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16 February 2017

Ms Jodi Keall
Senior Advisor, Financial Systems Division
Treasury
100 Market Street
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By email: whistleblowers@treasury.gov.au

Dear Ms Keall

Review into taxation and corporate whistleblowing protections

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide a submission to the Treasury 'Review of tax and corporate whistleblower protections in Australia' (**'the review'**). The ABA notes that this submission will also be provided to the Parliamentary Joint Committee on the Corporations and Financial Services inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.

With the active participation of its 25 members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Opening remarks

The ABA supports a stronger and more effective whistleblowing regime for corporate Australia. There are inherent challenges in the current regulatory framework and the Treasury review provides an opportunity to drive a level of consistency and efficiency across the various legal frameworks.

In April 2016, the Australian banking industry announced a comprehensive package of initiatives to protect consumer interests, increase transparency and accountability, and build trust and confidence in banks (banking reform program).[1] Ensuring bank internal whistleblower policies meet the highest standard of whistleblower protections was one of the six reform announcements. An overview of these initiatives is included in the Appendix 1.

In December 2016, the ABA released Guiding Principles to help banks ensure their internal whistleblower policies meet the highest standard of whistleblower protections and that they have a robust and trusted framework for escalating and responding to concerns (Appendix 2 - Guiding Principles on Whistleblower Protections)[2]. The Guiding Principles are deliberately broad in application and cover issues well beyond those included in the current legislative framework.

The Guiding Principles build on existing good practice by the banking industry and provide protections and provisions in addition to those contained within part 9.4AAA of the *Corporations Act 2001*, Part VIA Div 1 of the *Banking Act 1959* and analogous provisions in the *Insurance Act 1973*, *Life Insurance Act 1973* and *Superannuation Industry (Supervision) Act 1993* (**Relevant Legislation**). Importantly, we note the Guiding Principles incorporate many of the enhancements to corporate whistleblowing protections outlined in the Treasury consultation paper. This is discussed further in the submission.

[1] http://www.bankers.asn.au/media/media-releases/media-release-2016/banks-act-to-strengthen-community-trust
[2] http://www.bankers.asn.au/media/media-releases/media-release-2016/banks-improve-whistleblower-protections

The ABA also notes the significant research work being undertaken by Griffith University's Centre for Governance and Public Policy to get a better understanding of whistleblowing in the Australian context. We suggest that Treasury closely considers the results of *Whistling While They Work 2* as the first research to systematically compare evidence on the state of whistleblowing processes across the public and corporate jurisdictions within Australia.

The ABA is represented on the Standards Australia's Technical Committee QR-017 *Organisational Governance* tasked with developing a new Australian Standard on Whistleblowing Protections.

ABA Guiding Principles on Whistleblower Protections

The banking industry believes an effective whistleblowing policy and program is an important aspect of a bank's overall approach to ensure compliance with regulation and prevent and detect misconduct. It is critical that employees and others[3] have the confidence to raise problems and speak up.

The ABA's Guiding Principles articulate the importance of cultural change with a focus on 'tone from the top', with the Board and Executive Management championing whistleblower policies, and ongoing monitoring to ensure the effectiveness and continuous improvement in whistleblowing practices.

The Guiding Principles reflect the findings of a research paper on domestic and global practices prepared by Promontory Australia (Appendix 3 - Review of Whistleblowing Protections by Australian Banks) and work undertaken by the ABA, banks and stakeholders with expertise in governance and whistleblowing practices.

Banks are reviewing and revising their whistleblowing policies and practices to align with the ABA's Guiding Principles and to ensure the highest standard of whistleblower protections. The major banks are expected to ensure their whistleblowing policies are consistent with the Guiding Principles by the end of March 2017, and non-major banks by the end of June 2017.

The banking industry will amend the Guiding Principles as standards evolve and legislation changes.

Specific comments

Consultation topics reflected in the Guiding Principles

The Guiding Principles include support for:

Broader categories of whistleblowers and subject matter of disclosures

- Whistleblower policies should be available to a broad range of individuals (not just from employees but also third parties, contractors, secondees and former employees) (para 3.1).
- Whistleblower protections are designed to assist people working for or with an organisation who have information concerning suspected or actual misconduct or unlawful activity. The ABA does not believe it is necessary to extend whistleblower protections to customers and the general public. There are already well established and effective complaints handling systems that can be accessed by members of the public who wish to report suspected or actual misconduct or unlawful activity. These channels include internal dispute resolution schemes, customer advocates, ombudsman's services, external dispute resolution schemes and regulators.
- A broader range of issues are able to be reported and managed under the program than currently allowed for in the Corporations Act, Banking Act or other analogous legislation (para 3.2).
- A bank's policy which complies with the Guiding Principles is designed to protect a whistleblower who acts honestly, reasonably and with genuine belief over the conduct, action or state of affairs of an individual or group. Banks will focus on the quality of the information concerning the

[3] Others includes contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees.

misconduct or unlawful activity, not the motivation of the whistleblower or an express requirement to 'act in good faith' (para 3.3).

Provisions for anonymous disclosure

- Provisions for anonymous disclosures and mechanisms to support anonymous disclosure (paras 4.2-4.4).
- Provisions to make sure the identity of the whistleblower and the details of the investigation are kept confidential (to the extent possible) (paras 4.5-4.7 and 5.5). The ABA also notes the statutory protections in relation to confidentiality of whistleblowers and disclosures in the relevant regislation.

Protections for whistleblowers and procedural fairness

- All reasonable steps must be taken to protect whistleblowers (and anyone assisting in the investigation, other than those complicit in the misconduct or unlawful activity) from retaliation (section 5). The ABA also notes the statutory protections against retaliation in the relevant legislation.
- The program will ensure that, while observing obligations of whistleblower confidentiality and protections, natural justice will be followed, with the person subject to the whistleblowing allegation given the right to respond and also informed of the outcome, as appropriate (para 4.8).

The need for robust internal company procedures

The Guiding Principles are specifically designed to ensure that bank internal procedures provide the highest standard of protections and a clear and robust framework for escalating and responding to concerns, including:

- There is clear articulation of the benefits of the whistleblower program and the institution's commitment to identifying and responding to reported concerns (para 2.1).
- The policy is approved and endorsed by the Board and the Executive Management team (with internal reporting to the Board and Management Team) (para 2.2).
- There is clear responsibility for oversight of the program by the 'Executive Champion' (an individual with a sufficient level of authority within the institution) (para 2.3).
- The program is clearly documented in a policy with clear processes, roles and responsibilities (para 4.1).
- There is a process for monitoring and evaluating the effectiveness of the whistleblower program (section 7).
- The policy is easily accessible by all staff and the program is regularly communicated to ensure staff awareness and mandatory training is provided to all staff on a regular basis, with specialist training for staff responsible for key elements of the program (section 6).
- A summary of the policy and contact points are published on the bank's website (section 6).

Topics not reflected in the Guiding Principles

Third party disclosures

The ABA supports in principle the provisions in the Registered Organisations Act that allow for disclosures via the discloser's lawyer or legal adviser and assist in protecting the anonymity of the whistleblower.

The ABA does not support extension of these provisions to disclosure to the media as we believe it is preferable that initial disclosures should be made through the internal whistleblowing program or via the

regulator. Anonymity is an important part of an effective and fair whistleblower policy by ensuring the protection of individuals and others. Disclosure to the media may compromise the ability of the bank or corporation to maintain anonymity for those involved in the process. This is particularly important while the investigation is being conducted. Further disclosure also has the potential to compromise the preservation of documentation/records which could adversely impact the quality and integrity of any investigation.

Whistleblowers have existing alternative avenues, such as auditors and regulators (The Australian Securities and Investments Commission (**ASIC**) and the Australian Prudential Regulation Authority (**APRA**) for banks), for disclosure if a company does not act promptly/appropriately, all of which support anonymity and protection of the whistleblower and investigation integrity. In the event that a regulator does not act promptly/appropriately, then recourse to the Commonwealth Ombudsman or similar may potentially be appropriate.

The industry does not believe that timeframes for investigation should be prescribed in legislation as the time required for investigations will vary. Some situations are complex and can take longer to gather information and investigate. This would be difficult to prescribe in legislation.

Scope of current statutory confidentiality requirements

Currently, the effect of the relevant legislation appears to be that:

- It is a criminal offence for an employee or officer of the company who is aware of a whistleblower's disclosure, to disclose the content of the disclosure or the whistblower's identity, to any other person (internal or external), unless:
  - The whistleblower consents; or
  - The other person is a relevant regulator or government body (e.g. ASIC, APRA or Australian Federal Police, depending on the legislation).[4]

This may mean that, if a whistleblower makes a relevant disclosure to a senior manager, the senior manager is prevented from discussing the disclosure with anyone within the company, without the whistleblower's consent.

If so, in the absence of the whistleblower's consent (which is sometimes not forthcoming), it can be practically difficult to:

- Assess whether or not the disclosure is 'protected' under the Relevant Legislation (because, for example, assistance from relevant experts may not be able to be obtained);
- Investigate the disclosure (because, for example, the senior manager cannot communicate the issues or the whistleblower's identity to relevant investigators), and/or
- Ensure the protection of the whistleblower from retaliation (for example, the senior manager cannot reveal the whistleblower's identity to a human resource personnel who could otherwise be alert to any action which may be perceived to be detrimental – for example, restructures, performance management or disciplinary processes).

This becomes even more of an issue when the senior manager to whom the disclosure was made considers it appropriate to engage external support on the matter (including from an investigation or legal firm).

At least one ABA member has reported real difficulty in navigating the above situations, as they try to balance protecting the whistleblower's rights and identity while also attempting to prudently investigate the matter disclosed.

[4] See, for example, *Corporations Act 2001* section 1317AE.

We note that Treasury's discussion paper[5] references APRA's views that the relevant provisions may need to be reviewed, because prohibitions on wider dissemination "might inhibit companies and regulators from investigating issues.[6]

The ABA suggests reviewing the relevant provisions to ensure they do not have unintended practical consequences. The provisions should clarify that they do not prevent an organisation from disclosing the disclosure, or the whistleblower's identity, for the purpose of obtaining legal advice (internal or external) on how to deal with the disclosure. Consideration should also be given to making it clear in the legislation that a company is able to take certain actions with the disclosure to progress the issue. This may require limited disclosure of certain information and their identity with relevant internal persons (e.g. investigations, human resources, risk, senior management, in addition to legal) for the purpose of appropriately dealing with the disclosure and on the basis that those persons do not share the information more broadly. In these contexts 'dealing with' the disclosure should be restricted to investigating any issues, protecting the whistleblower, including from retaliation, and providing the whistleblower with requisite 'welfare' support.

Compensation

The ABA supports the provision of compensation in circumstances where a whistleblower has not been protected and has been financially disadvantaged or subject to other forms of discrimination or pain and suffering. We believe there should be clear pathways for whistleblowers seeking compensation. We note that there may be complex interaction between any new proposed compensation avenues and employment legislation (although not all categories of whistleblowers would fall within the employment law regime). The establishment of a compensation scheme across all companies should be given further consideration, including the legal, technical and practical implications. The banking industry recommends that any changes to compensation arrangements including the establishment of a compensation scheme, should be conducted in close consultation with industry. The operation of a compensation scheme will inevitably involve a number of complexities, which will need to be worked through before the banking industry could support such a proposal.

Oversight agency

In 2014, the Office of the Whistleblower was established within ASIC to ensure that ASIC gives appropriate consideration to the whistleblowing information it receives. While the ABA appreciates the potential benefit of establishing a new independent oversight agency for corporate whistleblowing, we believe it would be more effective to leverage existing structures, such as the Office of Whistleblowing within ASIC. ASIC has the experience and expertise in investigating misconduct in financial services and is best placed to oversee whistleblowing in the corporate sector. As part of its dialogue with other financial regulators and to ensure cross-regulatory exchange of information, ASIC should provide updates through the Council of Financial Regulators. Similarly we note that APRA also has a role to play under Relevant Legislation and suggest that each regulator should have an office of whistleblowing and method of triaging and referring cases outside its specific jurisdiction.

The ABA notes that if ASIC's role was enhanced to include a function of 'advocate for whistleblowers' this should be explicitly legislated as an ASIC Office of the Whistleblower duty**,** so that their responsibility to the whistleblower is clear and distinct from ASIC's enforcement role.

Whistleblower rewards

The ABA does not support the provision of monetary incentives or rewards by regulators to encourage whistleblowing. While some commentators believe that offering financial incentives may provide a credible method of improving rates of whistleblowing reporting, we are concerned that introducing an incentive scheme might increase the number of unreliable, opportunistic disclosures and undermine the effectiveness of a company's whistleblowing policy and internal program and weaken a company's risk

[5] Review of tax and corporate whistleblower protections in Australia, December 2016, p.15, footnote 9.
[6] Review of tax and corporate whistleblower protections in Australia, December 2016, p.15, footnote 9.

management framework. As noted in the Treasury discussion paper, motivators other than money (for example, sense of civic duty, commitment to improvement, moral concern) may be preferable[7].

The ABA believes this would represent a fundamental shift in approach to corporate law enforcement in Australia.

