



# Whistleblower protections

**10 February 2017**

**AIST Submission**

## Whistleblower protections

### AIST

**The Australian Institute of Superannuation Trustees** is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$700 billion profit-to-member superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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## 1 Executive summary

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AIST welcomes the opportunity to provide our views on whistleblower protections in the profit-to-member sector. A summary of our views are:

- Australia's whistleblowing framework requires reform because the current framework does not adequately protect whistleblowers following a disclosure and it has failed to keep pace with international developments and leading practice.
- A robust whistleblowing framework would contribute to the stability of the superannuation sector and would have a beneficial impact on super funds.
- A new whistleblowing framework should:
  - Be principles-based to cater for the different types of businesses in the profit-to-member sector;
  - Expand the definition of discloser (whistleblower) to both encourage reporting and to ensure that those who report wrongdoing receive protection under the framework;
  - Expand the definition of wrongdoing to align with leading practice and to allow for a greater variety of wrongdoing to be reported, and for those who report to be protected;
  - Be centralised with consistent application across Australia; and
  - Enable whistleblowers to access redress, including financial compensation, if they experience retaliation or are victimised as a result of making a disclosure.
- It is appropriate for super funds to have internal policies and procedures in place to facilitate the appropriate management of whistleblower disclosures.
- Regulators must have a strong, positive engagement with the superannuation industry and whistleblowers.
- AIST does not oppose broadening the whistleblower protection provisions to also cover anonymous disclosures.

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## 2 Introduction

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AIST is the peak representative body and principal advocate for the \$700 billion dollar profit-to-member superannuation sector and as such we are interested in the proposal to review the not-for-profit whistleblower protections that form part of the overall whistleblowing framework.

AIST believes that a strong whistleblowing framework is critical in ensuring that Australia keeps pace with international and domestic leading practice and that whistleblowers, who serve an important role in detecting corporate wrongdoing<sup>1</sup>, are afforded the protections that they deserve.

In addition to responding to the Terms of Reference we have also addressed a number of issues outlined in the Consultation Paper for the *Review of Tax and Corporate Whistleblower Protections in Australia* in this submission.

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<sup>1</sup> Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) 189.

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### 3 Whistleblowing in Superannuation

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#### 3.1 The current whistleblower framework and issues

The whistleblowing framework can be thought of as the broad whistleblowing system, encompassing:

- A clear definition of who is a whistleblower
- An outline of the disclosures that qualify for protection
- The process by which a disclosure can be made
- Protection mechanisms to prevent persons causing detriment to a whistleblower
- Compensation arrangements for whistleblowers that suffer detriment following a disclosure, including financial compensation, reinstatement of position, apologies, exemplary damages and injunctions
- Confidentiality requirements
- Protection from self-incrimination

The current profit-to-member whistleblowing framework is unsophisticated and it lacks many of the elements outlined above. The framework is a combination of the *Life Insurance Act 1995*, *Corporations Act 2001*, *Superannuation Industry (Supervision) Act 1993* provisions and relevant prudential standards, containing the following elements:

- Disclosures qualifying for protection
- Whistleblower protection
- Prevention of Whistleblower victimisation
- Right to receive compensation
- Confidentiality requirements
- Avoidance of self-incrimination

The framework's relationship with the superannuation industry, and its issues are detailed in the table below.

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Source	Interaction with superannuation	Issues
<b>Part 7 of the <i>Life Insurance Act 1995</i></b>	RSE Licensees (super funds) often engage the services of life insurance companies for the purpose of providing insurance to their members. The operations of the life insurance company is therefore material to an RSE licensee's product offering.	The provisions of this Act are similar to the <i>Corporations Act 2001</i> provisions, which have been highly criticised.
<b>Part 29A of the <i>Superannuation Industry (Supervision) Act 1993</i></b>	The bulk of super fund regulation is contained in the <i>Superannuation Industry (Supervision) Act 1993</i> .	The provisions of this Act are similar to the <i>Corporations Act 2001</i> provisions, which have been highly criticised.
<b>Part 9.4AAA of the <i>Corporations Act 2001</i></b>	Super funds are almost always corporate trustees and therefore must adhere to the provisions of the <i>Corporations Act 2001</i> . (Excluding exempt public sector funds)	These whistleblowing provisions have been extensively criticised and need reform. <sup>2</sup>

<sup>2</sup> Oliva Dixon, 'Honesty Without Fear? Whistleblower Anti-Retaliation Protections in Corporate Codes of Conduct' (2016) 12 *Melbourne University Law Review* 168, 175; above n 1, 202.

