

Whistleblowing While You Work

Using Rewards for Whistleblowing to Uncover White-collar Crime

Over 20 years ago the Australia Institute recommended creating a rewards system for whistleblowers. In the decades since, rolling corporate scandals have revealed white-collar crime is pervasive while American rewards systems have proven highly successful. By instituting a whistleblower rewards system Australia can more effectively uncover, combat, and deter these crimes, promote ethical business behaviour, and broadly benefit societal wellbeing.

Discussion paper

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Summary

White-collar crime degrades Australia's social fabric, subverts its democracy, and undermines its economy. Unfortunately, many white-collar crimes remain hidden while continuing to harm society, making them difficult to detect and deter using ordinary methods. As such, whistleblowing is essential to detecting and deterring white-collar crime, bringing covert conduct into the open and breaking down trust between conspirators.

Over 20 years ago the Australia Institute recommended a system to encourage white-collar whistleblowing, the Repayment of Gains Unlawfully Earned (ROGUE) scheme. This scheme would have provided rewards to white-collar whistleblowers, funded through revenue contingent fines on offenders.

The past 20 years have revealed both the pervasiveness of white-collar crime and proven the effectiveness of whistleblower rewards systems. Recurrent corporate scandals have shown white-collar crime to be prevalent and widespread in Australia such as the financial misconduct revealed by the Banking Royal Commission, the PwC tax scandal, and revelations of corporate wage theft and tax evasion. Though Australia's whistleblowing system has been strengthened in the wake of these scandals, no whistleblowing rewards system yet exists in Australia.

Over this same period the United States has continued to operate whistleblower rewards systems and created several more. These systems have been highly successful, helping reduce white-collar misconduct including financial crimes, fraud and foreign corruption. These systems have rewarded whistleblowers with billions of dollars and recovered tens of billions for the American public.

Implementing a whistleblower rewards system, such as ROGUE, would provide regulators with a new and effective tool in reducing white-collar crime across Australia. These rewards would uncover ongoing white-collar crime and deter future crimes by breaking down trust between current and potential conspirators. Additionally, ROGUE's revenue contingent fine payment system would allow regulators and courts to award fines based on actual damage caused, without affecting the financial viability of offending businesses. By reducing the prevalence of white-collar crime, a whistleblower rewards system would help rebuild Australia's damaged social fabric, enhance the integrity of its economy, and help ensure its democracy is not undermined by corporate misbehaviour.

Introduction

White-collar crime undermines Australia's economy, social fabric and even democracy. The extent and breadth of white-collar crime and misconduct has been revealed by decades of corporate scandals, ranging from repeated revelations of wage theft and tax evasion by major corporations, to the widespread abuse of market power revealed by the Price Gouging Inquiry,¹ to the shocking and anti-democratic PwC tax scandal.²

Despite these revelations, a considerable amount of white-collar crime likely continues to go undetected. These crimes can be difficult to detect and prosecute, and the victims of white-collar crime may not even realise they are victims. For instance, the consumers of a product that has a secret price-fixing cartel might not know that prices should be lower, and simply continue to pay what the market offers. These difficulties make whistleblowers essential; they reveal previously hidden unlawful or immoral conduct and allow society to stop this behaviour and prosecute wrongdoers.

Over 20 years ago, the Australia Institute recommended that Australia create a system to reward whistleblowers that is funded through revenue contingent fines on offending persons and corporations.³ This suggested policy was called the Repayment of Gains Unlawfully Earned (ROGUE) scheme. In the decades since, recurrent scandals have further revealed prevalence of white-collar crime, while the experience of whistleblower rewards systems in the United States have demonstrated just how effective these tools can be.

As white-collar scandals have mounted, so have calls for an Australian whistleblower rewards system, most notably:

- 2017: the Parliamentary Joint Committee on Corporations and Financial Services called for a whistleblower rewards system.⁴

¹Australian Council of Trade Unions (2024) *Inquiry into price gouging and unfair pricing practices*, <https://pricegouginginquiry.actu.org.au/>

²Treasury portfolio (2023) *Government taking decisive action in response to PwC tax leaks scandal: Media release*, <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks>

³Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, https://australiainstitute.org.au/wp-content/uploads/2020/12/WP50_8.pdf

⁴Parliamentary Joint Committee on Corporations and Financial Services (2017) *Whistleblower Protections*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/~/_media/Committees/corporations_ctte/WhistleblowerProtections/report.pdf

- 2019: a Whistleblower Rewards Scheme policy formed part of the Labor Party's election platform, though it did not return in their successful 2022 election campaign.⁵
- 2023: a consultation paper from the Attorney-General's Department discusses the use of whistleblower rewards in the context of the public sector whistleblowing stage 2 reforms.⁶
- 2024: following his chairing of the ACTU's price gouging inquiry, Professor Allan Fels AO publicly called for the implementation of an Australian whistleblower rewards scheme, citing the successes of the US experience.⁷
- 2024: the Senate Standing Committee on Economics called for an investigating the establishment of financial incentives and compensation for whistleblowers.⁸

Australia Institute polling has also revealed rewards for whistleblowers to be highly popular in Australia, with three in five Australians in support.⁹ Implementing a whistleblower rewards system, such as ROGUE, is more relevant than ever and would provide a pivotal tool in combating and preventing white-collar crime.

⁵ Bill Shorten MP (2019) *Labor Will Protect and Reward Banking Whistleblowers*, https://www.billshorten.com.au/labor_will_protect_and_reward_banking_whistleblowers_sunday_3_february_2019

⁶ Attorney-General's Department (2023) *Consultation paper: Public sector whistleblowing reforms - Public sector whistleblowing reforms Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, https://consultations.ag.gov.au/integrity/pswr-stage2/user_uploads/consultation-paper-public-sector-whistleblowing-reforms-stage-2.pdf

⁷ Allan Fels (2024) *How to keep corporations honest*, <https://www.thesaturdaypaper.com.au/comment/topic/2024/03/23/how-keep-corporations-honest#hrd>

⁸ Economics Reference Committee (2024) *Australian Securities and Investments Commission investigation and enforcement*, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000117/toc_pdf/AustralianSecuritiesandInvestmentsCommissioninvestigationandenforcement.pdf

⁹ Australia Institute (2023) *Whistleblowing & secrecy*, <https://australiainstitute.org.au/wp-content/uploads/2023/05/Polling-Whistleblowing-and-secrecy-Web.pdf>

White-collar crime, corporate crime, and whistleblowing

DEFINITIONS

This report focuses on white-collar crime, particularly corporate crime. White-collar crimes are financially motivated and do not involve direct violence. Examples of white-collar crimes are fraud, money laundering, tax evasion and insider trading.

