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Tax and Corporate Whistleblower Protection Project
C/- Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
Sydney NSW 2000

via email to whistleblowers@treasury.gov.au

Dear Ms Keall

Review of tax and corporate whistleblower protections in Australia

The Australian Institute of Company Directors (**AICD**) welcomes the opportunity to provide a submission in response to the Australian Government's consultation paper: *Review of tax and corporate whistleblower protections in Australia* (**consultation paper**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 39,000 includes directors and senior leaders from business, government and the not-for-profit (**NFP**) sectors.

Overview

In the AICD's view, existing protections afforded to corporate whistleblowers in Australia are in need of substantive reform to broaden and strengthen their coverage.

Strong systems for whistleblowing promote strong standards of governance. The AICD considers a robust whistleblowing framework to be an important contributor to maintaining Australia's global reputation for high standards in corporate governance and protecting against corruption and corporate misconduct.

Directors play a critical role in establishing and promoting a culture that supports disclosure of wrongdoing within Australian businesses. This is essential to detecting, addressing and, ideally, preventing corporate wrongdoing. The regulation of whistleblowing has a significant impact on establishing a culture of disclosure, and by extension, affects the ability of directors to play their part in ensuring the compliance of their organisations with the law. For their part, directors welcome information about misconduct and would prefer for misconduct to be brought to light and addressed at the earliest opportunity.

The AICD believes that whistleblowing protections should be broad, strong and easy for potential whistleblowers and businesses to understand. This must be balanced against the need to discourage meritless disclosures that drain corporate and regulatory resources. In our view, the existing protections in the Corporations Act do not meet these tests, and reform is required.

The ultimate aim of a whistleblowing framework should be to encourage disclosures of wrongdoing, protect whistleblowers and incentivise companies to establish internal disclosure regimes. To ensure this, legislation should always require in reasonable circumstances that whistleblowers utilise and exhaust internal disclosure systems before taking alternative action. The recipient for whistleblowing complaints should be, except in the most extraordinary circumstances, either the company or the relevant regulator (such as ASIC).

Reform recommendations

The AICD recommends reform to corporate whistleblowing regulation to:

- Broaden the definition of discloser to include people who have a former association with a company, as well as including additional categories of individuals (such as unpaid workers, and accountants and auditors);
- Broaden the range of topics about which a disclosure can be made to more accurately capture the scope of potential corporate wrongdoing;
- Remove the requirement that a disclosure be made in 'good faith' and replace it with a more objective test that does not focus on motive;
- Strengthen the protections against unlawful reprisal including tougher penalties for breaches;
- Give further consideration to a model for third party disclosures in extraordinary circumstances;
- Increase the penalties for companies breaching whistleblowing provisions and improve the compensation framework for whistleblowers who suffer victimisation or financial loss;
- Commit to a post-implementation review of the reforms that would include consideration of financial incentives for whistleblowing to regulators (the AICD does not support the introduction of US-style regulatory 'bounties' at this time); and
- Ensure that the focus of whistleblowing regulation is on incentivising early detection and prevention of wrongdoing, rather than on compliance with regulatory requirements.

The AICD does not support mandating legislative or regulatory requirements on the structure or scope of internal corporate regimes to manage whistleblowing. In our view, a stronger regulatory framework for whistleblowers will strengthen incentives for corporates to ensure robust internal systems are in place. Mandating specific systems would create undue complexity and limit the ability of companies to tailor approaches to their specific circumstances.

Our comments on issues raised in the consultation paper are set out below, by key subject area. In our response, the AICD has focused on improvements to the whistleblowing regime for corporations. The same principles, however, would be supported for reform in tax whistleblowing.

As we note in our response to **question 4** below, the AICD sees merit in establishing a single legislative framework for private sector whistleblowing protections. However, the AICD's reform recommendations would also be effective if incorporated in the Corporations Act, provided that accessible and clear guidance on the scope of the protections is made available to potential whistleblowers.

The AICD considers it appropriate that a public sector whistleblowing framework be recorded in separate legislation as this both provides a system for protected disclosures and mandates an internal procedures for responding to disclosures.

Definition of 'discloser'

The protections available to whistleblowers under the current framework extend to a too narrowly defined group of people.

There are many other people who may be witnesses of corporate wrongdoing who are not currently captured by the definition of 'discloser' set out in the *Corporations Act 2001* (Cth) (**Corporations Act**).

As a matter of principle, anyone who may have knowledge of corporate wrongdoing (and who would benefit from protections under a whistleblowing framework) should be captured under the definition of discloser.

Question 1

Do you believe that the Corporations Act categories of whistleblower should be expanded to former officers, staff and contractors?