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<p><b>Paragraphs 37 – 42 of the <i>Fit and Proper Prudential Standard</i> (SPS 520)</b></p>	<p>Prudential Standards apply to all RSE licensees (super funds) under the <i>Superannuation Industry (Supervision) Act 1993</i>.</p> <p>This standard requires RSE licensees (super funds) to have adequate provisions to allow for whistleblowing if a person believes that a responsible person does not meet the fund’s fit and proper criteria.</p> <p>Further, as the standard only applies to responsible persons, people who are not responsible persons may not be aware that the reporting provisions actually exist.</p>	<p>The information being disclosed must be about a responsible person that fails to meet the fit and proper criteria. The protection is narrow and does not provide full protection because it only covers whistleblowing about responsible persons or breaches of the Prudential Standard.</p>
<p><b>Paragraph 66 of the <i>Governance Prudential Standard</i> (SPS 510)</b></p>	<p>Prevents an RSE licensee from impeding persons from disclosing certain information to the Australian Prudential Regulation Authority (APRA).</p>	<p>It does not impose any positive obligation on RSE licensees to establish a whistleblowing framework.</p>

As summarised in the table above, there are a number of issues within the current framework that must be addressed. Of these issues, AIST believes the main limitations stem from the *Corporations Act 2001 (Cth)*, in particular:

- The provisions do not provide enough clarity to the Australian Securities and Investments Commission (ASIC), which makes it difficult for ASIC to adequately protect whistleblowers.<sup>3</sup>

<sup>3</sup> Above n 1, 202.

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- Persons that would like to make a disclosure may be unable to qualify for protection because the categories of protected persons are narrow; for example former employees are not protected.<sup>4</sup>
- Persons can only qualify for protection where the disclosure relates to a contravention of Corporations legislation.<sup>5</sup> This means that disclosure of suspected breaches of trust law are not covered, for example.
- It is unclear whether the protections come into force if a person caused detriment to a discloser (whistleblower) by an omission, rather than a positive act.
- The definition of detriment is undefined, which may cause doubt.

In addition to the criticisms of the *Corporations Act 2001* provisions, the Australian Prudential Regulation Authority (APRA) Prudential Standards do not have a broad application as they were not intended to comprise a significant part of the overall whistleblower framework. The Prudential Standards provide some coverage to whistleblowers, however they do not cover all instances of whistleblowing within a super fund, for example SPS 520 does not require super funds to have adequate provisions for whistleblowing that is unrelated to responsible persons, and because it relates only to responsible persons, it is not a whole of organisation framework.

Accordingly, AIST submits that the overall whistleblowing framework must be reformed.

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<sup>4</sup> The Treasury, *Improving Protections for Corporate Whistleblowers* (October 2009) <<http://tinyurl.com/guwa87g>>

<sup>5</sup> Ibid.



## Whistleblower protections

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### 4 Enhancing Superannuation Whistleblowing

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#### 4.1 The importance of whistleblowing

##### 4.1.1 The need for a whistleblowing framework

According to APRA, since 1996 superannuation assets have grown by over \$1.7 trillion dollars and the industry is expected to grow to over \$3.2 trillion dollars by 2035 and represent 130% of Australia's gross domestic product.<sup>6</sup> Due to the high-value nature of the superannuation industry there needs to be an effective whistleblower framework to ensure stability within the system.

The need for a robust whistleblower framework is higher in the retail superannuation fund sector than the profit-to-member sector. The risk of fraud, financial misconduct and illegal activity is arguably higher in the retail sector because of inherently conflicted vertically integrated business models and the overarching need to provide income to shareholders as well as super members.

Notwithstanding these concerns and the fact that AIST member funds, with their strong profit-to-member culture, strive to act in the best interests of beneficiaries at all times, the additional safeguard against illegitimate conduct offered by a whistleblowing framework is welcomed.

##### 4.1.2 Why whistleblowing matters

Whistleblowing should not be viewed in a negative light, rather whistleblowing should be viewed positively because it:

- Promotes organisational stability – whistleblowing helps organisations detect poor culture or practices and ultimately address those issues before they spiral out of control, or develop to such a point where its overall stability compromised.
- Reduces exposure to fraud – whistleblowing can save an organisation money. For example, consider the well documented case of unauthorised foreign currency trading at an Australian Bank which caused losses of \$360 million dollars.<sup>7</sup> These losses were ultimately detected by a whistleblower.
- Presents the last line of defence within an organisation – whistleblowing can step in when regulatory oversight and good governance fails.

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<sup>6</sup> Professor Rodney Maddock, 'Superannuation Asset Allocations and Growth Projections' (Research Paper, Financial Services Council, 17 February 2014) 6.

