

*Improving protections for corporate
whistleblowers*

Submission to the Treasury

December 2009



Australia and New Zealand Banking Group Limited ('ANZ') is pleased to provide comments on the Treasury's Options Paper, *Improving protections for corporate whistleblowers*.

ANZ supports the protections for whistleblowers provided under the Corporations Act. The protections under the Corporations Act protect whistleblowers from potential reprisal or liability they may suffer as a result of disclosing information about corporate fraud or other forms of corporate misconduct. These protections are important to enable whistleblowers to feel confident making disclosures. They ensure that whistleblowing occurs where it's necessary to uncover instances of corporate wrongdoing.

ANZ Global Whistleblower Protection Policy

ANZ supplements the legal framework with the ANZ Global Whistleblower Protection Policy. ANZ has a strong values based culture that encourages openness, integrity and accountability. ANZ requires corporate compliance and ethical conduct by all employees including compliance with applicable laws and practices of the countries in which ANZ operates. The Whistleblower Protection Policy is intended to encourage, support and promote honest and ethical behaviour by providing a framework for employees to escalate 'reportable conduct'. Reportable conduct is defined as any conduct of a person (or persons) connected to ANZ, which in the view of the employee making the disclosure is:

- dishonest
- fraudulent
- corrupt
- illegal
- in breach of local laws
- unethical
- other serious improper conduct
- an unsafe work practice
- a repeated breach of ANZ Policy or administrative procedures; or
- any other conduct which may cause financial or non-financial loss to ANZ or be otherwise detrimental to ANZ's interests.

A copy of the policy and the guidelines to the policy are included as attachments to this submission.

The Whistleblower Protection Policy provides an avenue for ANZ's employees, contractors and consultants to report or escalate serious issues in a confidential way, without fear of reprisal, dismissal or discriminatory treatment. All disclosures made under the policy will be treated in a confidential, sensitive and secure manner, protecting the identity (where we are allowed by law) of employees who make a report.

Any information disclosed would only be disclosed to a person who is not connected with the investigation of the matter if:

- the whistleblower has been consulted and given his or her written consent to the disclosure;
- ANZ's Whistleblower Protection Officers (WPO) or Whistleblower Investigation Officers (WIO) are compelled by law to disclose the whistleblower's identity;
- the report concerns the contravention of the Corporations Legislation, in which case disclosures may need to be made to:
 - the Australian Securities and Investments Commission (ASIC);
 - the Australian Prudential Regulatory Authority (APRA);
 - the Australian Federal Police (AFP).

Our policy goes further than the current legal requirements and ensures that whistleblowers have the same level of protection whether they are making a disclosure under the Corporations Act or not. On this basis we support many of the changes proposed in the Options Paper. We can also provide comments based on our experience from our Whistleblower Protection Policy.

Issue A: Who can qualify for protection as a whistleblower?

ANZ supports Option A.3.

Whistleblower protections are designed to encourage the disclosure of information about possible misconduct to the appropriate authority. Disclosures are by their very nature made by insiders who have access to information through a special relationship or proximity to the perpetrator. Without the protection provided by the legislation whistleblowers are vulnerable to reprisal, in particular victimisation, damage to long-term career prospects and possible liability for defamation or breaches of a duty of confidence.

In establishing who may qualify as a whistleblower, it is necessary to define under the legislation what relationships will be considered 'special' such that they would have the necessary access to information. Often employees and suppliers of goods and services will have intimate knowledge of a company's operations. However, former employees and business partners generally would not due to the legitimate needs of commercial secrecy. Furthermore, they are less likely to be vulnerable to the types of reprisal which may be exacted upon current employees and suppliers. ANZ considers that the point at which the line is currently drawn in the legislation is an appropriate balance between protecting the rights of whistleblowers who have access to inside information and protecting the legitimate right of the company to commercial secrecy.

If further consideration is given to extending the legislation to cover former employees, we would support a time limit after which protection would no longer be available. This would help to ensure that the disclosure is based on accurate information and relates to the

current practices of the company. We would propose a time limit of 3 months after the employee ceases employment with the company.

Issue B: Defining a 'subsidiary' for the purposes of the whistleblower protection provisions of the Insurance Act

ANZ supports Option B.1.

While ANZ is not affected directly by this proposal, we support a consistent approach to whistleblower protection across all industries.

Issue C: What issues can be disclosed under whistleblower protections?

ANZ supports Option C.1 and C.2.

Currently a whistleblower can only qualify for protection if they make a disclosure concerning an alleged breach of the corporations legislation only. The protection does not extend to disclosures about other illegal corporate activities. We do not believe there is a strong argument to limit the protection to disclosures concerning alleged breaches of the corporations legislation. We would support extending protection to whistleblowers who make disclosures concerning alleged illegal activities which ASIC can investigate. There are minimal additional risks for companies which comply with the law from this extension.

