Chapter 6

Protecting whistleblowers who expose foreign bribery

6.1 Information about foreign bribery is difficult to source and often relies on 'inside information' and investigative journalism for exposure. Whistleblowers therefore play an important role in exposing foreign bribery and corruption—be it alerting authorities or the general public to potential offences. Appendix 1 to this report includes some case examples of foreign bribery involving Australian entities which were brought to attention by whistleblowers.[1]

6.2 This chapter examines Australia's current whistleblower protections, and explores the complex nature of protecting those who blow the whistle on foreign bribery where the offending conduct or retribution occurs offshore. It then considers the suggestions for reform raised by stakeholders, before discussing recent reviews of Australia's whistleblower protections and the reforms proposed in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill).

Current whistleblower protections

6.3 Australia's whistleblower protection measures, often referred to as public interest disclosure, are made up by a patchwork of legislation. Different protections may apply to public interest disclosures in different circumstances, and current protections for disclosures by whistleblowers in the public and private sector are provided for in different Acts.

Commonwealth public sector

6.4 Certain public interest disclosures in the Commonwealth public sector are protected by the *Public Interest Disclosure Act 2013* (PID Act). The PID Act is intended to promote the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the making of disclosures of wrongdoing by public officials;
- ensuring that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure; and
- ensuring that disclosures are properly investigated and dealt with.[2]

6.5 These protections are quite comprehensive, in so far as they require public sector organisations to implement internal procedures for facilitating disclosures, and

1 See for example the Leighton Holdings Limited case example discussed in Appendix 1.

2 Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act 2013*, April 2016, p. 2.

protecting and supporting employees who report wrongdoing.[3] However, this comprehensive regime of whistleblower protection does not extend to other sectors.

Registered organisations

6.6 In November 2016, the Parliament passed amendments to the *Fair Work (Registered Organisations) Act 2009* (FWRO Act) which strengthened whistleblower protections for people who report corruption or misconduct in unions and employer organisations. The amendments provide protections to whistleblowers who disclose information about contraventions of the law, including current and former officers, employees, members and contractors of organisations.[4] Amendments that were introduced by the Senate and passed both Houses include:

- defining what constitutes a reprisal;
- civil remedies against reprisals;
- awarding of costs against vexatious proceedings;
- civil penalties for reprisals;
- criminal offences for reprisals;
- that protections have effects despite other Commonwealth laws;
- provisions for the investigation and handling of disclosures;
- time limits for investigations;
- disclosures to enforcement agencies; and
- protection of witnesses.[5]

Corporate sector

6.7 Current protections for whistleblower disclosures in the corporate sector are contained in Part 9.4AAA of the *Corporations Act 2001* (Corporations Act) which was introduced as part of a range of legislative reforms in 2004.[6] Those protections:

- confer statutory immunity on the whistleblower from civil or criminal liability for making the disclosure;

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3 Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 25, https://blueprintforfreespeech.net/wp-content/uploads/2015/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf (accessed 5 December 2017).

4 Australian Government, The Treasury, *Review of tax and corporate whistleblower protections in Australia* 20 December 2016, p. 7, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

5 *Fair Work (Registered Organisations) Act 2009*, Part 4A.

6 Australian Government, The Treasury, *Review of tax and corporate whistleblower protections in Australia* 20 December 2016, p. 4, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

- constrain employer rights to enforce a contract remedy against the whistleblower (including any contractual right to terminate employment) arising as a result of the disclosure;
- prohibit victimisation of the whistleblower;
- confer a right on the whistleblower to seek compensation if damage is suffered as a result of victimisation; and
- prohibit revelation of the whistleblower's identity or the information disclosed by the whistleblower with limited exceptions.[7]

6.8 Whistleblower protections for certain public interest disclosures concerning misconduct or an improper state of affairs or circumstances affecting the institutions supervised by the Australian Prudential Regulation Authority (APRA), are found in the following Acts:

- *Banking Act 1959*;
- *Insurance Act 1973*;
- *Life Insurance Act 1995*; and
- *Superannuation Industry (Supervision) Act 1993*.[8]

6.9 However, these provisions have been criticised on the basis that:

> …the scope of wrongdoing covered is ill-defined, anonymous complaints are not protected, there are no requirements for internal company procedures, compensation rights are ill-defined, and there is no oversight agency responsible for whistleblower protection.[9]

Whistleblowers need to be better supported

6.10 A number of submissions to this inquiry observed that Australia's whistleblower protection regime in the context of foreign bribery is insufficient, particularly for employees of private companies.[10] These conclusions are supported by the assessments of the Organisation for Economic Co-operation and Development

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7 Australian Government, The Treasury, Review of tax and corporate whistleblower protections in Australia 20 December 2016, p. 4, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

8 Australian Government, The Treasury, Review of tax and corporate whistleblower protections in Australia 20 December 2016, p. 5, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

9 Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 25, https://blueprintforfreespeech.net/wp-content/uploads/2015/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf (accessed 5 December 2017).

