

Improving protections for corporate whistleblowers

Options Paper
October 2009

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ISBN

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CONSULTATION PROCESS

REQUEST FOR FEEDBACK AND COMMENTS

The Government is seeking your feedback and comments on the options outlined in this paper, particularly any information about compliance costs, impacts on competition, existing business activities and any other impacts, costs and benefits. We also seek your advice on any potential unexpected consequences of these proposed changes.

The information will inform the Government's proposed approach on the way forward and also assist in meeting the requirements of the Office of Best Practice Regulation.

While submissions may be lodged electronically or by post, electronic lodgment is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

CLOSING DATE FOR SUBMISSIONS: COB 21 DECEMBER 2009

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FOREWORD



Recent instability in global financial markets has highlighted the importance of maintaining a robust regulatory framework for corporations and financial services. A key part of this is the detection of fraud and other forms of corporate and financial services misconduct. However, this can be difficult or impossible without the help of corporate whistleblowers.

Unfortunately, the ability of whistleblowers to contribute to detection of activities which compromise market integrity is limited by the serious personal risks they may face as informants.

The importance of protecting corporate whistleblowers has been recognised for many years. However, while legislative protections have been provided under the *Corporations Act 2001* since 2004, they appear to have been poorly regarded and rarely used. At the time this paper was written, only four whistleblowers had ever used these protections to provide information to ASIC.

As such, those with the best access to information still seem to feel as though they have least reason to disclose it. That is why I am pleased to release for comment this paper on options for enhancing the current framework and ensuring whistleblowers are adequately protected.

This paper deals with a series of concerns which have been identified with the existing protections and poses a number of options for addressing them. These issues include who can qualify for protection, what sorts of issues whistleblowers can disclose, whether whistleblowers can be anonymous and whether their motive matters.

The aim of this paper is to ensure that all who come forward with information that can assist in the protection of investor interests or the preservation of market integrity have access to protection.

It is not only the regulatory role which whistleblowers can play that makes their protection important. Many others also assist in the detection of corporate and financial services misconduct, but most have either mandated responsibilities or financial incentives to do so. However, whistleblowers are particularly courageous because they take serious risks without, usually, any prospect of personal reward.

For both practical and ethical reasons, the Rudd Government is committed to protecting whistleblowers. This paper is the first step in our efforts and so I invite all interested stakeholders to register their views.

A handwritten signature in black ink, reading "Chris Bowen". The signature is written in a cursive style with a period at the end.

Chris Bowen MP
Minister for Financial Services, Superannuation and Corporate Law

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SUMMARY OF OPTIONS

Who can qualify for protection as a whistleblower?	
Issue A	Option A.1
Many who might access information about corporate or financial services misconduct cannot qualify for protection because they do not fall into one of the categories currently covered.	That access to protection be extended to former employees, financial services providers, unpaid workers and business partners.
	Option A.2
	That protection be extended to any member of the public with access to inside information about corporate or financial services wrongdoing.
	Option A.3
	That the status quo be maintained.
Defining a 'subsidiary' for the purposes of the whistleblower protection provisions of the Insurance Act	
Issue B	Option B.1
The definition of 'subsidiary' under the Insurance Act is inconsistent with the definition under the other prudential Acts and the Corporations Act.	That the definition of 'subsidiary' for the purposes of the whistleblower protection provisions of the Insurance Act be made consistent with the definition of subsidiary under the Corporations Act.
	Option B.2
	That the status quo be maintained.
What issues can be disclosed under whistleblower protections?	
Issue C	Option C.1
Whistleblowers can only qualify for protection if they make a disclosure concerning an alleged breach of corporations legislation; whistleblowers cannot be protected if they make disclosures concerning other illegal corporate activities.	That whistleblowers have access to protection provided they make a disclosure concerning alleged illegal activities which ASIC can investigate.
	Option C.2
	That whistleblowers have access to protection provided they make a disclosure concerning alleged misconduct that ASIC can investigate.
	Option C.3
	That the status quo be maintained.
Should motive affect whether a whistleblower qualifies for protection?	
Issue D	Option D.1
Often whistleblowers with genuine information may have (or be open to the accusation of having) malicious or secondary motives. However, whistleblowers can only qualify for protection if they make a disclosure in good faith.	That whistleblowers no longer be required to make disclosures in good faith to access protections under the Corporations Act.
	Option D.2
	That the status quo be maintained.
Should anonymous disclosures qualify for protection?	
Issue E	Option E.1
As legislative protections cannot guarantee that a whistleblower will not suffer as a result of making a disclosure, many whistleblowers may wish to come forward anonymously. However, if the identity of a whistleblower who makes an anonymous disclosure is discovered, or they have to come forward later to provide evidence, they are unable to qualify for protection.	That whistleblowers no longer be required to identify themselves before making a disclosure to qualify for protection.
	Option E.2
	That a whistleblower's identity can only be required if it can be reasonably shown that their claims cannot be investigated without it.
	Option E.3
	That the status quo be maintained.

Improving protections for corporate whistleblowers

Should a court be able to order the production of documents which reveal a whistleblower's identity?	
Issue F	Option F.1
There is concern whistleblowers may be discouraged from coming forward if a court can order the release of documents that reveal or tend to reveal a whistleblower's identity.	That legislation require a court to consider the impact of requiring the production of documents revealing or tending to reveal a whistleblower's identity on the probability of future whistleblowers coming forward.
	Option F.2
	That legislation state the ASIC cannot be required to produce a document revealing or tending to reveal a whistleblower's identity unless an applicant can establish that the significance of those documents to their case outweighs the public interest in keeping the documents confidential.
	Option F.3
	That the status quo be maintained.
What confidentiality restrictions should apply to those receiving disclosures second-hand?	
Issue G	Option G.1
Third parties who receive information provided by a whistleblower second-hand are not subject to the same restrictions regarding the use of that information as those who receive the initial disclosure.	That parties receiving information provided by a whistleblower second-hand, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipients
	Option G.2
	That the status quo be maintained.
Should prospective whistleblowers be protected for seeking legal advice?	
Issue H	Option H.1
It may be difficult for many whistleblowers to determine whether or not they would qualify for protection.	That any disclosure made for the dominant purpose of seeking legal advice on a possible disclosure to a prescribed authority qualify for protection, regardless of other criteria.
	Option H.2
	That the status quo be maintained.

