10 February 2017

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Email: corporations.joint@aph.gov.au

Dear Sir/Madam

Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations (NFPs) and the public sector. Governance Institute members support legislation that encourages the disclosure of wrongdoing in companies, and believe that stakeholders, including individual employees and their representative bodies, should be able to freely communicate to senior management, the board and regulators their concerns about illegal or unethical practices and their rights should not be compromised for doing this.

Governance Institute of Australia welcomes the opportunity to provide a submission to the Parliamentary Joint Committee Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors (the PJC Inquiry) and, in particular, whether the comprehensive whistleblower protections contained in the *Fair Work (Registered Organisations) Amendment Act 2016* can be extended across the corporate and public sectors.

We commend the Australian Government for making a series of commitments to enhancing whistleblower protections, two of which have already come to pass. We note that the government is seeking submissions from the public to assist with the introduction of appropriate protections for tax whistleblowers and in assessing the adequacy of existing whistleblower protections in the corporate sector, in particular whether corporate sector protections should be harmonised with whistleblower protections in the public sector. We also note that public submissions and responses to that review will be made available to the PJC Inquiry to assist it to progress the required legislative reforms. Governance Institute will be lodging a submission to Treasury as part of that review. We note that our submission to the PJC Inquiry has followed the questions set out the Treasury consultation paper, as these questions deal with the matters raised under the Terms of Reference of the PJC Inquiry.

Other commitments undertaken by the Australian Government include that it will:

- make sure the PJC Inquiry reports by the end of June 2017
- set up an 'expert advisory panel' to develop draft legislation to act on the report

- introduce legislation into parliament by December 2017 with support of, at a minimum, the standards now set in the *Fair Work (Registered Organisations) Amendment Act* 2016
- commit to support enhancements to whistleblower protections and commit to a parliamentary vote on the legislation no later than 30 June 2018.

We also note that various consultations and inquiries have been held into the establishment of a National Anti-Corruption Commission (NAC) calling for evidence regarding the benefits and drawbacks of establishing a NAC. Calls for the establishment of a NAC date back to at least the 1980s; a time when the first state-based anti-corruption bodies were being established. Over recent years there have been renewed calls for the establishment of a NAC by non-government organisations, academics, and some politicians. We note that whistleblowing is a key aspect of fighting corruption and suggest that the government may wish to consider submissions and reports on a NAC when developing its regulatory framework on whistleblowing in the private sector.

General comments

a) Role of whistleblowing in identifying and stopping misconduct

Governance Institute is of the view that whistleblowing has a critical role to play in identifying and stopping misconduct in the corporate sector, but notes that it should be seen as just one, albeit vitally important, aspect of companies' overall programs to ensure compliance with regulation and prevent and detect misconduct. Our members' experience is that whistleblowing usually occurs when other avenues that already exist within corporations to deal with misconduct have been exhausted or failed or do not exist.

We do not consider that misconduct and illegal activity is endemic within Australian companies. However, we acknowledge that there are some instances of unlawful activity and misconduct that have only been identified and addressed because of the actions of whistleblowers and that whistleblowers are more likely to come forward if there are appropriate statutory protections for them.

As a matter of good corporate governance, many companies have created effective structures for dealing with internal reporting of misconduct or illegal activity. Whistleblower reporting mechanisms and processes are considered a key element of an effective compliance program. Our view is that companies wish to continually improve these structures and avenues for preventing and detecting misconduct to ensure that people do not feel that they are left with no other resort — which is usually when whistleblowing occurs.

It is for this reason that Governance Institute is supporting the national research project led by Griffith University, independently funded by the Australian Research Council and involving three other universities and 21 supporting organisations across Australia and New Zealand (including Governance Institute).[1] The challenge for many organisations is that there is currently little evidence-based information to guide them in developing best practice whistleblowing processes that work and which have the confidence of internal stakeholders such as staff, management and the board as well as external stakeholders such as shareholders, regulators and the broader public. The research project is focused on identifying current and potential best practice in organisational management of whistleblowing and aims to support evidence-based law reform and the criteria to determine whether a whistleblowing process works.

Professor AJ Brown of Griffith University, who is leading the national research project, has noted that assumptions that whistleblowers are generally mistreated and ignored should not be taken for granted, as many companies look to staff members to identify wrongdoing and cultural issues. He has stated that, 'Our existing research shows the whistleblowing that we get to hear

[1] Governance Institute hosted the launch of the research into whistleblowing, held in Sydney on 28 April 2016

about publicly is just the tiniest fraction of what goes on. Whistleblowing often gets into the public domain not because an organisation can't deal with wrongdoing concerns well, but because they haven't dealt with them well… when they could have, because others do.'[2]

Professor Brown has also commented that attention needs to turn to what any new legal and governance standards need to contain to best support internal, regulatory and public whistleblowing rather than assuming that whistleblowers are destined to suffer.[3] Governance Institute supports this view.

Governance Institute also notes that corporate culture is a key issue, often the key issue. Many of the instances of misconduct which have surfaced through whistleblowing appear to have been driven by a combination of large performance incentives and poor internal controls, with rewards and success focused entirely on financial outcomes. Culture cannot be legislated. Our view is that the question for boards is whether the culture is known and understood and whether the actual culture (the lived culture) represents the necessary and desired culture. It is an essential element of governance for a board not only to promote the desired culture but also to understand if there is any disjunction between the desired and stated culture and the actual culture, for it is only the actual culture — the enacted values — that ultimately matter. Of course, if the board is the driver of a flawed culture, whistleblowing becomes a key means by which the lack of an appropriate 'tone from the top' can be identified.

b) The limitations of the current provisions in the Corporations Act

Governance Institute is of the view that the current provisions governing the protection of whistleblowers in the Corporations Act are poorly regarded and infrequently utilised. One of the key shortcomings in the current regime is that it is very narrowly focused. It:

- relates only to contraventions of the corporations legislation rather than other legislation such as the Competition and Consumer Act, the various tax legislation, anti-bribery and corruption legislation, health and safety legislation
- the whistleblower has to be an employee of the company concerned, or a third-party supplier (contractor or employees of contractors) that have a current contract in place with the company
- the whistleblower must give their name to the person or authority to whom they are making the disclosure, and
- it only allows for disclosures to ASIC or disclosure of misconduct to directors, secretaries and senior managers of companies.

The current provisions expect an unrealistic level of sophistication on the part of whistleblowers in relation to their ability to analyse and understand which legislation and which regulator covers apparent corporate misconduct. We do not believe that a whistleblower should be required to have nuanced knowledge of applicable legal and regulatory frameworks to know which regulator or law enforcement agency they should make their disclosure to in order to qualify for protection. For example, an employee should not have to ponder if misconduct by a senior executive is a breach of the Corporations Act, or the Competition and Consumer Act, or taxation legislation etc before bringing the misconduct to the attention of ASIC or the company. It is a strong disincentive to making disclosures if employees or other relevant parties feel that they require legal advice before making any such disclosure.

Information about misconduct or illegal activity could be imperfect, and technical legal analysis of particular conduct by a discloser should not be required. Governance Institute believes that there should be an overarching framework that supports the disclosure of all alleged misconduct or illegal activity.