10 The poor treatment of whistleblowers is not confined to instances of foreign bribery. Indeed, the committee has observed the conduct and treatment of whistleblowers within the financial services sector across many inquiries, including: Senate Economics References Committee, *The performance of the Australian Securities Investments Commission* (26 June 2017) and *Scrutiny of Financial Advice* (30 June 2017).

(OECD), the United Nations Convention against Corruption (UNCAC) and the G20 Anti-Corruption Action Plan.[11]

6.11 The December 2017 Phase 4 OECD report noted that 'at least three foreign bribery enforcement actions reported by Australia appear to have been reported by whistleblowers,'[12] and that:

> During the on-site [visit], representatives from across the private sector and civil society repeated widespread media reports that whistleblowers in one foreign bribery enforcement action lost their jobs and have struggled to obtain new employment as a direct consequence of their reports to AFP. They asserted that there is a perception among the Australian public that any form of external whistleblowing will almost definitely result in reprisals.[13]

6.12 The December 2017 Phase 4 OECD report also observed that one participant summarised the status quo in Australia as providing 'no incentive for whistleblowers to speak up and no protection for them if they do'.[14] The report went on to advise that:

> …several private sector commentators expressed the view that stronger whistleblower protections would lead to increased foreign bribery enforcement.[15]

6.13 Research undertaken on the G20 whistleblowing regimes would support this view, as they found that there is a link between the number of whistleblowing reports and the existence of comprehensive and effective whistleblower protection laws in that country.[16]

6.14 The December 2017 Phase 4 OECD report recommended that Australia enhance its whistleblower protections by:

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11 Dr Kath Hall, *Submission 9*, p. 4.

12 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

13 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

14 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

15 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

16 Cited by Regnan, *Submission 13*, p. 3 (*Where does Australia sit in the world of whistleblowing?*, Australian Institute of Company Directors, 1 March 2014, http://www.companydirectors.com.au/Director-Resource-Centre/Director-QA/Roles-Duties-and-Responsibilities/Where-doesAustralia-sit-in-the-world-of-whistleblowing).

- Enacting legislation that provides clear, comprehensive, protections for whistleblowers across the private sector that align (where appropriate) with the protections for public sector whistleblowers in the PID Act.
- Raising awareness of any new legislation to ensure that employees in all sectors are fully apprised of the new regime.

6.15 Mr David Lehmann, Director of KordaMentha Forensic observed, 'that tips or whistleblowing are the most common means by which fraud is detected'. In this context, Mr Lehmann informed the committee that:

> Moving forward, we hope for and encourage a change in the attitude of business leaders and the wider community to one that sees whistleblowers as courageous and as people to be admired. Unfortunately, consequences such as bullying, harassment and loss of livelihood are often the norm.[17]

6.16 Regnan also noted that:

> Evidence suggests that it is not unusual for [whistleblowers]…to face victimisation or dismissal from the workplace; risk of being sued by their employer for breach of confidentiality or libel; and/or the risk of becoming the subject of criminal sanctions.[18]

6.17 Examples of whistleblowers who were allegedly targeted by their employers after coming forward with information regarding foreign bribery were presented to the committee during the course of its inquiry.[19] For example, KordaMentha reflected on the failings of the Australian whistleblowing regime to protect the whistleblowers in the Securency International and Note Printing Australia (NPA) cases. They explained that a former NPA employee:

> …reported his concerns to management about ongoing corrupt practices on numerous occasions and as a result was subject to various forms of harassment, intimidation and eventually forced from his job. This was despite the reported conduct being in breach of the *Corporations Act 2001* under which employees should be protected for making good faith disclosures about breaches of corporate legislation.[20]

6.18 Mr James Fuller, Chairman of the SKINS Group of companies, also described the experience of a former employee of the Football Federation of Australia (FFA) who blew the whistle on allegedly corrupt conduct in relation to Australia's failed bid to host the FIFA World Cup in 2018 or 2022. Mr Fuller contends that following the termination of the whistelblower's employment with the FFA, the whistleblower was 'denigrated personally in the press and on social media where she was described as bitter and twisted', and 'a disgruntled former employee'.[21] In addition, the

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17 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