We note that the provision of financial incentives to encourage whistleblowing was rejected by the Financial Conduct Authority (**FCA**) and the Bank of England Prudential Regulation Authority (**PRA**) ('the regulators') in their recent consideration of enhancements to the corporate whistleblowing regime in the United Kingdom. In summary, the regulators considered that providing financial incentives to whistleblowers would not encourage whistleblowing, increase the quality and integrity disclosures or improve the transparency in financial markets.[8]

Scope of reforms and varying legislative approaches to reform

The ABA supports a stand-alone legislative framework for the corporate sector that covers all forms of corporate misconduct and provides protection regardless of which regulator or oversight authority the whistleblower discloses the information to. We believe whistleblowers should not require detailed knowledge of legal and regulatory frameworks prior to making a protected disclosure. The framework should be simple and easy for whistleblowers to access, navigate and understand.

Concluding remarks

Consistent with our banking reform program, the ABA supports reforms to the corporate whistleblowing regime that encourage a culture where speaking up becomes normal business practice and people are more prepared to report concerns. This is an important part of driving continuous improvement within banks and ultimately improving outcomes for customers.

If you have any queries regarding the issues raised in our submission, please contact me or Amanda Pullinger, Policy Director – Retail Policy, on (02) 8298 0411 or amanda.pullinger@bankers.asn.au.

Yours sincerely

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[7] Review of tax and corporate whistleblower protections in Australia, December 2016, p.27
[8] Financial Incentives for Whistleblowers, Note by the Financial Conduct Authority and the Prudential Regulation, Authority for the Treasury Select Committee July 2014

Appendix 1- Banking reform package

In April 2016, the Australian banking industry announced a comprehensive package of initiatives to protect consumer interests, increase transparency and accountability, and build trust and confidence in banks (banking reform program). The initiatives include:

1) Reviewing product sales commissions:
    a) Conduct an independent review of commissions and payments in retail banking with a view to the banks removing or changing payments where they could lead to poor customer outcomes, and
    b) Each bank publishes overarching principles on remuneration and incentives to support good customer outcomes and sound banking practices.
2) Making it easier for customers when things go wrong:
    a) Establish a dedicated customer advocate in each bank to ensure retail and small business customers have a voice and customer complaints are appropriately escalated and responded to within specified timeframes
    b) Support the Government's review to broaden external dispute resolution (**EDR**) by promoting easier access and increasing eligibility thresholds for retail and small business customers
    c) Support expanding of customer remediation programs from personal advice to all financial advice and products, and
    d) Establish an industry wide, mandatory last resort compensation scheme covering financial advisers.
3) Reaffirming our support for employees who 'blow the whistle' on inappropriate conduct
    a) Ensure the highest standards of whistleblower protections by ensuring there is a robust and trusted framework for escalating concerns.
4) Removing individuals from the industry for poor conduct
    a) Implement an industry register or mechanism to identify individuals who have breached the law, codes of conduct, standards or policies, so that employers can make their own informed recruitment decisions.
5) Strengthening our commitment to customers in the Code of Banking Practice
    a) Conduct an independent review of the Code of Banking Practice with a view to improving banking standards, disclosure and principles of conduct.
6) Supporting ASIC as a strong regulator
    a) Support the Government's announcement to implement an industry funding model for ASIC, and
    b) Work with ASIC to enhance the current breach reporting framework.

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Appendix 2 - Guiding Principles on Whistleblower Protections.

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Guiding Principles – Improving Protections for Whistleblowers

Background

Australia's banks are putting in place comprehensive new measures to protect customer interests, increase transparency and accountability and build trust and confidence in banks.

One of these measures is to ensure that banks have the highest standard of whistleblower protections as well as appropriate policies and a robust, trusted framework for escalating and responding to concerns.

An effective whistleblowing policy and program is one aspect of a bank's overall approach to ensure compliance with regulation and prevent and detect misconduct. Not only is the whistleblowing policy part of the internal control and risk management framework of banks, it is an important part of driving continuous improvement within banks and ultimately improving outcomes for customers. It is critical that employees and others[1] have the confidence to raise problems and speak up.

The following guiding principles have been identified as encapsulating the core elements of an effective whistleblowing policy to assist the ongoing enhancement of whistleblowing programs by banks and banking groups. The guiding principles will be evaluated and updated over time to reflect changes in legislation, ongoing research, and developments in whistleblowing practices.

1. Purpose

1.1 The purpose of a whistleblowing policy is to encourage and support the reporting of suspected or actual misconduct or unlawful activity within an organisation, and to protect the whistleblower from any retaliation that may arise as a result of their disclosure.

1.2 An effective whistleblower policy is a key element of a culture of ethical behaviour, strong corporate governance and an effective compliance and risk management program. It helps protect the interests of customers as it acts as an effective deterrent to poor conduct or organisational behaviour. Poor management of whistleblowing can lead to poor outcomes for customers, a loss of trust by employees, customers, regulators, shareholders and the general public, financial loss and reputational damage.

1.3 Banks recognise that an effective whistleblowing policy helps a business to learn about problems, improve their practices, and reduce business risks. The application of these guiding principles will help improve whistleblowing programs and provide greater consistency for the protection of whistleblowers across banking groups.

1.4 The guiding principles are aimed at achieving the highest standard of whistleblower protection based on an assessment of current global banking industry whistleblowing policies.

Principles

2. Bank executives demonstrate strong and visible leadership

> The tone from the top is critical to maintaining trust in the whistleblower policy. Clear policies, roles and responsibilities and recognition of the importance of the program should be part of the senior management and organisational culture.

2.1 Whistleblowing is an essential part of building and actively fostering a culture of speaking up about problems and business risks. The whistleblower policy should clearly articulate the purpose and positive elements of the program, the commitment by the bank to identifying and

[1] Others includes contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees.

responding to reported concerns and commitment to a culture of continuous improvement within the banking group. The policy will only work if senior executives, managers, employees and others have trust in the process.

2.2 The whistleblower policy should be approved and endorsed by the Board of Directors and the Executive Management team:

- The Board of Directors should approve the policy and make sure it is adhered to.
- The bank's Executive Management team should be responsible for the oversight, implementation and communication of the whistleblowing policy.

2.3 An individual with a sufficient level of authority within the banking group or 'executive champion' should be responsible and accountable for the implementation and effectiveness of the program.

2.4 The whistleblowing policy should be linked to the banking group's Code of Conduct.

2.5 While respecting anonymity and complying with the law, the whistleblowing policy should provide for regular reporting to the Board or delegated committee on the effectiveness of the program as well as any material incidences and the status of any ongoing material investigations.[2]

3. The whistleblower policy allows for disclosures on a range of issues from a range of people with a connection to the bank

The scope of the whistleblower policy should be broad, allowing disclosures from people with a connection to the banking group.

3.1 The whistleblower policy allows for disclosures from a range of people with a connection to the bank on a range of issues. The range of people should include employees, contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees.[3]

3.2 The range of issues able to be reported and responded to under the whistleblower policy includes an activity, conduct or state of affairs, that is illegal, unethical or improper. For example, allegation of criminality (e.g. theft, fraud), harassment, unethical behaviour, failure to comply with a legal obligation, suspected or actual misconduct and significant breaches of a licensee's policies or code of conduct.

3.3 The whistleblower policy is designed to protect a whistleblower who acts honestly, reasonably and with genuine belief over the conduct, action or state of affairs of an individual or group. The bank will focus on the quality of the information concerning the misconduct or unlawful activity, not the motivation of the whistleblower.

[2] It may be difficult in some circumstances for the information disclosed to be communicated through the particular governance channels. Banks should exercise their judgement about getting the right balance between maintaining strict anonymity and confidentiality (in accordance with these guiding principles) and being able to report to employees as part of awareness raising about the whistleblowing program and promoting the desired culture of the banking group. It may not be possible to send general communications across a bank about a specific whistleblowing incident.

[3] Disclosures raised by external third parties are to be investigated to the extent possible. It should also be acknowledged that the banking group will not be able to provide the same level of protection for external third parties and former employees as it does to employees and contractors.

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4. Banks provide clear guidelines on the reporting and investigation process

The reporting and investigation process in the whistleblower policy should facilitate open and honest communications by whistleblowers. Anonymity and independent support should be provided as requested and to the extent possible.

4.1 The reporting and investigation process is clearly documented in the whistleblower policy with clear procedures, roles and responsibilities and details the organisational support that is available.

4.2 The whistleblower policy provides for anonymous disclosures.

4.3 The whistleblower policy has explicit acknowledgment that the whistleblower may communicate with regulators at any time in relation to the suspected or actual misconduct or unlawful activity.

4.4 The whistleblower program provides a number of specific channels for the whistleblower to report concerns (for example, independent internal reporting area and/or external third party reporting area, i.e. legal firm or consultancy that are contactable by phone, post, email, online and/or apps).

4.5 There are separate roles and responsibilities for the investigation of whistleblowing disclosures and the protection and support of whistleblowers. These are different functions and should operate independently of each other. To protect the whistleblower it may be appropriate, in some circumstances, for the investigation and protection functions to be conducted by one person. Banks will need to ensure appropriate practices are in place to protect the anonymity of the parties involved.

4.6 The whistleblower policy clearly identifies the limited roles within the bank with whom information disclosed by a whistleblower can be shared (for example, the whistleblower investigation officer), and explains that a whistleblower covered by a bank's policy consents to such limited sharing of the information if the circumstances allow[4].

4.7 The program is structured and adequately resourced to be effective and ensure that disclosures are investigated and responded to in a timely manner and independently of the area of the business concerned.

4.8 The program will ensure that, while observing obligations of whistleblower confidentiality and protections, natural justice will be followed, with the person subject to the whistleblowing allegation given the right to respond and also informed of the outcome, as appropriate.

4.9 Banks value the whistleblower and the information they disclose. The whistleblower will receive acknowledgement of the disclosure and they will be updated in relation to timeframes and next steps during the investigation and advised of the final outcome, where appropriate.

[4] In Australia, there are legislative obligations in relation to confidentiality and a person who discloses information from a whistleblower outside those obligations of confidentiality or who victimises a whistleblower on the basis of that information may be guilty of a criminal offence. Obligations of confidentiality around information from a whistleblower must be strictly observed by banking groups, including in their reporting.

5. Banks provide support and protections for whistleblowers

The whistleblower policy must articulate the standards for protecting and supporting whistleblowers during and after the process. Retaliation against a whistleblower will not be tolerated.

5.1 The whistleblower policy prohibits actions that disadvantage the whistleblower personally or financially in retaliation against their disclosure. All reasonable steps must be taken to protect whistleblowers from retaliation or adverse action related to the disclosure, including matters relating to their employment. It should be acknowledged that a banking group will not be able to extend the full level of protections set out in the whistleblower policy to whistleblowers who are not directly employed by the banking group at the time the disclosure is made, for example, protection of their employment conditions.

5.2 Retaliation against a whistleblower will not be tolerated. The whistleblower policy will detail clear processes for reporting and responding to retaliation or threats of retaliation against a whistleblower. It will detail organisational and individual behavioural expectations relating to whistleblowing. There are explicit and relevant responses to people exhibiting unacceptable behaviour towards whistleblowers and disciplinary action may be taken against any person responsible for such behaviour.

5.3 If the whistleblower is found to have been materially involved in the misconduct or unlawful activity, they may not be protected in relation to their role in that misconduct or unlawful activity (although in some cases the making a disclosure may be a mitigating factor).

5.4 Banks will have in place appropriate internal processes to investigate a matter where a whistleblower thinks they have not been treated fairly or has concerns about adverse action related to their employment.

5.5 The whistleblower policy provides support for whistleblowers through the banking group's employee assistance program, with additional support provided if required by the whistleblower.

5.6 Protection against retaliation and support is also provided to employees who are part of the whistleblowing investigation team.

6. The program is known, accessible and effective training is provided

The whistleblower program, including how to report suspected or actual misconduct or unlawful activity and the protections afforded to whistleblowers, is known and understood by all senior executives, managers, employees and others across the banking group. Raising awareness and providing training should be embedded in the banking group's business, operational risk and culture frameworks.

6.1 The whistleblower policy is easily accessible by all senior executives, managers and employees and the program is communicated regularly to ensure broad awareness across the banking group. The summary of the policy and contact points for the whistleblowing program are published on the banking group website so that others covered by the policy (i.e. non-banking employees) can access the program.

6.2 The whistleblower program is part of mandatory training for all employees (for example, as part of an induction program). Specialist training should be provided for executives, senior managers and employees responsible for key elements of the program (for example, training of employees charged with investigating whistleblower complaints and supporting the whistleblower).

6.3 Banks should consider how best to communicate their whistleblowing policy internally, including through the bank's intranet and/or other employee communications. Communications should

not compromise anonymity for whistleblowers, but aim to promote transparency around the program and consequences.

7. Ongoing monitoring

Banks will monitor the awareness and effectiveness of the whistleblower program to ensure continuous improvement and adherence to the highest standards in whistleblowing practices.

