Regulation impact statement – Reforms of protections for corporate sector whistleblowers

Contents

Background

The importance of protecting whistleblowers has been recognised for many years as a means of improving the compliance culture of corporations and improving detection of corporate crime. However, whilst legislative protections have formed part of the *Corporations Act 2001* (Corporations Act) since 2004, they have been sparingly used and are increasingly perceived as inadequate given recent advances in whistleblower protections in the public sector and overseas.

Independent reviews of corporate sector whistleblowing provisions in Australia have found that they lag those of the public sector and those of comparable overseas jurisdictions. An independent evaluation of G20 countries' whistleblowing laws in 2014, and a separate assessment of the same laws were undertaken by the Senate Economics References Committee (the Committee) as part of its Inquiry into the Performance of ASIC in 2014. They both found that the current corporate whistleblower protections are overly narrow and make it unnecessarily difficult for those with information to qualify for protections. The Committee recommended a comprehensive review of Australia's corporate whistleblower framework to bring it closer to Australia's public sector whistleblower framework under the PIDA. Refer to further details in section 1.

To remedy these inadequacies, the Government committed in December 2016, as part of the Open Government National Action Plan (OGNAP)[1], to ensuring appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. In order to achieve this, the Government committed to improving whistle-blower protections for people who disclose information about tax misconduct to the Australian Taxation Office. It also committed to pursuing reforms to whistleblower protections in in other parts of the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector available under the Public Interest Disclosure Act 2013 (PIDA).

The commitment in the OGNAP reaffirms the Government's announcement in the 2016-17 Budget to introduce greater protections for tax whistleblowers to further strengthen the integrity of Australia's tax system. Currently, there are no specific protections for tax whistleblowers, and the range of secrecy and privacy provisions relied upon are incapable of guaranteeing absolute protection.

Given the lack of protections for tax whistleblowers and the need to strengthen protections for other whistleblowers in the corporate sector the Government is progressing these reforms in parallel, including introducing them as part of the same legislation. This will ensure consistency in protections, where it makes sense to do so. Whilst the proposed protections for tax and other whistleblowers are largely consistent, there are some differences and so this regulatory impact analysis focuses on the corporate whistleblower protections only.

Separately, following the passage of amendments enhancing whistleblower protections in the *Fair Work (Registered Organisations) Act 2014* (RO Act), the Government referred to the Joint Parliamentary Committee on Corporations and Financial Services an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors (Parliamentary Inquiry). This Parliamentary Inquiry examined the RO Act whistleblower amendments with an objective of implementing the substance and detail of those amendments to achieve an equal or better whistleblower protection and compensation regime in the corporate and public sectors.

[1] http://ogpau.pmc.gov.au/2016/12/07/australias-first-national-action-plan-submitted

Corporate whistleblower protections available under the Corporations Act and the ASIC Act

The protections currently offered to corporate whistleblowers under Part 9.4AAA of the Corporations Act in respect of any disclosure about an actual or potential contravention of corporations legislation:

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

These protections have been widely criticised as being limited and overly complex. Specifically, to qualify for protection a whistleblower must:

- be either a current officer or employee of the company in question or a current contractor (that is, protections do not apply to former employees or contractors);
- make the disclosure in good faith to ASIC, the company's auditor, or nominated persons within the company (that is, protections rely on a whistleblower's motivation in making the disclosure);
- have reasonable grounds to suspect that either the company, or some of its officers or staff, have breached (or might have breached) a provision of the Corporations Act or the Australian Securities and Investments Commission Act 2001 (ASIC Act) (that is, the protections do not apply for disclosures relating to breaches of any other act); and
- provide their names before making the disclosure (that is, the disclosure cannot be made anonymously).

Corporate whistleblower protections available under statues within the remit of ASIC and APRA

Currently, there are no whistleblower protections under the *National Consumer Credit Protection Act 2009* (NCCP Act) or the *Financial Services (Collection of Data) Act 2001*.

