Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 10
456 Lonsdale Street
Melbourne VIC 3000
PO Box 523
Melbourne VIC 3001
DX 466 Melbourne
T (03) 9605 2700
F (03) 9258 9600

10 February 2017

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

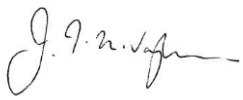
Email: whistleblowers@treasury.gov.au

Dear Ms Keall

We welcome the opportunity to provide a response to the *Review of tax and corporate whistleblower protections in Australia* Consultation Paper.

Please do not hesitate to contact me and my colleagues if we can further assist with the Treasury's important work.

Yours sincerely,



Jacob Varghese
MAURICE BLACKBURN

Response to the *Review of tax and corporate whistleblower protections in Australia* Consultation Paper

February 2017

Table of Contents

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in employment and industrial law, superannuation, personal injuries, medical negligence, dust diseases, negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

Maurice Blackburn Lawyers (Maurice Blackburn) contends that the current legislative framework in Australia lacks protection to those who are brave enough to come forward as whistleblowers and abysmally fails to provide incentives when the potential negative consequence to the individual is considered.

Whistleblowers should be protected and rewarded, not punished.

A comprehensive, robust whistleblower regime is critical in ensuring the highest standards of governance across the private, public and not-for-profit sectors.

Conversely, a second-best whistleblower regime will be a leave pass for those in the private sector who have not met the standards of governance the Australian public rightfully expect.

More specifically, the current Australian regime fails to adequately protect and assist private sector and not-for-profit sector whistleblowers for whom there is no protection beyond a very specific flawed set of arrangements for "Registered Organisations", unworkable protections under the Fair Work Act 2009 (Cth) ('Fair Work Act') and unduly limited and quite specific breaches of the Corporations Act 2001 (Cth) ('Corporations Act').

Under current arrangements, an Australian private sector whistleblower with knowledge of the systematic exploitation of workers, foreign bribery, collusion with a competitor, tax evasion or deceit of prudential regulators will not be legally protected when making a disclosure. Such a whistleblower will not be protected from reprisals and there is no hope that in the event that the person is demoted or sacked, that financial assistance will be available.

A recent survey by Griffith University found that while 80% of Australian employees would feel personally obligated to blow the whistle on wrongdoing, only 49% felt their managers would adequately protect them.[1]

This gap demonstrates a clear willingness to do the right thing, but the current system is failing them.

Most Australian states have adopted public sector legislation that facilitates and encourages public disclosure and provides protection for whistleblowers. However, the protection offered in Australia has historically been weak, and the personal and financial costs to whistleblowers and legal representatives of making disclosures, particularly under the current private sector legislation, is prohibitively high. Undermining existing legislation in Australia is the ongoing fear of reprisals, job losses, harassment and even death threats for whistleblowers.[2]

As the head of the Australian Securities and Investment Commission (ASIC), Mr Greg Medcraft warned, whistleblowers in Australia currently face an uncertain future and career oblivion often follows. This is exemplified by the case of Brian Hood, former CFO of the RBA-owned Note Printing Australia. After speaking out about executives bribing foreign officials, Mr Hood is now unemployed and has recently been forced to sell his house after 30 unsuccessful interviews with prospective employers.

Similarly, Jeff Morris blew the whistle on corporate misconduct inside CBA's financial planning arm, which resulted in more than $50 million in compensation being awarded to victims. Jeff received death threats and was left to negotiate his own exit from the bank.

Evidently, the personal rewards for blowing the whistle in Australia are few, while the detrimental emotional and career impacts are immense. A whistleblower should not have to take the risk they will never get another job again. Legislative reform is urgently required to ensure Australian whistleblowers and their legal representatives are not only encouraged to make disclosures but are adequately protected and compensated for doing so. It is crucial that this protection cover both the financial and personal costs of taking such risks if we are to foster a corporate environment that operates with transparency, respect for the law and integrity.