7.1 Banks have whistleblowing policies consistent with these guiding principles and communicate their whistleblowing policies internally and externally (for example, as part of their corporate responsibility reporting and the bank's website).

7.2 Banks will need to design and implement mechanisms to monitor and measure the effectiveness of the program as well as the awareness and attitude of employees and others, towards the whistleblower policy and program.

7.3 Banks should consider seeking regular and independent assessment of the effectiveness of the whistleblowing policy and program and ensure that a process exists to embed improvements as a result of these findings, and other internal audits or reviews.

Appendix 3 - Review of Whistleblowing Protections by Australian Banks

Review of Whistleblowing Protections by Australian Banks

Final Report

Prepared for

Australian Bankers' Association

August 2016

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PROMONTORY

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Abbreviations

ABA	Australian Bankers' Association
ADI	Authorised Deposit-taking Institution
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
FCA	Financial Conduct Authority
FCAC	Financial Consumer Agency of Canada
FDIC	Federal Deposit Insurance Corporation
OSC	Ontario Securities Commission
PIDA-AU	Public Interest Disclosure Act 2013 (Australia)
PIDA-UK	Public Interest Disclosure Act 1998 (UK)
PRA	Prudential Regulation Authority
SEC	Securities and Exchange Commission
SOX	Sarbanes-Oxley Act of 2002
UK	United Kingdom
US	United States of America
WPO	Whistleblower Protection Officer

Executive Summary

In general terms, a whistleblower is a person with information, usually gained from his or her employment, concerning illegal or unethical activities or misconduct within an organisation, and who reports that information. Effective whistleblower programs, capable of receiving and responding to disclosures from whistleblowers in an efficient and effective way, and of protecting them from inappropriate retaliation, are a critical element of modern corporate governance and risk management frameworks.

Poor management of whistleblowers can lead to financial loss, significant reputational damage and loss of trust. Therefore Australian banks, in addition to meeting legislative requirements, have developed their own internal whistleblower programs to support early identification of corporate misconduct. The programs are complex because, in order to be effective, they will apply to multiple business lines and often across multiple jurisdictions with differing expectations.

The Australian Bankers' Association Inc (ABA) has engaged Promontory Australasia (Sydney) Pty Ltd (Promontory) to assist in strengthening the standards of whistleblower protections across the banking industry. Promontory has conducted a desk-top review of offshore whistleblowing policies and practices, as well as local and global regulatory requirements, to establish the core elements of a best-practice whistleblower program. Once we established best-practice core elements, we reviewed a sample of whistleblower policies of Australian banks (major and smaller banks) and assessed their alignment with our best-practice program.

Promontory did not conduct a formal survey of practices in international banks. We also did not assess whistleblower practices in all Australian banks, or review how the policies have been applied and adhered to in practice. The results and conclusions in this Report should be interpreted against those limitations.

Australian landscape

There is no single whistleblower law or framework in Australia. In particular, the public and corporate sectors operate under different whistleblower legislation. While the public sector framework is comprehensive, laws governing the corporate sector are considered comparatively weak. Under the Corporations and Banking Acts[1], certain disclosures by whistleblowers qualify for protection against victimisation, protection from certain liability and rights to confidentiality. The disclosures that qualify, however, are narrowly defined and apply only to disclosure to certain people in relation to specific breaches of the law. Further, these disclosures cannot be made anonymously. Although Australian Prudential Regulation Authority (APRA) Standards require banks to have internal whistleblower policies, neither the Australian Securities and Investments Commission (ASIC) nor APRA provides any detailed guidance as to the elements that should be included in an internal whistleblower program.

A number of recent reviews (e.g., by the Senate Economics References Committee) have identified significant deficiencies in Australia's corporate whistleblower framework. It is likely that these whistleblower requirements will undergo some strengthening over coming years. A research project has also commenced, with support from ASIC, focused on improving management responses to whistleblowing in private sector organisations.

International landscape

To help identify the elements of a best-practice whistleblower program, we reviewed the legal and regulatory requirements applying in the United Kingdom (UK), the United States (US), Canada and Europe. Overall, we

[1] Corporations Act 2001 and Banking Act 1959.

consider the UK to be the global leader with respect to whistleblower requirements for financial institutions. In addition to the protections provided by the Public Interest Disclosure Act 1998 (PIDA-UK), the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) have recently issued a package of measures to formalise licensed firms' whistleblowing procedures. The US also has comprehensive programs for financial incentives and protections for individuals who report possible violations of the securities laws. Canada is now following suit.

Best-practice program

We conducted a desk-top review of whistleblower policies of over 30 banks based in the US, the UK and Canada, ranging in size from large global banks to small community banks (the 'peer institutions'). To develop a best-practice program, we selected examples of good practice from these peer institutions, considered global and local regulatory expectations and utilised the insights from our global resources.

The best-practice elements are set out below.

Scope of whistleblowers and disclosures

- The policy allows disclosures from a broad range of persons (not just from employees).
- A broad range of issues are able to be reported and managed under the program.

Reporting and investigation

- A number of specific and independent channels are available to the whistleblower for reporting concerns.
- The program provides for anonymous disclosures.
- There is explicit recognition of the whistleblower's right to communicate with regulators at any time in relation to any concern within the scope of the program.
- Processes for assessment, investigation and escalation of concerns are clear and transparent, and in line with a suitable set of guiding principles.
- The investigation is conducted independently of the business unit concerned.
- Whistleblowers receive acknowledgement of the disclosure provided, are kept updated during the investigation process and are advised of the final outcome (where appropriate).

Protections

- The identity of the whistleblower and the details of the investigation are kept confidential (to the extent possible).
- Reasonable steps must be taken to protect whistleblowers (and anyone assisting in the investigation, other than those complicit in the wrongdoing) from retaliation.
- There are clear processes for the reporting, investigation and monitoring of retaliation.

Implementation and maintenance

- The program is clearly documented in a policy with clear processes, roles and responsibilities.
- The policy clearly articulates the benefits of the program and the institution's commitment to identifying and responding to reported concerns.

- The policy is easily accessible by all staff and the program is regularly communicated to ensure staff awareness.
- Outcomes of whistleblower reports are tracked and regularly reported through governance channels (such as to senior management and the board).
- Mandatory training is provided to all staff on a regular basis, with specialist training for staff responsible for key elements of the program.
- There is clear responsibility for oversight of the program (by an individual with a sufficient level of authority within the institution), including regular reporting on the implementation and effectiveness of the program.

Australian banks

We conducted a desk-top review of the policies and related documents of a sample of seven Australian banks (major and smaller banks) [2] and compared their whistleblower policies and programs against the best-practice elements outlined above. To be effective, these programs must be developed to apply to multiple business lines, often across multiple jurisdictions, which adds significant complexity for the banks.

Overall, the Australian banks we sampled have comprehensive whistleblower programs that, in almost all cases, meet or exceed global best practice for the majority of the elements outlined above. For example, most Australian bank's documented practices for protections against retaliation exceed global best practice.

There are, however, inconsistencies between Australian banks in some aspects of their whistleblowing policies. There are also areas where improvements could be made, either for all banks or for some banks individually.

Further suggestions to align to best practice are provided below. Many of these suggestions relate to expanding the detail provided within the whistleblower policy to articulate procedures that we expect already exist in practice (e.g., reporting and investigation processes, roles and responsibilities, feedback to whistleblowers and protections provided). For some banks, however, there are aspects of the program that may be strengthened (e.g., extending coverage of the program, providing specialist training, and ensuring an annual review of the implementation and effectiveness of the program).

A key positive for Australian banks' whistleblower programs is that they cover more than the protected disclosures provided for by the Corporations Act or the Banking Act. Most banks also effectively communicate (through their policies) that specific benefits and protections apply to all disclosures within the scope of their policies.

As noted above, our examination was based on documented processes. Further work would be required to assess the extent to which these protections work in practice.

Suggestions to align with best practice

We suggest that banks consider broadening their program coverage to allow disclosures from a wider range of persons (not just from employees).

[2] Banks sampled were the Australia and New Zealand Banking Group Limited (ANZ), Bank of Queensland Limited (BOQ), Bendigo and Adelaide Bank Limited, Commonwealth Bank of Australia (CBA), National Australia Bank Limited (NAB), Suncorp Bank and Westpac Banking Corporation.

We also suggest that where a bank does not already do so, it consider:

- including explicit recognition of the whistleblower's right to communicate with regulators at any time, in relation to any concern within the scope of the program;
- increasing the level of detail provided on the assessment and investigation processes;
- including a commitment in the policy to providing the whistleblower with updates on progress, as well as details of outcomes;
- improving stated protections (confidentiality and protection against retaliation);
- extending protections to those participating and assisting in investigations (unless also committing or complicit in the wrongdoing under investigation);
- including additional detail on roles and responsibilities;
- including additional detail on regular internal reporting processes for whistleblower matters (such as regular reporting to senior management, committees and the board);
- including detail on the specialist training provided to key personnel (or, if not provided, these banks may consider implementing such specialist training); and
- improving the clarity of responsibility for overall oversight of the program (by an individual with a sufficient level of authority within the institution), including an explicit requirement for annual review of the implementation and effectiveness of the program.

Policy implementation

As noted above, a limitation of this Report is that we have conducted a desk-top review of policies that did not extend to a review of how the policies have been implemented and adhered to in practice. Although we provide comments on implementation issues (such as training, awareness and governance), a full assessment of the effectiveness of a whistleblower program should consider how well the policy is operationalised and the level of compliance with the policy requirements. Examples of such areas of implementation include:

- the visibility of the whistleblower program and the frequency and tone of messages to raise awareness of the program;
- the quality and effectiveness of employee awareness and training initiatives;
- attitudes of management, employees and whistleblowers;
- the responsiveness of the program upon receipt of a disclosure;
- how well the whistleblower program integrates with other areas of the institution (e.g., business and risk management processes); and
- whether regular internal reporting informs decision-making and leads to better outcomes for whistleblowers and continuous improvement in the program.

1 Background

The ABA has commissioned this review to help the Australian banking industry to develop standardised whistleblower policies and processes that align to or exceed global best practice. The ABA engaged Promontory to assist in benchmarking the standards of whistleblower protections across the banking industry and in comparison with international best practice.

Promontory conducted a desk-top review of offshore whistleblowing policies and practices, as well as local and global regulatory requirements, to establish the core elements of a best-practice whistleblower program.

We also reviewed a sample of whistleblower policies of Australian banks (major and smaller banks) and assessed their alignment with international best practice. While the whistleblower policies of Australian banks generally aligned well with international practice, in some cases exceeding it, there were also a few areas where the approach taken by some of the Australian banks could be strengthened.

The structure of this Report is as follows:

- Section 2 describes the Australian legal and regulatory context for whistleblower protection, and the guidance available for establishing and maintaining effective whistleblower protection programs. It also highlights recent developments for improvements in the whistleblower framework for the corporate sector.
- Section 3 summarises the legal and regulatory obligations for corporations and banks in the United Kingdom, United States, Canada and Europe.
- Section 4 outlines the elements of a best-practice whistleblower program, based on our review of policies at a selection of global peer institutions, as well as global and local regulatory requirements.
- Section 5 details the alignment of policies at a selection of Australian banks with the elements of our best-practice whistleblower program, including suggestions for improvement.
- Section 6 provides our closing comments.

2 Australian whistleblowing regulatory landscape

2.1 Overview

In general terms, a whistleblower is a person with information, usually gained from his or her employment, concerning illegal or unethical activities or misconduct within an organisation, and who reports that information. There is no single whistleblower law or framework in Australia. Whistleblowing in the public sector is governed by legislation at the Commonwealth and State and Territory levels. Whistleblowing in the private sector is covered by different legislation to that of the public sector. In addition to legislation, there is a range of frameworks and best-practice guidelines that apply to different industry sectors with varying degrees of enforceability.

Public sector

By international standards, whistleblower protection rules for the Australian Commonwealth public sector are fairly comprehensive. The Public Interest Disclosure Act 2013 (PIDA-AU) encourages public officials to report suspected wrongdoing in the Commonwealth public sector and protects public officials (current or former) from any adverse consequences as a result of making a disclosure.

The PIDA-AU includes obligations for each public sector entity to: establish internal procedures; appoint authorised officers; investigate disclosures within a set time; provide confidentiality and immunity from liability; and support and protect against reprisal (including access to compensation in the event of loss, damage or injury as a result of the reprisal). The Commonwealth Ombudsman has oversight over the operation of the PIDA-AU and can receive and investigate disclosures in certain circumstances. A statutory review of the effectiveness and operation of the PIDA-AU is currently underway.

In addition to the Commonwealth scheme, all States and Territories have stand-alone Acts that provide for the establishment of whistleblowing programs and some form of legal protection against reprisal (with some of these laws also applying to the private sector when dealing with issues such as health, safety and the environment).

Corporate sector

Whistleblower provisions were introduced into the Corporations Act in 2004 and are administered by ASIC, whose primary role is to receive, assess and investigate disclosures, where appropriate. Similar protections are reflected in APRA's legislation for the banking, insurance and superannuation industries. The sections below provide details about these obligations and recent developments in whistleblowing protections in the corporate sector.