INTRODUCTION

OVERVIEW

1. The purpose of this paper is to seek stakeholder views on possible reforms to the legislative protections provided to corporate whistleblowers under Part 9.4AAA of the *Corporations Act 2001*.
2. This paper sets out a range of concerns in relation to existing protections along with options for reform and questions which are designed to focus the discussion. It is preferred that you address the focus questions in indicating the option(s) you believe to be best. You may, however, provide comments in whatever way you wish. There is also an additional issue on which the Government is seeking feedback. Comments in relation to this and/or any other concerns you may have with the current framework are welcome.
3. The protections under the Corporation Act were introduced in the *Corporate Law and Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* ('CLERP 9') to protect whistleblowers from potential reprisal or liability they may suffer as a result of disclosing information about corporate fraud or other forms of misconduct.
4. Prior to becoming legislation, they were examined by the Parliamentary Joint Committee on Corporations and Financial Services (PJC), along with the rest of the CLERP 9 reforms. Some of the issues raised by the PJC report are reconsidered in this paper, including in relation to whether malicious or anonymous disclosures should be protected.
5. In broad terms, this paper addresses issues in relation to:
 - who can qualify for protection;
 - the types of information that can be disclosed;
 - the criteria that must be met by a qualifying disclosure; and
 - the post-disclosure protection of a whistleblower's identity.
6. Several of the proposed reforms also relate to the whistleblower protections provided by the banking and insurance prudential legislation under the *Banking Act 1959*, the *Insurance Act 1973*, *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993*. These protections were introduced by the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007* ('SIS Act'). However, as these provisions are relatively recent, broad changes to the protections offered by these Acts are not anticipated.
7. The Corporations and Market Advisory Committee (CAMAC) report entitled *Aspects of market integrity*, released June 2009, also comments on whistleblowing. Specifically, it recommends that the Australian Securities and Investments Commission (ASIC) consider establishing a policy for granting leniency to whistleblowers who are involved in the misconduct they are reporting. As consultation was undertaken through the CAMAC process, this issue is not examined in this paper and is being considered separately by ASIC.

WHY IS WHISTLEBLOWING IMPORTANT?

8. In the regulatory context, a whistleblower can be defined as an individual who discloses illegal activities, occurring within or perpetrated by the organisation with which they are associated, to persons or organisations (internal or external) with authority to take action.
9. Whistleblowers can play a key role in the detection of corporate and financial services misconduct, a task which is made particularly difficult by legitimate needs for commercial secrecy and the size and complexity of modern markets.
10. Other actors also contribute to this endeavour. Some, such as statutory regulators, market operators and auditors, have mandated responsibilities. Others, such as stock analysts, short-sellers and equity holders, have clear financial incentives.
11. Whistleblowers differ from these other actors as, although they often have the best access to information, they also have many reasons not to disclose it. This is because access to information through some special relationship or proximity to the perpetrator also makes a whistleblower more vulnerable to reprisal. Employees in particular face serious risks. These include direct victimisation, damage to long-term career prospects and possible liability for defamation or breaches of a duty of confidence.
12. Evidence on whistleblowing in the Australian corporate sector is limited, but a study in the United States suggested 19 per cent of corporate frauds between 1996 and 2004 were uncovered by employees of the company responsible.¹ Whistleblowers have played a key role in a variety of contexts, including in relation to the prosecution of charges against Enron Corporation, which cost investors an estimated US\$11 billion, led to the collapse of one of the world's five largest accounting firms and was followed by major regulatory reforms around the world.
13. If whistleblowing is to be encouraged, then whistleblowers must be protected to the greatest extent possible.

PROTECTIONS FOR CORPORATE WHISTLEBLOWERS

14. Current whistleblower protections under the Corporations Act provide an informant with protection from civil liability stemming from a potential breach of a duty of confidentiality, fiduciary duty or defamation which they may be exposed to as a result of a voluntary disclosure. They do not, however, protect informants from civil or criminal liability they may have incurred from participating in the misconduct which they are reporting.
15. Protection can apply to company officers and employees as well as persons, or employees of persons, who provide goods or services to the company. This includes people providing advice to the company.

1 Dyck Alexander, Morse Adair & Zingales Luigi (2000) 'Who Blows the Whistle on Corporate Fraud' *NBER Working Paper Series*, Working Paper 12882.

16. However, to qualify for protection the informant must:
- make the disclosure to ASIC, an auditor or an internal company officer authorised to receive such disclosures;
 - have reasonable grounds to suspect that the information indicates a breach of corporations law has occurred or may occur;
 - be acting in good faith; and
 - provide their name prior to making the disclosure.
17. Where the disclosures are made to an auditor or an internal company officer, those persons also have strict obligations to keep the identity and any information likely to identify the informant in confidence. ASIC is bound by separate confidentiality obligations under section 127 of the *Australian Securities and Investment Commission Act 2001* ('ASIC Act').