On 9 November 2016, Maurice Blackburn hosted the Corporate Conduct and Class Actions Symposium, where the keynote speech was delivered by the co-architect of America's SEC whistleblower program and former Assistant Director of the SEC, Jordan A. Thomas. During his presentation to the Symposium, in his engagement with legislators and in media comments, he made clear that the quality of protection offered by Australian private sector whistleblower legislation is inadequate, particularly in comparison to the protection offered to whistleblowers in the UK and US.

Australia needs a world-leading regime that is wide, deep and robust.

The Australian Government and its Parliament have an obligation to the community to protect individuals when they see something wrong in the workplace and wish to do the right thing.

A private sector regime that catches up to the "pack" of western nations in international comparisons is not good enough. We need to aspire to a world leading regime that integrates a complementary set of components from the best of regimes across the world.

Finally, Treasury officers should consider whether the significant corporate scandals of the past 20 years may have been avoided if there had have been an appropriate whistleblower regime in place. It would have saved significant time, effort, money and confidence.

Current state of the law

Public sector protection

Whistleblower protection in the Australian public sector is relatively straightforward. It is provided under the *Public Interest Disclosure Act 2013* (Cth). This Act protects public sector employees and facilitates their disclosure of suspected wrongdoing, whilst also supporting and protecting them from adverse consequences and ensures disclosures are properly investigated. However, protection under the Commonwealth legislation, alarmingly, does not apply to disclosures about corruption or wrongdoing by Ministers, their staff, other politicians, or judges.[3] States and Territories also offer some protection to whistleblowers. However, with the exception of South Australia, these laws only cover the public sector.[4]

Furthermore, protection under the *Public Interest Disclosure Act 2013* (Cth) is not automatic. A public sector employee wishing to rely on the legislation needs to follow a stringent process in relation to how they make their disclosure, and to whom, and must be able to prove in court that their disclosure was in the "public interest" for the purposes of the Act.[5] However, disclosing any information to the public at large may not qualify as disclosure in the public interest. Arguably therefore, the Act does not sufficiently counter the chilling effect that secrecy laws have on a public employee's willingness to disclose wrongful or wasteful conduct in ways that would practically ensure the rectification of unsound policies and practices.[6] For example, in 2016, Psychologist Paul Stevenson, had his contract cancelled after telling the Guardian newspaper about his experiences working in Australia's offshore detention regime, during which he described conditions in the camps as "demoralizing… and desperate".[7]

Private sector protection

Private sector whistleblowers are not provided with nearly the same level of protection as those in the public sector.

The existing regime for the private sector is narrow and inadequate. At the same time, corporate scandals have littered our newspapers and television news over the past decade.

This current protection in the private sector is provided, for the most part, by a messy tapestry of the Corporations and ASIC Acts and the Registered Organisations Act. It does not specifically apply to the collusion of competitors, exploitation of employees, tax evasion, foreign bribery and deception of prudential regulators. Where protections are in place, the onus is perverse, the mechanisms are flawed, the protections are weak and the financial support is non-existent.

Part 9.4AAA of the *Corporations Act* purports to protect officers, employees and company contractors. However, the scope of wrong-doing is ill-defined and hopelessly inadequate, anonymity is not provided, there are no requirements for internal company procedures, and protection is limited to disclosures of "breaches of corporations legislation". The limited protections do not extend to other breaches of law, including breaches of the Criminal Code, environment or competition and consumer law.[8] It does not protect former employees, volunteers, service providers, business partners and advisers.

Part 9.4AAA is, unfortunately, limited to "a person (the ***discloser***)" who is a current officer, employee or contractor with the company. This means that the protections are not extended to officers, employees or contractors who have left the company yet those persons are restrained by confidentiality obligations that will often prevent disclosures to ASIC or their legal advisers.[9]

As well, whistleblowers who wish to make a "qualifying disclosure" under the Act have the burden of proving that they have "reasonable grounds to suspect that the information indicates that . . . the company [or officer etc.] has, or may have contravened a provision of the Corporations legislation". This burden is onerous and puts the obligation onto the disclosure to obtain legal advice before making such a disclosure. It is submitted that this obligation would not be understood by most potential whistleblowers and that it is not fair to impose such an obligation on a person who would be likely to discover it after it is too late. That is, if the disclosure is made, not to ASIC but to an auditor, director or senior officer, as is provided by Part 9AAA, but that disclosure is determined by the officer to fail the reasonable grounds test, then there is nothing to prevent harmful repercussions from then flowing.

