CORPORATE WHISTLEBLOWERS AND FINANCIAL INCENTIVES

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Corporate whistleblowing laws seek to encourage reporting of misconduct and ultimately ensure business practices align with the standards expected by the community. An imminent review will evaluate whether past legislative change has been successful in achieving these objectives in Australia. The review is also an opportunity to consider the desirability of proposed reforms, including offering financial incentives to whistleblowers who contribute significantly to enforcement activities. Since the last inquiry into Australian corporate whistleblowing legislation, scholarship has emerged on the effectiveness of incentives. Meanwhile, incentive programs in the United States and Canada have matured such that they can be carefully evaluated. Drawing on these extensive materials, this article provides a state-of-the-art perspective on whistleblower incentives in Australia. It concludes that a whistleblower award program would be an evidence-based option for any future reform directed at maintaining and improving standards of Australian business conduct.

I INTRODUCTION

Whistleblowers benefit business, government and society by reporting misconduct that goes unnoticed or unremedied. They support corporate governance by alerting management to irregularities within an organisation so problems can be addressed at an early stage and without external intervention.[1] When irregularities require external intervention, regulators often rely on those within the corporation

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1 Sulette Lombard and Vivienne Brand, 'Whistleblowing and Corporate Governance: Regulating to Reap the Governance Benefits of "Institutionalised" Whistleblowing' (2018) 36(1) *Company and Securities Law Journal* 29. See also Amanda Lyras and Lauren Cooper, 'Whistleblower Director Duties and Responsibilities' (Guidelines, Australian Institute of Company Directors, 1 April 2022); ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations: 4th Edition' (Guidelines, February 2019) 17 (Recommendation 3.3).

for detection and enforcement.[2] In Australia, corporate whistleblowing has moved out of the regulatory shadows with the insertion of whistleblower protections in the *Corporations Act 2001* (Cth) ('*Corporations Act*') in 2004.[3] These provisions were comprehensively reviewed by the Parliamentary Joint Committee on Corporations and Financial Services ('PJC') in 2017.[4] The PJC's bipartisan report recommended a range of reforms which were partially enacted in 2019.[5]

Among the PJC's recommendations was a reform modelled on North American initiatives: paying individuals who report serious corporate misconduct to regulators.[6] Processes of that kind, tailored to securities regulation, exist in the United States ('US') (since 2011) and Ontario, Canada (since 2016). As Usha Rodrigues explains, these jurisdictions offer both the 'shield' of whistleblower protections and 'carrots' in the form of potential awards.[7] In contrast, jurisdictions like Australia have to date sought only to neutralise 'a disincentive, rather than provid[e] a positive incentive to blow the whistle'.[8] The Australian Government noted the financial award recommendation, flagging it for a 'post-implementation review' to be conducted after June 2024.[9] The government reasoned that this would 'provide the opportunity to assess the merit and cost case … when the present reforms have had a reasonable time to operate and further information is available'.[10]

Since the PJC's review, high-profile Australian inquiries into commercial activities have identified departures from the moral or ethical standards of conduct generally expected by the community.[11] Common themes considered by the

2 Alexander Dyck, Adair Morse and Luigi Zingales, 'Who Blows the Whistle on Corporate Fraud?' (2010) 65(6) *Journal of Finance* 2213 <https://doi.org/10.1111/j.1540-6261.2010.01614.x>; Association of Certified Fraud Examiners, *Occupational Fraud 2022: A Report to the Nations* (Report, 2022) 22.

3 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) sch 4 pt 2 ('*CLERP 9 Act*').

4 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, September 2017) ('*PJC Whistleblowing Report*').

5 See *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).

6 *PJC Whistleblowing Report* (n 4) 138–9 [11.55]–[11.59]. Awards of this kind are variously described in the literature as incentives, rewards and bounties: see below Part IV(A).

7 Usha R Rodrigues, 'Optimizing Whistleblowing' (2022) 94(2) *Temple Law Review* 255, 265.

8 Ibid.

9 Australian Government, 'Australian Government Response to the Parliamentary Joint Committee on Corporations and Financial Services Report into Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors' (Government Response, April 2019) 15; *Corporations Act 2001* (Cth) s 1317AK ('*Corporations Act*').

10 Australian Government (n 9) 15. Similarly, other participants in the PJC inquiry suggested financial incentives should be considered after more urgent reforms were implemented: see *PJC Whistleblowing Report* (n 4) 135–6 [11.48]–[11.50]; Australian Securities and Investments Commission, Submission No 51 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (February 2017) 25 [91]–[95]. In contrast, the (then) Opposition indicated it would 'set up a whistleblower reward scheme': Commonwealth, *Parliamentary Debates*, House of Representatives, 18 February 2019, 688–9 (Andrew Leigh, Shadow Assistant Treasurer).

11 See, eg, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) ('*Banking Royal Commission*'); PA Bergin, *Inquiry under Section 143 of the Casino Control Act 1992 (NSW)* (Report, 1 February 2021); Senate Finance and Public Administration References Committee, Parliament of Australia, *PwC: A Calculated Breach of Trust* (Interim Report, June 2023).

inquiries included why insiders did not speak up (or did not speak up sooner) and the efficacy of internal reporting systems.[12] More generally, it seems likely that 'significant amounts of corporate misconduct' occur in Australia, but it goes without detection or external intervention.[13] In this context, policy debate has returned to considering what might be done to encourage whistleblowing. Reforms beyond enhancing doctrinal protections from reprisals are contemplated and incentives have re-emerged as a reform proposal.[14]

International developments have much potential to inform the Australian incentives debate. The North American programs favoured by the PJC are no longer novel. The US Securities and Exchange Commission ('SEC') program has operated for more than a decade, rapidly grown in scale, been refined over time and adopted as a model process in other contexts.[15] The Ontario Securities Commission ('OSC') program – introduced shortly before the PJC inquiry – can be meaningfully evaluated. There are data on disclosures received in both jurisdictions and the effect of those disclosures over an extended period. Additionally, as the award programs have matured, empirical scholarship has emerged to test their efficacy as regulatory devices. Yet these recent developments have not been critically analysed to inform

12 See, eg, *Banking Royal Commission* (n 11) vol 1 ch 6. In respect of casinos, see, eg, Nick McKenzie, 'Taking on a Corporate Giant: How a Whistleblower Exposed Crown', *The Sydney Morning Herald* (online, 9 February 2021) <https://www.smh.com.au/business/companies/taking-on-a-corporate-giant-how-a-whistleblower-exposed-crown-20210209-p570zn.html>; Bergin (n 11) vol 2, 327 [19], 350–2 [8]–[18]. In respect of the audit and consultancy industry, see, eg, Commonwealth, *Parliamentary Debates*, Senate, 14 November 2023, 5539 (Barbara Pocock), 5587 (Deborah O'Neill), 5587–8 (Paul Scarr).

13 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, 30 April 2020) 97 [3.71]. See also David Bartlett et al, 'Corporate Crime in Australia: The Extent of the Problem' (Trends and Issues in Crime and Criminal Justice No 613, Australian Institute of Criminology, December 2020); Liz Campbell, 'Legal Professional Privilege and Corporate Wrongdoing' (2023) 44(2) *Adelaide Law Review* 339, 339 <https://doi.org/10.2139/ssrn.4553879>.

14 For examples in different private-sector contexts, see Senate Economics References Committee, Parliament of Australia, *Australian Securities and Investments Commission Investigation and Enforcement* (Report, July 2024) 71 [4.98]–[4.99], 159–160 [8.19] (Recommendation 6); Allan Fels, 'How to Keep Corporations Honest', *The Saturday Paper* (online, 23 March 2024) <https://www.thesaturdaypaper.com.au/comment/topic/2024/03/23/how-keep-corporations-honest>; Institute of Public Accountants, Submission No 15 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry* (31 August 2023) 10; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Adequacy and Efficacy of Australia's Anti-money Laundering and Counter-Terrorism Financing (AML/CTF) Regime* (Report, March 2022) 55 [3.47], 57 [3.53]–[3.54]; Jacob Varghese, Maurice Blackburn Lawyers, Submission to Grocery Code Review, *Independent Review of the Food and Grocery Code of Conduct 2023–24* (1 March 2024), quoted in *Independent Review of the Food and Grocery Code of Conduct* (Interim Report, April 2024) 42; Ronald Mizen, 'Crossbench Backs Financial Rewards for Whistleblowers', *Australian Financial Review* (online, 12 February 2024) <https://www.afr.com/politics/federal/crossbench-backs-financial-rewards-for-whistleblowers-20240211-p5f3yi>. In the public sector context, see Attorney-General's Department (Cth), 'Public Sector Whistleblowing Reforms: Stage 2' (Consultation Paper, November 2023) 18–19 <https://consultations.ag.gov.au/integrity/pswr-stage2/user_uploads/consultation-paper-public-sector-whistleblowing-reforms-stage-2.pdf>; Kieran Pender, *Making Australian Whistleblowing Laws Work: Draft Design Principles for a Whistleblower Protection Authority* (Report, February 2024) 10 <https://www.hrlc.org.au/reports-news-commentary/draft-design-principles-for-a-whistleblower-protection-authority>.

15 See below Part V.

Australia's approach to whistleblowing. Given the Australian Government's desire for further information on these programs, a comprehensive examination is timely.

This article provides a state-of-the-art perspective on whistleblower incentives in Australia. Principally, it considers whether an award process could contribute positively to Australian corporate regulation. In Part II, the article situates corporate whistleblowers in the regulatory system and observes that their potential continues to be stifled. Part III considers the whistleblower provisions under the *Corporations Act*. While the law offers substantial doctrinal protection for whistleblowers, it is not clear how effective these protections are in practice. The article then examines whether whistleblower awards might be a credible option for any future law reform. Part IV reviews the theoretical and emerging empirical scholarship, finding there is a sound basis to consider that incentives can encourage whistleblowing and promote appropriate standards of business conduct. This analysis is complemented by Part V, which focuses on experiences and perceptions of the 'model' SEC and OSC programs. The Part addresses specific concerns expressed about an Australian award program, left unresolved by the PJC inquiry. Part VI concludes that there exists an evidentiary basis to adopt an award process for corporate regulation. Further, if incentives are to be introduced, the design of the SEC and OSC programs provide a useful model for Australia.

II CORPORATE REGULATION AND WHISTLEBLOWING

Broadly, regulation can be understood as 'influencing the flow of events'.[16] Regulatory theories suggest business is influenced by a wide range of actors (of which a state enforcement agency is but one), and policy objectives can be achieved in a variety of ways (of which enforcing corporate law through the courts is but one).[17] These theories tend to seek cooperation from companies rather than command and control them; this is associated with greater compliance by business and resource savings by the state.[18]

16 Christine Parker and John Braithwaite, 'Regulation' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119, 119 <https://doi.org/10.1093/oxfordhb/9780199248179.013.0007>.

17 These elements are common to most well-established regulatory approaches, notwithstanding there are differences across approaches: see generally Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) ch 14. For how Australian corporate regulation aligns with theory, see Senate Economics References Committee, Australian Parliament, *Performance of the Australian Securities and Investments Commission* (Final Report, June 2014) ch 4; Angus Corbett and Stephen Bottomley, 'Regulating Corporate Governance' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 60 <https://doi.org/10.1093/acprof:oso/9780199264070.003.0004>; Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33(3) *Melbourne University Law Review* 908.

18 See, eg, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 2–3, 8–17; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 26, 128–9; Michelle Welsh and Vince Morabito, 'Public v Private Enforcement of Securities Laws: An Australian Empirical Study' (2014) 14(1) *Journal of Corporate Law Studies* 39, 51–2, 66–8 <https://doi.org/10.5235/14735970.14.1.39>; Pamela Hanrahan, 'Regulators' Enforcement Discretions and Civil Penalties' in Deniz Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (Federation Press, 2023) 109, 114–15.

An important objective of corporate regulation is to influence companies to engage in practices that are lawful, ethical and responsible.[19] Regulatory theory indicates that whistleblowers contribute in several ways. First, whistleblowers are individuals who, by reason of their insider position, will observe conduct that will not be known to management or those outside the organisation. In many circumstances, these individuals will be the only actors capable of reporting perceived misconduct to another actor who may address it. This capacity is a key regulatory contribution.[20] Second, whistleblowers may choose to report perceived misconduct to an actor outside the company (such as the regulator or a journalist). In turn, this may have consequences that are detrimental to the company's interests. To avoid the risk of detriment, companies are motivated to establish rigorous internal reporting channels, investigate misconduct reports properly and generally comply with the law.[21]

While whistleblowers are theorised to have significant regulatory potential, they are constrained in practice. Various models explain why individuals do (and do not) report perceived misconduct. A whistleblower's perception, and ultimate decision to report, will be influenced by numerous interrelated factors.[22] Some factors depend on the individual (such as personal attributes) and the individual's perceptions (such as the consequences of reporting, the seriousness of misconduct, and whether reporting will effect change).[23] Other factors depend on the disclosure recipient, the perceived misconduct and broader organisational or social factors

19 See ASX Corporate Governance Council (n 1) 2 (Principle 3). This is a simplistic summary of a broad and contested field: see Jean Jacques du Plessis, Anil Hargovan and Jason Harris, *Principles of Contemporary Corporate Governance* (Cambridge University Press, 4th ed, 2018) ch 5; Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217, 226–1 <https://doi.org/10.1177/0067205X1404200109>; Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing, 2015) 161–3, 699–702.

20 Ioannis Kampourakis, 'Whistleblowers as Regulatory Intermediaries: Instrumental and Reflexive Considerations in Decentralizing Regulation' (2021) 15(3) *Regulation and Governance* 745, 746, 750–2 <https://doi.org/10.1111/rego.12361>; Christine Parker, Suzanne Le Mire and Anita Mackay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the *McCabe* Tobacco Litigation' (2017) 40(3) *Melbourne University Law Review* 999, 1009–10, 1030–2.

21 See Janet Austin and Sulette Lombard, 'The Impact of Whistleblowing Awards Programs on Corporate Governance' (2019) 36 *Windsor Yearbook of Access to Justice* 63 <https://doi.org/10.22329/wyaj.v36i0.6067>. For empirical work, see Jaron H Wilde, 'The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness' (2017) 92(5) *Accounting Review* 247 <https://doi.org/10.2308/accr-51661>.