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[2] Brown, AJ, 'Patchy laws leave corporate whistleblowers vulnerable', *The Conversation*, April 28, 2016

[3] Governance Institute of Australia, *Whistleblowing research will improve corporate culture*, Tuesday, 10 May 2016 at http://www.governanceinstitute.com.au/news-media/news/2016/may/whistleblowing-research-will-improve-corporate-culture-says-governance-institute/

Taking all of this into account, Governance Institute is of the view that any reform of the provisions in the Corporations Act will not address the key shortcoming of the current regime, which is that it applies only to breaches of the corporations law.

Any legislative approach should not confine itself to financial misconduct but provide an avenue for disclosing wrongdoing that is not being addressed by the company, whether it be bribery, procurement processes, financial misconduct, bullying, environmental harm, taxation avoidance etc.

Governance Institute recommends that a provision — similar to s 29 of the *Public Interest Disclosure Act 2013* (Cth) — be introduced, which defines discloseable conduct as including conduct that contravenes a law of the Commonwealth, a state or a territory as well as some conduct that contravenes foreign laws and perverting the course of justice. Similarly, a whistleblower should be protected, regardless of which regulator they disclose to. That is, the disclosure should be able to be made to ASIC, ACCC, APRA, ATO, AFP or any other relevant regulator.

Governance Institute also recommends that a stand-alone, general whistleblower protection in its own Act (applicable to the private sector) would effect this more readily than regulator or legislation-specific protection. Governance Institute notes that in the UK there is general provision for allegations of misconduct made in good faith, and such allegations do not attract retribution. We support this approach rather than one which inserts the same provision in multiple pieces of legislation.

We also believe that it is important to distinguish between protecting the whistleblower who has made a disclosure of misconduct or illegal activity in good faith and any action taken in response to that disclosure.

Further, we recommend that a disclosure should be able to be made to any regulator or law enforcement agency. If that regulator or agency considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate body. We do not believe whistleblowers should be expected to know to which regulator or agency a disclosure should be made.

Governance Institute therefore recommends that whistleblowers have access to protection provided they make a disclosure concerning potentially illegal activities that ASIC or another regulator or law enforcement agency can investigate. Disclosures of unlawful activity should not be confined to ASIC.

We note that, if our recommendation is accepted that a disclosure should be able to be made to any regulator and, where that regulator considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate regulator (cross-agency referral), then it is important that parties receiving information second-hand, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipient.

Governance Institute also recommends that any provisions in a stand-alone, private sector Act ensure that the recipient of a disclosure is permitted to disclose that information to senior officers of the company for the purpose of investigating or remedying the matters raised.

We note that our recommendation accords with the intent to harmonise corporate whistleblower protections with those in the public sector. Importantly, whistleblower disclosures and protections will be much more readily effected if a stand-alone, private sector Act is introduced than any attempt to include protections in a wide range of legislation.

c) Key recommendations

Governance Institute recommends that:

- a provision in a stand-alone Act — similar to s 29 of the *Public Interest Disclosure Act 2013* (Cth) — be introduced, which defines discloseable conduct as including conduct that contravenes a law of the Commonwealth, a state or a territory as well some conduct that contravenes foreign laws and perverting the course of justice
- a whistleblower should be protected, regardless of which regulator or law enforcement agency they disclose to, and if that regulator or agency considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate body — disclosures of unlawful activity within the corporate sector should not be confined to ASIC or the ATO
- parties receiving information second-hand through a cross-agency referral, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipient
- any provisions in a stand-alone Act ensure that the recipient of a disclosure is permitted to disclose that information to senior officers of the company for the purpose of investigating or remedying the matters raised
- a stand-alone, general whistleblower protection in its own Act would effect this more readily than regulator or legislation-specific protection.

We provide more detailed comment on the following pages. Our responses follow the format of the Review of tax and corporate whistleblower protections in Australia issued by Treasury on 20 December 2016.

Governance Institute would welcome speaking to the PJC Inquiry on these matters, should public hearings be held, and the opportunity to be involved in further deliberations.

Yours sincerely

Steven Burrell
Chief Executive

1. Do you believe that the Corporations Act categories of whistleblower should be expanded to former officers, staff and contractors?
2. Should it be made clear that the categories include other people associated with the company such as a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners?
3. Are there any other types of whistleblowers that should be included, and if so, why?

Governance Institute is of the view that the categories of whistleblower and access to protection should be expanded to a wider group, including former employees, former officers, contractors, financial services providers, accountants, auditors, unpaid workers and business partners.

In principle, Governance Institute also supports access to protection being extended to suppliers, although we note that care would need to be taken to ensure that such protection was not misused for commercial advantage. While any existing contract for the supply of goods and services to a company would provide protection for the reporting of any misconduct, it is important to ensure that such protection extends to the acquisition of services from a company, as well as any situation where a contract does not exist (for example, an adviser to the company may not have a contract in place).

We note that the *Fair Work (Registered Organisations) Amendment Act 2016* provides for enhanced protections for whistleblowers, so that a broader category of person can make protected disclosures (such as former employees and those contracting with the organisation).

One example of the limitations of the current provisions in the Corporations Act is that an employee of one company in a corporate group who makes a disclosure concerning misconduct in a related body corporate in the group does not qualify for protection. Whistleblower protection should not hinge on the technicalities of an employment arrangement.

Another example would be the case of a whistleblower individual who is a casual employee. It is becoming increasingly common for companies to use casual employees. Often, such persons are employees of a third-party employment services or contracting company, and the technical employment status of a person should not affect a person's access to protection should they be aware of and make a disclosure of misconduct.

The category of whistleblower — and protection — should be extended to former employees, who could suffer detriment when searching for alternative employment if their former employer spoke against them, and to former contractors. The extension should also apply to former officers of the company.

However, Governance Institute's preferred position is not to create a prescriptive and potentially arbitrary list of those qualifying for whistleblower protection which could well exclude whistleblowers who should be protected and would require constant scrutiny to ensure it covers all relevant parties.

Governance Institute recommends that protection be extended to any person who makes a disclosure of alleged corporate wrongdoing to an appropriate corporate officer or regulator. That is, the test for qualifying for protection should not be connected to the capacity in which the discloser has access to the information (for example, the status of the individual as an employee, adviser or supplier) but to the information itself and the honest and reasonable belief in the genuineness of that information.

Importantly, this wider definition of whistleblower and access to protection should not be included in the Corporations Act, but in a stand-alone Act that applies to all legislation (see General Comments on pages 3—5 in this submission).

4. Should the scope of information disclosed be extended? If so, please indicate whether you agree with any of the options discussed above, and why. If you do not believe any of the above options should be considered please explain why not and whether there are any other options that could be considered instead.

As noted earlier, we do not believe that a whistleblower should have to ponder if misconduct by a senior executive or other staff members is a breach of the Corporations Act, or the Competition and Consumer Act, or taxation legislation etc before bringing the misconduct to the attention of ASIC or the company. Governance Institute believes that there should be an overarching framework that supports the disclosure of all alleged misconduct or illegal activity.