ASIC enforces the Corporations Act. However, ASIC does not have powers to enforce the whistleblower protections on behalf of individuals. While ASIC may investigate allegations of victimization, it generally focuses its limited resources on investigation of the information reported by the whistleblower to assess whether breaches of the Corporations Act have occurred.[10]

If a whistleblower is lucky enough to find that the disclosure is covered by Part 9AAA, then they are protected by section 1317AB from civil or criminal liability or the enforcement of any contractual right that arises from the disclosure. Victimization of a whistleblower is a criminal offence. A whistleblower has the right to seek compensation, including reinstatement of employment if damage is suffered as a result of victimization. However, bringing a case comes at a high cost to the individual, the success of which is often uncertain.

We are unaware of a single successful case since the law was introduced.

The Senate Economics Reference Committee report on Performance of the Australian Securities and Investment Commission, tabled on 26 June 2014, made a number of recommendations to improve ASIC's role, including expanding the definition of whistleblower and, subject to a broader view, updating protections for corporate whistleblowers so that they are generally consistent with and complement the protections afforded to public sector whistleblowers under the *Public Interest Disclosure Act 2013.*[11] The Government declined to implement these recommendations.[12] As an administrative response, ASIC established an Office of the Whistleblower, however, its powers remain limited.

In November 2016, Mr Medcraft spoke at the meeting of Parliamentary Joint Committee on Corporations and Financial Services about the success of the US whistleblower regime, but commented that the bounty system may not necessarily mesh with Australian culture. However, he said it was important that government at least compensates whistleblowers for loss of lifetime income and potentially for any money lost in fines, etc. He said

> *"The heart-wrenching thing is that sometimes these people are very courageous and their lives are destroyed, and that should not be the case. Many of these people are heroes, really. They should not be detrimentally affected. I think that is probably the system that reconciles compensation and recognising whistleblowers".*[13]

Fair Work Act

The Fair Work Act generally prohibits an employer from taking, or threatening, adverse action against an employee because the employee is able to make a complaint or inquiry in relation to the person's employment.

Maurice Blackburn has advised and/or represented a number of private sector whistleblowers who have blown the whistle on fraud, bribery and other regulatory breaches. Maurice Blackburn has also acted for employees with knowledge of multinational company tax avoidance. In virtually all cases of whistleblowing, the employee is victimized and or forced out of the company. Because the whistleblower protections in the Corporations Act are so poor, our clients have in a number of cases invoked the adverse action provisions of the Fair Work Act. In most cases, the litigation is settled on confidential terms and the underlying misconduct is not addressed.

Since 2013, the Government has attempted to pass legislation to introduce a Registered Organisations Commission (ROC), an entity tasked with the role of monitoring and regulating registered organisations (unions and employer groups). The ROC Bill was presented alongside other anti-worker Bills that were appropriately opposed by the Opposition and elements of the Senate crossbench. Maurice Blackburn does not support this legislation.

The Government ultimately secured parliamentary support for the ROC Bill and it was passed by both houses of Parliament on 22 November 2016 as an amendment to the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Fair Work Act 2009* (Cth) ('Fair Work Act'). Amendments were made to incorporate a basic whistleblower regime for Registered Organisations.

More significantly, as part of a commitment to Senator Xenophon the Government also agreed to a number of specific commitments intended to strengthen and enhance whistleblower protections in Australia beyond Registered Organisations. These include a promise to consider establishing an expert advisory panel to expedite the development and drafting of legislation to implement whistleblower reforms in the corporate and public sectors; that legislation to introduce greater protections for whistleblowers in the corporate and public sectors, which at a minimum support the substance and detail of the protection and compensation regime contained in the ROC legislation, will be introduced into the Parliament by December 2017; and that the Government will commit to support enhancements to whistleblower protections and to a parliamentary vote on the legislation before 30 June 2018.