18 Regnan, *Submission 13*, p. 9.

19 See, for example, the Leighton Holdings Limited case example discussed in Appendix 1.

20 KordaMentha, *Submission 22*, p. 10.

21 SKINS, *Submission 28*, pp. 9 and 10.

whistleblower has found it difficult to secure work following disclosures about the FFA:

> I am aware that [the whistleblower] was not able to find alternative appropriate employment despite her immense skills, capabilities and experience.[22]

6.19 Reflecting on his experience with whistleblowers, and the culture among corrupt organisations, Mr Fuller described the treatment of the above-mentioned whisteblower as:

> …typical behaviour of powerful people and organisations that are in the wrong. They operate on the basis of a culture of silence and intimidation where people who don't speak-up are rewarded and those who do can suffer.[23]

6.20 Appendix 1 to this report explores the Securency International and NPA and FFA cases in more detail, along with some of the other egregious foreign bribery examples involving Australian entities, including in circumstances where whistleblowers have exposed the foreign bribery and corruption.

6.21 Mr Nick McKenzie, who undertook research with international law enforcement officials as part of a Churchill Scholarship, commented that:

> Most of the anti-corruption and policing officials in Australia interviewed for this report conceded that legislative protection for corporate whistle-blowers here [in Australia] is weak, as are incentives to encourage whistleblowing.
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> …
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> Australia needs to improve protections for corporate whistle-blowers to dissuade employers from targeting them.[24]

6.22 There would therefore appear to be benefits from better coordinating and strengthening Australia's whistleblower protections.

Is the scope of coverage sufficient in foreign bribery cases?

6.23 Jurisdictional concerns are central to the development of whistleblowing policies for foreign bribery. In instances of foreign bribery, it is highly likely that whistleblowers will be located wherever their employer might be conducting business, including offshore. While there is no precedent in Australia, experience in the UK highlights some of the difficulties faced in providing protection to those who identify instances of foreign bribery.

6.24 In the UK, the *Public Interest Disclosure Act 1998* amends the *Employment Rights Act 1996* to provide certain protections for whistleblowers. These Acts protect a whistleblower who makes a disclosure to their employer, a legal adviser, a Minister

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22 SKINS, *Submission 28*, p. 10.

23 SKINS, *Submission 28*, p. 10.

24 Mr Nick McKenzie, *Submission 43*, p. 47.

of the Crown, individuals appointed by the Secretary of State for this purpose, or, in limited circumstances, 'any other person'.[25] In making the disclosure, the whistleblower must have a reasonable belief that the disclosure is made in the public interest and tends to show:

> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.[26]

6.25 These protections have been claimed in the context of foreign bribery; *Foxley v GPT Special Project Management Pty Ltd*[27] is one such example.

6.26 Mr Ian Foxley was a retired Army officer who was hired as the Programme Director for GPT Special Project Management Limited (GPT). GPT is a UK subsidiary of the EADS Group, which is the prime contractor for a £1.96 billion scheme to modernise communications in the Saudi Arabian National Guard (the SANGCOM Project). Mr Foxley was based in Saudi Arabia.[28]

6.27 Mr Foxley uncovered evidence of alleged corruption, and attempts to cover it up, within GPT and the SANGCOM Project. Mr Foxley reported his discoveries to EADS Group, the UK Ministry of Defence and the UK Serious Fraud Office (SFO); and his employment with GPT was subsequently terminated.[29]

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25 *Employment Rights Act 1996* (UK), Part IVA.

26 *Employment Rights Act 1996* (UK), ss. 43B(1).

27 *Foxley v GPT Special Project Management Pty Ltd.*, Employment Tribunal, No. 22008793/2011 (12 August 2011).

28 UK Parliament, *Banking Standards: Written evidence from Ian Foxley, Lieutenant Colonel (retired)*, 24 August 2012, https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv74.htm (accessed 15 March 2018).

29 UK Parliament, *Banking Standards: Written evidence from Ian Foxley, Lieutenant Colonel (retired)*, 24 August 2012, https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv74.htm (accessed 15 March 2018).

6.28 Mr Foxley brought a claim in the UK Employment Tribunal for unfair dismissal on the grounds of his whistleblowing against GPT.[30] The Employment Tribunal found that it had no jurisdiction and that, even though the cause of the dismissal may have been whistleblowing, there was no statutory position to support such a claim. Thus, the Employment Tribunal could not deal with this matter.[31]

6.29 On 7 August 2012, the SFO announced that it would be investigating the matter; the investigation is continuing.[32]

6.30 The Phase 3 Report on the United Kingdom by the OECD Working Group on Bribery, published in March 2012, evaluated and made recommendations on the UK's implementation and application of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[33] It stated:

> PIDA's [the UK *Public Interest Disclosure Act 1998*] scope of coverage may be insufficient in foreign bribery cases. The Act does not apply to expatriate workers of UK companies who are based abroad unless there are 'strong connections with Great Britain and British employment law'. [34]

6.31 This example demonstrates the complex nature of providing whistleblower protection for those who disclose foreign bribery (or suspicions of foreign bribery) where the offending conduct or retribution occurs offshore. While this example certainly does not illustrate every aspect of the laws' application, it is useful in understanding how whistleblower protection laws work and how they may apply in the context of foreign bribery in Australian cases.

