AUSTRALIAN INSTITUTE of SUPERANNUATION TRUSTEES

17 May 2017

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

Via email to: corporations.joint@aph.gov.au

Dear Mr Hodder,

Inquiry into Whistleblower Protections – Questions on Notice

We refer to the public hearing on Whistleblower Protections held by the Parliamentary Joint Committee in Melbourne on 27 April 2017. At the hearing AIST undertook to provide answers to three Questions on Notice. These questions have been extracted below and we are pleased to provide our responses.

Question 1: **Senator XENOPHON:** Could you take on notice to provide in the next couple of weeks your views, within the current framework of the Fair Work (Registered Organisations) Amendment Bill, on the extent to which those provisions might be useful or should be strengthened in the context of your sector?

We broadly support the substance of the *Fair Work (Registered Organisations) Amendment Act 2016* (FWROA). We believe it would be useful for elements of the Act to be adopted under a new, broad national framework. We note that the FWROA is intended to operate within the context of registered organisations and not more broadly, which means the provisions would require modification to be suitable for wider application. Notwithstanding this we are supportive of the FWROA as a whole, in particular:

- The definition of a discloser (whistleblower) in the Act is appropriately broad. In our written submission we argued that under the current framework the definition of a discloser is too narrow. Under the FWROA a discloser can be a current, as well as a former officer or employee of an entity, or someone that has a contract for the supply of goods and services to the entity. We support this change and believe the expanded definition will allow for a greater number of people to rely on the whistleblower protections.
- In order for a discloser to receive legal protection under the FWROA their disclosure must satisfy the definition of 'disclosable conduct'. We support the definition.

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- For the purposes of whistleblower protection we believe it is imperative to clearly define under what circumstances conduct against a whistleblower constitutes a reprisal. We support the definition of reprisal in the FWROA.
- In our written submission we state that the types of redress available to whistleblowers should be expanded. In the FWROA the remedies available to whistleblowers are extensive and we support this definition because we believe it is imperative that the entity awarding redress, such as a court, not be unduly curtailed by prescriptive legislation. It is important that a wide variety of remedies are available to whistleblowers because reprisals can take many forms and a novel remedy may be required to adequately address the harm suffered.

Question 2: **Senator XENOPHON**: What examples can you give the committee of the sorts of issues with which a whistleblower might come forward, and are there actual instances that you are aware of—obviously, you do not have to identify anyone—where there was concern about corrupt, bad, reckless or negligible behaviour in terms of superannuation governance?

The FWROA defines disclosable conduct as being an act or omission that constitutes, or may constitute an offence against a law of the Commonwealth. Within the superannuation context, this means that a wide variety of disclosures would be picked up by the provision and potentially be classified as being protected whistleblower disclosures. Examples of disclosable conduct include a disclosure to the effect of:

- A Registerable Superannuation Entity licensee becoming aware that it breached a condition imposed on it and this breach is significant and it fails to disclose this breach to the Australian Prudential Regulation Authority.
- A regulated superannuation fund failing to ensure that the fund is maintained for a core purpose (such as the provision of benefits for each member of the fund on or after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged).

We are not aware of any disclosures made by whistleblowers relating to superannuation fund governance or more generally.

Question 3: **Senator KETTER:** You point out that you would prefer to see a principle based system […] Do you have any view as to what might be the core principles of the type of framework you are talking about?

In our original submission we referred to fourteen best practice criteria for whistleblowing legislation contained in the *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws* report. In developing the criteria the authors had regard to the principles for good legislative practice contained in the *Blueprint Principles for Whistleblower Protection* report

developed by the Blueprint for Free Speech. We believe these principles should be considered in the development of Australia's whistleblowing framework.

While the report sets out twenty-four different principles we believe the following principles are particularly relevant:

- Broad coverage of organisations: For a whistleblower framework to be effective we believe that the framework's scope should be wide to ensure it has comprehensive coverage. The ability of a national framework to protect whistleblowers is limited if there are 'carve-outs' that exempt certain sectors or industries from being subject to the protection framework.
- Broad definition of reportable wrongdoing: We believe the law must contain a wide definition of reportable wrongdoing.
- Broad definition of a 'whistleblower' or discloser: We believe it is vital for a whistleblower to be defined broadly to ensure that those who disclose misconduct or wrongdoing are protected.

The twenty-four principles were developed, in part, to ensure that whistleblowers are protected from retaliation and to hold parties to account if they do take reprisals against whistleblowers.

We also believe that the OECD *Compendium of Best Practices and Guiding Principles* for legislation on the protection of whistleblowers contains a number of principles that should be considered. We believe that the following principles are particularly relevant:

- Clear definition of the scope of protected disclosures and persons able to rely on the legal protections.
- Robust legislative protections for whistleblowers.
- Clear legislative definitions of procedures and channels for whistleblower disclosures.

Please contact Jake Sims, Research Officer on or at should you wish to discuss our submission.

Yours sincerely,

Eva Scheerlinck
Chief Executive Officer