22 For recent reviews from different disciplines, see Heungsik Park et al, 'Laddered Motivations of External Whistleblowers: The Truth about Attributes, Consequences, and Values' (2020) 165(4) *Journal of Business Ethics* 565, 565, 567 <https://doi.org/10.1007/s10551-018-4082-0>; Lei Gao and Alisa G Brink, 'Whistleblowing Studies in Accounting Research: A Review of Experimental Studies on the Determinants of Whistleblowing' (2017) 38(1) *Journal of Accounting Literature* 1 <https://doi.org/10.1016/j.acclit.2017.05.001>; Tina Uys, *Whistleblowing and the Sociological Imagination* (Palgrave Macmillan, 2022) ch 4 <https://doi.org/10.1057/978-1-137-39445-3>; Adam R Nicholls et al, 'Snitches Get Stitches and End Up in Ditches: A Systematic Review of the Factors Associated with Whistleblowing Intentions' (2021) 12 *Frontiers in Psychology* 631538:1–20 <https://doi.org/10.3389/fpsyg.2021.631538>.

23 See Gao and Brink (n 22) 2–4; Nicholls et al (n 22) 6–8.

(such as any obligation to report, the availability of different reporting channels and whether reports can be made confidentially or anonymously).[24]

Generally, theoretical models suggest an individual will cognitively balance the perceived consequences and benefits of reporting.[25] Ian Freckelton concludes: '[M]ost of the time people within organizations who learn of practices that should not have occurred … continue to decide not to "blow the whistle". Often this is for rational, self-protective reasons.'[26] It suffices to say that the perceived risks of speaking up may not always eventuate, but the frequency and gravity of detriment suffered by corporate whistleblowers are known.[27] Factors which influence the cognitive balancing process undertaken by potential whistleblowers are therefore key to changing the rate of whistleblowing.

Acknowledging the risks whistleblowers will weigh in the balance, governments have sought to use law to protect whistleblowers from the potential harm they face for disclosing information and to 'harness the potential of individuals to extend [the state's] regulatory power'.[28] Yuval Feldman and Orly Lobel generalise that law commonly deploys four mechanisms to influence reporting behaviours: '[P]roviding employees with antiretaliation protections, creating a duty to report, imposing liability for failure to report, and incentivizing reporting with money.'[29] As the next Part explains, Australian law predominantly relies only on the first mechanism to encourage whistleblowing. It is not clear whether this approach has achieved significant success.

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24 See Gao and Brink (n 22) 5–12; Nicholls et al (n 22) 8–11.

25 See, eg, the different models presented by Marcia P Miceli, Janet P Near and Terry Morehead Dworkin, *Whistle-Blowing in Organizations* (Routledge, 2008) 38 (Figure 2.1) <https://doi.org/10.4324/9780203809495>; Mark Keil et al, 'Toward a Theory of Whistleblowing Intentions: A Benefit-to-Cost Differential Perspective' (2010) 41(4) *Decision Sciences* 787, 803 (Figure 2) <https://doi.org/10.1111/j.1540-5915.2010.00288.x>; Nadia Smaili and Paulina Arroyo, 'Categorization of Whistleblowers Using the Whistleblowing Triangle' (2019) 157(1) *Journal of Business Ethics* 95, 100–1 <https://doi.org/10.1007/s10551-017-3663-7>.

26 Ian Freckelton, *Scholarly Misconduct: Law, Regulation and Practice* (Oxford University Press, 2016) 465.

27 Benjamin van Rooij and Adam D Fine, 'Preventing Corporate Crime from Within' in Melissa L Rorie (ed), *The Handbook of White-Collar Crime* (John Wiley & Sons, 2019) 229, 235–6 <https://doi.org/10.1002/9781118775004.ch15>; Uys (n 22) ch 5. In Australia, see, eg, Inez Dussuyer et al, *Understanding and Responding to Victimisation of Whistleblowers* (Report, May 2018) 26, 28–34 (reporting on interviews with 21 disclosure recipients), 37–40, 47–50 (reporting on interviews with 36 whistleblowers); AJ Brown et al, *Clean as a Whistle: A Five Step Guide to Better Whistleblowing Policy and Practice in Business and Government* (Report, August 2019) 24 (Figure 12); International Bar Association Anti-Corruption Committee, Submission No 62 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (10 February 2017) 3–4.

28 Parker, Le Mire and Mackay (n 20) 1008.

29 Yuval Feldman and Orly Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality' (2010) 88(6) *Texas Law Review* 1151, 1160 <https://doi.org/10.2139/ssrn.1415663>. See also Sulette Lombard, 'Regulatory Policies and Practices to Optimize Corporate Whistleblowing: A Comparative Analysis' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 3, 18–32 <https://doi.org/10.1007/978-981-15-0259-0_1>.

III CORPORATE WHISTLEBLOWING LAW IN AUSTRALIA

A Policy and Law

Australian parliaments began to focus on legislating whistleblower protections from the early 1990s.[30] Since then, laws addressing whistleblowing have been passed in the state, territory, and federal parliaments. Legislation has generally maintained a separation between public and private sector contexts, and it continues to be studied and amended so as to best achieve regulatory objectives.

Statutory whistleblower protections '[t]o improve reporting of breaches of the corporate law' were proposed in 2002 by the Federal Government, which noted equivalent provisions under US corporate law.[31] In 2004, part 9.4AAA (entitled 'Protection for whistleblowers') was inserted into the *Corporations Act*.[32] While intended to 'encourage' corporate whistleblowing,[33] the consensus was that the 2004 laws did not achieve their policy objective.[34] In 2017, the Australian Government concluded the part 9.4AAA provisions were 'sparingly used and … increasingly perceived as inadequate, having regard to recent advances in the public sector, other parts of the private sector and overseas'.[35] Part 9.4AAA was substantially amended in 2019[36] and is now a principal component of Australia's legal framework for whistleblower protections in the private sector.[37]

Bowskill J (as her Honour then was) summarises the aims of the revised provisions:

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30 See Richard G Fox, 'Protecting the Whistleblower' (1993) 15(2) *Adelaide Law Review* 137, 139–42. See especially *Whistleblowers Protection Act 1993* (SA).

31 *Corporate Disclosure: Strengthening the Financial Reporting Framework* (Corporate Law Economic Reform Program Paper No 9, September 2002) 178–9. As to the state of statutory protections at the time, see Paul Latimer, 'Whistleblowing in the Financial Services Sector' (2002) 21(1) *University of Tasmania Law Review* 39, 44 ff.

32 See *CLERP 9 Act* (n 3) sch 4 pt 2.

33 Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [5.381].

34 See, eg, Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40(2) *Common Law World Review* 144, 153–4 <https://doi.org/10.1350/clwr.2011.40.2.0213>; Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty Hunters, Whistleblowers and a New Regulatory Paradigm' (2013) 41(5) *Australian Business Law Review* 292, 294–5, 297; Peter Coney and Christopher Coney, 'The *Whistleblower Protection Act* (Japan) 2004: A Critical and Comparative Analysis of Corporate Malfeasance in Japan' (2016) 42(1) *Monash University Law Review* 41, 46; Olivia Dixon, 'Honesty without Fear? Whistleblower Anti-retaliation Protections in Corporate Codes of Conduct' (2016) 40(1) *Melbourne University Law Review* 168, 170. See also Senate Economics References Committee (n 17) 201–7 [14.22]–[14.43].

35 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2017, 10098 (Mathias Cormann, Minister for Finance). See also Revised Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 (Cth) 8 [1.7]–[1.9] ('Revised Explanatory Memorandum').

36 *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).

37 Some private-sector organisations may also fall under similar regimes provided by sector-specific legislation: see, eg, *Aged Care Act 1997* (Cth) ss 54.4–54.8; *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) pt 10-5; *Fair Work (Registered Organisations) Act 2009* (Cth) pt 4A; *National Disability Insurance Scheme Act 2013* (Cth) s 73ZA; *Taxation Administration Act 1953* (Cth) pt IVD. These laws are similar to, but separate from, federal legislation for the public sector (the *Public Interest Disclosure Act 2013* (Cth)) and legislation existing in the states and territories.

> The purpose … is 'to *encourage* employees, officers and subcontractors engaged by a company to report *suspected* breaches of the corporations law to either ASIC or internally within the company' … The policy behind such encouragement reflects the dual aims of facilitating the early detection and prosecution of corporate misconduct, and promoting improved business practices and standards.[38]

The provisions are also shaped by competing policy interests. There is a clear interest in constraining individuals from distributing personal information and confidential business information, especially where that information may comprise untested allegations of misconduct.[39] Additionally, part 9.4AAA seeks not to undermine internal reporting channels; the conventional wisdom holds that misconduct is generally better handled internally first.[40]

Part 9.4AAA seeks to achieve its regulatory aims through mechanisms to facilitate whistleblowing, provide remedies for retaliation suffered because of disclosure and promote appropriate conduct towards whistleblowers. A brief summary of the law follows.

The concept of a 'qualifying disclosure' is central to most mechanisms provided by part 9.4AAA. Qualifying disclosures arise where *eligible whistleblowers* report *disclosable matters* to defined *recipients*.[41] An individual will be an 'eligible whistleblower' depending on their relationship to the 'regulated entity'.[42] Eligible whistleblowers include the entity's present or former officers, employees, suppliers, and associates,[43] as well as relatives and dependents of such persons.[44] A matter is *disclosable* 'if the discloser has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to' the entity.[45] This condition has subjective and objective dimensions,[46] and the degree of satisfaction required for a person to 'suspect' something is relatively low.[47] Where an individual is an eligible whistleblower and the information is a disclosable matter, she or he may communicate that information to certain

38 *Quinlan v ERM Power Ltd* (2021) 7 QR 377, 388 [18] (emphasis in original) (citations omitted) ('*Quinlan Strike-Out Application*').

39 This policy is reflected across other areas of law and equity: see generally Paul Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) 141–62 (considering duties of confidence in equity and contract); Patrick George, *Defamation Law in Australia* (LexisNexis, 4th ed, 2022) ch 4 (considering how defamation law protects reputation).

40 See Parker, Le Mire and Mackay (n 20) 1043–6; Lombard and Brand (n 1) 30–1.

41 *Corporations Act* (n 9) ss 1317AA(1)–(3).

42 Ibid ss 1317AAA–1317AAB.

43 Ibid ss 1317AAA(a)–(e).

44 Ibid ss 1317AAA(g)–(h). See also at s 9 (definitions of 'relative' and 'spouse').

45 Ibid s 1317AA(4). Two observations ought to be made for clarification. First, the *disclosable matter* condition can also be satisfied through section 1317AA(5), which more clearly identifies the kinds of matters that will qualify for protection. Second, although 'personal work-related grievances' may be disclosable matters, they may be excluded from the protection regime under section 1317AADA(1).

46 See *Quinlan Strike-Out Application* (n 38) 389 [24] (Bowskill J), quoted with approval in *Express Cargo Services Pty Ltd v Mysko* [2023] SASC 11, [506]–[507] (Stein J) ('*Mysko*').

47 See *HCF v The Queen* (2023) 415 ALR 190, 195 [13] (Gageler CJ, Gleeson and Jagot JJ).

recipients. Generally, recipients are limited to senior and authorised individuals within the entity,[48] regulators external to the entity,[49] or a legal practitioner.[50]

Part 9.4AAA's protective and compensatory mechanisms are designed to address the risks associated with making a qualified disclosure. First, section 1317AB grants wide immunities from the consequences of making a qualifying disclosure. These immunities lift restrictions that may otherwise inhibit a person from disclosing information, such as employment obligations as to confidentiality. Second, section 1317AAE prohibits those who receive qualifying disclosures from informing others of a whistleblower's identity, or sharing information that is likely to lead to the whistleblower's identity.[51] Third, section 1317AC prohibits victimisation against a person who has, or is believed or suspected to have, made a qualifying disclosure.[52] The section provides for 'dual-track' civil and criminal liability, as well as accessorial liability. Fourth, section 1317AE confers on the court a wide discretion to grant compensation (and other remedies) where a person has been victimised for making a qualifying disclosure (or victimised because he or she is believed or suspected to have made a disclosure).[53] Standard litigation processes are amended to make it easier for whistleblowers to pursue remedies: the burden of proof is reversed[54] and costs may only be awarded against a whistleblower if proceedings are instituted without reasonable cause.[55] In addition to these protective and compensatory mechanisms, the 2019 reforms require certain public and proprietary companies to have a whistleblower policy, and to make that policy available to officers and employees.[56]

In summary, a detailed regime exists to encourage whistleblowing. It does so by creating mechanisms to protect whistleblowers from harm, for the state to take action against those who victimise whistleblowers and for whistleblowers to seek compensation for harm they suffer as a result of reporting misconduct. Generally, these mechanisms – and particularly the requirement for companies to have whistleblower policies – seek also to influence long-term cultural change, so as to normalise speaking up about perceived misconduct.

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48 *Corporations Act* (n 9) s 1317AA(2). Section 1317AAC provides that internal disclosures may be made to officers or senior managers, auditors, actuaries and people authorised by the company to receive whistleblower reports.

49 Ibid s 1317AA(1).

50 Ibid s 1317AA(3). However, the disclosure must be 'for the purpose of obtaining legal advice or legal representation in relation to the operation of' part 9.4AAA.

51 Ibid s 1317AAE(1). But see at ss 1317AAE(2)–(3) (authorising further disclosure to government agencies and legal practitioners, and by consent), 1317AAE(4) (authorising further disclosure where it is reasonably necessary for the purposes of investigation).

52 Ibid ss 1317AC(1) (causing detriment to a person), (2) (threatening to cause detriment), (3) (accessorial liability). 'Detriment' is defined widely: at s 1317ADA.

53 The circumstances within which an order may be made are identified in section 1317AD of the *Corporations Act* (n 9).

54 Ibid s 1317AD(2B) (reversing the onus of proof where a whistleblower's case 'suggests a reasonable possibility' of certain matters).

55 Ibid s 1317AH.

56 Ibid s 1317AI. See also Australian Securities and Investments Commission, *Corporations (Whistleblower Policies) Instrument* (2019/1146, 13 November 2019) s 5(1) (excluding public companies from the requirement where revenue is less than $1 million).

B Review of Part 9.4AAA to Date

What do we know about the effect of these reforms? Some observations on the amended part 9.4AAA can be made from recent legal proceedings, the Australian Securities and Investments Commission's ('ASIC') reporting, and research on part 9.4AAA's internal corporate whistleblower policy requirement.

1 Legal Proceedings

Decided cases on legal reforms are often instructive for assessing whether doctrine achieves policy intention,[57] and for studying how law operates 'in action'.[58] The authors sought to identify and analyse legal proceedings where part 9.4AAA had been raised by parties. Searches were conducted online and were limited to the period of July 2019 to December 2023. They included keyword searches of legal databases (such as AustLII), media sources, and policy and grey literature repositories.[59] The searches identified proceedings involving the amended part 9.4AAA, as well as a few cases decided under the 2004 legislation.[60]

In the proceedings identified, at least three individuals raised the section 1317AB immunities as a defence to civil liability.[61] Several individuals sought remedies under the *Fair Work Act 2009* (Cth), alleging that unlawful adverse action was taken against them because they made qualifying disclosures.[62] With respect to the *Corporations Act* compensation provisions, applicants have unsuccessfully sought compensation under the 2019 reforms for conduct occurring before July 2019.[63] Several individuals applied for compensation orders (under section 1317AE), usually while seeking

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57 See, eg, *Digital Realty Trust Inc v Somers*, 583 US 149 (2018) ('*Digital Realty*') (where the Supreme Court did not accept the SEC's interpretation of 'whistleblower').