Overall, the whistleblower framework governing the Australian corporate sector is regarded as weaker than that applying to the public sector, with experts on whistleblowing suggesting that Australia's corporate framework has fallen behind that of other jurisdictions.[3]

While APRA requires licensed institutions to have an internal whistleblower program, and ASIC suggests it as good practice, neither regulator provides detailed guidance as to the elements that should be included in such a program.

2.2 Regulatory requirements – ASIC

Whistleblower protections under the Corporations Act [4] applying to the corporate sector are more limited than those that apply to the Australian Commonwealth public sector under the PIDA-AU. The Corporations Act uses narrow definitions for the disclosures that qualify for protection. Under the Corporations Act, the information provided by a whistleblower is considered to be a 'protected disclosure' and must be kept confidential, along with the identity of the whistleblower. This protection, however, is limited under the Corporations Act to a whistleblower who is an officer or employee of the company that is the subject of the disclosure, or a person (or employee of a company) who has a contract to provide goods and services to the company in question. In addition to these requirements, to qualify for protection the whistleblower must:

- disclose the information to ASIC, the auditor of the company (or member of the audit team), or specified persons within the company (such as a director, secretary, senior manager or person authorised to receive such disclosures);
- have reasonable grounds to suspect that the company (or an officer or employee of the company) has, or may have, contravened a provision of the Corporations Act or ASIC Act;[5]
- be acting in good faith; and

[3] Senate Economics References Committee "Performance of the Australian Securities and Investments Commission", June 2014, page 204
[4] Part 9.4AAA of the Corporations Act 2001, Sections 1317AA – 1317AE
[5] Australian Securities and Investments Commission Act 2001

- provide his or her name prior to making the disclosure (i.e., the disclosure cannot be made anonymously).

There is no formal registration process for whistleblowers. Once the above criteria are met, a range of protections apply, including:

- protection from civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure;[6]
- court ordered reinstatement of position (or comparable position) in the event an employment contract is terminated as a result of the disclosure;
- protection against victimisation (actual or threatened) and a right to seek compensation if damage is suffered as a result of that victimisation; and
- confidentiality (it is an offence to reveal the whistleblower's disclosed information or identity, unless it is authorised).[7]

ASIC has provided some additional guidance to whistleblowers, company officials and auditors to support the whistleblowing obligations in the Corporations Act.[8] Although the whistleblowing provisions in the Corporations Act relate to breaches of only the Corporations Act or ASIC Act, ASIC notes that contraventions of other legislation may involve secondary offences under these Acts (e.g., due to records being falsified). The guidance also provides that good practice requires setting up internal processes for handling disclosures, training staff (focusing on the consent needed before information is passed on to third parties for investigation) and periodically checking on the effectiveness of these processes. However, the guidance is limited to these brief statements and does not provide any supporting detail on the elements to be included in the procedures for a company.

2.3 Regulatory requirements – APRA

In addition to the obligations under the Corporations Act, institutions supervised by APRA, including banks, must meet requirements set out by any applicable industry-specific legislation and APRA's Prudential Standards.

Requirements under the Banking Act 1959[9] closely mirror the Corporations Act requirements in relation to disclosures made to Authorised Deposit-taking Institutions (ADIs),[10] including the protections provided to the whistleblower. However the Banking Act allows a broader range of behaviour to be disclosed within the definition of a whistleblower. To qualify for protections under the Banking Act 1959 the disclosure must:

- relate 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 1995, the Insurance Act 1973 and the Superannuation Industry (Supervision) Act 1993, with some minor differences to

[6] However, this does not extend to protection from civil or criminal liability resulting from participation in the misconduct being reported.
[7] The disclosure is authorised if it is made to ASIC, APRA, the Australian Federal Police or with the consent of the whistleblower.
[8] ASIC Information Sheet (INFO 52), "Guidance for Whistleblowers" and "Whistleblowers – company officeholder obligations" and "Whistleblowers – company auditors obligations" on ASIC's website
[9] Sections 52A - 52E of the Banking Act 1959
[10] This includes the ADI, authorised non-operating holding companies or subsidiaries of an ADI.

reflect the roles of the actuary for insurers and superannuation entities as well as the role of the trustee of the superannuation entity.[11]

A number of APRA's Prudential Standards include requirements for ADIs to maintain adequate processes for dealing with disclosures from whistleblowers. Although the term 'whistleblower' is not used, the Standards relate to employees with concerns about a range of matters.

The Prudential Standard on Governance (CPS 510) requires that:

"The Board Audit Committee must establish and maintain policies and procedures for employees of the APRA-regulated institution or group to submit, confidentially, information about accounting, internal control, compliance, audit, and other matters about which the employee has concerns. The Committee must also have a process for ensuring employees are aware of these policies and for dealing with matters raised by employees under these policies."

The Standard also requires that employees (current or former) must not be constrained or impeded from disclosing information to APRA, and the ADI's internal policy must not restrict or discourage auditors or other parties from communicating with APRA.

APRA's Fit and Proper Prudential Standard (CPS 520) requires that the ADI's Fit and Proper Policy includes adequate provisions to allow whistleblowing in relation to a responsible person not meeting the ADI's fit and proper criteria. The disclosure of information to APRA must not be constrained or discouraged. Any provisions of the Policy encouraging whistleblowing must be adequately communicated to employees, and reasonable steps must be taken to ensure that whistleblowers making disclosures in good faith are not subject to, or threatened with, any detriment due to the disclosure.

Given that the Banking Act requirements (and the aforementioned industry specific legislation) closely align with the requirements in the Corporations Act, we expect APRA to wait until any future review of the Corporations Act is complete (refer to Section 2.4 below) prior to considering relevant changes to requirements in the Banking Act**.**

2.4 Other requirements and guidance

An Australian Standard[12] on whistleblower protection programs was issued in 2003 as a practical guide for corporations, government agencies and not-for-profit entities in establishing and maintaining effective whistleblower protection programs.[13] 'Reportable conduct' was broadly defined[14] and entities were required to:

- establish a whistleblower protection policy (a checklist of matters to be addressed was provided);
- establish clear processes for disclosing information, investigating and reporting;

[11] Sections 156A - 156E of the Life Insurance Act 1995, Sections 38A - 38E of the Insurance Act 1973 and Sections 336A - 336E of the Superannuation Industry (Supervision) Act 1993

[12] Standards Australia is the nation's peak non-government standards organisation, which develops 'Australian Standards' setting out specifications and procedures to ensure products, services and systems are safe, reliable and consistent as well as internationally-aligned.

[13] Standards Australia, "Whistleblower protection programs for entities", AS 8004-2003, Incorporating Amendment No. 1 (November 2004).

[14] Examples of conduct included as 'reportable conduct' are conduct that is dishonest, fraudulent, illegal, in breach of laws, unethical, serious improper conduct and conduct that may cause financial or non-financial loss to the entity or be otherwise detrimental to the interests of the entity.

- ensure adequate resources, including the appointment of a Whistleblower Protection Officer (WPO) and a Whistleblower Investigation Officer;
- establish protections such as confidentiality and protection against reprisal or victimisation; and
- educate and communicate to all employees, and regularly review program effectiveness.

The application of the Australian Standard was voluntary. The Standard was withdrawn in November 2015 with no replacement issued to date.

The Australian Securities Exchange (ASX) has developed corporate governance principles,[15] which include a recommendation that a firm's code of conduct:

"Identify the measures the organisation follows to encourage the reporting of unlawful or unethical behaviour. This might include a reference to how the organisation protects 'whistleblowers' who report violations in good faith" (with a reference to the Australian Standard for guidance).

Research released in 2011 noted that only 31.5% of ASX 200 companies had developed whistleblower policies and procedures that are compliant with the ASX Principles and AS 8004-2003.[16]

2.5 Recent developments

At the time of their introduction, it was recognised that the reforms to the whistleblower provisions within the Corporations Act were only a first step, and that further reform would likely be required in the future.[17] Notwithstanding that recognition, over a decade has passed without further reform.

The corporate whistleblower protections have nevertheless been subject to a number of reviews, the most recent resulting in the release of an Issues Paper in April 2016 by the Senate Economics References Committee.[18] As noted in that Issues Paper, most stakeholders agree that the current whistleblower regime is inadequate and in need of further enhancement. The main deficiencies identified in the Issues Paper include:

- limited scope of the definition of protected disclosures;
- lack of a requirement for companies to establish internal processes to facilitate whistleblowing;
- lack of clarity about the role of ASIC (e.g., to protect whistleblowers, act as an advocate);
- the exclusion of anonymous disclosures from protection;
- the 'good faith' requirement (which is seen to be an unnecessary impediment and could be replaced with a more objective test, consistent with developments in the UK, where a similar requirement was removed in 2013); and

[15] ASX, "Corporate Governance Principles and Recommendations", 3rd Edition, 2014
[16] Janine Pascoe and Michelle Welsh, "Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia", Common Law World Review 40 (2011)
[17] Parliamentary Joint Committee on Corporations and Financial Services, CLERP (Audit Reform and Corporate Disclosure) Bill 2003, "Part 1: Enforcement, executive remuneration, continuous disclosure, shareholder participation and related matters", June 2004, Parliamentary Paper No. 122/2004
[18] Reviews include Treasury Options Paper, "Improving protections for corporate whistleblowers", Options paper, October 2009; Senate Economics References Committee "Performance of the Australian Securities and Investments Commission", June 2014; Senate Economics References Committee, Issues Paper "Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence", 21 April 2016

- ensuring protections against victimisation operate in practice (i.e., there have been no prosecutions under the current regime for retaliation against whistleblowers).[19]

Some commentators have noted that the 2013 public sector reforms could be a useful template for reform in the corporate sector. The Issues Paper also considered the possibility of Australia introducing rewards or monetary incentives for corporate whistleblowers (refer to Section 3.2 for a discussion of US reforms in this area). While some commentators believe that offering 'bounties' may offer a credible alternative to achieving change and improving rates of whistleblowing, there were concerns identified in the Issues Paper that introducing an incentive scheme might increase the number of unreliable disclosures, undermine internal reporting mechanisms and be inconsistent with the Australian culture. ASIC noted that any move in this area would also need to consider the civil penalties applied to Australian corporates (which are low by global standards). Any application of an incentive scheme in Australia, such as that implemented in the US, should consider differences in legal structures and penalty systems.

The Senate was due to report back on 31 August 2016, but all inquiries are now on hold and a new Economics References Committee is expected to be re-formed after the Federal election. Given the high profile of this work, our current expectation is that the new Committee will resume this work in the short term and consultation will recommence. We note that one recommendation from the Senate Economics References Committee review into the performance of ASIC that has already been adopted by ASIC is the establishment of an Office of the Whistleblower to ensure appropriate weight is given to information received and that disclosures are handled appropriately by ASIC.

While the work driven by the Economics References Committee is on hold, work on whistleblowing continues through a research project funded by the Australian Research Council and led by Griffith University's Centre for Governance and Public Policy (with support from a wide range of partner organisations and universities, including ASIC and the Commonwealth Ombudsman).[20] The survey-based project is focused on improving management responses to whistleblowing in private sector organisations. The survey size is comprehensive, with ASIC sending 30,000 letters to companies inviting them to participate. There is potential for the findings from this study to form the basis of a revised Australian Standard on whistleblower protections and to contribute to the Senate's deliberations and recommendations.

Given the heightened focus on whistleblowing, there is also the potential for additional guidance or support to be provided from private sector organisations or networks. There are a number of such organisations in Australia (and globally), with some providing support to whistleblowers and others providing guidance or whistleblower services to private sector employers wishing to establish effective whistleblower programs.

Given the deficiencies identified (by ASIC, Treasury and the Senate Committee) in the current whistleblower framework (as set out in the Corporations Act), and the extensive internal and external work currently being undertaken by ASIC, we expect that the whistleblower requirements that apply to the corporate sector may be strengthened and improved in coming years. We expect that such reforms will consider the experience of other jurisdictions, particularly in the US and the UK, where recent reforms have significantly enhanced whistleblowing regimes.

[19] Kim Sawyer, "Lincoln's Law: An Analysis of an Australian False Claims Act", paper, School of Historical and Philosophical Studies, University of Melbourne (September 2011)
[20] Whistling While They Work 2, http://www.whistlingwhiletheywork.edu.au/

3 International whistleblowing regulatory landscape

In order to better understand how Australia's whistleblower requirements compare to other jurisdictions, we reviewed the relevant requirements that apply to corporations (and, where specifically available, to banks) in the UK, US, Canada and Europe. A summary of the relevant requirements from each jurisdiction is provided below, with more detail provided in Appendix 1.

Overall, we consider the UK to be the global leader with respect to whistleblower requirements for financial institutions. The US also has comprehensive programs of financial incentives and protections for individuals who report possible violations of the securities laws, with Canada now following suit.

3.1 United Kingdom

The whistleblower protection arrangements in the UK are widely considered to be among the best in the world, and include broad protections under the Public Interest Disclosure Act 1998 and well as specific requirements for financial institutions imposed by the Financial Conduct Authority and Prudential Regulation Authority.

