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Secretary, Senate Standing Committees on Economics
Economics References Committee
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Parliament House
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By email: economics.sen@aph.gov.au

Dear Secretary

Inquiry into foreign bribery

We are academics with a research interest in the area of corporate whistleblower regulation in Australia. Elements of that research have some relevance to a specific component of the Senate Committee's Inquiry in regard to Terms of Reference b.(ix), ie 'the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including ...private sector whistleblower protection and other incentives to report foreign bribery'.

We believe that enhanced corporate whistleblowing systems have direct potential to improve foreign bribery regulation and enforcement in Australia, through increased internal and external reporting of suspect activity. Whistleblowing forms a core component of effective foreign bribery regulation but has to date not been given sufficient attention in Australia in this context (or more generally); the 2012 Report of the OECD Working Group which considered Australia's implementation of its foreign bribery regulatory obligations made specific reference to this shortcoming.¹

Our work has considered, amongst other things, the contribution that good internal systems within corporations can make to improved whistleblowing activity. Commonwealth legislative

¹ Organisation for Economic Cooperation & Development, Working Group on Bribery in International Business Transactions, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia, October 2012 [144].

amendments to facilitate such systems would enhance general regulatory outcomes as well as foreign bribery regulation in particular. A number of our comments in this submission draw on our work comparing the existing corporate whistleblowing provisions in Australia with the reformed Commonwealth public sector whistleblowing framework instituted by the *Public Interest Disclosure Act 2013* (Cth).²

We think concepts that may have particular relevance for this Inquiry are the importance of internal whistleblowing systems and the way in which such systems and enhanced communication could contribute to a cultural shift in respect of corporate whistleblowing.

Internal systems to facilitate corporate whistleblowing

Improved regulation of internal whistleblowing systems within corporations in Australia has the potential to assist the Australian Securities & Investments Commission and the Australian Federal Police in regulating foreign bribery. Currently there is no mandated requirement for Australian corporates to institute internal structures to facilitate whistleblowing. However there is evidence available in the literature that such systems can encourage rates of whistleblowing. Empirical evidence exists to suggest that the level of whistleblowing activity in a corporation is positively associated with the level of internal support for whistleblowing.³

While an enhanced external regulatory response to foreign bribery in Australia is clearly called for in light of the existing poor enforcement rate, we believe the capacity for internal activity of this kind to support external structures should not be overlooked. This is in fact the approach taken by the Commonwealth's own public interest disclosure regime, enacted in the *Public Interest Disclosure Act 2013* (Cth). That Act creates a regime within which initial internal disclosure is preferred, before external whistleblowing is countenanced.⁴ While we would not support such a restrictive regime in the case of foreign bribery disclosures, some greater attention to the value of internal systems for disclosure is warranted.

Cultural change through increased communication and feedback

Current statutory provisions aimed at encouraging and facilitating corporate whistleblowing emphasise 'protection' of whistleblowers. The level of protection offered in terms of these

² Lombard S and Brand V, 'Corporate Whistleblowing: Public Lessons for Private Disclosure' (2014) 42 *Australian Business Law Review* 351. Similar ideas formed the basis of our submission to the 2014 Senate Inquiry into the Performance of ASIC: Brand V and Lombard S, Submission no 419.

³ In the Australian corporate context see Lee G and Fargher N, 'Companies' Use of Whistle-Blowing to Detect Fraud: An Examination of Corporate Whistleblowing Policies' (2013) 114 *Journal of Business Ethics* 283 at 284; in the United States context Blount J and Markel S, 'The End of the Internal Compliance World as We Know It, or An Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting under the Dodd-Frank Act's Whistleblower Provisions' (2012) 17 *Fordham Journal of Corporate & Financial Law* 1023 at 1050 cite evidence of a similar effect.

⁴ *PIDA*, s 26(1)(c).

provisions has been criticised for a number of reasons⁵ and as such are in need of reform. Also, it is debatable whether an exclusive focus on anti-retaliation measures to encourage whistleblowing is generally effective.⁶ Whistleblowers decide to disclose information about wrongdoing for different reasons⁷ and of the well-known disincentives faced by whistleblowers, one factor that has particular relevance in a corporate environment is the risk of whistleblowers not being informed of the outcomes resulting from their disclosures. Cultural bias against whistleblowing continues to be a disincentive in corporate Australia as elsewhere, and this bias is compounded by lack of internal systems mandating the provision of feedback to whistleblowers. A statutory requirement in Commonwealth legislation that required corporations to provide some level of response to informants would, we believe, assist in achieving desirable cultural change within corporations.

Internal reporting systems and cultural change

Another legislative amendment that we believe would be desirable, both from the point of view of general corporate whistleblowing regulation in Australia and also from the specific perspective of improving foreign bribery regulation, would be the mandating of reporting obligations in relation to internal whistleblowing reports. At present no requirement exists for corporations to report publically on the number or kind of whistleblowing reports received, although corporations (particularly publically listed and other larger entities) have a wide-range of general reporting obligations and are experienced in the necessary data-capture and reporting protocols. The cultural change necessary to improve the position of whistleblowing in an Australian corporate environment would be facilitated by a requirement that corporations with existing reporting obligations report regularly on the number and nature of internal whistleblowing reports. Where, for instance, those reports related to foreign bribery activity, the concomitant increase in public awareness of the relevant corporation's exposure to foreign bribery risk would, we believe, play an important regulatory function. Given the structures that are already in place in relation to corporate reporting and its authentication, potential exists to quickly facilitate increased reporting of whistleblowing activities by corporations through reliance on these known mechanisms.

Conclusion

It has been said that the 'emergence of the whistleblower as an institution is one of the most significant developments in corporate governance in the last fifty years'.⁸ However, the extent to which whistleblowing could contribute to the productive and accountable operations of corporate

⁵ See discussion in Lombard S and Brand V, above n 2, at 358 and references cited there.

⁶ Dworkin TM and Brown AJ, 'The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws' (2012 – 2013) 11 *Seattle Journal of Social Justice* 653 at 654 at 690.

⁷ Blount J and Markel S, 'The End of the Internal Compliance world as We Know It, or An Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunters under the Dodd-Frank Act's Whistleblower Provisions' (2012) 17 *Fordham Journal of Corporate & Financial Law* 1023 at 1048.

⁸ Vega MA, 'Beyond Incentives: Making corporate Whistleblowing Moral in the New Era of Dodd-Frank Act Bounty Hunting' (2012) 45 *Connecticut Law Review* 483 at 485.

entities largely depends on the overall effectiveness of whistleblowing structures. The effectiveness of existing corporate whistleblowing regulation and structures is questionable and we suggest that regulatory reform in this area would prove useful in the context of foreign bribery, and also more generally.

We would be happy to answer any questions you may have in relation to our submission.

Yours sincerely

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