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The Treasury

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***Comment on Review of tax and corporate whistleblower protections in Australia***

We are legal academics based in the Law School at the Flinders University of South Australia. We research in the area of corporate whistleblowing, and have a particular interest in the range of incentives that might be offered to encourage whistleblowers to come forward, and to compensate them for doing so.[[1]](#footnote-1) We set out below brief responses to a number of the questions raised in the Consultation Paper.

***Categories of qualifying ‘whistleblowers’: Questions 1-3***

As a general principle we support the expansion of the categories of qualifying whistleblowers (Questions 1 & 2).

***Subject matter of disclosures & good faith requirement: Questions 4-5***

Question 4, scope of information: we support a widening of the definition of corporate whistleblowing disclosures. The current *Corporations Act* regime is unnecessarily narrow in its coverage and as a minimum ought to be extended to potential breaches of any law administered by ASIC. However the simplicity and consistency of a single private sector whistleblower statute is very attractive. A key advantage of the latter approach would be a reduced need for a whistleblower to research multiple legislative regimes in order to establish the availability of protection. Any enabling legislation could in addition provide for the establishment of a Whistleblower Ombudsman, as a support and advocacy service available in respect of all private sector whistleblowing activity.

Question 5, ‘good faith’ requirement: in our view the requirement that whistleblower disclosures be assessed in light of a motives or ‘good faith’ requirement adds an unnecessary layer of complexity. The barriers to disclosure that exist are recognised to be substantial; requiring the whistleblower to satisfy a test that inherently questions character, and will in many instances require subtle and subjective judgments, is an additional impediment that exposes a whistleblower to further risk of loss of protection. Impugning a whistleblower’s motives is one response that might be expected from those subject to a whistleblower revelation. It is difficult to see what a motives test adds to the process of whistleblowing; it is the quality and value of the information rather than the intention of the discloser that ought, in our view, be the key focus of any disclosure regime. We support the consistent application of an ‘honest belief, on reasonable grounds’ test.

***Anonymous disclosures: Questions 6-8***

We strongly support the capacity for disclosures to be made anonymously. Sufficient thought would need to be given, as a matter of policy and practice, to ensuring relevant legislative provisions dealt with the risk of identity being revealed through further dissemination or through mandatory disclosure processes (eg court orders).

***To whom information should be disclosed: Questions 9-14***

We support an emphasis on the primacy of corporations as the recipients of disclosures related to the company’s actions (provided adequate internal reporting mechanisms exist), to ensure remedial action is not delayed. However, there is a clear need to enable whistleblowers to access external advice if needed (in relation to the protections to which they may be subject: Question 14) and to allow for action where the company does not act on revelations or is, in the circumstances, an inappropriate recipient of the disclosure (Question 10). Given the potential complexity of the decisions involved, we believe an independent Whistleblower Ombudsman may play a part in providing a focus for potential whistleblowers when making an assessment of their ability to make protected disclosures outside the company. We note the remit of the New Zealand Ombudsman’s whistleblower service in this regard. Such a service may militate against the need for protections to be extended to disclosures to the media (a particularly contentious policy issue).

***Compensation arrangements: Questions 21-24***

A key issue with the efficacy of existing compensation arrangements in relation to whistleblowing is the additional stress and difficulty to which they are likely to expose a whistleblower. We agree with the Consultation Paper’s assessment that ‘practically, compensation is difficult to access’. Requiring a whistleblower to initiate a formal legal action through a court process introduces a high barrier to gaining compensation, and creates a further disincentive to disclosure. In our view a crucial policy question to investigate is the potential for a Whistleblower Ombudsman structure to provide advice and support for whistleblowers in this regard.