The PIDA-UK provides legal protections to most workers in the government, private and non-profit sectors (through provisions in the Employment Rights Act 1996). A worker cannot be dismissed or victimised for making a 'protected disclosure' (which includes an allegation of criminality, failure to comply with a legal obligation, miscarriage of justice, or issues relating to health, safety or the environment). In the event of victimisation or dismissal as a result of a protected disclosure, a compensation claim can be brought to an employment tribunal, where awards are based on losses suffered and potentially damages. Although the PIDA-UK originally had a 'good faith' test, this was removed in 2013 and replaced with a 'public interest' test.[21] However, a reduction of compensation (of up to 25%) may apply where the disclosure is not made in good faith.

Whistleblowers can make protected disclosures to a range of entities (including employers and regulators, as well as wider disclosures to the police, Members of Parliament and media). To encourage employees to make internal disclosures as a first step, a tiered system applies different standards for accuracy and process depending on to whom the disclosure is made.[22] There is no statutory requirement for organisations to establish whistleblowing policies or procedures. There are numerous sources of guidance, however, as to good practice. British Standards published a code of practice on whistleblowing arrangements in 2008. This sets out good practice for introduction, revision, operation and review of effective whistleblowing arrangements.[23] In March 2015, whistleblower guidance for employers was issued by the UK Department for Business Innovation and Skills to educate employers about whistleblowing and to promote good practice.[24]

In addition to the backstop provided by the PIDA-UK, employers in the financial sector must also meet new requirements issued by the FCA and PRA. In June 2013, the Parliamentary Commission on Banking Standards recommended that banks put in place mechanisms to allow their employees to raise concerns internally, and that the FCA and the PRA ensure these mechanisms are effective. The FCA and the PRA

[21] Enterprise and Regulatory Reform Act 2013, section 17 - 19 (amended 43B of the Employment Rights Act). The term 'public interest' is not defined, but may refer to disclosures with broader application to the public good, rather than relating to personal grievances.
[22] For example, disclosures to a regulator must meet an additional test, under which the employee must have a reasonable belief that the disclosure is substantially true and relevant to the regulator. For wider disclosures, a range of additional tests apply (e.g., not for personal gain, exceptionally serious in nature, fear of victimisation if raised with a regulator).
[23] British Standards, "Whistleblowing Arrangements Code of Practice", PAS 1998:2008, July 2008
[24] Department for Business, Innovation and Skills, "Whistleblowing: Guidance for Employers and Code of Practice", March 2015

have, in response, implemented a package of measures to formalise firms' whistleblowing procedures, aiming to move towards a more consistent approach, and building on existing good practice in firms.[25] Building on the FCA's existing guidance, the measures aim to ensure that all employees are encouraged to blow the whistle where they suspect misconduct, that their concerns will be considered and that there will be no personal repercussions. The requirements are designed to offer protection to all whistleblowers, whatever their relationship with the firm and whatever the topic of disclosure. The key requirement is for relevant firms to establish, implement and maintain appropriate and effective arrangements for the disclosure of reportable concerns by a person, including a firm's employee, internally through a specific, independent and autonomous channel. Further detail on the requirements is included in Appendix 2.

The UK whistleblowing framework does not currently offer any financial incentives for whistleblowing and neither the PRA nor the FCA offers whistleblowers any financial rewards for disclosures. In response to the Parliamentary Commission on Banking Standards, the FCA and PRA conducted further research into the impact of financial incentives on encouraging whistleblowing in the US. This research concluded that introducing financial incentives to whistleblowers would not encourage whistleblowing or significantly increase the integrity and transparency in financial markets.[26] It was noted that there is "no empirical evidence to suggest that the US system raises either the number or the quality of whistleblowing disclosures within financial services" nor do the incentives in the US model "appear to improve the protection available to whistleblowers".

In its response to the Whistleblowing Framework Call for Evidence, the UK Government noted that it "does not believe financial incentives should be introduced as an integral part of the whistleblowing framework to reward whistleblowers".[27] The support for the introduction of incentives from respondents to the consultation process focused on the possibility for incentives to reward whistleblowers who have suffered stress, loss or detrimental effects as a result of blowing the whistle. Following on from this decision, the focus in the UK will continue to be on regulatory changes necessary to establish effective whistleblowing procedures and senior management accountability for their implementation.

3.2 United States

The key requirements in the US in the corporate sector can be found in the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). SOX requires corporations to establish procedures for the receipt and treatment of complaints regarding accounting or auditing matters and procedures for employee submissions (either confidential or anonymous) regarding questionable accounting or auditing matters.[28] SOX protects whistleblowers employed by publicly traded companies from discrimination (in relation to reporting of possible violations of securities laws and certain other financial frauds) and makes it a crime to retaliate against a whistleblower who reports the possible commission of any federal offence.[29] The Federal Deposit Insurance Corporation (FDIC) has issued guidance to FDIC-supervised banks on implementing an effective ethics program that suggests a mechanism, such as a hotline, to report questionable activity, with protection of confidentiality.[30]

Much of the attention in relation to whistleblowing in the US relates to the Securities and Exchange Commission's (SEC's) program for financial incentives. Commencing in 2011, the Dodd-Frank Act established

[25] PRA "Whistleblowing in deposit-takers, PRA-designated investment firms and insurers", Policy Statement PRA PS24/15 and Supervisory Statement SS39/15, October 2015
[26] FCA and PRA, "Financial Incentives for Whistleblowers", Note by the FCA and PRA for the Treasury Select Committee, July 2014
[27] UK Department for Business Innovation & Skills, "Whistleblowing Framework Call for Evidence, Government response", June 2014
[28] Sarbanes-Oxley Act of 2002 Section 301
[29] SOX, Sections 806 and 1107
[30] FDIC, FIL-105-2005 October 21, 2005 and FIL-80-2005 August 16, 2005

new incentives and protections for individuals to report possible violations of the federal securities laws, including:

- monetary awards for providing original information to the SEC that leads to a successful enforcement action;
- heightened confidentiality assurances; and
- enhanced protection from retaliation for employees (these apply to employees who first report internally to the company and employees who report directly to the SEC) and those who assist with the investigation. Relief can include reinstatement of position, payment of back pay (at double rate) and compensation for costs.[31]

The SEC is authorised to provide monetary awards to eligible individuals who come forward with high-quality original information that leads to an SEC enforcement action resulting in over USD 1 million in sanctions. Information may be submitted anonymously (via legal representation). The range for awards is between 10% and 30% of the money collected. The SEC created the Office of the Whistleblower in 2011 (as required by the Dodd-Frank Act) to encourage whistleblowers to assist in the discovery and prosecution of securities laws violations. The SEC issued comprehensive Whistleblower Rules to implement its program, including requirements prohibiting companies from taking any action to impede whistleblowers from reporting to the SEC.[32] The SEC has paid more than USD 85 million to 32 whistleblowers since August 2011.[33] A similar program exists (also established by the Dodd-Frank Act) at the Commodity Futures Trading Commission.

3.3 Canada

Similar to US companies, Canadian publicly traded companies are subject to securities rules that require whistleblowing procedures. The audit committee must establish procedures for the receipt of complaints and for the confidential, anonymous submission, by employees, of concerns regarding questionable accounting or auditing matters.[34] However, there are relatively few other laws or regulations that impose substantive whistleblowing-related requirements on private sector organisations. The Financial Consumer Agency of Canada (FCAC) requires banks to establish procedures for dealing with customer complaints, but this does not specifically extend to whistleblowing.[35]

The Ontario Securities Commission (OSC) launched its own whistleblower program in July 2016 to provide incentives for the reporting of serious securities-related misconduct in Ontario to the OSC. The program is the first of its kind for securities regulators in Canada, and a whistleblower could be awarded compensation of up to CAD 5 million. The program incorporates anonymous whistleblowing (with legal representation) and provides whistleblowers with confidentiality and protection against retaliation.[36] The Quebec securities regulator has also launched a whistleblower program to offer protection measures for whistleblowers, but the program will not provide any financial reward to whistleblowers for information.

The CSA Group (formally the Canadian Standards Association) has recently issued guidance for the private and public sectors in relation to implementing effective internal whistleblower systems.[37] The guidance

[31] Dodd-Frank Act, Section 922, SEC Guidance (Release No. 34-75592 August 4, 2015
[32] SEC Whistleblower Rules, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-64545; File No. S7-33-10
[33] SEC, Press Release 2016-114, 9 June 2016
[34] National Instrument 52-110 – Audit Committees, Section 2.3 (7)
[35] Bank Act, S.C. 1991 c.46, Section 455(1)
[36] OSC, "Whistleblower Program", OSC Policy 15-601
[37] CSA Group, "Whistleblowing Systems – A Guide" EXP01-16, February 2016

addresses internal processes for dealing with reports from whistleblowers, critical system elements and the associated governance arrangements.

3.4 European Union

Most European countries lag behind the UK and US in protecting whistleblowers and providing them with safe reporting channels. According to Transparency International, only four of the European countries reviewed had legal frameworks for whistleblower protection that are considered to be advanced (Luxembourg, Romania, Slovenia and the UK), with another 16 countries having partial protections.[38] A country's laws were rated 'Advanced' if they include comprehensive or near-comprehensive provisions and procedures for whistleblowers who work in the public or private sectors.

In 2014, the Council of Europe (Council) issued a Recommendation on the Protection of Whistleblowers (Recommendation) that provided member states with guidance on the establishment of national whistleblower frameworks. The Recommendation encouraged member states to take action, including legislative change, to protect whistleblowers and provided guidance on the minimum standards to be implemented.[39] A number of countries have taken steps over recent years to strengthen their whistleblower regimes, and it is expected that the Council's recommendation will encourage member states to develop and implement laws and procedures to ensure whistleblowers with disclosures in the public interest are protected.

4 Elements of best-practice whistleblower programs

As noted above, other than the new requirements in the UK, there are limited legal or regulatory requirements about the specific elements to be included in an institution's whistleblower program. Notwithstanding the absence of regulatory imperatives, financial institutions in many jurisdictions have recognised the importance of implementing comprehensive whistleblower policies and practices. These institutions have recognised the benefits of early identification of issues that, if left unchecked, may expose the institution to regulatory penalties or, often more importantly, reputational damage. Supporting the whistleblower and avoiding potential for victimisation are also part of critical risk management, not least because of underlying legislation that can make it a criminal offence to victimise a whistleblower. An effective whistleblower program is also a key element to an effective compliance and risk culture, where the behaviour and attitudes of employees align to the risk appetite and policies approved by the board of directors.

To form a high-level view on best practice among these institutions, we conducted a desk-top review of whistleblower policies and procedures of over 30 banks (and financial services groups) based in the US, UK and Canada, ranging in size from large global banks to small community banks. We reviewed the regulatory requirements, both for the jurisdictions reviewed and those applying in Australia. We also drew on insights from Promontory's global team of former regulators, many of whom have hands-on experience in developing and enforcing whistleblower standards and protections. Based on our review of these international practices, regulatory requirements and other guidance (both local and global), we have determined what we consider to be the key elements of a best-practice whistleblower program. Our findings are summarised in the following sections.

[38] Transparency International, "Whistleblowing in Europe, Legal Protections for Whistleblowers in the EU", 2013
[39] Council of Europe, Recommendation CM/Rec(2014)7, 30 April 2014

4.1 Scope of whistleblowers and disclosures

Policy applicability

For most peer institutions, the whistleblower policy applies to more than just employees, with most also applicable to directors, officers,[40] contractors and temporary staff (i.e., anyone working at the institution). Coverage for contractors was not always explicit, although we understand that, when a contractor accepts the application of the code of conduct (as is often required), it implies that the whistleblower policy also applies. Some institutions extend coverage to employees of third-party service providers and some allow customers, members of the general public and any other stakeholders to report any concerns (using an independent hotline).

In its submission to the Senate Review of the Performance of ASIC, ASIC recommended that the Corporations Act be amended to expand the definition of whistleblower to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners.[41] The inclusion of former employees is also consistent with the public sector requirements in Australia under the PIDA-AU (under which current and former public officials are eligible).

The broadest coverage applies in the UK, under the new PRA regime, where any person can be a whistleblower, whatever his or her relationship with the firm (including former employees, employees of competitor firms, employees of appointed representatives or suppliers, as well as customers and other stakeholders).

Scope of reportable disclosures

The trend internationally is for a broad range of matters to be reportable through the whistleblower program to encourage whistleblowers to come forward without the distraction of complicated criteria. Whistleblowers in the UK can report any type of disclosure under the PRA regime, and ASIC has recommended expanding the scope in the Corporations Act to cover any misconduct that ASIC may investigate.[42]

A small number of institutions we reviewed restrict reporting to limited matters, such as accounting matters or breaches of the law. However, most peer institutions provide for broad categories, such as wrongdoing, unethical or improper conduct, or breaches of any policy, code or law. These broad definitions are often supported by examples of specific matters to be reported, but these lists are presented as indicative, not exhaustive. Many have an all-inclusive 'catch-all' definition relating to the bank's reputation, operation or financial performance. Most policies state that the conduct can be actual, suspected or potential. Almost all institutions require the report to be made in 'good faith', with 'reasonable grounds' or with honesty. Some go further and also inform the whistleblower that they do not need to be certain of the misconduct, or to provide any evidence, provided they are honest. Most institutions make it explicit that any whistleblower not reporting in good faith will not receive the benefit of protection from retaliation.