<sup>7</sup> Dellaportas et al, 'Leadership, Culture and Employee Deceit: The Case of the National Australia Bank' (2007) 15(6) *Corporate Governance: An International Review* 1442, pp23 – 24.

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- Stops wrongdoing and enables an organisation to take corrective action quickly, which can prevent the development of reputational issues, fines, lawsuits, employee dissatisfaction, and enhanced regulatory scrutiny.
- Contributes to the overall risk management framework of the entity.
- Detects issues, ultimately equipping organisations to address corporate governance weaknesses and improve its internal management.
- Exposes corruption because those who blow the whistle are in the privileged position of seeing how the organisation operates behind the scenes.

While some of these benefits may have limited impact within the profit-to-member superannuation context, due to different business structures and the trust overlay, a good whistleblowing framework can have a positive impacts on the superannuation sector.

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## 5 Improving Australia's whistleblowing framework

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### 5.1 Development and implementation of not-for-profit whistleblower protections

AIST submits that Australia's whistleblowing framework requires reform because the current framework does not adequately protect whistleblowers following a disclosure and because it has failed to keep pace with international developments and leading practice. AIST submits that reform must be principles based in recognition of the fact that the not-for-profit sector is comprised of high-value superannuation funds, as well as a variety of other organisations with different purposes and business structures.

### 5.2 Definition of whistleblower

One of the major criticisms of the current *Corporations Act 2001* whistleblowing framework is that the definition of 'discloser' (a whistleblower) is too narrow and effectively prevents potential whistleblowers from receiving adequate protection.<sup>8</sup> The definition of discloser under the Act is limited to current company officers and employees as well as contractors and employees of contractors.<sup>9</sup> This is a very narrow definition, and provides no incentive for former officers, staff or contractors to come forward to disclose and does not protect disclosers that cease employment throughout the process of making a disclosure.

AIST submits that the definition of discloser be expanded in the new framework to encourage greater reporting of wrongdoing and it should include:

- Current and former employees of the RSE licensee
- Current and former officers of the RSE licensee
- Current and former contractors of the RSE licensee – that is, persons who have or had a contract of supply of goods or services to the RSE licensee. This definition should include staff of outsourced service providers such as actuaries, administrators, insurers and custodians.

AIST believes that the views of former employees, officers and contractors are no less legitimate than the views of incumbents and their insights may be of significant value to an organisation. The expanded definition may also give former parties the courage to report knowing that they would receive protections under the framework.

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<sup>8</sup> Above n 4, 8; above n 1, 209.

<sup>9</sup> The *Corporations Act 2001* (Cth) s 1317AA(1)(a).

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This recommendation to expand the definition aligns with the international best practice principle that the legislative definition of a discloser (whistleblower) should be broad.<sup>10</sup> It is also consistent with definition in the *Fair Work (Registered Organisations) Amendment Act 2016*.

AIST submits that the definition of discloser (whistleblower) be broadened to encourage more whistleblowing reporting and to strengthen the overall framework.

### 5.3 Types of wrongdoing to be covered by a protection regime

In order for a discloser (whistleblower) to receive legal protection there is a requirement that the wrongdoing they are disclosing meets a certain threshold, that is, the wrongdoing is serious enough.

AIST submits that the current definition of wrongdoing is too narrow, and the types of wrongdoing covered by a protection regime should, at a minimum include:

- Actual or suspected contravention of applicable statutory provisions, or a law of the Commonwealth, including the *Superannuation Industry (Supervision) Act 1993*, the *Corporations Act 2001* and associated regulations
- Fraud
- Gross mismanagement
- Financial misconduct, including misappropriation of funds

While a broad definition of wrongdoing ensures that the interests of beneficiaries are adequately protected, AIST cautions that the definition should not be too wide. Protection under the framework should not be available for disclosures about personal disputes, employment grievances or disagreement with policies.

The need to avoid a broad definition of wrongdoing can be seen in the independent statutory review of the *Public Interest Disclosure Act 2013 (Cth)* in 2016. That review noted that the kinds of disclosable wrongdoing were drafted too broadly and unintentionally protected employment-related grievances.<sup>11</sup>

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<sup>10</sup>Wolfe et al, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws* (October 2015) Blueprint for Free Speech <<http://blueprintforfreespeech.net/>>

<sup>11</sup>Phillip Moss, *Review of the Public Interest Disclosure Act 2013* (15 July 2016) Department of Prime Minister and Cabinet <<http://tinyurl.com/je2rxqv>> 7.

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AIST's recommendation aligns with the best-practice principle that the legislative definition of reportable wrongdoing be broadly worded.<sup>12</sup> The wording will give those who engage with a fund certainty that they will receive legal protection after they disclose wrongdoing.

