



**ASIC**

Australian Securities & Investments Commission

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# **Review of tax and corporate whistleblower protections in Australia**

## **Submission by the Australian Securities and Investments Commission**

February 2017

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## Executive summary

- 1           The Australian Securities and Investments Commission (ASIC) supports the Government's work towards encouraging reporting of corporate wrongdoing and better protection for whistleblowers in Australia.
- 2           Whistleblowers play an important role in uncovering misconduct. ASIC values the information we receive from whistleblowers—it helps expose misconduct that may otherwise go undetected for long periods of time and cause serious harm to consumers and investors.
- 3           We acknowledge that whistleblowers can find themselves in difficult and stressful circumstances, which often involves putting their careers at risk.
- 4           In addition, we consider transparent internal whistleblower policies and processes to be essential to good corporate culture.
- 5           We look forward to working with Government on identifying opportunities to improve the operation of Australia's corporate sector whistleblowing regime for the benefit of the whole community.
- 6           We note from the Government's consultation paper that our submission will also be available to the recently announced inquiry by the Parliamentary Joint Committee on Corporations and Financial Services into the development and implementation of whistleblower protections in the corporate, public and not-for-profit sectors, taking into account the *Fair Work (Registered Organisations) Amendment Act 2016* that was passed by the Parliament in November 2016.
- 7           This submission should be read in conjunction with *Senate inquiry into the performance of the Australian Securities and Investments Commission: [Main submission by ASIC](#)*, October 2013, pp. 134–141.

## ASIC's whistleblowing policy and process

- 8           Section A of this submission provides an overview of ASIC's policy and procedures for handling reports of alleged misconduct from whistleblowers.
- 9           ASIC's experience to date in assisting whistleblowers and dealing with the information they provide has led us to regularly review and enhance our own processes.
- 10          ASIC has established an Office of the Whistleblower and enhanced our internal process for dealing with whistleblower reports, including ensuring ASIC staff who are involved in handling whistleblower matters are appropriately trained. In addition, we have developed targeted information to

ensure whistleblower awareness of the protections that may apply to them, and ensure understanding of ASIC's role.

- 11 The Office of the Whistleblower acts as a central point within ASIC for ensuring that we record and action whistleblower matters appropriately. This includes ensuring:
- (a) ASIC maintains regular contact with whistleblowers;
  - (b) information for whistleblowers is readily available;
  - (c) periodic training is provided to relevant ASIC staff; and
  - (d) there is sufficient oversight of the conduct of information and contact with whistleblowers.
- 12 ASIC values the specific and important information we receive from whistleblowers. Our training and oversight processes ensure whistleblower matters are handled appropriately and are transparent to ASIC's senior leadership group.

## Key elements of a comprehensive corporate whistleblowing regime

- 13 ASIC's experience to date in handling whistleblower matters has also helped inform our views on the areas of the law that could be improved.
- 14 In this submission, we outline our views regarding the proposals and options outlined in the consultation paper for encouraging reporting of corporate wrongdoing and enhancing whistleblower protections in Australia.
- 15 Section B outlines ASIC's key views on a more comprehensive whistleblowing regime for the Australian corporate sector, including:
- (a) the scope and legislative approach to corporate sector whistleblowing reform;
  - (b) the definition of protected disclosures, in particular the categories of qualifying whistleblowers and the types of disclosures that should be protected;
  - (c) the mechanisms for encouraging reporting of wrongdoing; and
  - (d) the oversight and administrative mechanisms and procedures.
- 16 In summary:
- (a) ASIC recommends replacing the current fragmented, sector-based approach to whistleblowing protection with a comprehensive corporate sector whistleblowing regime by enacting new, stand-alone legislation that covers all disclosures about corporate activities involving a possible breach of Commonwealth legislation.

- (b) ASIC agrees that the future corporate sector whistleblowing legislation should be closely aligned to the *Public Interest Disclosure Act 2013* (AUS-PIDA), the recently amended *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act), the proposed protections for tax whistleblowers, and take into account international best practice.
- (c) ASIC supports broadening the definition of whistleblowers to include a company's former employees, directors and officers, and contractors, a company's current and former financial services providers and their representatives, and a company's current and former accountants, auditors, unpaid workers, and business partners. In addition, we suggest including the other categories that have been proposed for tax whistleblowers i.e. tax agent, legal adviser or consultant, business partner or joint venture, and client of a financial service provider, accountant or auditor, tax agent, legal adviser or consultant.
- (d) ASIC also supports extending whistleblower protections to anonymous disclosures.
- (e) ASIC suggests that the proposed approach for protecting the identity of tax whistleblowers should also be considered for inclusion into the new corporate sector whistleblowing legislation. That is, the identity of a whistleblower, and the disclosure of any information which is capable of revealing their identity, should be subject to an absolute requirement of confidentiality.
- (f) ASIC supports replacing the 'good faith' requirement with an 'objective test' i.e. honest belief, held on reasonable grounds, that the information disclosed shows, or tends to show, wrongdoing has occurred.
- (g) ASIC recommends overhauling the compensation arrangements for reprisals so whistleblowers are confident they will not be disadvantaged as a result of disclosing corporate wrongdoing. We consider it is essential to clearly define 'reprisal' and 'detriment' and the nature of the damages for which a whistleblower may make a compensation claim (which should not be capped), establish a whistleblower tribunal to hear compensation claims from employees and non-employees, ensure cost protection for whistleblowers (unless a claim has been made vexatiously), and address compensation where the corporation the subject of the disclosure is insolvent.
- (h) ASIC agrees there is benefit in deferring the consideration of a rewards system until more comprehensive reform has been implemented, and in particular the operation of a new compensation regime has been assessed. This also allows time for higher monetary penalties to be introduced (following the completion of the Government's review of ASIC's current enforcement regime, which includes the level of penalties for misconduct).