PRUDENTIAL PROTECTIONS

18. Whistleblower protections under the banking and insurance prudential legislation are broadly similar to the protections under the Corporations Act. However, there are some key differences.
19. Firstly, in addition to those who can qualify for protection under the Corporations Act, persons in a related company can also provide protected disclosures.² These provisions differ from the equivalent Corporations Act provision because they seek to 'fit' the provision to the context of complex financial institutions and corporate groups. This framework is designed to encourage information flow in the financial entities, where financial accounts and reporting can be very complex and go through many different areas and layers of management, even different companies within the financial conglomerate.
20. Secondly, the principles that a disclosure must meet to qualify for protection are different. Under the Corporations Act a discloser must have reasonable grounds to suspect the information disclosed indicates a breach of corporations legislation. Under prudential legislation, this has been replaced with the requirement that the information concerns possible misconduct or an improper state of affairs and that the discloser believes the information will assist the officer to whom the information is being disclosed to perform their duties.

REFORMS TO PUBLIC SECTOR WHISTLEBLOWER PROTECTIONS

21. The Government supports a pro-disclosure culture in the public sector, underpinned by enhanced whistleblower protection mechanisms, as part of its commitment to integrity in Australian governance. Whistleblower protection is about ensuring that

² This includes a subsidiary, authorised non-operating holding company (NOHC) or contractor of an Authorised Deposit-taking Institution (ADI) or a general insurer, or a person employed by the investment manager or custodian of a superannuation fund trustee

there are appropriate processes in place, and protections offered, to facilitate the disclosure of misconduct and corruption within the public sector. The Government is committed to providing best-practice legislation to achieve this end.

22. As a first step towards reform, the House of Representatives Standing Committee on Legal and Constitutional Affairs tabled its report on a preferred model for whistleblower protection in the public sector on 25 February 2009. The report is available online on the Parliament House website (www.aph.gov.au).
23. The Government is currently considering the Committee's report and its recommendations with a view to providing a response. Building on this process, the Cabinet Secretary, Senator the Hon Joe Ludwig, intends to develop legislation during the remainder of 2009 and introduce it during this term of the Parliament.

APPROACHES IN INTERNATIONAL JURISDICTIONS

United Kingdom

24. In the UK, the *Public Interest Disclosure Act 1998* ('PID Act') provides protection to whistleblowers across almost all sections of the British economy, including the private and voluntary sectors, as well as to public bodies. The armed forces and intelligence services are the only areas where the Act does not apply.
25. Under the PID Act, whistleblowers can seek compensation from an employment tribunal where they are victimised or dismissed in breach of the Act, with awards being uncapped and based on the losses suffered.
26. As with Australian whistleblower legislation, the PID seeks to cover anybody who might do work for an organisation, not just those who are directly employed by it. However, depending on the nature of their work, it may not apply to volunteers.
27. The Act is aimed at protecting individuals who raise genuine concerns about a broad range of misconduct, including crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice and dangers to health and safety or the environment. As with Australian protections, all disclosures must be made in good faith to qualify for protection.
28. Disclosures must also meet other standards such as reasonableness, but these differ depending on the authority to whom the disclosure is made. Where a disclosure is made to an employer, only a reasonable belief that the information tends to show misconduct is required. Where the disclosure is made to a statutory authority, the discloser must also reasonably believe that the information and any allegation in it are substantially true and relevant to that authority.
29. Finally, under very limited circumstances, provisions are made to protect disclosures to groups such as to the police, media or parliamentarians. However, very stringent requirements must be met. To meet these requirements, such a disclosure must firstly be reasonable in all the circumstances and not made for personal gain. It must also be the case that either the whistleblower was at risk of victimisation; or had already raised the matter with the employer or regulator; or there was no prescribed regulator and there was reason to believe the evidence would be concealed or destroyed; or the concern was of an exceptionally serious nature.

30. Disclosure made in the course of obtaining legal advice also automatically qualifies for protection. However, the person to whom the disclosure was made cannot, of their own volition, make a protected disclosure.

United States

31. In the US under the *Sarbanes-Oxley Act 2002* Act ('SOX Act'), protection is afforded to whistleblowers by sections 806 and 1107.
32. These protections apply to employees of publicly traded companies who disclose a breach of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law relating to fraud against shareholders. To qualify for protection, this disclosure must be made to a federal regulatory or law enforcement agency; any member or committee of Congress; or anyone with supervisory authority over the employee. An employee is also protected if they are involved in filing of proceedings which relate to an alleged breach.
33. The protections give the employees of public companies the opportunity to pursue a civil claim against their employer if they discharge, demote, harass, threaten or in any other manner discriminate against an employee, provided the employee can make a prima facie case that the employer acted because of the employee's disclosure and the employer cannot convincingly show that there was another reason for which the person was dismissed. For the purposes of this legislation, employer also refers to individuals, including subcontractors, not just the company itself.
34. There are also criminal sanctions for any instance of victimisation, provided the information was correct and was provided to a law enforcement officer. These criminal sanctions are not limited to reports of breaches of the acts listed under section 806, but apply to any breach of US federal law.

1 WHO CAN QUALIFY FOR PROTECTION AS A WHISTLEBLOWER?

BACKGROUND

35. Whistleblower protections are designed to encourage the disclosure of information about possible misconduct to the appropriate authority. Only certain people will have access to information about misconduct (or be at risk of reprisal as a result of disclosing it). Accordingly, only certain people can qualify for protection under the current Corporations Act provisions.
36. To qualify for protection, under paragraph 1317AA(1)(a) of the Corporations Act, a person must be a company officer or employee; have a contract for the supply of goods or services to that company; or be an employee of a person who has a contract for the supply of goods or services to that company.
37. A similar approach is taken under prudential legislation, though a related company (including a subsidiary, non-operating holding company (NOHC) or contractor of an authorised deposit-taking institution (ADI) or a general insurer, or a person employed by the investment manager or custodian of a superannuation fund trustee) can also provide protected disclosures.
38. Overseas jurisdictions also limit who can qualify for whistleblower protections. The UK PID Act (though it uses the term employees) provides protection to anybody who works for an organisation. The US SOX Act also states that only employees can qualify for protection.

