Chapter 11
Reward system

Introduction

11.1 The committee considered whether reward and bounty systems such as those used in the United States (US), Canada and parts of Europe, would be appropriate for Australia. As noted in the previous chapter, the committee deliberately separated its consideration of reward and bounty systems from compensation because the committee considers that the nature and amount of compensation should be determined by the detriment suffered by the whistleblower.

11.2 This chapter begins with a brief overview of reward and bounty systems that exist in other countries. This is followed by a summary of the arguments put to the committee about the possible introduction of a reward or bounty system in Australia.

11.3 Professor A J Brown encouraged the committee to consider the advantages and disadvantages of bounty systems as part of the overall approach to whistleblowing:

> Certainly the common ground should be that we need to look at more serious remedies, in general, for compensation, for damage done, or for the risk of damage, for detrimental action. But I think it would be good if the committee seriously considers and has a look at what role bounty-type arrangements might play, not necessarily as a straight copy of the US arrangements, and the reasons for not creating perverse incentives and artificial legal services markets—that is, creating a whistleblowing industry. We have to look seriously at what is perverse and what is attractive out of those sorts of options.[1]

11.4 However, the key aspect for Professor Brown was working out a means to recognise the high value of the information that a whistleblower might be able to provide:

> To my mind, the issue is not really whether we go down the road of bounties or rewards for individual whistleblowers but how we recognise that whistleblowers provide information of incredibly high value. That value then manifests very often in the recovery of fraud lost and in the imposition of justifiable penalties for wrongdoing of a whole variety of kinds.[2]

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1 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 31.

2 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 31.

Bounty systems in other jurisdictions

11.5 The following sections provide a brief outline of several jurisdictions, some of which, such as the US, have implemented bounty systems and some of which, such as the United Kingdom (UK), have decided against them.

United States

11.6 The US has whistleblower bounty programs that incentivize reporting of securities, commodities, and tax violations, and fraud against the government. The whistleblower program for securities is operated by the United States Securities and Exchange Commission (US-SEC), the corporate regulator which, in general terms, performs a similar role to ASIC. The US-SEC Whistleblower Program (also called the Dodd-Frank Whistleblower Program) was founded on three core principles:

- the ability to report anonymously;
- enhanced employment protections; and
- the potential to receive monetary rewards.[3]

11.7 Section 21F of the US *Securities Exchange Act 1934*, as amended by the US *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, directs the US-SEC to make monetary awards to whistleblowers who provide information that leads to successful US-SEC enforcement actions with monetary sanctions over $1 million. Awards are required to be made in an amount equal to 10 per cent to 30 per cent of the monetary sanctions. To ensure that whistleblower payments would not diminish the amount of recovery for victims of securities law violations, Congress established a separate fund, called the Investor Protection Fund, out of which eligible whistleblowers are paid.[4]

11.8 Since the Dodd-Frank Whistleblower Program's first full year in 2012, the US-SEC has awarded more than US $111 million to 34 whistleblowers whose information assisted in bringing successful enforcement actions. Those enforcement actions included US $584 million in financial sanctions, including disgorgement of US $346 million of ill-gotten gains and interest.[5]

11.9 Other US whistleblower programs with bounty systems include:

- the US Commodity Futures Trading Commission (CFTC);[6]
- the US Internal Revenue Service (IRS);[7]

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3 Mr Jordan Thomas, *Submission 70*, pp. 3–4.