Similar whistleblower protections to those set out in the Corporations Act are contained in the statutes within APRA's remit such as:

- the Banking Act 1959;
- the Insurance Act 1973;
- the Life Insurance Act 1995; and
- the Superannuation Industry (Supervision) Act 1993.

Whistleblower protections are available under these Acts if the disclosures concern misconduct or an improper state of affairs or circumstances affecting the institutions supervised by APRA (authorised deposit-taking institutions (ADIs), insurers and superannuation entities). Under the Banking Act for instance, a person may qualify for protection if the disclosure:

- relates to misconduct, or an improper state of affairs or circumstances in relation to the ADI; and
- the whistleblower considers that the information may assist the recipient of the disclosure to perform his or her functions or duties.

Similar requirements are set out for insurers and superannuation entities in the Life Insurance Act, the Insurance Act and the Superannuation Industry Act respectively, with some minor differences to reflect the roles of the actuary for insurers and superannuation entities as well as the role of the trustee of the superannuation entity.

1. What is the policy problem?

Combating corporate crime is a longstanding law enforcement and public policy challenge. Corporate crime is estimated to cost Australia more than $8.5 billion a year and account for approximately 40 per cent of the total cost of crime in Australia.[2]

Whistleblowing plays a critical role in uncovering corporate crime. It is a significant means of combating poor compliance cultures, as it ensures that companies, officers, and staff know that misconduct can be reported. Furthermore, the opaque and complex nature of corporate crime makes it difficult for law enforcement to detect misconduct. In many cases, corporate crime is only detected because individuals come forward, sometimes at significant personal and financial risk.

To reduce these risks and encourage disclosures, whistleblowers are often afforded legal protections in relation to their disclosure. If the protections are inadequate or unclear, a whistleblower may be discouraged from sharing information due to fears of personal or professional reprisal.

Organisational behaviour research tends to show that rates of reporting and/or other action on wrongdoing go up where organisations are forced or induced to introduce stronger ethics policies or programs, including reporting policies, in which employees have confidence, or employees believe they are subject to legislative protections in which they have some confidence. This second point is illustrated in Whistling While They Work 1[3] where it was found that employee confidence in whistleblower protection legislation correlated strongly with lower 'inaction' in the face of perceived wrongdoing across 83 public sector organisations.

Further, in Whistling While They Work 2[4] it was confirmed that employee reporting is the single most important way of wrongdoing being brought to light especially on the part of managers and governance professionals. This is relative to other means, for example audits, management observation and internal controls. This is based on a sample of over 11,000 respondents from all employee classes from 38 organisations, public and private.

National and international evaluations of corporate whistleblower protections

The assessment of Australia's corporate whistleblower protections, undertaken by the Senate Economics References Committee as part of its Inquiry into the Performance of ASIC in 2014,

[2] The estimates refer to figures quoted in Attorney General Department, 2016, *Improving enforcement options for serious crime: Consideration of a Deferred Prosecution Agreements scheme in Australia.* Public Consultation Paper (page 4)
[3] Whistling While They Work 1: Brown, Mazurski & Olsen 2008
[4] Whistling While They Work 2: Select Work-in-Progress Results, 13 September 2017

concluded that "a strong case exists for a comprehensive review of Australia's corporate whistleblower framework, and ASIC's role therein."[5]

Witnesses to the Inquiry expressed concern over the Corporations Act's narrow definitions of who might be considered a whistleblower and the type of disclosures that could attract whistleblower protections; the absence of any requirement in the Act for internal whistleblowing processes within companies; and the fact that the Act does not mandate a role for ASIC in protecting whistleblowers.