58 See, eg, Parker, Le Mire and Mackay (n 20) (using a case study to analyse whistleblowing by lawyers).

59 As this was not intended to be an exhaustive review, the authors did not request access to any court or tribunal files, or undertake a bibliometric analysis.

60 See, eg, *The Environmental Group Ltd v Bowd* (2019) 137 ACSR 352, 356–8 [10], 405–7 [180]–[183] (Steward J) (dismissing claim for compensation); *Blenkinsop v Wilson* [2019] WASC 77, [114]–[117] (Corboy J) (rejecting submission that section 1317AB conferred immunity for breach of intervention order). See also at [118]–[140] (rejecting submission that conduct by others breached the whistleblower protections); *Olson v Keefe [No 2]* (2017) 122 ACSR 395, 414–15 [53]–[59] (Bromwich J) (summarily dismissing one of three victimisation claims).

61 In *Mysko* (n 46), the Court found that part 9.4AAA did not apply on several grounds: see [508] (Stein J). An appeal was dismissed: *Mysko v Express Cargo Services* [2023] SASCA 120. In the interlocutory decision of *Wu v United Overseas Bank Ltd, Sydney Branch [No 2]* [2021] FedCFamC2G 264 ('*Wu*'), the Court found against the respondent because of a lack of evidence or specificity regarding the 'reasonable grounds' for her belief as to misconduct: see at [85]–[89] (Judge Manousaridis). In another interlocutory decision, the Court found disclosures were made to persons other than 'qualified recipients' and did not consider it necessary to determine whether the disclosures were 'disclosable matters': see *Aland Care Pty Ltd v Pollard* [2023] NSWSC 1466, [29], [31] (Robb J).

62 See, eg, *Buckeridge v Littlepay Pty Ltd* [2023] FCA 1036, [159]–[162] (O'Callaghan J) (dismissing the application for several reasons). In *Sheldon v Donvale Christian College* (2022) 373 FLR 287, the Court found the applicant was entitled to protection: see at 316 [107], 323 [123], [125] (Judge Riley). However, the applicant's dismissal from employment was unrelated to her disclosures: see at 313–15 [91]–[104], 324 [126].

63 The applicants were unsuccessful: see *Alexiou v Australia & New Zealand Banking Group Ltd* (2020) 303 IR 35; *Watson v Greenwoods & Herbert Smith Freehills Pty Ltd* (2023) 413 ALR 227, 242–3 [35]–[47] (Moshinsky, Abraham and Raper JJ) (special leave to appeal to the High Court was subsequently refused).

relief on other bases (such as for breach of contract). Some of these cases were finalised before trial and the terms of settlement are not publicly known.[64]

Compensation orders are also sought in active proceedings before the Queensland Supreme Court (commenced in 2020),[65] the New South Wales Supreme Court (commenced in 2021),[66] and the Federal Court of Australia (commenced in 2021[67] and 2022).[68] Additionally, in 2023 ASIC commenced civil proceedings against a coal producer and four individuals in the Federal Court. Among other things, ASIC allege a former employee internally reported concerns about falsified coal quality results and was subsequently subject to detrimental conduct.[69]

So far, the legal proceedings provide limited insight into part 9.4AAA's effectiveness. Online databases do not reveal how many disputes are resolved before litigation is commenced;[70] the information on the public record makes it difficult to determine how many litigants could properly be regarded as whistleblowers (even on a broad, non-legal understanding of the term);[71] and few

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64 For one example, see *Baxter v RACQ Operations Pty Ltd* (Federal Court of Australia, NSD406/2021, lodged 6 May 2021); Felicity Ripper, 'RACQ Settles with Former Executive Who Claimed Unfair Dismissal', *The Courier Mail* (online, 14 July 2021) <https://www.couriermail.com.au/business/qld-business/racq-settles-with-former-executive-who-claimed-unfair-dismissal/news-story/c093fbb33876c19844b5aea88d55162b>. For a second example, see David Marin-Guzman, 'CBA Whistleblower Settles Lawsuit against Bank', *Australian Financial Review* (online, 6 October 2021) <https://www.afr.com/work-and-careers/workplace/cba-whistleblower-settles-lawsuit-against-bank-20211006-p58xmu>; Order of Perram J in *Nicholls v Commonwealth Bank of Australia* (Federal Court of Australia, NSD786/2021, 5 October 2021). For a third example, see Natalie Moses, 'Statement of Claim' in *Moses v Hillsong Citycare*, NSD629/2022, 12 August 2022. A Notice of Discontinuance was filed on 29 March 2023.

65 *Quinlan v ERM Power Ltd* [2023] QSC 80, [8]–[12], [21] (Brown J). See also *Quinlan Strike-Out Application* (n 38) (strike-out application); *Quinlan v ERM Power Ltd [No 2]* (2021) 7 QR 406 (application for costs of strike-out application). The proceeding was ongoing as of 11 August 2023.

66 *Saridas v Papuan Oil Search Ltd [No 3]* [2022] NSWSC 1515, [1] (Schmidt AJ). See also *Saridas v Papuan Oil Search Ltd* [2022] NSWSC 825 (Schmidt AJ) (summary dismissal and strike-out application); *Saridas v Papuan Oil Search Ltd [No 2]* [2022] NSWSC 1032 (Schmidt AJ); *Saridas v Papuan Oil Search Ltd [No 4]* [2023] NSWSC 1190 (Schmidt AJ) (summary dismissal and strike-out application, and application for advance evidentiary rulings). The proceeding was ongoing as of 10 October 2023.

67 *Braun v St Vincent's Private Hospital Northside Ltd* (2023) 323 IR 260, 263 [8], 263 [10] (Rangiah J). The proceeding was ongoing as of 4 October 2024.

68 See *Pigozzo v Mineral Resources Ltd* [2022] FCA 1166, [1], [91], [94], [119] (Feutrill J). The Court struck out parts of the first statement of claim, but granted leave to file an amended version: see *Pigozzo v Mineral Resources Ltd* [2023] FCA 331 (Colvin J) (refusing leave to appeal). More recent reasons for decision suggest that the final statement of claim has not been filed, so it is unclear how the whistleblower allegations will be formulated in a further pleading (if at all): see *Pigozzo v Mineral Resources Ltd [No 2]* [2023] FCA 478 (Colvin J) (application for costs); *Pigozzo v Mineral Resources Ltd [No 2]* [2023] FCA 1489, [20] (Feutrill J) (application for leave to issue subpoenas). The proceeding was ongoing as of 11 September 2024.

69 See Australian Securities and Investments Commission, 'Statement of Claim' in *ASIC v TerraCom Ltd*, NSD176/2023, 24 May 2023 [27], [36], [178]–[194]. See also Australian Securities and Investments Commission, 'Originating Process' in *ASIC v TerraCom Ltd*, NSD176/2023, 28 February 2023. ASIC's enforcement proceeding followed litigation concerning its right to inspect a document seized from the company: see *TerraCom Ltd v ASIC* (2022) 401 ALR 143; *TerraCom Ltd v ASIC* [2022] FCAFC 151.

70 Such an outcome is envisaged, in part, by the Federal Court's expectation that parties take 'genuine steps' to resolve a dispute before commencing proceedings: see *Federal Court Rules 2011* (Cth) rr 5.03, 8.02.

71 In several cases, individuals do not appear to have clearly identified any conduct that may be considered inappropriate: see, eg, *Wu* (n 61) [85]–[89] (Judge Manousaridis). Cf Dussuyer et al (n 27) 21–5 (summarising that many interviewed disclosure recipients believed 'that whistleblowing often became

cases are yet to be determined on their merits. Further, any fulsome review of the compensation provisions might explore the extent to which whistleblowers are able to access compensation for suffering detriment through other legal processes, such as workers' compensation, and the efficacy of those processes.[72]

On the one hand, this review identifies some positive effects of the laws. First, the existence of *some* whistleblower cases suggests an improvement on the 2004 laws, especially noting applications made under the new regime despite the alleged detrimental conduct having occurred before its operation. Second, there is evidence that *some* disputes have been resolved under the amended part 9.4AAA. If settlements are occurring on terms favourable to whistleblowers, it suggests the compensation provisions are working at least partly as intended.[73] Third, the published decisions do not reveal any unexpected curiosities in part 9.4AAA, suggesting that the provisions operate according to their legislative design (disregarding for the moment their efficacy).

On the other hand, the total number of whistleblower proceedings might indicate that the reforms are not having their desired effect. It appears no person has yet been found to have retaliated against a whistleblower in contravention of the *Corporations Act*.[74] Further, the total number of compensation applications is small. This may reflect a poor fit between adversarial justice and whistleblower compensation.[75] It might also illustrate how broader access to justice challenges intersect with whistleblower reprisals.[76] In any event, it is hard to draw conclusions as to the efficacy of protections provisions while the superior court cases remain active.

2 Disclosures to ASIC

ASIC reports and commentary offers some insight into the effects of the reforms. Whistleblower disclosures to ASIC have increased significantly since July 2019.[77] Meanwhile the proportion of valuable information received through

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a "catch all" for any issues arising in the workplace, thus diluting the importance of the concept that originally focussed on serious misconduct and corruption'), 54.

72 See Dussuyer et al (n 27) 44, 48; *Mishra v NBN Co Ltd* [2024] VSC 146, [114]–[125] (Ierodiaconou AsJ) (concluding that a person's claim for compensation under section 1317AE was 'extinguished' by a federal workers' compensation statute).

73 After all, there is 'a very significant public interest in the settlement of proceedings': *Patterson v Westpac Banking Corporation [No 2]* [2024] FCA 818, [18] (Raper J). See also David Bamford and Mark Rankin, *Principles of Civil Litigation* (Lawbook, 3rd ed, 2017) 24–5 (summarising that only 'the few or exceptional cases … get to trial').

74 Cf Australian Securities and Investments Commission, 'ASIC Sues TerraCom Limited, Its Managing Director, Chief Commercial Officer, Former Chair and a Former Director' (Media Release 23-045MR, 1 March 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-045mr-asic-sues-terracom-limited-its-managing-director-chief-commercial-officer-former-chair-and-a-former-director/>.

75 See Terry Dworkin, 'SOX and Whistleblowing' (2007) 105(8) *Michigan Law Review* 1757, 1764–6.

76 See, eg, Laura William and Wim Vandekerckhove, 'Fairly and Justly? Are Employment Tribunals Able to Even Out Whistleblowing Power Imbalances?' (2023) 182(2) *Journal of Business Ethics* 365 <https://doi.org/10.1007/s10551-021-05023-8>; Pascoe and Welsh (n 34) 151–3.

77 According to ASIC's annual reports from 2015–16 to 2022–23, whistleblower disclosures have increased from 146 disclosures (in 2015–16) to 793 disclosures (in 2022–23). In the four financial years preceding the 2019 reforms, 826 disclosures were received (an average of 207 each year). In the four years following the reforms, disclosures increased to 3,028 in total (an average of 757 each year). It appears that ASIC

whistleblower disclosures appears to have remained reasonably consistent,[78] suggesting that ASIC are receiving a substantial increase in valuable information. That circumstance may dispel concerns that increased whistleblowing would generate a non-productive burden for the regulator.

ASIC has also confirmed it undertook 'several investigations into whether whistleblowers have been properly treated and whether issues have received appropriate attention'.[79] With the exception of the allegations currently before the Federal Court, ASIC found companies 'responded appropriately' to disclosures.[80] This information suggests the 2019 reforms have had a positive effect and may be working as intended, increasing whistleblowing activity.

3 Reviews of the Whistleblower Policy Requirement

The whistleblower policy requirement has been the subject of research. On a positive note, ASIC's research appeared to find that companies did have policies.[81] As to their content, ASIC reported 'many did meet some of the requirements' of part 9.4AAA.[82] KN Thilini Dayarathna et al, who studied policies published by 66 Australian Securities Exchange ('ASX')-listed companies, considered the mandated content of policies was either 'moderately explained' or 'well explained' for 73% of policies.[83] On a less positive note, Dayarathna et al conclude that their findings suggest 'low active engagement by those charged with governance to introduce processes and mechanisms to ensure whistleblower protection'.[84] Similarly, in 2021, ASIC reported that 'the majority of policies we reviewed *did not* fully address the legal requirements'.[85] For example, two in five policies were found not to 'adequately summarise the threshold criteria for whistleblowers to

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do not filter these data for disclosures from 'eligible' whistleblowers and it does not seem the method for calculating disclosures has changed over time: see Australian Securities and Investments Commission, Answer to Question on Notice No 29 to Senate Economics References Committee, Parliament of Australia, *Australian Securities and Investments Commission Investigation and Enforcement* (28 June 2023) 2.

78 Each year, ASIC reports on the percentage of disclosures where further action was not required. The percentage ranges from approximately 80% (in 2015–16) to 95% (in 2017–18). On average, further action was not required for 91% of disclosures.

79 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 9 November 2022, 70 (Joe Longo, ASIC Chair).

80 Ibid.

81 ASIC did not explicitly state that all companies under review had a policy: Letter from Greg Yanco and Kim Demarte, Australian Securities and Investments Commission to CEOs of Public Companies, Large Proprietary Companies, and Corporate Trustees of Registrable Superannuation Entities, 13 October 2021 (summarising findings from a review of 102 policies) ('ASIC Letter').

82 Sean Hughes, 'Whistleblower Policies and the Compliance Gap' (Speech, Australian National Whistleblowing Symposium, 11 November 2021) <https://asic.gov.au/about-asic/news-centre/speeches/whistleblower-policies-and-the-compliance-gap/>.

83 KN Thilini Dayarathna et al, 'How Corporates Responded to the New Whistleblower Reforms: Evidence from ASX-Listed Companies' (2023) 38(2) *Australian Journal of Corporate Law* 157, 164–5, 171, 184–5. It is unclear whether the authors collected data before or after ASIC's review.