- (i) ASIC agrees that a comprehensive whistleblowing regime should be supported by an independent oversight agency, such as the Commonwealth Ombudsman.

## A ASIC's whistleblowing policy and process

### Key points

ASIC has an end-to-end process for dealing with reports of alleged misconduct from whistleblowers, which includes enhancements we have made to incorporate the findings from our internal review of past handling of whistleblowing matters.

[Information Sheet 52](#) *Guidance for whistleblowers* (INFO 52) outlines relevant information for whistleblowers to ensure that they are aware of the protections that may apply to them, and is supported by videos and podcasts regarding ASIC's role.

ASIC has developed more comprehensive internal reporting of whistleblower reports, including a formal bi-annual report to the Commission.

- 17 We acknowledge that whistleblowers can find themselves in difficult and stressful circumstances, and that they often risk their careers in providing valuable reports of alleged misconduct to ASIC.
- 18 ASIC has a dedicated approach for handling information from whistleblowers that involves trained officers and monthly reporting of all whistleblower matters, as well as reporting to the Commission.

### Functions of ASIC's Office of the Whistleblower

- 19 The Office of the Whistleblower:
- (a) ensures that information for whistleblowers is easily accessible by the public;
  - (b) provides training and development on dealing with whistleblower matters to ASIC officers;
  - (c) ensures that ASIC maintains regular contact with whistleblowers;
  - (d) designs and reviews procedures for dealing with whistleblower matters;
  - (e) monitors how ASIC identifies, assesses and handles whistleblower reports;
  - (f) collates information on a monthly basis and reports to the Commission twice per year on how ASIC is dealing with whistleblowers, the outcomes achieved, and relevant issues and trends; and
  - (g) identifies ways that ASIC can improve its processes and procedures for handling whistleblower matters.

## ASIC's process for dealing with whistleblower reports

- 20 ASIC's approach for dealing with whistleblowers is outlined in [Information Sheet 52](#) *Guidance for whistleblowers* (INFO 52).
- 21 ASIC has an end-to-end process for dealing with whistleblower reports. The process is designed to ensure that we:
- (a) inform whistleblowers about their rights and what they can expect from ASIC;
  - (b) fully and properly assess the information they provide to us; and
  - (c) keep them up to date about what action ASIC is taking in relation to their report.
- 22 All whistleblower reports are initially assessed by ASIC. This ensures we identify all potential whistleblower matters and provide information to those who claim to be whistleblowers, as well as those that may fall within the definition under the law but do not identify themselves as whistleblowers. We do this to make people aware of the legal protections that may apply to them.
- 23 Once a report is identified as a potential whistleblower matter, we record and begin to monitor the matter within our whistleblower handling process.
- 24 ASIC has trained staff to act as the designated point of contact for whistleblowers about the handling of their disclosure. Where a matter is assessed as requiring further action by ASIC, the whistleblower will be advised about the contact details of the ASIC officer that will be assisting them.
- 25 The officer is responsible for ensuring regular contact and communication with the whistleblower. At a minimum, this will occur once every four months.
- 26 Where ASIC has finalised a matter or decided not to take further action, the officer will communicate the outcome to the whistleblower.

## Improvements to ASIC's whistleblower handling process

- 27 The end-to-end process above incorporates the enhancements that ASIC implemented to specifically address the key issues identified from our internal review of our past handling of whistleblowing matters, including ASIC's handling of whistleblower issues raised in the Commonwealth Financial Planning Limited matter.

- 28            The key changes include:
- (a) ASIC will consider allegations from whistleblowers and determine whether the concerns warrant further inquiry by way of surveillance or investigation.
  - (b) We have appointed designated officers to have primary carriage of communicating with the whistleblower/s while a matter is actioned by ASIC.
  - (c) We have provided training to all officers involved in handling whistleblower matters on engaging with whistleblowers effectively and on our revised whistleblower handling process. This includes engaging an external provider to deliver training on methods for effectively communicating over the phone, including dealing with distressed and emotional callers.
  - (d) Officers are required to contact whistleblowers (preferably by telephone):
    - (i) within seven days of ASIC commencing work on their concerns;
    - (ii) at least once every four months to provide an update on the progress of our consideration of their concerns; and
    - (iii) within two days of ASIC finalising our activity, such as by commencing enforcement proceedings or determining not to take further action.
  - (e) We have also provided a framework for officers to regularly communicate with each other and identify and resolve issues, to facilitate ongoing improvements to our dealings with whistleblowers.
  - (f) ASIC compiles a monthly report from all officers to confirm that required contacts have been made and to see if any issues have arisen. This also allows internal monitoring of the actioning of each matter. The reporting is overseen by a Senior Executive Leader, Warren Day, who leads our Office of the Whistleblower. The Commission also receives a formal report on ASIC's handling of whistleblower matters bi-annually, including details of those matters.
  - (g) ASIC provides an information sheet to people who claim to be whistleblowers, as well as those that may fall within the definition under the law but do not claim to be a whistleblower; this is to ensure people are aware of the protections that may apply to them.

## Revised guidance in Information Sheet 52

- 29            On 18 February 2014, ASIC released a revised information sheet to provide information to whistleblowers about their rights under the law, and how we will assess their concerns and communicate with them. The information

sheet is part of ASIC's commitment to improving our communication with and handling of information brought to our attention by whistleblowers.