The AICD recommends broadening of the definition of 'discloser' in the Corporations Act to include former officers, staff and contractors.

This additional protection recognises that:

- Information concerning corporate wrongdoing may be held by people who no longer have a formal relationship with an entity (for example, because additional information comes to light after their association with the company has ended, or because they choose to leave a company because of the wrongdoing they have witnessed);
- A whistleblower's relationship to a company may change in the context of the investigation of their claim (for example, an employee may resign during an investigation) and this should not affect their entitlement to access whistleblower protections (or compensation); and
- Former officers, staff and contractors would still benefit from the protections afforded to whistleblowers (especially if the definition of victimisation is broadened) and to access compensation;

Question 2

Should it be made clear that the categories include other people associated with the company such as a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners

Question 3

Are there any other types of whistleblowers that should be included, and if so, why?

The AICD supports broadening of the definition of 'discloser to include':

- Accountants and auditors; and
- Unpaid workers.

Extending protections to these categories of people will allow additional perspectives to be captured by the whistleblowing framework. These people have unique perspectives afforded by their relationship to the company and (as in the case of accountants and auditors) may bring professional insights that allow them to detect corporate wrongdoing.

Expanding the definition of 'discloser' will also provide greater certainty to the witnesses of corporate wrongdoing by more completely capturing groups of people who may have access to insider information relevant to corporate misconduct.

In the context of NFP companies, this would also recognise the important role that unpaid workers (volunteers) play within these organisations. Australian charities (which represent only 10 per cent of the broader NFP sector) engage 2.97 million volunteers,[1] and as workers they can be indistinguishable from paid employees. Extending the definition of 'discloser' to include unpaid workers would ensure that this category of person is captured within the broader whistleblowing framework.

The AICD considers that financial services providers and business partners would be captured by the existing definition of people, and the employees of people who have contracts for the supply of goods and services to a company.

Definition of 'disclosable conduct'

The whistleblowing provisions in the Corporations Act cover disclosures that are made in relation to a breach or potential breach of corporations legislation. Although other whistleblowing regimes (such as in the *Banking Act 1959* (Cth)) do target additional laws, the overall effect of the system is fragmented and does not effectively capture the breadth of corporate wrongdoing about which a whistleblower might make a disclosure.

The effect of this fragmentation makes the framework difficult for whistleblowers to access, interpret and rely on, and for businesses to understand their obligations.

There is a significantly broader range of corporate misconduct that should be incorporated into one cohesive framework, thereby extending protections further and creating greater opportunity for information about corporate wrongdoing to come to light.

Question 4

Should the scope of information disclosed be extended? If so please indicate whether you agree with any of the options discussed above, and why. If you do not believe any of the above options should be considered please explain why not and whether there are any other options that could be considered instead.

The AICD notes the broadening of the definition of 'disclosable conduct' in the RO Act to include contravention of that Act, the *Fair Work Act 2009* (Cth) and the *Competition and Consumer Act 2010* (Cth), as well as offences against any Commonwealth law. This model could be effectively applied in the context of a broader corporate whistleblowing framework.

[1] Australian Charities and Not-for-profits Commission, 2015, *Australian Charities Report,* <http://www.acnc.gov.au/ACNC/Publications/Reports/CharityReport2015.aspx> (accessed 5 January 2016)

The AICD recommends that the definition of disclosable conduct should be extended in the context of corporate entities to:

- Contraventions of the Corporations Act;
- Offences against any Commonwealth, state or territory law; and
- Offences against the law of a foreign country that is also in force in Australia.

Importantly, this definition differentiates between contraventions and offences, addressing the concern raised in the review of the *Public Interest Disclosure Act 2013* (Cth) (**AUS-PIDA**) that the framework was used too often for the purposes of private grievances, rather than facilitating disclosure of significant wrongdoing.[2] Setting the threshold at 'offences' for laws other than the Corporations Act will help ensure that the framework targets more serious disclosures.

This question should be considered with **question 9**, as broadening the range of disclosable conduct may also require a broadening of the range of government agencies to whom a protected disclosure can be made.

A standalone Act for whistleblowing

A core consideration of any reform to Australia's whistleblowing framework should be the ease-of-use of the framework, both for whistleblowers and for businesses.

Whistleblowing frameworks exist across several pieces of legislation and there is variation in the substance and detail of each regime.

The AICD considers that the concurrent operation of several whistleblowing frameworks is not conducive to establishing a cohesive system of protections for whistleblowers. This fragmentation creates substantial regulatory burden for companies in seeking to understand and apply its provisions. This makes it more difficult for companies to comply with the requirements of the law and increases the risk of whistleblowers "falling between the gaps".

