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The Secretary
Senate Economics References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

**Inquiry into performance of
Australian Securities and Investments Commission**

It is a pleasure to make a submission to your inquiry into the above matter. Thank you for accepting a late submission. My submissions relate primarily to ASIC's role in corporate and private sector whistleblower protection:

- a) ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations, with respect to whistleblower protection; and
- e) the protections afforded by ASIC to corporate and private whistleblowers.

Background

It has been my privilege to have been involved in research, investigative practice and policymaking with respect to public interest whistleblowing for 20 years.

I have been project leader on two Australian Research Council-funded projects in this field, including the Australian Research Council Linkage Project, *Whistling While They Work* (2005-2011), one of the largest empirical research projects on whistleblowing, ever undertaken worldwide. This project was funded by the ARC and 14 public integrity and public sector management agencies, including the Commonwealth Ombudsman and Australian Public Service Commission, and involved surveys of over 8,000 managers and employees from 118 organisations. Key results and recommendations from this research are available in:

- Brown, A. J. (ed) (2008), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* Australia & New Zealand School of Government / ANU E-Press, Canberra.
- Roberts, P., Brown A. J. & Olsen J. (2011), *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*, Australia & New Zealand School of Government / ANU E-Press.

While the above research focused on the public sector, it contains many lessons for improvement of corporate and private sector whistleblower protection. The research was designed to assist in the evaluation and improvement of State whistleblower protection legislation, and the design of Commonwealth public sector whistleblowing legislation. As a result, I and other members of

my team were pleased to be able to play a direct role in law reform in these jurisdictions, including the design of the recently passed *Public Interest Disclosure Act 2013* (Cth).

I am also lead editor on the soon to be published *International Whistleblowing Research Handbook* (Edward Elgar, forthcoming 2014); and a non-executive director of Transparency International Australia, which has a strong interest in best-practice approaches to whistleblower protection in the corporate and private sector, worldwide.

Context and basic needs

Corporate and private sector whistleblower protection is an important focus for the Committee's inquiry. The Parliament and Committee are to be congratulated on including this focus.

For the purposes of this submission, whistleblowing means the 'disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action' (see Miceli, M. P., & Near, J.P., 1984, 'The relationships among beliefs, organisational position, and whistleblowing status: A discriminant analysis', *Academy of Management Journal*, 27(4), 687-705). In other words, whistleblowers are organisational employees, officers and other insiders – as distinct from customers, members of the public or others who may have evidence or complain of organisational wrongdoing. This distinction remains important, and the Committee should make clear its own definition of whistleblowing, when it reports.

Currently, Australia's legal regimes for facilitating, recognising, and responding appropriately to public interest whistleblowing in the corporate and private sectors are patchy, limited and far from international best-practice.

Part 9.4AAA of the *Corporations Act 2001* (Cth), as introduced by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), represent the primary national private sector provisions. However, given the many limitations of and deficiencies in these provisions, it is not surprising that ASIC's track record as a key agency responsible for whistleblowing is generally regarded as poor.

ASIC's preliminary and main submissions to the Committee effectively concede that it has only put in place any operational systems to support its limited role in whistleblowing in very recent times, despite these provisions having been in place for almost 10 years. The submissions also make clear that this has occurred in response to failures to appropriately recognise and manage whistleblowing disclosures, with respect to their particular qualities and needs (being the *raison d'être* for these provisions in the first place).

The following submissions are thus made in the context of a more general need for the Commonwealth to review how national regulation for whistleblower protection should be provided for, in the corporate and private sectors.

There are specific improvements that should be made to Part 9.4AAA of the *Corporations Act* in support of improved responsibilities and performance by ASIC (**Part A** of my submissions below). However, if these provisions and ASIC's role are to be made effective, the Committee also needs to put these recommendations in the context of clear advice to the Parliament and Government on how to progress the role of whistleblowing in Commonwealth regulation as a whole, as well as regulation of business by the States (see **Part B** of my submissions).

As pressure builds for more effective whistleblower protection in the corporate and private sector, failure to take a comprehensive approach may well result in a proliferation of separate whistleblowing requirements on business in different areas of regulation, leading to heightened complexities, confusion and cost for Australian businesses and regulators alike.

Further, given that neither the *Corporations Act* nor the *ASIC Act* place any positive obligations on ASIC to play a special role in whistleblower protection beyond pre-existing ones, it falls to this Committee to articulate what it considers that role should be, before any amendments to Part 9.4AAA or other legislation are likely to be effective (**Part C**). The options also have important implications for other areas of regulation.