Suggestions for reform

6.32 As stated above, whistleblowers often suffer significant professional and personal consequences as a result of their disclosures. The IBAACC suggested that 'the Australian culture supported the concept that you 'do not dob in a mate" and that '[i]ndividual employees go along with the herd mentality unless he or she wants to put

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30 *Foxley v GPT Special Project Management Pty Ltd.*, Employment Tribunal, No. 22008793/2011 (12 August 2011).

31 UK Parliament, *Banking Standards: Written evidence from Ian Foxley, Lieutenant Colonel (retired)*, 24 August 2012, https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv74.htm (accessed 15 March 2018).

32 Serious Fraud Office, *GPT Special Project Management Ltd*, 28 April 2016, https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd// (accessed 6 December 2017).

33 OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, March 2012, p. 55, http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf (accessed 14 March 2018).

34 OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, March 2012, p. 55, http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf (accessed 14 March 2018).

their head above the parapet and suffer the consequences'.[35] The IBAACC warned that in their experience the 'attitude of the Australian Government, as with many State governments and organisations, is to shoot the messenger and avoid the messenger.' The IBAACC expressed the view that as far as ASIC is concerned:

> …a whistleblower is largely on his or her own in fending for himself or herself against, what the Committee has seen in the experience of its members to be, vindictive employers and harassing employees who persecute, humiliate and discriminate against the whistleblower.[36]

6.33 Many stakeholders offered similar views, and argued that whistleblowers should be better supported and better protected.[37] For example, BHP Billiton stated:

> It is critical that individuals who suspect potential wrongdoing feel comfortable to raise concerns, in a timely manner, without fear of retaliation.[38]

6.34 While agreeing for the most part that change was needed to enhance whistleblower protections, suggestions varied as to the most effective way of achieving this goal.

Legislative reform

6.35 Regnan recommended that legislation be introduced to provide robust protection for whistleblowers as in peer jurisdictions. In particular, Regnan advocated for protection for disclosures made in good faith, including anonymous disclosures.[39] This is discussed in more detail below with reference to the EWP bill.

6.36 Professor Simon Bronitt, Professor Nikos Passas, Ms Wendy Pei and Ms Chloe Widmaier argued that legal protection for whistleblowers in the corporate sector should be extended beyond corporation law offences. They suggested that the protections in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* could be extended to encompass fraud and corruption offences.[40]

6.37 CPA Australia also proposed extending the scope of whistleblower protections in legislation. It suggested that there may be:

> …scope for either adopting the trust and structure of Corporations Act Part 9.4AAA (Protection for whistleblowers) within Division 70 of the Criminal Code or broadening the scope of Part 9.4AAA (s 1317AA(1)(d)) to cover

35 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 36.

36 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 36.

37 See, for example, Regnan, *Submission 13*, p. 3; CPA Australia, *Submission 18*, p. 4.

38 BHP Billiton, *Submission 37*, p. 7.

39 Regnan, *Submission 13*, p. 3.

40 Professor Simon Bronitt, Professor Nikos Passas, Ms Wendy Pei and Ms Chloe Widmaier, *Submission 35*, p. 13.

> specific matters additional to suspected contravention of Corporations legislation.[41]

6.38 If the scope of the Corporations Act were to be expanded as suggested above, effective interagency cooperation would be essential, as the disclosures would be made to ASIC in the main.[42]

6.39 Flinders University also argued that the cultural bias against whistleblowing is compounded by lack of internal systems mandating the provision of feedback to whistleblowers. Therefore, they considered that legislating to require 'corporations to provide some level of response to informants' would assist in achieving desirable cultural change within corporations.[43]

Compensation schemes v rewards

6.40 Given the significant financial and personal costs associated with being a whistleblower, some stakeholders advocated for a compensation scheme.[44] Submissions drew comparisons with the US scheme where whistleblowers may be entitled to receive rewards between 10 per cent and 30 per cent of any monies offered in bribery.[45]

6.41 Mr Robert Wyld, representing the IBAACC, told the committee that he supported the introduction of a statutory compensation scheme and that the US scheme provides extensive guidance that could help shape an Australian equivalent:

