EXPLORING THE BPS THAT DARE NOT SPEAK THEIR NAME" (2009) 9:1 International Journal of Business Strategy, p 200.

[93] Kopp C. and Mills B.I. "Information Warfare and Evolution" (November, 2002) Proceedings of the 3rd Australian Information Warfare & Security Conference, ECU, Perth. pp: 352-360 see also Kopp, C., "Classical Deception Techniques and Perception Management vs. the Four Strategies of Information Warfare" (2005) Clayton School of Information Technology, Monash University, Australia.

[94] Kopp, C., "Classical Deception Techniques and Perception Management vs. the Four Strategies of Information Warfare" (2005) Clayton School of Information Technology, Monash University, Australia; see also

Definition: *"*For the purpose of this paper, commercial product marketing is defined as the presentation of information pertaining to products which is intended to compel a potential customer to select these products over competing products. Deception in commercial product marketing is defined as the use of deception techniques to achieve the aim of marketing the commercial product despite the limitations or unwanted characteristics of the product in the perception of the potential customer*." Kopp, C., "*Considerations on Deception Techniques Used in Political and Product Marketing*" (2006) Clayton School of Information Technology, Monash University, Australia, p1.*

[95] Kopp C. "Shannon, Hypergames and Information Warfare," (2003) 2, 2: Journal of Information Warfare, pp108-118 see also Kopp, C., "Considerations on Deception Techniques Used in Political and Product Marketing" (2006) Clayton School of Information Technology, Monash University, Australia, p1.

[96] *Kopp, C., "*Classical Deception Techniques and Perception Management vs. the Four Strategies of Information Warfare*" (2005) Clayton School of Information Technology, Monash University, Australia.*

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7. Integrating Whistleblower Protections into Commonwealth Law

Question C - The most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law?

Mirrored provisions for an Australian False Claims Act.

There are many ways of integrating whistleblower protection laws for the corporate, public and not-for-profit sectors into Commonwealth law. In one respect it may be as simple as mirroring (*to some extent*) and transporting the *False Claims Act 31 U.S.C §§3729-3733* into Australian law because it provides a well rounded statutory package that provides sections for prosecuting wrongdoers and protecting whistleblowers. This concept is not foreign to Australian law, and history shows that both legal systems have many commonalities that include constitutional and statutory similarities, although direct use of legislations is not a common practice.

Cultural Similarities in law between Australia and USA.

Opponents to False Claims Act (qui tam) suggest that Australian laws are not culturally compatible with the principles of qui tam. Literature suggests that Australian law and U.S law have many similarities ranging from their criminal and civil codes against fraud, corruption, bribery and corporate wrongdoing to similarities in article III of the respective constitutions. Indeed, there are many differences too; however, the sociocultural and legal similarities are important measures that Australian lawmakers can refer to when implementing an Australian False Claims Act (qui tam) into Australian law.

For example, von Nessen (1992) notes (inter alia) that:

"*the Trade Practices Act 1974 (Cth) (now the Competition and Consumer Act 2010) reflects a limitation upon anticompetitive behaviour similar to that enacted in the United States in the Sherman Act 1890 (US) and the Clayton Act 1914 (US), as amended by the Robinson-Patman Act 1936 and the Celler-Kefauver Act 1950 (US). The areas of securities regulation, corporations laws, bankruptcy law, and environmental law provide other examples where similar issues have been faced and addressed legislatively; however, direct use of United States legislation is rare*".

It follows that if we accept the proposition that chapter III of the Australian constitution, *Competition and Consumer Act 2010* (Cth) and its predecessor the *Trade Practices Act 1974* (Cth) reflected an adaptation of private/public law principles originating in the USA, then we can also accept that further adaptations can occur if Australian legislators implement an *Australian False Claims Act* with qui tam provisions.

Civil Penalty Provisions

There is limited literature on the topic of transporting civil penalty provisions found under the CCA, to other statutes. However upon analysing the literature, it is apparent that further research in this area can provide new knowledge with respect to transplanting or transporting foreign legal principles to Australian statutes.

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The civil penalty provisions found under the CCA 2010 has been found to be similar (*not identical*) in construction to that of the *False Claims Act 31 U.S.C §3729* treble damages regime.

For example, Under the *Competition and Consumer Act 2010* (Cth) s76 states that if the court is satisfied that a provision of Part IV (except 44ZZRF & 44ZZRG) has been contravened the court may -

"*order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct*".

Section 76 (1A) (b) provides a penalty for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following. Section 76(1A)(b)(i) states that the greatest of $10,000,000 or (ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission--3 times the value of that benefit. A civil action for recovery of pecuniary penalties awarded under section 76 of the CCA 2010 is available after 6 years.

The literature suggests that the pecuniary penalties found under the CCA (2010) are similar to those found under the treble damages rules of the *False Claims Act 31 U.S.C §3729* where each false claim will attract a $5000 to $10,000 (US) fine with treble damages. Thus, research in this area supports the implementation of an *Australian False Claims Act* on the basis that it does comport with established Australian legal and cultural principles.

Relator provisions in Australia

Currently Australian law does provide private citizens with the power to act as relators. Under the *Uniform Civil Procedure Rules 2005 – Reg 7.23* (NSW) and Supreme Court Rules Part 4, Rule 5, there are statutory provisions for private citizens to act as Relators. Despite these provisions being available, they are rarely utilised to combat fraud and false claims because there is a gap in the overall structural framework including protections and rewards for whistleblowers, adequate legislative mechanisms to increase the likelihood of successful prosecutions, the political will of the Attorney Generals Department and common law rights granting citizens the authority to have standing and act as 'qui tam' relators in matters of public interest. Nonetheless, there has been some headway in Australian law that may be paving the way to the implementation of an Australian False Claims Act.

Australian Case Law supporting the implementation of a False Claims Act

Phelps Case

In *Phelps v Western Mining Corporation Ltd (1978) 20 ALR 183* the Australian High Court supported the right of private parties to seek injunctive relief for breaches of *Trade Practices Act 1974* (Cth) now the (*Competition and Consumer Act 2010* (Cth)).

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Truth About Motorways Case

In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd (2000) 200 CLR 591* the High Court upheld the capacity of private parties to bring a public action to prevent a violation of a public right or to enforce a public duty.

Australian Rewards Programs

The House of Representatives in Australia have made past references to (qui tam) rewards in an Australian context and noted it was incompatible with Australian societal principles. Director of Transparency international Australia (Dr Grahame Leonard) intimated that '*reward systems are incompatible with accepted principles found in Australia'*. However, after reviewing literature, I discovered that this view does not accord with contemporary or historical Australian cultural principles, evidence or legal practices from Australian society.

Australia has and continues to provide rewards to whistleblowers in areas of international criminal and local law. Australian jurisdictions have recognised the effectiveness of whistleblower 'tip-off' lines for Crime stoppers, neighbourhood watch and 'dob in a dumper'. For example, the 'dob in a dumper' campaign from Parramatta City Council offers rewards to residents that are prepared to testify and provide evidence in court about people who dump rubbish (trash) in public. This reward scheme provides people with monetary incentives for information leading to a conviction or infringement notice. Moreover, Crime Stoppers has paid more than $100 million (AU) in rewards for information leading to criminal convictions, drug and property recoveries globally.

The literature does suggest that there is a body of literature that suggests whistleblower rewards are immoral or do not comport with Australian values. While there may be critics rejecting (qui tam) in Australia because it is incompatible with Australian society, the principles and practices of (qui tam) can be seen to be operating in Australian society with success in civil and criminal matters.

Having regard to other reward programs currently in operation in Australia such as crime stoppers or 'dob in a dumper', there is no reason why (qui tam) actions cannot be introduced to support the public/private enforcement model for 'significant' frauds or wrongdoing depleting scarce Commonwealth resources.

Implementation of whistleblower protections into an Industrial relations framework

If a comprehensive set of whistleblower laws were implemented into Australian law, one way to integrate these provisions into Australian law may include merging a specific "Whistleblower" 'Part' or 'Schedule' into the *Fair Work Act 2009.* Ideally, this 'Part' or 'Schedule' will make specific reference to "whistleblowers" and/or 'relators' (*or a term defined by Parliament identifying the same conduct*) with specific remedies for breaches of any provisions.

It is submitted that the *Fair Work Act 2009* may be the best statutory instrument to ensure employee protections and rights are preserved because it is best suited to manage matters relating employment and industrial relations. The general law of employment provides a compelling basis for Australian Courts and Tribunals for the purposes of assessing compensation for claims of retaliation. In Australia, employers have a common law duty, arising from express or implied terms in contracts of employment, to take reasonable steps to ensure that employees in their organisation who blow the whistle are not bullied or

victimised. As a result, one of the few significant compensation awards was in favour of a NSW police officer whose employer failed to sufficiently support him after he reported suspected internal misconduct.

Implementing Whistleblower Provisions into the *Fair Work Act 2009*

Presently the *Fair Work Act 2009* (Cth) provides protections for employees under Part 3-1 of the *Fair Work Act 2009* ("FWA"), employees (including federal government employees) are protected from any unlawful 'adverse action' based upon their workplace rights, including initiation of any process or complaint under a work-related law.

The term 'Adverse action' is widely defined and includes *dismissal, injuring a person in their employment, prejudicially altering the employee's position and any other conduct that may have an adverse impact upon an employee, either directly or indirectly*.[125]

The remedies for breaching these provisions may include compensation, civil penalty orders imposed by a Court, interlocutory and final orders for injunctive relief, restitutionary measures including restorative orders and in serious cases it may include criminal penalties.

The *Public Interest Disclosure Act 2013* ("PIDA") appears to have increased the statutory protections of whistleblowers in the public sphere, however, it is yet to be tested in the High Court. However, the protections enunciated in 'PIDA' refer to the public sphere, not the private or non-profit sectors, thereby creating a legal gap that may be exploited.

There are trivial provisions available to whistleblowers in the private sector and these are found under the *Corporations Act 2001* (Cth) Part 9.4AAA. Indeed, these provisions are not highly regarded or utilised because they appear to be inadequate.

Australian Human Rights Commission

An alternative mechanism is addressing retaliatory conduct through the anti-discrimination commission. The *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth),[126] establishes the regime for making complaints of unlawful discrimination. Section 3 *et seq* of the "AHRC Act" defines 'discrimination' as meaning (except in Part IIB of the AHRC Act which relates to 'unlawful discrimination') s3(c) broadly states: *in respect of a particular job based on the inherent requirements of the job.* Whilst broad in context, it may be argued that detrimental action leading to a reprisal may be characterised as discrimination and attract remedies under the "AHRC" Act.

Integrating a False Claims Act into Australian Law

What is required is a stand-alone False Claims Act (qui tam) that is integrated into Australian law with a capacity to operate with the *Fair Work Act 2009* if and when a retaliation case is noted for a violation under the pertinent provisions of the FCA. Whilst the FCA relevantly proscribes retaliatory behaviour against whistleblowers and operates as a stand-alone law in the USA, matters where retaliation occurs tend to be filed in industrial Courts and it is up to the relator to bring the action in qui tam cases without the assistance of the Department of Justice.

Whistleblower protections "must" be as comprehensive and as broad based as possible to capture a wide variety of wrongdoing and protect whistleblowers from retaliation.

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[125] A.J Brown, 'Towards 'ideal' whistleblowing legislation Some lessons from recent Australian experience' (2013) E-Journal of International and Comparative Labour Studies. Available from <http://transparency.org.au/wp-content/uploads/2013/10/Brown-A-J-Towards-Ideal-Whistleblowing-Laws-Australia-forthc-2013.pdf> at 20 January 2017.

[126] *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 3.

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Whistleblower incentives for Financial Frauds as well as Fraud upon the Government.

The United States has enacted whistleblower incentives and protections in a piecemeal fashion, starting with the False Claims Act and then expanding the incentives and protections into other areas and statutes such as securities laws, tax laws, bank fraud laws and tax laws. Australia, however, can learn from this process and enact provisions that apply broadly to all types frauds and crimes that affect the public interest by enacting a statute which broadly incentivising the reporting of frauds that result in significant recoveries by a government enforcement authority. A central administrative filing structure that includes a designation by the whistleblower filer section as to which enforcement authorities have interests or jurisdictions would enable efficient referrals and potentially immediate electronic notice to the appropriate enforcement authorities.