***Whistleblower rewards: Questions 26-28***

In our view whistleblowing incentives and protections involve complex multidimensional policy considerations, but a well-developed framework of incentives will strengthen whistleblower structures overall. We believe important policy factors to consider include:

* a clear definition of the kinds of ‘financial incentive’ that might be offered. A wide spectrum potentially exists which includes cash payments, compensation, and non-prosecution agreements. Targeting of a range of appropriate incentives is likely to be crucial to the establishment of an effective Australian whistleblowing regime; and
* comparison with like regimes in operation elsewhere, including those that are now well-established (United States) and more recently introduced (Ontario, Canada, July 2016). Flinders Law School will co-host a June 2017 seminar with the University of Melbourne’s Centre for Corporate Law and Securities Regulation on this important topic. The seminar will focus on the 2016 introduction of a bounties system by the Ontario Securities Commission in Canada, the most recent example of a bounties model in a comparable jurisdiction.

***Internal company procedures: Questions 29 -32***

We are strong proponents of the importance of internal company procedures to support whistleblowing activities. Many of Australia’s largest and highest profile companies have already adopted excellent systems that have now been in place for many years. There are however clear disadvantages to over-burdening small companies with additional compliance obligations that may not be justified by the volume or nature of potential revelations. In our view an appropriate balance could be struck between mandating an ‘If not, why not’ requirement in relation to internal whistleblowing procedures for larger corporates, while allowing smaller companies to rely upon a less formal system. Further, regulatory guidance on the features of an internal system that could be expected to attract a reduction in penalties (for failure to adequately protect a whistleblower) would be a positive development, offering both an incentive to corporations to develop internal systems, and a level of guidance in relation to best-practice examples.

***Oversight agency responsible for whistleblower protection: Questions 33, 34***

As we have indicated above, we see strong arguments for careful consideration being given to the establishment of an independent Whistleblower Ombudsman, to deal with corporate whistleblower protection. Ideally this Office would be a central information and advocacy service for whistleblowers, rather than an adjunct to a regulatory agency. ASIC has established an Office of the Whistleblower, and there are clear attractions in a locating a corporate whistleblower office in an agency with an understanding of corporate structures and regulation. However the remit of this Office is necessarily very different from the role of a confidential guidance and advocacy service of the kind we envisage. The New Zealand Ombudsman’s whistleblower program appears to incorporate several of these desirable elements and is in our view worthy of consideration.

***Varying legislative approaches to reform: Question 36***

We do not support extending the application of the *Public Interest Disclosure Act, 2013* (Cth) in its current form to corporate whistleblowing. While offering a much stronger whistleblowing structure than the inadequate *Corporations Act* provisions, the recent independent review of PIDA[[2]](#footnote-2) has pointed to a number of concerns in relation to the experiences of both whistleblowers under the legislation and of agencies tasked with applying it. Further, distinctions between public sector processes and corporate structures need, we believe, to be taken into account in providing for an adequate corporate whistleblowing structure. A crucial policy issue to be addressed here is a comparison of the relative benefits of a unified disclosure system, and the advantages of separate systems that can more appropriately cater for the distinctions between public sector and corporate environments.

***Other matters relevant to strengthening the protections available for corporate whistleblowers: Question 37***

We believe a number of Australia’s largest corporations have had sophisticated whistleblowing systems in place for many years, often tailored to respond to international benchmarks. The insights gained by these corporations in the implementation of their systems are likely to offer valuable material for the Committee’s deliberations on improving corporate whistleblowing.

We are happy to provide further details of our research and the June 2017 Flinders Law School/Centre for Corporate Law & Securities Regulation seminar on whistleblowing bounties, if this would be of use.

Yours sincerely

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1. Brand, V, (2016) ‘Still “Insufficient or Irrelevant”: Australia’s Foreign Bribery Corporate Whistleblowing Regulation’, 39(3) *University of New South Wales Law Journal* 1072-1095; Lombard, S & Brand, V, ‘Corporate Whistleblowing: Public Lessons for Private Disclosure, (2014) 42 *Australian Business Law Review*, 351-366; Brand, V., Lombard S & Fitzpatrick, J, ‘Bounty hunters, whistleblowers and a new regulatory paradigm’ (2013) 41 *Australian Business Law Review* 292-307. [↑](#footnote-ref-1)
2. Commonwealth of Australia, *Review of the Public Interest Disclosure Act 2013: an independent statutory review conducted by Mr Philip Moss AM*, 15 July 2016, Canberra. [↑](#footnote-ref-2)