Any legislative approach should not confine itself to financial misconduct but provide an avenue for disclosing wrongdoing that is not being addressed by the company, whether it be bribery, procurement processes, financial misconduct, bullying, environmental harm, taxation avoidance etc. Extending the discloseable conduct to conduct contravening a law of the Commonwealth, a state or territory will facilitate disclosure of a broader range of misconduct including fraud, environmental harm and workplace health and safety etc.

We note that expanding the scope of the subject matter requirements may have the consequence that personal greivances and human resources matters are caught up in the whistleblower process. On this basis, we agree with the Review of ASU-PIDA that the relevant provision governing discloseable conduct should exclude matters relating solely to personal employment-related grievances that are better dealt with through existing processes.

Our members note that many disclosures that may be termed ‘whistleblowing’ are found to relate to internal human resources issues. As such, a triage system is required to assess if the matter:

- should be dealt with by the HR team (for example, dissatisfaction with remuneration), or
- is a persistent breach of workplace legislation (for example, persistent bullying that can be dealt with by HR but should also be brought to the attention of senior management and possibly the board, given it could indicate an issue with the culture of the company), or
- constitutes a breach of other legislation, including financial misconduct.

Griffith University’s preliminary findings confirm this, stating that ‘The bulk of organisations (82.9%) indicated they had different processes in place for responding to wider wrongdoing concerns such as fraud, theft, corruption, negligence or dangers to public health or safety, from their normal processes for responding to workplace grievances’.

Governance Institute recommends that the scope of information disclosed should not be confined to financial misconduct, but be extended to conduct contravening a law of the Commonwealth, state or territory, but that it exclude matters relating solely to personal employment-related grievances that are better dealt with through existing processes.

We do not, therefore, believe that a materiality threshold should be introduced in legislation, given that the internal processes within companies will work towards ensuring that significant matters of fraud or misconduct are dealt with through the whistleblowing processes. Assigning a monetary threshold may not capture those issues which go to the heart of sound culture and internal processes — there may be issues that do not have a high monetary value but nonetheless require high visibility throughout the organisation to ensure that it is understood that such conduct is not tolerated. As noted above, companies will assign disclosures to categories, and this is preferable to assigning monetary value to decide whether a matter is dealt with through whistleblowing processes.

We also note that materiality requirements may conflict with applicable laws and regulations, for example, foreign bribery laws that may apply to Australian companies operating in overseas jurisdictions (for example, the US Foreign Corrupt Practices Act, 1977) where materiality does not apply.

5. Should the 'good faith' requirement be replaced by an objective test requiring the disclosure be made on 'reasonable grounds'?

Governance Institute members are on the public record as stating that they believe that good faith should go to the genuineness of the discloser's belief in the information being disclosed and not the motives of the individual making the disclosure. That is, the motive of the whistleblower is not relevant, but the genuineness of their belief concerning the alleged illegal activity is relevant.

For example, an individual could make a disclosure concerning illegal activity being undertaken by a senior executive who is conducting an affair with the discloser's spouse. The disclosure could be prompted by a strong emotional response to discovery of the affair, but if there is a genuine belief in the integrity of the information concerning the illegal activity then the disclosure should be considered to be made in good faith. The motive for making the disclosure is irrelevant.

While Governance Institute is of the view that maintaining the emphasis on a disclosure being bona fide is essential, we support any provision in the legislation that clarifies that the good faith concept goes to the genuineness of the belief in the information being disclosed and not to the motive for making such a disclosure. If information is knowingly or recklessly fabricated, no protection should be available, but if there is a genuine belief in the veracity of the information, despite any secondary motive held by the discloser, then protection should be available. For example, we note that baseless allegations made simply for the purpose of gaining whistleblower protection would not be granted protection when the element of good faith is preserved. Furthermore, we note that the allegations need not be upheld for protection to be available to whistleblowers, but they must hold a genuine and reasonable belief to meet the good faith test.

Governance Institute notes that if the element of good faith is removed then it might be possible to make malicious or reckless allegations without regard to their truth. We do not believe that a person making false allegations with malicious intent should be protected. That is, we do not believe that an individual making a disclosure in bad faith should be protected. However, when the good faith test is directed at the genuineness of the belief in the integrity of the information being disclosed and not at the motive for disclosing it, as we noted above, the question of motive is irrelevant.

Notwithstanding our support of the 'good faith' requirement in the Corporations Act, we are of the view that the term 'good faith' could be read as implying that the whistleblower themselves needs to be free of any secondary motive before being able to make a disclosure. The term 'honest and reasonable' could assist in clarifying that the emphasis is on the genuineness of the belief in the information being disclosed and not the motive for making such a disclosure. We also consider that the term 'honest and reasonable' is one which whistleblowers are better able to understand.

On this basis, Governance Institute recommends that a 'good faith' requirement be replaced with a requirement that a disclosure is based on an honest belief, on reasonable grounds.

To give an example of how this could operate, we note that a whistleblower could, based on an honest belief, on reasonable grounds, believe that misconduct or wrongdoing is taking place, but that investigation reveals that no such misconduct or wrongdoing has occurred. The disclosure of the whistleblower was based on their perception of wrongdoing, rather than actual

wrongdoing having taken place. The whistleblower made a disclosure that they honestly believed to be true, even though it was shown not to be true.

If a disclosure is made and honestly believed to be true, it will not be a spurious allegation. It might turn out to be incorrect, but it will not be a frivolous or vexatious disclosure.

To provide another example, in some instances, an employer may be the only employer of substance in town, and it is important to make sure that this is not exploited by complainants looking for a favourable redundancy package. The requirement that a disclosure be based on an honest belief, on reasonable grounds would protect such a company from scurrilous disclosures.

6. Should anonymous disclosures be protected?

Governance Institute notes that it is impossible to offer protection to an unknown person. Governance Institute members believe that protection can only apply once the whistleblower has identified him or herself, or their identity has otherwise been ascertained, but that the order of disclosure of the information concerning illegal activity and the determination of identity should not determine whether an individual is afforded protection.

For example, a whistleblower could anonymously contact ASIC to disclose information concerning illegal activity and only disclose their identity at the close of the conversation or in a subsequent conversation. They should not be denied protection because their identity was revealed after the disclosure of misconduct, rather than before it.

Governance Institute recommends that a whistleblower should qualify for protection at the point they disclose their identity or their identity becomes known but that the protection extends retrospectively to the point of the anonymous disclosure. We note that the issue is not simply one of a whistleblower's identity becoming known to ASIC or another regulator, as there could be instances when the identity of a whistleblower can be readily determined within a company, given that the information disclosed could only have come from one source. Therefore, it is important that not only should qualification for protection not be contingent on timing, but it should also not be contingent on the whistleblower revealing his or her identity. Qualification for protection should arise both where the whistleblower identifies him or herself or their identity becomes known through other means.

We also recommend that a company should be subject to the requirement to protect a whistleblower's anonymity in the event a whistleblower has made a disclosure on an anonymous basis.

7. Should the information provided by anonymous whistleblowers also be subject to rules limiting further dissemination of the information if the information might reveal that person's identity?