On the surface, discouraging reports based on personal grievances or vindictiveness may be seen as a valid way of avoiding vexatious or exaggerated claims. However, the inclusion of a 'good faith' requirement (which was common among policies reviewed) may be out of step with future practice. The trend is to consider the quality of the information disclosed rather than any motive of the discloser, and to address the concern that

[40] Under Section 9 of the Corporations Act 2001, 'officer' includes a director or secretary, receiver, administrator, liquidator or other decision-making persons (amongst others).
[41] Senate Economics References Committee, Issues Paper "Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence", 21 April 2016, page 22
[42] Ibid, page 22

attempting to define 'good faith' may discourage whistleblowers from reporting. For example, it would not be unreasonable for an employee in a high-conflict workplace who witnessed illegal or immoral conduct to be motivated by a personal dislike of their colleague/s performing that conduct and a strong desire to see them brought to account. Their concern for the reputational harm of the firm may be secondary. In such circumstances, a 'good faith' provision may be interpreted (or misinterpreted) as meaning there must be no 'ulterior motive', and the employee may be discouraged from reporting given the perceived risk that the employee may not be protected as a whistleblower.

In the PIDA-UK, the 'good faith' test has been removed, with a requirement added that the disclosure be in the 'public interest'. The PRA regime does not include a 'good faith' requirement. Recent consultation in Australia has raised the possibility of removing the 'good faith' requirement and replacing it with a test based on honesty and reasonable grounds. For example, the public service regime in Australia uses a 'reasonable grounds' test.

It may be the case that broadening the scope for who can be a whistleblower, expanding the matters that can be reported and removing the 'good faith' requirement will increase the number of trivial or vexatious disclosures. However, Promontory considers that, on balance, the additional administration effort to filter through these types of disclosures is outweighed by the potential benefits of receiving a broader range of disclosures. The PRA notes that not all issues raised through the whistleblowing channel should be treated as cases of whistleblowing, and that firms should be able to filter out genuine whistleblowing cases from those that could be better handled by other functions, such as the usual complaints handling mechanisms (and we note the significant investment many banks are currently making in this area).

Best-practice elements

- The policy allows disclosures from a broad range of persons (not just from employees).
- A broad range of issues are able to be reported and managed under the program.

4.2 Reporting and investigation

Reporting channels

Institutions should seek to cater to whistleblowers' reporting preferences by offering different methods of communication. All peer institutions that were reviewed provide a range of channels. Many institutions suggest the immediate manager or supervisor as the first point of contact. However, this was not mandatory, and most institutions make it clear that other avenues are also available if the whistleblower is not comfortable with this approach. Other options include managers from compliance, legal, human resources, audit, office of the ombudsman or other identified key contacts (such as a Whistleblower Officer).

In most peer institutions, channels available for reporting accept all categories of disclosures, with some directing whistleblowers to specific channels depending on the type of disclosure (e.g., accounting matters reported to the internal auditor and breaches of internal policy reported to the compliance officer). However, where a policy directs a whistleblower to a specific channel, this tends to be a suggestion and not mandatory.

Many peer institutions offer a 'hotline' as a dedicated autonomous (and anonymous) channel to raise concerns (contactable by phone, email, website or post). In some cases this hotline is internal and in others it is provided by an external independent third party.

The UK's PRA regime requires the establishment of a 'specific, independent and autonomous channel', which may be provided 'through arrangements with third parties'. It also provides guidance that the firm's

arrangements should seek to ensure there are different methods of communication available (e.g., phone, email, post, online and face-to-face).

Reporting to regulators

Some institutions explicitly state that nothing in the policy prevents the whistleblower from reporting directly to a regulator or government agency, and some even provide details of the agencies that can be contacted. Others are silent on this possibility. A number of peer institutions discourage reporting to the regulator by suggesting that internal channels are preferable, at least in the first instance.

Discouraging disclosure to a regulator is not a practice we support (and is not a practice we found in the written policies of the Australian banks we reviewed). Indeed, APRA's Standard requires that employees must not be constrained or impeded from disclosing information to APRA. This is consistent also with global best practice. The UK's PRA regime, for example, requires that workers be informed that they may make 'protected disclosures' to the PRA or FCA and that there should be nothing in the firm's arrangements to prevent or discourage any disclosure to the PRA or FCA being made at any point.

It could be argued that being silent on the ability to report to a regulator is consistent with global best practice, provided that there is nothing else in the policy to prevent or discourage such as a disclosure. However, in our view, best practice is to explicitly provide for reporting to regulators at any point, including prior to an internal disclosure. This should be permissible either for 'protected disclosures' (those issues covered by whistleblowing legislation that may provide for additional protection) or for any concern. However, it is our view that the explicit recognition need not differentiate between these two types of disclosures, as both would be captured within the scope of the whistleblower program.

Anonymous disclosures

Almost all peer institutions allow anonymous disclosure of concerns. The use of a 'hotline', either internal or external, to receive anonymous disclosures is common practice among peer institutions. Others provide for anonymous disclosure via email or phone to the internal key contact. Although anonymous disclosure complicates investigation processes, and may encourage the reporting of trivial or vexatious matters, the option to disclose concerns anonymously should be provided to cater for whistleblowers who fear retaliation. International regulatory expectations also support the availability of a reporting channel that allows a whistleblower to make an anonymous disclosure. Although the Corporations Act does not currently provide protection for anonymous disclosures, this has been flagged for review.[43]

Processes for assessment, investigation and finalisation

A wide range of practices are employed by the peer institutions for the assessment and investigation of reported concerns. Some firms undertake an initial screening to assess whether the matter requires further investigation. The group undertaking the initial screening process and the group conducting investigations vary. At many institutions, the group investigating depends on the type of report (e.g., fraud or harassment). Some institutions task a single individual or unit to investigate all concerns. Many have the option of engaging external resources (e.g., auditors or lawyers) to assist with or conduct the investigation. Although anonymous disclosure is offered, most institutions make it clear to the whistleblower that a thorough investigation may be hampered by non-disclosure of the whistleblower's identity.

Best practice in this area is primarily driven by the clarity and transparency of the investigation process, having clear roles and responsibilities during the investigation and stating the principles that guide the process

[43] Ibid, page 4

(e.g., investigation must be confidential, thorough, fair, timely and independent of relevant business unit). Further independence is often achieved by separating the responsibility for protection of the whistleblower from the responsibility for investigation.[44]

Natural justice should also be followed, with the person subject to the allegation given the right to respond. Once concluded, there should be clear processes for the reporting of final outcomes to appropriate persons or committees within the institution, and escalation within the institution or externally to the regulator (or law enforcement agency where required).

Feedback to the whistleblower

The whistleblower should be kept informed of progress throughout the process. While most peer institutions communicate the results of the investigation upon conclusion, many also commit to acknowledging receipt of the initial report (and providing timeframes for reporting) and providing updates throughout the investigation process. Some also provide a mechanism by which an anonymous whistleblower can receive updates through the hotline.

Supervisory guidance from the UK PRA notes that internal procedures should assess and escalate concerns raised by whistleblowers within the firm as appropriate and, where this is justified, to the FCA or PRA (or an appropriate law enforcement agency). The guidance also requires the institution to track the outcome of whistleblowing reports and provide feedback to whistleblowers, where appropriate.

Best-practice elements

- A number of specific and independent channels are available to the whistleblower for reporting concerns.
- The program provides for anonymous disclosures.
- There is explicit recognition of the whistleblower's right to communicate with regulators at any time in relation to any concern within the scope of the program.
- Processes for assessment, investigation and escalation of concerns are clear and transparent, and in line with a suitable set of guiding principles.
- The investigation is conducted independently of the business unit concerned.
- Whistleblowers receive acknowledgement of the disclosure provided, are kept updated during the investigation process and are advised of the final outcome (where appropriate).

4.3 Protections

Confidentiality

All peer institutions reviewed strongly commit to maintaining the confidentiality of the whistleblower, with virtually all policies having an explicit statement on protecting the identity of the whistleblower and the details of the investigation. Most institutions include a qualifying statement that confidentiality is protected "to the fullest extent possible", recognising the need to comply with any legal obligations. Some peer institutions also explicitly state that disciplinary action may result in the event of a breach of the confidentiality provisions. The

[44] Guidance from the Australian Standard notes that the two roles should operate independently of each other. A Protection Officer has a role related to the interests of the whistleblower, and the Investigations Officer has a role to thoroughly investigate the matter.

use of hotlines provides a confidential and anonymous communication channel and assists in minimising the risk that a whistleblower's identity might be disclosed.

Protection against retaliation

Protection against retaliation is a central theme for most whistleblower regimes, since fear of retaliation can be a significant barrier to speaking up. The new UK regime requires that firms "take all reasonable steps to ensure that no person under the firm's control engages in victimisation of whistleblowers, and take appropriate measures against those responsible for any such victimisation".[45]

Every peer institution reviewed commits to protecting whistleblowers against retaliation, with explicit statements that any form of retaliation will not be tolerated, although the detail and strength of the statements varies. Many give examples of the sort of treatment that would be considered to be retaliation (such as changes to the terms and conditions of employment and victimisation by other employees, actual or threatened), and many state that any retaliatory action will be met by swift disciplinary action, including potentially the termination of employment. Many extend the protection beyond the whistleblower, to anyone who assists or participates in the investigation (although this would not extend to persons complicit in the wrongdoing that is the subject of the report).

For most institutions, however, this protection only applies to reports made in good faith, and when the whistleblower is not complicit in the matters that are subject to the report (although some institutions note that some limited form of immunity may be applied as a result of the whistleblower's assistance with the investigation). Most peer institutions state that employees who file an intentionally false report may be subject to disciplinary action. As noted above, the new UK regime does not require the whistleblower to make the report in 'good faith' for the whistleblower to benefit from protection from victimisation.

Some peer institutions have clear processes for reporting and investigating retaliation, including some where the retaliation incident is treated as a separate report of concern and the full whistleblower process is applied to any reported retaliation (including a full investigation with the same level of attention provided). Very few have a designated Whistleblower Protection Officer.

In the event of retaliation, or for the prevention of retaliation, a small number of peer institutions commit to providing corrective action (although the details of those actions are generally not detailed). Action may include relocation or granting a leave of absence during the investigation.

Compensation or incentives

Although most whistleblowing legislation provides for some form of compensation to the whistleblower in the event of retaliation, and some legislation provides financial incentives to report a concern, no peer institutions reviewed explicitly provide any financial compensation in the event of retaliation, or any financial reward for lodging a whistleblower report.

Best-practice elements

- The identity of the whistleblower and the details of the investigation are kept confidential (to the extent possible).
- Reasonable steps must be taken to protect whistleblowers (and anyone assisting in the investigation, other than those complicit in the wrongdoing) from retaliation.

[45] PRA Supervisory Statement SS39/15

- There are clear processes for the reporting, investigation and monitoring of retaliation.

4.4 Implementation and maintenance

Whistleblower policy and procedures

Peer institutions all have written policies in relation to their whistleblower programs, some with supporting procedures or other guidance. Many had clear processes, roles and responsibilities, although some lacked detail. Some institutions embed these policies in their documented code of conduct, but most of these institutions have a separate whistleblower policy (while also including references to the whistleblower program in the code of conduct). Although we did not review the interaction of whistleblower policies with code of conducts (or the interaction with other policies such as those relating to privacy or confidentiality), we would expect that provisions in the whistleblower policy should override other policies and codes in relation to whistleblowing matters.

Although we were unable to verify it, many peer institutions refer to the policy being readily accessible on their intranet, along with the details of the hotline or channel to report a concern.

Regular reporting and review

A number of peer institutions provide quarterly reporting (e.g., to the audit or compliance committee) of concerns raised and the results of investigations (in addition to escalation of immediate concerns as required). Records are maintained and outcomes tracked, often using a log or case management database. We understand that institutions review and analyse whistleblower data to understand root causes and common themes that need to be addressed.

We did not review reporting to the public, regulators or other external stakeholders, and there was no evidence in the policies reviewed that any of the peer institutions provide whistleblower data (in aggregate) to external parties. In the UK, banks must prepare an annual report for the board on the effectiveness of the whistleblowing systems and controls. This report should be made available to the FCA and PRA on request (but neither the FCA nor the PRA requires any of the reports to be made public). The reports are also required to include details of any employment tribunal cases involving whistleblowers that the firm has lost.

The UK regime requires that the whistleblower procedures be subject to inspection by audit and compliance functions. A number of the peer institutions reviewed conduct periodic testing for compliance with the policy and the effectiveness of the processes. This testing is conducted by Compliance and/or Internal Audit.