4 US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 4.

5 US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 10.

6 US Commodity Futures Trading Commission, Whistleblower program, https://www.whistleblower.gov/ (accessed 15 May 2017).

- the US Department of Justice under the US False Claims Act.[8]

11.10 Mr Jordan Thomas explained to the committee how the two different types of bounty systems work in the United States. One system involves a person actively filing a case on behalf of the government:

> One is a regime based upon the False Claims Act—sometimes called the 'qui tam' laws. People file a case under seal. Then the government joins or does not join, but the person is acting in the place of the government. And that has existed since the time of Abraham Lincoln. It is particularly strong where the government has weaker resources or where there is so much misconduct in this area that the government would benefit by having the additional support that exists in private bar.[9]

11.11 The other system typically involves the whistleblower providing a tip-off to the relevant regulator:

> The other regime is typified by the SEC, the CFTC and IRS programs where a whistleblower is, essentially, what we call a '911 caller'. They are, essentially, providing a tip. They are providing supporting information, but only the agency has the discretion to investigate and prosecute the case.[10]

United Kingdom

11.12 This section sets out some of the reasoning put forward by financial regulators in the UK regarding decisions not to introduce a bounty system for whistleblowers.

11.13 In 2013, the UK Department for Business, Innovation and Skills ran a consultation process on a UK whistleblower framework, including financial incentives for whistleblowers.[11] The government response indicated that the government did not believe that incentives should be introduced.[12] Associated with that process, in July 2014, the UK Financial Conduct Authority (FCA) and Bank of England Prudential Regulation Authority (PRA) informed the UK Treasury Select Committee that:

(a) Incentives in the US benefit only the small number of whistleblowers whose information leads directly to successful enforcement action

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7 US Internal Revenue Service, *Whistleblower – informant award*, https://www.irs.gov/uac/whistleblower-informant-award (accessed 15 May 2017).

8 US Department of Justice, *Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Years 2016*, https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 (accessed 15 May 2017).

9 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

10 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

11 UK Department for Business Innovation & Skills, *The whistleblowing framework call for evidence*, July 2013, p. 16.

12 UK Department for Business Innovation & Skills, *Government Response to The whistleblowing framework call for evidence*, June 2014, p. 20.

resulting in the imposition of fines. They provide nothing for the vast majority of whistleblowers.

(b) There is as yet no empirical evidence of incentives leading to an increase in the number or quality of disclosures received by the regulators.

(c) Introducing incentives has been accompanied by a complex, and therefore costly, governance structure.

(d) The incentives system has also generated significant legal fees for both whistleblowers and firms, although many whistleblowers are represented on a contingency basis (no award, no fee).

(e) Incentives offered by regulators could undermine the introduction and maintenance by firms of effective internal whistleblowing mechanisms.[13]

11.14 The FCA and PRA also noted that bounty systems may create the following moral or other hazards:

- malicious reporting or entrapment;
- the whistleblower's conflict of interests potentially weakening prosecution cases in court;
- inconsistency with the regulators' expectations of firms;
- the need for qualification criteria; and
- perceptions of large rewards for undertaking a public duty.[14]

Other bounty systems

11.15 In mid-2016, the Ontario Securities Commission launched its Office of the Whistleblower and its Whistleblower Program policy, which includes a bounty system. Whistleblowers who report information that leads to monetary sanctions of $1 million or more may be eligible for a financial award of up to $5 million.[15] Dr Sulette Lombard, Academic, Flinders Law School, informed the committee that the bounty system differs significantly from the US system, firstly, because it is capped, and secondly, because it is restricted to whistleblowing in respect of securities offences, and is therefore narrowly focussed.[16]

11.16 In South Korea, whistleblowers who contribute directly to increasing or recovering government revenues can receive between four and 20 per cent of these

13 UK Financial Conduct Authority and the Prudential Regulation Authority, *Financial incentives for whistleblowers*, July 2014, pp. 2, 3.

14 UK Financial Conduct Authority and the Prudential Regulation Authority, *Financial incentives for whistleblowers*, July 2014, p. 3.