30 [INFO 52](#) explains:

- (a) how to report important information to ASIC;
- (b) how we will communicate with whistleblowers;
- (c) who is a whistleblower under the law;
- (d) the protections available to whistleblowers under the law; and
- (e) how ASIC deals with information from whistleblowers.

31 A further revised [INFO 52](#) was issued on 3 August 2015, which provides more information for whistleblowers and details about ASIC's role in dealing with whistleblowers, including:

- (a) criteria for whistleblower protection;
- (b) ASIC's role, and the limitations of our role, in relation to whistleblowers; and
- (c) the role of ASIC's Office of the Whistleblower.

32 The revised [INFO 52](#) is now available from the ASIC website, and is supported by videos and podcasts about how ASIC supports whistleblowers.

## Statistics: Office of the Whistleblower

33 In February 2014, ASIC commenced reporting on reports of alleged misconduct from whistleblowers based on the type of whistleblower, as follows:

**Table 1: Categories of whistleblowers**

Whistleblower category	Description
Category 1	Person claimed to be a whistleblower but did not meet, or was unlikely to meet, the statutory definition
Category 2	Person claimed to be a whistleblower and appeared to meet the statutory definition
Category 3	Person appeared to meet the statutory definition but did not claim whistleblower status

34 In addition, ASIC categorises whistleblower reports based on the focus area of the issue or issues raised in the report, as follows:

**Table 2: Focus areas of whistleblower reports**

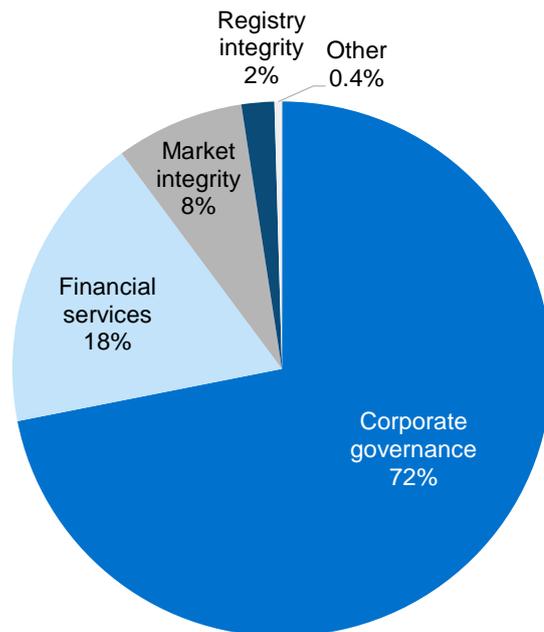
Focus area	Key issues included
Corporate governance	Insolvency matters; insolvency practitioner misconduct; contractual issues; director's duties
Financial services	Credit; managed investment schemes; superannuation; insurance; misleading and deceptive conduct
Market integrity	Insider trading; continuous disclosure; misleading statements; market manipulation
Registry integrity	Incorrect address recorded on ASIC's register; lodging false documents with ASIC; business name issues

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The following chart shows the whistleblower reports that the Office of the Whistleblower received from February 2014 to June 2016 by focus area. It shows that:

- (a) the majority (72%) of whistleblower reports related to corporate governance, which was higher than the proportion of general misconduct reports received relating to corporate governance (43% in the 2015–16 financial year); and
- (b) financial services issues were raised in 18% of whistleblower reports, which was a much smaller proportion relative to the general misconduct reports received about financial services (43% in the 2015–16 financial year).

**Figure 1: Whistleblower reports by focus area (February 2014 to June 2016)**



## Outcome of reports of misconduct to ASIC

### Whistleblower reports relative to general misconduct reports

36 Table 3 below shows the outcome for whistleblower reports compared with the outcome for general misconduct reports from February 2014 to June 2016. It shows that, relative to general misconduct reports, a smaller proportion of whistleblower reports:

- (a) were referred to other ASIC teams for further action (12% for whistleblower reports compared to 18% for general misconduct reports);
- (b) were outside of ASIC's jurisdiction (7% compared to 13%);
- (c) resulted in an outcome of 'no offence' (2% compared to 6%); and
- (d) were resolved.

37 The table also shows that, for 36% of whistleblower reports, ASIC was unable to take further action after making preliminary inquiries and analysing the information provided due to insufficient evidence. For 35% of whistleblower reports, ASIC did not take further action for other reasons, such as another agency or law enforcement body or third party (e.g. a liquidator) was better placed to appropriately deal with the issues or was already taking action. There were also instances where the information provided by whistleblowers did technically involve a breach of the law, but ASIC elected not to take action after considering the report against other priority matters and our finite resources.

38 [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151) explains how we approach our enforcement role and why we respond to particular types of breaches of the law in different ways.