Adequate Penalties for Violations Are Necessary for Deterrent Purposes

Whilst it may be perceived that incentives and/or compensation packages under the False Claims Act are large, the Senate may wish to consider the fact that large corporations must be fined adequately. There is value utilitarian in making fines adequate to deter future wrongdoing. In 2010, Melanie Newman in "Bitter Pills for Pharma" reviewed regulatory and business practices in the USA to ensure penalties were adequate. Referring to a number of civil and criminal False Claims cases overseen by the Federal Bureau of Investigations (FBI), Newman suggests penalties must be increased to include incarceration of executives and winding up subsidiaries selling company assets to third parties. According to the author, pharmaceutical companies agree to pay fines to settle their illegal drug marketing cases but they continue to do such practices calculating their conduct as '*the cost of doing business*'. Newman sums up by stating: fining multi-billion dollar corporations million dollar civil fines is similar:

"*to shooting a Rhinoceros in the arse with a 22 – they're roaring a little, running a little, and then they're going back to business, if we are going to affect change, we must change the calibre of the bullet*".[127]

[127] See e.g. Melanie Newman, 'BITTER PILLS FOR PHARMA'. (25 September, 2010) British Medical Journal, Volume 341, 632 <http://www.bmj.com/content/341/7774/Feature.full.pdf> at 10 May 2014.

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8. Whistleblower Compensation arrangements found in other jurisdictions.

Terms of Reference question (d)

Compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America;

"It is important for whistleblower laws to promote a culture where honest disclosures are respected, valued, and even rewarded. A failure to support whistleblowers equates to the promotion of the protection of misconduct and wrongdoing. In recent years, Australian whistleblowers have experienced remarkable hardship for uncovering crimes and potential breaches of National Security."

In the most recent commentary whistleblower incentivisation programs, Faunce, Crow, Morgan and Nikolic (2014) provide an overview of the various incentive programs found in international jurisdictions globally.[128]

The authors detail how anti-corporate fraud whistleblower incentive laws have spread to developing and developed nations globally. These locations include countries such as; Hungary, Pakistan, South Korea, India, China, Taiwan, Nepal, Ghana and Uganda. With regard to these whistleblower reward programs, the authors suggest that the U.S FCA model provides the most effective model for combatting fraud and wrongdoing. In West Africa, *Liberia Executive Order #62 of 2014* required private companies to establish procedures for handling disclosures by employees about company malpractices.

Indeed, it appears as though the aim of the authors is to establish a framework that will see an FCA modelled off the US version and applied internationally. The rationale behind this position is to create '*global solutions to global problems*'. The purpose of the *False Claims Act* is to provide a flexible enforcement model, whereby whistleblowers are empowered (*deputised citizens*) that have the ability to reveal wrongdoing without being noticed. Essentially, sophisticated entities can bypass most regulations and laws, however they find it difficult to detect whistleblowers.

There is a vast amount of literature available on whistleblower laws with reference to their application in the public sphere and private spheres. From the literature reviewed, the current problems facing Australia include:

(1) Incentivising whistleblowers to come forward with information exposing fraud in the private sector;

(2) Lack of coherent statutory mechanisms that fill the void between auditing and pragmatic enforcement capabilities;

(3) Increase transparency;

(4) Laws that can be confidently applied in practice to address the problems pragmatically, rather than idealistically.

As Brian Martin states, it appears as though Australian whistleblower laws provide illusory protections, they appear strong, however they are rarely used because in practice they cannot be relied upon by a whistleblower because the risk/benefit remains on the side of the wrongdoer. As a consequence, Australian laws are rarely (*if at all*) relied upon in practice

[128] Faunce, T., Crow, K., Nikolic, T., Morgan, F, M., "*Because they have Evidence: Globalizing financial incentives for corporate fraud whistleblowers*" in (eds) Brown, A, J., Moberly, R, E., Lewis, D, L and Vanderkerckhove, W., "*International Handbook on Whistleblowing Research*" (Edward Elgar, 2014).

making their effectiveness and protective efficiency low, thereby undermining any credible assertions that private parties may be protected if a disclosure is made.

Martin (2003) notes that even where statutory protections are in place prohibiting retaliation, whistleblowers are likely to face subtle, direct or other overt forms of retaliation. The reality that some form of retaliation will occur against the whistleblower is real, persistent and unacceptable in modern day Australia. Whether by subtle forms of stigmatisation or losing friends at work, not having contracts renewed or being fired or positions once advertised suddenly closing; the reality is that, whistleblowers may be targeted for revealing information.

In 2007, Rapp's journal publication in the Boston Law Review titled 'BEYOND PROTECTION: INVIGORATING INCENTIVES FOR SARBANES-OXLEY CORPORATE AND SECURITIES FRAUD WHISTLEBLOWERS' detailed the thought processes whistleblowers considered before blowing the whistle. According to Rapp, whistleblowers in the USA know that despite anti-retaliation measures being in place, they will more than likely experience retaliation that will end their career or publicly humiliate them. Hence, whistleblowers make rational choices based on risk/benefit calculus. That is, if the reward is greater than the losses, the whistleblower is more likely to blow the whistle. In his evidence based study, it emerged that even where a whistleblower was aware of 'significant wrongdoing' and there was no reward available, the employees would not blow the whistle. This study supports the idea that if whistleblower laws are to be successful, they should go beyond illusory protections and provide a reward to incentive disclosures.

In 2008, A.J Brown and Latimer suggested that incentive programs found in the USA under the False Claims Act (qui tam) actions have been successful in encouraging whistleblowers to come forward with information about frauds and false claims, largely because of its effectiveness. In the USA, Latimer and Brown suggest that the whistleblowers can receive up to 30% of the money they helped recover for the Government. Similar incentive provisions can be found in South Korea under its Anti-Corruption Act where whistleblowers receive up to 20% of the recovered amount. As a result of the successes, many US States have False Claims (or similar) legislations whilst other countries such as Canada are considering a similar legislation.

Qui Tam plaintiffs recovery under the False Claims Act - USA

If the FCA case is successful, the qui tam plaintiff stands to collect a percentage of any judgment or settlement regardless of whether the government intervenes in the action. The qui tam plaintiff can collect:

- Between 25% and 30% of the proceeds of any judgment or settlement if the government does not intervene.
- Up to 25% of the proceeds if the government intervenes. The specific amount depends on the extent to which:
- Qui tam counsel contributed to the prosecution of the action.
- The action was based on disclosures and information provided by the qui tam plaintiff.

Qui tam plaintiffs are also entitled to reasonable expenses and attorneys' fees. (31 U.S.C. §§ 3730(d)(1)-(2).) The court can, however, significantly reduce or completely eliminate the qui tam plaintiff's share of the recovery if either:

The court determines that the qui tam plaintiff planned or initiated the underlying violation.

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- The qui tam plaintiff is convicted of criminal conduct arising from its role in the alleged violation of the FCA, in which case it is dismissed from the civil action and does not receive any share of the proceeds. (see 31 U.S.C. § 3730(d)(3).)

State Based False Claims Act located in the (U.S)

State and City False Claims Acts

- Arkansas
- California
- Chicago
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Georgia State Medicaid FCA
- Georgia Taxpayer Protection FCA
- Hawaii (Counties)
- Hawaii (State)
- Illinois
- Indiana
- Iowa
- Louisiana
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico Fraud Against Taxpayers
- New Mexico Medicaid FCA
- New York City
- New York State
- North Carolina
- Oklahoma
- Rhode Island
- Tennessee FCA
- Tennessee Medicaid FCA
- Texas
- Virginia
- Washington
- Wisconsin

Examples of States making simultaneously under the False Claims Act

In addition to the federal FCA, litigants should be aware of potentially applicable state FCAs because qui tam plaintiffs are increasingly bringing suits under both federal and state laws (see, for example, *U.S. ex rel. Ge v. Takeda Pharm. Co., No. 10-11043, 2012 WL 5398564*, at *1 (D. Mass. Nov. 1, 2012), aff'd [meaning - *sub nomine* or '*under the name of*'], 737 F.3d 116 (1st Cir. 2013) (alleging violations of the federal FCA and more than 20 state FCAs)).

Over 30 states and municipalities have enacted FCAs of their own, particularly after the Deficit Reduction Act of 2005 (DRA) created federal incentives for states to enact false claims laws targeting Medicaid fraud. The DRA amended Section 1909 of the Social Security Act, which now provides that states can recover for themselves a larger percentage of the federal recovery in state FCA suits involving Medicaid fraud.

To be eligible for this increased incentive, the state law must comply with four requirements tethering it to standards found in the federal FCA. The state law must:

- Establish liability for the same false or fraudulent claims described in the federal FCA with respect to any federally-funded Medicaid expenditure.
- Be at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as the federal FCA.
- Require an action to be filed under seal for 60 days with review by the Attorney General.
- Impose a civil penalty that is not less than the penalty authorized under the federal FCA. (*Social Security Act § 1909(b).*) While some state FCAs target only Medicaid fraud, others are as broad as (or even broader than) the federal FCA. For example, the New York FCA (N.Y. State Fin. Law §§ 187-194) includes liability for tax claims, which are specifically exempted under the federal statute.

European Community

The European community has examined the prospects of enacting a FCA with qui tam provisions as a means to protecting revenue and expenditure of the European community.[129] The European community only represents 1% to 2% of the total Gross Domestic Profits (GDP) of its member states with specific importance placed upon the funds at the community, rather than national level.[130] The community's budget for 2002 was valued at €98.2 billion which was comprised of customs and agricultural duties. In terms of expenditure, €45.2 billion went to supporting agriculture while another €34.5 billion was spent on structural funds relating to the European Regional Development Fund.[131] Because of the large investments and turnovers of community funds, the European community began to examine models associated to the Civil False Claims Act similar to that of the United States.

The legal basis for the European model was supported by the Article 280(4) of the European Community (EC) Treaty. This treaty provides for the necessary adoption of measures in the combatting fraud that may affect the financial interests of the Community.[132] The idea was to afford effective and equivalent protection to its member states. The EC recognized that the FCA provided significant advantages in terms of its capacity to deter and recover funds in the public's interests. The aim of this 'supranational' legislation was to provide European Public Prosecutors (EPP) with the power to conduct community wide investigations and enforcement to rein in fraud.[133]

[129] Alan Riley, 'THE CIVIL FALSE CLAIMS ACT USING LINCOLN'S LAW TO PROTECT THE EUROPEAN COMMUNITY BUDGET' (December, 2003) Policy Brief 43, *Center for European Policy Studies.* <http://aei.pitt.edu/1943/1/PB43.pdf> accessed 3 June 2012.
[130] Id.
[131] Id.
[132] Id.
[133] Id.

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9. Effective access to Justice for whistleblowers

Terms of Reference question (e):

Measures needed to ensure effective access to justice, including legal services, for persons who make or may make disclosures and require access to protection as a whistleblower;

Forum

The setting to adjudicate a whistleblower's rights must be free from institutionalised conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavourable that so-called hearings in these settings have often been traps, both in perception and reality.

Whistleblower Information Filed Administratively

Under the newer securities and tax whistleblower provisions in the United States, the whistleblowers information is first filed administratively, rather than in Court as under the False Claims Act. The administrative filing avoiding the problems of faced under the False Claims Act of seal deadlines and extensions and eventual unsealing that the current United States False Claims Act requires. By allowing administratively filing and a presumption that deadlines can be extended absent objection of whistleblower, these artificially deadlines and the resulting pressure on occasion on whistleblowers and/or the government to proceed before case is fully investigated or before having opportunity to adequately explore a negotiated resolution could be avoided. Frequently targets also support continuing matters in confidential non-public way while investigation is ongoing and to give target opportunity either to address allegations or resolve them.

One of the reasons the FCA provides for in court filing is to toll the statute of limitations. This issue, however, could be addressed simply by providing a longer statute of limitations period or making the statute run five years from the date the information is filed with the government, thereby providing the government an adequate time period to investigate and potentially even resolve the allegations before having to file.

Another reason for in court filing is to empower the whistleblower to go forward expeditiously if the government does not take action promptly or is not interested. This goal, however, could also be accomplished administratively by requiring that the government give notice within, for example six months, that it is actively investigating or decline and allow the whistleblower to file at that time. There could also be in interim time period, for example, two years after filing, whereby, at which time the government must either have the assent of the whistleblower to continue to maintain administratively or seek court permission to do so.

It is important, however, in an administrative filing scheme to keep open the option for the whistleblower to proceed if the government is not still investigating or does not wish to pursue the allegations at some point. Otherwise, the possibility exists for the allegations to simply pile up in an overwhelmed government bureaucracy, where both good claims and bad would not be reached or detected. Even the possibility that a whistleblower may proceed and go public without the participation of the government serves as a healthy check on both government bureaucracy and any tendency of defrauded government representatives not to face the scope of fraud upon their own agencies.

