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The Treasury
Via online submission page

Dear Treasury

Review of tax and corporate whistleblowing in Australia

Thank you for the opportunity to provide a submission on the issues raised in Treasury's consultation paper, *Review of tax and corporate whistleblowing in Australia* (**consultation paper**).

The Australian Institute of Company Directors Limited (**AICD**)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 54,000 includes directors and governance leaders of not-for-profits (**NFPs**), large and small businesses and the public sector.

The AICD has been actively engaged in reform of Australia's corporate whistleblowing framework, including supporting the stronger whistleblower protections, increased penalties for breaches and improved compensation arrangements introduced through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*[1].

This review provides an important opportunity to build on the significant reforms introduced in 2019 and consider targeted amendments to ensure that the framework operates effectively in practice.

1. Executive Summary

The AICD's overarching position is that effective whistleblowing frameworks, underpinned by strong protections for whistleblowers, support high standards of governance.

Whistleblowing is an important component of a broader 'speak-up culture' and can provide boards and management with insights that may not otherwise be surfaced, supporting better risk oversight, transparency and accountability. Boards oversee company compliance obligations and organisational culture more broadly, and have a strong interest in the early identification and prevention of corporate misconduct.

Our key observations and recommendations are summarised below, with detailed responses to a number of questions in the consultation paper set out in **Attachment A**. Our responses are focused on the corporate whistleblowing regime contained in Part 9.4AAA of the *Corporations Act 2001* (**Corporations Act**), rather than the tax regime.

The positions in this submission have been informed by extensive consultation with senior directors, legal experts, industry bodies and the AICD's standing policy committees.

[1] https://treasury.gov.au/sites/default/files/2019-03/c2016-t226331-Australian_Institute_of_Company_Directors.pdf

a) Extend the corporate regime to partnerships and other legal structures

As a matter of principle, our view is that the availability of protections for whistleblowers should not depend on the legal form of an organisation.

The current scope of the corporate regime creates gaps that are difficult to justify from a policy perspective, and results in inconsistent access to whistleblower protections across entities of comparable scale that undertake activities of a similar nature.

We recognise that there are constitutional challenges associated with extending the regime beyond the current list of 'regulated entities' and support consideration of options to address these challenges and promote consistency.

b) Address the overlap between different whistleblowing regimes

The current overlap between different whistleblower frameworks detracts from the objective of a coherent and accessible system of protections, while also increasing complexity and the compliance burden for regulated entities.

The AICD has previously supported standalone whistleblower legislation for the private sector for this reason, and continues to support consideration of potential harmonised legislative solutions.

Additional regulatory guidance that explains the relevant requirements where multiple frameworks may apply, including the protections available to whistleblowers, may also assist.

c) Targeted amendments to support operation in practice

Based on consultation with legal experts and directors, we recommend targeted amendments to support the operation of the corporate regime, including to facilitate review and investigation of alleged misconduct, and support governance oversight processes. In particular:

- **Review the materiality threshold:** The definitions of a 'disclosable matter' and a 'personal work-related grievance' should be reviewed to ensure the regime captures serious misconduct and integrity concerns, while carving out employment matters that fall below the intended materiality threshold. The breadth of the current definition of 'disclosable matter' creates uncertainty for both potential whistleblowers and regulated entities and dilutes focus on serious wrongdoing within an organisation.

- **Consider measures to support effective internal reviews, investigations and oversight**: There is scope to support internal review, investigation and oversight of disclosures (and thereby the resolution of alleged misconduct) without compromising protections by:

  - introducing a 'referral power' with appropriate safeguards that allows eligible recipients who have received a protected disclosure to refer it to particular responsible role/s within the organisation (who may not necessarily be a legal practitioner) in order to facilitate internal review of the report, guide next steps, and support compliance with relevant obligations;

  - reviewing the limited carve-out which allows recipients of a whistleblowing disclosure to share information related to that disclosure where it is reasonably necessary for the purposes of investigating the matter, provided the whistleblower's identity is not disclosed and all reasonable steps are taken to reduce the risk of identification. This carve-out can be difficult to apply, particularly in smaller organisations with a limited number of employees, and can mean that alleged misconduct is not properly investigated; and

  - ensuring that appropriate reporting to boards and board committees to support oversight is not inhibited.