In the case of a contravention, a court may now impose enhanced civil penalties and newly introduced criminal penalties, and other orders such as sanctions on the registered organization for taking reprisals against whistleblowers. However, it should be noted that parties still generally bear the costs in proceedings under the Fair Work Act, so even where contravention is established, the individual is not compensated for the costs of bringing the action.

Our significant reservation is that the current arrangements only relate to unions and employer associations. There remain significant limitations on the scope of the Fair Work Act protection.

First, outside of registered organisations, the protection is limited to employees and does not apply to contractors or volunteers. Secondly, the protection depends on the complaint relating to the individual's employment. There is conflicting judicial authority on this point.

Some judges have taken a narrow approach to interpreting the provisions and held that the protection only extends to complaints or inquiries arising from the contractual and/or statutory obligations that govern the employment relationship.[14]

In some cases, courts have taken a broader approach. In *Walsh v Greater Metropolitan Cemeteries Trust (No. 2)* [2014] FCA 456, for example, Ms Walsh raised a probity issue in relation to a contract with a supplier who supplied services including to an operation which

Ms Walsh managed in the course of her employment. Bromberg J noted that had Ms Walsh failed to report suspected wrong-doing, this would have had the potential to reflect badly upon her and cause prejudice to her in her employment. Bromberg J therefore held that the complaint was 'in relation to' her employment.

While there is significant uncertainty in this area, even on the broader view, the protection would only apply to a complaint about a matter that has potential implications for the person's employment. The protection is therefore unlikely to apply where the complaint is purely motivated by a desire to protect others or the public at large.

Maurice Blackburn believes it is crucial the amendments of 22 November 2016 be used as a baseline for legislative change to be implemented in the corporate and public sectors. The aspirations of Treasury officers, Government and the Parliament should be for a world-leading set of arrangements including significant amendment of the *Public Interest Disclosure Act 2013* and *Corporations Act 2001*.

Compensation arrangements

Rather than punishing Australian corporations and organisations, providing compensation to whistleblowers is intended to encourage healthy cultures so that business and other organisations can thrive. This is critical to ensuring the highest standards of corporate governance.

Some argue that it is a citizen's duty to blow the whistle and that providing an incentive to do so is unnecessary. However, as the Australian system proves, the status quo is not working on its own. In the private sector, individuals are rewarded significantly for taking risks to produce financial returns, which infers the Australian market currently places a higher premium on profits than it does on integrity.

Compensation arrangements in the United States

According to a 2015 report, Australia and the United States (US) have the most comprehensive systems of protection for public sector whistleblowers. However, Australia falls behind China, Japan, South Africa, Canada, the US and the United Kingdom in its legal protection for private sector whistleblowers,[15] offering "some protection through general laws".[16] Australia ranks 13th of 168 countries in terms of Transparency International's Corruption Perceptions Index,[17] indicating there is room for legislative improvement.

The majority of whistleblower legislation in the US falls under the *Sarbanes-Oxley Act 2002*, which imposes anti-retaliation measures,[18] criminal penalties to deter retaliation against whistleblowers,[19] and less stringent burdens of proof,[20] particularly in comparison to the burden of proof imposed in Australia.

Notably, the US system offers an incentive scheme, which provides financial compensation or 'bounties' to whistleblowers who uncover fraudulent acts. Under the *Securities Exchange Act 1934,* whistleblowers who voluntarily provide information on corporate and securities fraud are entitled to between 10% - 30% of any recovery by the Securities Exchange Commission in excess of $1 million.[21] SEC whistleblowers can be almost anyone, and violations can occur anywhere in the world.[22] Importantly, the US legislation recognizes that fear of retaliation is a serious obstacle to reporting wrongdoing. To counter this, SEC whistleblowers are afforded significant employment protections and may submit their tips anonymously through their attorney.[23]

Since the program's inception in 2013, tips from whistleblowers have increased by 30% and the SEC has awarded approximately $111 million to whistleblowers.[24]

Possible changes

The aspiration of any reform package should be to establish a world leading regime.

