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Dr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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Parliament House
Canberra ACT 2600
Email: Corporations.Joint@aph.gov.au

Dear Secretary

Whistleblower protections in the corporate, public and not-for-profit sectors -- Responses to Questions on Notice

Thank you for the opportunity to give evidence before the Committee on 27 April 2017.

It is my pleasure to provide the following answers to questions on notice from the Committee – both the Committee's written questions of 11 April 2017, and specific questions from the hearing on 27 April.

Questions of 27 April (Hearing)

1. Questions from Senator O'NEILL regarding who should oversight the corporate whistleblower protection regime; and whether the oversight agency would be new i.e. 'completely outside the current regulatory structure'.

   See answer to question 4 above. In TI Australia's view, the task of effective whistleblower protection is sufficiently specialised and difficult so that there is no single, existing agency within present regulatory structures who is well placed to undertake the key oversight and implementation roles, with respect to the corporate and not-for-profit sectors.

   As we stated in the hearing, it is nevertheless important that the role of this protection agency be well integrated with existing avenues for employment remedies (e.g. Fair Work Australia, the Fair Work Ombudsman, Federal Circuit Court and

workplace health, safety and compensation systems) which should be augmented and extended as appropriate to the special nature of whistleblowing cases, under the new legislations. It is anticipated that the new agency would need to provide advice and legal support for individuals seeking to access remedies through these forums, and would need to have an advanced understanding of and relationship with these forums.

2. Questions from Senator XENOPHON regarding which elements of the Fair Work (Registered Organisations) Amendment Act 2016 are beneficial and how they might be 'improved both in terms of the processes and the substantive measures'.

   See answer 1(b) above.

   While strongly supporting all these steps forward, TI Australia supports Professor Brown's evidence to the Moss Review of the PID Act that to make employment and civil remedies properly available, further legislative steps should be taken to separate the criminal offence of reprisal from the breadth of circumstances that should give rise to employment or civil remedies for detrimental outcomes. Employment and civil remedies need to be available where anyone fails in their duty to support and protect a whistleblower, or to prevent or restrain detrimental outcomes, including detriment which may be unintended but could and should have been foreseen. This is distinct from a 'reprisal', which carries implications of intent or knowledge that an act or omission would result in detrimental impacts, as direct punishment or retaliation for the disclosure. While the Fair Work (Registered Organisations) Amendment Act contains a significant advance in this regard, by recognising that civil remedies should be available irrespective of intent where there is a failure of duty, this can and should be made clearer by further separating the criminal offence of 'reprisal' from civil liability for detrimental outcomes more generally.

3. Questions from Mr KEOGH regarding whether obligations on private sector entities regarding their own internal whistleblowing management regimes should be explicit, and legislated, and how prescriptive these should be. In particular, whether an organisation should be exposed to the risk of additional or punitive damages if they fail to put in place appropriate arrangements; and whether there is any useful comparison with the obligation under the UK Bribery Act for an organisation to make sure it has appropriate processes to prevent bribery, 'which is a very broad non-prescriptive obligation'.

   TI Australia believes that the legislation should require all organisations to have in place appropriate processes and procedures to encourage and enable the reporting of wrongdoing within the organisation, including by providing support and protection. We are strengthened in this view by the latest results from the Whistling While They Work 2 project, led by Griffith University and of which TI Australia is a supporter organisation. The report (A J Brown and S A Lawrence (2017), *Strength of Organisational Whistleblowing Processes: Analysis from Australia. Further results of the Whistling While They Work 2 Project,* Griffith University: Brisbane, May 2017) **details the extent to which whistleblowing processes in the private and not-for-profit sectors are currently lagging, and also the great variability in the current processes of companies and industries.**

While we support improved guidance, advice and support for companies to achieve good processes, we also believe that to achieve real change, there should be statutory requirements for organisations to have appropriate processes and procedures (with 'appropriateness' being a matter to be determined by any relevant tribunal or court with reference to (a) the size and circumstances of the organisation, (b) any relevant industry codes of practice, policies or principles applying to the organisation, and (c) any relevant Australian or International Standard.

In light of the latest research, appropriate processes and processes should also be statutorily defined to include key minimum processes, including those that facilitate:

(a) anonymous disclosure
(b) clear internal and external reporting channels
(c) tracking and recording of wrongdoing reports/concerns
(d) assessment of the risks of reprisal or detrimental outcomes for persons who report wrongdoing
(e) support for persons who report wrongdoing and
(f) remediation in the event of any detrimental outcomes.

To further maintain flexibility, the legislation could provide that an organisation's whistleblowing processes and procedures may be incorporated in other governance processes rather than necessarily being 'standalone' procedures.

The legislation should also make clear that the managers of an organisation are under a duty to take reasonable steps to support and protect employees who report wrongdoing, and to ensure that persons under their control prevent or refrain from any act or omission likely to result in detriment to a person who reports wrongdoing. The legislation should provide that the adequacy of an organisation's processes and procedures will be relevant to whether the organisation has fulfilled this duty.

To enforce these requirements, the legislation should identify that a failure to have appropriate processes is a specific ground on which exemplary damages may be awarded, in the event that detriment is suffered. The legislation could also empower a court or tribunal to make specific orders that an organisation must introduce or rectify whistleblowing arrangements, among the outcomes it may order in determination of claims for civil remedies brought by or on behalf of whistleblowers.

In these respects, the requirement in the UK Bribery Act for organisations to have appropriate procedures for preventing bribery provides an apposite analogy to the type of requirement needed here.

Yours sincerely

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