- **Eligible whistleblowers:** We support broadening the definition of ‘eligible whistleblower’ to include unpaid workers, recognising the important role that volunteers play in the NFP sector.

- **Improve effective regulatory oversight:** We continue to support expansion of the list of eligible recipients to additional Commonwealth regulatory agencies, including the Australian Consumer and Competition Commission (**ACCC**) and law enforcement agencies. We recognise that this brings its own complexity (and implications for regulator resourcing). As an alternative, we support additional resourcing to ASIC to allow it to operate as, in effect, a clearinghouse for whistleblowing disclosures, with ASIC to refer disclosures to the most appropriate regulator for review and investigation. We also support the intent of the ‘no wrong door’ approach advocated by the Human Rights Law Centre, such that if a whistleblower mistakenly reports to the wrong agency, they should not lose their legal protections.

d) Preparatory activities

Any proposed extension of protections to preparatory acts should not undermine entities’ efforts to protect against unauthorised access to, and use of, confidential, commercially sensitive and private information, and would need to be carefully weighed against related privacy, data protection and cyber security risks for organisations and third parties.

We acknowledge that the treatment of preparatory acts raises complex policy issues. If reform is considered necessary in order to provide appropriate protections to whistleblowers, any immunity would need to be limited to where the relevant acts are reasonably necessary for the making of a protected disclosure (based on clear statutory criteria), and incorporate robust safeguards. In particular, any evidence gathered should be required to have been lawfully accessed by the whistleblower in the ordinary course of their employment (i.e. not by unlawful or inappropriate means including hacking or trespass) and provided only to an eligible recipient for the purpose of supporting a protected disclosure.

Given the complexity of these issues, the AICD recommends further consultation with legal experts, regulators and other stakeholders before any reforms are progressed.

e) Incentives and legal support

The AICD does not support the introduction of a financial rewards scheme. We continue to have significant concerns that such a scheme risks a number of unintended consequences, including undermining the Australian approach that is founded on strong protections for whistleblowers and promoting a speak-up culture within organisations that is overseen by the board. We are also concerned that it would risk incentivising low-value disclosures with resulting resourcing implications for regulators.

Reform efforts should instead be focused on ensuring that the existing framework is operating as intended, including through targeted protections, compensation mechanisms, and organisational practices that support reporting of misconduct, as well as active regulatory oversight and enforcement.

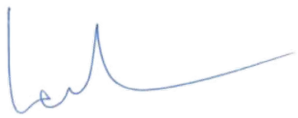
Rather than motivating disclosures through financial rewards, we support consideration of models, resourced appropriately, to allow whistleblowers to access independent legal advice and other support services they require.

We recognise that whistleblowers can face significant personal, professional and other risks in the course of making a disclosure and access to timely well-resourced legal advice is critical in navigating a complex regime.

2. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Sally Linwood, Senior Policy Adviser, at salinwood@aicd.com.au or Simon Mitchell, Head of Policy, at smitchell@aicd.com.au.

Yours sincerely,



Louise Petschler GAICD
GM, Education & Policy Leadership

Attachment A – Responses to consultation questions

Consultation question 2: Are the potential gaps or overlaps between concurrent whistleblowing regimes a concern for tax and corporate sector whistleblowers?

The overlap and inconsistency between different whistleblowing regimes is not conducive to establishing a cohesive system of protections for whistleblowers. The fragmentation also increases the regulatory burden for those companies caught by multiple regimes.

In addition to the tax and corporate regimes, Treasury has identified six other Commonwealth legislative regimes that contain some form of whistleblower protections, including the *Public Interest Disclosure Act 2013* (**Federal PID Act**) as well as the *Aged Care Act 2024*. These regimes differ in various material respects, and there are circumstances where multiple could apply to a particular disclosure.

