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

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Re: Fair Work (Registered Organisations) Amendment Bill 2014

Dear Dr Hodder

Thank you for recently providing me with the opportunity to appear as a witness at the public hearing for the inquiry into whistleblower protections.

At the conclusion of my testimony, Senator Nick Xenophon asked if I could provide my “views in a more prescriptive sense of the amendments to the Fair Work Act legislation.” Specifically, Senator Xenophon was interested to know whether I thought the amendments are suitable and how they could potentially be strengthened. In this letter I attempt to provide my response to Senator Xenophon’s request noting that I have no expertise in drafting legislation.

Having reviewed the amendments, my layperson view is that they unquestionably provide recourse for whistleblowers who experience inferior outcomes. Not only do they give the courts the ability to award compensation, but the definition of what constitutes reprisal is broad. For example, the amendments protect a whistleblower who “made, may have made, proposed to make or could have made a disclosure”, and the disclosure does not need to be “the reason”



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why the whistleblower experienced reprisal. In short, organisations have a significant duty of care.

However, as I mentioned in my submission, to properly protect whistleblowers we must address the root cause of inferior whistleblowing outcomes. To do this, legislation must place the onus on organisations to create environments where people can not only speak up, but when they do they are respected, listened to, and have their concerns appropriately addressed. It is in these environments that outcomes for whistleblowers are more likely to be positive.

There are many steps organisations can take to create such environments, some of which I outline in my submission. For example, having mechanisms in place that identify pockets of their organisation where attitudes to speaking up are unfavourable, investing in leadership development, and training staff to equip them with the skills and confidence to speak up. Suffice to say, it takes a lot more than a well-managed formal whistleblowing channel.

I make the above recommendation with two caveats. First of all, it could be the case that impelling organisations to invest in this work is not the role of legislation, and doing so might result in unintended consequences. For example, if the legislation is too prescriptive, it could result in excessive bureaucracy and encourage a “tick the box” approach, where organisations put processes in place simply to placate regulators rather than rectify the underlying issues the legislation was designed to address.

Secondly, it is also possible that the amendments as currently drafted will have the desired effect and motivate managers to invest in programs and processes that both encourage speaking up within their organisations and promote positive outcomes for whistleblowers. As executives and directors learn that their organisations could be liable if they fail to appropriately look after those who raise concerns, there is every likelihood this will drive increased focus.

Whatever the case legislators must recognise that compensation, although necessary, will not necessarily create positive whistleblower outcomes. Rather in most cases it simply attempts to remedy inferior outcomes.

My final comment with regards to the amendments is what qualifies as a “disclosure”. Unless I have misinterpreted the amendments, my understanding is that a disclosure must relate to conduct that “(a) contravenes, or may contravene, a provision of this Act, the Fair Work Act or the Competition and Consumer Act 2010; or (b) constitutes, or may constitute, an offence against a law of the Commonwealth.” My concern is that this is not sufficiently broad.

In many instances whistleblowers expose wrongdoing that is clearly unethical but not necessarily illegal or in contravention of the aforementioned Acts. The recent events at CommInsure provides one example of this. Although the wrongdoing in that organisation clearly caused hardship to consumers and was unethical, a recent investigation by ASIC did not find any of the



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conduct to be illegal. If possible legislation must also protect whistleblowers in these types of scenarios.

I once again thank you for the opportunity to make a submission to this very important inquiry. I hope my input assists the committee in its deliberations.

Yours sincerely,

Dennis Gentilin