While the Corporations Act currently permits disclosure to auditors and a person authorised to receive disclosures, the Act requires that any qualifying disclosure must be kept confidential. Section 1317AE(1) makes it an offence for a recipient to disclose the identity of the whistleblower, any information likely to lead to identification of the whistleblower, and the information disclosed by the whistleblower. Consent from the disclosing party is required before the information can be passed on. The only passing on of the information without consent that is contemplated by the Corporations Act is disclosure to APRA, ASIC or the Federal Police.

Governance Institute believes that this provision does not foster an outcome that serves good governance. While we recognise that it is essential to protect the whistleblower, the whole reason for facilitating whistleblowing is to allow unlawful activity and misconduct to be identified, investigated and dealt with. Indeed, a person making a disclosure clearly intends that the

misconduct they are identifying should be investigated and arrested, otherwise there is no point to their making the disclosure in the first place.

In the Corporations Act, unless the disclosing party consents, the recipient has no opportunity, under the relevant provisions, to discuss the issue with the board or senior officers in order to investigate or remedy any alleged contravention that gave rise to the disclosure. For example, a company secretary may receive a disclosure from an employee in accounting that the CEO is using company funds to renovate his house. At present, the company secretary is unable to discuss this with the board or any colleagues or remedy the misconduct if doing so might identify the whistleblower.

This curtailment of an intervention to remedy a contravention limits the usefulness of whistleblowing protection legislation. While acknowledging that there is provision for the recipient to disclose the matter to a regulator, we note that, first, a recipient may be reluctant to contact a regulator, particularly in relation to an alleged contravention that has not been investigated or established and, second, even if a report were to be made to a regulator, having regard to the various demands on regulators, there will not necessarily be timely action, that could be effected if the company itself were able to act. The misconduct and wrongdoing will therefore continue.

We also note that it can prove impossible to undertake or progress an investigation without discussing the disclosed information with the whistleblower and that this is only possible once their identity is known. For example, there could be a key conversation that is the discloseable information, with one party the alleged wrongdoer and the other clearly the whistleblower, but that if the consent of the whistleblower is not provided to disseminate the information, given that it would reveal their identity, the investigation into the matter cannot proceed.

Taking all of this into account, **Governance Institute therefore recommend**s that the recipient of a disclosure be permitted to disclose that information and discuss the issue with the board or senior officers of the company, for the purpose of investigating or remedying the matters raised.

Importantly, **Governance Institute also recommends** a carve-out to this provision, which is that if any directors or senior officers are implicated in the whistleblowers' disclosure, they will not receive any information relevant to the disclosure or be involved in any investigation of the misconduct.

Should the consent of the whistleblower be required before the information they disclosed can be discussed or disseminated further if such discussion and dissemination is likely to reveal the identity of the whistleblower, Governance Institute stresses that this will likely hinder or stifle any investigation into the alleged wrongdoing. In turn, we note that without the provision for a disclosure to be investigated, the misconduct or wrongdoing is likely to continue, which runs counter to the objectives of whistleblowing. We repeat that a person making a disclosure clearly intends that the misconduct they are identifying should be investigated and arrested, otherwise there is no point to their making the disclosure in the first place.

8. Should regulators be able to resist production of this information under warrants, subpoenas or Freedom of Information processes?

Governance Institute recommends that regulators should generally not be compelled to disclose documents (or parts of documents) that may reveal the identity of the discloser.

However, if a regulator is relying on the documents or relevant part of the document or documents to bring proceedings against a company or an individual then it should be required to disclose them in full.

It is an essential element of natural justice that a person knows the case being made against them and the identity of their accusers, should proceedings commence. It would be unjust not to

allow a person access to all the case made against them in order to protect the identity of a whistleblower. On the other hand, a regulator should not be required to disclose the identity of a whistleblower if, while information from the whistleblower may have prompted the regulator's initial investigation, that information is not part of ASIC's case.

We support ASIC being required to disclose documents under a court order if the court deems this necessary, even if this reveals the identity of the whistleblower. The court should have the power to compel the disclosure of documents, but only a court should be able to compel this information.

Governance Institute recommends that, at the point that ASIC or other relevant regulator or law enforcement agency has commenced proceedings against a company or individual, the regulator or law enforcement agency should be required to disclose the documents or relevant part of the document in full. This provides procedural fairness to a person against whom wrongdoing is alleged before making adverse findings about that person.

9. Should the specified entities or people to whom a disclosure can be made be broadened? If so, which entities and people should be included?

Governance Institute recommends that a disclosure should be able to be made to any regulator or law enforcement agency. If that regulator or agency considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate body. We do not believe whistleblowers should be expected to know to which regulator or agency a disclosure should be made.

Governance Institute therefore recommends that whistleblowers have access to protection provided they make a disclosure concerning potentially illegal activities that a regulator or law enforcement agency can investigate. Disclosures of unlawful activity should not be confined to ASIC or the ATO.

We note that, if our recommendation is accepted that a disclosure should be able to be made to any regulator and, where that regulator considers it is not the appropriate body to investigate the allegation, that regulator should refer it to the appropriate regulator (cross-agency referral), then it is important that parties receiving information second-hand, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipient.

Alternatively, should an Ombudsman or Office of Whistleblowing be created, a whistleblower should be able to make a disclosure to this body, which would have the responsibility to ensure it was then provided to the appropriate regulator.

10. Should whistleblowers be allowed to make a disclosure to a third party (such as the media, members of parliament, union representatives, and so on) regardless of the circumstances? In the alternative, should such wider disclosures be allowed but only if the company has failed to act decisively on the information provided? Are there alternative limitations that should be considered? Please give reasons for your answers.

11. What are the risks of extending corporate whistleblower protections to cover disclosures to third parties? How might these risks be managed?

Governance Institute notes that many large listed companies have already put in place 'hotlines' providing for employees to make disclosures of wrongdoing to third parties (for example, Stopline or hotlines run by the four big accounting firms through their forensic teams). The third party is acting as an agent of the company.

However, in relation to disclosure to other third parties, Governance Institute does not support disclosure to the media.

Governance Institute recommends that disclosures should be made to the board and appropriate regulator and agency, but that legislation should not provide protection for an employee disclosing to the media.

We are of the view that disclosures to the media should not be legally sanctioned in legislation, as the media has no legal powers to investigate but does have the capacity to express an opinion on a matter that has not yet been tested. Disclosure to the media and media opinion on the matter could also prejudice an ongoing investigation.

We note that the concept of 'failure of the company to act' is subjective in interpretation. Investigations can be underway but for many reasons may not be publicised, including to ensure that evidence is gained of wrongdoing. Indeed, while whistleblowers need feedback that the matter they have raised is being investigated, they may also need to be kept at arms' length to ensure a proper investigation is undertaken. Whistleblowers may not be able to kept apprised of progress, as this may interfere with procedural fairness and due process. The whistleblower also has no right to be shown evidence. These reasons are further grounds for why we do not support disclosure to the media by the whistleblower, as they may not be in a position to know fully if the company is acting or has failed to act.

This is similar to a criminal investigation, where the witness may contact the police but may not be able to be kept apprised of progress of an investigation and has no right to be shown evidence. The witness may need to be kept at arms' length to ensure procedural fairness and due process.