The new regime needs to be wider in its application, deeper in the provision of opportunities for those who disclose and must give them greater protection. Australia needs a more robust system that gets culture and standards right.

The existing barriers for disclosure, unclear processes, delays, reprisals and horrifying financial consequences, must be removed.

The package of reforms must, submit:

- Widen the categories of crime and misdemeanors for inclusion
- Give the whistleblower choices of disclosure forms (eg employer, regulator, anonymity) and a hierarchy for disclosures so there is consistency
- Put time limits on the turnaround for those disclosures to ensure certainty
- Provide financial support to overcome the significant threat of career loss and consequential financial collapse
- Redefine external disclosures to include Lawyers and the Media
- Ensure large employers have a best practice regime for managing the risk of corruption and supporting whistleblowers

<u>Expanded legislative protections</u>

> *Consultation Paper Questions:*
>
> *1. Do you believe that the Corporations Act categories of whistleblower should be expanded to former officers, staff and contractors?*
>
> *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?*
>
> *3. Are there any other types of whistleblowers that should be included, and if so, why?*
>
> *33. 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?*
>
> *37. Please comment on any other matters you believe the Government should consider in strengthening the protections available for corporate whistleblowers.*

Maurice Blackburn supports separate legislation to provide broad protections for private sector whistleblowers, modeled on the Public Interest Disclosure Act. This would extend beyond matters relating to the Corporations Act and those entities to which it applies.

Recent French Government reforms have extended their regime to

> *"… a crime or misdemeanor; a serious and manifest breach of an international commitment duly ratified or approved by France, of an unilateral act of an international organisation adopted on the basis of such commitment, or of a law or regulation; or a serious threat or harm to the public interest, of which he/she has had personal knowledge."*

As part of any reform, it is essential to create a strong, independent authority to act as an advocate for whistleblowers and their lawyers, to ensure that whistleblowing regimes are working and that protection and compensation are delivered. The Corporations Act or the ASIC Act could be amended to create this role for ASIC. Alternatively, another specific body could be created to perform these tasks. There is merit in the concept of the creation of a dedicated body that would focus resources on protecting whistleblowers and raise the public profile of whistleblower protections. It could also relate to a Federal Anti Corruption Commission and its institutional arrangements

Additionally, there is a need for greater protection for whistleblowers and their lawyers within organisations themselves. Corporate cultures of openness and robust disclosure systems are crucial, and there is huge value in requiring companies to put in place systems for internal disclosure. Alarmingly, the Australian Standard on whistleblower protection programs was limited in the guidance it provided, was out of date, and was withdrawn by Standards Australia with as yet no replacement.

There are three specific changes that would provide greater strength to any new system. First, there should be a specific requirement imposed on business to respond to any disclosure within a certain number of days – for instance 60 or 90 days. This would help to ensure accountability of the organisation and certainty for the whistleblower. Similarly, regulators should be required to respond to the whistleblower within the same number of days to provide such certainty.

Disclosures going in to a “black hole” and a lack of feedback or information creates distress and consternation – and a deterrent to making disclosures.

Consultation Paper Questions:

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.

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

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

Secondly, while disclosure to an employer and/or a relevant regulator should generally be encouraged, whistleblowers should have the right to disclose information to an external party should certain conditions be met.

Ireland’s *Protected Disclosures Act 2014* provides some guidance on these matters. The external party may be a journalist or a lawyer. The conditions may be that they reasonably believe evidence will be concealed or destroyed if the disclosure is made to the employer; that the person previously made the same or similar disclosure to the employer or regulator; or the wrongdoing is of an exceptionally serious nature.

Maurice Blackburn suggests that any such legislative change be crafted in such a way that individuals who first report internally be eligible for an increased whistleblower award.