This can create confusion for potential whistleblowers, which may deter some individuals from coming forward. It also means that regulated entities and eligible recipients are required to navigate overlapping obligations when receiving and investigating disclosures. This adds to the regulatory burden and heightens the risk of inadvertent non-compliance.

The overlap is particularly concerning given the complexity of the corporate whistleblowing regime itself, even before the interaction with other legislative frameworks is taken into account.

We have previously supported the introduction of standalone whistleblower legislation for the private sector, for the reasons outlined above. The AICD continues to support legislative steps to minimise unnecessary overlap and promote harmonisation.

Additional guidance for both whistleblowers and entities who may be caught by multiple regimes would also assist.

Consultation question 4: Do the current categories of 'eligible whistleblower' under the tax and corporate regimes sufficiently cover all individuals who have the potential to disclose relevant information about entities?

We support broadening the definition of 'eligible whistleblower' to include unpaid workers, recognising the important role that volunteers play in the NFP sector.

According to the 12th edition of the Australian Charities and Not-for-profits Commission's Australian Charities Report, registered charities reported that they engaged 3.9 million volunteers, with more than half of all charities, 53%, relying entirely on volunteers[2].

Consultation question 5: Is the current range of 'entities' captured by the tax and corporate regimes adequate? Do you have any particular concerns about entity types that are not covered?

As a general principle, the AICD considers that whistleblower laws should apply consistently to organisations regardless of their legal form.

As outlined above, the current scope of the corporate regime creates gaps that are difficult to justify from a policy perspective, including in relation to large professional services firms structured as partnerships.

We acknowledge that the position can be more nuanced in some cases, including where service companies are involved within a broader partnership structure. This adds to the complexity of the regime for

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2 https://www.acnc.gov.au/tools/reports/australian-charities-report-12th-edition

whistleblowers and entities, with organisations operating through complex structures needing to map application of the regime across those structures.

We are also aware that the scope of the regime creates some confusion in the NFP sector, given NFPs that meet the definition of a 'trading or financial corporation' will be subject to the regime, while those that do not will fall outside it. The relevant assessment is not necessarily straightforward and may change over time. As ASIC has noted, '[i]t is not always clear whether a not-for-profit organisation or charity falls within the definition of a trading or financial corporation, where it engages in trading or financial activities as part of its not-for-profit or charitable activities. Some of these organisations may fall within the definition, and some may not.'[3]

The AICD acknowledges the constitutional challenges associated with extending the regime beyond the current list of regulated entities. However, we support consideration of options to introduce a more consistent framework that reduces gaps in coverage.

Consultation question 7: Are entities able to sufficiently rely on the carve-out allowing limited disclosures for the purposes of investigating whistleblower disclosures? If not, why not?

The AICD strongly supports the intent of the anonymous and confidential disclosure provisions in the current regime. However, we are aware of concerns that elements of the current framework can inhibit appropriate review and investigation of disclosures. This may not serve the interests of the whistleblower, the entity or the broader policy objective of identifying and addressing alleged misconduct.

There is scope to support internal review and investigation of reports (and thereby the resolution of alleged misconduct) through:

- introducing a 'referral power' that allows eligible recipients who have received a protected disclosure to refer it to particular responsible role/s within the organisation (who may not necessarily be legal practitioners) in order to facilitate internal review of the report, guide next steps, and support compliance with relevant obligations. Appropriate safeguards could be built in, including notification to the reporter; and

- reviewing the current limited carve-out which allows recipients of a whistleblowing disclosure to share information related to that disclosure where it is reasonably necessary for the purposes of investigating the matter, provided the whistleblower's identity is not disclosed and all reasonable steps are taken to reduce the risk of identification. In practice, this can be difficult to apply, particularly in smaller organisations with a limited number of employees. The carve-out also does not extend to circumstances where a discloser's identity is broadly known (e.g. through voluntary self-identification or lawful publication).

To make the carve-out more workable in practice, we recommend consideration of approaches contained in section 20(3)) of the Federal PID Act and section 64(2)) of the Public Interest Disclosures Act 2022 No 14 (NSW) (**NSW PID Act**) as potential alternatives[4].