15 Ontario Securities Commission, OSC policy 15-601, *Whistleblower Program*, July 2016, pp. 1, 11.

16 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

funds, with an upper limit of US $2 million. Whistleblowers who serve the public interest or institutional improvement can receive up to US $100,000:

> As of May 2014 the largest reward paid was US $400,000 from a case in which a construction company was paid US $5.4 million for sewage pipelines that it did not build. Eleven people faced imprisonment and fines, and the US $5.4 million was recovered.[17]

11.17 Some limited reward systems have either been proposed or implemented in some European jurisdictions. For example, in Italy, a commission for the prevention of corruption established around 2012 made recommendations including issuing rewards in return for useful disclosures.[18] In 2003, the Lithuanian government passed a resolution to reward people for exposing financial crimes.[19] In Hungary anti-trust law qualifies whistleblowers for up to 1 per cent of the fine collected from the employer capped at around €160,000.[20]

Arguments for a reward system in Australia

11.18 This section summarises arguments that were put to the committee in support of a bounty system for whistleblowers in Australia.

11.19 Dr Vivienne Brand and Dr Lombard argued in favour of a reward based system, indicating to the committee that bounties could be a game changer in the Australian corporate sector:

> …any reform the committee considers ought to take into account the potential for some form of financial incentive, reward or compensation—a spectrum of those sorts of options—to really shift the level of whistleblowing activity.[21]

> …we are strong proponents of financial rewards for whistleblowing, recognising that that is just part of a bigger picture and that it will not be the answer to all the issues that have been addressed, but that a holistic view is important.[22]

11.20 Mr Jordan Thomas argued in favour of a bounty system suggesting that it can be relatively low risk and low cost for the government because the government only

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17 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 54.

18 Transparency International, *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU*, 2013, p. 55.

19 Transparency International, *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU*, 2013, p. 59.

20 Department for Business Innovation & Skills, *The whistleblowing framework call for evidence*, July 2013, p. 16.

21 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

22 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

pays a reward if the enforcement action is successful. Mr Thomas noted that before the whistleblower program regulators had to build a number of cases from the ground up, whereas now regulators are able to be much more targeted and efficient in looking at potential wrongdoing.[23] Mr Thomas also set out areas in which the US programs had been successful:

> …the American experience tells us that governments offering incentives for corporate whistleblowers to report misconduct really does work. First, surveys show that more than 80% employees, continue to report internally first —an important sign of a healthy corporate environment. Second, after the establishment of the SEC Whistleblower Program, many companies invested more time and resources in strengthening their internal reporting and compliance programs to encourage their employees to report internally, rather than externally. Third, attorneys, accountants, compliance professionals and other gatekeepers have reported being empowered because they now can argue that failure to do the right thing or invest more in their compliance and integrity programs will result in external reporting. Fourth, more organizations are self-reporting to law enforcement and regulatory organizations because the probability of detection associated with external reporting incentives is much higher than ever before. Finally, the success of American whistleblower programs has had a positive deterrent impact by discouraging potential wrongdoers from engaging in wrongdoing.[24]

11.21 Mr Thomas set out further arguments for a whistleblowing reward system:

> • Employees owe a duty to employers, but have many other important duties including to their company's shareholders and fellow citizens.
>
> • The public compensating whistleblowers does not create corrupt companies, but allowing wrongdoers to get away with crimes because knowledgeable employees and culpable corporations remain silent surely does.
>
> • Australia's primary focus should be on the real harm caused to real people through corporate wrong doing.
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> • Whistleblowing works: it ferrets out crime, leads to reform of corrupt corporate cultures, and protects innocent victims from corporate harm.
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> • The option of whistleblowing to the government can and does promote more robust internal corporate compliance and speak up programs.
>
> • Establishing impossibly subjective eligibility standards will ensure that corporate whistleblowers remain silent.

23 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 6.

24 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017), pp. 9–10.