Policies are generally reviewed annually, and approved by the board, board committee or executive committee. Although some policies state the policy owner (with responsibility for updates to the policy), very few of these policies explicitly state responsibility for the oversight of the whistleblower program, including reporting on the functioning and effectiveness of the program. In comparison with general practice, under the UK's new regime, a 'Whistleblower Champion' must be appointed, with responsibility for ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures, and with an annual report to the board. This position should be allocated to a non-executive director where possible (with the day-to-day operations potentially delegated to a dedicated whistleblowing function in larger firms).

We agree with the direction taken under the UK regime in that there should be clear responsibility for the oversight of the whistleblower program (e.g., a whistleblower champion). Although we believe that institutions should have some flexibility as to the role that performs this function, it is important that responsibility rests with an individual of sufficient stature and level of authority within the institution. Examples of appropriate senior executives might include the chief compliance officer, chief risk officer, or a dedicated whistleblower

officer (who is a senior executive). If whistleblower decisions reside with a committee (i.e., a whistleblower protection committee), the senior responsible individual could be, for example, the chair of that committee. Part of his or her role should be to assess and report at least annually on the effectiveness and integrity of the whistleblower program (including its systems and controls).

Training

Although not often referenced in the stand-alone whistleblower policies, it is our understanding that large peer institutions generally require all employees to complete mandatory training on whistleblower obligations, procedures and protections on a regular basis, usually annually. This training is usually conducted as part of training on the institution's code of conduct (e.g., via an online training module). Often, employees must also annually acknowledge their understanding and compliance with the policy. The institutions with whistleblower policies embedded in the code of conduct tend to have more explicit statements on annual training and certification. New employees and contractors are normally required to take the on-line training at the start of their employment or contract period.

Peer institution policies are mostly silent on specific whistleblower training provided to specialists involved in the program. We note that the UK's new regime requires firms to consider training for all staff, as well as tailored training for managers, whistleblowers' champions and staff involved in the program (e.g., staff manning a firm's whistleblowing service). The guidance also notes that much of this material may also be reflected in a firm's written procedures.

Culture, awareness and resources

Peer institutions recognise that whistleblower programs are an effective way of identifying compliance or conduct issues that may not be visible through other means. There should be strong leadership commitment to an open, responsive and impartial whistleblower system. Although some policies reviewed were procedural, many highlighted the institution's commitment to listening and responding to the concerns of employees and rectifying any wrongdoing.

A whistleblower policy on its own is not sufficient. Employee awareness of the program is critical, so that all potential whistleblowers know: the program is in place; when and how to use it; and the support and protection they will receive. In addition to regular formal training, there should be ongoing awareness and communication initiatives across the institution. The whistleblower program should be highly visible (e.g., by the use of posters, newsletters and intranet messages) and managers should demonstrate the institution's commitment by actively raising awareness of the program.

This is consistent with APRA's requirement that the Audit Committee has a process for ensuring employees are aware of the whistleblower policies, and the PRA guidance to inform staff about the whistleblowing arrangements. Often, managers are charged with promoting awareness of the whistleblower program, leading by example and being held accountable for the behaviour of their teams. Some policies state that processes must be visible, accessible and regularly communicated. A number of communication channels are used to promote awareness of the policy and processes, including posting on intranet, employee handbooks and regular emails or newsletters.

Although we found no explicit statements on resourcing, the peer institutions' stated commitment to establishing effective programs implies that they should be resourced appropriately, with those responsible assigned adequate resources and authority to deliver on their responsibilities. In the UK, the Whistleblowers' Champion must have a level of authority within the firm and access to resources and information sufficient to carry out that function.

Best-practice elements

- The program is clearly documented in a policy with clear processes, roles and responsibilities.
- The policy clearly articulates the benefits of the program and the institution's commitment to identifying and responding to reported concerns.
- The policy is easily accessible by all staff and the program is regularly communicated to ensure staff awareness.
- Outcomes of whistleblower reports are tracked and regularly reported through governance channels (such as to senior management and the board).
- Mandatory training is provided to all staff on a regular basis, with specialist training for staff responsible for key elements of the program.
- There is clear responsibility for oversight of the program (by an individual with a sufficient level of authority within the institution), including regular reporting on the implementation and effectiveness of the program.

5 Alignment of Australian banks against global best practice

5.1 Overall comments

We conducted a desk-top review of the policies and related documents[46] of a sample of seven Australian banks (major and smaller banks)[47] and compared their whistleblower policies and programs against the global best-practice elements outlined in Section 4. To be effective, these programs must be developed to apply to multiple business lines, often across multiple jurisdictions, which adds significant complexity for the banks.

Overall, the Australian banks sampled have comprehensive whistleblower programs that, in almost all cases, meet or exceed global best practice for the majority of the elements. For some elements, such as protections against retaliation, most Australian banks' documented practices exceed best practice as measured against the elements outlined in Section 4.3.

There are, however, inconsistencies between Australian banks in some aspects of their whistleblowing policies. There are also areas where improvements could be made, either for all banks or for some banks. For example, some banks need to include additional detail in their policies on the roles and responsibilities of the key stakeholders and on the internal procedures to be followed as part of the program.

Further suggestions to align to best practice are provided in Sections 5.2 to 5.5 below. Many of these suggestions relate to expanding the detail provided within the whistleblower policy to articulate procedures that we expect already exist in practice (e.g., reporting and investigation processes, roles and responsibilities, feedback to whistleblowers and protections provided). For some banks, however, there are aspects of the program that may be strengthened (e.g., extending coverage of the program, providing specialist training, and ensuring an annual review of the implementation and effectiveness of the program).

[46] Documents reviewed included policies, procedures, guidelines, guidance notes and flowcharts relating to the whistleblower program.
[47] Banks sampled were the Australia and New Zealand Banking Group Limited (ANZ), Bank of Queensland Limited (BOQ), Bendigo and Adelaide Bank Limited, Commonwealth Bank of Australia (CBA), National Australia Bank Limited (NAB), Suncorp Bank and Westpac Banking Corporation.

As noted above, our examination was based on documented processes. Further work would be required to assess how well these protections work in practice.

A key positive for Australian banks' whistleblower programs is that they cover more than the protected disclosures provided for by the Corporations Act and the Banking Act. Their policies extend to a broader range of disclosures by a broader range of whistleblowers. However the protections provided in the Corporations Act and Banking Act continue to apply to those whistleblowers that also meet the requirements in these Acts.

For example, a whistleblower that discloses a concern, in good faith and with reasonable grounds, relating to a breach of the Corporations Act to a senior manager and provides his/her name will be entitled to protections under the Corporations Act (as noted in Section 2.2). As a result of these protections, the whistleblower may, for example, bring an action against the bank for compensation if he/she is victimised. In addition, this whistleblower will also benefit from the bank's whistleblower program and the associated benefits (e.g., access to a Whistleblower Protection Officer, independent investigation with feedback, monitoring and action in the event of retaliation).

A whistleblower that discloses in good faith (possibly anonymously) a concern that relates to misconduct (other than that covered by the Corporations Act) through any of the reporting channels stated in the policy will not qualify for protection under the Corporations Act. However, this whistleblower will benefit from the bank's whistleblower program in the same way as the whistleblower above.

Most banks effectively communicate (through their policies) that specific benefits and protections apply to all disclosures within the scope of their policies.

5.2 Scope of whistleblowers and disclosures

The whistleblower policies of the Australian banks we sampled apply broadly to both employees and others working at the bank, such as contractors. Some banks also extend coverage to external parties, such as suppliers and service providers. None of the banks allows an open scope, under which anyone can be a whistleblower.

All banks sampled allow a broad range of matters to be reported through the whistleblower program, and most have an all-inclusive, catch-all definition (e.g., relating to the bank's reputation, interest or financial position) to ensure the program captures all instances of wrongdoing. Almost all banks require the whistleblower to disclose 'in good faith', as well as requiring the whistleblower to be genuine and with 'reasonable grounds' for believing there has been wrongdoing.

To align with global best practice, banks may consider broadening their program coverage to allow disclosures from a wider range of persons (not just from employees). We are not suggesting at this stage that Australian banks move to the broad coverage applying under the UK's regime (where anyone can be a whistleblower). Given the current climate in the financial services industry in Australia, a practical first step may be to broaden the program to include disclosures from contractors, all types of workers (including service providers and suppliers) and others, such as former employees, financial services providers, accountants and auditors (e.g., the scope suggested by ASIC to apply under an amended Corporations Act). The next stage may be to open the program to anyone wishing to report a concern.

5.3 Reporting and investigation

Almost all banks sampled provide multiple channels to report concerns, including an autonomous hotline (independent from the business unit), either managed internally or by an external third party (with roughly half providing an internal hotline, and the other half external). While many of the banks suggest that the whistleblower's immediate manager may be an appropriate person to contact in the first instance to discuss any concerns, this was not (and should not be) a mandatory requirement. Other channels may be used if this is not appropriate in the circumstances (e.g., where the immediate manager is the subject of the disclosure), or the whistleblower wants to remain anonymous. Some banks suggest managers in other areas that may be appropriate (e.g., fraud concerns to be directed to an internal fraud unit), but these are not compulsory channels.

All banks sampled allow a whistleblower to report anonymously through a hotline, with some also providing for anonymous reporting through other internal channels.

Around half the banks sampled make an explicit statement that there is nothing in the bank's policy preventing a whistleblower from contacting a regulator (using 'regulators' generally or referring to a specific regulator). No specific contact details are provided by any of the sampled banks. Some note the extra protection that may apply to disclosures made under the bank's whistleblower policy for disclosures that also qualify under the Corporations Act or Banking Act (i.e., these disclosures are handled under the bank's whistleblower program, but may be eligible for additional protection under the law).

As with the peer institutions, a range of practices are employed by Australian banks to assess and investigate reported concerns. Almost all banks sampled provide clear and transparent processes for the initial screening, assessment and investigation of reported concerns, along with high-level principles applying to the investigation process. Most of the banks state that they provide the person subject to the allegation with an opportunity to respond (i.e., to follow natural justice).

All banks sampled provide an investigation process that is independent from the business unit that is the subject of the reported concern, with most banks appointing an 'Investigations Officer' or specific unit to investigate the matter and report on outcomes. Most banks also separate the investigations role from the role to protect the whistleblower to enhance the degree of separation. Once the investigation is concluded, there are clear processes for internal reporting of final outcomes.

Almost all banks sampled commit to keeping the whistleblower updated on the progress of the investigation and the final outcome. This also extends to a whistleblower who reports anonymously, with the whistleblower given a reference number so he/she can contact the hotline at any time and receive updates on progress. Most banks allocate an officer as the dedicated contact point for the whistleblower (often a Whistleblower Protection Officer or disclosure coordinator) so the whistleblower can discuss any matter at any time.

Suggestions to align with best practice

- We suggest that banks that do not already do so consider including explicit recognition of the whistleblower's right to communicate with regulators at any time, in relation to any concern within the scope of the program.
- We suggest that banks that do not already do so consider increasing the level of detail provided on the assessment and investigation processes.
- We suggest that banks that do not already do so consider including a commitment in the policy to providing the whistleblower with updates on progress, as well as details of outcomes.

5.4 Protections

Almost all banks sampled have strong statements in relation to protecting confidentiality, including protecting the identity of the whistleblower and details about the disclosed matter (including the subsequent investigation and outcomes). Most, however, correctly state that there may be situations where disclosure of the whistleblower may be required (e.g., if compelled by law or disclosure to a regulator).

Almost all banks sampled have strong protections for the whistleblower against retaliation (with a broad listing of what constitutes retaliation). Most banks state that anyone found guilty of retaliation will be subject to disciplinary action, including possible termination of employment.

Although there is clear protection against retaliation for the whistleblower, only a few banks provide explicit protection for others who participate or assist in the investigation (although some extend protection to colleagues or families of the whistleblower). We suggest that protections extend to those who assist with the investigation. However, as with a number of the peer institutions, protection should not automatically extend to those who assist in the investigation and are subsequently found to be complicit in the matters that are the subject of the wrongdoing. In some limited cases, we accept that it may be appropriate that some form of immunity or reduced disciplinary action is applied to the person as a result of his or her assistance with the investigation.

Protection by the banks sampled is only applicable to disclosures made in good faith. Although applying protections to disclosures made in 'good faith' (or genuine concerns) is common practice among peer institutions, the UK regulatory regime does not include a requirement for the report to have been made in good faith. The issue of reporting in good faith is a topic for discussion in Australia, especially in the context of considering changes to the Corporations Act requirements. We suggest that any changes to the Corporations Act in relation to the threshold for protection (e.g., removal of the 'good faith' requirement) should also be applied to any broader disclosures within the scope of banks' whistleblower programs.

The Australian banks sampled mostly provide protection for the whistleblower that exceeds best practice, given that almost all banks allocate a dedicated internal contact (often called the 'Whistleblower Protection Officer') with responsibility for ensuring the whistleblower's rights and interests are protected. The WPO is often the contact point for the whistleblower and monitors the well-being of the whistleblower throughout the investigation process, including monitoring for any retaliation. Most banks sampled commit to offering a leave of absence or relocation to another work stream or department while the matter is under investigation. Although we did not review the level of support provided to whistleblowers in practice, the WPO is a key role in ensuring the whistleblower has sufficient support and assistance, from the time of the disclosure through to the final outcome.