The statute or the government otherwise needs some provision for resources to implement the statute and create the facilities and staff needed to take advantage of information provided by whistleblowers. While this need only be a relatively small investment, particularly at first, it is critical to have some experienced attorneys, consultants and investigators available to devote themselves to complex fraud cases in order to develop these kinds of cases and prosecutions.

In the United States, 3% of collections are returned to the Department of Justice and some of those funds are available upon approved requests to an internal review procedure to support litigation of such cases in the future.[134] Also, a portion of health care fraud recoveries are re-injected into the relevant departments and those funds are devoted to further fraud enforcement.

Ensuring effective access to Justice using individual Counsel

As a key element of this dual system, the civil claim is also accompanied by a "public interest" costs rule – the first of its kind in Australia, and possibly anywhere. As a result of one late amendment, initiated by the author and supported by the Community and Public Sector Union, a whistleblower who sues for civil damages in the Federal Court cannot be held liable for the respondent's costs, provided their claim is not legally vexatious and they conduct the litigation reasonably; even though, if they make out their claim, the respondent may be obliged to pay the whistleblower's costs. In part, this matches the *Fair Work Act* system, where each side must bear its own costs; but goes beyond this in recognising that the making of a public interest disclosure is more than a private right, and also constitutes a public good. In practice, costs impediments and risks have likely been the single most significant barrier to civil remedies to date. Unlike most employment legislation, none of the state whistleblowing compensation schemes provide any protection for workers from exposure to the legal costs of their employer, should they lose.

ne factor that may vary in other legal systems is the way in which counsel can be compensated for undertaking the representation of a whistleblower. One of the important elements of the American whistleblower experience is that there is an incentive for competent and experienced counsel to represent whistleblowers because the statute provides that they can recover fees and cost if successful and most counsel take the cases as contingent fee cases and recover up to 40% of their client's recovery if successful. These recoveries can fund law firms to do this kind of work and accept the hit or miss nature of the work, since one or two successful large cases can fund a moderate law office for several years. Moreover, the quality of the whistleblower information provided, the clarity with which it is presented, and the efficacy of support for the investigation are all potentially increased substantially by the involvement of good counsel. However, it is important caps on damages are not restricted and they must include punitive damages as they possess a utilitarian value in-so-far increasing the risk calculus for future offending.

Whether the government intervenes in a qui tam case is a major factor in determining the probable outcome and recovery in the case. According to the Department of Justice (DOJ), settlements and judgments in FCA cases in which the government intervened total more than $26 billion, compared to less than $1 billion where the government declined to intervene (see DOJ's Fraud Statistics - Overview).

Another factor includes the efficiency of competent counsel. Competent counsel has demonstrated their ability in the United States to cull through claims that involve disgruntled employees, and at the same time, identify significant and provable frauds from mere technical

[134] *See* 28 U.S.C. ' 527 (Debt Collection Improvement Act).

violations or simply unhappy employees. One of the most important roles that counsel play in the American system is as ***gate-keepers*** – selecting out the more promising whistleblowers to represent in judicial proceedings. Under the False Claims Act, whistleblowers are not permitted to proceed in Court *pro se* and moreover, counsel who is seeking a contingent fee will only want to represent those claims that have a strong prospect of success. Thus, the task of sorting through disgruntled potential complainants has shifted to some degree in the United States to whistleblower counsel, rather than already overburdened government employees. When the government intervenes in a suit, it takes the place of the qui tam plaintiff and assumes primary responsibility for prosecuting the case. The government also has the discretion to limit the participation of the qui tam plaintiff, who still remains a party to the action. In practice, the government often continues to rely on the assistance and resources of qui tam counsel, for example, to review and analyse documents produced by the defendant.

Restricting access to Justice and limiting damages acts as an inadvertent enabler to Wrongdoing.

Australian law currently severely limits contingent fee representation thereby restricting incentives to assist firms specialising in addressing fraud and false claims against the government.

Because an unsuccessful litigant is responsible for the fees of her/his opponent under the general rule of 'cost follow the event' (*except for industrial relations matters*), this litigation model could provide a disincentive to bringing such actions and act as an inadvertent enabler to the perpetuation of wrongdoing because small damages awards will invariably become a '*cost of doing business'*.

If implemented correctly, an Australian False Claims Act could provide, as US and Australian industrial relations statutes do, that no plaintiff is responsible for fees *absence frivolous or vexatious litigation*. Indeed, Australia is already on the path to relaxing prohibitions on contingent fees as an additional measure to assist whistleblowers.

Funding Retaliation Claims

In actions that involve retaliation against whistleblowers, funding provisions should be available (*for those whistleblowers that qualify*) on the basis that it will provide an equitable balance of power between the parties and increase the risks to large companies who may consider retaliating against an employee.

Regardless of the positive or beneficial information that a whistleblower may bring, they can be condemned professionally and personally by well-resourced defendants who have the capacity to affect a whistleblowers future in ways that a whistleblower may not realise until it is too late. Large organisations have the capacity to employ sophisticated intelligence sector techniques to locate and retaliate against a whistleblower.

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10. Detrimental action and reprisal and separating criminal and civil liability

Terms of Reference question (f)

The definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability;

Protection Against Unconventional Harassment.

The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from civil liability such as defamation suits, and the most chilling form of retaliation – criminal investigation or prosecution.[135]

Shielding Whistleblower from "gag orders" and injunctions.

Any whistleblower law or policy must include a ban on "gag orders" through an organisation's rules, policies or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech.

Greater option to protect confidentiality of whistleblower

Despite the fact that the whistleblower law contains protections from retaliation for whistleblowers, it is widely recognised that such provisions do not protect whistleblowers from the resentment of colleagues, being effectively blackballed and becoming unemployable in their industry. In high paying industries such as securities and financial industries, this is a powerful disincentive to those who wish to report fraud. The new securities and commodities futures trading fraud provisions in the United States give the whistleblower a greater likelihood of remaining anonymous if the case does not result in trial and particularly if the government does not decide to pursue the litigation.[136] Although the American FCA provides that a whistleblower with counsel can pursue the allegations even if the government does not decide to take over the case, it does not provide the whistleblower the option to dismiss the matter without being identified if, after the government's investigation, the whistleblower does not wish to go forward. Such a protection would also give whistleblowers whose case the government does not find to have significant merit an incentive not to go forward with the filing of the case publicly.

Criminal and Civil Sanctions under SOX.

SOX Criminal Whistleblower Provision — SOX contains both civil and criminal whistleblower provisions. The criminal provision, §1107, provides:

1. Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offence, shall be fined under this title or imprisoned not more than 10 years, or both.

[135] Tom Devine, 'International Best Practices for Whistleblower Policies' (25 November 2015).
[136] 15 U.S.C. ' 78u-6, n.7 above.

2. Criminal sanctions include, for individuals, fines up to $250,000 and/or imprisonment of up to 10 years and, for organisations, fines up to $500,000. The Attorney General has expressed that the DOJ will "*play a critical role*" in implementing the criminal provisions of SOX, including §1107.5 Section 1107's real value as a *substantive* prosecutorial tool may be questionable, however. It is arguably merely an extension of the already existing obstruction of justice charges currently available under 18 U.S.C §1510 (obstruction of criminal investigations) and 18 U.S.C. §1512 (tampering with witnesses, victims, or informants). What it does do, however, from a *sentencing* perspective is increase the penalty for such offenses from a maximum of five years in many cases to a maximum of 10 years.

3. The specific inclusion of §1107 within SOX certainly reflects The Congress's intent to aggressively ferret out criminal malfeasance in the post-Enron corporate environment.

   a. As recent prosecutions such as *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005), may suggest, however, Congress' zeal to get tough in the corporate sentencing arena often has the unintended result of creating more trials and less guilty pleas.

   b. Additionally, §1107 does have a number of potentially significant ramifications, none of which have yet been addressed by the courts. First, §1107 applies not only to publicly-traded companies, but to *any* "person." Because the term "persons" generally includes individuals, corporations, and other organizations, §1107 covers both employers and employees. Therefore, employees who in the past were not subject to individual liability under other federal retaliation statutes now could face enormous fines and jail time for their workplace misconduct. Moreover, employers are covered regardless of corporate status or number of employees. Thus, companies too small to be covered under Title VII or other anti-retaliation statutes are covered under §1107. Finally, because there is nothing limiting the criminal provision to the employment relationship, third parties, regardless of their agency relationship with the employer, may be liable for participating in prohibited retaliatory conduct.

4. Second, §1107 may criminalize retaliatory conduct in seemingly unrelated contexts which, in the past, may have given rise only to civil liability. Protected activity under §1107 is not limited to complaints of fraud or securities violations, but covers truthful disclosures to *any* "law enforcement officer" relating to commission or potential commission of *any* federal offense. This provision could reasonably be interpreted as protecting complaints to the Equal Employment Opportunity Commission (EEOC) under federal employment discrimination statutes. Whether such an interpretation is adopted by the courts hinges largely on the meaning of the term "federal offense," which is not defined anywhere in SOX or the federal criminal code. Although the term is usually used in reference to criminal violations, the courts have used the term in both civil and criminal

contexts.[137] Moreover, it appears that an act committed in violation of a federal statute will still be considered an "offense" even if the statute of limitations on the offense has run.[138]

11. Retaliation provisions of the False Claims Act

Relators have private information about wrongdoing; in the U.S. context, relators typically have and provide information about their employer's wrongdoing. Revealing this wrongdoing tends to place them at direct, indirect and vicarious risks of retaliation by their employer or associates. The benefits of the FCA is that it not only provides prosecutorial powers for addressing violations, but it has a rigid anti-retaliation mechanism, but this must be pursued by the relator. The Government does not typically intervene to provide aid, but prosecutions and retaliation claims under the FCA are filed together to ensure that the information is protected. Anecdotal evidence suggests that the majority of those seeking the protections under the FCA qui tam provisions are former employees rather than current employees, suggesting that current employees weigh up the risk/benefit of blowing the whistle.

A further issue arises in so far as statistical power; that is, current employees who do not blow the whistle (*but have knowledge of wrongdoing*) represent the 'dark figure' of whistleblowing statistics. That means, some people will not come forward to assist in confidential research for fear of retaliation. This phenomenon is also experienced in crime statistics. Criminologists refer to this as the 'dark figure of crime' and it often comes to the fore with matters relating to matters of underreporting.

Retaliation Definition and Elements

The World Health Organisation ("WHO") defines retaliation: as a direct or indirect adverse administrative decision and/or action that is threatened, recommended or taken against an individual who has:

3. reported suspected wrongdoing that implies a significant risk; or
4. cooperated with a duly authorized audit or an investigation of a report of wrongdoing.[139]

Retaliation thus involves three sequential elements:

4. a report of a suspected wrongdoing that implies a significant risk to WHO, i.e. is harmful to its interests, reputation, operations or governance;
5. a direct or indirect adverse action threatened, recommended or taken following the report of such suspected wrongdoing; and
6. a causal relationship between the report of suspected wrongdoing and the adverse action or threat thereof.

As such, the adverse action or actions that could constitute retaliation against a whistleblower as defined as defined in paragraph 9 can include without being limited to:

1. Harassment;[140]

[137] *See, e.g., Cole v. United States Dept. of Agric*., 133 F.3d 803 (11th Cir. 1998) (referring to "criminal and civil offenses"); *Thornton v. United States Dept. of Agriculture*, 715 F.2d 1508, 1512 (11th Cir. 1983) (referring to "[b]oth criminal and civil offenses").
[138] *See United States v. Keller*, 808 F.2d 34 (8th Cir. 1986).
[139] World Health Organisation eManual Section XII.14.1 Fraud policies and reporting of suspected fraud, para. <http://emanual.who.int/p12/s14/Pages/XII141FraudPoliciesandReportingofSuspectedFraud.aspx> at 29 January 2017.

2. Discrimination;
3. Unsubstantiated negative performance appraisals;
4. Unjustified contractual changes: termination, demotion, reassignment or transfer;
5. Unjustified modification of duties;
6. Unjustified non-authorization of holidays and other leave types;
7. Malicious delays in authorizing travel, or the provision of entitlements;
8. Threat to the whistleblower, their family and/or property including threats that may come from outside the WHO.

Retaliation constitutes misconduct in the WHO and is subject to policies directed towards disciplinary action against those that are involved.

Evidential Requirements

Retaliation will be found to have happened unless the administration can demonstrate by clear and convincing evidence that the act which is suspected to be retaliatory would have occurred even if the whistleblower had not reported a suspicion of wrongdoing.