> • Since whistleblowers often pay a heavy price for speaking up, Australia should compensate these courageous individuals for the hardships they experience.[25]

11.22 Both Mr Thomas and Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers noted that in Australia there are precedents for non-rewards based incentives for reporting violations of law in Australia. For example, under the ACCC's amnesty program, individuals and entities that are culpable for illegal cartel activities are entitled to amnesty from prosecution if they are the first to report the violations to regulatory authorities.[26] The ACCC provided further detail on how its immunity policy works, including noting that it is a policy rather than legislation:

> The main incentive, in fact almost the only incentive, that we offer is immunity, but that only applies to people who are involved in cartels. So it is actually quite narrow—a lot of the things that we investigate are not cartels—and it is only if you are involved.[27]
>
> Our immunity policy is not done under the statute. It is a policy, so it sits together with the Commonwealth prosecution policy.[28]
>
> The immunity policy is multilateral conduct; it helps to get a person to self-report. There might be two or three people. If one of those is encouraged to come in, that opens up the rest of the case.[29]

11.23 Mr Bornstein argued that the reason why a bounty system sits uncomfortably with our culture is because there is far too much acceptance of lax standards of corporate governance. He suggested that those who benefit from tax evasion, bribery and wage fraud have much to fear from whistleblower incentives:

> Those incentives undermine the levers that those wrongdoers use to try and prevent exposure. Companies who try to stop whistleblowing use the carrot and the stick with their workforces. It can be a financial incentive and it can be the threat of being expelled or punished or excluded from the organisation. The only effective way to overcome big threats and big money is to offer proportionate incentives and protection to the whistleblower, ensure that their disclosure is dealt with quickly and effectively, and provide adequate compensation.[30]

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25 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017), p. 2.

26 Mr Jordan Thomas, *Submission 70*, p. 3; Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, pp. 42–43.

27 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 71.

28 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 65.

29 Mr Ian Lawrence, Director, Law Reform and Competition Advocacy, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 71.

30 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 43.

11.24 The IBACC was in favour of a bounty system as part of a broader improvement to a compensation scheme. However, the IBACC acknowledged that while the majority of submissions supported substantially improved compensation rights, many submitters were more hesitant, if not hostile, towards the notion of rewarding the voluntary disclosure of corporate or not-for-profit misconduct.

> The [IBACC] respects the differences of views in terms of the introduction of a reward system. It would mark a major innovation and change in the Australian legal landscape. That, of itself, is no reason not to do it. The [IBACC] remains of the opinion, as expressed in its Submission, that an independent rewards system, supporting a reformed compensation scheme, is a desirable reform in Australia for the benefit of those in the community to stand up to report misconduct.[31]

11.25 While Professor Brown supported the careful introduction of reward systems, he noted that it would be important to ensure consistency across all sectors and regulatory areas. Importantly, however, Professor Brown also drew attention to the need for significantly higher penalties that would then allow for both greater compensation for individual whistleblowers and increased funds to support the functions of a whistleblower protection agency.[32]

Arguments against a reward system

11.26 This section summarises some of the many arguments put to the committee during the inquiry against a reward system in Australia. While many submitters and witnesses focussed on the ethical implications of a bounty system and the potential for perverse incentives to produce counter-productive outcomes, other submitters focussed on the practical concerns that a bounty system would raise.

11.27 Ms Serene Lillywhite, Chief Executive Officer of Transparency International, did not support a US style bounty system for whistleblowers because, in her view, the US system does not provide all the necessary protections and may in fact preclude whistleblowers from accessing other remedies:

> It may provide some form of compensation…but it is still not necessarily meeting all the issues in terms of providing adequate whistleblower protections.
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> The other point that I think still requires some consideration is whether the introduction of a bounty system, for want of a better word, would potentially preclude a whistleblower from seeking other forms of civil remedy or civil justice. Would there be the requirement, for example, that

31 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017, (received 18 May 2017).

32 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 5.

