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Independent Commission Against Corruption (South Australia)
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Sent by email to whistleblowerProject@icac.sa.gov.au

ICAC Whistleblower Project

I am grateful for the opportunity to make this submission in response to the ICAC's *Whistleblower Project: Discussion Paper* (September 2025).

I am a Professor in the College of Business Government and Law at Flinders University and a non-executive director; with my research work focusing on regulation of companies with an emphasis on corporate responsibility. I have published on whistleblowing,[1] given evidence to Commonwealth parliamentary inquiries on whistleblower laws, and made a submission to the earlier review by the Hon Bruce Lander KC. While my research has generally concerned whistleblowing in the private sector, some aspects of the research are directly relevant to issues considered in the Discussion Paper.

This submission is principally concerned with the role of financial incentives in incentivizing whistleblowing in South Australia (**Issue 8**).[2]

Realising the regulatory potential of whistleblowing

1. Incentives regimes have long been controversial, as raising ethical concerns amongst others.[3] As the Discussion Paper summarises, in 2014 the Hon Bruce Lander KC recommended that South Australia not adopt a US-style 'bounty' scheme (whether in the nature of laws enabling *qui tam* actions or a model like that operated by the US Securities and Exchange Commission).[4]

[1] Publications include: Jordan Tutton and Vivienne Brand, 'Corporate Whistleblowers and Financial Incentives' (2024) 47(4) *UNSW Law Journal* 1219; Vivienne Brand, 'Corporate Whistleblowing, Smart Regulation and Regtech: The Coming of the Whistlebot?' (2020) 43(3) *UNSW Law Journal* 801; Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice and Design* (Springer, 2020); Sulette Lombard and Vivienne Brand, 'Whistleblowing and Corporate Governance: Regulating to Reap the Governance Benefits of "Institutionalised" Whistleblowing' (2018) 36(1) *Company & Securities Law Journal* 29; Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty Hunters, Whistleblowers and a New Regulatory Paradigm' (2013) 41(5) *Australian Business Law Review* 292.

[2] This submission adopts (with permission) several components of a submission made with Jordan Tutton to the Senate Economics References Committee's *Inquiry into Australian Securities and Investments Commission investigation and enforcement* (2022–2024).

[3] Vivienne Brand, 'The Ethics of Corporate Whistleblowing Rewards' in Sulette Lombard, Vivienne Brand Jane Austin (eds), Corporate Whistleblowing: Theory, Practice and Design (Springer, 2020) 37.

[4] Bruce Lander, *A Review of the* Whistleblowers Protection Act 1993 *(SA)* (September 2014) at 151–154.

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2. In inviting submission with respect to incentives, it appears the ICAC may be interested in developments occurring in this space since 2014. Accordingly, I will briefly summarise developments that are particularly relevant to reasons for the 2014 recommendation.

3. As to the perceived incompatibility between Australian culture and whistleblower incentives,[5] some assistance is available in views expressed by a federal Parliamentary Joint Committee in a 2017 report on *Whistleblower Protections* at ch 11.[6]

4. As to the evidence base concerning whistleblower incentives: since 2014, further evidence has been published to inform consideration of whether an incentive regime would be a useful regulatory tool, and to assess its possible contribution to good market outcomes. A summary of that evidence follows; a more detailed review can be found in 'Corporate Whistleblowers and Financial Incentives' (2024) 47(4) *UNSW Law Journal* 1219.

5. First, there are long-term data on comparable regimes in the United States and Canada. These data suggest incentive regimes generate valuable information, leading to detection of corporate wrongdoing and contributing to enforcement outcomes.

6. In the United States, the Securities and Exchange Commission's Dodd-Frank Whistleblower Program has operated since 2012. On average between 2019 and 2022, in each year the Program:

   - received 9,164 tips; and
   - awarded USD$257 million across 78 awards.[7]

7. The number of tips and awards has consistently increased over ten years. Further, the Securities and Exchange Commission Whistleblowers Office has emphasised the benefits to investors and public that has arisen from the receipt of whistleblower disclosures:

   > 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.[8]

8. The Ontario Securities Commission's Whistleblower Program commenced in 2016. For the 2021-2022 year, the commission reported:

   > We marked the fifth year of our Whistleblower Program, which has helped to identify misconduct and advance our enforcement investigations. Each year we have received more tips than the year before. In

[5] Ibid at 153–154.

[6] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Report, 2017) at [11.54]–[11.59]. See also 'Corporate Whistleblowers and Financial Incentives' (n 1) at 1233–1234.

[7] Statistics have been taken from the annual reports on the Dodd-Frank Whistleblower Program.

[8] Office of the Whistleblower, US Securities and Exchange Commission, 'SEC Whistleblower Office Announces Results for FY 2022' (Media Release, 15 November 2022) at 1.

total, the program has led to enforcement actions resulting in the imposition of approximately $44 million of monetary sanctions and voluntary payments, and the award of nearly $9 million to whistleblowers.[9]

9. Both jurisdictions require resources be dedicated to administer the programmes. However, the link between this expenditure and the effective deterrence of misconduct appears to have now been established.

10. Significantly, the statistics indicate that the regulatory potential of whistleblowers has been realised by directly addressing prospective whistleblowers' fear of retaliation, rather than by solely providing doctrinal protections from retribution (the prevalent mechanism for whistleblowing reform in Australia).

11. Second, there is now important empirical research on how 'cash for information' programmes enhance regulators' capacity to detect corporate misconduct.[10] The studies suggest these programmes do have a positive impact and can reflect an 'optimal' regulatory approach.[11]

12. Overall, the empirical scholarship supports the view that incentives are effective. Financial awards motivate individuals to report misconduct and deters inappropriate activity in a business context. These findings are coherent with regulatory theory on deterrence and support the expectation that similar effects would be observed in other contexts. Broadly, people are less likely to engage in unlawful conduct if there is a real risk of it being reported. The sustained operation of the Northern American programs enable observations to be made on the costs and benefits of financial incentive programs. Enforcement activities have been supported and SEC and OSC data generally suggests risks, including negative impacts on internal reporting channels, have not been realised.

13. Noting the SEC program in particular has been consistently refined over the period since its inception, the core design of the SEC program may be especially instructive for Australia.

Matters for consideration

14. Having regard to the developments in the last decade, there are grounds for accepting that the Australian case for financial incentives, as part of carefully managed and designed regulation, has been strengthened. However the primary examples of successful incentives schemes are located in financial and corporate settings, providing greater access to potential financial pools from which to pay incentives.

15. In a wider regulatory context the issue of payment resourcing is likely to be more complex. However the strong evidence that now exists for the integrity benefits conferred by financial incentives provides a basis for further discussion.

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9 Ontario Securities Commission, *Annual Report 2021–2022* at 7.

10 See, for example, 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 at 1721; Philip G Berger and Heemin Lee, 'Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud' (2022) 60(4) *Journal of Accounting Research* 1337 at 1372.

11 For discussion on 'optimal' approaches to corporate whistleblower laws, see Usha R Rodrigues, 'Optimizing Whistleblowing' (2022) 94(2) *Temple Law Review* 225.

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Conclusion

16. Clear data and extensive overseas regulatory experiences offer insight on financial incentives as a regulatory tool and their effectiveness. An opportunity exists to enhance South Australia's whistleblowing systems to support the work of ICAC as part of a well-designed regulatory environment.

I would be happy to answer any questions you may have in relation to this submission.

Yours sincerely

V Brand

Professor Vivienne Brand