Corporate crime is any criminal activity undertaken by corporations or individuals acting on behalf of the corporation. These crimes are generally motivated by the corporation's wish to maximise profits or market share. Examples of corporate crimes are breaches of industrial relations or environmental laws, fraud, and tax evasion. Most corporate crimes fall under the category of white-collar crime.

Whistleblowing is the act of revealing information about illegal, unethical, or otherwise socially unacceptable behaviour of an organisation, such as a corporation or government agency. Whistleblowers are often current or former employees of these organisations.

RELATIONSHIP BETWEEN WHITE-COLLAR CRIME AND WHISTLEBLOWING

Whistleblowing is particularly important in detecting, prosecuting, and deterring white-collar and corporate crimes for several reasons. First, many white-collar crimes do not create a clear and direct victim. For instance, the Government may be totally unaware individuals or corporations are evading their taxes, or customers are unaware that prices are higher than they should be due to a secret business cartel. This makes these crimes very hard to detect as victims are unaware that they have been harmed and will not report these crimes to relevant authorities.

Second, criminal intent can be difficult to prove in white-collar crimes, for instance whether the offender knew that their conduct was deceptive or fraudulent. This makes gathering evidence difficult without sufficient cooperation from those involved or closely connected to the conduct.

Lastly, corporate white-collar crimes often involve groups of people participating in, or at least aware, of the conduct, creating a pool of potential whistleblowers. Individuals involved in or aware of white-collar and corporate crimes may be more willing to engage in whistleblowing than those involved in other group-based offences, such as organised crime, due to a lower risk of violent consequences.

White-collar crime: prevalence, harm, and recent scandals

The Australia Institute's original report predominantly focussed on the crimes of collusion and insider trading. While these crimes remain prevalent and highly damaging, the past two decades of recurrent white-collar crime and misconduct scandals have exposed a much broader problem. As such, this report expands the scope of the ROGUE system to white-collar crime more broadly.

COLLUSION

Collusion refers to when firms cooperate to restrain competition in some way. Australia bans various forms of collusion, including the formation of business cartels to fix prices, rig bidding, divide up markets, or artificially control output.¹⁰ For example, between 2005 and 2009 the popular travel agent company Flight Centre attempted to collude with three international airlines to fix prices, ensuring the airlines did not advertise any prices lower than those on the Flight Centre website.¹¹ If successful this would have illegally raised prices for consumers. For this conduct Flight Centre was ordered to pay penalties of \$12.5 million.¹²

The Australia Institute's original report described the scale of the harm caused by collusion:

In recent years it has been argued that reductions in trade barriers and increased globalisation have resulted in increased collusive activity (ACCC 2002), with the OECD estimating that the value of commerce affected by collusive conduct in 16 large cartel cases that had been examined was greater than \$55 billion (OECD 2002). Estimates of the impact of collusion on market prices range from ten per cent in the US (ACCC 2002, p. 23) to between 15 and 50 per cent (OECD 2002a, p. 9). The OECD has referred to collusive practices as the most 'egregious violations of competition law' (OECD 2002, p. 5).

¹⁰ Australian Competition & Consumer Commission (n.d.) *Competition and anti-competitive behaviour*, <https://www.accc.gov.au/business/competition-and-exemptions/competition-and-anti-competitive-behaviour#toc-business-behaviour-that-is-illegal>

¹¹ Australian Competition & Consumer Commission (2018) *Flight Centre ordered to pay \$12.5 million in penalties*, <https://www.accc.gov.au/media-release/flight-centre-ordered-to-pay-125-million-in-penalties>

¹² Australian Competition & Consumer Commission (2018) *Flight Centre ordered to pay \$12.5 million in penalties*

While the past two decades have seen few similar quantitative analyses of the extent of collusion, recurrent international and domestic scandals and prosecutions for collusive conduct indicate that this remains a major problem. For example, in 2016 a group of five European truck makers, including Volvo/Renault, were fined nearly €3 billion (equivalent of over AU\$6 billion)¹³ for participating in a cartel that fixed prices and passed on costs of compliance with emission standards to customers.¹⁴ The net welfare impact of this cartel has been estimated to have cost up to €15.5 billion (equivalent of about AU\$33 billion).¹⁵

In Australia, BlueScope Steel and its former general manager were recently fined \$57.5 million and \$575,000 respectively for attempting to fix the price of flat steel.¹⁶ The Australian Competition and Consumer Commission's (ACCC) most recent annual report reveals they enforced 25 interventions against anti-competitive conduct from 2019-20 to 2022-23.¹⁷

Though the full extent of undetected collusion is clearly unknown, it is likely to be significant. Since creating an immunity and cooperation policy for cartel conduct in 2019, the ACCC has been approached at least 37 times for cartel immunity.¹⁸ Additionally, Australian product markets are increasingly concentrated, with a smaller number of firms dominating various sectors. More concentrated markets are more likely to abuse their market power through breaching competition regulations.¹⁹

INSIDER TRADING

Per the Australian Institute of Company Directors:

¹³ All Australian equivalent conversions are calculated using OECD 2023 PPP for GDP conversion rates. OECD (n.d.) *Annual Purchasing Power Parities and exchange rates*, <https://data-viewer.oecd.org/?chartId=4b3ee5f4-976d-431f-9d54-967f552df643>

¹⁴ European Commission (2016) *Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel*, https://ec.europa.eu/commission/presscorner/detail/el/IP_16_2582

¹⁵ Intereconomics (2020) *The Welfare Implications of the European Trucks Cartel*, <https://www.intereconomics.eu/contents/year/2020/number/2/article/the-welfare-implications-of-the-european-trucks-cartel.html>

¹⁶ ABC News (2023) *Steelmaker BlueScope fined record \$57.5 million for attempted price fixing of flat steel*, <https://www.abc.net.au/news/2023-08-29/federal-court-imposes-570-million-fine-on-bluescope-price-fixing/102788800>

¹⁷ Australian Competition and Consumer Commission (2023) *Annual Report 2022-23*, <https://www.accc.gov.au/system/files/ACCC%20AER%20Annual%20Report%202022-23.pdf>