It is reasonable to expect that there would be some differentiation between whistleblowing frameworks in the public and private sectors, noting that the AUS-PIDA provides both a mechanism for protected disclosures and also a system of compliance for government departments.

However, to the extent that the people involved in establishing and overseeing internal whistleblowing systems may work across multiple sectors, consistency between regimes is critical to ensuring the effective operation of a cohesive framework. Tax whistleblowing, if not covered by a standalone Act, should embed the same principles as a corporate whistleblowing framework.

To this purpose, the AICD considers that a standalone Act establishing a regime that applies to all private sector entities has merit.

In order to ensure the effective implementation of a standalone Act, the government (through ASIC) should provide extensive guidance and education materials tailored to the needs of whistleblowers and businesses respectively. Those made available to whistleblowers making

[2] Phillip Moss AM, 2016, *'Review of the Public Interest Disclosure Act 2013: An independent statutory review conducted by Mr Phillip Moss AM'*, < https://www.dpmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf> (accessed 20 December 2016)

disclosures under the AUS-PIDA through the Commonwealth Ombudsman's website would serve as a useful standard and template for such materials.

Removal of 'good faith'

As a matter of principle, whistleblowing legislation should seek to encourage and protect disclosures from as broad a group as possible. This goal must be balanced against the need to effectively protect against spurious and malicious disclosures, noting the cost to businesses of responding to and investigating such claims.

The requirement of 'good faith' is intended to achieve this balance, but it is not effective in doing so.

Question 5

Should the 'good faith' requirement be replaced by an objective test requiring the disclosure be made on 'reasonable grounds'?

Under the Corporations Act, whistleblowers are required to make their disclosure in 'good faith' in order to qualify for whistleblowing protections. ASIC's guidance to whistleblowers explains that in order for a disclosure to be considered good faith, it must be:

> "…honest and genuine, and motivated by wanting to disclose misconduct. Your disclosure will not be 'in good faith' if you have any other secret or unrelated reason for making the disclosure."[3]

The AICD recognises that the requirement for disclosures to be made in good faith has been removed from the RO Act following its amendment in November 2016. It is also not a requirement in the AUS-PIDA Act.

The AICD recommends the removal of good faith as a precondition to accessing whistleblower protections because:

- It is in the public interest that information about corporate wrongdoing be brought to light regardless of the whistleblower's motivation, and the operation of this test likely reduces the number of whistleblowers who come forward;
- It is difficult to establish the motive of a whistleblower (as evidenced by there being no cases in any Australian court contemplating the good faith of a whistleblower) as motive is difficult to prove or disprove;
- It is difficult for whistleblowers to determine whether their disclosure is in 'good faith' (there are often many motivating factors behind disclosures and meaning of 'good faith' may be unclear) and, by extension, to be certain about their eligibility to access protections when making disclosures which may discourage whistleblowing; and
- The 'good faith' test is not necessarily an effective means of preventing spurious or malicious whistleblowing claims.

An alternative to good faith

The AICD supports removing the requirement of good faith because it is, on balance, a disincentive to whistleblowing. However, we recognise that there is a need to ensure that

[3] Australian Securities and Investments Commission, August 2015, 'Guidance for whistleblowers', <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/> (accessed 20 December 2016)

there is an appropriate hurdle to prevent the extension of protection to meritless disclosures.

In place of good faith, the AICD supports an alternative requirement (suggested by the Senate Standing Committee on Economics' review on the performance of ASIC) which would require that, to be protected, a disclosure:

- "is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or
- shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes."[4]

This is a more objective test which would require a reasonable level of evidence on which to make a disclosure in order for it to qualify for protection. As discussed in **question 3**, we consider that clear guidance on protections for potential whistleblowers, produced by the regulator, will be an important component of an improved framework of protection. Such guidance should address the operation of the proposed test replacing good faith.

The AICD believes that the removal of good faith and replacement with our proposed alternative would significantly improve the whistleblowing framework and appropriately shift the focus of eligibility requirements towards the truthfulness of the disclosure, rather than the motivation of the whistleblower.

It would also provide greater certainty to whistleblowers as the test is simpler to apply, thereby making the process of making a protected disclosure more accessible.

The AICD recommends that to reduce the risk of spurious or malicious disclosures, guidance on whistleblowing protections should make it clear that protections do not apply to such disclosures and a company may seek to take lawful recourse against in such situations.

It should be made clear in any guidance that it is an offence under Division 137 of the *Criminal Code* to knowingly make a false or misleading disclosure to a Commonwealth entity, which would include whistleblowing disclosures, to discourage spurious or malicious disclosures.

Operation of the test

A discloser would only need to satisfy one of the two limbs to qualify for protection.

