

20 February 2017

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email to: corporations.joint@aph.gov.au

INQUIRY INTO WHISTLEBLOWING PROTECTIONS

On behalf of the Australian Council of Superannuation Investors (ACSI), I am pleased to make this submission to the Parliamentary Joint Committee on Corporations and Financial Services in relation to whistleblower protections. We are also aware that Treasury are seeking submissions for their inquiry regarding tax and corporate whistleblower protections and we are providing a copy of our submission to your Committee to them.

About ACSI

By way of background, ACSI is a collaboration between 29 Australian profit-for-members superannuation funds and 6 major international pension funds. Through ACSI these institutional asset owners exercise their collective ownership rights to improve the management of environmental, social and governance (ESG) investment risks and opportunities by Australian listed companies.

As fiduciary investors with significant ownership stakes in Australian listed companies, ACSI's members have a vital interest in the adoption by those companies of high standards of governance, transparency and compliance in all areas of material risks to reputation and long-term shareholder value. Over recent years, Australian companies' exposure to fraud, corruption and other inappropriate behaviours and management of these risks has become an increasingly important theme of ACSI's research and engagement agenda. ACSI is a financial and in-kind supporter of the Whistling While They Work 2 (WWTW2) project being led by Professor AJ Brown of Griffith University.

Whistleblowers play a critical role in identifying and preventing misconduct and it is now well recognised that protection for whistleblowers in the private sector lags international best practice.¹ The importance of whistleblowers and the need to ensure they are protected from retribution has been highlighted in cases such as the Commonwealth Financial Planning scandal.²

¹ Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, 2014, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*

² Senate Economics References Committee, April 2016, *Corporate Whistleblowing in Australia: ending corporate Australia's cultures of silence*

Focus of Our Submission

ACSI has a broad interest in the Inquiry's terms of reference as the protection of whistleblowers across the corporate, government, and not-for-profit sectors are foundational institutional underpinnings. The focus of our submission is on the Inquiry's terms of reference as they relate to corporate Australia and, within this category, our specific area of expertise and interest is the large ASX-listed company sector (S&P/ASX300), which is the primary focus of ACSI's research and engagement program.

Anonymous disclosures and the 'good faith' requirement

As indicated, the Corporations Act only affords whistleblower protection if individuals identify themselves. In contrast, the Australian Public Interest Disclosure Act (covering the public sector) protects anonymous whistleblowers. It is unclear why corporate whistleblowers should be treated differently. US legislation permits anonymous corporate whistleblowing³ and Transparency International⁴ recommends that individuals should be able to maintain their anonymity if they choose. By allowing protection for anonymous reporting, there may be greater reporting of valuable information to identify fraud, corruption and other wrongdoing and to prevent it from continuing.

Data on the ASX300 companies from the first survey of the Whistling While They Work 2 (WWTW2) project indicates that all 33 ASX300 companies that responded permit anonymous reporting. Companies recognise the importance of anonymity but the legislation does not. This gap must be addressed.

The revised legislation should be drafted to discourage vexatious anonymous disclosures but encourage valid and detailed information to be reported. Currently, to qualify for protection under the Corporations Act, reports must be made in 'good faith' (as well as not being anonymous). 'Many experts argue that a disclosure motivated by a personal grievance or other less pure intentions can still be useful; what ultimately matters is not the whistleblower's motivation but the veracity of the information disclosed; in this sense, the 'good faith' requirement, in seeking to discourage false and frivolous disclosures may in fact be serving as a barrier to corporate whistleblowing.'⁵

In this regard, ACSI supports the Senate Economics References Committee April 2016 recommendation that workable thresholds for protection would include "honest and reasonable belief of wrongdoing" and include protection for "honest mistakes" but no protection for knowingly false disclosures or information.⁶

Recommendation 1 and 2 – Anonymity and disclosures based on honest and reasonable beliefs

ACSI recommends that the scope of the protection for corporate whistleblowers be expanded to allow anonymous reporters. It is also recommended that legislation require that protected disclosures be based on honest and reasonable beliefs but that there be no protection for knowingly false disclosures or information.

³ *Whistleblower Protection Rules in G20 Countries: The Next Action Plan*, S. Wolfe, M. Worth, S. Dreyfus and AJ Brown, June 2014, Page 58 <http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf>

⁴ *International Principles for Whistleblower Legislation*, page 6, accessed at: http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation

⁵ Page 39, Senate Economics References Committee Issues Paper, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*.

⁶ IBID, page 49.

The role of corporate culture, systems and process to prevent wrongdoing

A key element of good corporate governance is oversight of corporate culture as well as systems and processes which prevent wrongdoing. The latter includes whistleblowing management systems. The legislative framework should include principles requiring the development and implementation of robust whistleblowing management systems. ACSI does not recommend regulating companies on specific steps but rather encouraging companies to develop their own procedures.