Finally, there is a lack of empirical evidence regarding the incidence, significance, value and current needs and challenges with respect to management of whistleblowing in Australian corporations and businesses, by comparison with public sector agencies. This knowledge gap needs to be filled if legislative and regulatory solutions are to be designed to be ‘fit for purpose’ rather than clumsy encumbrances for regulators and business (**Part D**).

Submissions

A. Priority amendments to the *Corporations Act 2001* (Cth), Part 9.4AAA

A range of improvements should be made to Part 9.4AAA of the *Corporations Act* if these provisions are to have any real relevance for the facilitation and protection of whistleblowing. However, the scale of improvement needed is considerably beyond that proposed in ASIC’s submissions. The Committee’s report should note that these provisions were out of date before they began, and have only become more so:

- Effective whistleblowing rules for the purposes of improved corporate governance, accountability and regulation have been prioritised as an integrity and accountability reform in the United Nations Convention Against Corruption (UNCAC) and G20 Anti-Corruption Action Plan, among other international agreements;
- Most countries have also been progressively developing and strengthening their corporate whistleblowing regimes since the US corporate collapses of 2000-2001 (leading to the US federal Sarbanes-Oxley transparency legislation of 2002) and the global financial crisis (including the 2010 Dodd-Frank *Wall Street Reform and Consumer Protection Act*);
- Part 9.4AAA of the *Corporations Act 2001* (Cth) were introduced through the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) as a partial response to the first of these two waves of reform, but Australia has made no further reforms e.g. equivalent to the *Dodd-Frank* reforms.

In addition, the Committee will be aware that the previous Government commenced a review of Part 9.4AAA which was never completed. A range of issues were raised publicly by the Attorney-General’s Department and Treasury in their discussion paper, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, October 2009. No final report or opinion from the departmental review team has ever been released.

The Committee should seek the advice of that review team on its findings, for that effort not to be wasted. All those issues still need to be addressed – including a number of issues which will not be addressed here, such as clarity on whether prospective whistleblowers should be protected for seeking legal or other professional advice, and the criteria that should guide courts or others in decisions to order the production of documents which could reveal a whistleblower’s identity.

From a broad public policy perspective, however, there are at least nine important issues that need to be addressed if these provisions are to be effective, as follows. Only two of these are addressed in ASIC’s primary submission.

1) **Definition of whistleblower**

ASIC recommends extending the current definition of a ‘whistleblower’ in Pt 9.4AAA of the Corporations Act to include ‘a company’s former employees, financial services providers, accountants and auditors, unpaid workers and business partners.’ This was an issue identified in the unfinished AGD/Treasury review.

This recommendation should be taken up the Committee. It would be better if independent financial services providers were covered by equivalent but separate provisions relating to the reporting duties of financial service providers, rather than treating them as if they are whistleblowers. However this change should nevertheless be made.

2) **Protection of anonymous disclosures**

ASIC notes this issue, which was also highlighted by the unfinished AGD/Treasury review, but makes no suggestion on how it should be resolved. It is now standard in Australian public sector whistleblowing legislation, and international principles, that disclosures made anonymously should also attract the legal protections – as an important means of encouraging disclosures. This stands in contrast to Part 9.4AAA which deters disclosures by making it clear that a whistleblower is only protected if they identify themselves (equivalent to a message that people should only disclose if prepared to paint a target on themselves).

The protection of anonymous disclosures does not raise practical difficulties, since the protections and other obligations are only triggered if or when the identity of the whistleblower is subsequently revealed, and confirmed to be within the statutory definition above. The Committee should recommend amendment to extend the protections to all disclosures by such persons, irrespective of whether they initially identify themselves.

3) **‘Good faith’ requirement**

This issue was also highlighted by the unfinished AGD/ Treasury review. This threshold requirement is out of date and inconsistent with the approach taken by Australia’s public sector whistleblowing legislation, as well as best practice legislative approaches elsewhere. In particular, the relevant whistleblowing provisions of the UK *Employment Relations Act 1996*, which were inserted in 1998 with a ‘good faith’ requirement, were amended in 2013 to remove this requirement. Instead, the issue of ‘good faith’ is reduced to a consideration when the quantum of damages for compensation for a whistleblower is considered (i.e. if an employer can show ‘bad faith’, then the damages may be reduced by up to 25 per cent: see sections 49(6A) and 123(6A), *ERA 1996*).