[140] Harassment should not be confused with the usual performance by staff members of their functions and duties, including the discharge of managerial and supervisory responsibilities. See WHO Harassment policy, <http://intranet.who.int/homes/omb/documents/policy%20of%20the%20prevention%20of%20harassment%20at%20who%207sept2010.pdf> at 29 January 2017.

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12. Detrimental Action

PROTECTED DISCLOSURE ACT 2012 (Vic) - SECT 43

Detrimental action in reprisal for protected disclosure

(1) For the purposes of this Act and subject to subsections (2) and (3), a person takes detrimental action against another person in reprisal for a protected disclosure if—

(a) the person takes or threatens to take detrimental action against the other person because, or in the belief that—

(i) the other person or anyone else has made, or intends to make, the disclosure; or

(ii) the other person or anyone else has cooperated, or intends to cooperate, with an investigation of the disclosure; or

(b) for either of those reasons, the person incites or permits someone else to take or threaten to take detrimental action against the other person.

(2) A person does not take detrimental action against another person in reprisal for a protected disclosure made by the other person if the other person has contravened section 72(1) or (2) in relation to the information disclosed by the protected disclosure.

(3) In addition, for the purposes of this Act, other than section 45, a person who takes detrimental action against another person does not take detrimental action against the other person in reprisal for a protected disclosure unless a reason referred to in subsection (1)(a) is a substantial reason for the person taking the action.

The Independent Broad-based Anti-corruption Commission Act 2011 (Vic)

While WorkSafe Victoria cannot receive disclosures or may not know when a person has made a protected disclosure, this information may be provided to WorkSafe by *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ("IBAC") or other entity assessing or investigating a protected disclosure complaint.

The Act creates an offence for a person to take detrimental action against another person for someone making a protected disclosure. Section 3 of the Act defines detrimental action as including:

1. action causing injury, loss or damage
2. intimidation or harassment, and
3. discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action.

The person need not have actually taken the detrimental action, but can just have threatened to do so.

The person need not have taken or threatened to take the action against the person themselves, but can have incited someone else to do so.

The person (or the person they have incited) must take or threaten the action because, or in the belief that, the other person has:

1. made, or intends to make, a disclosure, or

2. has cooperated, or intends to cooperate with an investigation of a disclosure.

Addition to the detrimental action and reprisal mechanisms.

Protections against reprisals and detrimental action should extend to family members, friends and colleagues.

Example of detrimental action

Some types of detrimental action could involve threats to a person's personal safety and property. This might include intimidation or harassment, causing personal injury or prejudice to safety, property damage or loss, done directly or indirectly against the discloser, his or her family or friends.

Actions by an employer including demotion, transfer, isolation in the workplace or changing the duties of a discloser due to the making of a disclosure, might be detrimental action.

A public body which discriminates against a discloser, his or her family and associates in subsequent applications for jobs, permits or tenders may be taking action resulting in financial loss or reputational damage. Motive for the disclosure should not be a major consideration, rather the dominant consideration must be the information being imparted.

Action by a person against the discloser is not detrimental action if the discloser has made a false or vexatious disclosure.

13. Reprisal

People who make a public interest disclosure (whistleblowers) and suffer a detriment because of making the disclosure (reprisal) should have the option to make a complaint to the Anti-Discrimination Commission or Fair Work Australia.

The elements of a possible reprisal are:

1. the person has made, or intends to make, a public interest disclosure (PID), or the person is, has been, or intends to be, involved in a proceeding under the *Public Interest Disclosure Act* against any person; and
2. because of this, the person suffers detriment.

Protecting the Whistleblower even if the case does not go forward.

A qui tam system could also protect relators by hiding their identity. Disclosure is likely inevitable if the Government decides to pursue litigation, since companies can similarly conduct investigations to determine who had access to incriminating evidence. If however the Government chooses not to intervene in a case, its present policy is to unseal and this invariably discloses the whistleblowers identity whether the case proceeds or not. However, New York does not follow this policy and instead protects the relators identity if they desire. By protecting the relators identity, at least in a case that does not go forward, would also encourage whistleblowers to come forward.

14. Retaliation- Reprisals – Detrimental Action.

Immunity Provisions – Romantic Idealism vs Qui Tam Pragmatism: Go to the USA if you want justice!

Immunity provisions are an important aspect of any whistleblower protection regime, however, they are not an affective tool when it comes to encouraging people to come forward. The idea that immunity accompanied with no incentives has not proven to be an effective or efficient model. One of the reasons behind this is because of the ***romantic***

idealism that people of good conscience do not require a monetary incentive to reveal wrongdoing because it is unethical, immoral or an incentive does not conform with Australian culture. Evidence suggests that qui tam laws are proving to be one of the best ways (*when compared to other models*) in revealing wrongdoing, streamlining regulatory affairs, promoting a culture of compliance and at the same time repairing the budget.

International Justice

What we know is that Australian whistleblowers have information about accounting irregularities, frauds and false claims but lack adequate legal protection. As a consequence, Australian citizens cannot rely on their own laws to protect and go out in search of jurisdictions that provide security. If Australia was to implement an AFCA, it would increase detection rates over and above auditing and increase recoveries lost to fraud.

Recently, whistleblowers from 49 countries reported irregularities from their own nation to U.S authorities. For example, the Securities and Exchange Commission (SEC) attracted 349 tip-offs from 49 countries around the globe with whistleblowers from Britain numbering at (74), Canada (46), India (33), China (27) and Australia (21).[141] The reports were for violations under the *Dodd–Frank Wall Street Reform and Consumer Protection Act 2010* (qui tam) provisions and consisted of accounting misconduct, all of which escaped rigorous auditing, compliance and regulatory efforts.[142]

The original source detected the fraud in Britain and reported it to US and British authorities where they later received a reward from the (US) SEC.[143] There is a probability that matters falling under an AFCA are going unnoticed and unsupported leading to further losses against the public purse. As a result, the information provided by a British whistleblower led to a settlement in the USA with a reward being paid for the (qui tam) relator.[144] However, the largest compensation award totaling $30 million was awarded to a whistleblower ***outside*** the U.S.

Large Organisations can and do seek out the identity of the Whistleblower using Counter Intelligence methods.

The general rule is that where public interest immunity ('PII') is raised, the court:

"*... must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence.*" (*Australian Securities & Investment Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 [22])

The Test

"*The appropriate test to apply in determining whether inspection of the relevant documents and transcripts might disclose the identity of an informer or informers is to ask whether there is in the documents any material by which "**a shrewd idea**" might be conveyed as to the identity of the informer or informers, noting that documents taken together may convey*

[141] Drummond, S. "*Australians respond to US tip-off reward scheme*" (22 November, 2012) Financial Review, http://www.afr.com/f/free/markets/capital/cfo/australians_respond_to_us_tip_off_0XimSmUU5qkZoSIa2J43fN viewed 19 April 2013.
[142] Drummond, S. "*Australians respond to US tip-off reward scheme*" (22 November, 2012) Financial Review, http://www.afr.com/f/free/markets/capital/cfo/australians_respond_to_us_tip_off_0XimSmUU5qkZoSIa2J43fN viewed 19 April 2013.
[143] Drummond, S. "*Australians respond to US tip-off reward scheme*" (22 November, 2012) Financial Review, http://www.afr.com/f/free/markets/capital/cfo/australians_respond_to_us_tip_off_0XimSmUU5qkZoSIa2J43fN viewed 19 April 2013.
[144] Ibid.

information which each, by itself, could not convey. Further, the benefit of the doubt should be in favour of non-disclosure."
(*P Dawson Nominees Pty Ltd v Australian Securities and Investment Commission (No 5)* [2010] FCA 232 [15]).

What may constitute a 'Shrewd idea' – Counter Intelligence Methods?

A 'Shrewd idea' of a whistleblowers identity and the information they possess can be ascertained using a *counter intelligence* method referred to as the '*mosaic analysis*'. In *P Dawson Nominees Pty Ltd v Australian Securities and Investment Commission (No 5)* [2010] FCA 232 [13], Goldberg J described the concept of ***'mosaic analysis***' given by the Director-General of the Office of National Assessments as accepted by Foster J in *Watson v AWB Ltd* (No 2) (2009) 259 ALR 524, [32]:

As to this, the Director-General said:

"Mosaic analysis" is a well-established counter-intelligence tool. Mosaic analysis involves combining pieces of information to enable a "picture" to emerge from which inferences can be drawn by targets, or other persons of interest, about matters not otherwise known to them. Some of the pieces of information may appear to be disparate and/or benign; and specific (but important) items of information may only be known by the target(s) or other persons of interest (making it difficult to precisely assess the risk posed by mosaic analysis in any particular scenario). However, in my opinion there is a very high risk that, disclosure of parts of the subpoenaed documents [referring to the 62 reports], in conjunction with other facts already known to relevant persons, would enable them to draw reliable inferences in relation to sources and methods of intelligence collection of Australia's intelligence partners".

15. General Commentary

The first of the legal approaches introduced earlier, which has been a focus of previous legislative efforts, is the encouragement and protection of whistleblowing using an 'anti-retaliation' or remedial model. Most Australian states have followed the US in basing their whistleblowing legislation, in part, on this approach as opposed to the lesser effective British model.

In the US, they created general rights of compensation in the civil courts, even though – unlike the USA – Australia has well developed tribunal-based industrial relations forums. Nonetheless, their focus was not on specific whistleblowing or protecting employees from retaliatory conduct by employers. In hindsight, perhaps this gap in substantiative legislative protections has prevented whistleblowers from coming forward to report wrongdoing. As a consequence, this group of potential whistleblowers represents a 'dark figure', that is, statistics on whistleblower research will invariably omit this class of whistleblower because they do not feel safe and the risks of lost employment is too great.

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16. Obligations for the Private, Non-Profit and Public Sector to apply procedures

Terms of Reference question (g)

The obligations on corporate, not-for-profit and public sector organisations to prepare, publish and apply procedures to support and protect persons who make or may make disclosures, and their liability if they fail to do so or fail to ensure the procedures are followed;

Education Programs for Industry and Professionals to improve Compliance.

It is necessary that competent professionals, academics and legal representatives with a history in the field act as consultants to assist in education programs and roll-outs.

If implemented, there will undoubtedly be a rush from law firms and other professionals claiming to be qualified in the area and if this is not managed correctly, there is a risk that good intentions become blurred by institutionalised bias. Therefore, those professionals with a history of competence in this area should assist the corporate community and public organisations in rolling out education programs.

Educating Compliance

The False Claims Act provides a number of provisions that enhances and promotes its non-punitive and proactive approach to improving compliance. Companies that do business with the Government are provided with an opportunity to minimise their exposure by introducing and carefully managing a compliance program.

A strong compliance program is an effective tool to avoid FCA and SOX exposure because it may minimise potential liability. Plaintiffs often use a defendants' weak or non-existent compliance programs to support the argument that defendants acted with deliberate ignorance or reckless disregard of the allegedly unlawful conduct. In doing so the plaintiff triggers the operation of the False Claims Act §3729 (1)(a) permissive knowledge requirement that relevantly states *et seq;*

"Knowledge" under the FCA includes reckless disregard and deliberate ignorance, not just actual knowledge.

Defendants may use a comprehensive and well-implemented compliance program to demonstrate that even if unlawful conduct did occur, it was carried out by rogue actors and without company knowledge or acquiescence.

Effective compliance programs include:

- A lead compliance officer at the senior management level.
- Requirements that middle management periodically certify FCA compliance for their units.
- An anonymous whistleblower hotline or e-mail system.
- Regular notifications sent to employees informing them how to report a potential FCA or other problem.
- Consistent follow-up on all internal reporting and whistleblowing tips.
- Internal audits of business systems.
- Recurring training regarding the FCA, anti-fraud and anti-kickback policies, and employees' obligation to report potential wrongdoing.
- Widespread availability of an updated compliance guidebook tailored to the company's industry and policies.

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- Consistent messaging from management and supervisors emphasizing the importance of compliance.
- Requirements that business partners, agents, vendors, distributors, contractors and potential acquisition targets abide by the same compliance standards as the company.
- Due diligence regarding compliance issues when considering potential acquisitions.
- Strong anti-retaliation policies toward whistleblowers.

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17. Obligations on Independent Regulatory Agencies to ensure Protections for Whistleblowers

Terms of Reference question (h):

The obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures;

Providing Essential Support Services for Paper Rights.

Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defence funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralise resource handicaps and cut through draining conflicts to provide expeditious corrective action. The *U.S. Whistleblower Protection Act* includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

Treatment and Understanding of Whistleblower Laws in Australian Case law – The Facts

As noted by Sunberg, North & Tracey JJ when referring to persons who make disclosures and inform on wrongs:

'[t]he effect of disclosure of the identity of informers and the intimidating effect on potential future informers carries great weight: persons contemplating whistleblowing will realise that disclosure of their identity may cause them harm in ways they may never find out, such as employment or promotions not offered and friendships undermined. That such adverse consequences may ensue is not to be dismissed as speculative; fears may well be held by potential future informers who may, if disclosure is permitted (in the instant case) decide that informing ASIC is just not worth it.'

Providing adequate protections for whistleblowers should remain an **unconditional priority**. Even where the information provided is not used in a prosecution the person and their family should be protected unless their claim is baseless and vexatious. In order to achieve this, a rigorous, transparent and strict mechanism such as (strict liability) must be codified to ensure procedures are followed to the highest standards practicable. Any legislation must impose strict duties on agencies and relevant persons to protect whistleblowers and where a violation of these "duties" occur, that conduct "must" render them and the organisation liable to pay compensation as well as disciplinary action.

When it comes to high level corruption, wrongdoing, fraud or false claims, well-resourced entities have the ability to acquire information from many sources. Whilst we have confidence that most people can and do operate ethically, the reality is, some people in privileged positions do not.

In the case of the UK's Serious Fraud Office's investigation into BAE systems, a number of confidential sources identities who provided information in the investigation were released to BAE systems resulting in the coincidental loss of critical investigatory material. It would be an unacceptable outcome if the confidential information about wrongdoing is released and the statute compels the aggrieved party to prove the loss may or may not damage them; rather

than hold those who by mistake or design released the information for strategic advantage to account, the Serious Office apologised and stated it would not occur again. This type of scenario is clearly unacceptable and whilst it may have been an error, the error is one that may have long-term implications for a number of persons who provided information to the UK Government for the purposes of conducting an investigation into wrongdoing.

Whilst individuals may be made personally responsible for retaliatory conduct, the organisation must have overall responsibility for all remedies, restitution and compensation. Any remedial action must occur with minimal delay and represent a realistic assessment of damages. If the organisation fails to properly recompense a whistleblower, the legislation "must" provide legal entitlements to a whistleblower allowing them to bring damages claims with no possibility of a costs order against the whistleblower unless the claims are false.

BAE Systems – An Inconvenient truth about 'the Lost intelligence'

On 8 August 2013, the Serious Fraud Office in the United Kingdom reported that it had lost material concerned with the investigation on BAE Systems. The material pertaining the BAE systems investigation was sent to the wrong party. The material consisted of "32,000 pages, 81 audio recordings and other electronic media". The loss involved information originating from over 59 sources that contributed to the investigation. Whilst the SFO claims national security was not affected, there may be concerns about the safety, professional relationships and retaliation of those parties that provided information to the investigation against BAE systems. In response, the SFO is interviewing former staff members in an attempt to understand how the information was sent to the wrong parties.

(Australia) Balancing Rights with Protections – 7 Factors of Consideration

This case confirms that confidential disclosures from whistleblowers can be of great benefit to regulators and enforcement agencies. By way of example, the Court confirmed that the public interest in protecting informers, and encouraging future informers, is as important to a regulatory agency such as ASIC as it is to police in their traditional role: *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 1 ACSR 311, 312.

ASIC's regulatory role is vital to the proper functioning of the Australian financial and investment system, on which the prosperity of the Australian community is dependent. Fraud and incompetence can cause catastrophic damage to thousands of individuals. (*Australian Securities & Investment Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 [49]).

Of particular concern for ASIC was the intimidatory effect that disclosures can have on whistleblowers if their identity was revealed. In assessing this balance, the Court considered the benefits of protecting a whistleblowers identity on the basis that:

1 Protecting informers, and encouraging future informers, is as important to a regulatory agency such as ASIC as it is to police in their traditional role.

2 ASIC's regulatory role is vital to the proper functioning of the Australian financial and investment system, on which the prosperity of the Australian community is dependent. Fraud and incompetence can cause catastrophic damage to thousands of individuals.

3 Confidential disclosure to ASIC has particular benefits, given its area of responsibility:

4 Misconduct that ASIC might not otherwise be aware of is brought to its attention;

5 Timely investigation enables ASIC to move quickly, obtaining interlocutory injunctions, freezing assets before dissipation and preventing implicated parties fleeing the jurisdiction;

6 Information from knowledgeable persons enables ASIC to target its investigations to particular documents, transactions and persons, thus saving time and money and preventing further loss;

7 Witnesses can be interviewed while events are still fresh in their mind and business records still available.

If incentives were introduced, there is a high probability that individuals will feel empowered to report wrongdoing, resulting in a beneficial and steady uptick in reports.

Statistical analysis and Record Keeping

Depending on the organisation charged with directing and administering whistleblower claims, all whistleblower false claims cases should be recorded with results published (*minus the identity of the whistleblower*).

In order to implement an administrative filing system, a central government repository for all filings with the capacity to track exactly when they were filed should be established to ensure proper coordination and tracking of the dates of filing. The statute should permit liberal sharing of the information within the government to avoid unnecessary obstacles in the process of investigation and consideration. A case filing system could be designed to require the filer to designate potentially affected agencies and the filing system could automatically forward the filing electronically to the affected departments and agencies.

18. Protection Against Spill-over Retaliation.

The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as "assisting whistleblowers," (to guard against guilt by association), and individuals who are "about to" make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.[145]

Reliable Confidentiality Protection.

To maximise the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognised repeatedly, denying this option creates a severe chilling effect. Confidentiality goes beyond just promising not to reveal a name. It also extends to restrictions on disclosure of "identifying information," because often when facts are known only to a few that information easily can be traced back to the source and are the equivalent of a signature. Further, almost no whistleblower can guarantee absolute confidentiality, because testimony may be required for a criminal conviction or other essential purpose. Under those circumstances, a best practice confidentiality policy provides for as much advance notice as possible to the whistleblower that his or her identity must be revealed.[146] In these circumstances and despite the best intentions of a legislation, the whistleblower may require an incentive/compensation for providing relevant information.

[145] Tom Devine, 'International Best Practices for Whistleblower Policies' (25 November 2015).
[146] Tom Devine, 'International Best Practices for Whistleblower Policies' (25 November 2015).

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Final remarks

The effect of disclosures by Australian citizens in matters that may be of importance to regulators and enforcement agencies requires further reform. Whilst there are 'whistleblower laws' in the public sector, Australia's private sector does not balance the need to maintain law and order and preserve commercial integrity at the same time. Merely providing immunity, with the absence of compensation may not be the answer despite the good intentions of the legislature to promote accountability.

The commercial implications of this decision includes:

In theory, immunity can assist someone in coming forward to report a violation. However, as noted by Sunburn, North & Tracey JJ, in practice the reality is; more needs to be done to in the private sector to provide comprehensive protections. To this end, a whistleblower system that provides incentives or compensation packages that take into account the realistic long-term consequences a whistleblower faces professionally, financially and personally - *including emotionally* should become a priority. These consequences are difficult to quantify and that is why the US based system appears to be of benefit. However, merely insisting that whistleblowers do not need incentives or compensation appears unrealistic given the evidence. Whilst some reports may be received using other models, there is a higher probability that incentives/compensation will attract more reports and serve the public interest in much more efficient manner.

19. Circumstances where protected disclosures can occur to third parties and media.

Terms of Reference question (i):

The circumstances in which public interest disclosures to third parties or the media should attract protection;

External Whistleblowing

I advocate for tiered system.

For external whistleblowing to non-governmental entities including the media, a plaintiff should provide 'reasonable grounds' satisfying at least one of the following:

1. A reasonable belief must be held that dismissal or other disadvantageous treatment would occur if the disclosure was made internally or to a government agency; or
2. A reasonable belief must be held that evidence may be concealed or destroyed if the disclosure was made internally; or
3. The employer had unreasonably demanded the employee not to report to a government agency.
4. The employer failed to advise the whistleblower within 20 days that the employer will investigate the complaint; or advises the worker, without any good reason, that the complaint will not be investigated.
5. A person's life or body is at risk.
6. Systemic Corruption is identified.

Olympus Case

Olympus was probably the most egregious accounting fraud in Japan's history.[147] Further consideration of this case is worthwhile as it illustrates the current limitations of the *WPA*.

As noted earlier, , the Olympus CEO, was dismissed for revealing this accounting fraud which had been concealed for two decades. After speaking publicly to the press, a global media frenzy ensued. At first, Olympus denied claims. Senior management asserted that had been dismissed for problems with his 'management style'.[148] Eventually, Olympus admitted illegally concealing the US$1.5 billion of losses. Olympus' stock value dropped nearly 80 per cent within days and the corporation came close to being delisted.[149] Senior executives have been convicted of criminal fraud and Olympus and its former managers are the subject of ongoing civil and criminal proceedings both within and outside Japan. Olympus commissioned a third party committee to investigate and report on the causes of the fraud. Unfortunately for , as a director and CEO, he was not a 'worker' protected by the *WPA*. In any event, he did not use the Olympus whistleblower system to disclose. Nonetheless, the investigation report concluded that the internal whistleblower system, which had not been properly established, was one cause of the fraud insofar as it was part of an organisation-wide breakdown of corporate governance at Olympus. Historically, the system was defective and rarely used. The bulk of the small number of reports made on the hotline were about 'personality clashes', not reports of corporate malfeasance. The hotline was linked only to the Olympus compliance department, and notwithstanding numerous attempts to establish a link external to Olympus, this was prevented by a senior manager, who himself was complicit in the fraud. Shortly after the hotline was established, an employee sought to make an anonymous report and despite the

[147] Hideo Mizutani, 'Whistleblower Protection Act' (2007) 4(3) *Japan Labor Review* 95, 104; Takashi Araki, 'Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan' (2007) 28 *Comparative Labor Law & Policy Journal* 251, 264.
[148] Ibid, 100-1.
[149] Yamaoto Takehehiro, 'Reconsidering the Whistleblower Protection Act, Consumer Law News', (Osaka, October, 2012) 22-3.

employee's objections, the relevant compliance officer tried to identify the employee. This became known throughout Olympus, causing the use of the system to decline even more.[150]

Blowing the whistle from outside an organisation.

Any whistleblower law should provide an avenue for person who may not be internally employed by an organisation, but nonetheless, can produce evidence of wrongdoing. Precluding external parties from blowing the whistle merely acts as a limiter on our capacity to address wrongdoing. By way of example, imagine saying to a neighbour that their concerns about the safety of friend was not credible because they do not reside in the same house.

[150] Peter Coney and Christohper Coney, 'THE *WHISTLEBLOWER PROTECTION ACT* (JAPAN) 2004: A CRITICAL AND COMPARATIVE ANALYSIS OF CORPORATE MALFEASANCE IN JAPAN', (2016) Vol 42, Iss 1 *Monash Law Review,* 41-71.

20. Other Matters Relating to Enhancements

Terms of Reference question (j):

Any other matters relating to the enhancement of protections and the type and availability of remedies for whistleblowers in the corporate, not-for-profit and public sectors;

An Australian False Claims Act could create an alternative civil action remedy and criminal sanction for the recovery of public money obtained by fraud and false claims. This may be achieved by amending the *Criminal Code 1995* (Cth) Part 7.3 to include a civil remedy for fraud equivalent to current criminal provisions already found under the *Criminal Code 1995* (Cth) Part 7.3. The *Criminal Code 1995* (Cth) Part 2.5 also applies to corporate criminal responsibility, but does not provide a civil equivalent for the same conduct associated to frauds.

Linking the civil statutes to the *Criminal Code 1995* (Cth) has been achieved in previous statutes suggesting that such a concept does comport with current legal practice. The linkage between the civil and criminal remedies provides enforcement bodies with a greater range of prosecutorial powers and remedies when considering causes of action for violations under a False Claims statute.

Linkages between civil and criminal statutes have already been made for violations occurring under the *Competition and Consumer Act 2010* (Cth) s6AA ("CCA"). Generally, these provisions pertinently provide guidance and scope on the application of the *Criminal Code 1995* (Cth) for offences under the CCA. Thus, the CCA provides the Australian Competition Consumer Commission ("ACCC") with greater prosecutorial flexibility and in some respects is similar to the flexibility found under the *False Claims Act 31 U.S.C §§3729-3733*.