The Committee recommended a review of Australia's corporate whistleblower framework to bring it closer to Australia's public sector whistleblower framework under the PIDA and introduce a number of amendments to the Corporations Act focusing on:

- extending the definition of whistleblowers expand the definition of a whistleblower to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners;
- expand the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate;
- allowing anonymous disclosures;
- remove the requirement that a whistleblower must be acting in 'good faith' in disclosing information. Consistent with PIDA, replace with a requirement that a disclosure is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing regardless of what the whistleblower believes;
- strengthening protections by strengthening the victimisation provisions to match the level of protections provided by the PIDA and including provisions in the Corporations Act that would not require ASIC to reveal a whistleblower's identity without a court or tribunal order.

Similarly, in 2014 an independent evaluation of G20 countries' whistleblowing laws[6] concluded that that although Australia's whistleblower protections were comprehensive for the public sector, they lagged international best practice for the private sector. It identified the following areas for potential reform:

- broadening definition of whistleblowers and the scope of wrongdoing covered;
- introducing protections for anonymous complaints;
- introducing external reporting channels and requirements for internal company procedures;
- improving compensation arrangements and protections against retaliation;
- establishing an oversight agency responsible for whistleblower protections; and
- improving the transparency of the legislation.

In November 2016, the Parliamentary Inquiry was established to review the whistleblower protections in the corporate, public and not-for-profit sectors with the objective of recommending that the new whistleblower protections in the RO Act are implemented in the corporate and public sectors. In many respects the new whistleblower protections in the RO Act represented the new standard for whistleblower protections in Australia.

[5] Senate Standing Committee on Economics, 2014, Performance of the Australian Securities and Investments Commission

[6] Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, 2015, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*

Using the whistleblower protections in the RO Act as the standard, the committee made 35 recommendations to improve whistleblower protections in the public and private sectors.[7] Some of the key recommendations address inadequacies identified with the existing whistleblower protections in the following areas:

- protecting whistleblowers from reprisals and holding those responsible for reprisals to account;
- effectively investigating alleged reprisals;
- whistleblowers being able to seek redress for reprisals; and
- the fragmented and inconsistent nature of whistleblower legislation. It was found that significant inconsistencies 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.

The reforms described in this regulatory impact statement have been developed having regard to the recommendations made by the above national and international evaluations of Australia's corporate whistleblowing regime.

2. Why is government action needed?

Shifting technologies and the global nature of business are contributing to the increasing complexity and sophistication of corporate misconduct. In this evolving setting, the knowledge of those working within an organisation provides an important, and in some cases the only, route to detection and prosecution of corporate crime.

As a result of the inadequacies detailed above, the current legal settings give whistleblowers in the corporate sector little incentive to come forward with their information.

In addition, because whistleblower protections are spread across multiple statutes, their application is complicated and their coverage is fragmented. To be certain of protection, a whistleblower is required to possess sophisticated knowledge of Australia's legal system, specifically, the precise Act which the organisation has contravened. This potential for uncertainty is compounded by the fact that, under the current protections, the whistleblower is unable to seek legal advice while retaining their statutory protections, as lawyers are not included in the list of persons to whom a whistleblower can make a protected disclosure. Additionally, there are categories of people with potentially valuable knowledge who are excluded from protection; for example, former employees or an organisation's accountant.

Government action is needed to ensure that the legislative settings:

- actively protect whistleblowers;
- encourage them to make disclosures;
- provide an early warning system for regulators;
- facilitate investigation of the disclosures made; and
- afford procedural fairness to those who may be subject of a disclosure.

[7] Parliamentary Joint Committee on Corporations and Financial Services, 2017, *Whistleblower Protections* available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report

The main objective of this proposal is to remedy these shortcomings of the current legislation and meet Government's commitment made as part of the OGNAP to ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.[8]

Public consultation (held in line with the OGNAP commitment) seeking stakeholders views on the adequacy of the current protections for whistleblowers in the corporate sector highlighted an urgent need for a Government action in this area and overwhelming support for the reforms proposed (see for more on consultation section 5).

3. Policy options

There are three policy options available to the Government.

- Option 1 – Maintain the status quo.
- Option 2 – Reform whistleblower protections in the Corporations Act only.
- Option 3 – Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

Option 1 - Maintain status quo

This policy option does not involve a legislative change.