ISSUE A

39. While most potential whistleblowers will be covered by the existing categories, some may also come from other groups. Consequently, some of those who have access to privileged information about corporate misconduct (and face risks should they choose to disclose it) cannot currently qualify for protection.
40. A particular concern is that former employees currently lack access to protection. In some respects, former employees are particularly well placed to act as informants because the risks they face are less extensive than the risks facing those currently working at a firm. However, without access to appropriate legislative protections, confidentiality clauses may still prevent them from coming forward.
41. Protection may also be unavailable to volunteers and those on work experience. Such individuals do not face financial risks, but they can still be open to victimisation or bound by a duty of confidence. Though in a commercial context it would be rare for volunteers to have extensive access to non-public information, corporations law also applies to many not-for-profit entities. In the not-for-profit sector it is possible, and perhaps common, for volunteers to hold important positions and have access to key information.
42. Other groups that may gain access to evidence of wrongdoing are financial services providers, business partners and other professionals who are not in a contractual

relationship with those involved in misconduct, but work in close proximity to them. The nature of the relationship entered into with such parties may make it unclear as to whether it would be considered a contract for the supply of goods or services. Hence, it is unclear whether these people would currently have access to protection.

43. There are significant financial risks and reputational risks for such individuals if they choose to come forward as a whistleblower. There is also significant potential for confidentiality obligations to prevent disclosure in the absence of the exemptions provided by the whistleblower protections.
44. In dealing with groups who are not covered, there are two options, in addition to the option to maintain the status quo. The first is to simply extend protection to these groups. However, it may be difficult to accurately capture everybody with the potential to report inside information. As such, another option is to provide protection to any member of the public who comes forward with inside information.
45. There appear to be few costs to extending protection in this manner as anybody who did not feel at risk of reprisal would not be made more likely to make a frivolous disclosure by being granted protection. It should also be noted that a person who knowingly provides false or misleading information to ASIC may be guilty of an offence, pursuant to Division 137 of the *Criminal Code Act 1995* ('Criminal Code').
46. The protection provided under prudential legislation is already available to a range of persons. In addition to persons associated with an ADI, general insurer, life insurer or superannuation trustee, the whistleblower protection framework also applies to persons associated with an authorised NOHC, subsidiary, contractor, or a custodian or investment manager (in relation to superannuation). However, the gap is that whistleblower protection does not apply to former employees of all of these entities.

Focus questions

Should any or all these groups – former employees, financial services providers, unpaid workers and business partners – be allowed to qualify for whistleblower protections?

Are there any other groups who should also be allowed to qualify for whistleblower protection?

Are there any problems which you believe could emerge as a result of allowing any individual to qualify for protection?

Who can qualify for protection as a whistleblower?

Issue A	Many who might access information about corporate or financial services misconduct cannot qualify for protection because they do not fall into one of the categories currently covered.
Option A.1	That access to protection be extended to former employees, financial services providers, unpaid workers and business partners.
Option A.2	That protection be extended to any member of the public with access to inside information about corporate or financial services wrongdoing.

Option A.3	That the status quo be maintained.
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ISSUE B

47. There is also an anomaly under the Insurance Act whistleblower protection framework in respect of subsidiaries of a general insurer or NOHC. Whistleblower protection applies to an officer or employee of a subsidiary of an ADI or its NOHC or a life insurer if the subsidiary were a ‘subsidiary’ under the Corporations Act. That is, if the ADI, an NOHC of an ADI or a life insurer is in a position to cast, or control the casting of, more than half of the maximum number of votes that might be cast at a general meeting of the subsidiary, or holds more than half of the issued share capital of the subsidiary.
48. However, under the Insurance Act, a company is a ‘subsidiary’ of a general insurer or the NOHC of a general insurer if the parent entity is in a position to cast, or control the casting of, more than one quarter of the maximum number of votes that might be cast at a general meeting of the subsidiary, or holds more than one quarter of the issued share capital of the subsidiary.
49. There is no policy reason for this difference between the Insurance Act and the Banking or Life Insurance Act. For financial groups with an ADI or life insurer and a general insurer, the different legislative definitions of ‘subsidiary’ are likely to create additional compliance costs. Therefore, there may be merit in harmonising the three prudential Acts to adopt the Corporations Act meaning of subsidiary with regard to whistleblower protections. Further changes to the definition of subsidiary under the Insurance Act may be considered if consultation indicates a wider issue.

Focus question

Should whistleblower protection for officers or employees of a subsidiary of a general insurer or an NOHC of a general insurer be consistent with the protection for officers or employees of a subsidiary of an ADI, an NOHC of an ADI or a life insurer?

Defining a ‘subsidiary’ for the purposes of the whistleblower protection provisions of the Insurance Act

Issue B	The definition of ‘subsidiary’ under the Insurance Act is inconsistent with the definition under the other prudential Acts and the Corporations Act.
Option B.1	That the definition of ‘subsidiary’ for the purposes of the whistleblower protection provisions of the Insurance Act be made consistent with the definition of subsidiary under the Corporations Act.
Option B.2	That the status quo be maintained.

2 WHAT ISSUES CAN BE DISCLOSED UNDER WHISTLEBLOWER PROTECTIONS?

BACKGROUND

50. As whistleblower protection legislation is designed to apply in a regulatory context, a whistleblower can only qualify for protection if they make a disclosure concerning issues of regulatory importance.
51. Specifically, under paragraph 1317AA(1)(d) of the Corporations Act, a whistleblower must have reasonable grounds to suspect that a company (or company officer or employee) has or may have contravened a provision of the Corporations legislation. The application of the Criminal Code also extends the protection to disclosures made in relation to attempts, incitement or conspiracy to breach the law.
52. Under the banking and insurance prudential legislation the test is broader. It only requires that the information being disclosed concerns possible misconduct or an improper state of affairs and that the discloser believes the information will assist the officer to whom the information is being disclosed to perform their duties.
53. The protection provided by the SOX Act in the US is also more general, though it still relates specifically to legislative breaches rather than broader ideas of misconduct. Under section 807 of the SOX Act, a whistleblower can qualify for protection provided they make a disclosure concerning a breach of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.
54. The UK PID Act is aimed at protecting whistleblowers across an even broader range of contexts (though it should be noted that the PID Act applies to the public and private sectors). Under the PID Act, protection can be provided to individuals who raise genuine concerns about a broad range of misconduct, including crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice and dangers to health and safety or the environment.