Maintaining Checks on Vexatious or Frivolous Litigation

Qui tam as a developed legal doctrine has stood the test of time and perhaps has laid the foundation for how many countries manage frivolous and vexatious proceedings in other jurisdictions. Whilst many may criticise the FCA as attracting vexatious or frivolous claims, these claims appear to be contentious because almost every jurisdiction can attract such cases regardless of jurisdiction. Whilst the False Claims Act has been the subject of such criticisms historically, it has developed in its ability to detect and address vexatious and frivolous claims. Basically, the modern FCA allows private lawyers to detect and litigate fraudulent claims on behalf of the government by relying on its qui tam provisions. [151] The relator fulfils a civil duty by exposing wrongdoing and then brings this information to the attention of the government. At this point, the government has 60 days (usually takes longer) to evaluate the case and decide whether they will take over the litigation. In so doing, vexatious and frivolous cases are vetted by the Attorney General and an individuals gate keeper, their lawyers with competent counsel. However, these processes are not contemporary in nature, they have developed over centuries.

In "*The Third Part of the Institute of the Laws of England* 1911, 194 (1628)", Lord Coke devoted a chapter proposing reforms for the qui tam law in relation to vexatious litigants, or

[151] **Qui tam is the short form of qui tam pro domino rege quam pro seipso: "he who as much for the king as for himself."** The qui tam action was borrowed from the English common law, which had recognized it since the thirteenth century. See generally, Edmund C. Baird, III, The Use of Qui Tam Actions to Enforce Federal Grazing Permits, (1994) 72 Wash. U. L. Q. pp1407 (referencing Note, The History and Development of Qui Tam, (1972) Wash. U.L.Q., pp81, 83 (citing 3 Blackstone, Commentaries on the Laws of England 160 (1st ed. 1768); Pitzer, D. D. Comment, the Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth, (1972) 7 Tex. Int'l L.J. 415, pp 417-18.

as Lord Coke referred to them - '*parasitic*' litigants, '*viperous vermin*' and *turbidium hominem genus* (a class of unruly men).[152]

By approximately 1768, (a century and half later), successful legislative reforms led to later commentaries on *qui tam's* ability to manage vexatious and frivolous claims by Lord Blackstone to be positive and without criticism, because English Common Law had developed sufficiently to manage such claims.[153]

It is clear from the historical context of qui tam actions that English law and U.S law had developed sufficient safeguards against frivolous and vexatious litigants, which continue more so today.[154] Australian law has also developed significant strategies to manage and detect vexatious and frivolous claims and it is unlikely that Australian Courts will be compromised.

Vetting Cases and filing rules assist in assessing Vexatious and Frivolous cases.

One of the major concerns addressed in the 1986 amendments to the American FCA was how to avoid frivolous and vexatious litigation by whistleblowers in cases that lacked merit or merely piggy-backed on information in the public record. The American FCA has carefully drafted provisions to address these concerns, including a rule which provides payment only for information not already publicly available. The statute also specifically provides that defense may collect their fees from whistleblowers who proceed with frivolous or vexatious litigation. In the United States, many whistleblowers who file suit but find that the government does not believe the case merits intervention simply dismiss their claims rather than go forward. Moreover, a statute that protected whistleblower identity up to that time, as discussed below, would further encourage whistleblowers not to proceed since if they did not go forward at that time, they could remain anonymous – the newer model now used in the American whistleblower provisions with for securities fraud and commodity futures trading fraud. [155] Moreover, Australia already provides that winning litigant recovers fees, but there is also a strong incentive not to bring meritless or weak claims.

Similarly, concerns about the statute interfering with existing administrative or criminal or other civil remedies have not been borne out by experience in the United States. To the contrary, the whistleblowers have not only been a fertile source of civil cases, but also criminal and administrative actions, as discussed above. Care of course needs to be taken to appropriately share information and coordinate where appropriate, but use the investigative tools of each as permitted by those authorities.

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[152] Doyle, above n11, p2.

[153] Doyle, above n11, p3 citing III BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 68)(transliteration supplied)("*But, more usually these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor and then the suit is called a qui tam action, because it is brought by a person 'qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur . If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a qui tam , or popular, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws ...* ")

[154] *Pfingston v. Ronan Eng'g Co.* , 284 F.3d 999, 32 Envtl. L. Rep. 20638 (9th Cir.2002) - *Judicial opinions from the U.S.A involving litigants indicates that the term 'frivolous' has been dealt with in varying ways. For example in Pfingston v. Ronan Eng'g Co. , 284 F.3d 999, 1006 (9th Cir.2002) a frivolous action was described as "An action is clearly frivolous when the result is obvious or the appellant's arguments of error are wholly without merit.". Because of the vexatious proceedings, the courts view was to implement an extraordinary safeguard under the FCA and held that a fee award under §3730(d)(4) is an award against the relator, not counsel for instituting the proceedings in the first instance.*

[155] 15 U.S.C. ' 78u-6, n.7 above.

Whistleblower Incentives for Financial Frauds as Well as Fraud Upon the Government.

The United States has enacted whistleblower incentives and protections in a piecemeal fashion, starting with the False Claims Act and then expanding the incentives and protections into other areas and statutes such as securities laws, tax laws, bank fraud laws and tax laws. Australia, however, can learn from this process and enact provisions that apply broadly to all types frauds and crimes that affect the public interest by enacting a statute which broadly incentivizing the reporting of frauds that result in significant recoveries by a government enforcement authority. A central administrative filing structure that includes a designation by the whistleblower filer section as to which enforcement authorities have interests or jurisdictions would enable efficient referrals and potentially immediate electronic notice to the appropriate enforcement authorities.

Determination of Whistleblower Compensation

The United States experience since the 1986 FCA Amendments has demonstrated that it is critical to the success of such a statute that the statute provide a significant minimum range of incentive to whistleblowers and those who fund their litigation in order to make it worth the effort and someone funding the costs of litigation. In addition, significant risks of retaliation and blackballing in the industry often come with whistleblowing, even when there are legal protections. A strong financial upside is necessary to induce corporate insiders to take these risks as well as to induce others to fund the litigation. The system of allocating a percentage of the recovery to the whistleblower has worked well both to insure that the reward is related to the value of the value of the information brought forward and provides an incentive to whistleblowers to continue to work to support and expand investigations into complex areas so as to maximize the government's (and their own) recovery. A flat monetary cap would undermine such a symbiotic relationship.

However, the statute should also, however, explicitly give the government adequate discretion to determine within a reasonable range the appropriate share a particular whistleblower should receive, taking into account the overall size of the recovery as well as the whistleblower and their counsel's contribution to the effort and other equitable factors, so as not to overcompensate at the high end from very large recoveries. A broader range, such as a range between 10-30%, would allow the government more discretion to award higher percentages in relatively small recoveries and smaller percentage recoveries in the largest ones, when appropriate. The United States Attorney General's office has developed such a set of guidelines, which have been followed by some Courts, but statutory language should make this type of equitable allocation within a range explicitly permitted.[156]

21. The Future: A Co-ordinated Global Fraud Enforcement Model?

In the global economy, fraud is also global. By adopting similar or model like statutes, countries could benefit from a kind of international coordination and global parallel proceedings. In the United States, the federal statute provides an incentive to states that adopt FCA to prevent frauds on own programs and has resulted in adoption of fundamentally similar statutes in over twenty states. As a result, when one state or federal government identified nationwide fraud, individual states can recover pro rata share of impact, even if did not devote any resources to investigation other than to calculate share of losses. The United States uses national coordinating committees for states to make sure state shares are recovered and correctly allocated among states. American cities now are also following

[156] http://taflawlibrary.org/docs/attorneyresources/DOJ_Relators_Share_Guidelines.pdf.

along and collecting after large settlements for impact on their municipal workers health care programs.

Thus, the potential exists to develop a model or core elements of a model whistleblower fraud reporting statute for countries to adopt worldwide. When a citizen of one country becomes aware of a fraud that is having international impact, they could file with all countries that have statutes, and many, with only minimal additional resources, could recover based upon one core investigation of the underlying facts.

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22. Other Related Matters

Terms of Reference question (k):

Good Public Policy – Qui tam laws

As early as 1885, U.S courts declared that qui tam was a good public policy law because it promoted a participatory public/private enforcement partnership and increased detection and recovery rates for law enforcment. Qui tam's social utility and ancient principles were espoused in - *U.S. v. Griswold, 24 F. 361, 365-366* (D. Or. 1885):

> *"The Statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilisation that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons ...."*

Magnitude of Fraud Internationally affects Australia Domestically

The magnitude of fraud is well documented with literature being available globally and locally. The '*Report to Nations 2010*' reported 1843 cases of fraud from 106 countries amounting to $2.9 trillion of the gross world product of approximately $58.07 trillion.[157] During this period, the distribution of losses indicated that 29.3% involved sums ranging from $100,000 to $499,000, whilst 23.7% of the reported losses exceeded $1 million.[158] In 2011, the gross world product was estimated at $70.28 trillion with a projected loss to 'reported frauds' of more than $3.5 trillion. Offences during this period were spread over 100 countries, stretching across six continents (including Oceania).[159] Despite the total number of organisations reporting fraud decreasing in 2009 from (1843) to (1388) in 2012, the *reported* total amount of money lost to fraud increased from $2.9 trillion to $3.5 trillion respectively.[160]

The Australian Institute of Criminology fraud report suggests that the Australian community lost approximately $345.4 million through fraudulent business practices and $977 million through personal fraud.[161] When it came to fraud on the Commonwealth, 152 government agencies responded indicating that public sector frauds amounted to $498 million with increases in internal frauds.[162] An underlying theme from international and domestic fraud

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[157] Whitehouse, T. "Survey Puts Fraud Loss at $2.9 Trillion Globally in 2009" Compliance Week <http://www.complianceweek.com/survey-puts-fraud-loss-at-29-trillion-globally-in-2009/article/189557/> viewed 18 April 2013 see also Association of Certified Fraud Examiners, "The Report to the Nations on Occupational FRAUD and ABUSE: Global Fraud Study" (2010) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf> viewed 28 April 2013. P9.

[158] Association of Certified Fraud Examiners, "The Report to the Nations on Occupational FRAUD and ABUSE: Global Fraud Study" (2010) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf> viewed 28 April 2013. P9.

[159] Association of Certified Fraud Examiners, "The Report to the Nations on Occupational FRAUD and ABUSE: Global Fraud Study" (2012) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-to-nations.pdf> at 18 April 2013, p8.

[160] Association of Certified Fraud Examiners, "The Report to the Nations on Occupational FRAUD and ABUSE: Global Fraud Study" (2010) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf> at 28 April 2013, 9.

[161] See KPMG (2010) and Australian Bureau of Statistics (2008) in Lindley, J. Jorna, P,. Smith, R,G. "Fraud against the Commonwealth 2009-10 annual report to Government" (2012) Australian Institute of Criminology http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf at 17 April 2013, p xi.

[162] Lindley, J. Jorna, P,. Smith, R,G. "Fraud against the Commonwealth 2009-10 annual report to Government" (2012) Australian Institute of Criminology <http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf> at 17 April 2013, p xi.

statistics suggested that the true figures and value of fraud losses are underrepresented and underreported.[163]

The Fraud and Misconduct Survey 2010 by KPMG, identified a number of areas where government departments were experiencing asset misappropriation, false claims for benefits and reverse false claims (false claim to evade a liability), bribes, kickbacks corruption and fraudulent financial statements.[164] These figures from KPMG[165] and the Australian Attorney General's Office[166], whilst independent of the Report to Nations[167] report on global fraud patterns, tended to point towards a global and domestic increase in fraud, malfeasance, corruption and bribery at various levels of the local and global community.

In 2011, the Australian Institute of Criminology (AIC) research in *Counting the Cost of Crime in Australia: A 2011 Estimate* provided an insight into the cost of crime in Australia.[168] This latest report updates previous data and refers to the costs of crime for 2011. The present research suggests that the cost of fraud in Australia is approximately $6 billion.[169] The estimated total cost of crime was estimated at $47.6 billion or 3.4% of Australia's GDP and represents a 49% increase since 2001. Furthermore, it is estimated that only one third of frauds are detected, thus the real amount placed upon fraud could exceed $18 billion.

Using Qui Tam Style Laws to Identify and Correct Regulatory Weaknesses

A vast amount of literature including that from (OECD) indicates that weak regulatory processes may act as fraud enablers, albeit in some cases, inadvertently. There is a vast amount of literature available detailing the failures of regulatory bodies to protect consumers from drug companies and their products. The theory of regulatory capture has evolved considerably over the past four decades and currently dominates discussions where regulators fail in their duty to protect the public interest. Generally, the theory postulates that regulations are not in fact designed to protect the public interest, rather it is a process by which private organisations and groups seek to promote their own interests to a point where it is the industry that dominates how and what regulatory procedures are necessary.