Option 2 - Reform whistleblower protections in the Corporations Act only

This policy option involves strengthening protections available to whistleblowers under the Corporations Act only. The Corporations Act is amended to:

- expand the categories of whistleblowers qualifying for protection to include former officers, employees and suppliers as well as associates of the entity in relation to which the disclosure is made, and specified family members of employees, officers and others of a regulated entity;
- eliminating the 'good faith' requirement for disclosures so that generally the motivation of whistleblowers cannot be taken into account in determining whether a disclosure ought to qualify for be protection or not;
- allow anonymous disclosures;
- enhance requirements designed to protect a whistleblower's identity;
- expanding the range of persons or entities to which a whistleblower may make a protected disclosure including to lawyers for the purpose of obtaining legal advice;
- expand the protections and redress for whistleblowers who suffer reprisal or retaliation in relation to a disclosure;
- improve access to compensation for whistleblowers who are the subject of such reprisals; and
- introduce a requirement that public companies, large proprietary companies and superannuation trustees have a whistleblower policy, which will include company-specific

[8]Open Government Partnership – Australia, Australia's First National Action Plan available at: https://ogpau.pmc.gov.au/2016/12/07/australias-first-national-action-plan-submitted

information about the protections available to whistleblowers, as well as how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures.

- Transparent internal whistleblower policies are essential to good corporate culture and governance. It will encourage whistleblowers to come forward as they will have confidence that they will be protected for making the disclosure. It encourages companies to take action to investigate and resolve reports of misconduct. This change also aligns the Corporations Act with the PIDA and the RO Act pursuant to which the development of such procedures is mandatory.

Option 3 – Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

This policy option involves strengthening the Corporations Act provisions (as in Option 2) and also extending the proposed Corporations Act protections to other specified statutes falling within the remit of ASIC and APRA including:

- the Australian Investments and Securities Commission Act 2001;
- the National Consumer Credit Protection Act 2009;
- the Banking Act 1959;
- the Insurance Act 1973;
- the Life Insurance Act 1995;
- the Superannuation Industry (Supervision) Act 1993; and
- the Financial Sector (Collection of Data) Act 2001.

In addition, the scope of protected disclosures is expanded to include information that the discloser has reasonable grounds to suspect:

- indicates misconduct, or an improper state of affairs or circumstances, by a whistleblower regulated entity or related body corporate of a whistleblower regulated entity;
- is an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or
- represents a danger to the public or the financial system.

The amendments make it clear that disclosures about the broad set of serious wrongdoing in a corporation or a financial sector entity are within the scope of the protection. This could include serious breaches of any Commonwealth, State or Territory law that are not criminal offences.

4. Cost benefit analysis of each option and impact analysis

Option 1 - Maintain status quo

Making no legislative change would result in Australia continuing to lag behind both domestic and international best practice.

If protections for corporate whistleblowers remain unchanged, there are no additional compliance costs for the businesses affected. However, the current corporate whistleblower protections remain sparingly used and there remains little to no incentive for insiders to share vital information with regulators and law enforcement agencies. With very few insiders stepping forward, the investigation

and prosecution of corporate crime in Australia remains difficult, costing Australia approximately $8.5 billion a year.

Option 2 - Reform whistleblower protections in the Corporations Act

This policy option involves strengthening protections available to whistleblowers under the Corporations Act, aligning them with the PIDA and the RO Act and with what is considered to be international best practice. The reforms are designed to encourage whistleblowers to come forward by ensuring protections are in place for people who report such activities in corporations covered by the Corporations Act. This would in turn be expected to reduce misconduct over time (see further discussion below).

However, by amending the Corporations Act only (in isolation of other statutes which relate to banking, insurance and superannuation) the reforms have very limited scope as they guarantee protections for whistleblowers making the disclosures in relation to breaches of the Corporations Act only. Disclosures related to the breaches of the NCCP Act continue to lack protections. Also, the protections for whistleblowers available under legislation within APRA's remit remain unchanged. They would also not cover broader types of misconduct that a regulated entity may engage in.