The first limb requires that a discloser honestly believes that the information shows or tends to show wrongdoing. As this test is predicated on the discloser's 'belief', it arguably presents a higher threshold than 'reasonable grounds for suspicion' alone, while still providing protections for whistleblowers holding an honest belief that the disclosure shows or suggests wrongdoing (even if the disclosure itself is subsequently shown to have no merit). However, the belief must be based on 'reasonable grounds', meaning there is some objective basis on which it is formed.

The second limb provides that if the facts of the disclosure show or tend to show wrongdoing (on an objective basis), the belief of the discloser is not relevant to the test. As

[4] Senate Standing Committee on Economics, June 2014, 'Review of the Performance of the Australian Securities and Investments Commission', Part 3, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index> (accessed 5 January 2017)

a result, this test is purely objective and the evidentiary basis on which this disclosure is made would need to be stronger.

Anonymous disclosure

Question 6

Should anonymous disclosures be protected?

The AICD recommends the extension of protections for whistleblowers to disclosures that are made anonymously.

This would bring the corporate whistleblowing framework into line with the RO Act and the AUS-PIDA which already provide for anonymous disclosures, as well as better conforming to international best practice.

Question 7

Should the information provided by anonymous whistleblowers also be subject to rules limiting further dissemination of the information if the information might reveal that person's identity?

One of the benefits of protecting anonymous disclosures is that it facilitates disclosures from informants who may not otherwise have come forward.

If further dissemination of information concerning a disclosure might result in the identity of the informant being revealed, this could negatively impact the willingness of such individuals to make disclosures.

However, the AICD recognises that there may be certain circumstances in which in order for an investigation and prosecution to be successfully carried out, a whistleblower's identity or information that would enable a whistleblower's identity to be established, may need to be revealed.

In situations such as this, the regulator should consult with the whistleblower at the point of disclosure (and throughout the development of any investigation or prosecution) to inform them of the risks of their identity being revealed.

Question 8

Should regulators be able to resist production of this information under warrants, subpoenas or Freedom of Information processes?

Further to our comments to **question 7**, the AICD believes that it would be reasonable for a whistleblowing framework to provide statutory provision for regulators to conceal the identity (or information that would enable a third party to establish the identity) of a whistleblower in the context of warrants, subpoenas or Freedom of Information requests.

To whom a disclosure may be made

Question 9

Should the specified entities or people to whom a disclosure can be made be broadened? If so, which entities and people should be included?

The AICD supports the broadening of the entities to whom a disclosure can be made.

In the first instance, the AICD considers that the specified entities to whom a disclosure can be made should be broadened to include:

- ASIC, the Australian Consumer and Competition Commission (**ACCC**), the Australian Prudential Regulatory Authority (**APRA**), the Australian Charities and Not-for-profits Commission (**ACNC**) and the Office of the Registrar of Indigenous Corporations (**ORIC**);
- Any other government agency that the discloser reasonably believes is appropriate to receive such a disclosure; or
- A member of an Australian law enforcement agency that is responsible for the investigation of such an offence.

If the definition of disclosure is expanded (as contemplated in **question 1**), it may be necessary to expand the range of government agencies to whom a disclosure can be made. For example, if an offence relates to unlawful industrial relations practice, it may be appropriate for the disclosure to be made to the Fair Work Commission.

Emphasising the company as the primary contact

It should be the aim of any whistleblowing framework that corporate wrongdoing is reported in the first instance to the company. The ordering of potential recipients of whistleblowing disclosures should reflect this intent in the drafting of the legislation.

To achieve this, internal contacts (a director, secretary, or senior manager of a company as in section 1317AA(1)(b)(iii)) and authorised third parties (as in section 1317AA(1)(b)(iv)) should feature first in the list of potential recipients of whistleblowing disclosures (before ASIC or a company's auditors).

Guidance addressing how to make a disclosure should also make it clear that this is the objective of the framework.

Question 10

Should whistleblowers be allowed to make a disclosure to a third party (such as the media, members of parliament, union representatives, and so on) regardless of the circumstances? In the alternative, should such wider disclosures be allowed but only if the company has failed to act decisively on the information provided? Are there alternative limitations that should be considered? Please give reasons for your answers.

It is always preferable that disclosures are made internally before they are directed externally. The goal of an effective whistleblowing framework should be to encourage (though not by means of statutory requirement) systems for internal disclosure that capture, address and ultimately seek to prevent corporate wrongdoing.

For the purposes of incentivising companies to establish robust systems of internal disclosure, any disclosure made to the company should also be able to be made to ASIC. This should be the case regardless of the seriousness of the disclosure (provided it meets the definition of disclosable conduct).