Option C.2 proposes also extending the whistleblower protections to disclosures concerning alleged misconduct which ASIC can investigate. ANZ's Whistleblower Protection Policy provides employees with protection when they make a wide range of disclosures, including those which allege breaches of legislation or misconduct. We would not be opposed to extending legislative coverage to these disclosures.

Issue D: Should motive affect whether a whistleblower qualifies for protection?

ANZ supports Option D.1.

ANZ believes that a whistleblower can act with malice but also disclose important instances of corporate misconduct. It appears that in practice the good faith requirements of the legislation mitigate the evidentiary strength of the disclosure where malice is a motive, even if it is not the dominant motive. This is because the question of evidentiary strength is particularly focused on the good faith requirement.

Where a court is required to consider the evidentiary strength of the disclosure, motive should remain one of a number of factors which are relevant. However, it should not be the only factor. We would support a test remaining in the legislation which would still enable the court to take into account malice as a relevant factor but which was not as restrictive as the requirement of good faith.

We note that, if the good faith requirement is removed, section 1317AA(1)(d) will continue to require whistleblowers to hold reasonable grounds to suspect their disclosure is true. Furthermore, it will remain an offence pursuant to Division 137 of the Criminal Code for a person to knowingly provide false and misleading information to ASIC. This will prevent vexatious or fabricated disclosures.

Issue E: Should anonymous disclosures qualify for protection?

ANZ supports Option E.3.

Currently, the Corporations Act requires a whistleblower to provide their name to the person to whom they are making a disclosure prior to making the disclosure. Anonymous whistleblowers do not qualify for protection. This is an appropriate hurdle to reduce the likelihood of vexatious, trivial or fabricated claims.

ANZ's internal Whistleblower Protection Policy does not require whistleblowers to identify themselves in all instances. Employees may make anonymous Disclosures where the Reportable Conduct relates to:

- financial misconduct;
- accounting or internal accounting control measures; or
- auditing matters, including non-disclosure or a failure to comply with internal or external audit processes.

However, where a disclosure relates to an actual or potential contravention of the Corporations Act the employee making the disclosure needs to provide their details. This is to ensure that ANZ's policy is consistent with the legislation and ANZ employees qualify for legislative protection where it is available.

In our experience complaints which are anonymous are more likely to be trivial, fabricated or vexatious. Investigating and resolving these complaints consumes limited and valuable resources. Anonymous disclosures are more difficult to investigate because the investigator is unable to ask further questions of the complainant. Permitting anonymous disclosures would likely increase the number of disclosures, however, it would be more difficult to assess their veracity and investigate the complaints.

Issue F: Should a court be able to order the production of documents which reveal a whistleblower's identity

ANZ supports Option F.1. However, the notion of the public interest which is raised in F.2 is useful and could be incorporated into the test which the court must apply under the legislation in determining whether to release the documents.

ANZ supports the general position that the identity of the whistleblower should not be revealed. However, there may be cases where documents which may disclose their identity should be revealed by the court. Given the very serious implications for the whistleblower and the effect on the likelihood of future disclosure, these cases should be considered carefully. However, we believe the court should retain this power provided the test requires the court to take into account the implications for the whistleblower and the public interest in the release of the documents.

Issue G: What confidentiality restrictions should apply to those receiving disclosures second-hand

ANZ supports Option G.1.

Section 1317AE(1) of the Corporations Act is designed to safeguard the identity of the whistleblower. It makes it an offence to disclose information disclosed by a whistleblower, the identity of the whistleblower or information likely to lead to the identification the whistleblower that was obtained directly or indirectly from the whistleblower. It appears that a loophole exists where a third party who receives the information with the whistleblowers consent is not subject to the same confidentiality requirements as the person who initially received the information. ANZ would support the closure of this loophole as proposed in Option G.1 of the Options Paper.

Issue H: Should prospective whistleblowers be protected for seeking legal advice?

ANZ supports Option H.1.

Legislation to encourage disclosure of information by whistleblowers should be clear and easy to understand. It would be preferable if a whistleblower did not need to seek legal advice when making a decision to disclose information. However, uncertainty will arise in some cases which may prompt a prospective whistleblower to seek legal advice before deciding whether to disclose information. Whistleblowers should be protected when they do this. As noted in the Options Paper the confidentiality afforded by legal professional privilege may already provide some protection for such disclosures. However, it would not provide protection against reprisal if the company discovers that a potential whistleblower has contacted a lawyer about making a disclosure.

We would support the proposition that a disclosure made for the dominant purpose of seeking legal advice should qualify for whistleblower protections, provided that the person receiving the disclosure is unable to make further disclosures unless they are acting as the whistleblower's agent. This would increase the likelihood that a potential whistleblower seeks legal advice and is appropriately informed about their rights and obligations.

ANZ would be pleased to provide any further information about this submission as required, and can be contacted as follows:

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