While a whistleblower will instigate the investigation, and is entitled to know the outcome, they do not 'own' it. The matter becomes a company issue in the first instance, and may become a regulator issue. The whistleblower is the catalyst but has no greater legal rights except protection from victimisation. The whistleblower should also be offered counselling, as the psychological negative impact on whistleblowers has been well documented and there needs to be recognition that their mental health should be protected.

Companies, regulators and agencies should, as a matter of good practice, contact whistleblowers regularly so that they remain informed as to the progress of the matter. However **Governance Institute strongly recommends against** legislating this. The analogy with an investigation of a criminal complaint is the test.

We also note that employees could place pressure on a company by threatening to go to the media in order to generate an outcome favourable to the individual that is unconnected to any wrongdoing and that this should not be legally sanctioned.

Given that there can be a fairly grey area between concern about unlawful conduct and disappointed advocates of one position or another in a company deciding to pursue their battles through the media, Governance Institute does not recommend extending protections to disclosures to the media.

Governance Institute also does **not** recommend extending protections to disclosures to unions, unless it is a workplace health and safety or Fair Work issue, where unions have a legitimate role to play that is legally sanctioned.

We also do **no**t recommend extending protections to disclosures to members of parliament. Parliamentarians have the benefit of qualified privilege which allows them to publicise whistleblower disclosures with no risk of defamation to themselves. However, such actions may unfairly prejudice any subsequent investigation into the whistleblower disclosures.

Our recommendations cover the situation where the company has failed to act decisively on the information received. We note that the whistleblower can always disclose to a regulator (particularly if any regulator or law enforcement agency can receive the disclosure and have to

pass it to the relevant regulator). We also note that the whistleblower may be of the view that the company is failing to act on the information received, when in fact an investigation is underway and carefully implemented so as not to disclose the identity of the whistleblower. It can take time to amass evidence and ensure that any action is based on solid foundations, and this process may not be apparent to the whistleblower.

12. Do you believe there is value in a 'tiered' disclosure system being adopted similar to that in the UK?

Governance Institute does not support the adoption of a 'tiered' disclosure system if the whistleblower provisions allow for disclosure to any regulator or law enforcement agency or Ombudsman or Office of Whistleblowing, should one be created, for the reasons sets out above. We consider that if the scope of information disclosed is not be confined to financial misconduct, but extended to conduct contravening a law of the Commonwealth, state or territory, but excludes matters relating solely to personal employment-related grievances that are better dealt with through existing processes, there should not be the need to include a 'tiered' system of disclosure.

Moreover, if the whistleblower has the right to disclose to the company, any regulator or law enforcement agency or the Ombudsman or Office of Whistleblowing if one is created, then this in effect operates as a tiered disclosure system.

13. Should there be any exceptions in this context for small private companies?

Governance Institute does not consider that there is justification for small private companies to be exempted from any proposed new whistleblower provisions.

14. Should disclosure be allowed for the purpose of seeking professional advice about using whistleblower protections, obligations and disclosure risks (as suggested by the review of AUS-PIDA)?

We are of the view that a potential whistleblower may wish to consult a lawyer to seek legal advice on what protections will be available to them under legislation before they make a disclosure and that such communication between the potential whistleblower and their lawyer would be subject to legal professional privilege.

Governance institute notes that recent amendments to the *Fair Work (Registered Organisations) Amendment Act 2016,* which significantly strengthened whistleblower protections for people who report corruption or misconduct in unions and employer organisations, provides for disclosure to be made via the discloser's lawyer.

Governance Institute recommends that disclosure to a lawyer be allowed for the purpose of seeking legal professional advice.

15. Is there a need to strengthen protections of a whistleblower's identity, and if so, what specific amendments should be considered?
16. To whom should the provisions apply to — government agencies who receive the information or all recipients of the information or both?
17. Should courts and tribunals be allowed access to information provided the confidential character of the information and the whistleblower's identity is maintained through the use of bespoke judicial orders?

We refer to our earlier comments concerning the right to protection of identity, and that disclosure of information that may reveal the identity of the whistleblower can only be done with

their consent or by court order, excepting a recipient of a disclosure within a company who may discuss the matter with the board and senior officers, even if this reveals the identity of the whistleblower, in order that the wrongdoing or misconduct can be investigated and arrested.

Governance Institute recommends that the provisions concerning protection of a whistleblower's identity should apply to all recipients of the information. There should not be a different regime in place for government agencies.

18. How should any additional protections of a whistleblower's identity be balanced by the need for a company or agency to investigate the wrongdoing and also to ensure that procedural fairness is afforded to those alleged to have engaged, or been involved, in wrongdoing?

19. Should consent by a whistleblower be required prior to disclosing the information to people or entities for the purposes of investigating a matter? If so, in what circumstances should consent be obtained?

While the current Corporations Act permits disclosure to auditors and a person authorised to receive disclosures, the Act requires that any qualifying disclosure must be kept confidential. Consent from the disclosing party is required before the information can be passed on. The only passing on of the information without consent that is contemplated by the Corporations Act is disclosure to APRA, ASIC or the Federal Police.

As noted earlier, Governance Institute believes that these provisions do not necessarily foster an outcome that serves good governance. While we recognise that it is essential to protect the whistleblower, the whole reason for facilitating whistleblowing is to allow unlawful activity and misconduct to be identified, investigated and dealt with. Whistleblowers want to feel confident that their disclosures will lead to unlawful conduct being stopped.

As set out earlier in this submission (see or response to Q7), under the current provisions of the Corporations Act, the recipient of a disclosure has no opportunity to discuss the issue with the board or senior officers in order to investigate or remedy any alleged contravention that gave rise to the disclosure unless the disclosing party consents. This curtailment of an intervention to remedy a contravention limits the usefulness of whistleblowing protection legislation. We also note that it can prove impossible to undertake or progress an investigation without discussing the disclosed information with the whistleblower.

Taking all of this into account, **Governance Institute therefore recommend**s that the recipient of a disclosure be permitted to disclose that information and discuss the issue with the board or senior officers of the company, for the purpose of investigating or remedying the matters raised. Those parties receiving information second-hand are then subject to the confidentiality restrictions.

Importantly, **Governance Institute also recommends** a carve-out to this provision, which is that if any directors or senior officers are implicated in the whistleblower's disclosure, they cannot receive any information relevant to the disclosure or be involved in any investigation of the misconduct.

We note that without the provision for a disclosure to be investigated, the misconduct or wrongdoing is likely to continue, which runs counter to the objectives of whistleblowing.

We recommend that, if our recommendation is accepted that a disclosure should be able to be made to any regulator or law enforcement agency or Ombudsman or Office of Whistleblowing should one be created and, where that regulator or law enforcement agency or other agency considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate regulator (cross-agency referral), then it is important that parties receiving information second-hand be subject to confidentiality restrictions.

20. Is there a need to strengthen the current prohibition against the victimisation of whistleblowers in the Corporations Act? If so, should these be similar to those which exist under the AUS-PIDA and RO Act?