However, both companies and regulators may fail to appropriately address corporate wrongdoing in certain circumstances.

The AICD acknowledges that protecting disclosures to third parties, even in the most extreme of cases, presents material risks of harm to companies. Considerable care would need to be taken to protect corporates from the risks of reputational damage and industrial espionage, and to avoid diminishing the incentives for whistleblowers to disclose internally.

Strict criteria would need to be applied when assessing whether protections can be extended to disclosures made to third parties. As an example, criteria might include that:

a) The discloser has attempted to raise the issue with the company or the regulator and an investigation has failed to address the wrongdoing, or there are extraordinary circumstances justifying why the disclosure has not been made through these channels; and
b) The wrongdoing or suspected wrongdoing is of sufficient seriousness (such as where there is serious and imminent risk to the health, safety or lives of individuals, or a risk to the environment) that immediate intervention is required; and
c) The disclosure is in the public interest.[5]

Consideration should be given to what role the courts could play in determining whether a disclosure meets the above criteria, emphasising that they should only be made in extraordinary circumstances.

It may be worthwhile considering whether whistleblowers should be required to direct their disclosures to a source they reasonably believe has the capacity to bring the information to light, or whether there should be a prohibition against whistleblowers being paid by third parties to whom they make a disclosure.

On balance, however, the AICD is not confident that the criteria above would sufficiently address the risks involved from extending disclosures to third parties. We recommend that further consideration be given to this issue and consultation on detailed proposals be held.

Given the significance of such a reform and its interaction with other aspects of the framework currently being revised, whether protections for third party disclosures is acceptable or not will hinge on the detail of the model proposed.

Question 11

What are the risks of extending corporate whistleblower protections to cover disclosures to third parties? How might these risks be managed?

A benefit of protecting third party disclosures is that it incentivises companies to establish effective internal whistleblowing procedures. Ideally, a company with a robust internal whistleblowing framework will not be the subject of a whistleblowing disclosure made to a third party (or even a regulator).

[5] The model set out in Section 26 of AUS-PIDA provides further insights on how such criteria could be considered for the purposes of a broader corporate whistleblower framework.

In order for this to be the case, it is necessary that there are sufficient prerequisites to making such a disclosure (as outlined in response to **question 10** above). If whistleblowers could make disclosures to third parties on any matter without seeking to make internal disclosures first (in reasonable circumstances), this incentive would not exist.

Companies would prefer to detect, or ideally prevent, wrongdoing before it reaches the attention of a regulator or third party. Companies should be afforded the opportunity to investigate and respond to matters relating to the administration of their business.

A risk of permitting third party disclosures is that information from a whistleblowing claim may be brought to the public's attention before its veracity is sufficiently tested.

In such situations, a disclosure (if made public) could cause serious, irreparable damage to a company's reputation before it has the opportunity to respond or investigate. This could lead to situations in which disclosures which are brought to the attention of the public damage a company regardless of a company's best efforts to meet its obligations under the law.

There could also be risks of disclosures being made to harm the interests of a firm commercially, for example to suppliers or competitors, if the definition of third parties is sufficiently broad.

It is critical that it is clear (such as through the publication of guidance) that a company may take recourse against a whistleblower if their allegations are found to be malicious. This is particularly important as while the Division 137 of the *Criminal Code* prohibits misleading disclosures to the regulator, it would not apply in the context of a disclosure to a third party.

The AUS-PIDA establishes a useful limitation on third party disclosures which prevents whistleblowers from providing any more information than is reasonably necessary for the investigation of a disclosure.[6] This limitation should be applied to a corporate whistleblowing context as a risk mitigation strategy, should disclosures to third parties be included in the scope of reform.

Question 12

Do you believe there is value in a 'tiered' disclosure system being adopted similar to that in the UK?

The AICD supports the use of a 'tiered' system to determine whether a disclosure should qualify for protections and under what circumstances.

As outlined in response to **question 10**, the AICD considers that a higher threshold of 'seriousness' must be met in order for a disclosure to third parties to attract whistleblower protections. If wrongdoing is to be disclosed to third parties, it should only be in the context of serious wrongdoing.

If third party disclosures are introduced together with a broadening of the types of wrongdoing that constitute disclosable conduct (as contemplated in **question 2**), a tiered system will assist in ensuring that minor matters are not inappropriately disclosed to third parties.

[6] *Public Interest Disclosure Act 2013* (Cth) Section 26

The findings of the *Review of the Public Interest Disclosure Act 2013*[7] by Phillip Moss AM highlighted the overuse of the AUS-PIDA for employment-related grievances and ultimately recommended their exception from the framework for public sector whistleblowers. An advantage of a tiered system is the ability to control employment-related grievances (and other minor grievances of a similar nature) to ensure that they are directed through more appropriate channels.