### Average outcome of whistleblower reports

39 Figure 2 below shows the average outcomes for whistleblower matters for the time period February 2014 to June 2016.

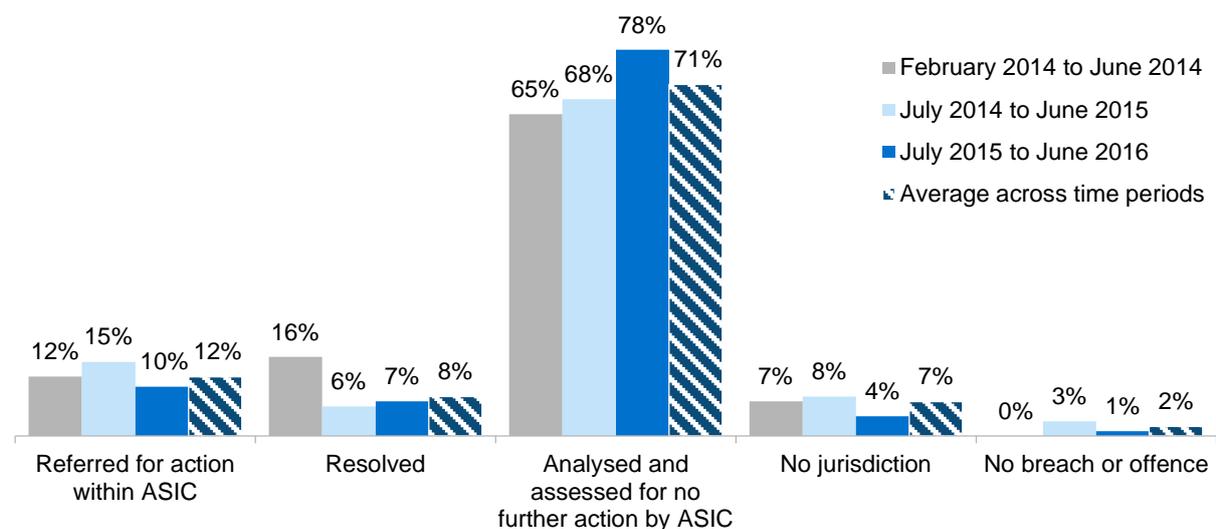
### Outcome of whistleblower reports by whistleblower category

40 Table 4 below shows the summary of outcomes for whistleblower matters by whistleblower category for each year from February 2014 to June 2016.

**Table 3: Outcome of whistleblower reports relative to general misconduct reports (February 2014 to June 2016)**

Outcome	Whistleblower reports	General misconduct reports
<b>Referred for action within ASIC</b>	<b>12%</b>	<b>17%</b>
Resolved—More appropriate government agency	1%	<0.5%
Resolved—Warning letter or consumer alert issued	2%	5%
Resolved—Referred for internal/external dispute resolution	–	3%
Resolved—Assistance provided to resolve complaint	5%	3%
Resolved—Compliance achieved	–	1%
<b>Total resolved</b>	<b>8%</b>	<b>12%</b>
Analysed and assessed—No action	35%	21%
Analysed and assessed—Insufficient evidence	36%	31%
<b>Total analysed and assessed for no further action by ASIC</b>	<b>71%</b>	<b>52%</b>
<b>No jurisdiction</b>	<b>7%</b>	<b>13%</b>
<b>No breach or offence</b>	<b>2%</b>	<b>6%</b>
<b>Total</b>	<b>100%</b>	<b>100%</b>

Note: There were 455 whistleblower reports and 20,102 general misconduct reports from February 2014 to June 2016.

**Figure 2: Average outcome of whistleblower matters (February 2014 to June 2016)**

**Table 4: Outcome of whistleblower matters by whistleblower category (February 2014 to June 2016)**

Category and time period	Referred for action within ASIC	Resolved	Analysed and assessed for no further action by ASIC	No jurisdiction	No breach or offence	Total
February 2014 to June 2014—Category 1	20%	–	80%	–	–	100%
February 2014 to June 2014—Category 2	22%	11%	67%	–	–	100%
February 2014 to June 2014—Category 3	9%	19%	63%	9%	–	100%
July 2014 to June 2015—Category 1	23%	5%	55%	14%	5%	100%
July 2014 to June 2015—Category 2	38%	–	58%	4%	–	100%
July 2014 to June 2015—Category 3	10%	7%	72%	8%	3%	100%
July 2015 to June 2016—Category 1	35%	6%	47%	6%	6%	100%
July 2015 to June 2016—Category 2	13%	13%	73%	–	–	100%
July 2015 to June 2016—Category 3	5%	6%	84%	5%	–	100%

Note: See paragraph 33 and Table 1 for an explanation of whistleblower categories.

## Timeliness

- 41 The average time taken by ASIC to deal with whistleblower matters between February 2014 and June 2016 was 42 days. Matters referred to another stakeholder team in ASIC, however, took an average of 64 days, with other matters taking an average of 39 days.
- 42 In contrast, matters relating to general misconduct reports took 35 days on average, while the average time for referrals and other matters was 40 days and 35 days, respectively.
- 43 The longer timeframe for handling whistleblowing matters was mainly due to the more detailed information often received from whistleblowers, which required further attention.

## ASIC's support for research into whistleblowing in the private sector

- 44 ASIC has contributed funding to a whistleblower research project led by Griffith University's Centre for Governance and Public Policy.
- 45 The project is jointly funded by 16 state, federal and New Zealand ombudsman and anti-crime commission bodies. The research seeks to review the experience of whistleblowers and management responses to whistleblowing, to ascertain what works well and can be used across organisations to inform future policy and law reform.
- 46 As a further assistance to this project, ASIC wrote to 30,000 organisations about this project seeking information and assistance.
- (a) 261 private sector or not-for-profit and 436 public sector organisations responded and completed an initial survey of organisational processes and procedures.
  - (b) Griffith University research staff released an analysis of the data in November 2016.
  - (c) Early indications are that a high number of organisations have formal whistleblower procedures and processes, which shows that Australian business is taking this issue seriously.

## B Key elements of a comprehensive corporate whistleblowing regime

### Key points

The current fragmented, sector-based approach to whistleblowing protection should be replaced with a comprehensive corporate sector whistleblowing regime through enacting new, stand-alone legislation that covers all disclosures about corporate activities involving a possible breach of Commonwealth legislation.

The future corporate sector whistleblowing legislation should be closely aligned to the *Public Interest Disclosure Act 2013* (AUS-PIDA), the recently amended *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act), the proposed protections for tax whistleblowers, and take into account international best practice.