> The framework that you can look at is already in the United States. The regulators from the SEC that I have spoken to—and I know from Mr McKenzie's submission that he has spoken to them; as part of his Churchill Fellowship he looked into these issues—see it particularly as a game-changing process that a whistleblower is, in fact, actively protected and actively compensated. From an Australian perspective, it is better to look at compensation. I think that if you start looking at reward and bounties, it becomes very emotive… I think there is a very legitimate role for it if it is statutorily enacted with a scheme that is transparent and administered by somebody who looks at these people independently and assesses it based on what they have suffered.[46]

6.42 In response to questions on the issue, Mr Wyld conceded that some employees may turn whistleblower in the face of the imminent termination of their employment. However, he emphasised:

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41 CPA Australia, *Submission 18*, p. 4.

42 CPA Australia, *Submission 18*, p. 4.

43 Flinders University, *Submission 19*, p. 3.

44 See, for example, Mr Nick McKenzie, *Submission 43*, p. 8.

45 See, for example, International Bar Association Anti-Corruption Committee, *Submission 6*, p. 37; Governance Institute of Australia, *Submission 14*, p. 2.

46 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, pp. 19–20.

> …I think the reality is that if, in fact, somebody blows the whistle and gives information, and that information leads to a conviction, and that information leads to sentence imposed—as it does in the US—of an award, then that whistleblower, irrespective of anything else, should be entitled to some compensation.[47]

6.43 While some submissions supported this concept, the Governance Institute of Australia suggested that the US scheme creates a moral hazard and noted that its members do not believe it is an appropriate model on which to base Australian reform.[48] BHP Billiton echoed this conclusion, stating that it is not currently clear whether the introduction of incentives would lead to an increase in whistleblower reports.[49]

Incorporating protections in guidance and compliance programs

6.44 Suggestions for reform included the incorporation of whistleblowing issues into any guidance issued by regulators on effective compliance programs and consideration of an effective whistleblowing program in the context of deferred prosecution agreements (discussed in more detail in Chapter 5).[50]

6.45 As discussed in detail in chapter 4, a company will not be liable under the new failure to prevent foreign bribery offence where it can prove it had adequate procedures in place to prevent and detect foreign bribery.[51] The minister will publish guidance on what adequate procedures a body corporate should take to prevent an associate from bribing a foreign public official.[52]

6.46 In a submission to the Legal and Constitutional Affairs Legislation Committee's (L and C committee) inquiry into the CCC bill, Associate Professor Vivienne Brand suggested that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.[53] Associate Professor Brand argued that including clear guidance on the extent to which good internal whistleblowing systems can be used as evidence of the taking of 'adequate steps' to prevent foreign bribery by an associate is important because:

- whistleblowing activity is positively correlated with anticorruption outcomes;
- whistleblowing is a relevant factor under the UK's analogous 'adequate steps' foreign bribery provisions; and

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47 *Committee Hansard*, 22 April 2016, p. 20.

48 Governance Institute of Australia, *Submission 14*, p. 2.

49 BHP Billiton, *Submission 37*, p. 7.

50 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 3.

51 CCC bill, explanatory memorandum, p. 18.

52 CCC bill, new s. 70.5B.

53 Associate Professor Vivienne Brand, *Submission 4*, L and C committee inquiry into the CCC bill, p. 2.

- a significant reform of Australia's corporate whistleblowing regime is currently underway that should lead to increased levels of corporate whistleblowing activity, making this anti-corruption mechanism even more effective.[54]

6.47 The UK's guidance about procedures which relevant corporations can put in place to prevent persons associated with them from bribing, includes a non-exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced. This non-exhaustive list includes 'the reporting of bribery including 'speak up' or 'whistle blowing' procedures.[55]

6.48 In addition, the UK guidance also provides that, as a 'top-level commitment', commercial organisations should include 'internal and external communication' of their 'commitment to zero tolerance to bribery'.[56] The guidance specifically provides that:

> This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site.[57]

6.49 The guidance also provides examples of what effective formal statements that demonstrate top level commitment are likely to include, such as:

> …reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing).[58]

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54 Associate Professor Vivienne Brand, *Submission 4* to the L and C committee inquiry into the CCC bill, pp. 2–3.

55 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 22, paragraph 1.7, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

56 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

57 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, paragraph 2.3, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

58 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, paragraph 2.3, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

6.50 In response to questions on notice asked by the L and C committee, AGD indicated that 'the department intends to consider' including internal corporate whistleblowing systems as part of any recommended adequate procedures 'designed to prevent the bribery of a foreign public official.'[59]

Recent reviews into whistleblowing protections

6.51 Whistleblower protection has been a perennial subject of many parliamentary committees in both houses over the last thirty years.[60] In the last two years, there have been two major reviews of whistleblowing and public interest disclosure:

- the 'Moss Review' which examined the effectiveness and operation of the PID Act; and
- the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry on Whistleblower Protections.