For several reasons, ‘good faith’ is not a useful concept to appear at all in whistleblowing legislation. Motives are notoriously difficult to identify and may well change in the process of reporting, for example, when an internal disclosure is ignored or results in the worker suffering reprisals. Because it is such a subjective and open-ended requirement, the likely effect of a good faith test is negative — that workers simply choose not to report their suspicions about wrongdoing, because they are unsure whether or how this test would be applied to their circumstances.

The proper tests are simply whether the disclosure is based on an honest belief, on reasonable grounds, that the information shows or tends to show defined wrongdoing; or does show or tend to show such wrongdoing, on an objective test, irrespective of what the discloser believes it to show. This is the approach taken by best practice legislation including the *Public Interest Disclosure Act 2013* (Cth). The Committee should recommend the same approach be instituted in Part 9.4AAA, by deleting paragraph 1317AA(1)(e).

4) **Clearer definition of applicable wrongdoing**

ASIC recommends extending the protections in Pt 9.4AAA to information indicating a contravention of any legislation that ASIC can investigate, including breaches of relevant Commonwealth and state criminal law (such as fraud and theft), rather than simply the corporations legislation. This issue was also raised by the unfinished AGD/Treasury review.

ASIC's recommendation should be taken up. However the Committee should recommend extension and clarification of the definitions in a way that will make the provisions achieve their purpose (encouragement and protection of reporting), rather than simply align with ASIC's investigative jurisdiction. While that makes sense, the limited utility of the provisions to date is owed in part to the vague meaning of a 'contravention of the corporations legislation'. Extending this to include breaches of relevant criminal law may assist, but fundamentally will still not help resolve this vagueness:

- Will it be any clearer as to whether a disclosure will attract the protections if it is about major irresponsible, negligent or damaging conduct which amounts to a breach of general directors' duties – as against conduct constituting clear but technical and minor breaches of corporate reporting or disclosure requirements?
- Will it be clear as to which types of 'other' criminal breaches, if reported, would attract the disclosure protections? For example, would financial and corporate crimes other than simply theft and fraud be reportable? For example: a breach of Commonwealth foreign bribery offences, especially given that these would normally be investigated primarily by the Australian Federal Police rather than ASIC? Would it not serve the purposes of corporate regulation better, if the reporting of *any* offences attracted the protections – not just some, and potentially not even the most serious ones?
- Will the scope of issues be readily intelligible to employees, officers and other workers? E.g. will a discloser need to continue to first seek legal advice as to which types of offences or wrongdoing may be covered, before being able to be confident as to whether or not their disclosure is protected? How credible will the scheme ever become if it is only clear breaches of financial, disclosure and corporate regulation that attract reporting protections, and not other serious wrongdoing that falls outside 'white collar' crime (e.g. negligence on the part of a company's managers or directors causing major risks to public health and safety or the environment)?

The Committee should recommend that the scope of applicable wrongdoing be broadened, clarified and made more intelligible. However this needs to be done in the context of a clear overall policy direction for how whistleblower protection should feature in Commonwealth regulation (see **Part B** below).

5) **Requirements &/or incentives to institute internal whistleblower protection systems**

The current provisions are not 'business friendly', in that they do little to help guide businesses in how to maximise whistleblowing to their own advantage.

The unfinished AGD/Treasury review identified the important issue that the current provisions do nothing *directly* to require or incentivise businesses to support and protect whistleblowers wherever possible. Consistently with *Sarbanes-Oxley*, they provide indirect incentives for businesses to set up internal disclosure channels (i.e. so that they are listening for whistleblowers and act on their concerns). However they do little more to encourage timely internal whistleblowing because there are no direct, positive protection requirements or incentives – only indirect, negative ones (liability for reprisals if damage is done to the whistleblower, which is necessary but only triggered if damage is done).

The question of what provisions would best support business-friendly approaches reinforces the questions above, and at Part B below.

For example: in respect of **defined wrongdoing** (above), organisations should also be able to define for themselves the types of wrongdoing that they wish to encourage employees to report, and for which they will guarantee protection, in addition to those specified by the legislation. It again makes no sense for a business to be wasting resources, trying to comply with Part 9.4AAA requirements in respect of technical breaches of corporations law, but cannot guarantee to its staff that equivalent legal protections will apply in respect of major substantive types of wrongdoing risk, relevant to its own business, which it *wishes* or *obliges* its staff to report. In the public sector, protections can be triggered if what is reported is a breach of an applicable code of conduct or similar, in the organisation (in addition to statutorily-defined wrongdoing) (see *Public Interest Disclosure Act 2013* (Cth)). There is no reason why a similar approach could not be taken in the corporate sector.

