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

Your reference

Our reference

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18 May 2017

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

Dear Dr Hodder

PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES (COMMITTEE): INQUIRY INTO WHISTLEBLOWER PROTECTIONS - QUESTIONS ON NOTICE

We refer to Dr Hodder's letter dated 20 April 2017 providing questions on notice, DLA Piper Australia's submissions dated 13 February 2017 (**DLA Piper's Submissions**) and Ms John's appearance before the Committee via telephone at the public hearing held on 27 April 2017.

Our responses to the questions on notice are included in **Annexure A** to this letter. During the public hearing on 27 April 2017, Senator Xenophon also requested that Ms John provide "*...a critique on notice as to what you say about the specific measures and the processes contained in those amendments* [*Fair Work (Registered Organisations) Amendment Act 2016* (Cth)], *because it is meant to be a minimum benchmark for the government to consider in the context of changes to public and private sector whistleblower protection laws.*" DLA Piper's response to Senator Xenophon's question is addressed in Annexure A, in particular in response to question 1(b).

Some of the questions on notice have previously been addressed in greater detail in DLA Piper's Submissions. Where that is the case, we have included appropriate cross-references to DLA Piper's Submissions in Annexure A.

Our responses to the questions on notice are confined to our consideration of corporate sector whistleblowing legislation and reforms. Accordingly, we have not addressed the questions on notice concerning whistleblowing in the public and not-for-profit sectors.

Should you wish to discuss any aspect of our responses to the questions on notice, please do not hesitate to contact Rani John on .

Yours sincerely

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ANNEXURE A: DLA Piper Australia's responses to questions on notice

Question 1 a
What are your views on which of the best practice criteria should be considered in any reforms for corporate sector whistleblowing legislation in Australia?

The below table sets out DLA Piper's views in relation to each of the best practice criteria which should be considered in any corporate sector whistleblowing legislative reforms:

#	Criterion short title	DLA Piper's view
1.	Broad coverage of organisations	We support standalone legislation providing for a whistleblower regime applicable to all private companies in the corporate sector.
2.	Broad definition of reportable wrongdoing	The existing whistleblower regime in Part 9.4AAA of the *Corporations Act 2001* (Cth) (**Corporations Act**) only covers contraventions of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); other Commonwealth legislation such as the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, and *Superannuation Industry (Supervision) Act 1993* provide for subject-specific regimes. We support the development of legislative reforms which expand the scope of reportable wrongdoing to cover disclosures about possible contraventions of Commonwealth legislation that attract a material penalty or constitute an offence.
3.	Broad definition of whistleblowers	The definition of whistleblowers should be broadened to include a company's *former* employees, directors and officers, service providers, accountants and auditors, unpaid workers, contractors (working directly with a company) and business partners. We consider that the necessary ingredient in order to be afforded protection is that the whistleblower has, or has had, a connection to the internal workings of the corporation, rather than any requirement for the whistleblower to have a current contractual relationship with the entity.
4.	Range of internal/regulatory reporting channels	We support the fostering of internal reporting structures (see the further discussion in response criteria 9 below). We also support the continued role of regulatory agency reporting channels. What distinguishes both regulators and other persons currently able to receive protected disclosures (namely, the company's auditor and officers of the company) from other third party reporting channels, is their ability to forensically investigate the allegation made. See further DLA Piper's Submissions at paragraphs 3 to 18.
5.	External reporting channels (third party/public)	We do not support protection being extended to disclosures made by whistleblowers to the media, NGOs, labour unions or Parliamentary members. Disclosures to these third parties has the potential to prejudice the proper investigation of a disclosure and also undermine the effectiveness of internal whistleblowing regimes. See further DLA Piper's Submissions at paragraphs 15 to 17.
6.	Thresholds for protection	The current 'good faith requirement' in order for whistleblowers to qualify for protection as defined within the Corporations Act should be removed. In our view, the focus should be on the identification of misconduct and the accuracy of the information rather than the motives of the whistleblower (which are often difficult to identify and subject to change).