6.52 The 2016 Moss Review was, amongst other things, tasked with considering 'the breadth of disclosable conduct covered by the [PID] Act, including whether disclosures about personal employment-related grievances should receive protection under the [PID] Act'.[61]

6.53 The Moss Review found that:

- the PID Act had only been partially successful in its aim to promote integrity and accountability in the Commonwealth public sector;
- the PID Act's interactions with other procedures for investigating wrongdoing are overly complex;
- the categories of disclosable conduct are too broad and only a minority of disclosures bring to light allegations of serious integrity risks and wrongdoing; and
- by adopting legalistic approaches to decision-making, the PID Act's procedures undermine the pro-disclosure culture it seeks to create.[62]

6.54 The Moss Review made recommendations including:

- strengthening the ability of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security to scrutinise and monitor the decisions of agencies;
- creating more investigative agencies under the PID Act;

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59 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 15.

60 House Standing Committee on Legal and Constitutional Affairs, 2009, *Inquiry into whistleblowing protections within the Australian Government public sector*, p. vii-x.

61 Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 2.

62 Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 6–7.

- strengthening the PID Act's focus on significant wrongdoing—fraud, serious misconduct and corrupt conduct—in order to achieve the integrity and accountability aims;
- expanding the grounds for external disclosure; and
- redrafting procedural aspects of the PID Act using a 'principles-based' approach and providing better protections for witnesses and whistleblowers.[63]

6.55 Following the Moss Review, in November 2016, the PJC was referred an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.[64] The PJC received 75 submissions and held five public hearings before publishing its report, *Whistleblower protections*, in September 2017.[65]

6.56 The *Whistleblower protections* report identified the fragmented nature of Australia's whistleblower legislation and, in particular, the significant inconsistencies that exist not only between various pieces of Commonwealth public and private sector whistleblower legislation, but also across the various pieces of legislation that apply to different parts of the private sector.

6.57 The report made a large number of recommendations to address these issues. They included broadening the range of whistleblowers who are covered (to include, for example, former employees and suppliers of a company); allowing for anonymous disclosures; increasing penalties for victimisation and for breaching the confidentiality of a whistleblower, and creating civil offences with a lower standard of proof than the existing criminal offences in such cases; and reversing the onus of proof in civil cases.

6.58 An important recommendation was the establishment of a Whistleblower Protection Authority (to be housed within a single body or an existing body) that can support whistleblowers, assess and prioritise the treatment of whistleblowing allegations, conduct investigations of reprisals, and oversee the implementation of the whistleblower regime for both the public and private sectors.[66]

6.59 The report also recommended creating a single private sector system for protecting whistleblowers; extending coverage to the not-for-profit sector; and introducing a rewards scheme for whistleblowers.[67]

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63 Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 7–8.

64 Journals of the Senate, No. 22, 30 November 2016, p. 714.

65 *Whistleblower protections*, report of the Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower protections in the corporate, public and not-for-profit sectors, September 2017, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections (accessed 13 March 2018).

66 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017, p. ix, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections (accessed 13 March 2018).

67 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017, pp. xiii–xx.

6.60 Following the *Whistleblower protections* report the government established an expert advisory panel on whistleblower protections which, amongst other things, will:

> …review and provide advice to the Government in respect of recommendations for legislative reforms to enhance whistleblower protections in the private, not-for-profit and public sectors made by the PJC…[68]

Recent legislative developments

6.61 In October 2017, the government released an exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017 for consultation.[69] The intention of the bill was to deliver on the Government's commitment under the Open Government National Action Plan and tax integrity measure announced in the 2016 Budget. Submissions for this consultation, which closed on 3 November 2017, have been published.[70]

6.62 In December 2017, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill) was introduced into Parliament. Because work on the EWP bill commenced before the *Whistleblower protections* report was published, it does not purport to address all the recommendations of the PJC.[71]

6.63 The EWP bill proposes to bring the corporations and financial sector whistleblower regimes into alignment under new arrangements in the Corporations Act.[72] It also creates a new whistleblower protection regime in the taxation law, to protect those who expose tax misconduct.[73]

6.64 At present the disclosures that are protected have to do with breaches of the particular act that governs the entity. The amendments to the Corporations Act in the EWP bill would expand the scope of disclosable matters to include misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity, or an

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68 Minister for Revenue and Financial Services, The Hon. Kelly O'Dwyer, MP, *Expert advisory panel on whistleblower protections*, 28 September 2017, http://kmo.ministers.treasury.gov.au/media-release/097-2017/ (accessed 15 March 2018).