### 5.4 Integrating whistleblower protection requirements

Whistleblower protections can be established by reforming current legislation or by establishing national legislation. Of these options AIST believes that the new whistleblower protections should be contained in one Act and have consistent application across Australia. Centralising the protections:

- Provides certainty to whistleblowers
- Reduces confusion, complexity and overlap between applicable protections, which may contain subtle differences
- Removes the need to consider multiple sources of protections and decide which regime is the best to disclose under

While national legislation has its benefits, it is vital that the legislation acknowledges the differences between the not-for-profit, public and corporate sectors and the important distinctions within those sectors. The not-for-profit sector includes both high value superannuation funds and charities, similarly, the corporate sector includes listed and non-listed companies. The risk of harm in each of these structures differs markedly, as such it is important that the whistleblowing protections, and burdens imposed on companies, are appropriate in light of the entity to which they apply.

The need for different regulatory approaches is highlighted by the fact that in the United States, the highly regarded whistleblower framework and protections under the *Sarbanes-Oxley Act 2002* and the *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010* only apply to publicly listed companies.

### 5.5 Whistleblower compensation arrangements

Given that fear of retaliation is often the biggest barrier to a person making a disclosure (whistleblowing),<sup>13</sup> it is critical that if there is retaliation, the whistleblower is entitled to receive some form of redress. Currently, if a whistleblower suffers detriment as a result of making a

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<sup>12</sup>Above n 10, 6.

<sup>13</sup>David Banisar, *Whistleblowing: International Standards and Developments* (February 2011) <<http://tinyurl.com/jyps5j8>> 8.

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disclosure they are entitled to claim financial compensation from the person(s) that caused the detriment. If the whistleblower is dismissed from their employment by their employer they are also able to seek a court order that they be reinstated in that position, or one at a similar level.

These protections are insufficient and fail to send the message that whistleblowers are valued, and are making a genuine commitment to the organisation by exposing serious wrongdoing. AIST submits that the abovementioned protections be retained and the types of redress available to whistleblowers be expanded to include:

- A formal apology from those who have caused detriment
- Exemplary damages
- Positive and negative injunctions

### 5.6 Internal whistleblower protection policies and procedures

AIST submits that it is appropriate for superannuation funds to have internal policies and procedures in place to facilitate the appropriate management of whistleblower disclosures.

AIST believes that the presence of internal policies and procedures within funds sends a clear message to employees, and those that engage with the fund, that they will be supported by the organisation should they decide to make an eligible disclosure.

The policy serves a central role because it acts as a formal statement from the organisation that integrity, good management and accountability are held in high regard. A policy can also serve as a useful indicator of an organisation's culture and approach to managing problems.

Many AIST member funds have internal whistleblowing frameworks in place, due in part to the prudential requirement for funds to allow disclosures about responsible persons. The prudential requirements themselves reflect the importance that whistleblowing can play in the overall management of a company and how internal policies can provide real value.

Our views on the merits of having an internal whistleblowing framework aligns with the best-practice principle that companies should have internal disclosure procedures.<sup>14</sup>

AIST supports the requirement for funds to develop internal policies and protection mechanisms to facilitate effective management of disclosures, however it is important to avoid unnecessary duplication of the current regulatory framework within the super sector.

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<sup>14</sup> Above n 10, 6.

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### 5.7 Whistleblowing and the regulator

AIST submits that regulators need to have a strong, positive engagement, with both the superannuation industry and whistleblowers. ASIC is the most appropriate entity to be responsible for protecting whistleblowers and investigating their claims upon receiving a disclosure.

Currently, whistleblower legislation does not specify how ASIC is to deal with whistleblower reports when it receives them, nor how it is to protect the whistleblowers. Given the absence of guiding principles setting out how the regulator is to respond to a whistleblower report, AIST submits that any future framework should clearly specify the regulators role in detail.

This clarity would have the effect of providing greater certainty to whistleblowers and gives them an understanding of what they can expect throughout the processes. It also makes it clear that they can rely on the regulator while also providing funds with an understanding of how the regulator investigates disclosures, and the likely impact that the investigation will have on them.

### 5.8 Anonymous disclosures

AIST is not opposed to broadening the whistleblower protection provisions to also cover anonymous disclosures. Many international whistleblowing frameworks cover anonymous disclosures as does the *Fair Work (Registered Organisations) Amendment Act 2016*.

Anonymous disclosures can potentially limit the ability of parties who receive disclosures to investigate the matter thoroughly as they are unable to consult the discloser and this limitation should be considered as part of any future reform. Furthermore, anonymous disclosures limit the evidentiary testing of information as the original discloser may be unable to provide further evidence of the disclosed conduct.

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