When it comes to **protecting** whistleblowers, regulation should proceed on the basis that there are *often* situations in which management or the Board can support and protect whistleblowers – even though there are also many where this will require regulator intervention, or where detriment suffered will only be able to be addressed by compensation. The aim of regulation should be to maximise the amount of whistleblowing cases that fall into the first category, to minimise those falling into the second and third categories.

As in the public sector, in the private sector many businesses do already have ‘internal disclosure procedures’ which attempt to meet the Australian Standard (AS 8004-2003), *Whistleblower Protection Programs for Entities*. The proportion, type and strengths and weaknesses of these procedures are under-researched and thus relatively unknown (see Part D) – but there remains good reason to support this approach.

The main challenge for prescribing whistleblowing protection procedures is the potential inflexibility and regulatory burden, especially on small and medium enterprises. Any positive requirements for such procedures may also be best located in workplace relations and health and safety laws, rather than corporations law (see below and Part B). Nevertheless, Part 9.4AAA should at least incentivise businesses to adopt whistleblower protection strategies by offering defences or partial relief from liability, for itself or its managers, if the business can show (a) it had whistleblower protection procedures of this kind, (b) that the procedures were reasonable for its circumstances, and (c) that they were followed (i.e. that the organisation made its best efforts to prevent or limit detriment befalling the whistleblower). This type of approach is used in other areas of white collar crime mitigation, e.g. sentencing guidelines. The Committee should so recommend.

6) **Clear and effective compensation provisions**

Enforceability of the current provisions rests largely on the right to compensation for damage caused by deliberate victimisation, or threats of victimisation, given by s.1317AD.

This right is so limited and vague, by relative standards, that it is not surprising that there is little empirical evidence of it having any utility or impact. The only case of which I am aware is the action commenced and settled by Mr Brian Hood, former company secretary of Note Printing Australia (NPA) Limited, in November 2012. Mr Hood’s employment was terminated by NPA after he made internal disclosures of suspected foreign bribery offences by the company and its executives, to which the company subsequently pleaded guilty. The terms of the settlement are unknown due to the confidentiality clause in the deed of settlement, but evidence relating to this case has been in the public domain and previously been taken by the Parliamentary Joint Committee on ACLEI and other committees.

The compensation provision is sub-standard in a number of key respects:

- It is unclear to which forum(s) an application for compensation can be made and the rules that would apply;
- There is no guidance as to potential relief from costs risks, which is inconsistent with the public interest purpose of the protections, and a likely barrier to many or any applications being made in deserving cases (contrast s. 18, *Public Interest Disclosure Act 2013* (Cth));
- Liability is only triggered if there was a direct intention to cause detriment in reprisal for a disclosure (par 1317AC(1)(c)), which is a standard more suitable for a criminal offence than civil liability. Civil rights to compensation should be triggered by breach and damage arising from any failure to fulfil a duty (a) not to cause detriment, whether deliberately or negligently, or (b) to take action to prevent or limit detriment.
- There is insufficient clarity as to vicarious liability, such as now provided for clearly in public sector legislation (sub-section 1317AC(3) provides for individual managerial liability where corporate liability is found, but no guidance on corporate liability where individual managerial liability is found).
- Vagueness as to the burden of proof (meaning of ‘because’: par 1317AC(1)(d)).
- Lack of clarity that all actions brought and settlements reached under Part 9.4AAA must be reported to ASIC (or another equivalent regulator), notwithstanding any confidentiality clauses entered into, so that the effectiveness of the provisions can be monitored, consistently with their public interest purpose.

In addition, the Committee should note that the *Public Interest Disclosure Act 2013* (Cth), ss.22 and 22A, makes clear that wider remedies for detrimental action for making a public interest disclosure, taken against many private sector employees, are also now available under both that Act and the protection provisions of the *Fair Work Act 2009* (Cth):

- The definition of ‘public official’ to whom these *Public Interest Disclosure Act* and *Fair Work Act* remedies are available includes any ‘individual who: (a) is an officer or employee of a contracted service provider for a Commonwealth contract; and (b) provides services for the purposes (whether direct or indirect) of the Commonwealth contract’ (*Public Interest Disclosure Act 2013* (Cth), s.69(1), Table, Item 16);
- In other words, any employee of any business that contracts with the Commonwealth to provide a service, and who is engaged in that service, has these remedial avenues;
- Moreover, the types of wrongdoing by other employees or by the business, in respect of which such a whistleblower may seek protection, are far more comprehensive than Part 9.4AAA (see *Public Interest Disclosure Act 2013* (Cth), s.29(1), Table). The only limitation is that the wrongdoing must also have occurred ‘in connection with entering into, or giving effect to’ the Commonwealth contract (ss. 29(1)(c); 30).