Whistleblowers should not be victimised. A mechanism needs to exist to provide protection and our recommendation of a stand-alone Act that applies to all legislation would include a prohibition against the victimisation of whistleblowers. The template provided in the *Public Interest Disclosure Act 2013* (Cth) is a useful starting point. Governance Institute also supports the anti-reprisal provisions contained in the *Fair Work (Registered Organisations) Amendment Act 2016*.

Governance Institute is of the view that this principle is important, as companies should not be put in a position of being taken to have engaged in reprisals if those involved in a decision had no knowledge of a whistleblower's status as a whistleblower. It may be helpful to clarify that such knowledge should not be deemed to exist for decision-makers unaware of the whistleblower's identify just because an officer responsible for a whistleblower process is aware of the whistleblower's identity.

Governance Institute recommends that the anti-reprisal provisions clarify that the protections apply to whistleblowers whose identity is known to the decision-maker and that such knowledge should not be deemed to exist because the whistleblower's identity is known to officers who have an obligation to keep that identity confidential.

We also note that disclosures of misconduct are frequently dealt with internally, as is the misconduct. Governance Institute members have heard anecdotally that, in some instances, the whistleblower is offered a favourable severance package, if the whistleblower agrees to withdraw the complaint. The company addresses the misconduct (in most instances), but is keen to keep the matter confidential, given the risk to reputation, and the fact that the misconduct has been arrested. A strict confidentiality clause will usually be built into these severance packages.

We recognise that the whistleblower may wish to 'move on' and may themselves be keen to have a severance arrangement in place. However, it is important that there is an internal process in place to vet such arrangements.

Governance Institute is of the view that there is merit in companies mandating that a nominated person be required to review any arrangements made by the company with a whistleblower. A person with an independent status outside of management may be the company secretary. Such an independent person could have the ability to review arrangements such as a severance package with a confidentiality clause, to ensure not just protection of the whistleblower, but also that the substantive issue of misconduct is being addressed. Alternatively, any arrangement reached with the whistleblower could be approved by a resolution of the board or audit committee, which would ensure proper disclosure within the company. It is important that any package offered to the whistleblower is not used to avoid addressing the substantive issue and that confidentiality clauses are not being utilised to silence complaints and cover up problems. It is also important that a good reference is not unreasonably withheld, as well as ensuring that the problem disclosed is addressed.

This is a suggestion for consideration by companies when developing their whistleblowing processes rather than a recommendation for legislative change. **Governance Institute strongly recommends** against internal processes being mandated in legislation, but be left to companies to implement, given the diversity of size and complexity of companies.

Any protections for whistleblowers must discourage employers from punishing those who reveal misconduct. The *Fair Work (Registered Organisations) Amendment Act 2016* provides that

managers will be required to support whistleblowers rather than simply not to punish them for speaking out. This is a useful model to follow.

21. Do the existing compensation arrangements in the Corporations Act need to be enhanced? If so, what changes should be made to ensure whistleblowers are not disadvantaged?

See our suggestions above on severance arrangements, if sought by the whistleblower.

Where laws do protect whistleblowers, they tend to criminalise reprisals (for example, the *Life Insurance Act 1995*). This creates a very high legal bar before anyone is prepared to accept that an employee deserves apologies, compensation or restitution for any victimisation suffered. That is, a whistleblower can only access compensation if a criminal reprisal against them is first proven, which is extremely difficult.

Compensation avenues that do not rely on this kind of bar clearly need consideration.

The *Fair Work (Registered Organisations) Amendment Act 2016* provides that whistleblowers would be able to apply for a range of rememdies if they have been financially harmed by their disclosures.

Governance Institute recommends that a similar model be followed, with whistleblowers able to seek a range of remedies to cover any financial loss or damage, including lost opportunity, and mental suffering arising from their disclosures. We stress that this process must be easy and inexpensive — it would defeat the intent of the provision should whistleblowers have to seek expensive legal advice in order to seek such penalties.

We recognise that there has been significant discussion of providing financial rewards to whistleblowers, with reference frequently made to the USA where such rewards exist. However, there is a difference between compensation for loss or damage suffered and a bounty or reward scheme, where whistleblowers are incentivised to reveal wrongdoing by taking or initiating actions which lead to them recovering a percentage of the fraud revealed, or of the penalties imposed. We comment on this further below in response to Q26.

22. Does the existing legislation provide an adequate process for whistleblowers to seek compensation? Should these be aligned with the AUS-PIDA and the RO Act? Please include an explanation for your answer and identify what changes, if any, are needed and why.

Governance Institute does not consider that the provisions in the Corporations Act provide an adequate process for whistleblowers to seek compensation. Clearly, alternative mechanisms for ensuring adequate compensation or restitution require consideration — see our comments above in relation to Q21.

We support the provisions contained in the *Fair Work (Registered Organisations) Amendment Act 2016* that allow whistleblowers to apply for a range of remedies if they have been financially or mentally harmed by their disclosures.

23. What would be the most appropriate mechanism for administering the compensation process? Should it rely on whistleblowers having to make a claim or someone else as advocate on their behalf?
24. How should compensation be funded?
25.Should whistleblowers be required to bear their own and their opponent's legal costs when seeking compensation or have the risk of adverse costs order removed as per recent amendments to the RO Act?

Governance Institute recommends that the courts be empowered to decide the most appropriate mechanism for administering the compensation process, and who pays costs. This is how the law currently operates and we do not believe that a new system should be created.

We also recommend that the risk of adverse costs orders to the whistleblower be removed as per recent amendments to the RO Act.

26. Should financial rewards or other types of rewards be considered for whistleblowers? Why or why not?
27. If so, what options should be considered in establishing a rewards system?
28. If a reward system is established, how should it be funded?

We understand that whistleblowers can find it very difficult to secure employment after they leave the employer where they blew the whistle, and therefore a secure source of income can prove elusive. Suffering financial and career penalties for whistleblowing clearly is a high price to pay and potentially a strong deterrent to whistleblowers coming forward. As such, we are also strong supporters of compensation (see our comments above).

There has been considerable discussion of bounty or reward, where whistleblowers are incentivised to reveal wrongdoing by taking or initiating actions which lead to them recovering a percentage of the fraud revealed, or of the penalties imposed.

As noted by Professor Brown, 'These schemes, based on the US False Claims Act and the Dodd-Frank reforms to the Securities and Exchange Commission's powers, are not compensation schemes — they are incentivisation schemes, with compensation as a by-product in the specific types of cases where they work'.[4] Governance Institute is concerned that this could lead to a vigilante culture and an approach of exploiting whistleblowing for financial gain rather than to address perceived or actual wrongdoing. We are also concerned that the rewards witnessed in the US — some as high as US$20 million and US$30 million — can lead people to view these schemes as 'get rich quick' schemes. Governance Institute would be very concerned if a system was introduced that maximised the use of whistleblowing rather than the use of internal controls and processes to detect and prevent misconduct and illegal activity.