Although no banks provide financial incentives or explicit compensation via their whistleblower programs, many banks provide non-financial incentives for reporting. A whistleblower involved in misconduct who reports and actively cooperates with the investigation may benefit from reduced disciplinary action (at the discretion of the bank).

Suggestions to align with best practice

- We suggest that banks that do not already do so consider improving stated protections (confidentiality and protection against retaliation).
- We suggest that banks that do not already do so consider extending protections to those participating and assisting in investigations (unless also committing or complicit in the wrongdoing under investigation).

5.5 Implementation and maintenance

All banks sampled document their whistleblower programs in separate policies (some with supporting procedures), including the articulation of the bank's commitment to the program. Almost all banks include clear roles and responsibilities as part of the policy. Although we could not verify this in practice, we understand that all policies and procedures are widely available (along with contact details for the program) to all employees via the banks' intranets. A number of banks note the party responsible for promoting ongoing awareness of the whistleblower program, although we were unable to confirm the extent and effectiveness of the awareness strategies in practice.

Almost all banks commit to keeping appropriate records and to regular internal reporting of concerns and outcomes through normal channels (such as executive and board, audit, compliance and risk committees). Although we did not review external reporting channels, we are aware that some Australian banks provide aggregate whistleblower data as part of publicly available reports (such as corporate responsibility reports).

We understand that all banks conduct mandatory annual training on the code of conduct, including the whistleblower program, and almost all banks commit to providing specialist training to key personnel (such as investigation officers and staff manning internal hotlines).

Oversight for the effective implementation of the program was mixed. For some banks, oversight was provided by an individual or committee (at management level), and for some it was the board risk committee. Others have multiple responsibilities, but no clear overall oversight and no explicit requirement for an annual review of program effectiveness.

Suggestions to align with best practice

- We suggest that banks that do not already do so consider including additional detail on roles and responsibilities.
- We suggest that banks that do not already do so consider including additional detail on regular internal reporting processes for whistleblower matters (such as regular reporting to senior management, committees and the board).
- We suggest that banks that do not already do so consider including detail on the specialist training provided to key personnel (or, if not provided, these banks may consider implementing such specialist training).
- We suggest that banks that do not already do so consider improving the clarity of responsibility for overall oversight of the program, including an explicit requirement for annual review of the implementation and effectiveness of the program.

Table 1: Snapshot of extent of alignment and suggestions to align with best practice

Best-practice Element	Extent of Alignment	Suggestions to Align with Best Practice
Scope of whistleblowers and disclosures		
The policy allows disclosures from a broad range of persons (not just from employees).		Banks could consider extending the coverage of the program.
A broad range of issues are able to be reported and managed under the program.		None
Reporting and investigation		
A number of specific and independent channels are available to the whistleblower for reporting concerns.		None
The program provides for anonymous disclosures.		None
There is explicit recognition of the whistleblower's right to communicate with regulators at any time in relation to any concern within the scope of the program.		For banks that do not currently do so, include explicit recognition.
Processes for assessment, investigation and escalation of concerns are clear and transparent, and in line with a suitable set of guiding principles.		For a small number of banks, additional detail could be provided on the principles and the internal procedures to be followed for assessment, investigation and escalation of concerns.
The investigation is conducted independently of the business unit concerned.		None
Whistleblowers receive acknowledgement of the disclosure provided, are kept updated during the investigation process and are advised of the final outcome (where appropriate).		For a small number of banks, the policy could increase commitment to feedback to the whistleblower, including keeping the whistleblower updated during the progress of the investigation, not just in relation to final outcomes.

Protections		
The identity of the whistleblower and the details of the investigation are kept confidential (to the extent possible).		For a small number of banks, policy requires additional detail to strengthen the statements on confidentiality protections.
Reasonable steps must be taken to protect whistleblowers (and anyone assisting in the investigation, other than those complicit in the wrongdoing) from retaliation.		Some banks could consider extending protection to those participating and assisting in the investigation. For one bank, policy requires additional detail to clarify the protection provided from retaliation.
There are clear processes for the reporting, investigation and monitoring of retaliation.		For one bank, policy requires additional detail on whom to contact in the event of retaliation, how that notification is investigated and in relation to the ongoing monitoring of the well-being of whistleblowers.
Implementation and maintenance		
The program is clearly documented in a policy with clear processes, roles and responsibilities.		For one bank, policy requires additional detail on the roles and responsibilities of the key stakeholders involved in the program, such as the reporting officer, protection officer, investigations officer and those with responsibility for oversight and maintenance of the program.
The policy articulates the benefits of the program and the institution's commitment to identifying and responding to reported concerns.		None
The policy is easily accessible by all staff, and the program is regularly communicated to ensure staff awareness.		None
Outcomes of whistleblower reports are tracked and regularly reported through governance channels (such as to senior management and the board).		For one bank, there is no detail about regular reporting processes.

Mandatory training is provided to all staff on a regular basis, with specialist training for staff responsible for key elements of the program.		One bank does not detail the specialist training provided.
There is clear responsibility for oversight of the program (by an individual with a sufficient level of authority within the institution), including regular reporting on the implementation and effectiveness of the program.		For a small number of banks, there is insufficient clarity about oversight of the whistleblower program, including annual review of the implementation and effectiveness of the program.

6 Closing comments

As noted in Section 2.5, there have been recent reviews of the whistleblowing framework for the corporate sector in Australia that have raised significant concerns. It is likely that a new Senate Economics References Committee will be re-formed following the Federal election and that consultation on whistleblower protections will recommence. In addition, a significant survey-based initiative is also underway aimed at improving management responses to whistleblowing in private sector organisations. In light of these developments, we expect that the whistleblower requirements and guidance that apply to the corporate sector may be strengthened and improved in coming years. Any changes to the public sector regime as a result of the statutory review of the PIDA-AU may also be considered for the corporate sector.

The UK is currently implementing reforms with firms given until September 2016 to comply with the new PRA/FCA rules. Any implementation issues experienced in the UK, and subsequent guidance provided by the PRA or FCA, are likely to be influential in Australia.

Based on our sampling, we have suggested some improvements to the whistleblowing programs of Australian banks. Many of these suggestions are to provide additional details on various aspects of the whistleblower program within the policies and procedures that we expect are existing practices. For some banks, there are aspects of the program that may be strengthened.

There are also areas where changes may be affected by the broader reviews of corporate whistleblower requirements (e.g., changes to the scope of whistleblowers under the Corporations Act, or removal of the 'good faith' requirement). However, given that the timing for these reforms is uncertain, we do not believe that banks should wait for these reforms to be finalised before proceeding with any improvements. We suggest that banks would benefit from being seen as leaders rather than followers in strengthening their whistleblower programs. In doing so, they should remain alert to any reforms in the corporate sector or other best practice guidance that may develop.

A more comprehensive review may also be of value given the heightened interest in this topic by the Australian Government, regulators and the general public. A limitation of this Report is that we did not assess how whistleblower policies work in practice. The ABA could consider extending this Report with a confidential deeper analysis that includes interviewing key personnel and whistleblowers about their experiences, as well as testing for internal understanding of existing policies. There could also be value in conducting a more comprehensive and systematic benchmarking exercise for a peer group of banks and non-banks from a wider range of jurisdictions.

Appendix 1 – Compilation of key regulatory requirements

Jurisdiction	Source of Regulatory Requirement	Link
Australia	Corporations Act 2001 – Sections 1317AC-AE	http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1317ac.html
	ASIC Information Sheet 52, "Guidance for Whistleblowers"	http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/
	ASIC "Whistleblowers-company officeholder obligations"	http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/
	Banking Act 1959 – Sections 52A-52E	http://www.austlii.edu.au/au/legis/cth/consol_act/ba195972/s52a.html
	Life Insurance Act 1995 – Sections 156A-156E	http://www.austlii.edu.au/au/legis/cth/consol_act/lia1995144/s156a.html
	Insurance Act 1973 – Sections 38A-38E	http://www.austlii.edu.au/au/legis/cth/consol_act/ia1973116/s38a.html
	Superannuation Industry (Supervision) Act 1993 – Sections 336A-336E	http://www.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s336a.html
	APRA Prudential Standard, CPS 510 Governance	http://www.apra.gov.au/adi/PrudentialFramework/Pages/prudential-standards-and-guidance-notes-for-adis.aspx
	APRA Prudential Standard, CPS 520 Fit and Proper	http://www.apra.gov.au/adi/PrudentialFramework/Pages/prudential-standards-and-guidance-notes-for-adis.aspx
UK	Public Interest Disclosure Act 1998 – Sections 1-18 Enterprise and Regulatory Reform Act 2013 – Sections 17-20	http://www.legislation.gov.uk/ukpga/1998/23/contents http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted
	Prudential Regulation Authority - Policy Statement PS24/15, "Whistleblowing in deposit-takers, PRA-designated investment firms and insurers", October 2015	http://www.bankofengland.co.uk/pra/Pages/publications/ps/2015/ps2415.aspx
	Prudential Regulation Authority - Supervisory Statement SS39/15, "Whistleblowing in deposit-takers, PRA-designated investment firms and insurers", October 2015	http://www.bankofengland.co.uk/pra/Pages/publications/ss/2015/ss3915.aspx

US	Sarbanes-Oxley Act of 2002 – Sections 301, 806, 1107	https://www.sec.gov/about/laws/soa2002.pdf
	Dodd-Frank Wall Street Reform and Consumer Protection Act – Section 922	https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf
	SEC Whistleblower Rules	https://www.sec.gov/about/offices/owb/reg-21f.pdf
	SEC Interpretation – Release No. 34-75592	https://www.sec.gov/rules/interp/2015/34-75592.pdf
	FDIC Guidance, FIL-105-2005 October 21, 2005 and FIL-80-2005 August 16, 2005	https://www.fdic.gov/news/news/financial/2005/fil10505.html https://www.fdic.gov/news/news/financial/2005/fil8005.html
Canada	National Instrument 52-110 – Audit Committees, Section 2.3 (7)	http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20101210_52-110_unofficial-consolidated.pdf
	OSC Policy 15-601 – Whistleblower Program	http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20151028_15-601_policy-whistleblower-program.htm
Europe	Council of Europe, Recommendation CM/Rec(2014)7	https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf

Appendix 2 – UK regulatory requirements[48]

The UK requirements are designed to offer protection to all whistleblowers, whatever their relationship with the firm and whatever the topic of disclosure. Requirements for 'relevant firms'[49] include to:

- establish, implement and maintain appropriate and effective arrangements for the disclosure of reportable concerns by a person, including a firm's employee, internally through a specific, independent and autonomous channel (note that the channel may be provided through external arrangements);
- inform staff about the whistleblowing arrangements, the whistleblowing services of the PRA and the FCA, as well as the legal protections offered under the PIDA-UK;
- ensure that nothing in its arrangements prevents or discourages any worker from making any disclosure to the PRA or the FCA before making the disclosure through an internal channel;
- ensure wording in employment contracts and settlement agreements does not deter staff from whistleblowing (in relation to protected disclosures); and
- allocate the prescribed responsibility for whistleblowing under the Senior Managers Regime[50] to a non-executive director (referred to as the 'Whistleblowers' Champion') with responsibility for oversight of the internal whistleblowing arrangements.

The 'Whistleblower Champion' must have a level of authority within the firm, and access to resources (including training) and information sufficient to carry out its functions, which include to:

- ensure that an annual report is presented to the board regarding the effectiveness of whistleblowing systems and controls (including detail of any employment tribunals involving whistleblowers that the firm has lost); and
- ensure and oversee the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing.

Reportable concerns are defined broadly to include:

- subject matter that would be a 'protected disclosure' under the PIDA-UK;
- failure to comply with policies and procedures; and
- behaviour that has or is likely to have an adverse effect on the firm's reputation or financial well-being.

Additional guidance provides that internal whistleblower procedures should:

- ensure confidentiality and provide for anonymous disclosures (if requested);
- assess and escalate concerns within the firm (and to regulators where justified);
- track the outcomes of whistleblower reports;

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[48] PRA "Whistleblowing in deposit-takers, PRA-designated investment firms and insurers", Policy Statement PRA PS24/15 (including Appendices) and Supervisory Statement SS39/15, October 2015.
[49] Includes UK deposit-takers with assets of £250m or greater (including banks, building societies and credit unions), as well as PRA-designated investment firms and insurers. For other firms, the rules will act as non-binding guidance.
[50] The PRA and Financial Conduct Authority have developed the new Senior Managers Regime, Certification Regime and Senior Insurance Managers Regime, which were implemented on 7 March 2016. The Senior Managers Regime is aimed at supporting a change in culture at all levels in firms through a clear identification and allocation of responsibilities to individuals responsible for running them.

- provide feedback to whistleblowers (where appropriate);
- maintain appropriate records;
- take all reasonable steps to ensure that no person under the firm's control engages in victimisation of whistleblowers, and take appropriate measures against those responsible for any such victimisation; and
- consider training for all staff, as well as tailored training for managers, whistleblowers' champions and staff involved in the program.

Firms have until 7 September 2016 to comply with these rules.

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