ISSUE C

55. As not all issues of regulatory importance relate to Corporations legislation, there may be grounds for extending the current protections so that whistleblowers have access to protection in a broader range of contexts.
56. To highlight the problems of focusing exclusively on breaches of Corporations legislation, it is useful to note that approximately 10 per cent of ASIC enforcement activities in 2007-2008 were either solely a State Crimes Act contravention or a State Crimes Act contravention combined with a Corporations Act contravention.
57. It seems anomalous that there are matters which a whistleblower would not be protected for disclosing, but which are still significant enough to warrant investigation by ASIC. This suggests a clear need for the scope of protections to be expanded, at least to include disclosures on any matter which ASIC can investigate. As ASIC has broad ranging powers, this should effectively replicate the approach taken under the

US SOX Act and provide whistleblowers with protection for any disclosures concerning breaches of legislation related to the protection of investors.

58. Nonetheless, there is another question, specifically, whether disclosures should be restricted to breaches or possible breaches of legislation, or whether they be allowed to relate to broader notions of misconduct or improper states of affairs.
59. The former is consistent with the approach currently taken under the Corporations Act and the US SOX Act. The latter is consistent with the approach taken under the banking and insurance prudential legislation and the UK PID Act. While the latter option provides the potential for more proactive regulation, it also poses problems. In particular, it is unclear how the terms 'misconduct' and 'improper state of affairs' will be interpreted in the context of corporate law, let alone by members of the public.
60. While it is reasonable to ask business to obey the law, it may be unreasonable to ask them to refrain from vaguely defined misconduct (as the term may have different implications for corporate conduct and governance in the prudential and corporations law contexts). Consequently, there is a risk that uncertainty about whether information can be shared with regulators will undermine the relationship between a business and its staff and result in an increase in the regulatory burden. In the absence of detailed requirements as exist under the prudential framework, it may also be difficult for authorities to take action when such disclosures are made if these do not concern legislative breaches.
61. The situation is different in the prudential context where it is important for the regulator to receive early warning of likely breaches so that it can use its supervisory and preventative powers to reduce the likelihood of failure at the entity or other detriment for the depositors, policyholders or superannuation members.
62. The difference is that the Australian Prudential Regulation Authority (APRA) is a proactive regulator that seeks to correct inappropriate practices or governance arrangements so as to reduce to an acceptable level the risk of financial difficulties at the entity or detriment to the depositors, policyholders or superannuation members. To this end, there are clear community benefits from APRA receiving early warning of misconduct or an improper state of affairs that may result in such breaches or detriment. In addition, the prudential framework provides a significant level of enforceable requirements and guidance in relation to operational, financial or other aspects of governance for the entity's management.

Focus questions

Do you believe there are any risks associated with extending protection to any disclosure which concerns a matter that ASIC can investigate or that relates to the protection of investors rather than just disclosures concerning corporations legislation?

Do you believe there are risks associated with providing whistleblower protection to disclosures that concern broader notions of misconduct or improper states of affair and/or the notion of an officer's duties or functions in the corporate context?

Are there benefits to broadening protections in this way?

What issues can be disclosed under whistleblower protections?

Issue	Whistleblowers can only qualify for protection if they make a disclosure concerning an alleged breach of corporations legislation; whistleblowers cannot be protected if they make disclosures concerning other illegal corporate activities.
Option C.1	That whistleblowers have access to protection provided they make a disclosure concerning alleged illegal activities which ASIC can investigate.
Option C.2	That whistleblowers have access to protection provided they make a disclosure concerning alleged misconduct which ASIC can investigate.
Option C.3	That the status quo be maintained.

3 SHOULD MOTIVE AFFECT WHETHER OR NOT A DISCLOSURE CAN QUALIFY FOR PROTECTION?

BACKGROUND

63. There is always a risk that measures designed to protect genuine whistleblowers will be abused by individuals who wish to make vexatious claims, either out of malice or for personal benefit. To address this risk, paragraph 1317AA(1)(e) of the Corporations Act requires a whistleblower to have been acting in 'good faith' to qualify for protection. The explanatory memorandum states that this means that the whistleblower should not have any malicious or secondary motive in making the disclosure.
64. This could be taken to mean that a whistleblower's motive must be wholly altruistic. However, a more moderate interpretation might be drawn from the treatment of a similar provision in the UK PID Act which the courts have determined to mean only that the dominant purpose must not be malicious.
65. Like the Corporations Act and UK PID Act, the whistleblowing protections provided by the banking and insurance prudential legislation also require that a disclosure be made in good faith. In contrast, a whistleblower's motive does not affect whether or not they can qualify for protection under the US SOX Act.

ISSUE D

66. Some stakeholders have expressed concerns about the good faith provision, both when it was introduced and subsequently. Even if it is only the whistleblower's dominant purpose that must be altruistic, the good faith provision has the potential to unfairly deny protection and inhibit the detection of misconduct.
67. If a whistleblower has information concerning corporate misconduct, it seems in the public interest to have it disclosed, regardless of the whistleblower's motive. The counter argument is that disclosures that have been made maliciously may have been fabricated. However, paragraph 1317AA(1)(d) of the Corporations Act also requires a whistleblower to have 'reasonable grounds to suspect'. An individual found to have fabricated information in their disclosure would fail this test. Furthermore, a person who knowingly provides false or misleading information to ASIC may be guilty of an offence, pursuant to Division 137 of the Criminal Code.
68. It may be argued that it is often difficult to determine whether or not a disclosure was fabricated and that the good faith clause serves to identify fabricated information that would not otherwise have been detected. However, the good faith provision exaggerates the importance of motive in determining whether or not a disclosure has been fabricated. While a malicious motive may be suggestive, in the absence of the good faith provision other factors would also be considered.
69. If the evidence is flimsy, then a questionable motive might indicate that a discloser has fabricated their claims, but motive is less important if the evidentiary strength of the information is strong. The problem with the good faith provision is that it means that

the evidentiary strength of a disclosure becomes irrelevant if a whistleblower’s motive is found to be questionable.