Regulatory capture ("RC") was articulated by Stigler (1971) and encompasses all forms of state intervention into the economy with a focus on controlling monopolies.[170] According to Stigler (1971), the starting point for (RC) was based upon economic theories that were designed to benefit the industry it was created to regulate. Stigler (1971:3) noted "…*as a rule, regulation is acquired by the industry and is designed and operated primarily for its*

[163] Lindley, J. Jorna, P,. Smith, R,G. "Fraud against the Commonwealth 2009-10 annual report to Government" (2012) Australian Institute of Criminology <http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf> at 17 April 2013, p xi..

[164] KPMG (2010) and Australian Bureau of Statistics (2008) in Lindley, J. Jorna, P,. Smith, R,G. "Fraud against the Commonwealth 2009-10 annual report to Government" (2012) Australian Institute of Criminology <http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf> at 17 April 2013, p xi.

[165] KPMG (2010) and Australian Bureau of Statistics (2008) in Lindley, J. Jorna, P,. Smith, R,G. "Fraud against the Commonwealth 2009-10 annual report to Government" (2012) Australian Institute of Criminology <http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf> at 17 April 2013, p xi.

[166] Commonwealth Fraud Control Guidelines (2011),III <http://www.ag.gov.au/Documents/Commonwealth%20Fraud%20Control%20Guidelines%20MARCH%202011.PDF> at 6 April 2013, p Foreword.

[167] See Association of Certified Fraud Examiners, "The Report to the Nations on Occupational FRAUD and ABUSE: Global Fraud Study" (2010) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf> at 28 April 2013. P9.

[168] Smith, R, G., Jorna, P., Sweeney, J & Fuller, G. Counting the Cost of Crime in Australia: A 2011 Estimate (November 2014), 129, Canberra: Australian Institute of Criminology <http://aic.gov.au/publications/current%20series/rpp/121-140/rpp129.html> at 24 November 2014.

[169] Ibid.

[170] Stigler, G. 'The Theory of Economic Regulation' (1971), 2, Bell Journal of Economics and Management Science, 21.

benefits." The basic premise postulated by Stigler was that the industry can use and abuse the coercive public powers the state may introduce to obtain private benefits.

Later, Ernesto Dal Bo in (2006) reviews literature on "Regulatory Capture" (RC) and its affect upon how national and state governments manage regulatory processes and the coinciding interventions resulting from its actions (or inactions).[171] According to Dal Bo, regulatory capture is a process by which special interest groups affect and/or state intervention in areas as diverse as '*tax, foreign monetary policies and legislations that may affect areas such as research and development*'.[172] A narrow interpretation of regulatory capture suggests that it is a process '*through which regulated monopolies manipulate state agencies that are supposed to control them'*.[173] Regulatory capture has many variables and takes into consideration asymmetrical agency models that emphasise influential transactions between regulators and their 'client' who is typically the industry to be regulated. Regulatory capture may be seen as a gateway to corruption and wrongdoing unless adequate processes are implemented to mitigate the risks.

McMahon (2008) refers to regulatory capture in an Australian context and suggests the best way to detect and mitigate corruption and wrongdoing is to provide adequate whistleblower laws and protections. The reasons for taking this approach is to ensure transparency is achieved throughout Australia's regulatory bodies. According McMahon, whistleblowers can ferret out corruption and fraud originating from within organisations and as a result, modes of corruption and wrongdoing that typically found shelter in a captured agency were vulnerable to detection. In the event a regulatory body had been captured, the information from whistleblowers may reveal the extent of the fraud and corruption resulting in a root and branch compliance overhaul. [174]

In 2010, Dr Ken Harvey presented a compelling comparison exposing examples of regulatory capture occurring in Australia's pharmaceutical industry.[175] Harvey provides examples where the Therapeutic Goods Administration ("TGA") and Medicines Australia (MA), Australia's primary drug/medication statutory body and regulator, did not pursue drug companies for providing undisclosed education and hospitality expenses to doctors marketing their pharmaceutical products. Harvey notes that it was not until the Australian Competition and Consumer Commission (ACCC) intervened that changes occurred in the way Doctors received payments in cash or kind. The significance of such conduct occurring in plain sight of the regulator is overlooked in Australia, often at the expense of safety and efficacy.

The undisclosed sums of money and lavish treatment such as cash payments, sexual favours, honoraria payments and paid holidays have been linked to doctors influencing treatment guidelines and clinical practice.[176] The position espoused by Harvey indicates that a close relationship between the regulator and those regulated renders matters of public interest ineffectual in favour of catering for a 'client' industry.

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[171] Erneto Dal Bo, 'Regulatory Capture: A Review', (2006), 22, (2), Oxford Review of Economic Policy, 203.
[172] Ibid, 203.
[173] Ibid.
[174] McMahon, G. 'The Need for Protection of Witnesses and Whistleblowers: The Sword and the Shield.' (24 August, 2008) Submission to the inquiry into whistleblowing protections with the Australian Government Public Sector.
[175] Harvey, K. 'Position Paper and Consultation on the Promotion and Advertising Arrangements of Therapeutic Goods in Australia: A Response', (2 July, 2010), <https://www.tga.gov.au/sites/default/files/consult-advertising-arrangements-101028-submission-harvey.pdf> at 29 November 2014.
[176] Rosenberg, M., '5 Shady Ways Big Pharma May Be Influencing Your Doctor: Pharma can entice doctors to prescribe its expensive patent drugs, even when they are dangerous". (23 January, 2014) AlterNet <http://www.alternet.org/personal-health/5-shady-ways-big-pharma-may-be-influencing-your-doctor> at 15 December 2014.

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23. Schedule

Schedule 1 – Example of wrongdoing addressed by States in the USA.

The information below is intended to provide the Senate with examples of the types of wrongdoing addressed in other jurisdictions.

1. **ALABAMA**: Child labor violations.
2. **ALASKA**: Occupational safety and health violations, the Alaskan Railroad Company violations, **child care** facilities violations, assisted living homes violations, legislative employees violations.
3. **ARIZONA**: Water quality control violations, occupational safety and health violations.
4. **ARKANSAS**: *Civil rights violations*, fair housing violations, long term care violations.
5. **CALIFORNIA**: State universities violations, savings associations violations, health care facilities violations, elderly care facilities violations, occupational safety and health violations, toxic substances violations, fraudulent unemployment actions violations, mental health facilities violations.
6. **COLORADO**: Minimum wage law violations, false disclosures to the state violations.
7. **CONNECTICUT**: Environmental violations, information to auditors or public accountants violations, child care violations, violations committed by leaders or employees of a foundation violations, civil rights violations, **collective bargaining** for state employees violations, public schools violations, nursing homes violations, minimum wage violations, Labor Relations Act violations, **child abuse** violations.
8. **DELAWARE**: Public and private schools violations, nursing homes violations, civil rights violations, workers compensation fraud violations, long term care facilities violations, child labor violations, minimum wage violations, firefighters violations, public works contractors violations, hazardous chemical control.
9. **DISTRICT of COLUMBIA**: Procurement issues violations, discrimination and civil rights violations, unfair labor practices violations, workers compensation fraud violations, minimum wage violations, occupational safety and health violations, long term care facilities violations.
10. **FLORIDA**: Child abuse violations, long term care facilities violations, continuing care facilities violations.
11. **GEORGIA**: Fraud in state programs violations, unfair labor practices violations, gender discrimination in minimum wage laws violations.
12. **HAWAII**: Unfair labor practices violations, elder care violations, minimum wage laws violations, civil rights violations, occupational safety and health violations.
13. **IDAHO**: Sanitation violations on farms violations, fair wage law violations, environmental protection violations, PCB waste disposal violations, minimum wage laws violations, state **human rights** law violations, long term care facilities violations.
14. **ILLINOIS**: Field sanitation for agricultural workers violations, prevailing wage law violations, disclosures by transportation authority workers violations, civil rights laws violations, migrant worker conditions violations, unfair labor practices violations, public and private schools violations, elder care violations, nursing home facilities violations, minimum wage laws violations, equal pay laws violations, occupational safety and health violations, toxic substances violations.

15. **INDIANA**: Elder care violations, health care facilities violations, long term care facilities violations, education violations, political subdivisions violations.
16. **IOWA**: Collective bargaining violations, public health facility personnel violations, civil rights violations.
17. **KANSAS**: Reporting disease violations, child abuse violations, elder care violations, working conditions violations.
18. **KENTUCKY**: Occupational safety and health violations, long term facilities violations, firefighters violations.
19. **LOUISIANA**: Health care providers violations, lead hazard reduction licensing of certification violation violations, insurance code violations, hospitals violations, long-term care facilities violations, environmental laws violations.
20. **MAINE**: Human rights law violations, occupational safety and health violations, employment practices violations, state universities violations, judicial branch violations, agricultural violations, public utility violations.
21. **MARYLAND**: Occupational safety and health violations, civil rights violations.
22. **MASSACHUSETTS**: Domestic service violations, health care violations, asbestos **abatement** violations, hazardous substances violations, child care violations, minimum wage violations, civil rights violations.
23. **MICHIGAN**: Adult care provider violations, civil rights violations, long-term care facility violations, occupational safety and health violations.
24. **MINNESOTA**: Child care facility violations, **unfair labor practice** violations, civil rights violations, occupational safety and health violations, health services violations, asbestos abatement violations.
25. **MISSISSIPPI**: Workers compensation violations, vulnerable adult violations.
26. **MISSOURI:** Nursing home violations, public health violations, Department of Correction violations, mental health facility violations, in home care provider violations, long term care facility violations.
27. **MONTANA**: Unlawful discrimination violations.
28. **NEBRASKA**: Occupational safety and health violations, unlawful discrimination violations, Industrial Relations Act violations, nursing home violations.
29. **NEVADA**: Long term care facility violations, occupational safety and health violations, mental health care facility violations.
30. **NEW HAMPSHIRE**: Hazardous waste law violations, human rights law violations, asbestos management and control violations, elder care violations, dog and horse racing facility violations, toxic substance control violations, child care facility violations.
31. **NEW JERSEY**: Ski tow lift and tramway violations, hazardous substance violations, civil rights violations, child abuse violations, occupational safety and health violations, minimum wage violations, elder care violations.
32. **NEW MEXICO**: Long term care facility violations, residential care facility violations, occupational safety and health violations, radiation control violations.

33. **NEW YORK**: Civil rights violations, elder care facility violations, occupational safety and health violations, minimum wage violations, Labor Relations Act violations, toxic substances control violations, health care facility violations.
34. **NORTH CAROLINA**: Long term care facility violations, violations of state law by department, agency or local political subdivision.
35. **NORTH DAKOTA**: Child abuse and welfare violations, adult care facility violations, mentally and physically handicapped violations, minimum wage law violations, long-term facility care violations, agency misuse of funds violations.
36. **OHIO**: Long term care facility violations, **child care** facility violations, minimum wage law violations, nursing home violations, health care facility violations, abuse of mentally handicapped adult violations.
37. **OKLAHOMA**: Children's group home violations, civil rights violations, violations occurring in group homes for person with developmental or physical disabilities, child abuse violations, foster care violations, occupational safety and health violations, nursing home violations.
38. **OREGON**: Adult care facilities violations, long term care facilities violations, collective bargaining violations, occupational safety and health violations, civil rights violations.
39. **PENNSYLVANIA**: Occupational safety and health violations, radioactive waste violations, Community Right to Know Act violations, toxic substances violations, civil rights violations, seasonal farm workers rights violations, public utility company violations.
40. **RHODE ISLAND**: State hospital violations, long-term care facility violations, asbestos abatement violations, insurance company violations, HMO violations, non-profit hospital violations.
41. **SOUTH CAROLINA:** Occupational safety and health violations, long-term care facility violations.
42. **SOUTH DAKOTA**: Civil rights violations, collective bargaining violations.
43. TENNESSEE: State educational system violations, nursing home facility violations, child care facility violations, mental health and **disability** facilities violations, adult care facilities violations, minimum wage violations, occupational health and safety violations.
44. **TEXAS**: Agricultural laborer violations, worker health and safety violations, immediate-term care facility violations, treatment facility violations, hospital and health care facility violations.
45. **UTAH**: Minimum wage law violations, occupational safety and health violations, long term care facility violations.
46. **VERMONT**: Occupational safety and health violations, **Polygraph** Protection Act violations, fair employment practices violations, state labor practices violations, long term care facilities violations.
47. **VIRGINIA**: Occupational safety and health violations, adult care facilities violations, child welfare protection violations, nursing home facilities violations.
48. **WASHINGTON**: Agricultural laborer violations, long-term care facility violations, minimum wage law violations, nursing home violations, state hospital violations.