¹⁸ Australian Competition and Consumer Commission (2023) *Annual Report 2022-23*; Australian Competition and Consumer Commission (2022) *Annual Report 2021-22*, <https://www.accc.gov.au/system/files/ACCC%20and%20AER%20annual%20report%202021-22.pdf>; Australian Competition and Consumer Commission (2021) *Annual Report 2020-21*, <https://www.accc.gov.au/system/files/Annual%20Report%202020%2021%20-%20Web.pdf>

¹⁹ e61 Institute (2023) *The State of Competition in Australia*, <https://e61.in/state-of-competition/>

Insider trading is the trading of securities or a wider set of financial products while in possession of information:

- which is not generally available; and
- if it were, would be likely to have a material effect on the price or value of the security.²⁰

Essentially this means insiders (for instance, company directors) must not buy and sell financial products while in possession of non-public insider information (such as not-yet-released financial reports). For example, in 2015 Lukas Kamay and Christopher Hill were both sentenced to prison terms for insider trading.²¹ In this case Kamay was a banker with the National Australia Bank and Hill worked at the Australian Bureau of Statistics (ABS). By using Hill's access to unreleased ABS data, Kamay is estimated to have made \$7 million in profit from foreign exchange trades.²² Insider trading is illegal because it undermines the efficiency and integrity of the financial system and erodes investor confidence.

Our original report described the extent of insider trading in Australia as follows:

While there have been relatively few prosecutions for insider trading in Australia some researchers have suggested that between five and ten per cent of all trades involve insider information (Richards 2000). Similarly, a study of Australian executives found that 52 per cent of respondents would be willing to buy shares before their own company made a favourable announcement (Richards 2000). It would therefore appear that the detection, and prosecution of insider trading lags well behind its prevalence.

The extent of insider trading in Australia remains unknown. ASIC claims the Australian financial market "is among the cleanest in the world" however this, and ASIC itself, has come under scrutiny.²³ For instance, recently a Senate Committee inquiry into ASIC's investigation and enforcement roles noted the following:

ASIC's own data suggests that only a small proportion of alerts or reports of potential insider trading lead to investigation by ASIC and an even smaller number of reports result in prosecution and conviction. For example, from 2019–20 to 2021–22:

- ASIC received and reviewed 136,997 insider trading surveillance alerts

²⁰ Australian Institute of Company Director (2020) *Insider trading*, <https://www.aicd.com.au/board-of-directors/duties/breach-corporations-act/insider-trading.html>

²¹ ABC News (2015) 'Greedy' pair Lukas Kamay, Christopher Hill jailed over \$7 million ABS insider trading scam, <https://www.abc.net.au/news/2015-03-17/pair-sentenced-over-abs-insider-trading/6324526>

²² HopgoodGanim Lawyers (2015) *Record seven year jail sentence for perpetrator of Australia's worst instance of insider trading*, <https://www.hopgoodganim.com.au/news-insights/record-seven-year-jail-sentence-for-perpetrator-of-australias-worst-instance-of-insider-trading/>

²³ Australian Securities & Investment Commission (2024) *Australian equity market cleanliness a crucial ASIC priority*, <https://asic.gov.au/about-asic/news-centre/articles/australian-equity-market-cleanliness-a-crucial-asic-priority/>

- ASIC received 245 reports from brokers on suspicious trading activity
- ASIC commenced 36 investigations into insider trading
- the Commonwealth Director of Public Prosecutions commenced seven prosecutions against people or companies charged with insider trading
- six people or companies were convicted of insider trading offences.²⁴

Research from the University of Technology Sydney has estimated that at least 80% of insider trading in the US stock market, which has one of the world's most mature regulatory and enforcement regimes, is undetected.²⁵ Though similar calculations have not been made for the Australian stock market, one of the report's researchers has pointed out that the ASIC method for checking the level of insider trading appears unable to properly estimate the absolute amount of insider trading occurring.²⁶

EXPANDING THE SCOPE

Since The Australia Institute originally proposed the ROGUE scheme in 2003, the broader prevalence and severe harm of white-collar crime and misconduct has come to light. In 2016, an Australia Institute report analysed official reports from regulators and criminal enforcement agencies for corporate crime and found that while Government continued to cut and under-resource these agencies, malfeasance in the private sector appeared to be rife.²⁷ This finding has been underscored by an ongoing series of white-collar crime and misconduct scandals.

Recent scandals

Financial industry

From 2017 to 2019 the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission) revealed widespread misconduct and systemic failures of the financial industry.²⁸ The Commission was accompanied by concurrent scandals, most notably Commonwealth Bank breaches of anti-

²⁴ Economics Reference Committee (2024) *Australian Securities and Investments Commission investigation and enforcement*, p 87

²⁵ University of Technology Sydney (2021) *How much insider trading really happens in US stock markets?*, <https://www.uts.edu.au/news/business-law/how-much-insider-trading-really-happens-us-stock-markets>

²⁶ Australian Financial Review (2021) *Three in four insider traders get away with it*, <https://www.afr.com/chanticleer/three-in-four-insider-traders-get-away-with-it-20210604-p57y1a>

²⁷ Australia Institute (2016) *Corporate Malfeasance in Australia*, <https://australiainstitute.org.au/report/corporate-malfeasance-in-australia/>

²⁸ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019) *Final Report*, <https://www.royalcommission.gov.au/banking/final-report>

money laundering and counter-terrorism financing laws.²⁹ This resulted in reforms which enhanced protections for corporate whistleblowers.³⁰

Wage theft

Recent years have seen a rolling series of wage theft revelations, as prominent corporations have been found to have underpaid workers millions of dollars, including Woolworths, Commonwealth Bank and 7-Eleven.³¹ In 2023, BHP, one of Australia's largest mining companies, conceded it had underpaid 28,500 workers since 2010, to a total cost of about \$430 million.³² Partly because of revelations like this, the federal, state and territory governments have passed workplace reforms, enhancing workplace rights and regulating various conduct from employers, such as criminalising industrial manslaughter and intentional wage theft.³³

Tax evasion

Tax evasion and avoidance have become progressively prominent public concerns, due to the high-profile leaks of tax haven documents such as the Panama, Paradise and Pandora papers. As a result of the Panama papers the Australian Tax Office (ATO) identified more than \$140 million in additional tax liabilities.³⁴ Public awareness of multinational corporate tax avoidance and evasion strategies has also increased, such as in the ATO's successful legal case against Chevron, finding the company owed more than \$340 million in taxes.³⁵ Partly as a result, the Albanese Government has taken steps to improve tax transparency including