70. The other problem with the good faith provision is that a whistleblower’s motive may be difficult to determine. This difficulty can be amplified if the whistleblower raises the matter internally first as any tension or animosity this generates may be used to suggest malicious motives.
71. It is also easier to suggest a whistleblower has malicious motives if they have been treated badly by their employer. The Shipman Inquiry, which was conducted by a British High Court judge at the request of the British Secretary of State for Health to investigate improvements to the British healthcare system, observed that, under the good faith provision, the more ‘loathsome’ the employer, the more difficult it would be for employees to act (or prove they were acting) in good faith.
72. Overall, the effects of the good faith provision appear predominantly negative. It is likely to do little to discourage vexatious disclosures and may prevent significant instances of corporate misconduct from being considered. In relation to the Corporations Act, the primary option for addressing this issue would be to remove the good faith provision and rely on the reasonableness requirement under paragraph 1317AA(1)(d) to prevent vexatious disclosures.
73. There appears to be sound policy rationale for maintaining the good faith requirement under prudential legislation. As discussed above, whistleblower protection under the prudential legislation applies to a range of matters in addition to actual or suspected breaches, but a whistleblower must make the report in good faith. These principles seek to ensure that disclosures that are relevant to the regulator or company officer’s duties and functions receive protection, unless the disclosure is malicious, dishonest or vexatious.
74. These principles achieve a difficult balance by protecting a broad range of relevant disclosures while discouraging malicious or vexatious disclosures. Therefore, it is not envisaged that the ‘good faith’ requirement under the prudential whistleblower protection framework would be removed.

Focus questions

Do you believe disclosures that are malicious but concern genuine misconduct should be protected?

Do you believe removing the good faith provision would encourage large numbers of fabricated disclosures to be made?

Should motive affect whether or not a disclosure can qualify for protection?

Issue	Often whistleblowers with genuine information may have (or be open to the accusation of having) malicious or secondary motives. However, whistleblowers can only qualify for protection if they make a disclosure in good faith.
Option D.1	That whistleblowers no longer be required to make disclosures in good faith to access protections under the Corporations Act.
Option D.2	That the status quo be maintained.

4 SHOULD ANONYMOUS DISCLOSURES QUALIFY FOR PROTECTION?

BACKGROUND

75. There is a perception that disclosures made anonymously are more likely to be fabricated or frivolous. Consequently, another measure designed to prevent protections aimed at genuine whistleblowers from being abused is to stop anonymous whistleblowers from qualifying for protections. Specifically, paragraph 1317AA(1)(c) of the Corporations Act requires a whistleblower to provide their name to the person to whom they are making a disclosure prior to making the disclosure.
76. A similar requirement exists in relation to the whistleblower protections provided by the banking and insurance prudential legislation. However, overseas neither the UK PID Act nor US SOX Act have similar requirements.

ISSUE E

77. Given the risks associated with becoming a whistleblower, there is a strong preference among whistleblowers for anonymity. As long as a whistleblower is able to maintain their anonymity, they will be free from reprisal and it is irrelevant that they do not qualify for legislative protection.
78. However, a whistleblower's efforts to remain anonymous may not be successful. For example, once an investigation begins it may become clear that only a few individuals had access to the information being used by the investigators. Alternatively, suspicions may be aroused if the whistleblower had previously raised the matter with colleagues.
79. Once an anonymous whistleblower's identity is revealed, they become as in need of protection as any other whistleblower, so the question becomes whether there is any reason to deny them access.
80. Generally, the argument given for denying access to anonymous whistleblowers is that protecting them would lead to vast amounts of false and irrelevant information being reported. However, anonymity is not the only factor that stops vexatious disclosures from being protected as, under paragraph 1317AA(1)(d), a whistleblower must have 'reasonable grounds to suspect' to qualify for protection.
81. Allowing disclosures that were initially anonymous to qualify for protection should not give comfort to those who wish to make vexatious disclosures. For an individual making a vexatious disclosure anonymously, whether or not they qualify for protection under the Corporations Act is irrelevant, provided they remain anonymous. Alternatively, if their identity is discovered and their disclosure is found to be vexatious, then whether or not anonymous disclosures are protected is also irrelevant. This means that the main consequence of denying protection to anonymous whistleblowers is the disqualification of those making genuine disclosures.
82. The most obvious solution to this issue is to allow anonymous disclosures to be protected. However, based on the belief that these are less useful than where a

whistleblower identifies themselves, two concerns have been expressed in relation to this option.

83. The first concern is that all whistleblowers would refuse to identify themselves if the legislation were changed to allow anonymous disclosures. However, the fact that very few whistleblowers have come forward suggests that there are very few whistleblowers who would be willing to come forward openly. Additionally, it is possible to request that a whistleblower identify themselves if this is essential to the investigation. Logically, anybody who is willing to come forward under the present scheme and disclose their identity would also be willing to disclose their identity if they were told it was essential for the investigation to proceed.
84. The second concern is that anonymous disclosures, regardless of whether or not they are genuine, are not useful and even counterproductive. This is asserted on the grounds that they are difficult to investigate and may be a waste of resources. However, it seems that there are situations where anonymous disclosures would be useful, such as where the disclosure assists an existing investigation.
85. Nonetheless, there is a compromise position if these issues prove to be substantial. It would be to allow anonymous disclosures, but provide that protection will lapse if the authority to whom the disclosure is made requests that the whistleblower identify themselves and can reasonably show that the investigation cannot proceed without it.
86. The broader range of disclosures that are protected under the whistleblower protection framework under prudential legislation are balanced by the requirements for 'good faith' disclosures and for the whistleblower to disclose his or her identity. However, the effect of any amendments under the Corporations Act with respect to anonymous disclosures would be monitored.