These protections thus now create a substantial area of overlap with Part 9.4AAA. They reinforce the need for a clear and consistent approach (see Part B). In the meantime, the Committee should recommend that the compensation entitlements and avenues in Part 9.4AAA be reviewed and amended so as to be made consistent with both international best practice, and the new *Public Interest Disclosure Act 2013* (Cth), including by similarly making *Fair Work Act* remedies available to all employees who report disclosable wrongdoing under Part 9.4AAA. This should occur through clarifying amendments to the *Fair Work Act* itself, in addition to the *PID* and *Corporations Acts*.

7) Criminal offence of reprisal

As noted above, the entitlement to compensation for victimisation arises in circumstances of deliberately intended detriment. However, there is no criminal consequence for such deliberate reprisal or threats of reprisal. Such a criminal offence is now standard in Australian public sector whistleblowing legislation.

The Committee should recommend that a criminal offence of victimisation be created, consistently with other legislation. However, to avoid problems experienced with Australian public sector legislation, the Committee should recommend that this criminal offence (with its requirement for deliberate intention to harm or threaten harm) be clearly distinguishable from the wider range of conduct that can attract civil liability (as discussed above, this should include detriment caused unintentionally but negligently, in breach of any relevant duty i.e. not merely to refrain from detrimental action, but also to provide protection).

8) Disclosure to third parties / media

Currently under Part 9.4AAA, protections do not extend to corporate whistleblowers who take their disclosure to third parties or the media – even in circumstances that are widely regarded as acceptable, for example:

- Where the wrongdoing has already been disclosed internally in the organisation and/or to appropriate regulatory agency, and not been acted on in a reasonable time having regard to the nature of the matter; or
- Where circumstances exist such as to make prior disclosure, internally or to a regulatory agency, either impossible or unreasonable (for example, where there is an unacceptable risk of reprisal, or in circumstances involving serious and immediate threat to public health or safety).

This is a major gap. Extension of protections to these circumstances is now widely regarded as necessary for whistleblowing provisions to be effective. If nothing else, this is because such protection creates a powerful incentive for companies to recognise and respond to whistleblowing more effectively in order to prevent the need for reputational damage in the public domain. (See for example, the view of Bob Ansell, controls and compliance manager for Philip Morris Limited, that such protection makes ‘a compelling case’ for organisations to develop effective whistleblowing policies; ‘I would much rather people speak to me than a newspaper or *Today Tonight*’: as quoted in L. Mezrani, ‘Cash rewards for whistleblowers cause concern’, *Lawyers Weekly*, 2 May 2013 <<http://www.lawyersweekly.com.au/>>).

Protection of disclosures to the media is a feature of reformed Australian public sector whistleblowing legislation, including in NSW, Queensland, Western Australia, and the Commonwealth under the new *Public Interest Disclosure Act 2013* (Cth). According to the House of Representatives Standing Committee on Legal and Constitutional Affairs (2009: 162-4), protection of disclosures to the media is needed as ‘an important check on procedure’ and a ‘safety valve’; ‘any public interest disclosure scheme that does not provide a means for such matters to be brought to light will lack credibility’.

In the UK, under the *Employment Rights Act 1996* (UK) as amended by the *Public Interest Disclosure Act 1998* (UK), protection has been available since 1998 for private sector whistleblowers who have reasonable grounds for making a further disclosure beyond their employer and regulatory agencies, including to the media. Such protection is also supported by Transparency International’s recently released principles for best practice whistleblowing legislation (see Worth, M. 2013, *Whistleblowing in Europe: Legal Protections for Whistleblower in the EU*, Transparency International, Berlin).

Part 9.4AAA of the *Corporations Act* and like corporate whistleblowing protections will continue to lack credibility until they also deal with the circumstances in which further disclosure to the media or other third parties is justified.