Related to this, ACSI places importance on adequate resourcing of ASIC to both take action against companies for wrongdoing and to protect whistleblowers that are instrumental in bringing information forward which lead to civil or criminal action. As a corollary, companies that can demonstrate effective and meaningful systems and processes to prevent wrongdoing (including whistleblowing systems with follow-up investigations and, where appropriate, disciplinary actions) should be able to apply for reduced civil or criminal penalties in the event of conviction. This review would need to be rigorous to ensure that companies do not simply adopt boilerplate approaches to reduce liability. ACSI believes such measures will help to encourage a pro-disclosure culture and robust internal reporting processes.

Recommendation 3 – Courts should have a discretion to reduce civil/criminal penalties for companies to encourage robust corporate culture and systems and process to prevent wrongdoing

ACSI recommends that companies that are convicted of wrongdoing be considered for reduced fines or sentences if they can demonstrate meaningful activities that have been undertaken to encourage the robust corporate culture and the effectiveness of systems and processes to prevent wrongdoing.

Whistleblower compensation

Less than a third (30 per cent) of the 33 ASX300 companies surveyed in the WWTW2 questionnaire reported having mechanisms for ensuring adequate compensation or restitution if a whistleblower experiences reprisals, conflicts, stress or other detrimental impacts associated with reporting. Given that fear of reprisal is key barrier to whistleblowing, this limitation should be addressed.

Where the law does protect whistleblowers, it tends to criminalise reprisals, creating a very high legal bar before anyone is prepared to accept that an employee deserves an apology, compensation or restitution for any victimisation suffered. As a result, access to compensation only occurs if a criminal reprisal is first proven, which is extremely difficult. The Fair Work (Registered Organisations) Amendment Act 2016 enables whistleblowers to apply for penalties if they have been financially harmed by their disclosures. This model should also be applicable to corporate whistleblowers.

ACSI notes that in the US it is possible to claim up to 30 per cent of recovered damages. In the UK the law imposes a reverse burden of proof on employers (requiring that they prove that any action taken against an employee was not motivated by the fact the employee was a whistleblower) and allows for uncapped compensation if an employee is dismissed.

Recommendation 4 – Compensation mechanisms

ACSI recommends that legislation be introduced to require compensation of whistleblowers in the event that they suffer reprisals for raising issues internally at a civil level. Compensation provisions for disclosing fraud and wrongdoing externally should be given greater prominence and clarity. The Committee should consider the US and UK models for compensation.

Definition of whistleblowers

The scope of the Australian definition of a corporate whistleblower in the Corporations Act is narrow. Valuable information which can assist in identifying and stopping wrongdoing may not be put forward as former employees, for example, are not afforded protection or compensation under the law. Whistleblowers can find it very difficult to secure employment after reporting.

By including a broader definition of whistleblowers, doubt or ambiguity regarding protection will be removed and the risk of reprisal to people in these categories will be lessened. The scope for compensation will also be widened. The recommendation is consistent with ASIC's perspective.⁷

Recommendation 5 – Definition of whistleblowers eligible for protection

ACSI recommends that the scope of the coverage for whistleblowers under the Corporations Act be expanded to include former officers, staff, contractors (including financial service providers, accountants and auditors), unpaid workers and business partners.

Scope of wrongdoing covered by protection and responsibility for implementing protections

Currently whistleblower protections in the Corporations Act do not cover information relating to all of the types of investigation, for example, that ASIC may investigate.⁸ Protections do not apply in some cases where the information suggests that there is a breach of legislation which ASIC may investigate, including, for example, state criminal legislation. Enforcement outcomes under state criminal legislation, including matters related to misappropriation, theft or fraud, are a significant part of ASIC's work.⁹

Furthermore, compared to many of Australia's G20 counterparts, research suggests that 'the scope of wrongdoing covered (in the Corporations Act) is ill-defined' and 'other limited protections in industry specific legislation is typically vague and ill-defined, with no agency tasked with direct responsibility to implement them.' This lack of clarity regarding direct responsibility for implementation of whistleblower protection needs to be addressed.

Recommendation 6 and 7 – Clarify and expand scope of information protected

ACSI recommends clarifying and expanding the scope of information protected by whistleblower protections in the Corporations Act. At the same time, a review of the definition of the scope of whistleblower protections in industry-specific legislation such as the federal Banking Act 1959, Life Insurance Act 1995, Superannuation Industry Act 1993 and Insurance Act 1973 is recommended in order to tighten and align the scope of information covered by whistleblower protections. Responsibility for implementation of the range of whistleblower protections also needs to be clarified.

Conclusion

ACSI trusts that the comments made in this submission and accompanying research material will be of assistance to the Committee in its review of this important area of public policy, corporate and national reputation, and risk to long-term shareholder value.

⁷ASIC submission 45.2, October 2013, page 162

http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Submissions

⁸ Senate Economics References Committee Issues Paper, Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence, p 22 Table 2.1

⁹ ASIC submission 45.2, October 2013, page 163

We will be following the progress of the Inquiry with interest, and would be happy to answer any questions the Committee may wish to raise about our submission. Please contact me or Holly Lindsay, ACSI's Manager Research and Engagement, at hlindsay@acsi.org.au or 03 8677 3898 should you require any further information regarding our submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Louise Davidson', written in a cursive style.

Louise Davidson
Chief Executive Officer

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