Similarly, when corporations self-report wrongdoing they uncover, we suggest they receive favorable dispensation from law enforcement authorities.

> *Consultation Paper Questions:*
>
> *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.*
>
> *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?*
>
> *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.*

France's *Law on Transparency, the Fight against Corruption and Modernisation of Economic Life 2016* creates a new French Anti-Corruption Agency under the authority of the French Minister of Justice and Minister of Budget. The National agency is responsible for aiding the prevention and detection of acts of corruption, influence peddling, extortion, misappropriation of public funds, and other related wrongdoing, and will advise prospective whistleblowers on their rights and the legal protection to which they may be entitled.

Similar to legislation in the UK and Switzerland, the law imposes a positive obligation to prevent and detect corruption risks on companies that employ over 500 individuals, or belong to a group of companies whose parent company is headquartered in France and employs over 500 individuals, and generate consolidated revenues exceeding 100 million Euros. The law mandates these companies adopt a corruption prevention plan, which must contain the following:

- An ethics code explaining prohibited conduct;
- A procedure devoted to internal whistleblower complaints;
- A risk mapping analysis;
- A procedure for assessing the integrity of third parties, such as clients, suppliers and intermediaries;
- A system of audits;
- Employee training at various levels; and
- The practice of disciplinary sanctions.

The Agency will review the quality and effectiveness of companies' anti-corruption programs can request documentation as part of its review.

A similar requirement would ideally be introduced for ASX listed companies and Australia's larger private companies and Not-for-Profits.

Disclosure to lawyers

> *Consultation Paper Questions:*
>
> *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)?*

Alleged wrongdoers should be prevented from suing whistleblowers or their lawyers in circumstances where the whistleblower has provided incriminating confidential information to lawyers in litigation against the alleged wrongdoer.

In *AG Australia Holdings v Burton & Anor* (2002)[25] ('***Burton***') a whistleblower was sued for talking to class action lawyers for shareholders in breach of a confidentiality agreement. *Burton* has had a chilling effect on whistleblowers in the context of civil litigation, with lawyers understandably now very reticent to talk to whistleblowers.

It is contrary to the interests of justice for wrongdoers to be protected from the consequences of unlawful behavior in this way, and the IOOF matter illustrates how *Burton* is being abused. In this case, the whistleblower sent incriminating documents to ASIC, Senators and Fairfax Media and subsequently provided these documents to Maurice Blackburn at the time when our lawyers were investigating a potential class action on behalf of shareholders in IOOF against the company for breaches of the Corporations Act. IOOF sued Maurice Blackburn to restrain it from acting in the class action but did not pursue the whistleblower or Fairfax Media. It seems clear that the true purpose of the suit was to avoid the class action, or at least to frustrate it, and to increase the costs involved in its pursuit, in an attempt to mitigate IOOF's liabilities to its shareholders.[26]

Maurice Blackburn proposes an amendment to the law which would protect whistleblowers and lawyers from this type of unfair suit. In particular, the law should explicitly provide that there can be no liability for a breach of confidence in the following circumstances:

- A person (whistleblower) has information which they believe, demonstrates, or provides evidence that tends to demonstrate, that a company or person has engaged in unlawful conduct; and
- Another person or persons (claimant/s) has claims against the alleged wrongdoer in relation to the relevant unlawful conduct; and
- The claimant has sought legal advice in relation to the pursuit of those claims from a lawyer (the lawyer);
- The lawyer should be permitted by law to obtain from the whistleblower confidential information or confidential documents belonging to the alleged wrongdoer for the following purposes:
    - To advise the claimant in relation to litigation or contemplated litigation;
    - To take a proof of evidence for the purposes of determining whether to call the whistleblower as a witness at the trial and in order to prepare for examination of that witness;
    - To obtain documents for tender as evidence in the trial.
- Any informal documents obtained by the lawyer from the whistleblower may only be used for those purposes and otherwise protected by the usual implied undertaking.[27]

Financial support

Consultation Paper Questions:

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?