This fragmented legislative setting continues to result in inconsistent approaches to handling disclosures between different statutes and regulators and requires whistleblowers to consult a number of statutes or seek legal advice in order to understand their eligibility for protection.

Possible outcomes from the implementation of Option 2 include the following.

- **Whistleblowers:** will benefit from increased protections and better access to compensation, but may need to consult a number of statutes or seek legal advice in order to understand their eligibility for protection.
- **Companies:** will bear the costs of developing whistleblower policies (if they don't already have one) and potentially dealing with greater whistleblowing activity. However, companies may benefit from being made aware of inappropriate behaviour within the company so that they can take action to investigate and remedy. Also, by better supporting whistleblowers the company will be able to demonstrate its commitment to good corporate practices and improved culture.
- **Regulators:** will, through a potential increase of valuable disclosures, be able to more effectively take early action to investigate and prosecute corporate misconduct.
- **Public:** may, as investors and customers, face slight increases in the costs of products and services, if the costs to companies of developing whistleblower policies are passed on. However, this is considered unlikely as the estimated costs calculated in this regulatory impact assessment for an average company are relatively small. Customers may also benefit from higher standards of behaviour by companies. Furthermore, the public would be expected to benefit from potential decreased levels of corporate misconduct over time and overall increase in confidence in the financial system.

Most of the proposed reforms (discussed in detail in Section 3 – Option 2) do not result in any additional compliance cost, as they build on the existing legislation and correct existing deficiencies. An exception to this is a requirement for public companies, large proprietary companies and superannuation trustees to have a whistleblower policy.

There are approximately 33,000 of these companies in Australia. We estimate that the whistleblower policy requirement will impose certain one-off implementation costs on these companies as well as annual training costs.

As there is a range in size and complexity of the companies to whom this will apply, the estimated costs are based on an expected average. Also it is expected that the average company already has a base structure in place for compliance and ethics policies and training and so development of a whistleblower policy in accordance with the proposed reforms will leverage this base.

Based on the average company, the estimated costs include the administrative time required to developing the policy (20 hours), legal advice in developing the policy (five hours), and the production of informative materials for staff members (four hours). In addition, it is estimated that each company with the whistleblower policy requirement will devote ongoing time to familiarising themselves with this legal requirement (four hours per year). Following these time estimates and a standardised labour cost, it is estimated that Option 2 will result in an overall compliance cost of $15.6 million per year over ten years.

Average annual regulatory costs (from business as usual)

Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$15.6 million	$0	$0	$15.6 million

Given the proposed reforms significantly strengthen the protections for whistleblowers in the corporate sector, it is not unreasonable to suggest that there could be a corresponding reduction in the cost of corporate crime as detection and prosecution of the corporate crime improves over time. This is due to whistleblowers being more willing to report misconduct because they feel better protected and are better informed about a company's whistleblowing policies.

Overseas evidence suggests that whistleblowing is important in uncovering corporate crime. A recent European Commission study[9] outlined the economic case for whistleblower protection in the European Union. It focused on the public procurement sector, a major component of the economy and an attractive hotspot for corruption. In this context, whistleblower protection can encourage the reporting of corrupt practices, resulting in less misuse of public funds. It found that the overall costs for setting up and maintaining whistleblower protection are quite low in comparison with the potential benefits.

This study referenced the 2016/17 Global Fraud Report[10] which is based on a survey and in-depth interviews with senior executives worldwide about their experience with fraud. It reports that the percentage of fraud uncovered, thanks to whistleblowers, was equal to 44 per cent in Canada, 49 per cent in the US, 53 per cent in Italy and 50 per cent in the UK, against a global average of 44 per cent.

Using the results of these studies as a guide, and considering that corporate crime is estimated to cost Australia more than $8.5 billion a year, it is reasonable to suggest that these reforms to significantly strengthen the protections for whistleblowers could have a large impact on combatting corporate crime.