49. **WEST VIRGINIA**: Miners health, safety and welfare protection violations, nursing home violations, personal care home violations, residential care violations, asbestos abatement violations, occupational safety and health violations, equal pay law violations, minimum wage law violations.
50. **WISCONSIN**: Residential care facility violations, long-term care facility violations, rural medical center violations, collective bargaining violations, solid waste facility violations.
51. **WYOMING**: Long-term care violations, equal pay act violations, occupational safety and health violations.

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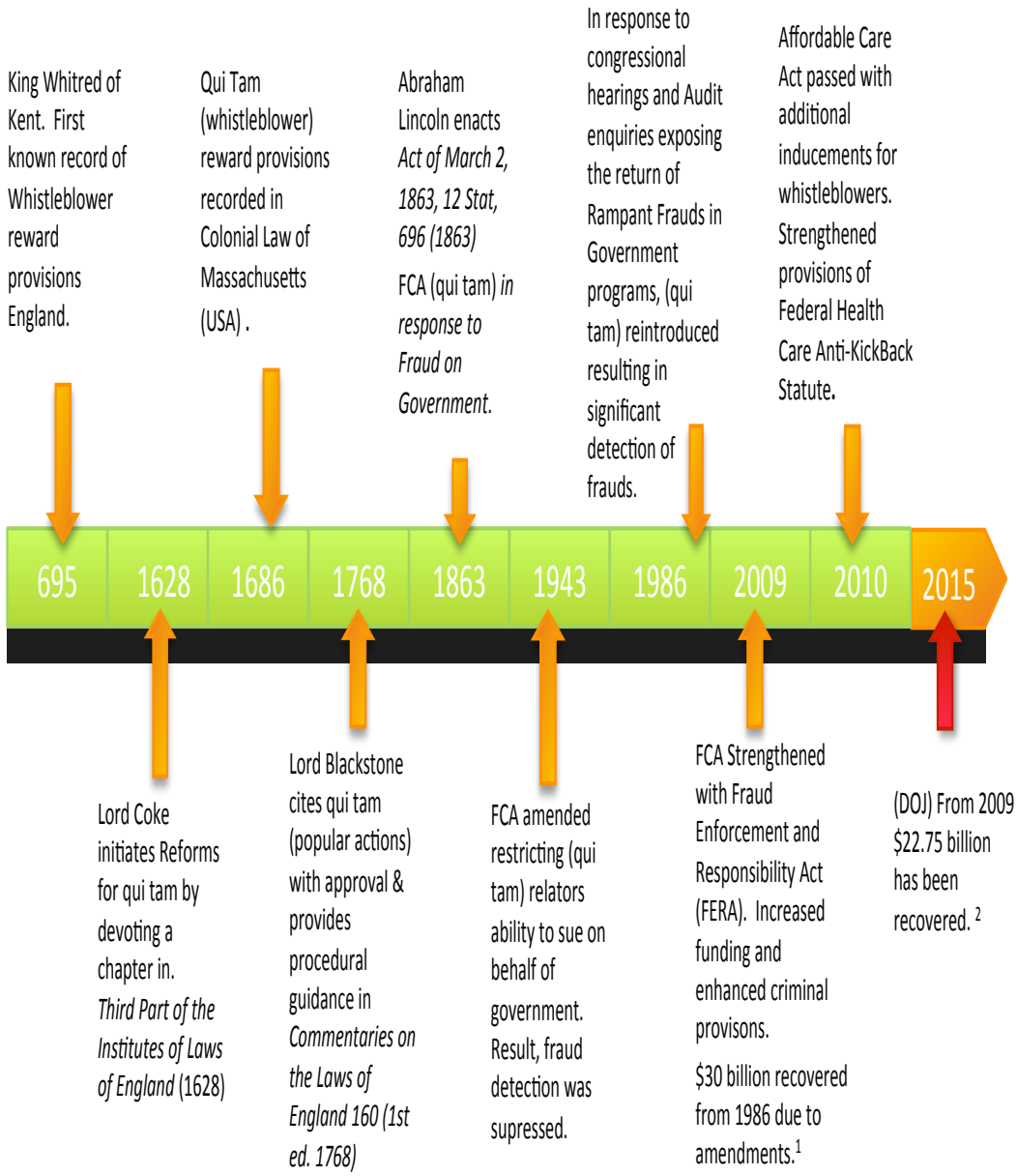
25. Figure 1

Figure 1.

TIMELINE – False Claims Act (qui tam) – Evolution of Whistleblower Laws.



1. **Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986**
   http://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986

2. **Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014** ***First Annual Recovery to Exceed $5 Billion; Over 700 Whistleblower Lawsuits for Second Consecutive Year.*** http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014

26. Definitions

Definition of Qui Tam

"qui tam pro domino rege quam pro se ipso in hac parte sequitur - meaning *"[he] who sues in this matter for the king as well as for himself*."

'Abuse'

"*Abuse, defined here as a subset of waste, entails the exploitation of "loopholes" to the limits of the law, primarily for personal advantage. One abuses a system of travel allowances by intentionally and unnecessarily scheduling meetings in another city on a Friday afternoon and on the following Monday morning in order to claim per diem over a weekend. Another example would occur where a person, transferred to an overseas diplomatic posting, uses the diplomatic position to export a luxury vehicle for personal use at the posting and subsequently, prior to returning to Australia, sells the vehicle for a substantial personal profit."*[177]

'Audit'

In the case of Frankston & Hastings Corporation v Cohen [1960] 103 CLR 607, 617 the High court provided guidance on the term "Audit".[178]

"The word "audit" is a well-known English word, and the general nature of what constitutes an audit seems plain enough. The Oxford English Dictionary defines the noun "audit" as "an official examination of accounts with verification by reference to witnesses and vouchers". Mr. R.A. Irish in his book "Practical Auditing" (p. 1) says:

"*An audit may be said to be a skilled examination of such books, accounts and vouchers as will enable the Auditor to verify the Balance Sheet. The main objects of any audit are: (a) To certify to the correctness of the financial position as shown in the Balance Sheet, and the accompanying revenue statements. (b) The detection of errors. (c) The detection of fraud. The detection of fraud is generally regarded as being of primary importance*".

Ex relatione (ex rel.)

Abbreviation for Latin ex relatione, meaning "upon being related" or, more loosely, "on behalf of." The phrase is typically used in the title of a legal proceeding filed by the Government, to indicate the name of an interested private party who pushed for the instigation of the suit. For example, a case caption might read: The State of Tennessee ex rel. Archie Johnson v. Hardy Products. Such suits usually happen when the private party's interests happen to coincide with those of the Government or the public.

For example, if an employee of a defense contractor discovered that his boss was defrauding the government, the employee could file a False Claims qui tam suit against his employer. In that action,

- the employee would be the ***relator***;
- the employer would be the ***defendant***, and
- the government would be the ***plaintiff***.[179]

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[177] Above, n8.
[178] See also recent case where the term Audit was cited with approval in *Lahoud & Anor v Lahoud & Ors* [2011] NSWCA 405 (19 December 2011) (Giles JA, Handley AJA, Sackville AJA).
[179] Cornell University Law School. 'Legal Information Institute' available at < https://www.law.cornell.edu/wex/relator> at 10 January 2017.

False Claims Act

Federal statute setting criminal and civil penalties for falsely billing the government, over-representing the amount of a delivered product, or under-stating an obligation to the government. The False Claims Act may be enforced either by the Justice Department or by private individuals in a qui tam proceeding.[180]

Fraud

"Fraud is understood to mean a dishonest and deliberate course of action which results in the obtaining of money, property or an advantage to which the recipient would not normally be entitled. This would include, inter alia, theft of government property, or the submission of artificially inflated invoices by a contractor."[181]

Characterisation of Fraud against the Commonwealth

Fraud against the Australian Commonwealth may be characterised by individuals and outside agencies that seek to make claims and obtain financial advantage with the aim of depleting scarce Government resources.[182]

Kickback

In order to define 'Kickback", I refer to U.S statute law. *Medicaid Patient Protection Act of 1987 (MPPA), as amended, 42 U.S.C. §1320a-7b* (the "Antikickback Statute").

"The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favourable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract."

Misconduct

The term appears to be narrow in scope as it may be interpreted as misconduct exclusively by employees, not employers, contractors, sub-contractors and agents.

This term is defined in Reg 1.07 under the *Fair Work Regulations 2009* to mean:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment
- conduct that causes serious and imminent risk to the health and safety of a person, or the reputation, viability or profitability of the employer's business
- theft
- fraud
- assault
- the employee being intoxicated (alcohol or drugs, other than prescribed drugs) at work
- the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

[180] Cornell University Law School. 'Legal Information Institute' available at <https://www.law.cornell.edu/wex/false_claims_act> at 10 January 2017.

[181] Grabosky, N, P,. 'Controlling Fraud, Waste and Abuse in the Public Sector' Australian Institute of Criminology < http://aic.gov.au/documents/D/8/5/%7bD85289A2-1BD1-4652-ABD3-C85F0A9F5082%7dfraud.pdf>, p 9, at 4 November 2014.

[182] KPMG (2010) and Australian Bureau of Statistics (2008) in Lindley, J. Jorna, P. Smith, R,G. "Fraud against the Commonwealth 2009-10 annual report to Government" (2012) Australian Institute of Criminology http://www.aic.gov.au/documents/B/5/1/%7BB514C8BC-4578-4D7F-A9C8-475FF1269004%7DMR18.pdf viewed 17 April 2013, p xi. p XI.

Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences. It has also been said to mean '*wrongful, improper or unlawful conduct motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts*'.[183]

Regulation 1.07 of the *Fair Work Regulations 2009*, further defines 'serious misconduct' for the purposes of the *Fair Work Act 2009* (Cth) s12.

'Fraud' is referred to in 1.07(3)(a)(ii) of the *Regulation* as an act amounting to '**serious misconduct**'.

Waste

"*Waste entails the expenditure or allocation of resources significantly in excess of need. An example would be the negligent or reckless requisition of three times as much perishable produce as required. Waste need not necessarily involve an element of private use nor of personal gain, but invariably signifies poor management.*"[184]

Whistleblowing

In Australia, the accepted definition for "Whistleblower" in public policy and the social sciences is and why it is necessary that they are protected:

"… the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action".[185]

The definition above was endorsed by: *The Senate Select Committee on Public Interest Whistleblowing* (Commonwealth Parliament), In the public interest, August 1994, Parliamentary Paper No. 148/1994.

Wrongdoing

In this submission the term "wrongdoing", unless otherwise specified, will refer to a range of behaviours or conduct that may include the following;

1. Fraud
2. False Claims
3. Corruption
4. Abuse and Waste
5. Kickbacks

A 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).[186]

[183] ***See*** *O'Connor v Palmer and Others* (No.1) (1959) 1 FLR 397; *Pillai v Messiter* (No.2) [1989] 16 NSWLR 197; de Leon v Spice Temple Pty Ltd [2010] FWA 3497 (6 May 2010).
[184] Ibid, 8.
[185] Miceli, Marcia P., Near, Janet Pollex., Dworkin, Terry Morehead. '*Whistleblowing in organization's'* (2008, Routledge/Psychpress), p6 see also Near, JP & Miceli, MP, 'Organisational dissidence: the case of whistleblowing' (1985), *Journal of Business Ethics* 4: 1–16, p.4.
[186] Wolfe, S., Worth, M., Dreyfus, S., Brown, AJ. 'Whistleblower Protection rules in G20 Countries: The Next Action Plan". Public Consultation Draft, (June, 2014), 4 <http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf> at 18 December 2016.

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27. Acronyms

ASIC	- Australian Securities and Investment Commission
ATO	- Australian Taxation Office
CIA	- Corporate Integrity Agreement
CFTC	-Commodities Future Trading Commission
EEOC	- Equal Employment Opportunity Commission (U.S)
Ex rel.	- "*Upon being related*" (see definition above)
FCA	- False Claims Act
FDA	- Food and Drug Administration
FDCA	- Federal Food, Drug, and Cosmetic Act (FD&C Act) 21 USC 9.
FERA	– Fraud Enforcement and Recovery Act
IRS	- Internal Revenue Service
PBS	- Pharmaceutical Benefits Scheme
SEC	- Security and Exchange Commission
TGA	- Therapeutic Goods Administration
U.S.C	- United States Code.