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.

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?

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

27. If so, what options should be considered in establishing a rewards system?

Where a whistleblower provides information which materially assists any regulator (eg ASIC, ACCC) pursue a civil penalty for unlawful conduct, the regulator should be permitted to agree to remunerate the whistleblower on the basis of a pre-agreed percentage of the civil penalty ultimately awarded to the regulators.

As discussed above, a similar approach has been adopted successfully by the Securities Exchange Commission in the US. The benefits of such a scheme are that it:

- Provides an incentive to whistleblowers to come forward about unlawful conduct, countervailing the many disincentives which currently prevent executives and directors from taking the important but difficult step of blowing the whistle;
- Makes civil penalty claims easier to assess and prosecute by providing incentives to whistleblowers to actively assist in securing outcomes; and
- Increases the revenue of regulators by increasing successful prosecutions and recoveries.

It may be that is it argued that Australian culture and values mean that such a system would be at odds with our own unique approach, but the status quo cannot remain. Bounty systems have fundamentally changed the US system and led to significant change in corporate culture.

The choice for the Government is whether, ultimately, a renovated version of the status quo is adequate to achieve the change the public desires, or whether more fundamental reform is required.

An Example of the Need for Change

Given the lack of incentives and protection provided to whistleblowers in Australia, blowing the whistle has proven to result in extremely negative consequences, and thus takes a particularly courageous individual who is willing to sacrifice their livelihood and their reputation to speak up.

A recent example is the case of the former chief medical officer of the Commonwealth Bank's insurance arm CommInsure, Dr Benjamin Koh. Dr Koh went public in a joint media investigation by Fairfax Media and Four Corners in late 2014 after repeatedly and unsuccessfully trying to speak out as a whistleblower inside the company to its highest executives and board. Dr Koh had concerns about the company's manipulation of medical reports, missing files and "artificial" declining of valid claims. Following going public, Dr Koh was informed that the bank was investigating an allegation that he had "forwarded confidential information from his bank email to his personal account," and for being misleading and "demonstrating a lack of integrity in relation to specified matters". In July 2015, the bank claimed it had substantiated the allegations against him and he was dismissed in August 2015.[28] Dr Koh has since filed a claim in a Victorian Court, claiming he suffered loss and damages as a result of his dismissal,[29] and maintains he was sacked because he was a whistleblower. He told the Senate inquiry into financial advice, "I've got nothing to gain from doing what I did but, by implication, they have smeared me. And I've also heard that PR persons have gone around back grounding politicians and journalists about my character."[30]

Whistleblowing to expose wrongdoing and misconduct shouldn't come at such a high cost to the individual. It is in everyone's best interests that whistleblower protection in Australia is bolstered and incentives are provided. As a corollary of such legislative change it is likely that the need to whistleblow will also be reduced, as corporations and governments will recognize the ease with which their wrongdoing could be exposed.

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[1] Griffith University, *World Online Whistleblowing Survey,* (2012) https://www.griffith.edu.au/__data/assets/pdf_file/0003/418638/Summary_Stage_1_Results_Australian_Population_Sample_FULL.pdf

[2] J. Van Akkeren & J. Tarr, *Troublemakers and traitors – it's no fun being a whistleblower,* (2015) https://theconversation.com/troublemakers-and-traitors-its-no-fun-being-a-whistleblower-50755

[3] Transparency International Australia, *Whistleblowing,* PP8 (2016), 2. http://transparency.org.au/wp-content/uploads/2016/01/PP8-Whistleblowing-Transparency-International-Australia-Jan-2016.pdf

[4] CPA Australia, *Whistleblowing: Some Relevant Considerations,* (2016), 9. https://www.cpaaustralia.com.au/~/media/corporate/allfiles/document/professional-resources/ethics/whistleblowing.pdf

[5] *Public Interest Disclosure Act 2013* (Cth), s 25.