#	Criterion short title	DLA Piper's view
		Instead, one of the following conditions should be met in order for a whistleblower's disclosure to qualify for protection: • the person making the disclosure holds an honest and reasonable belief that the disclosure shows proscribed wrongdoing (subjective test); or • the disclosure does show, or tends to show, proscribed wrongdoing, irrespective of the person's belief (objective test). We agree that protection should not extend to knowingly false disclosures. See further DLA Piper's Submissions at paragraphs 30 to 35.
7.	Provision and protections for anonymous reporting	We do not support protections for anonymous disclosures (which arguably would not require any protections, unless that person's identity was ultimately revealed). The whistleblower's identity should be protected, but with mechanisms to enable the proper investigation of a disclosure. See further DLA Piper's Submissions at paragraph 14.
8.	Confidentiality protected	Similarly, as set out in response to criterion 7, we support the protection of confidentiality, however not to the detriment of properly investigating the allegations made.
9.	Internal disclosure procedures required	A robust internal whistleblower disclosure regime has a number of advantages. While we support measures to assist the strengthening of internal disclosure regimes, we do not consider that internal whistleblower regimes should be mandated. The varying size, structure and industry sectors of organisations means that a 'one size fits all' proscribed internal whistleblowing program would be inappropriate. Further, studies and surveys such as those conducted by Griffith University and the Australian Bankers Association do not suggest that a failure to have in place some form of internal regime is a widespread issue; rather, there is considerable variance in content and quality. Regulatory guidance as to "best practice" in designing and implementing would be more useful. See further DLA Piper's Submissions at paragraphs 3 to 18.
10.	Broad protections against retaliation	We support the strengthening of protections against retaliation. We consider that the recent *Fair Work (Registered Organisations) Amendment Act* 2016 (Cth) (**ROC amendments**) including the definition of 'reprisal' action (which includes causing 'a detriment' such as dismissal, alteration of position, discrimination, harassment, intimidation, harm or injury (including psychological harm), or damage to property/reputation) can be usefully adopted for the corporate sector. It should be clear in any such amendment that "detriment" of a trivial nature is not captured, and where the alleged reprisal action has no causal relationship with the person's status as a whistleblower, the onus of proof is on the employer to establish that position.
11.	Comprehensive remedies for retaliation	We support enhanced compensation arrangements for victims of retaliation, including compensation or reinstatement, similar to the civil remedies outlined by the ROC amendments for those subjected to reprisal action. Clarification of the definition of reprisal (as recommended above in response to criteria 10) will provide whistleblowers with additional certainty about the circumstances in which they have a right to compensation. We do not support a US

#	Criterion short title	DLA Piper's view
		style bounty scheme to financially reward whistleblowers.
12.	Sanctions for retaliators	We support the introduction of harsher penalties for companies who victimise whistleblowers, including civil and criminal penalties, similar to those specified by the ROC amendments (sections 337BD and 337BE respectively).
13.	Oversight authority	We think that it is important that support is available to individuals who are (or who are considering being) whistleblowers. We do not believe that this function should be performed by ASIC or any other regulator, given the potential for conflicts of interest. Support should instead be afforded by a whistleblower advocate or agency that is separate and independent from relevant regulators. See further DLA Piper's Submissions at paragraphs 19 to 25.
14.	Transparent use of legislation	We do not favour legislative "overriding" of confidentiality regimes within employment contracts or deeds of settlement that restrain disclosures, where such provisions otherwise serve a number of valuable purposes. One option for dealing with the potential impact of such provisions on whistleblowing is for the guidance note discussed in response to criteria 9 above to encourage corporations to include information in employment contracts or deeds of settlement in relation to an employee's ongoing right to blow the whistle on misconduct.

Question 1 b
Are there aspects of the recent Fair Work Registered Organisation amendments (ROC amendments) to legislation for whistleblowing that would be appropriate to include in ***corporate*** *sector reforms?*

The recent ROC amendments provide enhanced protections for whistleblowers who report misconduct in trade unions and employer associations. We consider that a number of the ROC amendments are attractive and should be adapted as part of the corporate sector reforms, in particular:

- ***Expanding the definition of protected whistleblowers*** [*similar to the ROC amendments to section 337A(a)*] The ROC amendments expand the categories of protected whistleblowers. As discussed above in response to criterion 3, we support a similar extension of protection to a company's former employees, directors and officers, service providers, accountants and auditors, unpaid workers, contractors (working directly with a company) and business partners.
- ***Expanding the definition of reportable wrongdoings*** [*similar to the ROC amendments to section 6*] The ROC amendments expand the categories of disclosable conduct. As addressed above in response to criterion 2, we are in favour of broadening the scope of reportable wrongdoing to cover disclosures about possible contraventions of Commonwealth legislation that attract a material penalty or constitute an offence.
- ***Enhanced protections against reprisal action*** [*similar to the ROC amendments to section 337BA*] As discussed in response to criterion 10 to 12 above, we support an expanded definition of 'reprisal' action and 'detriment', in line with those definitions within the ROC amendments but with the modifications suggested in response to criterion 10 above. We are also in favour of civil and criminal penalties for actual or threatened reprisal action, similar to those within the ROC amendments.
- ***Removal of the good faith requirement*** [*similar to the ROC amendments to section 337A(c)*] As discussed above in response to criterion 6, we support the removal of the

'good faith' requirement and its replacement with a subjective, objective or combined test.