- 47 This section outlines ASIC's views regarding the proposals and options outlined in the consultation paper *Review of tax and corporate whistleblower protections in Australia*.
- 48 Specifically, it covers:
- (a) the scope and legislative approach to corporate sector whistleblowing reforms;
  - (b) the definition of protected disclosures, which includes:
    - (i) the categories of qualifying whistleblowers; and
    - (ii) the types of disclosures that should be protected (including anonymous disclosures, confidentiality and protecting the identity of the whistleblower, and the 'good faith' requirement);
  - (c) the mechanisms for encouraging the reporting of wrongdoing (including compensation and rewards); and
  - (d) the oversight and administrative mechanisms and procedures.

### Scope and legislative approach to corporate sector whistleblowing reform

- 49 The whistleblowing provisions under the *Corporations Act 2001* (Corporations Act) currently only cover contraventions of the Corporations legislation (Pt 9.4AAA s1317AA(1)(d)), which includes the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). The provisions do not extend to the range of misconduct that ASIC may be able to investigate (e.g. they do not extend to breaches of the *National Consumer Credit Protection Act 2009*).

- 50 ASIC agrees there is a wide range of corporate activities and potential contraventions of Commonwealth legislation, and therefore corresponding whistleblower disclosures, that are not covered under the Corporations Act (e.g. money laundering). In view of this, ASIC considers there is a need for a comprehensive corporate sector whistleblowing regime implemented through new, dedicated legislation. The new legislation would cover all disclosures about corporate activities involving a possible breach of Commonwealth legislation, and would be a counterpart to the AUS-PIDA for public sector misconduct (i.e. Option 4 on p. 31 of the consultation paper).
- 51 Enacting comprehensive, stand-alone legislation for corporate sector whistleblowing would significantly simplify the law, provide greater legal certainty and clarity for would-be whistleblowers, and ensure a consistent approach to handling disclosures from all industries across regulators. It would also avoid the additional complexities and costs of different whistleblowing requirements being applied in various areas of regulation.
- 52 Comprehensive, stand-alone legislation should also improve the visibility of the regime, making its promotion easier for regulators and corporations.
- 53 ASIC agrees that the current fragmented legislative approach (i.e. numerous statutes with separate, specific whistleblowing regimes) is problematic because it may require a would-be whistleblower to consult a number of statutes or a lawyer to determine whether they have protection.
- 54 We understand that the fragmented industry-based approach currently in operation in the United States is considered to have added to the complexity of the US whistleblowing regime, since would-be whistleblowers need to determine which legislation covers their disclosure.

### **Alternative to all-inclusive whistleblowing legislation**

- 55 Should a comprehensive corporate sector whistleblowing regime that covers all disclosures about corporate activities involving a possible breach of Commonwealth legislation not be adopted, ASIC considers the most appropriate alternative option would be to create new, dedicated legislation for the entire financial services industry. That is, new, stand-alone legislation should be enacted to replace the separate whistleblowing regimes contained in the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, and *Superannuation Industry (Supervision) Act 1993*, and it should also cover the

*National Consumer Credit Protection Act 2009*, which does not currently include whistleblowing provisions.<sup>1</sup>

- 56 We consider this alternative approach would ensure ASIC could handle whistleblower reports regarding any misconduct or potential misconduct that falls within our remit. It would eliminate the need for legislative changes should ASIC's remit be broadened in future. It would also avoid the need to update each individual statute to mirror any future changes to the whistleblowing provisions in the Corporations Act. More importantly, it would ensure whistleblowers across the financial system have the same protections and obligations when making disclosures.
- 57 We note that one of the legislative options proposed in the consultation paper is to amend AUS-PIDA so that the public and private sector whistleblowing regimes are covered under the same legislation (i.e. Option 3 on p. 31 of the consultation paper). We do not consider this to be the most appropriate alternative. Although we understand that AUS-PIDA is considered a best practice approach to whistleblowing legislation, we consider the creation of new, dedicated legislation as a counterpart to AUS-PIDA would ensure the final regime takes into account the different considerations that apply to disclosures about private institutions. For example, it would reflect that private sector disclosures should be subject to additional privacy and confidentiality requirements (discussed below) and that investigations relating to private sector disclosures should be undertaken by regulators (rather than internally by public sector agencies under AUS-PIDA).
- 58 Notwithstanding, we agree with the proposal to better align the future corporate sector whistleblowing legislation with AUS-PIDA, the Registered Organisations Act and the proposed tax whistleblowing legislation.

## Definition of protected disclosures

### Categories of qualifying whistleblowers

- 59 Part 9.4AAA s1317AA–AE of the Corporations Act defines a whistleblower as a company's current officer or employee, or a contractor who has a contract to supply goods or services to the company (including their employees). In this regard, it appears that the provisions are targeted at maintaining an ongoing employment or contractual arrangement between

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<sup>1</sup> ASIC has previously suggested broadening the scope of information protected by the whistleblowing provisions in the Corporations Act to cover any misconduct that ASIC may investigate. See *Senate inquiry into the performance of the Australian Securities and Investments Commission: [Main submission by ASIC](#)*, October 2013, pp. 161–164.

the whistleblower and company. However, the protections may still be relevant to a person who has ceased their employment or engagement with the company.

60 In addition, the definition of whistleblower under the Corporations Act does not cover the other categories of individuals who could also provide valuable information regarding corporate wrongdoing, and may require protection.

61 ASIC considers it would be beneficial for the definition of whistleblowers to be broadened to include a company's former employees, directors and officers, contractors, a company's current and former financial services providers and their representatives, and a company's current and former accountants, auditors, unpaid workers, and business partners.