Focus questions

Should anonymous disclosures be allowed to qualify for protection?

If you have been involved in disclosure arrangements that accepted information anonymously, did you find such information useful or counterproductive?

Do you think that allowing anonymous disclosures would decrease the number of non-anonymous disclosures?

Do you think it would make whistleblowers more likely to come forward if their identity would only be requested if it can be reasonably shown that their claims cannot be investigated without it?

Should anonymous disclosures qualify for protection?	
Issue E	As legislative protections cannot guarantee that a whistleblower will not suffer as a result of making a disclosure, many whistleblowers may wish to come forward anonymously. However, if the identity of a whistleblower who makes an anonymous disclosure is discovered, or they have to come forward later to provide evidence, they are unable to qualify for protection.
Option E.1	That whistleblowers no longer be required to identify themselves before making a disclosure to be granted protection.
Option E.2	That a whistleblower's identity can only be required if it can be reasonably shown that their claims cannot be investigated without it.
Option E.3	That the status quo be maintained.

5 SHOULD A COURT BE ABLE TO ORDER THE PRODUCTION OF DOCUMENTS THAT REVEAL A WHISTLEBLOWER'S IDENTITY?

BACKGROUND

87. Legislative protections cannot fully insulate whistleblowers from the risks associated with becoming an informant. As such, where a whistleblower discloses their identity or information which might tend to identify them to ASIC or another authority, it is important for their identity to be appropriately protected.
88. Accordingly, where disclosures are made to an auditor or an internal company officer, there are strict obligations for them to keep the identity and any information likely to identify the informant confidential. These restrictions are outlined under subsection 1317AE(1) of the Corporations Act. ASIC is bound by separate confidentiality obligations under section 127 of the ASIC Act.
89. However, recent court decisions have indicated that it may be possible for a court to order the production of documents that reveal a whistleblower's identity if they find the significance of those documents to the party seeking them outweighs the public interest in keeping the documents confidential.
90. These decisions relate to a class action by Multiplex shareholders against Multiplex Ltd. The applicants issued a subpoena seeking production of examination transcripts and documents obtained by ASIC during its investigation of Multiplex Ltd. ASIC resisted the inspection of particular documents and transcripts on the grounds of public interest immunity, as the documents would or might disclose the identity of whistleblowers who had supplied ASIC with information in relation to the case.
91. The Federal Court initially rejected ASIC's claim to public interest immunity, but the Full Court of the Federal Court found in ASIC's favour, and special leave for the Multiplex shareholders to appeal to the High Court was refused.
92. The Full Federal Court recognised that there is an undeniable interest in the protection of the particular informers in question and the encouragement of future informers. This public interest was weighed against the significance of the documents to P Dawson Nominees in the proceedings. The potential effect of the decision on the willingness of future whistleblowers to come forward was taken into consideration.
93. However, the question of the production of documents is currently being reconsidered as the Multiplex shareholders were granted leave by a single judge of the Federal Court to re-litigate their application for inspection of the relevant documents. During the hearing of the application to re-litigate, the identity of one of the Multiplex informers was publicly revealed as a result of, amongst other things, the court refusing to close the court. This demonstrates the risk that, because of the ambiguities of the current legislation, attempting to determine in court whether it is appropriate to restrict access to documents that identify or could identify an informer can jeopardise the very public interest immunity that is at issue.

ISSUE F

94. There is concern that whistleblowers will be discouraged from coming forward because of the risk that their identity will not be protected if documents revealing or tending to reveal their identities are sought, via subpoena or otherwise, in proceedings.
95. Nonetheless, it is important to consider the interests of litigants, such as the Multiplex shareholders, in this area. It must also be recognised that the Full Federal Court has already agreed that there are public interest considerations in relation to the protection of a whistleblower's identity, which must be considered where there is the possibility that their will be revealed.
96. Consequently, there is an argument that it should be left to the courts to consider the strength of the arguments for public interest immunity on a case-by-case basis.
97. However, this approach causes difficulties. The length, complexity and costs of the proceedings arising from the whistleblower identity issues in the Multiplex proceedings suggest that the legislation may provide insufficient guidance in relation to the importance of keeping a whistleblower's identity confidential. The simplest option for addressing this issue might be to codify the Full Federal Court's recognition of the need to consider the interest of the whistleblower with respect to confidentiality.
98. On the other hand, ASIC would still need to establish the case for public interest immunity in each instance. As such, given the risks faced by whistleblowers in coming forward and the potential discouragement of future whistleblowers if their identity is not adequately protected a second option may be to switch the burden of proof so that the applicant must demonstrate that the significance of those documents to their case outweighs the public interest in keeping the documents confidential.
99. These concerns are considered to be relevant in the prudential context as well. Therefore, comments would be welcome on whether this proposal should also apply to the whistleblower protection under prudential legislation.

Focus questions

- To what extent do you think amending the legislation to better protect the identity of whistleblowers would affect the probability of future whistleblowers coming forward? Would they be encouraged to a significantly greater extent by placing the burden of proof on the applicant?
- To what extent would the options disenfranchise litigants who might wish to gain access to ASIC documents to pursue an action?