A further concern about the provision of rewards (incentives) for whistleblowing is that Governance Institute members are aware of employees being contacted via LinkedIn by US-based law firms, informing the individuals of the cash rewards for whistleblowers who voluntarily provide the SEC with information relating to corruption. The law firms also said that they would split any award on a 70/30 basis (with the law firm receiving the 70 per cent cut). Such law firms are clearly touting for business — there is no suggestion that there is wrongdoing taking place, only an incentive being offered to suggest that it is.

Professor Brown has also noted that, 'unlike the USA, but consistent with the regulatory framework in the UK, Australia already has a much stronger system of workplace law to help

[4] Brown, AJ, 'Patchy laws leave corporate whistleblowers vulnerable', *The Conversation*, April 28, 2016

support a more comprehensive approach. An important starting point is our systems of workplace health and safety, which recognise that all employers must protect and support those who disclose wrongdoing, as an extension of their responsibility to provide a safe working environment for all employees.'[5] Governance Institute is of the view that the emphasis should be on improving internal processes and controls to prevent misconduct rather than incentivising whistleblowing.

Given our concerns with the moral hazards associated with bounty or reward schemes, Governance Institute does not support bounty or reward schemes to provide financial rewards to corporate whistleblowers. We do support compensation, but not bounty schemes.

29.Do you believe there is merit in requiring companies to put in place systems for internal disclosures? If so, what form should this take?
30.Mandating internal disclosure systems for companies would impose a higher regulatory burden but the benefits may outweigh the costs. Would you support a move to a mandatory system? Please give reasons for your answer.
31.Should systems for internal disclosure be considered for all companies, irrespective of size or should there be an exception for small proprietary companies, as defined in the Corporations Act? Please explain why or why not.
32.If internal procedures are required should any breach of these be the subject of internal disciplinary action or should responsibility or enforcement be undertaken by ASIC or another external regulator? What would be a potential mechanism for oversight and monitoring of internal company procedures by a regulator? Could it be modelled on the UK FCA's approach?

Governance Institute does not support a statutory requirement for putting in place systems for internal disclosure, given the existence of systems for internal disclosure and the diversity of company size and type. The Corporations Act applies to all companies incorporated in Australia, regardless of size. [6] A family-owned small business with one or two employees will have very different requirements for an internal disclosure system than a public listed company with 30,000 employees.

We also note that legislative prescription concerning internal procedures stifles improvement. As companies learn how to improve their internal disclosure processes, based on research and evidence of effectiveness or otherwise, they will modify and change those processes to meet best practice standards. If those procedures are prescribed in legislation, no such improvement will take place.

Many larger Australian companies are implementing compliance programs in line with UK and US regulator guidance. Governance Institute is of the view that regulator guidance is a good alternative to mandating internal disclosure and investigation/response system requirements, and has proved effective in the US and UK.

As noted earlier in this submission, as a matter of good corporate governance, many companies have created effective structures for dealing with internal reporting of misconduct or illegal activity. The preliminary findings of the research being undertaken by Griffith University and others shows that 'The vast bulk of organisations who responded to the survey reported a wide range of processes for encouraging and responding to wrongdoing concerns from staff. As

[5] Brown, AJ, 'Patchy laws leave corporate whistleblowers vulnerable', *The Conversation*, April 28, 2016
[6] As at October 2016, ASIC reports that there were 2,349,382 proprietary companies, representing 99 per cent of all registered companies and 23,047 public companies, representing one per cent of all registered companies

already indicated, 89.3% of all organisations indicated they had formal, written whistleblowing procedures or policies setting out these processes'.[7]

The report also states that '90% of organisations reported they had processes for ensuring appropriate investigations or management actions were undertaken'. These results show that companies are already putting in place systems for internal disclosure. What is not yet clear is if these processes and systems are operating effectively.

As noted earlier in this submission, our members note that many disclosures that may be termed 'whistleblowing' are found to relate to internal human resources issues. As such, a triage system is required to assess if the matter should be dealt with by the HR, is a persistent breach of legislation or constitutes wrongdoing, such as financial misconduct.

Griffith University's preliminary findings confirm this, stating that 'The bulk of organisations (82.9%) indicated they had different processes in place for responding to wider wrongdoing concerns such as fraud, theft, corruption, negligence or dangers to public health or safety, from their normal processes for responding to workplace grievances'. [8]

A key role in relation to internal disclosures of financial misconduct is the audit committee, which is responsible for oversight of risk management and internal control, and the integrity of financial reporting. These are closely related — inaccurate financial reporting is just one risk among many, and many other risks have financial reporting implications. The audit committee is mandated in Australia for the S&P/ASX top 300 companies and is required for many other organisations by various forms of regulation. All other listed entities are recommended to establish an audit committee under Principle 4 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (3rd ed, 2014). APRA requires the establishment of an audit committee in the entities that it regulates. [9]

The ASX Corporate Governance Council's Principle 7 includes a recommendation that listed entities establish a committee or committees to oversee risk, but does not specify that it has to be a stand-alone risk committee, or combined with the audit committee.

An internal audit function also brings a systematic, disciplined approach to evaluating and continually improving the effectiveness of the organisation's risk management and internal control processes. The head of that function should have a direct reporting line to the board or to the board audit committee (and risk committee or committees if separate) to ensure there is independence of assurance.

The 'three lines of defence' can be a useful way to define roles and responsibilities when considering effective risk management and control:

- First line — operational management control
- Second line — management assurance (risk control and compliance oversight functions established by management), and
- Third line — independent assurance.

The board and its committee(s) are not included in the 'three lines of defence' but are served by the 'three lines'. Their role is to ensure that the 'three lines of defence' model is reflected in the organisation's risk management and control processes.

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[7] Brown AJ, Doz N and Roberts P, *Whistleblowing Processes & Procedures — A New National Snapshot, Preliminary Results: Whistling while they Work 2*, pp 8—9, Griffith University, November 2016. The results show that 86.0% of private businesses have formal, written whistleblowing procedures or policies setting out the processes for encouraging and responding to wrongdoing concerns from staff and 84.7% of private businesses have processes for ensuring appropriate investigations or management actions were undertaken

[8] Ibid, p 9

[9] Australian Prudential Regulation Authority, *Prudential Standard CPS 510 — Governance*, p 14, January 2015

We also note that an auditor or an external consultant may wish to raise an issue — it should not be assumed that it will always be an employee seeking to make a disclosure. Good internal controls and risk management processes will provide for disclosures to be made by such individuals.

For all these reasons, **Governance Institute recommends** that regulator guidance is a preferable approach to implementing sound internal disclosure and investigation/response system requirements.

Governance Institute is also of the view that there is merit in providing greater transparency as to how listed companies are addressing systems of internal disclosure and to encourage those companies that have not yet put in place an internal disclosure process to do so. Currently, Principle 7[10] requires companies to disclose if they have an internal audit function, and if not, how they demonstrate the processes in place for evaluating and continually improving the effectiveness of their risk management and internal control processes. Principle 3 [11] includes whistleblowing in its suggested contents of a corporate code of conduct, but does not provide any further commentary on it.

Governance Institute recommends that a new recommendation should be introduced to Principle 3 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendation*s requiring listed companies to disclose whether they have a system for facilitating whistleblowing and protecting whistleblowers, and whether it is documented and applied, and if not, an explanation as to why not.