²⁹ AUSTRAC (2018) *AUSTRAC and CBA agree \$700m penalty*, <https://www.austrac.gov.au/news-and-media/media-release/austrac-and-cba-agree-700m-penalty>

³⁰ Australian Securities & Investment Commission (n.d.) *Protections for corporate sector whistleblowers*, <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/protections-for-corporate-sector-whistleblowers/>

³¹ The Guardian (2019) *Woolworths underpaid thousands of workers by up to \$300m*, <https://www.theguardian.com/business/2019/oct/30/woolworths-underpaid-thousands-of-staff-by-up-to-300m>; Australian Financial Review (2024) *Court whacks CBA with record \$10m fine for wage theft*, <https://www.afr.com/work-and-careers/workplace/court-whacks-cba-with-record-10m-fine-for-wage-theft-20240215-p5f589>; ABC News (2022) *7-Eleven to pay \$98m after franchisees allege its model was 'a lemon' based on wage theft*, <https://www.abc.net.au/news/2022-04-06/7-eleven-wage-theft-98-million-franchisees-class-action/100970682>

³² ABC News (2023) *Mining giant BHP admits underpaying almost 30,000 Australian workers*, <https://www.abc.net.au/news/2023-06-01/bhp-wages-underpaid-28500-workers/102419890>

³³ Australian Institute of Company Directors (2023) *New legislation criminalises wage theft and industrial manslaughter*, <https://www.aicd.com.au/board-of-directors/duties/liabilities-of-directors/new-legislation-criminalises-wage-theft-and-industrial-manslaughter.html>

³⁴ Australian Financial Review (2021) *Panama Papers tax haul tops \$143 million*, <https://www.afr.com/politics/federal/panama-papers-tax-haul-tops-143-million-20210118-p56uw3>

³⁵ Australian Financial Review (2017) *Chevron loses Australia's biggest tax case*, <https://www.afr.com/politics/chevron-loses-australias-biggest-tax-case-20170421-gvp8e1>

implementing the global minimum corporate tax³⁶ and increasing reporting requirements on corporate structures.³⁷

Data management

Corporate management and mismanagement of user data have become of increasing public concern. Data breach scandals are now common, with major data breaches for both Optus and Medibank in 2022. Optus was fined only \$1.5 million for this breach,³⁸ while legal actions against Medibank remain ongoing.³⁹

Management consultants

The consultancy industry has come under recent scrutiny for conflicts of interest, breaches of confidentiality, and other professional misconduct. The most prominent of these scandals continues to be the PwC tax scandal, revealed in 2022, where the firm was engaged by the Australian Government to consult on tax policy reform and abused its access to confidential information to help corporate clients.⁴⁰ Other examples include revelations of widespread cheating on online training tests designed to improve professional safety and integrity requirements by KPMG Australia.⁴¹

Price gouging and abuse of market power

In February 2024, the Australian Council of Trade Union's (ACTU) Inquiry into price gouging and unfair pricing practices, chaired by Professor Allan Fels AO, revealed the abuses of market power used by a range of industries including supermarkets, aviation, and energy companies.⁴² The price gouging report made recommendations, including:

- making it an offence to charge excessive prices in terms similar to the European Union,

³⁶ Australian Tax Office (2024) Implementation of a global minimum tax and a domestic minimum tax, <https://www.ato.gov.au/about-ato/new-legislation/in-detail/international/implementation-of-a-global-minimum-tax-and-a-domestic-minimum-tax>

³⁷ Holding Redlich (2024) *Crackdown on multinational tax arrangements with new subsidiary disclosure requirements*, <https://www.holdingredlich.com/crackdown-on-multinational-tax-arrangements-with-new-subsi-dary-disclosure-requirements>

³⁸ ABC News (2024) *Optus fined \$1.5 million by ACMA for breaches to public safety, customers 'at risk'*, <https://www.abc.net.au/news/2024-03-06/optus-fined-for-public-safety-breaches/103552146>

³⁹ Australian Financial Review (2024) *Medibank faces maximum \$21.5 trillion fine in new cyber hack case*, <https://www.afr.com/technology/medibank-faces-maximum-21-5trn-fine-in-new-cyber-hack-case-20240605-p5jje>

⁴⁰ ABC News (2023) *What is the PwC tax scandal? Who is Peter-John Collins? Who knew about it? Why does it matter?*, <https://www.abc.net.au/news/2023-06-05/pwc-pricewaterhousecoopers-government-tax-leak-scandal-explained/102409528>

⁴¹ The Guardian (2021) *US watchdog fines KPMG Australia over 'widespread' cheating on online training tests*, <https://www.theguardian.com/australia-news/2021/sep/15/us-watchdog-fines-kpmg-australia-over-widespread-cheating-on-online-training-tests>

⁴² Professor Allan Fels AO (2024) *Inquiry into Price Gouging and Unfair Pricing Practices*, https://pricegouginginquiry.actu.org.au/wp-content/uploads/2024/02/InquiryIntoPriceGouging_Report_web.pdf

- criminal sanctions for unlawful price fixing,
- a fully mandatory Food and Grocery Code Review.⁴³

Relatedly, there have been inquiries into Australia's supermarkets and their pricing from both a Senate Committee⁴⁴ and the ACCC.⁴⁵

⁴³ Professor Allan Fels AO (2024) *Inquiry into Price Gouging and Unfair Pricing Practices*, pp 10-12

⁴⁴ Senate Select Committee on Supermarket Prices (2024) *Final Report*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Supermarket_Prices/SupermarketPrices/Report

⁴⁵ ACCC inquiry is ongoing at time of publication. Australian Competition & Consumer Commission (2024) *Supermarkets inquiry 2024-25*, <https://www.accc.gov.au/inquiries-and-consultations/supermarkets-inquiry-2024-25>

Current whistleblowing regime

Whistleblowing is essential to detecting, prosecuting, and discouraging white-collar crime. This section outlines Australia's current framework to protect and encourage whistleblowers. These measures can be broadly divided into the categories of protections, support, and incentives.

PROTECTIONS

Protections refer to laws and policies that protect whistleblowers from adverse consequences as a result of their whistleblowing. This includes maintaining confidentiality of whistleblowers, preventing whistleblowers from being sacked, persecuted, or sued, potential immunities for whistleblowers from prosecution for their own past misconduct, and independent agencies to oversee these policies.

