Written Inputs on Whistleblower Treatment: Senate Economics References Committee Inquiry into ASIC Investigations and Enforcement

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Introduction

I was flattered to have been asked to give verbal testimony via Webex to the above inquiry, in a session that took place on the morning of 1 November, 2023.

At that session, I was asked by the Deputy Chair, Senator Andrew Bragg, to provide further information in writing regarding the questions discussed in the meeting about how measures might be introduced by the Australian Parliament to improve protections for whistleblowers, both in financial services and in other sectors. This document constitutes my response to that request.

Whistleblowing in UK financial services

Inadequate or no regulatory action in response to evidence provided by internal and external[1] whistleblowers was a significant feature in two critical external reviews of the UK's principal financial regulator, the Financial Conduct Authority (FCA), published in December 2020[2]; in the first of these cases, the principal whistleblower, George Patellis, was also treated appallingly by the regulator. Other cases within the sector in which similar behaviours are alleged include alleged false accounting and compliance breaches by a UK bank that subsequently required rescue and a case involving a high-profile Australian, namely Lex Greensill.

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[1] I define an *internal* whistleblower as an employee or contractor within the organisation about which he or she provides evidence, whether to a person within the organisation who might reasonably be expected to act on that information or an external body, and an external whistleblower as a stakeholder other than an employee doing likewise in respect of information about an organisation that is not generally known outside it

[2] The Connaught Income Fund Series 1 and London Capital & Finance plc (LCF)

The FCA responded to the Connaught and LCF cases by promising to undertake a Transformation Programme, a key feature of which was a new initiative, In Confidence, With Confidence, which it claimed would improve the treatment of whistleblowers and their evidence, and encourage more people to provide information. Politicians and other stakeholders asked it to survey whistleblowers post-implementation to check whether the scheme had been successful.

The regulator subsequently carried out such an exercise - albeit with a suspiciously small, perhaps cherry-picked, sample size. The results were predictably damning, with fewer than a third of those approached completing the survey and the FCA able to find only two people, out of more than a thousand whistleblowers, who were at least 'somewhat satisfied' with the regulator's approach to them and their evidence.

The case for an Office of the Whistleblower

Across all sectors of the UK economy, there are a number of perceived flaws in whistleblower protections. These include:

- Under existing legislation, the definitions of a whistleblower[3] and a protected disclosure[4] are narrow, and many cases that would normally be defined as whistleblowing have been deemed to be excluded;
- The process of disclosure required to secure any degree of protection is narrowly defined;
- The protections provided are very much related to employment, rather than any other harms that a whistleblower might experience;
- There is an upper limit to the amount that employees, including whistleblowers, can receive as a result of a successful Employment Tribunal claim, which is often far from sufficient to provide full redress for the loss of employment, let alone of future employability, suffered by whistleblowers in financial services, where remuneration tends to be high

The non-profit campaign group WhistleblowersUK has for some years been advocating the creation of an Office for the Whistleblower. The features of such a body are set out here.

The organisation provides the Secretariat to an All Party Parliamentary Group on Whistleblowing, whose members have made two attempts to bring forth primary legislation to give effect to this policy - one in the Commons, the other in the Lords - and have attempted to amend two Government Bills[5].

So far, Government has not adopted any of these measures[6], so progress has been slow. In March 2023, the Department for Business and Trade announced a review into whistleblowing provisions. Transparency Task Force recently learned that the Department has engaged a

[3] A 'worker', therefore excluding external whistleblowers, even former employees
[4] Which excludes, for example, harms caused where there is no breach of a legal obligation, no criminal offence being committed and no physical harm
[5] A summary, progress report and link to the wording for each legislative intervention is set out on WhistleblowersUK's homepage. It is worth following the links to read the drafting of the two Bills and Parliament's summaries of their respective provisions
[6] Under the operating procedures of the UK Parliament, a Bill proposed by a backbench MP or a Peer is unlikely to become law unless adopted by Government, because insufficient Parliamentary time is allocated to its progression

professional services firm, Grant Thornton, to conduct a research study. Given that firm's client base and consequent economic interests, I suspect the conclusion will be that there is no pressing need for change. In any event, the introduction of this research phase is likely to push out the reporting stage beyond the next UK General Election[7], at which there is a very high probability of a change of Government. So it is exceptionally unlikely that there will be legislative change under the current administration, and the issue does not at this stage appear to be a priority for the official Opposition.

The United States' approach

In my verbal testimony to the Committee, I expressed the view that while no country's financial services regulatory regime is perfect, the US' approach may be a better model for Australia to build on than the UK's. I believe this is especially true of whistleblowing.

The SEC already has an Office of the Whistleblower, and has done so since (from memory) 2011. It not only protects whistleblowers (who need not be employees) and investigates their tip-offs but also provides them with sizable monetary rewards. These payouts are frequent occurrences, and the sums granted are material, as its press releases demonstrate.

I believe these awards are significant not just because they may tip the financial equation in favour of disclosure but, perhaps more important, because they signal that whistleblowing is a pro-social activity. In predominantly Anglo-Saxon cultures, as I set out in my verbal testimony, we are undecided about whether this is the case: we celebrate the plucky individual who stands up to the monolithic organisation, but we also believe in taking one for the team and standing by one's mates.

The SEC's Office of the Whistleblower has a much narrower remit than that proposed by WhistleblowersUK - it focuses solely on financial services, and specifically securities violations. And its model for paying life-changing financial rewards, as opposed to preventing and mitigating career harms and other losses, is controversial, and may not be appropriate in some other countries or sectors. But the entity is significant, because it is an established and seemingly effective precedent that other nations might wish to evaluate, and potentially adapt and adopt.

If the Committee is considering whether legislation is needed to improve ASIC's treatment of whistleblowers and their evidence, if its schedule allows, I wonder whether it might be open to inviting a representative of the SEC's Office of the Whistleblower to give evidence on the subject.

Further information

If I can provide any additional information or assistance, please do not hesitate to let me know. I can be reached on this email address: [redacted]

[7] Probably late October 2024, possibly May 2024