9) *Qui tam* or reward-based disclosure incentives

Recent corporate law disclosure reforms elsewhere (e.g. the US *Dodd-Frank* reforms) have extended the use of reward-based incentives for disclosure of corporate wrongdoing, leading to either the recovery of fraud or the imposition of pecuniary penalties, through awarding the whistleblower a percentage of the amount recovered or penalty imposed. These reforms have been at the heart of a significant expansion of attention on whistleblowing by the United States Securities and Exchange Commission (SEC).

In the US, this comes on top of a longer history of success in enlisting whistleblowers to uncover and halt fraud upon the public sector, by entitling them to pursue the recovery and receive a percentage of the recovered funds under the *False Claims Act* (see Dworkin, T.M. and A.J. Brown (2013), ‘The Money or The Media? Lessons from Contrasting Developments in U.S. and Australian Whistleblowing Laws’, *Seattle Journal of Social Justice*, 11(2): 653–713).

Such provisions should also be considered if Australian corporate whistleblowing provisions are to approach best practice. The Committee should endorse their inclusion and recommend their further investigation. However, given this is another issue that also cuts across other regulation (**Part B**), it is another issue that dictates that these provisions should not be restricted to fraud or penalties only in ASIC’s jurisdiction.

B. What should be the Commonwealth’s overall regulatory approach?

As identified in the previous section, on many of the issues relevant to making Part 9.4AAA of the *Corporations Act* and ASIC’s role more effective, the Commonwealth should not be treating corporate whistleblower protection in respect of breaches of corporations law, as if it is separate from private sector regulation and whistleblower protection in other areas – e.g. practices contrary to law or regulation in the areas of:

- General Commonwealth law enforcement (including criminal offences);
- Commonwealth prudential regulation;
- Commonwealth trade practices and competition law;
- Commonwealth consumer protection law; and
- Commonwealth environmental law.

A comprehensive approach to corporate and private sector whistleblower protection, alongside public sector whistleblower protection, has been recommended since at least the time of the Senate Select Committee on Public Interest Whistleblowing (1994). Today, the state of corporate whistleblowing rules means that, notwithstanding the enactment of Part 9.4AAA, this area of regulation remains a relatively “greenfield” site. This is because Part 9.4AAA is limited and has, as yet, had little impact or implementation; and only two states have legislated in any respect, and then only partially and in different ways, to provide whistleblower protection to private sector employees (South Australia and Queensland).

Given that the Commonwealth retains this opportunity to determine the overall regulatory approach that should be taken, it faces three broad options:

- 1) ***Status quo*** – A situation where even if whistleblower protection is improved with respect to *Corporations Act* enforcement, it remains patchy or missing in other areas of regulation, with the states also left to legislate differentially (or not at all) in respect of private sector whistleblowing;
- 2) ***Separate whistleblowing provisions in different areas of regulation*** – A situation akin to the United States, where corporate whistleblower protection rights are to be found in each separate piece of regulatory legislation – often similarly but also with variations. On last count, these rights were to be found in no less than **47** different US federal laws, including 12 new laws since 2000 (not including federal and state public sector whistleblower protection laws) (see Devine, T. and T. Massarani, 2011, *The Corporate Whistleblower's Survival Guide*, San Francisco: Berrett-Koehler, p.151);
- 3) ***A comprehensive approach*** – In which improved protections of the type provided by Part 9.4AAA are simply expanded to also cover a more comprehensive spectrum of corporate wrongdoing and relevant regulators; and the requirements imposed on business, and the protections afforded to employees and others, are kept consistent across the spectrum of business regulation – including by further embedding some of these protections in the *Fair Work Act* regime, applying equally to all employers (akin to the UK).

The Committee should determine its recommendations with respect to ASIC's role and Part 9.4AAA, having formed a view as to which of these paths the Commonwealth should follow. Failure to do so means a default to either of the first two options, when for reasons flagged earlier, either is substandard:

- If whistleblower protection is fragmented only to certain types of wrongdoing, but not others, it becomes more technical, less relevant to those whose behaviour it is meant to influence, and more difficult to implement and communicate within organisations;
- There is limited public interest in Commonwealth regulation which offers protections in respect of some types of reporting to one regulator, but leaves unprotected company officers who report more serious types of wrongdoing to a different regulator;
- Separate regulation dealing with different areas of activity corporate regulation in isolation, is a recipe for inconsistency, given that whistleblower protection requirements imposed under one piece of Commonwealth legislation will more easily fall out of alignment with similar or related protections under other legislation.