> by accepting a bounty you effectively forego your right to other forms of natural justice?[33]

11.28 Similarly, Mr Gentilin was cautious about a bounty system and argued that other measures would be more beneficial in protecting whistleblowers:

> I am not supportive of a bounty system similar to the one currently in place in the US. This is not to suggest that the US bounty system has not been successful. If one looks at it purely through the lens of increased disclosures, an argument could be made in favour of a bounty system. However, this inquiry has been launched under the banner of increasing whistleblower protections. I believe there are more effective ways to achieve this than through the introduction of a bounty system.[34]

11.29 Ms Rebecca Maslen-Stannage, Chair of the Corporations Committee, Law Council, told the committee that the Law Council did not support a bounty system which risked setting up perverse incentives, and preferred a compensation system instead. The Law Council argued that getting the legislative settings right was the key to reducing the incidence of victimisation so that whistleblowers would feel safe to report wrongdoing internally and seek to change an organisation from within.[35]

11.30 Mr Warren Day, Senior Executive Leader, ASIC noted that in ASIC's experience, the majority of whistleblowers who contact the regulator are motivated by altruism.[36] He also raised serious practical considerations that could arise from the application of a bounty system:

> You can see a scenario where there are two people working side by side. One is actually the whistleblower and the other one knows nothing about what is going on, but they work in the same place. The second person is completely oblivious to what is going on. Management come down from on high and think there is a leak and are really concerned they have a whistleblower and want to take harmful action against both employees. We would say that the second employee, the person who is oblivious to what is going on, is just as victimised as the first person, even though they are not the whistleblower. This is something we want to point out.
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> Where we see a circumstance that people have been victimised on the basis that they are potentially a whistleblower—they have been victimised because of that—we think there needs to be some way for that to be

33 Ms Serene Lillywhite, Chief Executive Officer, Transparency International Australia, *Committee Hansard*, 27 April 2017, p. 6.

34 Mr Dennis Gentilin, private capacity, *Committee Hansard*, 28 April 2017, p. 1.

35 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 19.

36 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 67.

> considered as well, whereas, with a rewards scheme, it is only the person who has actually put the information there who is considered.[37]

11.31 In light of the potentially unfair distribution of a bounty in the scenario set out above, ASIC pointed out that a compensation system has the advantage of potentially providing resources to a broad range of whistleblowers, whereas a reward based system only assists a small proportion of whistleblowers who are associated with cases leading to a successful prosecution and large fines.[38]

11.32 The Institute of Internal Auditors told the committee that it did not support a bounty system and that rewarding whistleblowers should not be encouraged:

> …whether the whistleblower comes from the ranks of internal audit or not, one must ponder how paying someone for doing the right thing can restore a healthy culture.
>
> [The Institute of Internal Auditors] Australia agrees with that position and does not agree with the US position where whistleblowers can be rewarded with part of the moneys recoverable. [39]

11.33 Similarly, Dr Simon Longstaff from the Ethics Centre did not support incentives for people to disclose wrongdoing and argued that incentives would be inconsistent with the duty to act in good faith for the benefit of an employer or in the public interest:

> I think, two wrongs do not make a right, and the fact that there are incentives in some environments to do wrong does not mean that they should matter, because it is the nature of the incentive itself that corrupts the underlying relationship which ought to motivate people to come forward, and the solution in this case is to provide adequate protections for individuals who have exhausted the internal mechanisms for raising their concerns, which should be, ideally, in place.[40]

11.34 Dr Longstaff also argued that the ends do not justify the means, and that instead of looking at bounty systems, the focus should instead be on remedying the situation which leads to people suffering detriment:

> We should not have people losing their jobs. We should not have people who are subject to some kind of reprisal, even in the broad terms which have been talked about here today. That is what we need to fix, rather than just compensate people for a failure to address the underlying problem itself. I just do not think that it is a healthy situation for society at large or for people in organisations—whether it is the public sector or the private

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37 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 67.

38 Australian Securities and Investments Commission, *Submission 51*, p. 22.

39 Mr Peter Jones, Chief Executive Officer, Institute of Internal Auditors, *Committee Hansard*, 27April 2017, p. 33.

40 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, p. 4.