[9] Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, written by Milieu Ltd July – 2017

[10] Kroll, Global Fraud Report 2016-17

Option 3 – Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

This policy option extends the proposed expanded Corporations Act protections to other specified statutes falling within the remit of ASIC and APRA as well as corporate misconduct more broadly (as described by Section 3 – Option 3). The corporate whistleblower protections for disclosures made with respect to breaches of financial system legislation within the remit of ASIC and APRA are consolidated into one statue: the Corporations Act. In addition, the Corporations Act whistleblower protections will be extended to disclosures that relate to misconduct, or an improper state of affairs or circumstances, contraventions of any law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or represents a danger to the public or the financial system. These reforms will reduce the gaps and inconsistencies that currently exist in the corporate whistleblower protection regime.

This regime is designed to work for the whistleblower and address the previously identified issues by creating a less fragmented whistleblower protection regime with broader protections for disclosures. In addition to all of the benefits of Option 2, Option 3 ensures a consistent approach to whistleblower protections in the financial system and more broadly, and greater certainty of protection for whistleblowers who are guided now by a single statue when inquiring about their protections. This reduces the risk of a whistleblower having no statutory protection if he/she discloses misconduct that is not captured by the existing, fragmented regime.

It simplifies the existing legislative regime by combining in one statute (the Corporations Act) the whistleblower protections currently spread across the statutes listed above. This approach:

- eliminates the gaps in protections in the existing law which result from this piecemeal approach;
- removes confusion as to which law applies;
- reduces compliance costs for industry; and
- ensures consistency of approach in the financial system as a whole.

Possible outcomes from the implementation of Option 3 include the following.

- **Whistleblowers:** will benefit, not only from increased protections and improved access to compensation but also a greater certainty about their legal position.
- **Companies:** will bear the costs of developing whistleblower policies (if they don't already have one) and potentially dealing with greater whistleblowing activity. However, those costs may be reduced by the decrease in complexity of whistleblower protections across the corporate sector.
- **Regulators:** will, through a potential increase of valuable disclosures, be able to more effectively take early action to investigate and prosecute corporate misconduct. ASIC and APRA may need to process a greater number of disclosures as they receive disclosures on a broader range of misconduct from across the corporate and financial sectors. However, the reforms allow for an increased cohesion in approach to sharing information about disclosures across regulators.
- **Public:** may, as customers, face slight increases in the costs of products and services, if the costs to companies of developing whistleblower policies are passed on. However, this is considered unlikely as the estimated costs calculated in this regulatory impact assessment for an average company are relatively small. Compared to Option 2, more customers will benefit

from higher standards of behaviour by companies, as whistleblowers can now also make protected disclosures relevant to the National Consumer Credit Protection Act (which currently does not provide for protections) as well as any corporate misconduct more generally. Furthermore, the public is expected to benefit from decreased levels of corporate misconduct.

Similar to Option 2, with an exception of a requirement for public companies, large proprietary companies and superannuation trustees to have whistleblower policies, the proposed amendments do not result in any compliance cost, as they build on the existing legislation and correct existing deficiencies.

The compliance cost calculation for Option 3 largely follows Option 2. However, there is one key difference. Under Option 2, corporate whistleblower provisions are spread across multiple statutes relating separately to banking, insurance and superannuation. Option 3 simplifies this regime by consolidating whistleblower protections across the financial system and corporate activities more generally. Therefore, for the 33,000 eligible companies, the regime under Option 3 will be easier to interpret and it is assumed that, compared to Option 2, fewer legal services will be purchased by companies when developing their policy (four hours of legal advice in developing the policy compared to five hours). Apart from the differences in legal services costs, regulatory cost calculations for Option 3 are identical to Option 2. The estimated overall compliance cost is $15.4 million per year over ten years.