84 Ibid 189.

85 Hughes (n 82) (emphasis in original).

qualify for protection'.[86] (ASIC has indicated there has been greater compliance by companies since its education efforts started.)[87]

It seems likely that companies are developing better-practice policies than they previously were, which may contribute to long-term cultural change.[88] The initial level of non-compliance suggests internal reporting channels are not a priority for all – or perhaps many – companies, even in circumstances where failing to have a compliant policy was a strict liability offence (carrying a maximum penalty of $12,600).[89] While it is unclear how non-compliant policies might be influencing internal governance,[90] attitudes of this kind may fall short of the 'improve[d] culture and transparency' the legislation was designed to support.[91]

4 Summary on Effectiveness of 2019 Reforms

The 2019 reforms seem to be having mixed success in achieving their regulatory objectives. At a minimum, it is fair to conclude that the 2019 reforms improved on the 2004 laws.[92] The 2019 reforms created doctrinal protections that are theoretically capable of supporting positive regulatory outcomes; there is evidence that *some* individuals may have been compensated for detriment suffered as a result of reporting wrongdoing; and ASIC's reporting on disclosures, and the effect of its ongoing education program for whistleblower policies, appear positive. These are modest signs of improvement which must be considered having regard to the ultimate goal of achieving cultural change. It is a long game. Nonetheless, the absence of public examples of whistleblowers being compensated, and anti-retaliation provisions being enforced, may not be regarded as sending a clear signal that it is safe to report misconduct, despite the 2019 reforms.

There are beliefs among academics, lawyers, professional associations and politicians that part 9.4AAA remains sub-optimal in encouraging whistleblowing,

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86 Ibid. For example, ASIC reported that one-third of policies stated that 'whistleblowers must make disclosures in "good faith" or without "malice" in order to qualify for protections': ASIC Letter (n 81) 7. See also Dayarathna et al (n 83) 188.

87 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 9 November 2022, 70 (Sean Hughes, ASIC Commissioner).

88 For research on company policies before 2019, see Pascoe and Welsh (n 34) 165–8 (reviewing 186 policies of top 200 ASX-listed companies); Dixon (n 34) 184, 204–5 (reviewing 166 policies of top 200 ASX-listed companies). The post-2019 research did not replicate the methodology of Pascoe and Welsh (n 34) or Dixon (n 34), and did not study the same specific companies they studied. These differences limit the extent to which they can be used to infer longitudinal changes.

89 *Corporations Act* (n 9) ss 1311(1), 1317AI(1)–(4), sch 3 (fixing a maximum penalty of 60 penalty units). One penalty unit was equal to $222 as of 1 July 2020: Attorney-General, *Notice of Indexation of the Penalty Unit Amount* (F2020N00061, 1 July 2020). It has since increased to $313: Attorney-General, *Crimes (Amount of Penalty Unit) Instrument 2023* (F2023N00196, 1 July 2023).

90 Likewise, the existence of a compliant policy does not confirm how whistleblowers are treated in practice: Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(1) *Administration and Society* 3, 28–9 <https://doi.org/10.1177/0095399708328869>; Dussuyer et al (n 27) 56, 58; Pascoe and Welsh (n 34) 168–70.

91 Revised Explanatory Memorandum (n 35) 45 [2.144].

92 See Senate Economics Legislation Committee, Parliament of Australia, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (Report, March 2018) 15–25 [3.20]–[3.73] ('*Whistleblower Protections Bill Report*').

and further law reform is required.[93] If law reform is contemplated, one approach could be to further enhance the existing protections and supports for whistleblowers, thereby reducing the perceived risks that weigh against the decision to report. This could be achieved by increasing the scope and content of whistleblower protections,[94] promoting coherence across different whistleblower regimes, or establishing a central authority to advise whistleblowers and act as a 'cleaning house' for disclosures.[95] However, existing reforms do not appear to have reset Australia's corporate whistleblowing landscape to a degree proportionate to estimated rates of corporate wrongdoing. Perhaps, as Allan Fels comments, 'it is not a rational decision to do the right thing and speak up about wrongdoing because the incentives are all wrong'.[96]

An alternative approach is to look for other ways of influencing the cognitive balancing process undertaken by potential whistleblowers, noting the different regulatory tools identified by Feldman and Lobel.[97] This article now considers whether financial incentives, as one such tool, might contribute positively to Australian corporate regulation.

IV FINANCIAL INCENTIVES FOR WHISTLEBLOWERS

A History and Models

The Australian Government has a long history of using financial incentives as a regulatory tool to influence behaviour in tax and criminal law contexts.[98] Arie Freiberg identifies how incentives have taken the form of 'tax deductions, tax rebates, tax benefits, discounts or concession, subsidies, bounties and grants'.[99] Among these incentives are payments in exchange for information on unlawful behaviours, 'mak[ing] up for limited police numbers or for those situations which public policing is unable to penetrate'.[100] Such arrangements are illustrated by the state and Commonwealth 'Crime Stoppers' programs;[101] the New South Wales program was designed to '[encourage] involvement of citizens to establish a

93 See, eg, Fels (n 14); Institute of Public Accountants (n 14) 10; Pender (n 14) 10; Governance Institute of Australia, Submission No 22 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry* (31 August 2023) 2. See generally Australian Law Reform Commission (n 13) 509–10 [11.60]–[11.69].

94 Compare, eg, the extension of protections effected by the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* (Cth) sch 2.

95 *PJC Whistleblowing Report* (n 4) ch 12.

96 Fels (n 14). Cf Dworkin (n 75) 1767.

97 Feldman and Lobel (n 29) 1160.

98 As Freiberg (n 17) summarises, providing 'bounties became a Commonwealth activity soon after federation': at 32.

99 Ibid 246.

100 Ibid 247.

101 Challinger suggests the 'Crime Stoppers' initiative originated in the US in the 1970s: Dennis Challinger, *Crime Stoppers Victoria: An Evaluation* (Technical and Background Paper No 8, Australian Institute of Criminology, 2004) 6.

problem solving partnership'.[102] Nonetheless, there has been less enthusiasm for using financial incentives to encourage corporate whistleblowing. In the same year Crime Stoppers was introduced in New South Wales, a federal parliamentary committee 'reject[ed] any suggestion that a system of rewards for informers … be introduced in Australia' to address insider trading.[103] The committee concluded: 'Such a system is … incompatible with accepted principles and practice within Australian society.'[104]

Two US award models dominate academic and policy discussions on whistleblower incentives. The first model, *qui tam* litigation under 'False Claims' legislation, enables citizens to bring actions on the government's behalf for fraudulent conduct.[105] Individuals are entitled to a proportion of the amount recovered if they succeed.[106] Pamela Bucy argues that *qui tam* actions demonstrate the contribution private justice can make to public regulation through bringing 'needed resources to public regulatory efforts'.[107] *Qui tam* actions locate the enforcement role on the private side of this public–private partnership, enabling private citizens to assume the role of defender of the state's rights.

The second model is the SEC's Whistleblower Program, operated by its Office of the Whistleblower since 2011 ('the SEC program').[108] In July 2016, the OSC started its Whistleblower Program ('the Ontario program').[109] The Ontario program

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102 New South Wales Police Service, *Annual Report 1989–90* (Report, 1990) 71 ('*1990 Report*'). In New South Wales, Crime Stoppers was established as a government program in 1989 and had paid out 22 rewards by June 1990: New South Wales Police Service, *Annual Report 1988–89* (Report, 1989) 61; New South Wales Police Service, *1990 Report* (n 102) 71. As of 16 March 2024, a New South Wales Police Force webpage states: 'Police need your help in solving the cases listed in this site. You may be eligible for a reward if you can provide information that leads to an offender being charged and convicted.' The webpage goes on to identify about 140 cases, sorted into ten 'reward' tiers, ranging from $1 million to $50,000: 'Rewards Offered', *New South Wales Police Force* (Web Page) <https://www.police.nsw.gov.au/can_you_help_us/rewards>.

103 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Fair Shares for All: Insider Trading in Australia* (Report, October 1989) 45 [4.14.4].

104 Ibid.

105 Steven L Jackson and Erin Reilly Lewis, '*Qui Tam* Relator Suits and False Claims Act Proceedings' in James T O'Reilly et al (eds), *Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory Violations* (Oxford University Press, 2009) 221, 223. See also William Blackstone, *Commentaries on the Laws of England*, ed Thomas P Gallanis (Oxford University Press, 2016) bk 3, ch 9 108 <https://doi.org/10.1093/actrade/9780199601011.book.1>. Roman Artemiev describes the 'historical antecedents' of *qui tam* in the laws of Athens and Rome: Roman Artemiev, '*Qui Tam* Legal Concept and Practice: Evolution of the Legislation in the United Kingdom and the United States of America' (PhD Thesis, University of Westminster, January 2017) 23–32.

106 Jackson and Lewis (n 105).

107 Pamela H Bucy, 'Information as a Commodity in the Regulatory World' (2002) 39(4) *Houston Law Review* 905, 915. A particularly insightful paper by John Braithwaite presents both optimistic and pessimistic visions of 'flipping markets in vice to markets in virtue' through *qui tam* litigation: John Braithwaite, 'Flipping Markets to Virtue with *Qui Tam* and Restorative Justice' (2013) 38(6–7) *Accounting, Organizations and Society* 458, 458 <https://doi.org/10.1016/j.aos.2012.07.002>.

108 See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 922(a), 124 Stat 1376, 1841 (2010).

109 See generally Ontario Securities Commission, *Update on the OSC Whistleblower Program 2016 to 2022* (Report, 9 March 2023) <https://www.osc.ca/en/enforcement/osc-whistleblower-program/update-osc-whistleblower-program-2016-2022> ('*Ontario Program Report*').

was designed with reference to the 'apparent success' of the SEC program, as well as an initiative of the Canada Revenue Agency.[110] Under these programs, the state retains its traditional enforcement role.

This article studies the SEC and Ontario programs as a model for several reasons. First, a key concern expressed about whistleblower incentives is the evidence base for (and against) them. This article's focus enables the experiences and perceptions of the North American programs to be comprehensively examined from different perspectives and drawing on diverse sources. The evidence to be interrogated is now considerable because the model has operated for an extended period of time and across two common law jurisdictions. The length of operation of the model in the US and Ontario also assists in anticipating whether such reforms might have unexpected results for the private sector. In the strongly regulated, market-facing environment in which Australian corporations operate, predictability and certainty are important regulatory aims. Second, the SEC program was favoured over other models by the PJC, following its inquiry. That fact demonstrates a degree of bipartisan support for (or at least interest in) it as the preferred model for Australia. Third, the North American programs are designed to address securities-related misconduct. They are tailored to distinctive features of corporate crime and whistleblowing in the private sector (which presents a different context to public sector whistleblowing).

A limitation of the financial award model should be noted at the outset. If the policy objective is to compensate whistleblowers, these programs are not well suited to the task. Occasionally award amounts are influenced by harm suffered by a whistleblower.[111] However, a compensatory outcome is incidental to the primary functions of an award process: incentivising individuals to report misconduct and creating an additional source of pressure on companies to comply with the law. Under the SEC and Ontario programs, harm suffered by an individual is not linked to the making of an award (and only weakly linked to the quantum of that award).[112]

The following analysis draws on a diversity of recent, authoritative sources to address common arguments for and against introducing incentives for corporate

110 Ontario Securities Commission, 'Proposed Framework for an OSC Whistleblower Program' (Ontario Securities Commission Staff Consultation Paper No 15-401, 3 February 2015) 3–4 <https://www.osc.ca/en/securities-law/instruments-rules-policies/1/15-401/osc-staff-consultation-paper-15-401-proposed-framework-osc-whistleblower-program>.

111 See, eg, US Securities and Exchange Commission, *Order Determining Whistleblower Award Claim* (Release No 88547, 3 April 2020) 2; US Securities and Exchange Commission, *Order Determining Whistleblower Award Claims* (Release No 90247, 22 October 2020) 5; US Securities and Exchange Commission, *Order Determining Whistleblower Award Claim* (Release No 88689, 20 April 2020) 2.

112 There may well be circumstances where a whistleblower may disclose valuable information to a regulator, suffers serious detriment as a result of disclosure, and the regulator (a) properly determines not to take enforcement action; (b) is unsuccessful in the enforcement action; or (c) the enforcement action succeeds, but the penalty imposed (or amount recovered) falls below the eligibility threshold. In each circumstance, the whistleblower would not benefit from the award system, for reasons wholly unrelated to him or her. As to the quantum issue, see *PJC Whistleblowing Report* (n 4) 113 [10.2], 123 [11.1]; Australian Law Reform Commission (n 13) 510 [11.65].

whistleblowers (expressed in Australia[113] and other jurisdictions).[114] In short, the interrelated issues often debated include:

(a) If, and how, incentives contribute to positive regulatory outcomes – that is, a pragmatic approach. For example, do awards motivate individuals to report misconduct, promote corporate compliance with the law and foster positive corporate culture?
(b) If, and how, incentives contribute to negative regulatory outcomes. For example, does an award process promote external disclosures over the use of internal whistleblower systems (and so bypassing opportunities to solve problems early), encourage individuals to withhold information to increase a potential award, or contribute to negative corporate culture?
(c) Can whistleblowers be better protected, and whistleblowing better facilitated, through other mechanisms (such as by imposing positive duties on companies to protect whistleblowers, establishing dedicated agencies to support whistleblowers, or establishing immunity policies)?
(d) Whether incentives are morally, ethically or culturally appropriate. For example, should individuals be rewarded for reporting misconduct when they are morally obliged to do so regardless? Are financial incentives conducive to building a sustainable, ethical climate?

In Part IV(B), this article examines how the theoretical and emerging empirical scholarship on financial incentives provide insight into these issues. Part V offers a more granular analysis by focusing on the SEC and Ontario programs and addressing unanswered questions that lingered over past consideration of Australia's whistleblower laws.

B Theoretical and Empirical Research

Financial incentives are intended to regulate business by (1) encouraging whistleblowers to report serious misconduct; and (2) promoting higher standards of

113 For review of the arguments for/against whistleblower awards in Australia, see *PJC Whistleblowing Report* (n 4) ch 11; *Whistleblower Protections Bill Report* (n 92) 14–15 [3.17]–[3.19]. For academic perspectives generally, see Bruce Chapman and Richard Denniss, 'Using Financial Incentives and Income Contingent Penalties to Detect and Punish Collusion and Insider Trading' (2005) 38(1) *Australian and New Zealand Journal of Criminology* 122 <https://doi.org/10.1375/acri.38.1.122>; Bob Baxt, 'New Whistleblowing Initiatives' (2017) 33(8) *Company Director* 54; Brand, Lombard and Fitzpatrick (n 34) 300–4; David A Chaikin, 'Reforming Private Whistleblower Protections: What Next in Australia?' (2020) 48(1) *Australian Business Law Review* 50, 60–3.