Australian protections for whistleblowers have been strengthened since the revelations of the Banking Royal Commission and the reforms it generated. This includes:

- clearer definitions of whistleblowers
- protections for whistleblowing activity including, in certain circumstances, reporting non-illegal activity or reporting to a journalist or parliamentarian
- protections for whistleblowers from victimisation
- penalties for parties that victimise whistleblowers
- requirements for public companies and large proprietary companies to have a whistleblowing policy.⁴⁶

Additionally, there have been improvements for public sector whistleblowers as a result of the ongoing reform of the Public Interest Disclosure Act.

Whistleblowing in Australia does not generally grant immunity from prosecution for misconduct revealed in the disclosure. However, in some sectors voluntary whistleblowing can be considered when regulators decide whether to act and which remedies to seek.⁴⁷ Additionally, in certain circumstances, companies cooperating to reveal cartel conduct can receive immunity from prosecution.⁴⁸

⁴⁶ Australian Securities & Investment Commission (n.d.) *Protections for corporate sector whistleblowers*

⁴⁷ Australian Securities & Investment Commission (n.d.) *Whistleblower rights and protections*, <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/whistleblower-rights-and-protections/>

⁴⁸ Australian Competition & Consumer Commission (2019) *ACCC immunity and cooperation policy for cartel conduct*, https://www.accc.gov.au/system/files/1579_ACCC%20immunity%20%26%20cooperation%20policy%20for%20cartel%20conduct%20-%20October%202019_FA.pdf

Despite steps forward, protections for whistleblowers can still be improved. Notably, ‘Protecting Australia’s Whistleblowers: The Federal Roadmap’ (Protecting Australia’s Whistleblowers), a report by Griffith University, the Human Rights Law Centre and Transparency International Australia outlines next steps in whistleblower protection reform, including establishing a whistleblower protection authority, clarifying immunities from prosecution, and enforcing a positive duty to protect whistleblowers.⁴⁹ This report also recommended that an established whistleblower protection authority administer a rewards scheme for whistleblowers.⁵⁰

SUPPORT

Support includes all laws and policies that assist whistleblowers in their whistleblowing and support their wellbeing afterwards. This includes policies such as accessible reporting mechanisms, compensation for harm experienced by the whistleblower, training and education for workplaces, or counselling and legal advice services.

Australia has some measures to support whistleblowers, for instance employers are liable to compensate employees for any loss, damage or injury caused to whistleblowers.⁵¹ Additionally, though not provided by the Government, the Human Rights Law Centre does provide a free legal service for whistleblowers.⁵²

As noted by Protecting Australia’s Whistleblowers, there is considerable room for improvement in support for whistleblowers. Suggestions include easier and more consistent access to remedies, greater power and resources for training and oversight, and amendments to confidentiality requirements to assist unions and professionals in providing support and representation to whistleblowers.⁵³

INCENTIVES

Incentives are policies that not only protect and compensate whistleblowers for any harm suffered but also actively entice whistleblowers to disclose information. This includes monetary rewards to whistleblowers – often calculated as a percentage of the total penalty awarded against the offenders.

⁴⁹ Griffith University, Human Rights Law Centre, and Transparency International Australia (2023) *Protecting Australia’s Whistleblowers: The Federal Roadmap (Updated Edition)*, <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/63d7386b85717c13d55b5fe8/1675049126788/Protecting+Australia%27s+Whistleblowers+Federal+Roadmap+Updated+Jan+2023.pdf>

⁵⁰ Griffith University, Human Rights Law Centre, and Transparency International Australia (2023) *Protecting Australia’s Whistleblowers: The Federal Roadmap (Updated Edition)*, f

⁵¹ Australian Securities & Investment Commission (n.d.) *Whistleblower rights and protections*

⁵² Human Rights Law Centre (n.d.) *Whistleblower Project*, <https://www.hrlc.org.au/whistleblower-project>

⁵³ Griffith University, Human Rights Law Centre, and Transparency International Australia (2023) *Protecting Australia’s Whistleblowers: The Federal Roadmap (Updated Edition)*

Australia does not have a system of rewarding whistleblowers. However, Australia does have a long history of providing rewards for information on serious crimes. For instance, the Australian Federal Police offers rewards of up to \$1,000 for information that leads to an arrest,⁵⁴ meanwhile various states and territories offer rewards of up to \$1 million for information on cases of murder and other serious offences.⁵⁵

⁵⁴ Australian Federal Police (n.d.) *Crime Stoppers for illegal activity in Australia*, <https://www.afp.gov.au/about-us/contact-us/crime-stoppers>

⁵⁵ Sydney Morning Herald (2022) *'Money talks': the rise and rise of police rewards for unsolved crimes*, <https://www.smh.com.au/national/nsw/money-talks-the-rise-and-rise-of-police-rewards-for-unsolved-crimes-20220506-p5aj9l.html>

International experience - the United States

The effectiveness of whistleblower rewards is underscored by its success internationally, most notably in the United States. The United States has created several whistleblower rewards systems, across a wide variety of sectors, ranging from financial regulation to the protection of wildlife.⁵⁶ Most of these systems have had considerable success and provide lessons for the design of an Australian system.

DODD-FRANK ACT

As a result of the Global Financial Crisis the US Congress passed the Dodd-Frank Act in 2010, strengthening regulation of the financial sector. This included implementing whistleblower rewards schemes for both the securities market, regulated by the Securities and Exchange Commission (SEC),⁵⁷ and the derivatives market, regulated by the Commodity Futures Trading Commission (CFTC).⁵⁸ Whistleblowers under both schemes are eligible for 10-30% of the imposed monetary sanctions.⁵⁹

Both of these schemes have been highly successful. Since implementing its scheme, the SEC has rewarded whistleblowers with over US\$1 billion (about AU\$1.4 billion) and enforcement actions based on whistleblower tips resulted in over US\$6 billion (over AU\$8.3 billion) in financial remedies.⁶⁰ In 2003 the SEC also awarded the largest ever reward for a whistleblower: US\$279 million (about AU\$388 million). Though the related legal case was not officially reported, media have linked this payout to a bribery case against telecommunications giant Ericsson, which resulted in a settlement of US\$1.1 billion (over AU\$1.5 billion).⁶¹ Meanwhile the CFTC has awarded about US\$370 million (about AU\$515

⁵⁶ National Whistleblower Center (n.d.) *The Lacey Act*, <https://www.whistleblowers.org/what-is-the-lacey-act/>

⁵⁷ U.S. Securities and Exchange Commission (n.d.) *Whistleblower Program*, <https://www.sec.gov/enforcement-litigation/whistleblower-program>

⁵⁸ Commodity Futures Trading Commission: Whistleblower Program (n.d.) *Program Overview*, <https://www.whistleblower.gov/overview>

⁵⁹ U.S. Securities and Exchange Commission (n.d.) *Whistleblower Program*; Commodity Futures Trading Commission: Whistleblower Program (n.d.) *Program Overview*.