> sector—to have people raising concerns motivated, principally, by the prospect of some reward as a result of having done so. It should be a matter of duty that one acts from, and that should be underpinning the relationship in this area.[41]

11.35 Mr Matthew Chesher, Director Legal and Policy, MEAA did not support a scheme such as the Dodd-Frank legislation in the US. He argued that there should be no incentive for a person to disclose, beyond restoring or maintaining the position that they held, in a financial sense, prior to a disclosure having taken place.[42]

11.36 Mr Trevor Clarke, Director, Industrial and Legal from the ACTU was cautious about a US style incentive system for whistleblowers, arguing that it would be a sad day if all enforcement processes were based on the idea that you get something out of it rather than do it because it is the right thing to do. He suggested instead that the relevant regulator could be given some discretion to allocate, on compassionate grounds, a percentage of a fine to a whistleblower.[43]

11.37 With respect to the public sector, the Queensland Ombudsman argued that a bounty system is not consistent with the duties and responsibilities of a public servant to receive a reward for disclosing information about wrongdoing. The reporting of wrongdoing is integral to the ethical obligations of persons in public sector employment.[44]

11.38 Some submitters and witnesses also drew attention to the perverse incentives and counter-productive outcomes that a bounty system may engender.

11.39 For example, Dr Brand and Dr Lombard from Flinders University raised ethical concerns relating to the temptation for whistleblowers to hold information longer to increase their reward under a bounty system.[45]

11.40 Mr Lucas Ryan, Senior Policy Advisor, AICD outlined similar concerns:

> Firstly, if there were an opportunity for whistleblowers to receive some sort of financial reward from their disclosure, there may be a perverse incentive for whistleblowers to sit on information and to wait for wrongdoing to grow to a greater extent, so that when they made their disclosure with the hope of receiving a bounty the extent of their reward is greater. As I said moments ago, the purpose of the framework should be to try to encourage whistleblowers who want to raise instances of corporate wrongdoing in the hope that they are corrected. People who do that should always want to go to the company in the first instance and see that happen as soon as possible.

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41 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, pp. 6, 8.

42 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

43 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, p. 18.

44 Queensland Ombudsman, *Submission 13*, p. 3.

45 Dr Vivienne Brand and Dr Sulette Lombard, *Submission 14*, p. 3.

> But, if there is an opportunity for them to make more money by watching corporate wrongdoing spiral out of control, there is a significant hazard in that.[46]

11.41 Mr Ryan also pointed out that financial rewards may encourage whistleblowers to access information about a company by illegitimate means. He indicated that the AICD had heard of such scenarios occurring in the US.[47]

11.42 In addition, Mr Gentilin warned that a bounty system might not produce more useful information, but might instead merely result in more meritless disclosures:

> My view of the bounty system—if our goal is to increase the number of disclosures and tips, then I say go for it. You will get an increased number of disclosures. My question is: will it encourage people to make meritless disclosures? That is the risk you run. Any time you are put an incentive scheme in place in any walk of life, there are intended and unintended consequences. You have to be prepared for both.[48]

11.43 The committee also heard that in the US, some corporations had started to try to evade the bounty systems by putting contract conditions on employees banning them from participating in bounty systems. The US-SEC has pursued cases against those contract arrangements:

> One is an overly broad confidentiality agreement, which does not say—in many cases—you cannot go to the cops, but it is so broadly written that that would be an natural interpretation. The second thing is notice provisions—something that would require people, if they have contact with law enforcement authorities or regulators, to notify their organisations. That has a chilling effect on people. In the US, because you could report anonymously, that actually violates the law. The third area that we see is in broad labour provisions that say that, 'You agree that you won't make a claim or receive any money for reporting wrongdoing against the organisation,' which undermines the regimes within the US.[49]

Third party legal interests

11.44 Evidence to the committee also indicated that the bounty system in the US had provided enough of a financial incentive to create a legal services market for whistleblowers.[50]

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46 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard,* 28 April 2017, p. 29.

47 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard,* 28 April 2017, p. 29.