62 Updating the definition of whistleblowers to include former employees, officers and contractors would better align the future corporate sector whistleblowing regime with the definition of whistleblowers in AUS-PIDA, the Registered Organisations Act and international best practice.

63 We also consider there is a need to expressly include financial services providers, accountants and auditors to provide legal certainty and ensure the new legislation is comprehensive, despite the fact they are likely to fall within the 'contractor' category. In the case of auditors this would ensure the protections apply although they are subject to a mandatory disclosure requirement under s311 of the Corporations Act.

64 ASIC notes that the proposed definition of tax whistleblower also includes tax agent, legal adviser or consultant, business partner or joint venture, and client of a financial service provider, accountant or auditor, tax agent, legal adviser or consultant. In line with our earlier suggestion that the whistleblowing provisions should be aligned as much as possible across legislation, we consider it would be beneficial to include these additional categories under the definition of corporate whistleblower, since they may also disclose information to regulators—and therefore require protection—regarding possible breaches by corporations of any Commonwealth legislation.

65 We also consider it would be beneficial to align the protections available to a person where they make a disclosure to a regulator based on information received in the course of providing client advice. Currently under s1317AB of the Corporations Act, a person has qualified privilege in relation to a protected disclosure. However, under AUS-PIDA, a person who makes a public interest disclosure has absolute privilege in proceedings for defamation in respect of the public interest disclosure.

## Types of disclosures that should be protected

### Anonymous disclosures

- 66 The Corporations Act requires a person to provide their identity in order to avail themselves of the whistleblower protections. This means that if an anonymous whistleblower is subsequently identified and victimised or pursued with legal proceedings, they would not be able to rely on the statutory protections.
- 67 ASIC considers this requirement to be one of the key disincentives for would-be whistleblowers under the current regime. In recognition of this, ASIC suggests broadening the definition of protected disclosures to include anonymous disclosures.
- 68 Extending corporate whistleblower protections to cover anonymous disclosures would also ensure the future corporate sector whistleblowing regime is consistent with the approach under AUS-PIDA, the Registered Organisations Act and international best practice.
- 69 During the panel discussion held by the Ontario Securities Commission (OSC) regarding its proposed whistleblowing program, representatives from the US Securities and Exchange Commission (SEC) said that they considered anonymity as one of the core elements of its whistleblowing program.<sup>2</sup>
- 70 In addition to covering anonymous disclosures, we consider it is necessary that the future whistleblowing regime clearly provide that the protection provisions will be triggered at the time an anonymous disclosure is made, rather than at a later point when the whistleblower's identity is disclosed to the regulator.

### Confidentiality and protecting the identity of the whistleblower

- 71 Other mechanisms should be introduced to help ensure the adequate protection of a whistleblower's identity and provide them with another layer of protection against reprisals.
- 72 Specifically, ASIC suggests that the new whistleblowing legislation should clearly outline the circumstances under which regulators should be able to resist an application for the production of documents that may reveal a whistleblower's identity. This is important to avoid applications that are intended to access documents that contain, or would enable the requestor to deduce, a whistleblower's identity.

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<sup>2</sup> Ontario Securities Commission, [Roundtable discussion of OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program](#), transcript, 9 June 2015.

- 73 We consider a similar approach to what has been proposed for protecting the identity of tax whistleblowers should also be considered for the new corporate sector whistleblowing legislation. As proposed, the identity of a tax whistleblower, and the disclosure of any information which is capable of revealing their identity, will be subject to an absolute requirement of confidentiality. This would prohibit the release of any information by anyone to anyone, including to a court or tribunal, unless the whistleblower gives informed consent to the release of their identity or the revelation is necessary to avert imminent danger to public health or safety, to prevent violation of any criminal law, or to enable the whistleblower to secure compensation for reprisals.
- 74 Currently, s127 of the ASIC Act requires ASIC to protect any information we receive in confidence, from all reports of misconduct, irrespective of whether the information has been provided by a whistleblower or any other person. We seek to prevent the unauthorised use or disclosure of information provided by whistleblowers in accordance with our obligation under s127. However, as the Corporations Act whistleblowing provisions do not mandate how ASIC should handle whistleblower information, we have previously experienced difficulties in resisting applications for the production of documents that contain whistleblower information, including information that might reveal a whistleblower's identity, during litigation.

#### **'Good faith' requirement**

- 75 ASIC agrees there is a need to remove the motive of a discloser from the criteria for whistleblower protection by replacing the 'good faith' requirement with an 'objective test' i.e. honest belief, held on reasonable grounds, that the information disclosed shows, or tends to show, wrongdoing has occurred.
- 76 This change is necessary since the existence of a 'good faith' requirement may result in the focus incorrectly shifting from the importance of the information disclosed to the motives of the whistleblower.
- 77 The Corporations Act currently requires a whistleblower to disclose information in 'good faith' in order to qualify for whistleblower protection.
- 78 ASIC understands that the 'good faith' requirement is generally considered to be out-of-date and inconsistent with the 'objective test' adopted under AUS-PIDA, the Registered Organisations Act and the UK *Public Interest Disclosure Act 1998* (UK-PIDA).
- 79 We recognise that the original intention of the 'good faith' requirement was to prevent vexatious disclosures (e.g. by a disgruntled employee). However, motives can be difficult to identify, and may change in the process of the reporting. While a whistleblower may have various motives, the information they are providing may in any case be very valuable.