Average annual regulatory costs (from business as usual)

Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$15.4 million	$0	$0	$15.4 million

The slightly lower compliance cost is likely to be accompanied by a further decline in corporate crime (compared to Option 2), as this policy option extends the proposed expanded Corporations Act protections to all financial sector statutes falling within the remit of ASIC and APRA as well as corporate misconduct more broadly. This is because the simplified legislative regime which combines whistleblower protections that are currently spread across the number of statutes, as well as providing for protections for disclosures of corporate misconduct more generally, gives whistleblowers greater certainty and removes confusion as to which law applies. As a result, more whistleblowers may make protected disclosures. Therefore, it is likely that Option 3 will improve the prospects of prosecution and will potentially further reduce the incidence and cost of corporate crime.

5. Consultation plan

Treasury consulted extensively on this proposal publically and with each of the key regulatory agencies.

On 20 December 2016, the Minister for Revenue and Financial Services released the *Review of tax and corporate whistleblower protections in Australia* consultation paper. The paper sought public comment to assist the Government with the introduction of appropriate protections for tax whistleblowers and in assessing the adequacy of existing whistleblower protections in the corporate sector. Thirty-six submissions were received in response to this consultation; all were generally supportive of the proposals.

In addition, the Parliamentary Joint Committee on Corporations and Financial Services undertook an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. A vast

majority of seventy-five submissions responding to the Inquiry supported reforms strengthening the whistleblower regime in Australia.

In its final report, tabled on 13 September 2017, the Inquiry concluded that existing whistleblower protections are ineffective and made 35 recommendations to strengthen them. Amongst others, the Parliamentary Inquiry recommended a single statute for Commonwealth private sector whistleblowing legislation (including tax).

The proposed reforms have regard to submissions made to both consultation processes as well recommendations made by the Parliamentary Inquiry. They also take into account recommendations made by the national and international evaluations of Australia's corporate whistleblowing regime.

Option 3, in particular, goes a significant way to address the concern of the Parliamentary Inquiry of the fragmented and inconsistent nature of whistleblower legislation including across the various pieces of legislation that apply to different parts of the private sector. The tax whistleblower reforms mentioned earlier this statement are being progressed in parallel to these corporate and financial sector reforms to ensure consistency in protections, where it makes sense to do so.

On 23 October 2017, the proposed reforms were released for public consultation as the *Treasury Laws Amendment (Whistleblowers) Bill 2017*. The Bill contains provisions related to both corporate and financial sector whistleblowers (consistent with Option 3), and tax whistleblowers. Thirty-nine submissions were received. Submissions were received from a broad range of stakeholders, including professional and industry bodies, legal and accounting firms, civil society groups, academics and individuals.

Feedback to the draft Bill was supportive overall and it was recognised that strengthened legislative protections for whistleblowers play an important role in reinforcing corporate accountability and encouraging whistleblower disclosures. In particular there was support for:

- Streamlining the existing various whistleblower rules contained in legislation administered by ASIC and APRA into a single regime contained within the Corporations Act. Feedback indicated that this would address the issue that existing whistleblower legislation is disjointed and unnecessarily complex, rendering it ineffective in encouraging whistleblowers to come forward and report misconduct and wrongdoing. For example:
  - It was broadly noted that regulated entities are currently required to observe whistleblower rules under multiple pieces of legislation, and streamlining the rules will facilitate ease of compliance and consistency of application.
- The inclusion of provisions which recognise the need for an individual to consult with a lawyer and the enforcement of the anonymity of whistleblowers.
- Introducing a whistleblower policy requirement. Some comments included:
  - A number of stakeholders, including an academic, a law firm and a large listed company asserted that the introduction of the mandatory requirement for large companies to have a whistleblower policy is a positive reform. This requirement will assist entities in developing robust corporate governance systems while also providing a mechanism and useful guidance to individuals who may wish to report suspected or actual illegal activity.
  - A law firm noted that there is presently no requirement for corporations to have an internal policy for dealing with whistleblowers. Therefore, it is likely that in many cases, better internal procedures for dealing with whistleblowers could allow for a more mutually-beneficial outcome for the whistleblower and the organisation. At the very least, the requirement to have a whistleblower policy will ensure that employees are

made aware of the protections available to whistleblowers under the Whistleblowers Bill.