48 Mr Dennis Gentilin, private capacity, *Committee Hansard*, 28 April 2017, p. 7.

49 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

50 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard,* 23 February 2017, p. 26.

11.45 Some submitters and witnesses were concerned by the potential for third party interests to be seeking to profit from whistleblower bounty systems by offering legal and other services to whistleblowers. The Institute of Internal Auditors had concerns about the US bounty system and argued that:

> All that it has done is create a market for increased litigation and litigation funders. It is our view that the courts in Australia have sufficient latitude to compensate individuals commensurate with the damages incurred, and [Institute of Internal Auditors] Australia would not support the proposition of financially rewarding whistleblowers as occurs in the US.[51]

> Evidence in the US shows—you have the False Claims Act, the Dodd-Frank Act and a plethora of state legislation covering whistleblowers, and it has created a whole market where lawyers are profiting out of this and basically ambulance chasing. I do not think we really need that in Australia. I think that would be the last place you would want to go.[52]

11.46 Clayton Utz also argued that a bounty system may lead to a litigation culture perpetuated by litigation funders which may put a strain on court and regulator resources and businesses that would have to defend the actions.[53]

11.47 By contrast, Mr Bornstein from Maurice Blackburn had a different view. He argued that a bounty system would counterbalance the pernicious effect of third parties profiting from wage fraud schemes and tax evasions schemes. Mr Bornstein also argued that the law currently protects against vexatious claims:

> The law does this already; if you bring a vexatious claim under the Fair Work Act then you might get a costs order against you. So, if you impose a threshold—that it cannot be vexatious—then you eliminate a lot of the froth and bubble that is generated when people talk about adopting the US model of having incentives.[54]

Timing of the introduction of a reward system

11.48 Some submitters and witnesses discussed whether it may be appropriate to reconsider a reward or bounty system at another time.

11.49 The AICD noted that there are some challenges with the operation of the US whistleblower bounty system and that the US bounty system was put in place sometime after other whistleblower protections were established:[55]

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51 Mr Peter Jones, Chief Executive Officer, Institute of Internal Auditors, *Committee Hansard*, 27 April 2017, p. 33.

52 Mr Tony Rasman, Public Affairs Managers, Institute of Internal Auditors, *Committee Hansard*, 27 April 2017, p. 34.

53 Clayton Utz, *Submission 4*, pp. 3–4.

54 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 45.

55 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

> … Firstly, they have a different cultural context to us. They have a previous whistleblowing act that introduced similar protections that we are contemplating with ours.[56]
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> Secondly, they have a strong history of qui tam provisions, which previously operated under American law that we do not have here in Australia. The AICD is particularly concerned about some of the moral hazards that arise from a bounty scheme. That is not to say that in five years, 10 years time or whenever we review the system, if it has not gone far enough, they might be hazards we are willing to take. But in the short-term, our view is that there is enough scope to improve the whistleblowing framework now that we do not need to contemplate entertaining those moral hazards.[57]

11.50 The AICD suggested reconsidering a bounty system after other measures have been given a chance to work:

> Our suggestion is that the types of improvements that we have outlined in our submission—and we believe the genuine focus of boards and corporates to improve practices—supported by a better regulatory environment, will materially shift that conversation and the experience within Australia. Our suggestion, then, is: why don't we do that, and have a look at bounties as part of a post-implementation review, which, as a matter of good practice, we think is something we should be doing with all substantive reforms in a relatively short period.[58]

Limitations of a bounty system based on existing low penalty regime

11.51 ASIC suggested that 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. ASIC also noted that this would also allow time for higher monetary penalties to be introduced.[59]

> 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).[60]

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56 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

57 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

58 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 26.

