**SUBMISSION TO 2017 TREASURY WHISTLEBLOWER ENQUIRY**

By Dr. Peter Bowden, peterbowden@ozemail.com.au. Dr. Bowden is a lecturer and writer on ethics, and has written a book on whistleblowing. A copy has been sent to the enquiry’s secretariat

**This submission makes four points**:

1. Australia needs a whistleblower protection system for the private sector. The current whistleblower provisions of the Corporations Act are useless.
2. Australia needs the equivalent of a False Claims Act and associated acts
3. We also need an ICAC at the federal level
4. Before these changes are made we need to compare the better international systems and choose the most effective. Approximately 70 countries have introduced whistleblower protection and reward systems.

**Back ground**

There are three major reasons why we should make these changes:

**The first reason** is that Australia is party to several international agreements to the effect that we will encourage blowing the whistle and protect whistleblowers. Transparency International (TI), of which Australia is a member, provides three principles for whistleblower protection legislation: (i) accessible and reliable channels to report wrongdoing; (ii) robust protection from all forms of retaliation; and (iii) mechanisms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing.

Such protection is a requirement of the United Nations Convention Against Corruption (UNCAC). Australia ratified the UNCAC in December 2005. Article 8 (4) of the Convention states that “each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.”

Similarly, Article 33 of the UNCAC requires each country to consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds any offences in accordance with this Convention.

The International Labour Organization (ILO) also requires specific legislation for the protection of whistleblowers.

**The second reason** is that as soon as we make effective changes, Australia, and individual Australians, will be better off, economically and financially. Corruption destroys the effective competitiveness of our business systems, as it facilitates the provision of lower quality goods or services. Perhaps not a major issue to every Australian, but we will also be a more ethically moral nation.

**The third reason,** perhaps more for the future, that the encouragement and protection of people who speak out against wrongdoing, has the potential to correct some of the ills that the world is facing. This submitter can provide the committee with the empirical support behind this statement, if it so wishes. Australia, as a thinking, developed nation has the obligation to encourage that movement. At the moment, it is lagging the world.

**The four Points:**

**1. Private sector whistleblowing.** All Australia is aware of recent wrongdoing in the private sector – Comminsure, wage underpayments at Woolworths, Hungry Jack's and KFC and many others. The Australian Institute of criminology, a Government agency, says corruption takes many forms, including cheque and credit card fraud, fraudulent trade practices, social security fraud, forgery, counterfeiting and bribery., Many of the above have been exposed by whistleblowers. ASIC, to my knowledge has not acted on any one. However, AMP and the big four banks willingness to refund at least $178 million to more than 200,000 customers who did not receive financial advice for which they were charged is a result of ASIC pressure.

The biggest weakness of Part 9.4AAA of the Corporations Act 2001 (the whistleblowing provisions), however, is that it covers only contraventions of the Act. Your local factory could be dumping all its rubbish in the river. If you tell the authorities and you are fired, you are not protected. ASIC cannot act.

My recommendation on this issue is that Australia adopt a law along the lines of a specific provision of British law that protects whistleblowers who expose any private sector contravention. The equivalent US law has similar protection but in each and every law that controls the activities of the private sector. The result is that there are over 50 laws in the US that control private sector whistleblowing. A person thinking of exposing a wrong must go to a lawyer to find out which law has been contravened.

This, incidentally, is not a recommendation to adopt the British law in its entirety. Should he enquiry be interested , I would be willing to provide them with an outline of the weaknesses of the British system

This submission has suggested that private sector whistleblowing be protected when the whistleblower exposes contraventions of the laws that affect that company’s operations. In addition, it is suggested that the whistleblower be protected when he or she exposes contraventions of the organisation’s code of conduct (or code of ethics). Such an action will encourage the development of organisational codes of conduct. If the organisation is encouraged to involve the whole organisation in the code’s formulation, such actions will, in the longer term, strengthen ethical behaviour across Australian organisations. This submitter can also provide the committee with the empirical support behind this statement, if it so wishes.

2. **False Claims Act (FCA)**. The benefits of a FCA and associated Acts are overwhelming. The enquiry is aware that these are schemes pay the whistleblower a percentage of the savings. The enquiry will receive submissions recommending against such payments, some perhaps pointing out that a relatively recent British government enquiry decided against rewards as they were contrary to British ethical norms. In fact, that decision was ethically dubious, as such whistleblowing recompense millions of dollars to the public treasury annually. The US Department of Justice released its False Claims Act (FCA) recovery statistics for Fiscal Year 2016 on December 13, 2016, announcing that it had recovered $4.76 billion. This sum would otherwise go to the private sector companies that were trying to rip off the government.

3. **A Federal ICAC - Independent Commission against Corruption**

My reason for advocating a federal ICAC is not the reason given by the petitions that are currently in circulation - to stop the corruption current in Federal parliamentarians (although that is a very strong reason). It is to strengthen the implementation of existing whistleblower protection legislation- the 2013 Public Interest Disclosures (PID) Act. And any revised legislation that may come out of this review. The current procedures are ineffectual.

The Commonwealth Ombudsman’s review of the first two years of the PID scheme (from 15 January 2014 to 14 January 2016) showed that the act had been completely ineffective. The review stated that agencies had received 1336 disclosures.The Ombudsman’s office received 142 public interest disclosures, 51 of those met the criteria for an internal disclosure. Of these 27 were allocated to the concerned agency and 24 were allocated to the Ombudsman’s office.

Nothing appear to eventuate.

I believe that there is an overriding desire in both the public service and in parliament to minimise the public visibility of wrongdoing. By doing so, the public odium that descends on politicians and on public servants, is minimised. In evidence of this statement is the Treasury Review of whistleblowing a couple of years back There were several recommendations made by most submissions. Some are repeated in the above paragraphs. None were implemented. The result is that the public hears of much less wrongdoing than takes place.

Peter Bowden

13 March 2017