Should a court be able to order the production of documents which reveal a whistleblower's identity?	
Issue F	There is concern whistleblowers may be discouraged from coming forward if a court can order the release of documents that reveal or tend to reveal a whistleblower's identity.
Option F.1	That legislation require a court to consider the impact of requiring the production of documents revealing or tending to reveal a whistleblower's identity on the probability of future whistleblowers coming forward.
Option F.2	That legislation state the ASIC cannot be required to produce a document revealing or tending to reveal a whistleblower's identity unless an applicant can establish that the significance of those documents to their case outweighs the public interest in keeping the documents confidential.
Option F.3	That the status quo be maintained.

6 WHAT CONFIDENTIALITY RESTRICTIONS SHOULD APPLY TO THOSE RECEIVING DISCLOSURES SECOND-HAND?

BACKGROUND

100. A key aspect of providing protection to whistleblowers is ensuring that their identity is appropriately safeguarded. Where disclosures are made to an auditor or an internal company officer, there are strict obligations for them to keep the identity and any information likely to identify the informant in confidence.
101. These protections are outlined under subsection 1317AE(1) of the Corporations Act. They provide that it is an offence to disclose information disclosed by a whistleblower, the identity of the whistleblower or information likely to lead to the identification of the whistleblower that was obtained directly or indirectly from the whistleblower.
102. However, there is an exemption from the requirements of subsection 1317AE(1) under subsection 1317AE(2) where the disclosure is to ASIC, APRA, the Australian Federal Police (AFP) or a third party with the consent of the whistleblower. ASIC is bound by separate confidentiality obligations under section 127 of the ASIC Act. APRA and the AFP are subject to analogous confidentiality obligations.

ISSUE G

103. Where a whistleblower gives consent for information to be disclosed to a third party, that third party does not appear to be bound by the restrictions of subsection 1317AE(1). This raises concerns, for both whistleblowers and business. For whistleblowers, there is an increased risk of their identity being revealed. For businesses, there is the risk that this third party will be able to reveal sensitive commercial information or unproven allegations to the broader public.
104. The solution to this problem seems to be to give whistleblowers control over the flow of information. It seems reasonable to provide a whistleblower with some control over the flow of information by legislating that if any information they have provided is given to a third party, then that third party should also be bound to keep it in confidence, unless the whistleblower states otherwise.
105. This should not pose a problem in terms of possible restrictions on the investigation itself. There is a distinction between a disclosure (that is prohibited) and a use of information (that does not involve disclosure). While a use of information may often involve the disclosure of that information, this is not always the case. A person may use information in the sense of acting upon the knowledge that it has provided without disclosing the information to anyone else. Such a use of 'confidential information' (as defined) would not involve the person committing an offence against subsection 1317AE(1). This appears appropriate, as there is little point in a whistleblower providing information to a person if they cannot act on it (for instance by making further enquiries).
106. This aspect of prudential legislation's whistleblower protection framework is consistent with the Corporations Act. Therefore, the options proposed for the Corporations Act are also likely to be relevant for the prudential context.

Focus questions

If an authority which receives a protected disclosure from a whistleblower is authorised to pass on information to a third party, should that third party be subject to confidentiality requirements with respect to that information?

Would this inhibit the effective investigation of a whistleblower's concerns?

What confidentiality restrictions should apply to those receiving disclosures second-hand?

Issue	Third parties who receive information provided by a whistleblower second-hand are not subject to the same restrictions regarding the use of that information as those who receive the initial disclosure.
Option G.1	That parties receiving information provided by a whistleblower second-hand, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipients.
Option G.2	That the status quo be maintained.

7 SHOULD PROSPECTIVE WHISTLEBLOWERS BE PROTECTED FOR SEEKING LEGAL ADVICE?

BACKGROUND

107. Any law, particularly a law seeking to provide protection to vulnerable parties, should be as clear and easy to understand as possible. However, whatever changes are made, there will always be uncertainty for whistleblowers about whether or not they will be protected.
108. To address this problem, the UK PID Act provides that any disclosure made for the dominant purpose of seeking legal advice can qualify for protection, though the person receiving the disclosure is unable to make further disclosures unless they are acting as the whistleblower's agent.
109. In Australia, the confidentiality offered by legal professional privilege may already provide some protection for such disclosures, but this does not protect whistleblowers against victimisation if the company discovers that they have contacted a lawyer about making a disclosure.

ISSUE H

110. Given the existing whistleblowing protection regime has been used so infrequently, there may be some uncertainty about how it operates. Introducing a provision analogous to that under the UK PID Act would help provide prospective whistleblowers with certainty in relation to whether they qualify for protection and potentially encourage more whistleblowers to come forward. There do not appear to be obvious risks with this proposal and it may actually help to prevent instances of erroneous disclosure.
111. This option is desirable in the prudential context as well, particularly in view of the broader range of disclosures that may qualify for protection under prudential legislation.

Focus questions

Should a disclosure made for the dominant purpose of seeking legal advice qualify for whistleblower protections, provided that the person receiving the disclosure is unable to make further disclosures unless they are acting as the whistleblower's agent?

Would this encourage more whistleblowers to come forward?

Would this help educate potential whistleblowers about their rights and obligations?

Should prospective whistleblowers be protected for seeking legal advice?	
Issue	It may be difficult for many whistleblowers to determine whether or not they would qualify for protection.
Option H.1	That any disclosure made for the dominant purpose of seeking legal advice on a possible disclosure to a prescribed authority qualify for protection, regardless of other criteria.
Option H.2	That the status quo be maintained.

8 INTERNAL WHISTLEBLOWING

112. Under the existing whistleblower protection scheme, qualifying disclosures may be made to certain private authorities, in addition to ASIC. However, there is limited information available on how effective the scheme has been in promoting disclosures to these private authorities.

Focus questions

Are you aware of internal reporting mechanisms that allow a whistleblower to voice their concerns without involving regulatory authorities?

If so, have legislative protections helped encourage whistleblowers to use these mechanisms?