114 For a comparative perspective across multiple jurisdictions, see Janet Austin, 'To Reward or Not to Reward: A Cross-Jurisdictional Comparison of the Reasons Why Securities Regulators Have Adopted or Rejected Policies to Pay Whistleblowers' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 65 <https://doi.org/10.1007/978-981-15-0259-0_3>. For specific jurisdictions see, eg, Helena Wood, 'Reframing the UK Debate on Financial Crime Whistleblower Rewards', *Royal United Services Institute for Defence and Security Studies* (Commentary, 7 February 2023) <https://www.rusi.org/explore-our-research/publications/commentary/reframing-uk-debate-financial-crime-whistleblower-rewards>; Connor Bildfell, 'In-House Counsel's Eligibility for Whistleblower Awards: A Critical and Comparative Analysis' (2018) 49(2) *Ottawa Law Review* 373, 384–93; Kristian Metzler, 'Comparing Insider Trading Enforcement in Australia and New Zealand: How New Zealand Can Achieve Stronger Enforcement' (2023) 38(2) *Australian Journal of Corporate Law* 191, 211–14.

business conduct (given the increased risk of misconduct being reported externally if it is not addressed internally). An emerging field of research provides support for these theorised contributions.[115]

1 Do Awards Influence the Intention to Report Misconduct?

As illustrated above, Australian whistleblower laws have generally sought to encourage whistleblowing by ameliorating the anticipated cost of reporting misconduct. In theory, financial incentives are directed at the same outcome. However, the encouragement is instead achieved by *incentivising* disclosure.

Empirical research on *qui tam* litigation is instructive for understanding how incentives might generally influence whistleblowing intention. *Qui tam* actions are a different scheme from award programs, particularly because of the principal role of the citizen as a 'prosecuting authority'.[116] Nonetheless, they both function to award to whistleblowers a proportion of a sum ultimately paid to the state, thus creating a comparable incentive to report misconduct. Two comprehensive studies of *qui tam* litigation are particularly instructive in this respect.

Alexander Dyck, Adair Morse and Luigi Zingales analysed 216 cases of alleged frauds in large US companies between 1996 and 2004. Their sample included health care companies where financial incentives were available to whistleblowing employees through *qui tam* litigation, as well as companies where incentives were not available to whistleblower employees. The study found employees reported the fraud in 41% of the health care matters, yet employees were the reporter in 14% of non-health care frauds (where no incentive existed). Dyck, Morse and Zingales conclude: '[A] strong monetary incentive to blow the whistle does motivate people with information to come forward.'[117]

Aiyesha Dey, Jonas Heese and Gerardo Pérez-Cavazos examine 5,138 *qui tam* cases brought against public and private US organisations.[118] The cases were filed across the 12 regional court circuits, with particular circuits being affected differently by three Court of Appeal decisions. Each decision increased financial incentives for bringing claims within particular circuits.[119] The authors collected data on (a) the number of cases filed in each circuit; (b) the length of time the Department of Justice spent investigating each case (assuming the department is likely to spend more time investigating valuable disclosures); and (c) case outcomes. The study found that appeal court 'decisions that increased the financial incentives for whistleblowing … incite whistleblowers to file a greater number of lawsuits, which the [Department of Justice] investigates for a longer period and

115 The following review focuses on research published since 2010. For reviews of earlier research see, eg, Dworkin (n 75) 1769–73.

116 Bucy (n 107) 910.

117 Dyck, Morse and Zingales (n 2) 2215. See also at 2246–8, 2251.

118 Aiyesha Dey, Jonas Heese and Gerardo Pérez-Cavazos, 'Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers' (2021) 59(5) *Journal of Accounting Research* 1689, 1701, 1702 (Table 1, Panel A) <https://doi.org/10.1111/1475-679X.12370>.

119 As the authors indicate, 'exploiting [the] appeals-court decisions comes close to a natural experiment': ibid 1691 (citations omitted).

that are more likely to result in a settlement'.[120] Ultimately, the authors conclude there is evidence that financial award 'programs help to expose misconduct'.[121]

Further empirical work examines the effect of incentives using experimental methods, usually measuring US participant responses to hypothetical corporate misconduct scenarios. These studies generally find that awards motivate whistleblowing,[122] or at least do not lower whistleblowing intention.[123]

Several publications address specific concerns raised about incentives. First, there are arguments that award processes increase frivolous or unhelpful disclosures to regulators.[124] Paul Andon et al found that the intention of US accountants to report fraud externally was 'significantly higher' in the presence of an SEC-style program, 'particularly in relation to incidents that may be regarded as of lower significance'.[125] Nonetheless, the authors conclude: '[G]iven the social and economic costs of financial statement fraud, we argue that the benefits of increasing the intention to whistleblow outweigh the additional costs of processing [less serious] reports.'[126] (We return to this issue below, in Part V(C).)

Second, there is an important question as to whether whistleblower awards might be counterproductive because they re-frame the reporting decision to be an economic question, rather than an ethical/moral question. Some research suggests that incentives might 'crowd out' pro-social motivations, and so reduce reporting intention.[127] Feldman and Lobel surveyed 2,081 adults in the US, asking

120 Ibid 1733.

121 Ibid 1692.

122 See, eg, Jeffrey V Butler, Danila Serra and Giancarlo Spagnolo, 'Motivating Whistleblowers' (2020) 66(2) *Management Science* 605, 614–17 <https://doi.org/10.1287/mnsc.2018.3240> (experiment involving 103 simulated, three-person firms); Masaki Iwasaki, 'Relative Impacts of Monetary and Non-monetary Factors on Whistleblowing Intention: The Case of Securities Fraud' (2020) 22(3) *University of Pennsylvania Journal of Business Law* 591, 615–16 (experiment involving 200 US workers). For further research, see the literature reviewed by these authors, as well as Wim Vandekerckhove, Bethania Antunes and Kate Kenny, *What Do We Know about Rewards for Whistleblowers* (Report, March 2018) 18–24; Daniel J Gaydon and Douglas M Boyle, 'The Effects of Whistleblower Program Financial Incentives and Administration on Financial Managers' Reporting Judgments' (2023) 8(1) *Journal of Forensic Accounting Research* 387 <https://doi.org/10.2308/JFAR-2022-026>.

123 See, eg, Kelly Richmond Pope and Chih-Chen Lee, 'Could the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of 2010 Be Helpful in Reforming Corporate America? An Investigation on Financial Bounties and Whistle-Blowing Behaviors in the Private Sector' (2013) 112(4) *Journal of Business Ethics* 597 <https://doi.org/10.1007/s10551-012-1560-7> (experiment involving 97 US university students).

124 See below Part V(C)(1).

125 Paul Andon et al, 'The Impact of Financial Incentives and Perceptions of Seriousness on Whistleblowing Intention' (2018) 151(1) *Journal of Business Ethics* 165, 172, 176 <https://doi.org/10.1007/s10551-016-3215-6> (experiment involving 80 US accountants).

126 Ibid 176.

127 See Feldman and Lobel (n 29) 1178–81; Vivienne Brand, 'The Ethics of Corporate Whistleblowing Rewards' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 37, 48–50 <https://doi.org/10.1007/978-981-15-0259-0_2>. Jonathan Farrar, Cass Hausserman and Morina Rennie identify inconsistent findings and methodological limitations in subsequent recent research on the 'crowding out' phenomenon: Jonathan Farrar, Cass Hausserman and Morina Rennie, 'The Influence of Revenge and Financial Rewards on Tax Fraud Reporting Intentions' (2019) 71 *Journal of Economic Psychology* 102, 105–6 <https://doi.org/10.1016/j.joep.2018.10.005>.

them to respond to a hypothetical scenario of corporate misconduct. Participants received different instructions regarding the legal duties, protections, penalties and rewards that apply to the scenario.[128] Financial incentives influenced participants differently, depending on (a) the perceived morality of corporate conduct; and (b) whether the reward was low ($1,000) or high ($1 million). The research found that 'framing reporting as a commodity with a price tag attached may actually suppress internally motivated action', although the crowding-out effect largely disappears with the introduction of sufficiently high monetary rewards.[129] It is doubtful that this phenomenon has arisen for the whistleblower awards presently considered, given that they are directed at serious misconduct and are usually made for more than $1 million.[130]

Generally, the studies conclude that financial awards do not discourage whistleblowing. Rather, the findings of (and policy recommendations arising from) the research support the view that awards motivate individuals to report corporate misconduct in the US.

2 Do Awards Deter Corporate Misconduct (and/or Promote Compliance with the Law)?

Benjamin van Rooij and Adam Fine summarise that 'corporate deterrence is difficult' and 'the existing science does not provide strong evidence that punishment consistently and effectively deters corporate wrongdoing'.[131] Similarly, theorising from extensive empirical research on Australian businesses, Christine Parker and Vibeke Nielsen conclude: 'Giving regulators bigger and bigger sticks might seem like an easy route to greater deterrence. But logic and evidence show that there is no easy route to deterrence.'[132] The researchers instead suggest 'regulators should not only have big sticks but must also work out how to make business people feel as if big brother's eyes and spies (the regulator and various third parties) will always find out about their wrongdoings'.[133] Since the PJC inquiry, research has interrogated how incentives might contribute to embedding such a feeling within businesses.

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128 Feldman and Lobel (n 29) 1187–9.

129 Ibid 1202. Similarly, Leslie Berger, Stephen Perreault and James Wainberg suggest that financial awards might 'hijack a person's moral motivation to "do the right thing"': Leslie Berger, Stephen Perreault and James Wainberg, 'Hijacking the Moral Imperative: How Financial Incentives Can Discourage Whistleblower Reporting' (2017) 36(3) *Auditing* 1, 1 <https://doi.org/10.2308/ajpt-51663> (drawing on an experiment where 166 US university students were asked if they believed a hypothetical employee would report corporate fraud).

130 Cf Amanda M Rose, 'Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate' (2014) 108(4) *Northwestern University Law Review* 1235, 1277–8 <https://doi.org/10.2139/ssrn.2305403>.

131 Van Rooij and Fine (n 27) 229.

132 Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *Antitrust Bulletin* 377, 412 <https://doi.org/10.1177/0003603X1105600207> ('Deterrence'). See also Nicholas Simoes da Silva and Matthew Corrigan, 'Civil Penalties in the Financial Services Sector' in Deniz Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (Federation Press, 2023) 218, 236–8.

133 Parker and Nielsen, 'Deterrence' (n 132) 412. This suggestion further develops earlier findings from the research project: see Vibeke Lehmann Nielsen and Christine Parker, 'To What Extent Do Third Parties

Jetson Leder-Luis analysed US *qui tam* actions involving four types of Medicare fraud.[134] In these cases, litigation recovered USD1.9 billion in taxpayer funds (of which whistleblowers were entitled to between 15% to 30%).[135] The deterrence effect created by these actions was estimated to be worth USD18.9 billion.[136] Leder-Luis concluded that whistleblowing has 'strong deterrence effects and relatively low costs, overcoming the limited incentives for government-conducted anti-fraud enforcement'.[137]

Three further studies employ different methodologies to investigate whether the SEC program has deterred fraud and insider trading, relying on models for predicting misconduct. These studies are complementary in that their different methodologies consistently find that the SEC program is effective in deterring corporate fraud and insider trading. Philip Berger and Heemin Lee examine accounting fraud in US pension funds before the SEC program was introduced (2008–10) and after (2011–14).[138] Pension funds were separated into two groups, depending on whether they were subject to a whistleblower award process before the SEC program through *qui tam* litigation. Relying on a model for predicting financial reporting misstatements (known as an 'F-score'),[139] the research found 'that when firms not previously exposed to [*qui tam* litigation] are treated by the [SEC program], fraud probability decreases by 12%–22%'.[140] Berger and Lee conclude that their findings 'provide reasonable casual quantification' to support the SEC program's effectiveness.[141]

Christine Wiedman and Chunmei Zhu investigate financial reporting misconduct by US public companies before the SEC program was introduced (2006–10) and after (2011–14).[142] The authors use the F-score model to predict a decrease in reporting misstatements of 9.3% after the SEC program commenced.[143] The results did not appear to be influenced by other factors such as contemporaneous legislative

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Influence Business Compliance?' (2008) 35(3) *Journal of Law and Society* 309, 334, 339–40 <https://doi.org/10.1111/j.1467-6478.2008.00441.x>.

134 Jetson Leder-Luis, 'Can Whistleblowers Root Out Public Expenditure Fraud? Evidence from Medicare' (2023) *Review of Economics and Statistics* (advance) <https://doi.org/10.1162/rest_a_01339>. Leder-Luis focused on four categories of fraud to capture 'the largest whistleblower cases that are feasible to analyze', given the limited data available to researchers: at 21. Overall, the data covered 'lawsuits against hundreds of [healthcare] providers, and represent[ing] about 7% of total healthcare whistleblower settlements': at 22.

135 Ibid 37, 47 (Table 2).

136 Ibid.

137 Ibid 38.

138 Philip G Berger and Heemin Lee, 'Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?' (2022) 60(4) *Journal of Accounting Research* 1337 <https://doi.org/10.1111/1475-679X.12421>.

139 See Patricia M Dechow et al, 'Predicting Material Accounting Misstatements' (2011) 28(1) *Contemporary Accounting Research* 17 <https://doi.org/10.1111/j.1911-3846.2010.01041.x>.

140 Berger and Lee (n 138) 1372. The data included 11,670 firm-year observations across 1,867 organisations. For explanation of the percentage range, see at 1358 (Table 5), 1359.

141 Ibid 1372.

142 Christine Wiedman and Chunmei Zhu, 'The Deterrent Effect of the SEC Whistleblower Program on Financial Reporting Securities Violations' (2023) 40(4) *Contemporary Accounting Research* 2711, 2722 <https://doi.org/10.1111/1911-3846.12884>.

143 Ibid 2722–4. The F-score model relied on 30,888 firm-year observations.

change, or wider economic factors.[144] Notably, the authors further suggest that companies with weaker internal governance processes improved their processes after the SEC program commenced.[145] Wiedman and Zhu conclude that their 'findings provide evidence that the [SEC program] has been effective in achieving the goal of deterring securities violations relating to fraudulent reporting'.[146]

Jacob Raleigh extends the field by investigating the impact of the SEC program on (informed) insider trading.[147] First, his study examines trading activities depending on organisations' sensitivity to whistleblower allegations.[148] The data show 'a decrease in the profitability of purchases' within sensitive organisations.[149] Second, Raleigh examines specific circumstances where insider trading is more likely to occur.[150] The research finds 'that the volume of potentially information-driven insider sales … significantly reduces' after the SEC program was introduced.[151] Raleigh concludes that 'the results suggest the [SEC program] has been successful at deterring illegal insider trading by firm executives'.[152]

In sum, these studies indicate that incentives may deter corporate misconduct. They do so by increasing perceptions that misconduct will be detected and reported. Together with the research on whistleblower intentions, the research provides a reasonable basis to consider that awards can be an effective regulatory tool.

3 Are Awards for Whistleblowing Intrinsically Unethical?

Considerable debate in relation to incentives and the desirability of legislated award systems has focused on ethical objections, independent of the perceived efficacy of such systems.[153] These arguments are well canvased in Australia and internationally.[154] Given that the empirical evidence for the positive impact of incentives is clearer, there is value in revisiting these normative concerns.

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144 Ibid 2724–6.