The AUS-PIDA establishes a useful limitation on third party disclosures which may manage this risk by requiring that they are not, "on balance, contrary to the public interest."[8] Such a limitation may be appropriate in a tiered system as there can be no reason for a disclosure to be made to a third party if it is not in the public interest.

Question 13

Should there be any exceptions in this context for small private companies?

The AICD does not consider there to be any reason why small, private companies should be exempt from any new provisions allowing for disclosures to third parties.

Question 14

Should disclosure be allowed for the purpose of seeking professional advice about using whistleblower protections, obligations and disclosure risks (as suggested by the review of AUS- PIDA)?

The AICD supports the extension of whistleblower protections to disclosures made to legal practitioners where the disclosure is made for the purpose of obtaining legal advice or professional assistance in relation to making a disclosure.

Although reforms to whistleblowing legislation (and the development of associated guidance materials) have the opportunity to substantially simplify the framework, there will still be circumstances in which potential whilstleblowers will want to seek legal advice (or the assistance of a legal practitioner in making a disclosure on their behalf, including to protect their identity).

In these circumstances, whistleblowers and potential whistleblowers should still be afforded protection against reprisal for seeking such advice. This will enable whistleblowers to make more informed disclosures without fear of reprisal.

Protection against retaliation

Preventing whistleblowers from detriment as a result of their disclosure is a key element of a successful whistleblowing framework. The current protections are insufficient as they do not provide a clear and broad definition of 'detriment'.

Victimising whistleblowers is not only an unjustified act against a discloser, but also contributes to eroding the culture of disclosure and the confidence of potential whistleblowers in the system of protections. For this reason, the AICD supports more robust and detailed protections, and stronger sanctions against reprisal.

[7] Phillip Moss AM, 2016, *'Review of the Public Interest Disclosure Act 2013: An independent statutory review conducted by Mr Phillip Moss AM',* < https://www.dpmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf> (accessed 20 December 2016)
[8] *Public Interest Disclosure Act 2013* (Cth) Section 26

Question 20

Is there a need to strengthen the current prohibition against the victimisation of whistleblowers in the Corporations Act? If so, should these be similar to those which exist under the AUS-PIDA and RO Act?

The AICD recommends that the prohibition against the victimisation of whistleblowers be strengthened by adopting a broader definition of 'reprisal' based on the amended RO Act (337BA(2)). This includes:

- dismissal of an employee;
- injury of an employee in his or her employment;
- alteration of an employee's position to his or her detriment;
- discrimination between an employee and other employees of the same employer;
- harassment or intimidation of a person;
- harm or injury to a person, including psychological harm;
- damage to a person's property; and
- damage to a person's reputation.

The RO Act also provides a useful model for consideration of who may be the subject of a reprisal, noting that the person taking a reprisal must only believe or suspect that the subject of their reprisal intended to make a disclosure (or should have known). This would be a suitable model to replace the requirement for intent (under section 1317AC(1)(c)) of the Corporations Act.

The AICD also recommends that penalties for taking a reprisal be increased and brought into line with those set out in the RO Act (100 penalty units). The RO Act also provides for both civil and criminal offences. This would be a useful feature in a corporate whistleblowing framework as it recognises both the seriousness of the offence and the varying degrees of victimisation.

It should be noted that there may be other methods by which a company could take recourse against a whistleblower (for example, defamation proceedings) and these should be considered in the context of redefining 'victimisation'.

Compensation for whistleblowers

Question 21

Do the existing compensation arrangements in the Corporations Act need to be enhanced? If so, what changes should be made to ensure whistleblowers are not disadvantaged?

Question 22

Does the existing legislation provide an adequate process for whistleblowers to seek compensation? Should these be aligned with the AUS-PIDA and the RO Act? Please include an explanation for your answer and identify what changes, if any, are needed and why.

The AICD recommends that provisions outlined in section 1317AD of the Corporations Act be significantly expanded to provide greater detail on what compensation is available to whistleblowers who are the subject of reprisal and how this compensation can be accessed.

The AICD believes that the framework compensation framework set out in the AUS-PIDA and the RO Act provide a suitable model to be used in a more detailed compensation framework for corporate whistleblowers.

The AICD recommends that further detail be included to establish:

- Under what circumstances an application for compensation may be made;
- How applications for compensation can be made;
- Who can make an application;
- The powers of the court in determining compensation; and
- How compensation will be funded.

Question 23

What would be the most appropriate mechanism for administering the compensation process? Should it rely on whistleblowers having to make a claim or someone else as advocate on their behalf?