We note that the ASXC Corporate Governance Council's *Corporate Governance Principles and Recommendations* require listed companies to disclose their practices annually in a corporate governance statement. The manner in which listed companies deal with the governance recommendations and the systems and processes they implement to establish sound governance frameworks are reviewed by unlisted and private companies (and not-for-profit organisations). As such, they act as a model of sound governance practice. Small proprietary companies will therefore have the benefit of assessing how listed companies deal with internal disclosure procedures and as such Governance Institute does not believe there should be an exception for them.

Governance Institute also recommends that any breaches of internal disclosure procedures should be dealt with by the company and not by the regulator. It is not appropriate to have the regulator make decisions as to the consequences of breaching internal company procedures.

33. Should the Corporations Act establish a role for ASIC or another body to protect the interests of and generally act as an 'advocate' for whistleblowers?
34. Should alternate private enforcement options be considered instead?

Governance Institute is of the view that it will often be inappropriate for ASIC to act as the advocate for a whistleblower. ASIC cannot assess the claims of the whistleblower against the claims of others if it is the advocate of the whistleblower. ASIC needs to remain sceptical but curious, so that it can assess the claims made. This is true of any regulator investigating a claim of wrongdoing.

However, it is important that ASIC be seen as proactive and able to respond to disclosures from whistleblowers. Whistleblowers should feel confident that the whistleblowing unit is taking their

[10]ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, Principle 7: Recognise and manage risk, Recommendation 7.3, page 30

[11] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, Principle 3: Act ethically and responsibly, Box 3.1: Suggestions for the content of code of conduct, page 20

complaint seriously. ASIC established its whistleblower unit in 2015 and this may ensure that the criticisms of delay and neglect attached to whistleblower disclosures in the past do not occur again.

We refer to the SEC whistleblower program which has been running since 2011. The SEC Chair noted in a speech in 2015 that 'We at the SEC take these whistleblower protections very seriously and companies should too. In June 2014, we brought and settled our first action against a company for retaliating against a whistleblower who had reported a possible securities law violation to the Commission', and 'Strong enforcement of the anti-retaliation protections is critical to the success of the SEC's whistleblower program and bringing retaliation cases will continue to be a high priority for us'.[12] While there is a view that the SEC has been advertising itself as the whistleblower's advocate, it needs to be considered within the context of a regulator taking appropriate action for breaches of the law.

We note that ASIC itself sees that the role of the Office of the Whistleblower 'is to liaise with the people who provide information to ASIC and keep them informed of their issue's progress and outcome. ASIC divides people who approach it with information about potential wrongdoing into three categories — those who are still in the organisation they are providing information about, those who are no longer in the organisation but have valuable information and those who 'call themselves a whistleblower but may not meet the definition'.[13]

ASIC has noted that 'The number of reports of misconduct to ASIC spiked after the Senate inquiry into the corporate regulator's performance, but the volume is beginning to level out now. At any one time we've probably got about 50-70 matters with someone who fits one of those three criteria. However, the number of issues raised by the public that have led to full-blown investigations are in the single digits'.[14]

Governance Institute recommends that a separate Ombudsman or Office of Whistleblowing would be the most effective advocate for whistleblowers, but that ASIC should maintain its whistleblowing unit, act proactively when disclosures are made to it and ensure that the whistleblower protections are enforced.

35. Should reforms be extended to the industries regulated under the other legislation identified above, including the credit legislation? If so, should the reforms be uniform across all similar legislative whistleblowing regimes, even those not named in this paper?

Governance Institute recommends that a provision — similar to s 29 of the *Public Interest Disclosure Act 2013* (Cth) — be introduced, which defines discloseable conduct as including conduct that contravenes a law of the Commonwealth, a state or a territory. This would be contained in a stand-alone, whistleblowing Act applicable to the private sector.

Governance Institute does not recommend introducing multiple reforms in multiple pieces of legislation.

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[12] Chair Mary Jo White, 'The SEC as the Whistleblower's Advocate', Ray Garrett, Jr Corporate and Securities Law Institute, Northwestern University School of Law, Chicago, 30 April, 2015

[13] Stewart, T, 'ASIC backs whistleblowing research project', *Investor Daily*, 29 April 2016

[14] Ibid

36. Please provide your views on how the proposed reforms should be best structured and rationale.

Governance Institute is very supportive of the provisions in the *Public Interest Disclosure Act 2013* serving as a starting point for stand-alone whistleblowing legislation applying to the private sector, particularly the wide coverage of the misconduct it covers and the disclosers it applies to. The RO Act also contains amendments introduced late in 2016 that should be considered.

Governance Institute recommends that AUS-PIDA and the RO Act serve as starting points for stand-alone, whistleblowing legislation applying to the private sector.

Proposed protections for tax whistleblowers

Governance Institute is of the view that the law should be amended to make sure that whistleblowers for tax-related matters receive the same benefits and protections as for any other corporate-related matters.

Our recommendation of a stand-alone, private sector Act governing whistleblowing would ensure that this alignment takes place.

Governance Institute recommends that:

- a provision — similar to s 29 of the *Public Interest Disclosure Act 2013* (Cth) — be introduced, which defines discloseable conduct as including conduct that contravenes a law of the Commonwealth, a state or a territory
- similarly, a whistleblower should be protected, regardless of which regulator they disclose to. That is, the disclosure should be able to be made to ASIC, ACCC, APRA, ATO, AFP or any other relevant regulator or law enforcement agency
- a stand-alone, general whistleblower protection in its own Act (applicable to the private sector) would apply regardless of the legislation to which the disclosure applies.

Application to the public sector

Governance Institute notes that the provisions of the Corporations Act do not apply to public sector entities unless they are companies or government -owned corporations constituted under that Act.

In 2016, Governance Institute issued *Governance Principles for boards of public sector entities in Australia*. This publication also has wider application to public sector entities in general. 'Principle 6 — Engage openly and honestly with stakeholders' also recognises the need for a public sector entity to develop a framework for handling grievances and whistleblowers.

Application and consistency across the state public sectors are complicated by the myriad of other specific legislation in those states. Benchmarking of whistleblower activities would need to take this into account.

In Queensland, for example, apart from the state's own Public Interest Disclosure Act, there is also the *Crime and Corruption Act 2001*. This Act also defines the term 'corrupt conduct' (s 15) and introduces the term 'maladministration' (schedule 4, s 4). Presumably maladministration covers off on 'wrongdoing' in the Commonwealth PID Act. Certain items of corrupt conduct are also reportable to the Auditor-General (for example, fraud) as well as the Crime and Conduct Commission. Over time, Queensland has moved away from the term 'official misconduct' to 'corrupt conduct' as defined in the Crime and Corruption Act.

Apart from the lack of consistency across the sectors, an agency may inadvertently be non-compliant with a piece of whistleblower/public interest disclosure because it is contained in other legislation with which the agency may not be familiar.

Governance Institute recommends that consideration be given to fine-tuning the operation of the PID Act from not only a Commonwealth public sector perspective but also from that of relevance to the state public sectors, with a view to consolidating provisions of other relevant Commonwealth Acts into one piece of legislation.