145 Ibid 2727–30, 2739.

146 Ibid 2739.

147 Jacob Raleigh, 'The Deterrent Effect of Whistleblowing on Insider Trading' (2023) *Journal of Financial and Quantitative Analysis* (advance) <https://doi.org/10.1017/S0022109023001035>. Raleigh notes that financial awards for insider trading had existed before the SEC program, however the program increased the award quantum: at 5. Data were analysed for the periods before the SEC program (2007 to mid-2010) and after the SEC program was introduced (October 2011 to October 2014): at 11.

148 Organisations were considered 'sensitive' to whistleblower allegations because they lobbied against the SEC program: see ibid 11. A similar approach was taken by Vishal P Baloria, Carol A Marquardt and Christine I Wiedman, 'A Lobbying Approach to Evaluating the Whistleblower Provisions of the *Dodd-Frank Reform Act* of 2010' (2017) 34(3) *Contemporary Accounting Research* 1305 <https://doi.org/10.1111/1911-3846.12309>. Raleigh (n 147) tested the robustness of the findings through further analysis depending on the strength of the organisation's internal reporting mechanisms: at 22–3, 24 (Table 6).

149 Raleigh (n 147) 4, 15–20.

150 See ibid 13–14.

151 Ibid 4, 20–2.

152 Ibid 27.

153 See, eg, *PJC Whistleblowing Report* (n 4) 130 [11.26].

154 For academic perspectives, see especially Brand (n 127); Amy Deen Westbrook, 'Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the *Foreign Corrupt Practices Act*?' (2018) 75(2) *Washington and Lee Law Review* 1097, 1140–6; Vandekerckhove, Antunes and Kenny (n 122) 27–31.

It has been argued that it is inappropriate or unethical to reward whistleblowers at all and the implementation of rewards creates a moral hazard.[155] On this view, the societal benefits experienced as a result of uncovering illegal or immoral activity are outweighed by the ethically problematic basis for the disclosures, including derogation of a pro-social corporate culture, the risk of encouraging delay in reporting (to increase the scale of reward), the 'crowding out' of pro-social behaviour (discussed above) and the inappropriateness of rewarding the chance possession of highly valuable information.[156] In general, it has been suggested that hostility to whistleblowing rewards reflects a perspective 'that disclosures motivated by gain … are not "true" whistleblowing'.[157] Similarly, the PJC noted the argument that providing incentives 'corrupts the underlying relationship which ought to motivate people to come forward'.[158] Indeed it is possible that unresolved cultural tensions in relation to the place of whistleblowing rewards in Australian society have delayed their implementation to date.[159]

Responsive works have sought to locate whistleblowing rewards within an ethically defensible framework. Where the design features of the rewards structure account adequately for the inherent ethical risks the ethically problematic components of rewards may be minimised. Potential features include systems to encourage non-delay in reporting, moderating rewards by reference to a compensation-like calculation and careful calibration of award quantum to account for the potential for 'crowding out'.[160]

In favour of incentives, it might be argued that society (and commerce generally) benefit from whistleblower disclosures, while the individual whistleblower suffers significant personal detriment – and often no personal benefit at all. This creates a moral asymmetry which is unsustainable; financial awards have the power to reduce this inequity. On this view, the moral or ethical concept underpinning corporate whistleblower regulation needs to account adequately for the disproportionate detriment suffered by the whistleblower. However, a counter-argument may arise from the acknowledgment above: award programs are different from compensation schemes. If one believes that whistleblowers should be compensated, it might be difficult to premise the right to compensation on enforcement activities. These are all factors that ought to inform any forthcoming debate on incentives programs.

155 Financial Conduct Authority (UK) and Bank of England Prudential Regulation Authority, *Financial Incentives for Whistleblowers* (Note for the Treasury Select Committee, July 2014) 3 [5]. For further discussion, see Brand (n 127) 38–9.

156 Brand (n 127).

157 Elletta Sangrey Callahan and Terry Morehead Dworkin, 'Do Good and Get Rich: Financial Incentives for Whistleblowing and the *False Claims Act*' (1992) 37(2) *Villanova Law Review* 273, 319.

158 Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 27 April 2017, 4 (Simon Longstaff), quoted in *PJC Whistleblowing Report* (n 4) 132 [11.33].

159 Brand (n 127) 39.

160 Ibid 58–61.

In summary, the scholarship on financial incentives has evolved and strengthened in recent years. Generally, it seems this work has informed the design and operation of the SEC and Ontario programs,[161] which is the focus of the next Part.

V THE SEC AND ONTARIO WHISTLEBLOWER PROGRAMS

This article now moves from the general to the particular, closely examining the operation of the North American award programs. This Part: (a) summarises the design of these programs; (b) evaluates the operation of the programs, drawing on diverse primary and secondary sources; and (c) synthesises the available information to address specific concerns previously raised about an Australian award program.

A Policy and Design

In conjunction with reforms to anti-retaliation and anonymity/confidentiality laws, the SEC program was designed to address serious misconduct vis-à-vis securities.[162] The program expressly seeks to 'motivate those with inside knowledge to come forward … [r]ecognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing "career suicide"'.[163] It is governed by the *Securities Exchange Act of 1934*,[164] as well as rules made under that Act.[165] There is some complexity in the SEC procedures. In part, this arises from occasional tuning intended to improve the program, as well as a deliberate effort to give insiders greater certainty about the possible outcome for reporting serious misconduct.[166] The Ontario program mirrors the essential aspects of the SEC program, although it is simpler and less generous in paying awards.[167]

The programs have similar eligibility requirements, which are highlighted to inform the analysis that follows.[168] Broadly:

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161 For example, after having undertaken a literature review and selected studies for this article, the authors found that the SEC itself also identified many of the same studies in footnotes in the commentary to its last policy amendments: see *Whistleblower Program Rules*, 87(170) Fed Reg 54140, 54147 nn 68–71 (2 September 2022) ('*2022 Whistleblower Program Rules*').

162 Evidence to House Committee on Financial Services, US Congress, Washington DC, 21 April 2016, 20 (Sean McKessy, Chief, Office of the Whistleblower); Justin W Evans et al, 'Reforming Dodd-Frank from the Whistleblower's Vantage' (2021) 58(3) *American Business Law Journal* 453, 474 <https://doi.org/10.1111/ablj.12191>.

163 Senate Committee on Banking, Housing, and Urban Affairs, US Congress, *The Restoring American Financial Stability Act of 2010* (Report No 111-176, 30 April 2010) 110–11.

164 *Securities Exchange Act of 1934*, 15 USC § 78u–6 (2022).

165 *Securities Whistleblower Incentives and Protections*, 17 CFR §§ 240.21F-1–240.21F-18 (2022) ('*SEC Program Rules*').

166 See, eg, Senate Committee on Banking, Housing, and Urban Affairs (n 163) 111–12.

167 Ontario Securities Commission, 'Whistleblower Program' (Ontario Securities Commission Policy No 15-601, 29 April 2022) ('*Ontario Program Policy*').

168 For detailed discussion of the SEC program, see Keith R Fisher, LexisNexis, *Banking Law Manual* (online at 10 January 2024) § 18.08; Christopher F Regan et al, 'It's All in the Footnotes: A Field Guide to SEC Whistleblower Awards', *Business Law Today* (online, 15 May 2018) <https://businesslawtoday.org/2018/05/its-all-in-the-footnotes/>.

(a) Certain groups of people are deemed to be ineligible;[169]
(b) The individual must voluntarily provide information to the agency;[170]
(c) The information must be 'original';[171]
(d) There must be a specified enforcement outcome.[172] Generally, there must be an enforcement action resulting in an order that a respondent pay USD1 million in sanctions (SEC), or been ordered to pay sanctions of CAD1 million (OSC);
(e) The information must significantly contribute towards the specified enforcement outcome;[173] and
(f) The whistleblower may need to provide additional information or assistance to the agency.[174]

The amount of an award will fall within a fixed percentage range of any financial penalty imposed following enforcement actions. Generally, the SEC will award between 10 and 30% of the total penalty *recovered* following legal proceedings.[175] The OSC will award between 5 and 15% of the total penalty *ordered* in legal proceedings. If the penalty is equal to or greater than CAD10 million, then the award is capped at either CAD1.5 million or 5 million.[176] Both agencies have a discretion to determine the percentage to be awarded, having regard to an inclusive list of factors.

B Outcomes, Evaluations and Perceptions

The SEC and OSC each claim the programs are successful. Between August 2011 and September 2023, the SEC received about 83,000 'tips'. In the same period, the SEC awarded 397 whistleblowers a total of USD1.9 billion.[177] Most awards were for less than USD5 million.[178] The SEC summarised in 2022:

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169 *SEC Program Rules* (n 165) § 240.21F-8(c); *Ontario Program Policy* (n 167) s 15.

170 *SEC Program Rules* (n 165) § 240.21F-3(a)(1). See also at § 240.21F-4(a) (definition of 'voluntary submission of information'); *Ontario Program Policy* (n 167) s 14(1)(b). See also at s 1 (definition of 'information that has been voluntarily submitted').

171 *SEC Program Rules* (n 165) § 240.21F-3(a)(2). See also at § 240.21F-4(b) (definition of 'original information'); *Ontario Program Policy* (n 167) s 14(1)(a). See also at s 1 (definition of 'original information').

172 *SEC Program Rules* (n 165) § 240.21F-3(a)(4). See also at §§ 240.21F-4(c)–(d) (definitions of 'information that leads to successful enforcement' and 'action'); *Ontario Program Policy* (n 167) s 14(1)(d). See also at ss 1 (definition of 'award eligible outcome'), 19.

173 This causation requirement is expressed in varying ways and can be satisfied in different ways. See *SEC Program Rules* (n 165) § 240.21F-3(a)(4). See especially at § 240.21F-4(c); *Ontario Program Policy* (n 167) ss 14(1)(c)–(d).

174 *SEC Program Rules* (n 165) § 240.21F-8(b); *Ontario Program Policy* (n 167) ss 5, 15(1)(a).

175 *SEC Program Rules* (n 165) § 240.21F-5.

176 If the regulator collects an amount equal to or greater than CAD10 million, the cap is CAD5 million. If the regulator does not collect CAD10 million, the cap is CAD1.5 million: see *Ontario Program Policy* (n 167) s 18(5).

177 Office of the Whistleblower, US Securities and Exchange Commission, *Annual Report to Congress for Fiscal Year 2023* (Report, 14 November 2023) 1 <https://www.sec.gov/files/fy23-annual-report.pdf>.

178 As of July 2020, 75% of awards were for amounts less than USD5 million (and 56% of all awards were less than USD2 million): *Whistleblower Program Rules*, 85(215) Fed Reg 70898, 70934 (Table 1) (5 November 2020) ('*2020 Whistleblower Program Rules*').

> Whistleblowers have played a critical role in the SEC's enforcement efforts in protecting investors and the marketplace. Enforcement actions brought using information from meritorious whistleblowers have resulted in orders for more than $6.3 billion in total monetary sanctions, including more than $4.0 billion in disgorgement of ill-gotten gains and interest, of which more than $1.5 billion has been, or is scheduled to be, returned to harmed investors.[179]

From July 2016 to March 2022, the Ontario program received 797 tips from 840 whistleblowers.[180] In the same period, the OSC made 11 awards for a total of CAD9.33 million.[181] The Commission states that these tips resulted in CAD48 million in 'monetary sanctions and voluntary payments ordered against 19 respondents'.[182] The OSC describes the program as 'a success', elaborating:

> Our experiences since the launch of the Program have clearly shown us that there are individuals with actionable information about misconduct in the capital markets. The Program has incentivized these individuals to come forward. This update highlights the significant value that whistleblowers bring in identifying complex or hard-to-detect securities misconduct. The OSC has successfully concluded a number of cases due in large part to the helpful tips submitted by whistleblowers. This has enabled the OSC to hold those who engage in misconduct accountable and to send impactful regulatory messages.[183]

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179 Office of the Whistleblower, US Securities and Exchange Commission, 'SEC Whistleblower Office Announces Results for FY 2022' (Media Release, 15 November 2022) 1 <https://www.sec.gov/files/2022_ow_ar.pdf>. For similar perceptions expressed by senior SEC officers see, eg, Mary Jo White, 'The SEC as the Whistleblower's Advocate' (Speech, Corporate and Securities Law Institute, Northwestern University School of Law, 30 April 2015) <https://www.sec.gov/news/speech/chair-white-remarks-garrett-institute>; Jane A Norberg, 'Keynote Address' (2018) 23(2) *Fordham Journal of Corporate and Financial Law* 386; Gary Gensler, quoted in US Securities and Exchange Commission, 'SEC Amends Whistleblower Rules to Incentivize Whistleblower Tips' (Press Release 2022-151, 26 August 2022) <https://www.sec.gov/news/press-release/2022-151>. Similar views have been expressed by lawyers with experience of the program: see, eg, Daniel J Hurson, 'The United States Securities and Exchange Commission Whistleblower Program: A Long and Winding Road' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 159, 184 <https://doi.org/10.1007/978-981-15-0259-0_7>; Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 28 April 2017, 6 (Jordan Thomas), discussed in *PJC Whistleblowing Report* (n 4) 127–8 [11.20]; *2022 Whistleblower Program Rules* (n 161) 54147–8 n 72 (quoting examples of 'comments that support the conclusion that the [SEC program] is valuable and effective').

180 *Ontario Program Report* (n 109) 7. The number of whistleblowers may exceed 'tips' because of 'joint submissions': see at 5–6.

181 Since March 2022, at least three further awards have been made: see Ontario Securities Commission, 'OSC Awards Nearly Half a Million Dollars to Whistleblower' (Media Release, 20 March 2023) <https://www.osc.ca/en/news-events/news/osc-awards-nearly-half-million-dollars-whistleblower>; Ontario Securities Commission, 'OSC Awards $1.5 Million to Whistleblower' (Media Release, 27 February 2024) <https://www.osc.ca/en/news-events/news/osc-awards-1-5-million-whistleblower>; Ontario Securities Commission, 'OSC Awards $300,000 to Whistleblower Who Uncovered Complex Misconduct' (Media Release, 15 May 2024) <https://www.osc.ca/en/news-events/news/osc-awards-300000-whistleblower-who-uncovered-complex-misconduct>.

182 *Ontario Program Report* (n 109) 4. It is unclear from the report whether the respondents ultimately paid the full CAD48 million.

183 Ibid 12. See also Maureen Jensen (Chair and CEO) describing the program as 'a game-changer for the OSC's enforcement efforts': Ontario Securities Commission, 'OSC Awards $7.5 Million to Three Whistleblowers' (Media Release, 27 February 2019) <https://www.osc.ca/en/news-events/news/osc-awards-75-million-three-whistleblowers>.

