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

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

Dear Secretary

ACCC submission to the Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors*.

The ACCC is Australia's national competition and consumer protection enforcement agency. Its role is to enforce compliance with the *Competition and Consumer Act 2010* (CCA) with a view to ensuring that Australia's market economy works for the benefit of all Australians.

The success of ACCC investigations is heavily reliant upon the co-operation of individuals, particularly in respect of alleged contraventions which involve coercive or covert behaviour. Where matters proceed to Court, the ACCC needs to produce enough credible evidence to prove the relevant facts of a case for the Court to find a contravention of the law. Accordingly, adequate protection for the people whose evidence is often necessary to prove those facts is critical.

The ACCC is strongly of the view that greater protection should be available for whistleblowers within the CCA.¹ Enhanced whistleblower protections would encourage whistleblowers to come forward, and protect and support them when they do so. This would lead to increased detection of contraventions of the CCA, a higher quality of material that is provided to the ACCC, and enable the ACCC to achieve efficiencies in the investigation of anti-competitive conduct.

Current protections under the CCA

Typically, there are three categories of persons who alert the ACCC to potential breaches of the law involving coercive or covert behaviour:

¹ ACCC, [Reinvigorating Australia's Competition Policy: ACCC Submission to the Competition Policy Review; ACCC submission to the 2016 white collar crime penalties inquiry](#).

- *Immunity applicants* (who are involved in alleged conduct), *informants* (who have knowledge of the conduct but are not directly involved) and *complainants* (who have some limited knowledge of the conduct and wish to report the matter to the ACCC).

Persons within all three categories will have unique concerns about the implications of their assistance in an ACCC investigation.

Of these, immunity applicants are incentivised to self-report cartel conduct and have the benefit of the protection of the ACCC's immunity and co-operation policies² and the operation of provisions governing "protected cartel information".³ Informants and complainants have some protection afforded by provisions governing protected cartel information. They are further protected by section 162A of the CCA in respect of intimidation or other coercive conduct they may be subjected to as a result of co-operation with the ACCC.⁴ Information provided by immunity applicants as well as third party whistleblowers, such as informants and complainants, is kept confidential to the extent permitted by the law and is guided by the ACCC and AER information policy.⁵

However, these protections do not adequately extend to circumstances outside of the ACCC's control which can result from assistance being provided to the ACCC; for example, contractual actions or other impacts to an individual's livelihood. In the ACCC's experience, the lack of whistleblower protections under the CCA has led to cases being directly impacted, with witnesses unwilling to provide information (or cooperate fully) with the ACCC due to a range of commercial and safety concerns. The consequence of this is that, in some instances, the ACCC may not have access to sufficient evidence due to a lack of adequate whistleblower protection.

Penalties for intimidation are inadequate

The ACCC strongly supports consideration of reform to penalties for intimidation and other coercive conduct under section 162A. The ACCC considers that the level of sanctions applying to contraventions of section 162A—that is, a fine of up to \$3,600 and/or 12 months imprisonment—are inadequate and do not provide sufficient deterrence.

Further, section 162A should be amended to put beyond doubt the ACCC's interpretation that it captures both positive acts and failures to act (for example not renewing a contract).

The CCA should provide for an effective third party whistleblower regime

Unlike the *Corporations Act 2001*, the CCA does not provide for a formal third party whistleblower regime.

The ACCC considers that protection for third party whistleblowers is an important element of an effective competition policy and that such a regime should be introduced as an amendment to the CCA.

The ACCC considers that the third party whistleblower protections under the *Corporations Act* could inform similar amendments to the CCA. The *Corporations Act* broadly provides

² ACCC, [ACCC immunity & cooperation policy for cartel conduct](#). The immunity policy is limited to conferring protection from ACCC legal action or a criminal prosecution by the Commonwealth Director of Public Prosecutions. It only applies to persons engaged in the contravention.

³ Sections 157, 157B, 157C of the CCA provide that information given in confidence to the ACCC which relates to a breach or possible breach of a cartel prohibition is, in certain circumstances, protected from further disclosure.

⁴ Section 162A broadly prohibits persons from threatening, intimidating or coercing another or causing damage, loss or disadvantage to another, on account of that other person assisting the ACCC.

⁵ [ACCC & AER information policy: collection and disclosure of information](#).

that a third party whistleblower can be protected from civil or criminal liability, as well as from liability or termination arising from enforcement of any other form of right or remedy, such as a contract.⁶ Protection is afforded if the whistleblower meets certain conditions—such as being an employee, officer or contractor of the company the subject of the disclosure; having made the disclosure to ASIC or other specified persons; having reasonable grounds for believing the law has been contravened; and having made the disclosure in good faith.⁷ The whistleblower also has a right to compensation if the protection afforded to them under the regime is breached in specified circumstances.⁸

While the Corporations Act provides a starting point for consideration of increased whistleblower protections in the CCA, a targeted regime for the CCA would require additional measures. For example:

- The ACCC can and does seek to protect the identity of persons who come forward with information in relation to a possible contravention of the CCA. While provisions to resist production of confidential information or documents on public interest grounds exist in the CCA itself and under other regimes (such as freedom of information or court processes), consideration should be given to specific protections for information or documents that disclose the identity of whistleblowers as part of a whistleblower regime under the CCA.
- The ability for the ACCC to seek compensation on behalf of a witness who has suffered loss or damage as a result of giving evidence or otherwise assisting the ACCC would help to deter unlawful intimidation. Accordingly, the ACCC strongly recommends such a capacity as part of any whistleblower regime under the CCA.

The ACCC thanks the Committee for the opportunity to make a submission, and would be happy to provide further detail on any of the issues raised in this letter, and to respond to issues of interest to the Committee.

Should you wish to discuss the ACCC's submission in more detail please contact Marcus Bezzi, Executive General Manager Enforcement Operations, on

Yours sincerely

Rod Sims
Chairman

⁶ *Corporations Act 2001* s.1317AB. The regime does not protect a whistleblower from liability arising from conduct they engage in themselves: s. 1317AB(1).

⁷ *Corporations Act 2001* ss. 1317AA, 1317AB.

⁸ *Corporations Act 2001* ss.1317AC, 1317AD. See also: *ASIC Information Sheet 52: Guidance for whistleblowers*, which provides: 'It is important to note that it is the responsibility of whistleblowers to bring any action for compensation because the legislation does not authorise ASIC to do this on behalf of the whistleblower.' Online at: <http://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>