



ASIC

Australian Securities & Investments Commission

Whistleblowing

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*Business Law Section of the Law Council of Australia Whistleblowing Seminar (Sydney,
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CHECK AGAINST DELIVERY

Thank you for that introduction and for the opportunity to speak here today.

Today's session is very timely indeed. Community interest in whistleblowers has never been higher. Today I would like to talk to you about:

- various proposals to help improve the position of whistleblowers
- ASIC's previous suggestions on whistleblower laws that we administer
- some important issues that might come up as Parliament considers these matters more broadly.

Let me start by saying that ASIC considers transparent and effective whistleblower policies and processes as essential elements of good corporate culture. Whistleblowing plays an important role in uncovering misconduct.

With that in mind it should be no surprise that there have been a number of recent initiatives to promote whistleblowers.

Government initiatives

Let me start with various Government initiatives.

ASIC supports the government's commitment to improve whistleblower protections recently announced in the [Draft Open Government National Action Plan](#) on 31 October 2016.

The action plan sets milestone dates for reform options to strengthen and harmonise whistleblower protections in the corporate sector with those in the public sector. The plan sets dates for public consultation between December 2016 and March 2017 with the development of draft legislation and recommendations to Government set for May 2017 to July 2017.

Treasury is the lead agency for these reforms and ASIC is supporting Treasury on the development of its upcoming public consultation paper on tax and corporate whistleblower protections as part of the action plan.

Of course, there are also the recent amendments in the Senate to the *Fair Work (Registered Organisations) Amendment Bill 2014* to include additional whistleblower protections and the suggestions that those provisions form a model for corporate whistleblower law reform. Again, ASIC supports the objective discussed during these amendments to achieve an equal or better whistleblower protection regime for the corporate sector as compared to the public sector.

In addition, in April of this year, the Senate Economics Reference Committee Inquiry on the Scrutiny of Financial Advice in the previous Parliament released an [issues paper](#) intended to encourage further public consideration of how Australia's corporate whistleblower framework might be improved. The paper sets out a series of items for discussion and the Committee invited written submissions on those items or on the issues generally.

Some specific items for discussion included:

- preventing and punishing the victimisation of whistleblowers and allowing for payment of whistleblower compensation
- internal disclosure
- rewards and other incentives for whistleblowers
- an advocate for whistleblowers
- eligibility for whistleblower protections and the scope of protected disclosures
- anonymous disclosures
- the 'good faith' requirement for whistleblowers in the *Corporations Act 2001*
- disclosure to third parties including the media
- keeping whistleblowers 'in the loop'
- the *Public Interest Disclosure Act 2013* as a template for reform.

The election intervened after that issues paper was released. The Senate Economics References Committee in the 45th Parliament has re-referred the inquiry on the Scrutiny of Financial Advice, however there is no update on a new procedure or timeline for further work on the issues paper at this stage. Nonetheless the issues paper remains a very useful reference document.

It is not just Government leading the charge on whistleblower reform.

On 12 October 2016, the Australian Bankers' Association (ABA) issued its draft guiding [principles](#) on *Improving Protections for Whistleblowers* for consultation. The ABA has sought feedback from ASIC and other stakeholders on its draft guiding principles prior to publication. We think the ABA's principles are a good step to guiding its members in the development of appropriate approaches to properly receive, assess and action whistleblower information and support whistleblowers. The ABA's guiding principles went through a process of public consultation and we understand that, along with internal reviews conducted by individual banks and government reform initiatives, the ABA milestone of completing implementation by June 2017 remains in place.

In addition, ASIC has contributed funding to Griffith University academics to undertake whistleblower research. The project is jointly funded by 16 State, Federal and New Zealand ombudsman and anti-crime commission bodies. The research seeks to review the experience of whistleblowers and management response to whistleblowing to date, to ascertain what worked well to inform future policy and law reform.

ASIC recently wrote to thirty thousand organisations about this project seeking information and assistance.

- 261 private sector or not for profit organisations and 436 public sector organisations have responded and completed a first Survey of Organisational Processes and Procedures
- Griffith University research staff released analysis of the data in November 2016
- early indications are that a high number of organisations have formal whistleblower procedures and processes, so this shows that Australian business is taking this issue seriously.

ASIC and whistleblower laws

To date ASIC has said the following, amongst other things, about whistleblower laws that we administer:

- we support law reform to strengthen whistleblower protections so that whistleblowers do not suffer detriment as a result of reporting inappropriate conduct
- should a whistleblower suffer detriment as a result of reporting inappropriate conduct, a possible remedy might be the award of whistleblower compensation for the loss of their lifetime earnings should fines and penalties eventuate. This is in contrast to the US system where whistleblowers may be paid a bounty which is a percentage of fines etc. levied as a result of successful regulatory action against the firm subject of a whistleblower complaint
- strong whistleblower and pre-whistleblower procedures are a key element of good corporate culture
- companies should have systems and a culture in place which supports and incentivizes people to raise inappropriate conduct. Companies should also consider

awarding bonuses or rewards to whistleblowers or to people who raise inappropriate conduct.

In particular, ASIC has also previously suggested consideration of reforms to:

- expressly extend the definition of people to whom the protections may apply, such as to former employees or directors and confirm inclusion of certain types of advisers
- extend the types of disclosures that would attract protection, to include possible misconduct under a range of laws, rather than confined to breaches of the corporations legislation
- provide ASIC with the power to resist the production of documents where to do so would expose the identity of a whistleblower.

To summarise then, my view is that reforms to whistleblower laws are vitally important and they are already being advanced by a number of Government and other initiatives. However, we should recognise any reforms may raise quite complex issues. Just a few examples are:

- if monetary payments are made to whistleblowers, either as compensation or through a US style bounty payment, that may lead to people automatically going to regulators rather than seeking to resolve issues with the relevant company first. If people always go directly to regulators rather than seeking to resolve issues internally, is that a good thing?
- in the US I understand that intermediaries have emerged, often law firms, to 'package up' whistleblower complaints to regulators for a fee. Should there be any rules around this?
- do possible payments to whistleblowers create conflicts with other duties that particular professions such as lawyers or directors might owe?
- many people, including regulators, may hold an unstated view that people should not profit from their own misconduct. Payments to whistleblowers may well challenge this assumption. Is this something we are comfortable with?
- How, if at all, should malicious or unfounded disclosures be discouraged?

Make no mistake, the difficulty of these issues is not an argument for inaction but it underscores the need for an informed and thoughtful discussion.

I look forward to further discussion of these issues today and am happy to hear any comments or questions from my fellow speakers or any of you here.