⁶⁰ U.S. Securities and Exchange Commission (n.d.) *Whistleblower Awards Over \$1 Billion*, <https://web.archive.org/web/20240625010622/https://www.sec.gov/page/whistleblower-100million>

⁶¹ Reuters (2023) *Tipster on Ericsson won SEC's largest-ever whistleblower award of \$279 million*, *Wall Street Journal reports*, <https://www.reuters.com/business/media-telecom/tipster-ericsson-won-secs-largest-ever-whistleblower-award-279-mln-wsj-2023-05-26/>

million) to whistleblowers while enforcement actions associated with these rewards have totalled US\$3.2 billion (about AU\$4.5 billion).⁶²

Dodd-Frank also introduced a whistleblowing rewards scheme to the Foreign Corrupt Practices Act, which prohibits bribing of foreign officials and associated conduct.⁶³ Since this change, whistleblowers have contributed significantly to enforcement of these laws.⁶⁴

An important aspect of all of these systems, as well as some listed below, is their availability to non-US citizens. This means that people outside of the US with knowledge of corporate wrongdoing are also incentivised to reveal this misconduct.⁶⁵

FALSE CLAIMS ACT

The False Claims Act criminalises knowingly submitting, or causing the submission, of false claims to the federal government.⁶⁶ The Act makes the perpetrator liable for three times the damage to the government plus a penalty. Given the wide variety and vast scale of government spending and procurement, including sectors such as health, education and defence, the potential for hugely damaging false claims is significant.

The whistleblowing element in this system allows for ‘qui tam’ suits, meaning that private citizens are able to sue others on behalf of the government. The government is then able to take over these suits if it so chooses.⁶⁷ If the ‘qui tam’ suit results in a successful prosecution, the citizen who brought the suit can receive 15-30% of recovered proceeds. For instance, employees or ex-employees are able to use their insider information about their employer defrauding the government to bring a ‘qui tam’ suit.

The whistleblowing element of the False Claims Act has been hugely successful, since this aspect of the law was strengthened in 1986, settlements and judgements from these ‘qui tam’ suits have resulted in settlements and judgements of nearly US\$53 billion (nearly AU\$74 billion), with ‘whistleblowers’ receiving nearly US\$9 billion (over AU\$12 billion).⁶⁸ According to the National Whistleblower Centre “[t]he False Claims Act is the most

⁶² Commodity Futures Trading Commission: Whistleblower Program (n.d.) *The Whistleblower Program*, <https://web.archive.org/web/20240705082723/https://www.whistleblower.gov/>

⁶³ U.S. Department of Justice: Criminal Division (n.d.) *Foreign Corrupt Practices Act*, <https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act>

⁶⁴ National Whistleblower Center (n.d.) *Foreign Corrupt Practices Act*, <https://www.whistleblowers.org/foreign-corrupt-practices-act/>

⁶⁵ National Whistleblower Center (n.d.) *Guidance for Whistleblowers Outside the U.S.*, <https://www.whistleblowers.org/know-your-rights/international-whistleblower/>

⁶⁶ U.S. Department of Justice: Civil Division (n.d.) *The False Claims Act*, <https://www.justice.gov/civil/false-claims-act>

⁶⁷ U.S. Department of Justice: Civil Division (n.d.) *The False Claims Act*

⁶⁸ U.S. Department of Justice (2023) *Fraud Statistics*, <https://www.justice.gov/opa/media/1339306/dl?inline>

successful piece of anti-fraud legislation in [US] history with 72% of fraud recoveries stemming from whistleblower disclosures.”⁶⁹

INTERNAL REVENUE SERVICE (IRS)

The US equivalent of the Australian Tax Office provides monetary rewards to whistleblowers for “specific and credible information regarding tax underpayments or violations of internal revenue laws and that lead to proceeds collected”.⁷⁰ These rewards are generally 15-30% of the proceeds collected as a result of the disclosure.⁷¹

This system has had significant success. Between 2007 to 2020, whistleblowers received over US\$1 billion (nearly AU\$1.4 billion) in rewards, and their disclosures resulted in the recovery of over US\$5.9 billion (over AU\$8.2 billion).⁷²

FINANCIAL INSTITUTIONS REFORM, RECOVERY, AND ENFORCEMENT ACT

The Financial Institutions Reform, Recovery, and Enforcement Act provides whistleblowers with rewards for reporting fraud, embezzlement, and other white-collar crimes. Rewards are based on a range of 5-30% of the amount recovered to a maximum of US\$1.6 million (about AU\$2.2 million).⁷³

The success of this whistleblower rewards scheme is disputed. The scheme has certainly had some successes, from 1989 to 2021 there were six FIRREA legal settlements involving a whistleblower, these settlements resulted in US\$9.3 million (nearly AU\$13 million) in rewards for whistleblowers and an astounding US\$19.9 billion (over AU\$27 billion) in fines for banking fraud.⁷⁴ However, FIRREA has come under criticism, such as from the National Whistleblower Centre, who claim that this low number of legal cases is a result of the cap on whistleblower rewards. They argue that capping rewards provides an insufficient incentive

⁶⁹ National Whistleblower Center (n.d.) *The Importance of Rewards*, <https://www.whistleblowers.org/the-importance-of-rewards/>

⁷⁰ Internal Revenue Service (n.d.) *Whistleblower Office*, <https://www.irs.gov/compliance/whistleblower-office>

⁷¹ Internal Revenue Service (n.d.) *Whistleblower Office*

⁷² National Whistleblower Center (n.d.) *IRS Whistleblower Program*, <https://www.whistleblowers.org/irs-whistleblower-program-success/>