69 Australian Government, The Treasury, *Treasury Laws Amendment (Whistleblowers) Bill 2017— Exposure Draft*, https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/ (accessed 2 November 2017).

70 Department of the Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017— Exposure Draft, Published Responses, https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/ (accessed 21 February 2018).

71 In effect the bill does address the vast majority of the PJC's 35 recommendations. The recommendations which are not addressed, as they pertain to the private sector, are summarised in the EWP bill, explanatory memorandum, pp. 10–11.

72 EWP bill, Schedule 3.

73 EWP bill, explanatory memorandum, pp. 65–66.

offence against any law of the Commonwealth that is punishable by 12 months imprisonment, or represents a danger to the public or the financial system.[74]

6.65 An eligible whistleblower is an employee, supplier (or employee of a supplier) or associate of the entity; or a relative or dependant or spouse of such a person. Importantly, the EWP bill proposes to widen the definition to cover former employees and associates—people who are likely to have information about matters which should be disclosed.[75]

6.66 The EWP bill provides for 'emergency disclosure' to a journalist or a member of Parliament. Such disclosure will be protected only if the disclosure has already been made to ASIC, APRA or a prescribed body and qualifies for protection, a reasonable period has passed since it was made, and there is now an imminent risk to public health or safety or to the financial system if the disclosure is not acted on immediately. The discloser must give the original recipient written notification of their intention to make an 'emergency disclosure'.[76]

6.67 At present, whistleblowers are required to make disclosures 'in good faith'. This has allowed them to be challenged on the basis that they are acting from malice or other subjective motivations. Pursuant to the EWP bill, this requirement will be replaced by a reasonableness test which requires that the whistleblower have reasonable grounds to suspect misconduct or an improper state of affairs.[77]

6.68 The EWP bill makes it an offence to reveal the identity of a whistleblower without the whistleblower's consent. In a prosecution for an offence the defendant 'bears an evidential burden'—that is, the burden of proof is on the person accused of revealing a whistleblower's identity. Under the EWP bill there will no longer be any requirement that a whistleblower provide his or her name in order to qualify for protection. Anonymous disclosures will now be protected.[78]

6.69 A whistleblower is not subject to any civil, criminal or administrative liability for making a disclosure, and no action can be taken against him or her under a contract; for example, an employment contract or a supply contract with the company the disclosure relates to. Information that will be protected under the EWP bill will not be able to be used against the whistleblower in criminal proceedings or proceedings where a penalty is imposed. However, a note in the EWP bill makes it clear that a person can still be subject to civil, criminal or administrative liability for conduct that is revealed by the disclosure.[79]

6.70 The EWP bill seeks to make it easier for a whistleblower to seek redress for victimisation, because it will allow for civil or criminal prosecutions for victimisation.

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74 EWP bill, Schedule 1, item 2, new ss.1317AA(4).

75 EWP bill, explanatory memorandum, p. 23.

76 EWP bill, Schedule 1, item 2, new s. 1317AAD.

77 EWP bill, Schedule 1, item 2, new ss. 1317AA(4) and (5)

78 EWP bill, explanatory memorandum, p. 28.

79 EWP bill, Schedule 1, item 2, new ss. 1317AB(1).

There is no requirement to prove that the victimiser intended to cause the detriment, nor that the disclosure is the only reason for the detriment. The detriment can be to another person: it does not have to be to the whistleblower, but can also be to a colleague, supporter, friend or relative.[80]

6.71 The claimant for compensation has to point to evidence that suggests a 'reasonable possibility' that the victimisation has taken place. Once that is done, the onus is on the person against whom the claim is made to show that the claim is not substantiated. The claimant cannot be ordered to pay costs, except where the proceedings have been vexatious or where the claimant's behaviour has unreasonably caused the other party to incur costs.[81]

6.72 The EWP bill will requires public companies, large proprietary companies and companies that are trustees of superannuation entities to have a whistleblower policy, and to make that policy available to officers and employees of the company. The policy has to set out information about the protections available to whistleblowers and what disclosures are protected, how the company will support whistleblowers and investigate disclosures, and how the company will ensure fair treatment of employees who are mentioned in disclosures.[82]

6.73 At present disclosing victimisation and disclosing a whistleblower's identity are offences and a contravention has to be proved to the criminal standard, beyond reasonable doubt. The EWP bill leaves this as a possibility, but also makes civil contraventions with a maximum penalty of $200,000 for an individual and $1 million for a corporation.[83]

6.74 The EWP bill amends the *Taxation Administration Act 1953* in ways that are broadly similar to the amendments to the Corporations Act. It creates a regime to protect individuals who report non-compliance with tax laws or misconduct in relation to an entity's tax affairs.[84]

6.75 No explicit mention is made in the EWP bill, or in the explanatory materials, of how it would apply to disclosures made in foreign jurisdictions.