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[3] https://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/whistleblower-protections-for-not-for-profit-organisations/

[4] For example, under the PID Act (Cth) (section 20(3)), the carve-out covers circumstances where the person likely to be identified by the identifying information has acted in a way that is inconsistent with keeping that person's identity confidential or the identifying information has previously been lawfully published. Under the PID Act (NSW) (section 64(2)), it covers circumstances where it is generally known the person is the maker of the voluntary public interest disclosure as a result of the person's voluntary self-identification as the maker; or after consulting the person, the public official or agency reasonably considers it necessary to disclose the identifying information to protect a person from detriment; or it is necessary the identifying information be disclosed to a person whose interests are affected by the disclosure; or the identifying information has previously

We also recommend additional guidance on what constitutes 'reasonable steps', to mitigate the risk that companies will not pursue investigations of allegations for fear of inadvertent breach of confidentiality obligations.

From a governance perspective, it is important to facilitate appropriate reporting to boards and board committees. For example, a broader carve-out could extend to information sharing with boards and board committees where necessary to support effective board oversight of investigations and organisational responses to allegations, while maintaining appropriate confidentiality safeguards.

Consultation question 11: Is the law sufficiency clear with regards to any protections for acts committed in preparing for making a disclosure? What circumstances and qualifications would need to be addressed in any clarification?

We acknowledge that the treatment of preparatory acts raises complex policy issues.

In general, our view is that the preferable approach is that once a disclosure has been made, relevant evidence and documentation can be obtained through appropriate internal review mechanisms, investigative processes or regulatory inquiries.

It is critical that entities' efforts to protect against unauthorised access to, and use of, confidential, commercially sensitive and private information are not undermined; that other legal obligations (e.g. under the *Privacy Act 1988*) are taken into account when considering any proposed extension of protections; and that any privacy, data protection and cyber security risks for organisations and third parties are mitigated.

If reform is considered necessary in order to provide appropriate protections to whistleblowers, any immunity should be limited to where the relevant acts are reasonably necessary for the making of a protected disclosure (based on clear statutory criteria[5]), and incorporate robust safeguards. In particular, any evidence gathered should be required to have been lawfully accessed by the whistleblower in the ordinary course of their employment (i.e. not by unlawful or inappropriate means including hacking or trespass) and provided only to an eligible recipient for the purpose of supporting a protected disclosure.

Given the complexity of these issues, the AICD recommends further consultation with legal experts, regulators and other stakeholders before any reforms are progressed.

Consultation question 12: Do you consider that the list of 'eligible recipients' for each regime is appropriate? If not, why not? Are there any other individuals which should be included within this definition?

The AICD supports protection of disclosures to medical practitioners and psychologists (for the purpose of obtaining medical or psychiatric care, treatment or counselling), consistent with the tax regime.

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been lawfully published; or the identifying information is disclosed to a medical practitioner or psychologist for the purposes of the practitioner or psychologist providing medical or psychiatric care, treatment or counselling to the individual disclosing the information; or the identifying information is disclosed for the purposes of proceedings before a court or tribunal; or the disclosure of the identifying information is necessary to deal with the disclosure effectively; or it is otherwise in the public interest to disclose the identifying information.

[5] For example, regard could be had to the relevant factors contemplated by the Wilson Review into the Queensland public sector whistleblowing regime, accessible at https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/163329e9-3aa2-4601-9ff8-725458170b6b/public-interest-disclosure-act-review-report.pdf?ETag=6ed2cd469f3a798f3249255b1278d3bd, at page 178

Consultation question 13: Do you consider that the regulators that are able to receive disclosures under the tax and corporate regimes are appropriate? If not, why not? Should protection for whistleblowers extend to disclosures made to any other regulators or bodies? If so, which regulators and why?

We acknowledge that having ASIC and the Australian Prudential Regulation Authority as the only regulators to whom disclosures can be made may create potentially perverse outcomes (for example, where the relevant alleged conduct sits within the remit of another regulator), as outlined in the consultation paper.