If ASIC undertook an expanded role in the regulation of whistleblowing (such as contemplated in **question 31**), it would be appropriate to consider whether the head of this office (or their delegates) should be empowered to make an application for compensation on behalf of a whistleblower (in the manner set out in the RO Act).

Question 24

Should whistleblowers be required to bear their own and their opponent's legal costs when seeking compensation or have the risk of adverse costs order removed as per recent amendments to the RO Act?

The potential of being exposed to adverse costs in the context of pursuing compensation is a powerful disincentive to whistleblowers.

As such, the AICD supports the amendments set out in the amended RO Act (section 337BC).

Whistleblower rewards

Question 26

Should financial rewards or other types of rewards be considered for whistleblowers? Why or why not?

The AICD notes the success of systems of financial incentives for whistleblowers, particularly in the United States of America.

The Securities Exchange Commission has reported that the introduction of the Dodd-Frank Whistleblower Program has resulted in a 40 per cent increase in whistleblower tips between

2012 (the first year of full data for the program) and 2016[9]. 4,200 tips were received in 2016[10], contributing to a total of 10,540 tips since the establishment of the program.[11] These tips have generated as much as US$904 million in successfully recovered penalties, resulting in US$100 million being paid as rewards to whistleblowers,[12] demonstrating the success of the program in encouraging whistleblowers to bring information about breaches to the regulator.

Financial incentives in an Australian context would:

- Raise the profile of Australia's whistleblowing framework;
- Likely result in an increase in disclosures;
- Incentivise companies to establish robust internal whistleblowing frameworks;
- Incentivise disclosure from people who have knowledge of serious corporate offences; and
- Demonstrate that disclosures about corporate wrongdoing are welcomed by the government.

However, the introduction of financial incentives for whistleblowers would represent a significant departure from Australia's corporate culture and possibly even be out of step with community expectations.

Directors have legitimate concerns about the moral hazards of such incentives including the potential for whistleblowers to 'sit' on information in an attempt to maximise potential reward, or to gain information about a company's operation by illegitimate means in the hope of exposing corporate wrongdoing.

It should also be noted that, depending on the formulation of the exact model, financial incentives for whistleblowers may discourage internal disclosures at significant regulatory cost.

There is significant scope to improve Australia's corporate whistleblowing framework in the context of this consultation. The AICD recommends that the impact of other reforms to the whistleblowing framework be evaluated prior to making any further amendment to consider financial incentives for whistleblowing.

Further, the detail of a framework for incentivising whistleblowers would need to be considered in the context of other changes contemplated in this consultation. For example, if the requirement of good faith is removed, it may be worthwhile considering whether a financial incentive should or could be paid to a discloser not acting in good faith.

Recognising this, the AICD recommends that consideration to financial incentives be given in the context of a formal post-implementation review of a revised corporate whistleblowing framework.

[9] U.S. Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf, p. 1
[10] *Ibid.*
[11] U.S. Securities and Exchange Commission, December 2016, https://www.sec.gov/page/whistleblower-100million
[12] *Ibid.*

Internal company procedures

As a matter of good practice, the AICD acknowledges that all companies should have strong internal whistleblowing policies and procedures which aim to identify and address misconduct internally before it becomes the subject of an external whistleblowing disclosure. However, the AICD strongly recommends against any statutory requirement for companies to put in place systems for internal disclosures.

Question 29

Do you believe there is merit in requiring companies to put in place systems for internal disclosures? If so, what form should this take?

The AICD strongly recommends against creating a statutory requirement for companies to put in place systems for internal disclosures.

Creating a regulatory requirement would shift the focus of a whistleblowing framework from prevention and detection of wrongdoing to compliance. It would also direct regulatory resources towards enforcement of such requirements, rather than responding to actual instances of whistleblowing.

Providing robust protections for whistleblowers will incentivise companies to establish or improve their internal frameworks as a means to detect and prevent corporate wrongdoing. Directors, for their part, will naturally direct their attention to where it is most valuable: promoting a culture of disclosure, investigating whistleblowing claims and establishing systems to detect and prevent corporate wrongdoing.

Mandating requirements for internal whistleblowing will distract directors from this work, compelling them to focus on conforming to regulatory requirements, to the detriment of whistleblowers and business.

Question 30

Mandating internal disclosure systems for companies would impose a higher regulatory burden but the benefits may outweigh the costs. Would you support a move to a mandatory system? Please give reasons for your answer.

There is not a sufficient evidence of a regulatory problem to justify for the establishment of a statutory requirement for internal disclosure systems. The AICD considers that the massive regulatory burden that this would create would significantly outweigh any proposed benefits.