[6] T. Conboy, *Backing the Whistleblowers: Politics, Australia's Secrecy Laws and our Criminal Justice System,* (2016) https://newmatilda.com/2016/06/09/backing-the-whistleblowers-politics-australias-secrecy-laws-and-our-criminal-justice-system/

[7] B. Doherty, *Offshore detention whistleblower loses job after condemning 'atrocity' of camps,* (2016) https://www.theguardian.com/australia-news/2016/jun/21/offshore-detention-whistleblower-loses-job-after-condemning-atrocity-of-camps

[8] DLA Piper, *Whistleblowing – An employer's guide to global compliance* (2015), 14. *https://www.dlapiper.com/~/media/Files/Insights/Publications/2015/06/Whistleblowing_Law_Report_2015.pdf*

[9] See the discussion below and *AG Australia Holdings v Burton & Anor* (2002) 58 NSWLR 464

[10] Q. Digby, *Bounty hunting and whistleblowing: preparing for change on the horizon,* (2016). < http://www.herbertsmithfreehills.com/insights/legal-briefings/bounty-hunting-and-whistleblowing-preparing-for-change-on-the-horizon>

[11] Senate Standing Committees on Economics, Performance of the Australian Securities and Investments Commission, Final Report (2014). http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC

[12] Mathias Cormann, *Government response to Senate Inquiry into the Performance of ASIC,* (2014) http://mhc.ministers.treasury.gov.au/media-release/043-2014/

[13] Cth. Parliamentary Joint Committee on Corporations and Financial Services. Oversight of the Australian Securities and Investments Commission and the Takeovers Panel (25 November 2016) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2Fd50beb13-d08d-4741-b282-7367703ef32d%2F0001;query=Id%3A%22committees%2Fcommjnt%2Fd50beb13-d08d-4741-b282-7367703ef32d%2F0000%22

[14] Bunnett FM in *Harrison v In Control Pty Ltd* [2013] FMCA 146 and Dodds-Streeton J in *Shea v TRUenergy Services Pty Ltd (No. 6)* [2014] FCA 271.

[15] Senate Standing Committees on Economics. Whistleblowing Paper (21 April 2016) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice/Whistleblowing_Paper

[16] A. Brown, *Patchy laws leave corporate whistleblowers vulnerable* (2016) theconversation.com/patchy-laws-leave-corporate-whistleblowers-vulnerable-58406

[17] Transparency International, *Corruptions Perception Index,* (2015) < http://www.transparency.org/cpi2015>

[18] Publ.L 107-2014, 116 Stat. 745, s 806.

[19] Publ.L 107-2014, 116 Stat. 745, s 1107

[20] Publ.L 107-2014, 116 Stat. 745, s 806

[21] Publ.L. 73-291, 48 Stat. 881, s 240.21F-5.

[22] *J. Thomas. We are Connected: The Global Reach of the Whistleblower,* (2016) http://www.secwhistleblowerадvocate.com/BlogRetrieve.aspx?BlogID=11842&CategoryID=109279

[23] *Ibid.*

[24] Above, n22.

[25] *AG Australian Holdings v Burton & Anor* (2002) 58 NSWLR 464.

[26] See *IOOF Holding Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311

[27] *Home Office v. Harman* [1983] 1 AC 280.

[28] C. Yates, *Commonwealth Bank whistleblower says he went to wealth boss Annabel Spring,* (2016) http://www.smh.com.au/business/banking-and-finance/former-chief-medical-officer-sues-comminsure-for-wrongful-dismissal-20160309-gnelxz.html

[29] A. Ferguson & S. Danckert. *CommInsure: Former chief medical officer Dr Benjamin Koh sues for wrongful dismissal,* (2016) http://www.abc.net.au/news/2016-03-09/comminsure-whistleblower-suing-for-wrongful-dismissal/7234064

[30] P. Ryan, *Commonwealth Bank whistleblower Dr Benjamin Koh alleges smear campaign,* (2016) http://www.abc.net.au/news/2016-04-28/commonwealth-bank-whistleblower-alleges-smear-campaign/7368442