The AICD has previously supported expansion of the list of eligible recipients to additional Commonwealth regulatory agencies including the Australian Consumer and Competition Commission (**ACCC**) and law enforcement agencies.

We also acknowledge, however, that expanding the list of eligible recipients to include additional regulators creates its own complexity, and that it has implications for regulator resourcing.

As an alternative, we suggest consideration be given to providing additional resourcing to ASIC to allow it to operate as, in effect, a clearinghouse for whistleblowing disclosures, with ASIC to refer disclosures to the most appropriate regulator for review and investigation. This approach has a number of benefits, including a more streamlined process for reporters.

We support the intent of 'no wrong door' approach advocated by the Human Rights Law Centre, such that if a whistleblower mistakenly reports to the wrong agency, they should not lose their legal protections.

Consultation questions 16 and 17: Do you consider that the scope of matters that qualify for protection under the tax and corporate regimes is appropriately targeted? Is there sufficient clarity around the types of disclosures that would qualify for protection under the two regimes?

We recommend reviewing the definitions of a 'disclosable matter' and a 'personal work-related grievance' to ensure the regime captures serious misconduct and integrity concerns, while appropriately carving out employment matters that fall below the intended materiality threshold.

The current definition of a disclosable matter is broad, covering information that a person has reasonable grounds to suspect concerns 'misconduct' or an 'improper state of affairs or circumstances' in relation to a regulated entity (or related body corporate) or indicates that the regulated entity (or an officer or employee) has engaged in conduct that:

- constitutes an offence against or contravention of certain Commonwealth laws such as the Corporations Act and other financial sector legislation, or any other Commonwealth law punishable by 12 months' imprisonment; or
- represents a danger to the public or the financial system.

In practice, the breadth of the definition creates uncertainty as to the matters that are properly within scope of the regime. As a result, companies tend to take a conservative approach to the assessment of disclosures, which can lead to resourcing pressures, complicate internal reviews and investigations, and dilute focus on serious wrongdoing within an organisation.

In cases where entities assess that a disclosure is a personal work-related grievance and re-refer the report through human resources processes, the risk is that reporters may have mistakenly believed that the relevant disclosure would be protected. ASIC's report *REP 827 Insights from the ASIC whistleblower questionnaire: July 2024 to June 2025* (**REP 827**) notes that companies reported that 39% of disclosures made through the whistleblower channels qualified for protection under the Corporations Act (i.e. were 'in-scope' whistleblower disclosures).[6] While we recognise, as noted in REP 827, that companies may use a general speak-up channel to receive concerns, rather than a specific whistleblower channel, there is a clear risk that reports are being made through whistleblower channels that individuals may consider are going to be protected, which are ultimately determined not to be in-scope.

We are aware of recent Federal Court decisions that have examined the definition[7], as well as the guidance set out in ASIC Regulatory Guide 270, but note that there remains uncertainty about scope.

While a level of judgment will necessarily be involved in some cases, additional clarity in relation to the types of matters that do (and do not) give rise to a protected disclosure - having regard to the principles developing through case law - would reduce unnecessary ambiguity. For example, an approach could be to set out categories of protected disclosures in legislation, similar to the approach taken in section 29 of the Federal PID Act, and/or to provide more detailed regulatory guidance, including to reflect available case law.

Consultation question 19: Do the civil and criminal penalties act as a sufficient deterrent against:

- **the victimisation of whistleblowers? Why or why not?**
- **breaching the anonymity of a whistleblower? Why or why not?**
- **failing to have a compliant whistleblowing policy? Why or why not?**
- **engaging in tax or corporate misconduct or wrongdoing more generally? Why or why not?**

The penalties in place for breaches of the corporate regime are significant and, in the AICD's view, informed by input from consultation, act as an effective deterrent.

We are also cognisant of the importance of active enforcement and that additional resourcing could support ASIC in its work.

Consultation question 22: Do you consider that a rewards scheme would lead to a larger volume of low-value disclosures? Why or why not?