## Mechanisms for encouraging reporting of wrongdoing

### Compensation

- 80 ASIC regards an overhaul of the existing compensation arrangements (see Corporations Act s1317AD) to be essential to the implementation of a more comprehensive whistleblowing regime for the Australian corporate sector.
- 81 We consider the compensation arrangements should provide whistleblowers:
- (a) confidence that they will not be disadvantaged as a result of reporting corporate wrongdoing;
  - (b) a clear pathway for whistleblowers to seek compensation if they suffer detriment as a result of reprisal, or threat of reprisal, for reporting wrongdoing;
  - (c) better access to compensation, which should not be capped; and
  - (d) cost protection where a whistleblower's claim is not determined to be vexatious.
- 82 In contrast to a rewards system, where only a small number of whistleblowers would be able to access substantial rewards (since by nature it is dependent on successful prosecution and monies recovered), we consider the implementation of more effective whistleblowing compensation arrangements would remove a key disincentive to the reporting of wrongdoing for would-be whistleblowers. We also consider compensation arrangements would provide faster resolution, since rewards can only be paid upon the completion of investigations and court proceedings.
- 83 As it stands, the Corporations Act allows a person who has suffered detriment as a result of making a protected disclosure to seek compensation for damages (s1317AD). However, as the provisions do not define 'reprisal' and 'detriment' and the nature of the damages upon which a whistleblower may make a compensation claim, the type of claims available is unclear. Furthermore, the provisions do not clearly outline the avenues and procedures for seeking compensation, nor do they provide any cost protection.
- 84 Accordingly, the current whistleblowing compensation arrangements are generally regarded as ineffective, as evidenced by the lack of claims made under the current provisions,<sup>3</sup> and out-of-step with the approach adopted under AUS-PIDA, the Registered Organisations Act and international best practice (e.g. UK-PIDA).

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<sup>3</sup> ASIC is aware of a whistleblower case that is currently in progress in the Federal Court where the applicant is suing their employer for breaches of employment contract under the Fair Work Act, including losses and damages suffered.

## Proposed arrangements

85 In view of the above, there is merit in incorporating the below features in the corporate sector whistleblowing compensation arrangements:

- (a) Clearly outline the circumstances under which a whistleblower has a right to a compensation claim, by adopting the approach under AUS-PIDA and the Registered Organisations Act. In particular, provide a right to compensation for detriment suffered from a reprisal or threat of reprisal by defining:
  - (i) 'reprisal' as an act or omission that causes detriment to another person because they believe or suspect that the person may have made or intends to make a disclosure; and
  - (ii) 'detriment' as including any disadvantage to a person, including dismissal; injury to a person in his or her employment; discrimination; alteration of their position to their disadvantage; harassment or intimidation; harm or injury to a person, including psychological harm; damage to a person's property; and damage to a person's reputation.
- (b) The provisions should clearly state that compensation may be payable where no action by a regulator, on the basis of the disclosure or for contravention of a prohibition against reprisal, occurs or is successful. For example, under AUS-PIDA, it is clear that civil remedies are available even if a prosecution for criminal reprisal has not been brought or cannot be brought (s19A).
- (c) Whistleblowers should be able to make a compensation claim against the perpetrator of a reprisal, and also the corporation, with a defence available to the corporation for taking reasonable precautions and exercising due diligence to avoid the reprisal or threat.
- (d) The level of compensation should be uncapped, consistent with the approach adopted under UK-PIDA. It should reflect the damage, loss or injury flowing from the reprisal, including the impact on the whistleblower's earnings, taking into account the whistleblower's likelihood of securing future employment and gaining an equivalent position in the same field or industry. Where appropriate, the level of compensation should cover a whistleblower's forgone lifetime earnings.
- (e) Consistent with the approach under AUS-PIDA, the compensation arrangements should provide whistleblowers with cost protection. That is, all legal costs should be covered by the corporation the subject of the disclosure, unless the whistleblower's reprisal claim is vexatious.
- (f) To provide support to whistleblowers, ASIC considers that an independent body could be appointed to guide them about the process for making a compensation claim for reprisals, including potentially providing information about accessing legal aid. In addition, the

independent body could provide advice to whistleblowers regarding their disclosures (e.g. whether the nature of their disclosure falls within the scope of the whistleblowing provisions, or which regulator would be responsible for handling the subject matter).

We also consider that it may be beneficial for an established body, such as an ombudsman, to be appointed to this role—in addition to providing independent oversight for the whistleblowing regime. In the below section on oversight arrangements, we also suggest that an established body, such as the Commonwealth Ombudsman, could be appointed to provide independent oversight for the whistleblowing regime.

### **Whistleblower tribunal**

- 86 There is also merit in establishing a clear pathway for employees and non-employees to make a compensation claim. This could be achieved by establishing a Whistleblower Tribunal, or may be an existing tribunal such as the Fair Work Commission or Administrative Appeals Tribunal.

### **Insolvency of the corporation**

- 87 Where the corporation the subject of the disclosure is insolvent, the Commonwealth could make the compensation payment to the claimant in the first instance. The payment could then be offset on an ex-post basis by monies from penalties obtained as a result of actions by the regulator generally. The compensation payment would become a debt to the Commonwealth, standing in the shoes of the claimant as an unsecured creditor.

### **Alternative model**

- 88 In the absence of the model above, an alternative could be to allow compensation claims to be made through:
- (a) the Federal Court and Federal Circuit Court; or
  - (b) an employment tribunal (i.e. the Fair Work Commission), in the case of current and former employees.
- 89 This is a similar approach to that adopted under AUS-PIDA and UK-PIDA. This approach would require whistleblower disclosures to be recognised as a workplace right. Since the Fair Work Commission would be the first port of call for a corporation's current and former employees, we consider it important to align the level of compensation (i.e. uncapped) and cost protection available through the courts and employment tribunal.
- 90 Consistent with current practice, if the corporation is insolvent, the whistleblower would become an unsecured creditor.