⁷³ Constantine Cannon (n.d.) *FIRREA*, <https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/firrea/>

⁷⁴ Whistleblower Network News (2021) *WNN Exclusive: FIRREA Fiasco*, <https://whistleblowersblog.org/government-whistleblowers/firrea-fiasco/>

for people working in the lucrative finance industry to turn whistleblower and potentially end their career.⁷⁵

SYSTEMS OUTSIDE OF THE UNITED STATES

Though the US remains a trailblazer, it is not alone in its use of whistleblower rewards systems. Notably, the United Kingdom's Competition and Markets Authority offers rewards of up to £250,000 (about AU\$521,000) for whistleblowers who reveal unlawful cartel activity that they have witnessed.⁷⁶ Similarly, Canada's Ontario Securities Commission offers rewards of up to CA\$5 million (nearly AU\$6 million) for tips on violations of financial securities law.⁷⁷

LESSONS FOR AUSTRALIA

The US experience has several lessons for Australia. Most significantly it demonstrates the efficacy of a properly designed whistleblower rewards system to detect and prosecute white-collar crime. The US whistleblower rewards systems have resulted in billions of dollars in rewards for whistleblowers and tens of billions in penalties for white-collar wrongdoers. More importantly though, the revelation and prosecution of these white-collar crimes acts as a deterrent for future white-collar wrongdoing and undermines trust between potential co-conspirators. Other lessons for Australia include the importance of allowing a broad range of people to benefit from the scheme (for instance non-residents) and the potential impact of capping possible rewards on the schemes' incentives. Importantly, even if the proportion of the penalty flowing to rewards is considerable, for instance as high as 30% of the penalty as in the US system, then this system may still be justifiable. Given that the rewards scheme would likely result in more *overall* penalties being applied, a slight reduction in the percentage of each penalty going towards government revenue (as opposed to individual rewards) would still raise more money and deter wrongdoing.

The public receiving 70% of millions or billions of dollars in penalties, which simultaneously uncover and deter wrongdoing, is preferable than receiving 100% of zero dollars while allowing hidden wrongdoing to continue unabated.

⁷⁵ National Whistleblower Center (n.d.) *Strengthen FIRREA Whistleblower Protections*, <https://www.whistleblowers.org/strengthen-firrea-whistleblower-protections/>

⁷⁶ Competition and Markets Authority (2023) *Blowing the whistle on cartels*, <https://www.gov.uk/government/news/blowing-the-whistle-on-cartels>

⁷⁷ Ontario Securities Commission (n.d.) OSC Whistleblower Program, <https://www.osc.ca/en/enforcement/osc-whistleblower-program>

The ROGUE scheme

The Australia Institute originally proposed a whistleblower rewards system in 2003, titled ROGUE. Under ROGUE, the Commonwealth would pay the whistleblower reward and then recoup both the fine and the reward from the offender. These payments would be recovered from the offender using a ‘revenue contingent payment mechanism’.

ROGUE’s revenue contingent payment mechanism would work similarly to Australia’s current student debt system, the Higher Education Loan Program (HELP). Under HELP the amount of student debt repayments that students and graduates make each year is determined by their income, progressively paying a higher rate as revenue or income (and thus ability to pay) rises. Under current arrangements, a person with a HELP debt earning less than \$54,435 per annum does not pay any of their income toward their debt repayments. If this person earns more than \$54,435 per annum, they will pay a gradually increasing percentage of their income towards their debt. For instance, if the graduate earns:

- \$70,000 per annum 2.5% of their income will go towards repayments.
- \$90,000 per annum, 5% of their income will go towards repayments.
- \$110,000, 6.5% of their income will go towards repayments.⁷⁸

This will continue until the graduate has repaid their debt.

The ROGUE system would involve a similar system, though it would usually apply to corporations not individuals, so it would apply to revenue not personal income. The repayment rates for the ROGUE scheme would be calculated by Government, likely the regulator, and properly balance: how quickly the penalty is repaid (requiring higher repayment rates) and financial impacts on the offender that would make them unable to repay in the future (requiring lower repayment rates). This system has various benefits both against the existing system and international comparators.

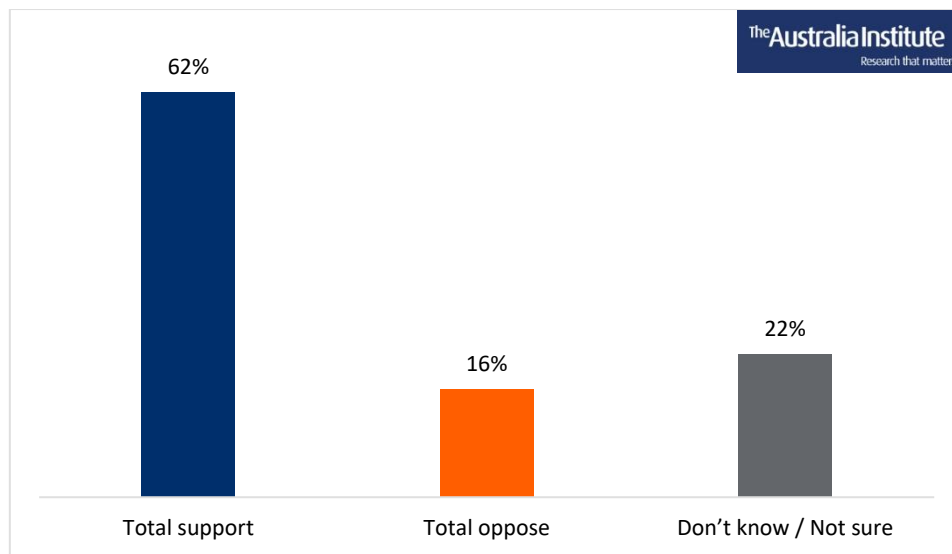
BENEFITS OF ROGUE: REWARDS FOR WHISTLEBLOWERS

Rewards for whistleblowers appear to be widely popular policy in Australia. As in Figure 1, research from the Australia Institute in 2023 showed that three in five (61%) Australians supported new laws that would reward those who exposed corporate wrongdoing, while

⁷⁸ Australian Taxation Office (June 2024) *Study and training loan repayment thresholds and rates*, <https://www.ato.gov.au/tax-rates-and-codes/study-and-training-support-loans-rates-and-repayment-thresholds>

less than one in five would oppose these laws (16%). This majority support was consistent across voters for all political parties.⁷⁹

Figure 1: Support for rewards for whistleblowers who expose corporate wrongdoing



Source: Australia Institute (2023) *Whistleblowing & secrecy*, <https://australiainstitute.org.au/wp-content/uploads/2023/05/Polling-Whistleblowing-and-secrecy-Web.pdf>

It is likely that rewards for whistleblowers is a popular policy because it acts as both an incentive to reveal potential crimes and deterrent for committing those crimes.