We do not support the introduction of a rewards scheme in Australia.

While we acknowledge there is some international precedent, we would have significant concerns about the introduction of such a scheme in the Australian context. Such a scheme would usher in a highly litigious environment where regulators would bear the weight of assessing and responding to a high volume of low value disclosures.

Fundamentally, it would represent a clear departure from the current Australian approach, which is founded on strong protections for whistleblowers and the promotion of a speak-up culture within organisations to support internal identification and prevention of wrong-doing, ideally at an early stage.

We believe a rewards scheme risks a number of unintended consequences including discouraging internal disclosures, incentivising delays in disclosure to maximise potential reward, inequitable treatment of different whistleblowers, a higher volume of meritless disclosures and additional burden on regulators.

Addressing the deficiencies and gaps in the current framework should be the reform priority. Rather than moving to a highly litigious United States system of incentives, we support a focus on whistleblower protections, compensation arrangements and ease-of-use of the regime as well as, importantly, robust systems of internal disclosure.

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[6] REP 827 Insights from the ASIC Whistleblower Questionnaire: July 2024 to June 2025 | ASIC at page 10

[7] Jackson v Heart Research Institute Ltd [2025] FCA 301; Mount v Dover Castle Metals Pty Ltd [2025] FCA 101; and Reiche v Neometals Ltd (No 2) [2025] FCA 125

Consultation question 23: Is the existing guidance, information and support available to whistleblowers and potential whistleblowers sufficient?

The AICD commends ASIC for the market surveys, reports and guidance issued to date in connection with the corporate regime.

Areas that continue to create practical uncertainty where additional guidance (for both whistleblowers and regulated entities) would be beneficial include:

- interaction between overlapping whistleblower regimes;
- the types of disclosures that qualify for protection, including in relation to the 'improper state of affairs or circumstances' limb of the discloseable matter definition; and
- guidance on the circumstances in which information can be shared to facilitate investigations, and oversight, while maintaining confidentiality protections. This could include further commentary on the requirement to take 'reasonable steps' to reduce to risk of identification when relying on the confidentiality carve-out (building on ASIC Information Sheet 247).

We also note that we support consideration of models, resourced appropriately, to allow whistleblowers to access independent legal advice and other support services they require, recognising that whistleblowers can face significant personal, professional and other risks in the course of making a disclosure. The statutory framework is complex, and it is entirely appropriate that whistleblowers have timely access to independent legal advice to ensure that the technical requirements of the regime are met.

Consultation question 25: Do you consider that whistleblower policies are helpful in:

- **encouraging entities to have transparent internal whistleblower procedures in place?**
- **discouraging wrongdoing?**
- **educating whistleblowers about their rights and obligations?**
- **encouraging people to make disclosures about wrongdoing?**

Whistleblower policies are an important component of an effective governance framework. They help foster a culture in which individuals feel safe, supported and encouraged to speak up about misconduct, while providing clear information about how reports can be made, the protections available, and the organisation's process for responding to reports.

The AICD's view is that, even where an organisation is not required to have a whistleblower policy or is not subject to statutory whistleblower protections, good governance practice is to maintain an appropriate whistleblower policy and for the board to take an active role in overseeing its implementation and effectiveness.

However, we note that the content requirements contained in section 1317AI(5) of the Corporations Act mean that whistleblower policies are often lengthy and technical in nature, and in many cases more detailed than other company policies. We understand that these requirements are intended to support the policy objective of providing comfort to individuals about how disclosures can be made and the protections and support available to whistleblowers. We also note ASIC's Regulatory Guide 270, which contains both guidance on complying with legal obligations and broader good practice guidance on implementing and maintaining an effective whistleblower policy.

At the same time, we are aware of concerns that the prescriptive nature of the policy requirements can result in documents that are difficult for users to navigate and understand. We recommend an assessment of options that improve accessibility and usability while maintaining the core policy objective. For example, there may be merit in streamlining certain content requirements or permitting greater reliance on cross-references to regulatory guidance, particularly for smaller entities.