## Rewards

- 91 ASIC agrees there is benefit in deferring the consideration of a rewards system until more comprehensive whistleblowing reform has been implemented, and in particular the operation of a new compensation regime has been assessed. This would also allow time for higher monetary penalties to be introduced (following the completion of the Government's review of ASIC's current enforcement regime, which includes the level of penalties for misconduct).
- 92 Despite the fact that some countries have already adopted a rewards system to encourage the reporting of corporate wrongdoing, ASIC does not consider that a rewards system that is dependent on successful prosecution and the level of penalties imposed would be effective in Australia at this time (generally, in other jurisdictions, the reward payments are calculated as a proportion of the penalty imposed).
- 93 ASIC has previously indicated that we consider the quantum of penalties set in Australia to be too low, particularly compared with jurisdictions offering reward payments for whistleblowers.<sup>4</sup> The Financial System Inquiry also recommended that the penalties for contravening ASIC-administered legislation should be substantially increased. Therefore, in our view it would be worthwhile for the Government to defer consideration of a reward system until the completion of its review of ASIC's enforcement regime, which includes the level of penalties for corporate misconduct.
- 94 We understand that the introduction of a bounty system by the US SEC has helped enhance the quantity and quality of the whistleblower reports it receives, including the quality of evidence it receives in support of disclosures. This is also due to the emergence of a new industry that is dedicated to supporting whistleblowers to attain rewards.
- 95 However, we are aware that the SEC's bounty system relates to securities law violations, where fines, and therefore potential rewards, are generally very significant. We are also aware that the SEC rewards program has received funding support from the US Government. For example, a special fund was set up under s922 of the *Dodd–Frank Wall Street Reform and Consumer Act* (US) to provide funding for the SEC's whistleblower reward program.<sup>5</sup> As at the end of the 2015 financial year, that fund had a balance of US\$400.6 million. As one US participant of the OSC's consultation noted,

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<sup>4</sup> See *Senate inquiry into the performance of the Australian Securities and Investments Commission: [Main submission by ASIC](#)*, October 2013, pp. 168–173.

<sup>5</sup> Securities and Exchange Commission, *2015 Annual Report to Congress on the Dodd–Frank Whistleblower Program*, report, 2015.

the ‘certainty’ of payment of rewards is an important factor to encouraging tip-offs to the SEC.<sup>6</sup>

- 96 ASIC is aware that the introduction of a rewards system in Australia may be regarded as inconsistent with Australian culture. However, it is worth noting that offering rewards for information about non-corporate crime (e.g. serious criminal activity such as homicide) is not uncommon in Australia.
- 97 Another important consideration is that although monetary rewards may act as an incentive for some whistleblowers, research generally indicates that other factors (e.g. moral duty) may be preferable motivators.
- 98 More importantly, we recognise that while monetary rewards may incentivise those who would not normally speak out, rewards are not a substitute for strong legal protection. Anecdotally, we are aware that the effectiveness of a rewards model is very much dependent on the other components of a whistleblowing regime. As noted above, in addition to rewards, the SEC considers anonymity and protection from retaliation to be core components to the success of its whistleblowing program.<sup>7</sup>
- 99 Lastly, given ASIC’s recent work on encouraging corporates to focus on improving their culture, we consider there should be further consideration around the extent to which offering financial rewards to potential whistleblowers will actually address the ingrained cultural issues that have been frequently attributed as the root cause of poor conduct in the financial sector. This is consistent with the finding of the UK Financial Conduct Authority and Prudential Regulatory Authority, who have introduced a series of new rules that aim to ensure the culture at companies is one where people are prepared to speak up, as part of improving behaviour throughout the firm, instead of introducing financial rewards.<sup>8</sup>

## Oversight and administrative mechanisms and procedures

- 100 ASIC considers that a comprehensive corporate sector whistleblowing regime should be supported by appropriate and effective oversight arrangements. This would provide greater confidence to would-be whistleblowers and industry about the robustness of the regime by:
- (a) determining standards with which agencies must comply;

<sup>6</sup> Ontario Securities Commission, [Roundtable discussion of OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program](#), transcript, 9 June 2015.

<sup>7</sup> Ontario Securities Commission, [Roundtable discussion of OSC Staff Consultation Paper 15-401: Proposed Framework for an OSC Whistleblower Program](#), transcript, 9 June 2015.

<sup>8</sup> Financial Conduct Authority and the Prudential Regulation Authority, [Financial Incentives for Whistleblowers](#), report, July 2014.

- (b) providing ongoing monitoring of the administration of the whistleblowing regime by regulators; and
- (c) facilitating public awareness raising and communication.

101 ASIC is aware that the independent oversight arrangements under AUS-PIDA, which is supported by two agencies (i.e. the Commonwealth Ombudsman and, for intelligence agencies, the Inspector-General of Intelligence and Security), are considered core to AUS-PIDA's success. We are also aware that the inclusion of independent oversight arrangements is in line with international best practice.

102 Based on the above, and to avoid the need to establish a new oversight body, we consider the Commonwealth Ombudsman would be an appropriate independent oversight body for the whistleblowing regime.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> , including regulations made for the purposes of that Act
AUS-PIDA	<i>Public Interest Disclosure Act 2013</i>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
INFO 153 (for example)	An ASIC information sheet (in this example numbered 153)
Registered Organisations Act	<i>Fair Work (Registered Organisations) Act 2009</i>
OSC	Ontario Securities Commission
SEC	Securities Exchange Commission
UK-PIDA	<i>Public Interest Disclosure Act 1998 (UK)</i>