The agencies provide quantitative and qualitative data on how whistleblower disclosures impact on enforcement work. Broadly, both agencies claim their programs contribute to faster, more efficient regulatory activities.[184] For example, the SEC indicates 29% of awards are made where investigations were already open, but the whistleblower's information nonetheless 'significantly contributed' to the investigation.[185] The Commission further reports that whistleblowers significantly contribute to enforcement activities by providing the regulator with internal documents, undertaking factual and technical analysis, giving evidence, and identifying others who may give evidence (and encouraging them to cooperate), among other things. The effect of these contributions is said to include:

(a) Building cases faster and using fewer agency resources;[186]
(b) Generating stronger cases, which in turn increases pressure on companies to consent to an outcome, or improves the prospects of success at trial;[187]
(c) Enabling the regulator to intervene in ongoing misconduct sooner, so as to limit the harm caused by misconduct;[188] and
(d) Expanding the scope of cases (and so increasing the total penalties imposed by a court or tribunal).[189]

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184 See Ontario Securities Commission, 'Whistleblower Roundtable' (Transcript, 9 June 2015) 19, 66 ('OSC Roundtable'); Ontario Securities Commission, 'OSC Awards over Half a Million to Three Whistleblowers' (Media Release, 17 November 2020) <https://www.osc.ca/en/news-events/news/osc-awards-over-half-million-three-whistleblowers>.

185 These data are limited to 2011–20: Office of the Whistleblower, US Securities and Exchange Commission, *Whistleblower Program: 2020 Annual Report to Congress* (Report, 16 November 2020) 24 ('*SEC Annual Report 2020*').

186 See, eg, US Securities and Exchange Commission, *Order Determining Whistleblower Award Claims* (Release No 99229, 22 December 2023) 4–5 (whistleblowers 'provid[ed] supporting documents to the staff that served as a guide for the investigation, and identif[ied] key witnesses that were critical to the investigation'); Commodity Futures Trading Commission, *Order Determining Whistleblower Award Claims* (Determination No 20-WB-09, 28 August 2020) 2 (disclosure 'caused … staff to request many of the documents ultimately produced by [the] Respondents. This enabled … staff to obtain signed declarations and to take testimony from a limited number of target witnesses, conserving Commission resources').

187 See, eg, Commodity Futures Trading Commission, *Order Determining Whistleblower Award Claims* (Determination No 18-WB-1, 12 July 2018) 4 (disclosure 'led the Commission to successfully settle the case and thereby avoid a potentially costly, risky, and cumbersome trial'); US Securities and Exchange Commission, *Order Determining Whistleblower Award Claims* (Release No 85412, 26 March 2019) 5 (whistleblower gave SEC '"smoking gun" evidence' that 'was highly significant and critical to the success' of the enforcement action). Cf, with respect to ASIC investigations, Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say' (2020) 43(4) *University of New South Wales Law Journal* 1405, 1416 <https://doi.org/10.53637/SMBW3234>.

188 See, eg, US Securities and Exchange Commission, *Order Determining Whistleblower Award Claim* (Release No 88803, 4 May 2020) 2 (where the SEC was already investigating a company, a whistleblower alerted them to 'an ongoing fraud that the Commission was not aware of'. The disclosure 'informed the staff's need to expeditiously seek a temporary restraining order and asset freeze to prevent further investor losses').

189 See, eg, Commodity Futures Trading Commission, *Order Determining Whistleblower Award Claims* (Determination No 22-WB-01, 22 November 2021) 3 (disclosure 'during the earliest stages of the matter helped … staff conserve time and resources, as well as better focus the staff's investigative efforts' and 'supported and ultimately led to different charges the Commission brought'). Cf Andrew C Call et al, 'Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions' (2018) 56(1) *Journal of Accounting Research* 123, 163–4 <https://doi.org/10.1111/1475-679X.12177> (finding that whistleblower involvement in enforcement actions had a positive influence on penalties and time taken to commence enforcement proceedings).

Further evidence of the agencies' perceptions is provided by past and anticipated reforms of each program. Amendments to the SEC program have generally expanded the eligibility for awards, or amounts payable to whistleblowers.[190] Similarly, in reviewing the first five years of the Ontario program, the OSC notes its intention to explore 'changes … such as by issuing awards in more cases and awarding potentially larger amounts'.[191] These actions are consistent with claims that the programs are effective.

It is not possible to determine precisely how many tips are valuable,[192] or result in an award.[193] Developing an accurate assessment is further complicated by year-on-year increases in tips each agency receives.[194] There was a particularly large increase in tips to the SEC program after September 2020, which has continued to further increase each year (as have the value and number of awards).[195] Nonetheless, even if one adopts generous assumptions, it is unlikely that awards are made for more than 1% (SEC),[196] and 2% (OSC) of tips.[197]

Empirical scholarship on the SEC program suggests it has deterred corporate fraud and insider trading, as indicated above.[198] The SEC program has been the subject of other empirical inquiries, which also indicate it has had positive effects.[199] Where recent legal scholarship expresses criticism of the SEC program, the criticism is usually directed at specific design features or administration –

190 See, eg, *2020 Whistleblower Program Rules* (n 178) 70937–8.

191 *Ontario Program Report* (n 109) 11.

192 For example, it may be that the information is valuable, but the regulator chooses not to pursue enforcement action for strategic or other reasons. Nonetheless, it would not be surprising if a substantial proportion of tips had little merit: see below n 217 and accompanying text.

193 Awards may not be made for some time (perhaps several years) after the tip was received: Office of Inspector General, US Securities and Exchange Commission, *SEC's Whistleblower Program: Additional Actions Are Needed to Better Prepare for Future Program Growth, Increase Efficiencies, and Enhance Program Management* (Report No 575, 19 December 2022) 5, 8; Hurson (n 179) 160 (commenting that the period can be 'five years or more in some cases').

194 Office of Inspector General, US Securities and Exchange Commission (n 193) 7 (Figure 2); *Ontario Program Report* (n 109) 7 (reporting an average increase of 17% each year).

195 For example, more tips were received in the 2021–23 financial years than for the whole of 2011–20.

196 This estimate is based on three calculations (using the data reported up to 30 September 2023). First, the award rate is 0.48% if one assumes no awards were made after 30 September 2023 (which is false, but provides for a 'bottom' estimate). Second, the award rate is 0.76% if one assumes that awards have only related to tips received since October 2021 (therefore assuming a two-year time lag). Third, the award rate is 1.41% if one assumes that awards have only related to tips received since October 2019 (which assumes there is a time lag of about four years for all awards, which seems unlikely).

197 This estimate is based on two calculations (using the data reported up to 30 March 2022). First, the award rate is 1.38% if one assumes no awards were made after 30 March 2022 (which is false). Second, the award rate is 2.47% if one assumes that awards have not been made in respect of tips received after 30 March 2020.

198 Berger and Lee (n 138); Wiedman and Zhu (n 142); Raleigh (n 147).

199 Baloria, Marquardt and Wiedman (n 148) 1305 (suggesting US investors expected the Dodd-Frank reforms 'to provide net benefits by improving shareholder protection'); Call et al (n 189); Evans et al (n 162) 499.

and does not suggest the program should end.[200] On the whole, recent academic commentary indicates the SEC program has been effective.[201]

Similarly, other US government departments and Congress appear persuaded as to the effectiveness of the SEC program, and its adaptability to other areas of corporate misconduct. For example, in 2011 Congress also established a whistleblower program to be administered by the Commodity Futures Trading Commission ('CFTC'). In 2017, the CFTC amended its program rules to largely mirror that of the SEC program.[202] The CFTC program enjoys bipartisan support[203] and reports comparable results as the SEC program (albeit on a slightly smaller scale), having 'awarded almost $350 million to whistleblowers, with more than $3 billion in enforcement sanctions ordered in cases associated with those awards'.[204] Further whistleblowing programs styled on the SEC program have been legislated and proposed.[205]

Initially, the perceptions of government agencies in other jurisdictions tended to be less enthusiastic. In the United Kingdom ('UK'), a parliamentary commission 'call[ed] on the regulator to undertake research into the impact of financial

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200 Several issues appear to dominate the recent US legal scholarship: the Supreme Court's decision in *Digital Realty* (n 57); the SEC's resourcing; transparency in determining the quantum of awards; and the 'revolving door' between the SEC and private sector. See, eg, Evans et al (n 162) 477–99; Alexander L Platt, 'The Whistleblower Industrial Complex' (2023) 40(2) *Yale Journal on Regulation* 688; Mary Kreiner Ramirez, 'Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime' (2019) 50(3) *Loyola University Chicago Law Journal* 617, 645–55; Amanda M Rose, 'Calculating SEC Whistleblower Awards: A Theoretical Approach' (2019) 72(6) *Vanderbilt Law Review* 2047 <https://doi.org/10.2139/ssrn.3395503>; Jeffrey R Boles, Leora Eisenstadt and Jennifer M Pacella, 'Whistleblowing in the Compliance Era' (2020) 55(1) *Georgia Law Review* 147, 181–5; Symposium, 'What Would We Do without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank' (2017) 23(2) *Fordham Journal of Corporate and Financial Law* 379, 429–34. In recent years, the SEC has attempted to improve transparency and efficiency in the administration of the program: see Office of Inspector General, US Securities and Exchange Commission (n 193).

201 Platt (n 200) 688–91 (describing the SEC and CFTC programs as being 'no panacea', but observing their 'universal acclaim'); Christina Parajon Skinner, 'Whistleblowers and Financial Innovation' (2016) 94(3) *North Carolina Law Review* 861, 885–917 (concluding that the SEC Program has 'real costs', but 'is, on balance, desirable'); Ramirez (n 200) 623–4; Boles, Eisenstadt and Pacella (n 200) 176 (commenting that the SEC program 'has been very successful'). For academic perspectives internationally, see Wood (n 114) ('while the US approach is undoubtedly a blunt instrument, the evidence is growing that it works'); Austin (n 114) 89–90 ('empirical evidence continues to mount in support of the hypothesis that a financial award may ... motivate some people to come forward').

202 See *Whistleblower Awards Process*, 81(168) Fed Reg 59551, 59552 (30 August 2016).

203 See Chuck Grassley, 'Senate Unanimously Clears Grassley Bill to Save CFTC Whistleblower Program' (News Release, 28 May 2021) <https://www.grassley.senate.gov/news/news-releases/senate-unanimously-clears-grassley-bill-to-save-cftc-whistleblower-program>.

204 See Commodity Futures Trading Commission, 'Statement of Commissioner Christy Goldsmith Romero in Support of the CFTC's 2023 Annual Report on the Whistleblower Program and Customer Education Initiatives' (Public Statement, 31 October 2023) <https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement103123>.

205 See, eg, Liana W Rosen and Rena S Miller, 'The Financial Crimes Enforcement Network (FinCEN): *Anti-Money Laundering Act* of 2020 Implementation and Beyond' (Congressional Research Service Report No R47255, 27 September 2022) 7; Lisa Monaco, 'Remarks at the American Bar Association's 39th National Institute on White Collar Crime' (Speech, San Francisco, 7 March 2024) <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations> (announcing a Department of Justice whistleblower program).

incentives in the US' in 2013.[206] The Financial Conduct Authority and prudential regulator reported back that 'financial incentives could create a number of moral and other hazards', and 'providing financial incentives … will not encourage whistleblowing or significantly increase integrity and transparency in financial markets'.[207] In Canada, the other provincial securities regulators determined not to implement award programs in Quebec (2016) and Alberta (2017).[208] Among other things, the provincial regulators appeared to consider the state of evidence to be inconclusive.

More recently, it seems the attitudes of some overseas regulators have been influenced by the ongoing experience of the SEC and Ontario programs. The British Columbia Securities Commission introduced an award program in November 2023.[209] In the UK, at least two regulators are receptive to incentives in the context of addressing cartel and tax offences. For instance, payments for information about cartel activities have existed since 2008.[210] The Competition and Market Authority's 'informant reward' program featured prominently in its campaign on cartel activities in 2017, as well as in 2023 (when it increased the reward maximum from GBP100,000 to 250,000).[211] The regulator has described the program as 'a useful part of [the] cartel detection toolkit'.[212] An example of shifting attitudes with respect to other criminal activities is provided by remarks from the directors of the Serious Fraud Office (UK). The former director 'had argued moral responsibility should encourage people to come forward and said paying for such information "just isn't

206 Parliamentary Commission on Banking Standards, UK Parliament, *Changing Banking for Good* (HL Paper 27-II, June 2013) vol 2, 376 [803].

207 Financial Conduct Authority (UK) and Bank of England Prudential Regulation Authority (n 155) 3 [5], 7 [27]. But see criticism of the regulators' summary of the empirical research: see, eg, Austin (n 114) 81. A more recent report commissioned by the Financial Conduct Authority expressed different views: Vandekerckhove, Antunes and Kenny (n 122).

208 See Austin (n 114) 76–8; Autorité des Marchés Financiers (Québec), *Proposed Framework for a Whistleblower Program* (Report, 20 February 2016) 14.

209 British Columbia Securities Commission, 'Whistleblower Program' (BC Policy No 15-604, 7 November 2023).

210 Office of Fair Trading (UK), 'OFT Offers Financial Incentives for Information regarding Cartel Activity' (Press Release 31/08, 29 February 2008) <https://webarchive.nationalarchives.gov.uk/ukgwa/20100402135453/http:/www.oft.gov.uk/news/press/2008/31-08>. With respect to tax offences, see HM Revenue and Customs (UK), *Annual Report and Accounts 2020 to 2021* (Report, 4 November 2021) 53 <https://assets.publishing.service.gov.uk/media/619e0aaae90e070445fd762a/HMRC_Annual_Report_and_Accounts_2020_to_2021_Web.pdf>; 'HMRC Paid over £500,000 to Whistleblowers in the Past Year', *Reynolds Porter Chamberlain LLP* (Blog Post, 21 August 2023) <https://www.rpc.co.uk/press-and-media/hmrc-paid-over-500-000-pounds-to-whistleblowers-in-the-past-year>.

211 Competition and Markets Authority (UK), 'CMA Launches Campaign to Crack Down on Cartels' (Press Release, 20 March 2017) <https://www.gov.uk/government/news/cma-launches-campaign-to-crack-down-on-cartels>; Competition and Markets Authority (UK), 'Blowing the Whistle on Cartels' (Press Release, 6 June 2023) <https://www.gov.uk/government/news/blowing-the-whistle-on-cartels>. While the Authority did not recommend adopting a percentage approach to determining awards, it cited the SEC program in arguing that GBP100,000 'is far too low': Letter from Lord Andrew Tyrie to Greg Clark, 21 February 2019, 27–8.

212 Competition and Markets Authority (UK), 'Alternatives to Leniency Programmes: Contribution from United Kingdom' (Contribution No DAF/COMP/GF/WD(2023)17, OECD Global Forum on Competition, 30 November 2023) 4 [13].