- One professional body asserted that as a matter of good practice, all companies should have sound internal whistleblowing policies and procedures that aim to detect, address and ultimately prevent corporate wrongdoing. One of the central goals of the whistleblowing framework should be to encourage companies to make internal disclosure easy and safe for whistleblowers. This will help to ensure that misconduct is addressed as early as possible, ideally before it becomes the subject of regulatory intervention. Although it is not necessary to include a statutory requirement for a whistleblower policy, the components in the draft legislation are not unreasonable.

- Another professional body agreed that it is appropriate for large companies to have a whistleblower policy. However, extending the requirement to all public companies is not necessary, given that some public companies may be very small.

There was broad support for the draft Bill in expanding the scope of eligible whistleblowers and of disclosees, as well as improving access to compensation.

However, some stakeholders expressed uncertainty regarding how the new law may be interpreted and how regulated entities would be expected to handle disclosures. For example, a number of stakeholders expressed a concern that employees' workplace grievances appeared to be captured in the draft legislation. This feedback was addressed in the Explanatory Memorandum by making it clear that workplace grievances are not within the scope of protected whistleblower disclosures.

Other feedback sought clarification as to how large companies will satisfy the requirement of making their whistleblower policy available to all eligible whistleblowers. In response to this, the legislation was amended to require that whistleblower policies are to be made available to employees and officers only.

In addition, Treasury conducted targeted consultation with an experienced industry stakeholder on the regulatory impact of the whistleblower policy requirement. The regulatory cost estimates were refined in this statement following these discussions as follows:

- Increase to the estimated average time for staff to familiarise themselves with the new policy from three hours to four hours each year; and
- Decrease the estimated average hours to produce materials to inform employees about the whistleblower policy from five hours to four hours.

6. Option selection and conclusion

Preferred option

Having considered:

- recommendations made by the national and international evaluations of Australia's corporate whistleblowing regime,
- national and international best practice,
- evidence received and recommendations made by the Parliamentary Inquiry, and
- results of the Treasury and Parliamentary Inquiry consultation processes,

Treasury's preferred option is **Option 3.**

This option:

- strengthens protections for whistleblowers and provides them with greater legal certainty;
- simplifies the existing legislative regime as it combines in one statute the financial system legislation within the remit of ASIC and APRA, as well as expanding protections to corporate misconduct more generally; and
- meets commitments made publically by the Government.

Option 3 also results in expected lower compliance costs to industry compared to Option 2 and is more likely to improve the detection of corporate crime in Australia.

7. Implementation, evaluation and review

Legislation is required to implement this proposal. The reforms will be introduced as part of the *Treasury Laws Amendment (Whistleblowers) Bill 2017*.

These reforms will address recommendations made by the Parliamentary Inquiry to strengthen whistleblower protections.

Prior to introduction of legislation into Parliament in December 2017, the exposure draft legislation was released for public consultation. Also, the Government established an Expert Advisory Panel to review and provide feedback on the draft legislation.

There was broad support for these reforms to strengthen whistleblower protections. There was a minority view that not all public companies needed to have a whistleblower policy. However given the broad support on the requirement to have whistleblower policy, no amendments were made to reduce the companies in scope. A small amendment was made to ensure that all superannuation trustees were captured. This did not materially alter the number of companies in scope upon which the estimated costings are based.

The draft legislation was amended to require that whistleblower policies are to be made available to employees and officers only. No other amendments were identified as being needed to ensure that the implementation of the reforms will not impose undue compliance costs for industry.

The success of the whistleblower protection reforms will be identified by:

- an increase in protected whistleblower disclosures which instigate or materially assist investigation and prosecution of corporate crime; and
- better protections for whistleblowers including access to compensation if they are the subject of reprisal action due to their disclosure.