59 Australian Securities and Investments Commission, *Submission 51*, p. 25.

60 Australian Securities and Investments Commission, *Submission 51*, p. 25.

11.52 Dr Lombard also argued that a bounty system may not work in Australia because the penalties for corporate wrong doing are much smaller than the US in many cases and a portion of the fine may not necessarily be attractive.[61]

Previous parliamentary inquiries did not support a bounty system

11.53 The committee notes the findings of three previous parliamentary inquiries which did not support financial reward or bounty systems:

- In 1989, the House of Representatives Legal and Constitutional Affairs Committee rejected any suggestion that a system of rewards or bounties be introduced in Australia concluding that such a system was incompatible with accepted principles and practice within Australian society.[62]
- In 1994, the Senate Select Committee on Public Interest Whistleblowing recommended that a reward system should not be considered because it would be contrary to the purpose of a scheme which should encourage the development of appropriate ethical standards.[63]
- In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into public sector whistleblower protections considered reward and bounty systems. That committee concluded that:

  > …recognising whistleblowers where they have made a contribution to the integrity of public administration sends an important message about the value of an open pro-disclosure culture. Agency heads should actively consider recognising whistleblowers within their organisation through their own existing rewards and recognition programs.[64]

Committee view

11.54 The committee has considered the experiences of other jurisdictions with whistleblower financial reward and bounty systems. The committee notes that reward systems exist in a number of jurisdictions similar to Australia, including the US and Canada. To date, reward or bounty systems have not been taken up by Australian states or territories.[65]

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61 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

62 House of Representatives Legal and Constitutional Affairs Committee, *Fair shares for all: Insider trading in Australia*, October 1989, p. 45.

63 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. xiii–xxv, 228.

64 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 86.

65 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 May 2017 (received 15 Jun 2017).

11.55 The committee acknowledges that there were strong arguments put forward by both proponents and opponents of financial reward and bounty systems. However, it considers that a reward system would motivate whistleblowers to come forward with high quality information. This information would otherwise be difficult to obtain. The committee considers that a reward system will motivate companies to improve internal whistleblower reporting systems and to deal more proactively with illegal behavior.

11.56 The committee also acknowledges that the submissions that did not support a reward system in Australia focused primarily on the US style Dodd-Frank bounty system, which provide uncapped rewards to whistleblowers and have a broad focus. The arguments presented against a reward system center largely around the concern that it would establish unethical incentives to whistleblow.

11.57 The reward system proposed by the committee would place a cap on the reward being paid to a whistleblower, be reflective of the information that is disclosed and be determined against a number of criteria so as to mitigate against perceived negative consequences of a US style bounty system.

Recommendation 11.1

11.58 The committee recommends that following the imposition of a penalty against a wrongdoer by a Court (or other body that may impose such a penalty), a whistleblower protection body (such as that recommended in Chapter 12) or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.

Recommendation 11.2

11.59 The committee recommends that such a reward should be determined within such body's absolute discretion within a legislated range of percentages of the penalty imposed by the Court (or other body imposing the penalty) against the whistleblower's employer (or principal) in relation to the matters raised by the whistleblower or uncovered as a result of an investigation instigated from the whistleblowing and where the specific percentage allocated will be determined by the body taking into account stated relevant factors, such as:

- **the degree to which the whistleblower's information led to the imposition of the penalty;**
- **the timeliness with which the disclosure was made;**
- **whether there was an appropriate and accessible internal whistleblowing procedure within the company that the whistleblower felt comfortable to access without reprisal;**
- **whether the whistleblower disclosed the protected matter to the media without disclosing the matter to an Australian law enforcement agency or did, but did not provide the agency with adequate time to investigate the issue before disclosing to the media;**
- **whether adverse action was taken against the whistleblower by their employer;**

- **whether the whistleblower received any penalty or exemplary damages (but not compensation) in connection to any adverse action connected with the disclosure; and**
- **any involvement by the whistleblower in the conduct for which the penalty was imposed, noting that immunity from prosecution, seeking a reduced penalty against the whistleblower etc. is dealt with by separate processes and that a reward would be regarded as a proceed of crime, if the whistleblower had been involved in criminal conduct (i.e. immunity or reduced penalty, not the reward is the benefit and incentive).**