British"'.[213] In contrast, in 2024 the new director stated that whistleblowers should be paid, principally because it would enable the faster investigation and prosecution of cases.[214] In May 2024, the director contrasted how whistleblowers are relied upon by enforcement agencies in the US and the UK. He elaborated:

> There is a significant difference between the contribution whistleblowers make in the States, whether you like their system or not, and the contribution they make here. … All I am articulating is the desire to understand what we might learn from that … and how we could find a similar way of incentivising whistleblowing in this country that is acceptable to this country and delivers the benefits that the States has clearly got from it.[215]

The final section of this Part continues the comprehensive review of the SEC and Ontario programs' operation. It does so by focusing upon particular concerns expressed in Australia about award programs and informs debate about those issues by analysing the current state of the evidence.

C Informing Australian Debates

Several concerns were expressed to the PJC inquiry regarding the efficacy of an award program. There was limited evidence available to inform consideration of these submissions, which seemed to guide the government's response to the award program recommendation. Notably, before the introduction of the North American programs, similar risks were identified to the SEC and OSC regarding (1) frivolous or unhelpful disclosure; (2) encouraging people to delay reporting misconduct; and (3) the effect of an award program on internal reporting systems. Accordingly, the design of these programs and publication of certain data appears to be responsive to those concerns. In this final section, key questions raised about the efficacy of an Australian award program are addressed having regard to what is known from extended operation of the North American programs.

1 Will an Award Program Attract Frivolous Disclosure?

Submissions to the PJC queried the impacts on the regulator of frivolous disclosure and resources required to review it.[216] The number of frivolous or unhelpful reports to the SEC and OSC is likely to be substantial.[217] It is unclear how

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213 Suzi Ring, 'New SFO Chief in Drive for Whistleblowers to be Paid', *Financial Times* (London, 14 February 2024) 3.

214 Nick Ephgrave, 'Director Ephgrave's Speech' (Speech, Royal United Services Institute, 13 February 2024) [27]–[28] <https://www.sfo.gov.uk/2024/02/13/director-ephgrave-speech-at-rusi-13-february-2024>.

215 Evidence to House of Commons Justice Committee, UK Parliament, London, 14 May 2024, Q35 (Nick Ephgrave, Director, Serious Fraud Office) <https://committees.parliament.uk/oralevidence/14850/pdf/>.

216 International Bar Association Anti-Corruption Committee (n 27) 6–7 (Recommendation 8); Law Council of Australia (n 229) 19–20; Nicholas Mavrakis and Katrina Hogan, Clayton Utz, Submission No 4 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (10 February 2017) [13]–[16].

217 See, eg, US Securities and Exchange Commission, *Order Determining Whistleblower Award Claim* (Release No 98220, 25 August 2023) (one person submitted 23 tips, none were useful); Maxwell Murphy, 'Meet the SEC's 6,500 Whistleblowers', *The Wall Street Journal* (online, 28 July 2014) <https://www.wsj.com/articles/meet-the-secs-6-500-whistleblowers-1406591157>. Cf *2020 Whistleblower Program Rules*

much the North American agencies spend on staffing,[218] but it can be assumed that both programs recover sufficient penalties to offset agency costs in administering the programs.

Any Australian program is also likely to receive substantial amounts of unhelpful reports, although the amount may be somewhat moderated by the design of the program.[219] Nonetheless, the likely impact on the Australian regulator in managing frivolous disclosures ought not be overstated.[220] One may expect Australian regulators have developed expertise in identifying frivolous information, triaging disclosures and managing such information.[221]

2 Might an Award Program Incentivise Delayed Reporting?

In the past, commentary has questioned whether an Australian award program would incentivise individuals to delay in reporting misconduct externally.[222] Similar concerns were expressed with respect to the SEC and Ontario programs.[223] The concern arises from the possibility that: (a) if misconduct grows over time, the eventual penalty will also grow; and (b) the award to a whistleblower will be a percentage of that larger penalty. Under the SEC program, any incentive to delay reporting is primarily addressed by the SEC's publicised ability to reduce the percentage of an award (to a minimum of 10%) for unreasonable reporting

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(n 178) 70939 (estimating that frivolous applications for awards may be as high as 9%, although it is unclear how that corresponds with tips received); Commodity Futures Trading Commission, 'CFTC Announces Approximately $7 Million Whistleblower Award' (Press Release 8022-19, 27 September 2019) <https://www.cftc.gov/PressRoom/PressReleases/8022-19> (indicating that 40% of CFTC 'investigations now involve whistleblowers').

218 Researchers have offered different views on the number of SEC staff who support the whistleblower program: see, eg, Ramirez (n 200) 650–3 (counting only staff employed in the Office of the Whistleblower); Platt (n 200) 701, 704–6 (suggesting an unknown number of staff outside the whistleblower office review disclosures). It seems the separate SEC Office of Market Intelligence 'cull[s] through the wheat and the chaff', so it is unclear how many staff administer the program overall: see Kellie Lerner et al, 'Roundtable on the DOJ Leniency Program' (2023) 38(1) *Antitrust* 54, 62–3. See also House Committee on Financial Services (n 162) 19–20 (Sean McKessy, Chief, Office of the Whistleblower).

219 For example, the penalty threshold that must be crossed before an award can be made; procedural requirements for making a disclosure; and whether there are processes for appealing from decisions on awards.

220 Australian regulators and complaints-handling bodies appear to receive a substantial volume of misguided, frivolous and/or unhelpful information from the public: Jordan Tutton and Vivienne Brand, Answer to Question on Notice to Senate Economics References Committee, Parliament of Australia, *Australian Securities and Investments Commission Investigation and Enforcement* (24 November 2023). ASIC itself receives voluminous 'reports of misconduct' a year: Australian Securities and Investments Commission, Submission No 1 to Senate Economics References Committee, Parliament of Australia, *Australian Securities and Investments Commission Investigation and Enforcement* (February 2023) 4 [10], 49 (Table 2) ('ASIC Submission No 1').

221 See ASIC Submission No 1 (n 220) 5–7 [20]–[37], 19–22 [81]–[89]. However, identifying frivolous or vexatious disclosures does not always demand much sophistication, such as where a single, named individual is making vexatious disclosures: see above n 217.

222 *PJC Whistleblowing Report* (n 4) 133 [11.39].

223 The SEC did not accept the premise of this argument: *Securities Whistleblower Incentives and Protections*, 76(113) Fed Reg 34300, 34351 n 391 (13 June 2011) ('*2011 Whistleblower Incentives and Protections*'). See also 'OSC Roundtable' (n 184) 131, 145.

delay.[224] Further, while individuals may be eligible for an award notwithstanding unreasonable delay, the likely significance of their information for any investigation may decrease over time. Delay may ultimately mean the information has no value and so the person would not be eligible for an award.[225]

It is difficult to determine whether the SEC and Ontario programs have encouraged reporting delays. While SEC awards have been reduced due to unreasonable delay by individuals,[226] it is not clear (a) whether the individuals delayed so the misconduct would grow, and therefore increase the potential award; or (b) the extent to which individuals have reported matters (internally or externally) faster, in order to increase the likelihood that their information is valuable to the SEC. Earlier comments from the SEC suggested individuals are not generally motivated to withhold information to increase the award size.[227] However, it is difficult to corroborate this view with the information available to the public.

3 What Effect Might an Award Program Have on Internal Reporting Systems?

A key concern has been that an Australian award program would encourage external disclosures over internal disclosures and so undermine internal reporting channels.[228] Similar concerns were expressed in the United States and Ontario, so regulators explicitly designed the programs to 'support, not undermine' internal systems.[229] The North American experience is instructive in three respects.

First, a sizeable proportion of those who disclose to the SEC and OSC are not company insiders, and so could not report misconduct internally.[230] Second, whistleblowing research generally finds that 'insiders' will report internally before

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224 *SEC Program Rules* (n 165) § 240.21F-6(b)(2).

225 For example, where an individual reports misconduct but the matter (a) is already under investigation by the SEC independent of a tip-off; (b) has been reported by another person; or (c) has been self-reported by a company.

226 See, eg, US Securities and Exchange Commission, 'SEC Announces Whistleblower Award of More than $325,000' (Press Release 2015-252, 4 November 2015) <https://www.sec.gov/news/press-release/2015-252>. The press release noted: '[T]he award could have been higher had this whistleblower not hesitated.'

227 'OSC Roundtable' (n 184) 141, 144–5.

228 See Brand, Lombard and Fitzpatrick (n 34) 304; *PJC Whistleblowing Report* (n 4) 134 [11.42]; Law Council of Australia, Submission No 52 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (9 February 2017) 20.

229 *2011 Whistleblower Incentives and Protections* (n 223) 34323. See also Ontario Securities Commission, 'OSC Notice and Request for Comment: Proposed OSC Policy 15-601' (28 October 2015) 2–3, 5–8; Austin and Lombard (n 21) 65. Internal reporting is not required under either program. However, a person's engagement with an internal reporting system may increase an award, and 'undermin[ing] the integrity' of an internal system may (and has) decreased award amounts: *SEC Program Rules* (n 165) §§ 240.21F-6(a)(2)(ii), (b)(3), (4); *Ontario Program Policy* (n 167) ss 25(2)(f), (3)(g).

230 From 2011–17, SEC program award recipients were current employees (30%), former employees (25%), 'other types of insiders' (7%), industry professionals (4%), harmed or prospective investors (19%), and 'other types of outsiders' (15%): Office of the Whistleblower, US Securities and Exchange Commission, *Whistleblower Program: 2017 Annual Report to Congress* (Report, 15 November 2017) 17. It is unclear whether employment status refers to the time of the disclosure, or the time of an award. More recent statistics have not been published. See also *SEC Annual Report 2020* (n 185) 25; *Ontario Program Report* (n 109) 5.

contacting a regulator. The SEC and OSC statistics suggest that trend generally persists for securities whistleblowers. Of those who were 'inside' the company (and received an award), the SEC program data indicates that 'approximately 84 percent [of award recipients] raised their concerns internally … or understood that their supervisor or relevant compliance personnel knew of the violations' before contacting the SEC.[231] The OSC, reporting on all who provided 'tips', states that 63% of insiders had previously made an internal disclosure.[232] The former Chair of the SEC Office of the Whistleblower offered an attractive explanation:

> [The concern that an award program] might destroy internal compliance as you know it … has really proven unfounded in the United States because, believe [it] or not, most people like their companies. They actually want to believe the company is going to do the right thing, and it's only after they report it internally and the company either turned a blind eye or wasn't taking appropriate steps that the whistleblowers came to us and reported.[233]

Third, there is reason to consider that the SEC and Ontario programs have a different effect on internal systems: business was pressured to improve those systems.[234] Janet Austin and Sulette Lombard suggest that in theory a combination of design features serve as 'a regulatory "nudge" to ensure that corporations have effective, well-publicized internal systems in place without the need for prescriptive regulation'.[235]

In summary, future consideration of an Australian award program will have the benefit of these findings from the extended operation of the SEC and Ontario programs. While there are limits on what data are published by the agencies, there is sufficient information to address key concerns raised in Australia at earlier times.

VI CONCLUSION

Whistleblowing has become a recognised and important part of corporate regulation in Australia. Parliament has sought to use corporate law to encourage whistleblowing, intending to contribute to cultural change around reporting

231 These data are limited to 2011–20: *SEC Annual Report 2020* (n 185) 25. In more recent years, the rate of internal reporting has dropped slightly: see, eg, Office of the Whistleblower, US Securities and Exchange Commission, *Whistleblower Program: 2021 Annual Report to Congress* (15 November 2021) 24 (reporting a decrease to 75% for award recipients in that financial year, where 60% of all recipients were 'current or former insiders'). The change is likely to be attributable to *Digital Realty* (n 57).

232 *Ontario Program Report* (n 109) 9. It is unclear whether these data were collected via self-reports, or if they were verified by the OSC. The OSC offers a further statistic that may explain why the 63% of whistleblowers made an external disclosure: '84% of those whistleblowers did not believe, or were not sure, that any steps had been taken to address their concerns': at 9.

233 'OSC Roundtable' (n 184) 66 (Jane Norberg, Chief, SEC Office of the Whistleblower).

234 Similar perceptions have been expressed by those with experience of the SEC program: see ibid 21; Jordan Thomas, Answers to Questions on Notice to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors* (28 April 2017), quoted in *PJC Whistleblowing Report* (n 4) 128 [11.20]; Symposium (n 200) 415–16.

235 Austin and Lombard (n 21) 82–3. This argument is consistent with the empirical research discussed above in Part IV(B)(2): see especially Wiedman and Zhu (n 142).

misconduct and ultimately promote proper business practices. The last comprehensive review of Australian whistleblowing laws recommended employing a wider range of mechanisms to achieve these objectives. Instead, existing mechanisms for protecting whistleblowers were refined in 2019. Consideration of further reform was deferred to 2024, when (a) the effect of the 2019 changes would be known; and (b) more information about the approaches taken in North America would be available.

These issues are directly addressed by this article. Much remains unknown about how successful the Australian reforms have been in promoting good business practice, and encouraging whistleblowers to disclose perceived misconduct. While the doctrinal protections in part 9.4AAA appear strong and generally conform with the PJC's 2017 recommendations, their success so far has been muted. The imminent statutory review will be well placed to interrogate the effect of part 9.4AAA comprehensively, especially as several 'test' cases are finalised. It may be that the current law is found to strike an appropriate policy balance.

But if reform is desired, what is to be done? One option is to attempt to further 'neutralise' the disincentives facing a prospective whistleblower. That would be consistent with corporate law's approach to date. An alternative option is to address the other half of the cost-benefit equation that informs the decision to blow the whistle: incentivise individuals to report misconduct.

This article has comprehensively examined the use of financial incentives to encourage corporate whistleblowing. The analysis focused particularly on developments occurring since the PJC's inquiry into Australian whistleblower laws. In short, the empirical scholarship supports the view that incentives are effective. The research indicates that financial awards motivate individuals to report misconduct and deters inappropriate business activities. These findings are coherent with regulatory theory on deterrence: people are less likely to engage in unlawful conduct if there is a real risk of it being reported. The sustained operation of the SEC and Ontario programs enable observations to be made on the costs and benefits of award programs. Enforcement activities by both agencies do seem to have been aided. Data from the SEC and OSC generally suggests risks – such as negative impacts on internal reporting channels – have not arisen, perhaps because of the programs' design. In this respect, and noting the SEC program has gradually been refined with the benefit of experience, the core design of the SEC program may be especially instructive for Australia.

Overall, there is a reasonable basis to consider that award programs contribute positively to corporate regulation. An award program would be an evidence-based option for any future reforms that seek to improve standards of Australian business conduct, or enhance regulators' ability to detect misconduct.