Preliminary results from the *Whistling While They Work 2* research report into whistleblowing processes and procedures in Australia and New Zealand found that the great majority of Australian businesses already have formalised whistleblowing frameworks:

- "89% of respondent organisations indicated they have formal, written whistleblowing procedures or policies;
- 90% of organisations indicated they have processes for ensuring appropriate investigations or management actions in response to wrongdoing concerns;"[13]

[13] A J Brown, Nerisa Dozo and Peter Roberts, November 2016, '*Whistleblowing processes & Procedures – An Australian & New Zealand Snapshot' (Preliminary Results: Whistling While They Work 2),* <http://www.whistlingwhiletheywork.edu.au/?p=604 > (accessed 20 December 2016)

Based on these figures, there is insufficient evidence of a problem to warrant regulatory intervention of the type contemplated in this question.

A mandatory system would be difficult to enforce and create a significant and unnecessary regulatory burden for businesses which would be contrary to the Australian Government's focus on red tape reduction for business.

Question 31

Should systems for internal disclosure be considered for all companies, irrespective of size or should there be an exception for small proprietary companies, as defined in the Corporations Act? Please explain why or why not.

The AICD strongly recommends against the establishment of a regulatory requirement of mandated internal disclosure systems.

Despite this, to minimise the impact of excessive regulatory burden if internal disclosures are mandated, the AICD recommends that mandated systems of internal disclosure be principle-based. This would allow companies to develop and implement internal disclosure frameworks that will best suit their needs and circumstances.

On this basis, there would be no reason to exclude small proprietary companies from any principles based requirement for the establishment of internal disclosure regimes.

Question 32

If internal procedures are required should any breach of these be the subject of internal disciplinary action or should responsibility for enforcement be undertaken by ASIC or another external regulator? What would be a potential mechanism for oversight and monitoring of internal company procedures by a regulator? Could it be modelled on the UK FCA's approach?

The AICD strongly recommends against the establishment of a regulatory requirement of mandated internal disclosure systems.

That said, to minimise the impact of onerous regulatory intervention, breaches of mandated internal disclosure frameworks should only ever be the subject of internal disciplinary action.

As outlined in response to **question 31**, the AICD recommends that any mandatory requirement for systems of internal disclosure be principles-based.

Because each company's circumstances will be different and its system of internal disclosure unique to those circumstances, it would be too complex and impractical for an external regulatory body (including ASIC) to have oversight or enforcement responsibility for a company's internal disclosure frameworks, or to effectively evaluate their suitability.

Instead, the AICD recommends that external regulators become involved where there is evidence to suggest that a company has failed to meet its obligations under a principles-based requirement.

Oversight agency responsible for whistleblower protections

Question 31

Should the Corporations Act establish a role for ASIC or another body to protect the interests of and generally act as an 'advocate' for whistleblowers?

The AICD believes that a dedicated office of ASIC (such as the office of the whistleblower) would be suitable agency for the purpose of enforcing a new whistleblowing framework and to act as an 'advocate' for whistleblowers. To complement the introduction of a more robust whistleblowing framework, this office should be appropriately resourced and consideration should be given to whether a degree of independence would be beneficial to its operation.

The consultation paper contemplates the potential for this role to be filled by the Commonwealth Ombudsman. The AICD considers that this would be an inappropriate role for the Commonwealth Ombudsman to play as:

a) The functions of that agency are well-known and are specific to the public sector and its regulatory approach is tailored for that purpose; and
b) Investigating corporate whistleblowing would be inconsistent with its purpose and may distract from its core functions as a regulator.

However, alternative, specialist ombudsman service may be appropriate.

The consultation paper also contemplates self-regulatory models which the AICD does not support. Although companies should aspire to establish and imbed robust internal disclosure frameworks, the purpose of a regulatory regime is to provide protections for whistleblowers when these systems fail or are insufficient.

For this reason, it is inconsistent with the purpose of the framework for companies to self-regulate when their internal disclosure systems have already failed.

The AICD recommends that an independent office of ASIC be established with the purpose of:

- Being the official channel for the receipt of whistleblowing disclosures made to government by whistleblowers (or referred by other government agencies);
- Providing guidance to whistleblowers about the operation of a whistleblowing framework;
- Working with other government agencies to facilitate information sharing on disclosures where relevant;
- Prosecuting companies who take unlawful reprisals against whistleblowers; and
- Making applications on behalf of whistleblowers (if permitted by the framework) for compensation.

Question 31

Should alternate private enforcement options be considered instead?

The AICD does not support any alternative enforcement options.

We hope our comments will be of assistance to you. Should you wish to discuss any aspect of this submission, please contact our Policy Adviser, Lucas Ryan via lryan@aicd.com.au or (02) 8248 6671.

Yours sincerely

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