Rewards are likely to be more effective than simply providing immunity to whistleblowers. As written in our previous report:

While leniency policies rely on the principle of incentive, the incentive being offered is not very attractive, especially if conspirators are of the opinion that the probability of being caught is low. Furthermore, leniency policies do not provide an incentive for people who have knowledge of criminal conduct, but who are not directly involved, to come forward. The most important advantage of the system to the informant is that there would be a guarantee of financial reward independent of the circumstances of the offending individual or corporation. This aspect of the policy provides those with the requisite information a much greater incentive to disclose hidden crime.⁸⁰

Given white-collar crimes are primarily financially motivated, providing these offenders with financial rewards could be an especially effective incentive for whistleblowing.⁸¹ Any reward system could also work in tandem with an immunity program, incentivising those partly culpable themselves to come forward.

⁷⁹ Australia Institute (2023) *Whistleblowing & secrecy*

⁸⁰ Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, p 5

⁸¹ Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, p 7

A system of rewards importantly shifts the decision-making process for those involved in collective illegal conduct. Any individual who is made aware of the conduct will now be able to profit from its revelation. Without whistleblower rewards, those approached to engage in illegal conduct can risk significant professional and personal consequences for revealing the conduct to authorities. Under a rewards system, these people now have a substantial incentive to reveal this information to authorities.

This will mean that some potential conspirators will be deterred from wrongdoing due to the increased risk of being detected and reported. For instance, they may be less willing to approach further conspirators, as that will raise the probability of being reported.⁸² Trust between existing co-conspirators will also be eroded. Each co-conspirator will know that another co-conspirator may be the first to reveal information to authorities, creating a strong incentive to be the first to confess.⁸³

BENEFITS OF ROGUE: PAYMENT SYSTEM

The ROGUE scheme's revenue contingent payment design would also generate several advantages beyond those seen in countries with existing whistleblowing reward systems. Firstly, regulators and courts would have total flexibility to set penalties without regard to the individual or businesses' current ability to pay, ensuring penalties can fully reflect the damage caused by conduct, properly deter future misconduct, and provide whistleblowers with adequate rewards.⁸⁴ Secondly, the ROGUE scheme provides certainty of payment to both the whistleblower and the Commonwealth Government. The whistleblower can be sure they will receive the reward as they immediately receive the payment from the Commonwealth Government. Meanwhile the Commonwealth Government is protected from default by the offender, the revenue contingent repayment system means offending corporations are less likely to go out of business due to costs imposed, and offending individuals can be made legally incapable of going bankrupt to evade repayment. Relatedly, the system would become self-financing after a short period, rewards being recouped from offenders.⁸⁵

POTENTIAL PROBLEMS

One criticism of whistleblower rewards involves moral concerns around relying on financial incentives for whistleblowers, particularly for those who have carried out misconduct themselves.⁸⁶ However, if the ROGUE scheme substantially reduces the amount of harm imposed by white-collar and corporate crimes, perhaps these moral qualms would be

⁸² Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, pp 7-8

⁸³ Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, pp 7-8

⁸⁴ Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, p 5

⁸⁵ Chapman and Denniss (2003), *Using rewards to catch white collar criminals*, p 5

⁸⁶ Parliamentary Joint Committee on Corporations and Financial Services (2017) *Whistleblower Protections*, ch

overcome. Additionally, providing rewards for information is already reasonably common within the Australian legal system in the context of serious crimes such as murder.

Other concerns relate to the potential for perverse incentives.⁸⁷ For instance, if whistleblowers are rewarded with a percentage of the final penalty imposed, they may be incentivised to let the misconduct continue for an extended period, letting the harm (and thus future penalty) grow. Alternatively, they may be incentivised to provide low-quality tips to regulators in the hope of receiving a reward. These can be addressed through careful design of the system to remove these incentives. For instance, US whistleblower rewards schemes include a 'first to file' rule.⁸⁸ This means that only the whistleblower who first makes authorities aware of the scheme will be eligible for the reward, incentivising early whistleblowing while also reducing trust between conspirators. Another way US whistleblower schemes manage this risk is through allowing regulators to reduce rewards due to 'unreasonable delays'.⁸⁹ Lastly, US whistleblower systems only provide rewards for information that leads to successful prosecutions of offenders, mitigating the risk of low-quality whistleblowers.⁹⁰

⁸⁷ Parliamentary Joint Committee on Corporations and Financial Services (2017) *Whistleblower Protections*, ch 11

⁸⁸ National Whistleblower Center (n.d.) *Deadlines for Filing Whistleblower Claims*, <https://www.whistleblowers.org/deadlines-for-filing-whistleblower-claims/>

⁸⁹ U.S. Securities and Exchange Commission (n.d.) *Frequently Asked Questions: Whistleblower Rule Amendments*, <https://www.sec.gov/page/frequently-asked-questions-whistleblower-rule-amendments>

⁹⁰ U.S. Securities and Exchange Commission (n.d.) *Frequently Asked Questions: Whistleblower Rule Amendments*

Conclusion

Since The Australia Institute's original proposal of the ROGUE system in 2003, white-collar crimes of collusion and insider trading have remained prominent and other white-collar crimes and misbehaviour have been revealed. A dual focus on incentivising the revelation of hidden information through rewards and ensuring offenders are held fully accountable for their harms, means the ROGUE scheme offers a highly effective way to reduce the prevalence of these crimes.

The Australian Government has called for better regulation of whistleblowing and offering rewards to whistleblowers is a policy that many Australians support. The effectiveness of a whistleblowing rewards system is apparent when looking at the United States, where the system has provided billions of dollars to whistleblowers while collecting tens of billions from wrongdoers. The knowledge that bystanders and even co-conspirators could turn whistleblower and receive substantial rewards has surely reduced the confidence of corporate wrongdoers and undermined trust between them.

The ROGUE rewards system would be an effective additional tool to empower regulators to reveal and prosecute prevalent corporate and white-collar criminal behaviour and create a more competitive and scrupulous economy in Australia.