As pressure builds for more effective whistleblower protection in the corporate sector, failure to take a comprehensive approach may result in a proliferation of separate whistleblowing requirements on business in different areas of regulation, leading to heightened complexities, confusion and cost for Australian businesses and regulators alike. This is likely to include different state legislation, in addition to federal provisions, since gaps and inconsistencies are also likely to result in pressure on state governments to compensate.

In addition to the issues raised above, there is special reason for the Commonwealth to take a comprehensive approach, and one consistent with that reflected in the *Public Interest Disclosure Act 2013* (Cth). As noted earlier, this is because the definitions of 'public official' whose disclosures are protected under the Act (s.69), and of 'agency' whose wrongdoing may be disclosed triggering the protections (s.29), now include a wide cross-section of private sector employees and employers, engaged in 'entering into, or giving effect to' a Commonwealth contract. The protections available under the *Public Interest Disclosure Act 2013* (Cth), including by way of rights of complaint to the Fair Work Ombudsman and Fair Work Australia, thus now create a substantial area of overlap with Part 9.4AAA and with any other prospective areas of Commonwealth corporate whistleblower protection.

If the *Corporations Act* provisions and ASIC's role are to be made effective, the Commonwealth needs to address whistleblowing across all its major fields of regulation in a coherent and streamlined way. For these reasons, the Committee needs to put its recommendations about ASIC's role and reform to Part 9.4AAA in the context of clear advice to the Parliament and Government on how to progress the role of whistleblowing in Commonwealth regulation as a whole, as well as regulation of business by the States.

The most logical path in the near-term, is the removal of an improved battery of Part 9.4AAA provisions from the *Corporations Act*, and their inclusion in new stand-alone legislation, complementing and consistent with the *Public Interest Disclosure Act 2013* (Cth), which would:

- Articulate the common rules of whistleblower protection applying to employees, workers and other organisational insiders across the above fields of Commonwealth regulation (that is, across a comprehensive definition of applicable wrongdoing);
- Ensure that further amendments to the *Fair Work Act* regime, in support of fair and equitable resolution of whistleblowing matters, support this regulation in a simple, streamlined way that is readily intelligible to all employers;
- Establish common base requirements and incentives for all organisations in the business and civil society sectors – including but not limited to corporations – regarding their own approach to recognising and supporting whistleblowers;
- Identify all the major regulatory agencies with responsibility for receiving and acting on whistleblower disclosures;
- Identify or create the particular regulatory agencies with responsibility for enforcing the whistleblower protection element of the scheme (see Part C below); and
- Be supported by consequential amendments to the enabling legislation of all the relevant regulators, rather than being replicated in substance in all that regulation.

C. ASIC's role

ASIC's performance with respect to whistleblowing needs to be considered in light of the fact that Part 9.4AAA does not actually impose any specific whistleblower protection role on ASIC. As ASIC's main submission states (par 494):

The whistleblower protections in Pt 9.4AAA operate to protect and provide remedies for whistleblowers against third parties rather than mandating any particular conduct of ASIC. These protections do not deal with how ASIC is to treat whistleblowers....

Where ASIC has embarked on improvements in its policies and procedures, and recommended reform, these relate primarily to ASIC's primary functions of being able to competently receive and investigate information regarding breaches of corporate regulation – including effectively manage its sources and witnesses. This is a welcome first step, since if not even ASIC is making an effort to encourage and respond effectively to the particular needs of whistleblowers as strategic information sources, it seems unrealistic to expect companies or others to do so.

However, ASIC's submission lays bare the reality that in addition to the issues listed above at Part A, Part 9.4AAA is defective in failing to set out the responsibilities of any agency – whether ASIC or anyone else – to ensure the provisions are implemented. Duties requiring clearer statutory support include responsibilities to:

- 1) **Investigate and remedy alleged reprisals** against whistleblowers, irrespective of whether the primary alleged wrongdoing is being investigated (or the outcome of the investigation).

This distinction is relevant because as it stands, anecdotal evidence indicates that ASIC does not consider itself to have this role. Consistently with its submission, it appears that if ASIC determines that a matter does not warrant its investigation (for whatever reason), it is currently showing little interest in following-up on the separate issue of whether the whistleblower suffered reprisals for the disclosure, even when the disclosure was honest and reasonable, or has led to other action in which ASIC is not involved.