6.76 Among the recommendations in the *Whistleblower Protections* report that are not covered in the EWP bill are:

- the establishment of a Whistleblower Protection Authority;
- extending coverage to the not-for-profit sector; and
- introducing a rewards scheme for whistleblowers.

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80 EWP bill, explanatory memorandum, p. 33.

81 EWP bill, Schedule 1, item 9, new s. 1317AH.

82 EWP bill, Schedule 1, item 9, new s. 1317AI.

83 EWP bill, Schedule 1, items 10 and 11, new ss. 1317E(1) and 1317G(1G).

84 EWP bill, explanatory memorandum, pp. 65–66.

6.77 The EWP bill was referred to the Senate Economics Legislation Committee for inquiry and report by 22 March 2018. Most contributors to the inquiry, on balance, suggested that the EWP bill should be passed because it is an improvement on current arrangements.[85]

6.78 The committee recommended that a requirement for review be included in the EWP bill, so that the possibility of further development is kept open, and, in particular, the recommendations of the PJC that had not been implemented will remain under active consideration.[86]

6.79 Labor Senators in their additional comments noted a number of concerns raised by stakeholders with the EWP bill, including whether the government is committed to progressing further reforms in this term of Parliament, the omission of the role of unions in assisting employees, the effectiveness of the EWP bill in enabling whistleblowers to access adequate compensation for reprisals, the range of allowable emergency disclosures and how internal company processes will manage the range of eligible recipients.[87]

Committee view

6.80 Evidence presented to the committee suggests that Australia's whistleblower protection regime is insufficient, particularly for employees of private companies. Given the significant harm generated by foreign bribery and corporate corruption and the key role insiders can play in exposing such conduct, the committee considers it essential that Australia take immediate action to adequately protect whistleblowers.

6.81 The committee notes that research undertaken on the G20 whistleblowing regimes found that there is a link between the number of whistleblowing reports and the existence of comprehensive and effective whistleblower protection laws in that country. The committee also notes observations made in the December 2017 Phase 4 OECD report that stronger whistleblower protections in Australia would lead to increased foreign bribery enforcement. In particular, the committee notes the report's specific recommendations that Australia: enhance its whistleblower protections by enacting legislation that provides clear, comprehensive, protections for whistleblowers across the private sector that align (where appropriate) with the protections for public sector whistleblowers in the PID Act; and raise awareness of any new legislation to ensure that employees in all sectors are fully apprised of the new regime.

6.82 The committee welcomes the suggestions made by stakeholders to strengthen Australia's public interest disclosure framework. In particular, the committee considers that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.

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85 Senate Economics Legislation Committee, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (22 March 2017).

86 Senate Economics Legislation Committee, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (22 March 2017).

87 Senate Economics Legislation Committee, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (22 March 2017), pp. 29–37.

6.83 The committee notes the Parliamentary Joint Committee on Corporations and Financial Services' *Whistleblower Protections* report and endorses the recommendations made in that report. The committee also notes stakeholder concerns that were raised that the EWP bill represents a limited step in the right direction—with many stakeholders holding concerns about its effectiveness. The committee is also concerned that the bulk of the recommendations made in the PJC *Whistleblower Protections* report remain outstanding.

6.84 The committee welcomes the establishment of the expert advisory panel to review the PJC's recommendations. However, in the context of the unfulfilled expectations from the many parliamentary committees past, the committee considers it imperative that the government support the panel to work expeditiously to progress the outstanding suggested PJC reforms. In so doing, the committee encourages the government to request that the panel consider how any proposals will apply in foreign bribery cases, where the offending conduct necessarily occurs offshore. The committee is of the view that it is particularly important that the scope and application of whistleblower protection laws is well understood by all employees, including those based overseas.

Recommendation 15

6.85 The committee endorses the Parliamentary Joint Committee on Corporations and Financial Services report on Whistleblower Protections, and urges the government to work with the expert advisory panel to expeditiously implement the committee's outstanding recommendations.

Recommendation 16

6.86 The committee recommends that the government request the expert advisory panel on whistleblowers to consider whether the scope of Australia's whistleblower protections provides sufficient coverage in foreign bribery cases.

Recommendation 17

6.87 The committee recommends that the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence include the existence of internal corporate whistleblowing systems.