- 2) **Determine rewards to whistleblowers**, or play a part in their determination, where a *qui tam* or other reward system operates (a new role of the US SEC).
- 3) **Set standards** for companies, businesses and organisations regarding their own practices and procedures for facilitating, acting on and supporting whistleblowing;
- 4) Support or undertake **training and capacity building**;
- 5) **Monitor and report on compliance** by businesses with their whistleblower protection responsibilities, as part of regular reporting on overall implementation of the Act.

The nature of these duties, and their overall goal of seeing whistleblowing embedded in the management systems of organisations, means that they do not automatically or naturally fall to any one particular regulatory agency. Moreover these functions need to be appropriately resourced. In the US, most of the 47 federal laws requiring the protection of private sector whistleblowers give the first of these responsibilities to the Occupational Safety and Health Administration (OSHA) in the U.S. Department of Labor. However it is a point of debate that OSHA's Office of Whistleblower Protection has had no increase in resources despite the passage of 12 new laws providing coverage to some 65 million additional workers, since 2001.

Similar questions in Australia's public sectors have seen a particular oversight agency given clearer statutory responsibility with respect to the last three of the above roles, and stronger implied responsibility for the first one. Most often this is now the Ombudsman (Commonwealth, NSW, Queensland, Tasmania); although it does vary (in Victoria, it is the Independent Broad-based Anti-Corruption Commission; in WA, the Public Sector Commission).

In addition, once accessible avenues for remedies are established, a range of other bodies also have responsibilities for making sure these work: e.g. at Commonwealth level, the Fair Work Ombudsman and Fair Work Australia; and in three states (SA, WA and Queensland), the Equal Opportunity Tribunal which has jurisdiction to hear whistleblower victimization complaints.

The Committee's view on what ASIC's roles should be, needs to again be informed by its view of where ASIC and its jurisdiction sits within corporate and private sector whistleblowing as a whole (Part B above). This is especially because the Commonwealth should not be legislating to impose multiple different types of responsibility on companies or businesses with respect to whistleblower protection, in different areas of regulation, in ways that are then monitored and enforced in different ways by different regulators.

These issues mitigate in favour of a single agency (either a lead regulator such as ASIC or the Australian Competition & Consumer Commission, or the Fair Work Ombudsman or similar) being tasked with most or all of the above duties. However, to ensure an integrated and coordinated approach, and streamline the guidance and assistance given to business, the relevant office should be set up within the agency so as to have a mandate and capacity to serve all regulators and the special needs of whistleblower protection, rather than simply its own conventional jurisdiction. The Committee should so recommend.

However, as long as whistleblower protection provisions remain in Part 9.4AAA, the Committee should recommend that the *Corporations Act* and/or *ASIC Act* make explicit what ASIC's roles

and responsibilities for whistleblower protection are meant to be; and also recommend that resources be allocated which are commensurate with these roles.

In the absence of any other plan, ASIC should at least be given an explicit responsibility to receive, investigate and help resolve complaints of whistleblower victimization or reprisal arising from matters within Part 9.4AAA, irrespective of whether or how the matter has been investigated – if the disclosure otherwise fits the Part 9.4AAA requirements.

D. Research and evaluation

As outlined at the outset, comprehensive empirical research into whistleblowing in the Australian public sector helped inform the design of more effective whistleblowing policies and procedures for public agencies. Updated research can also now assist oversight agencies with monitoring the implementation of those policies.

In Australia and internationally, there is a lack of equivalent knowledge regarding the incidence and most effective options for managing whistleblowing in the private sector. This is despite awareness that whistleblowing is a crucial tool of modern corporate governance, widespread investment in whistleblowing hotlines, and indications from a wide range of companies and service providers that they would see benefit in such research.

Internationally, there is also little if any systematic, large-scale empirical research comparing organisational experience between the public and private sectors. This gap cries out to be filled, since many of the practical issues raised by whistleblowing relate to challenges of human resource management and organisational justice which transcend the sectors. Indeed with legal responses increasingly spanning the sectors, there is enormous value in studying which approaches will better serve corporate governance needs in different types of organisations, including which lessons do and don't translate between sectors.

The Committee's report should note these knowledge gaps, and the importance of filling them if the next major steps in legislating for whistleblower protection are to be similarly evidence-based and 'fit for purpose'. Such research is the primary way of ensuring that regulation works to support best-practice business conduct, rather than simply becoming a clumsy encumbrance for regulators and business. Accordingly, the Committee should recommend that the Commonwealth, via ASIC and other regulators, sponsor this much-needed research on a collaborative basis, as an input to higher quality regulatory reform.

I trust these submissions will assist the Committee.

Yours sincerely

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