Question 1 c
Are any additional provisions necessary to ensure that whistleblowing laws are effective for multinational corporations, with significant management structures outside Australia?

There are inherent limitations in the extent to which Australia's legislation can have extra-territorial application. One of the advantages of encouraging corporations to have a robust internal disclosure regime in the way suggested in DLA Piper's Submissions (at paragraphs 3 to 18) is that the implementation of these internal regimes may have application to multinational corporations in a way that cannot be achieved by legislation.

Question 4
Some submitters and witnesses have commented on the idea of establishing a Public Interest Disclosure Agency (PIDA) agency as an independent body to receive disclosures, provide advice to whistleblowers and a clearing-house for initial investigations (e.g. Submissions 32, 22). What do you consider to be the potential advantages and disadvantages of such an approach?

As discussed in response to criterion 13 above, we support the establishment of an independent body to receive disclosures and provide advice to whistleblowers (in relation to making a disclosure and the process for seeking compensation for reprisal). Such a body may also usefully serve as a clearing-house to direct allegations to the appropriate regulatory agency for investigation of the type of complaint (or provide guidance where multiple regulators are involved); or, where necessary, identify allegations that patently have no substance and which should not occupy regulatory resources. The formation of such an agency may remove some of the obstacles that whistleblowers face when making disclosures. For instance, the current whistleblower protection legislation potentially requires whistleblowers to undertake a complex legal assessment in order to assess whether an intended disclosure qualifies for protection. That may act as a disincentive to potential whistleblowers coming forward. An independent agency would enable whistleblowers to receive advice and support to overcome these issues.

Ideally, the proposed agency would operate on a Commonwealth-wide basis and interact with a number of different regulatory agencies. It would need to be staffed by people with the ability to review and assess the information being provided by the whistleblower and to effectively advise whether the whistleblower would qualify for protection, and to identify the regulator to whom the disclosure should be directed for investigation. The agency could potentially also provide support for a whistleblower experiencing reprisals or victimisation.

Another benefit stemming from the formation of an independent agency is that it would ensure that the relevant regulators' focus remains on the investigation of disclosures and avoid potential conflicts of interest.

The potential disadvantages of an independent agency performing this function may include that the agency:

- misidentifies the information being provided by the whistleblower as not constituting a protected disclosure;
- prematurely dismisses the merits of the whistleblower's disclosure; or
- fails to refer the whistleblower to the appropriate regulator.

These potential disadvantages are operational, and can be overcome or mitigated with appropriate resourcing, training and processes. We think that the benefits of establishing an independent agency outweigh the potential disadvantages of doing so.

Question 5
What do you consider to be the advantages and disadvantages of putting all whistleblower protection laws in a single Act versus the current situation where the laws are spread over at least four Acts?

The current legislative framework for the corporate sector is fragmented. It is preferable to have all whistleblower protection laws, insofar as they relate to the corporate sector, within a single act. This would consolidate in one place all the whistleblower protections currently within the Corporations Act and those acts with whistleblowing provisions that apply to the financial services industry (namely, the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, and *Superannuation Industry (Supervision) Act 1993*). We also consider that this singular act should cover disclosures relating to suspected contraventions of the *National Consumer Credit Protection Act 2009* (Cth). A single corporate sector act would provide whistleblowers with increased certainty and ensure a more consistent approach to the handling and investigation of disclosures.

Public and private sector whistleblower legislative regimes should remain separate but be harmonised where appropriate (see our response to question 6 below).

Question 6
To what extent should there be harmonisation (not replication, but consistency and difference where appropriate) of whistleblower provisions across the public, corporate and not-for-profit sectors?

In principle, we are in favour of harmonisation of whistleblower provisions across the public, corporate and not-for-profit sectors. Harmonisation has the benefit of reducing confusion and increasing confidence for whistleblowers, these sectors and regulators. As discussed above in response to question 1(b), we consider that there are provisions of the ROC amendments which could be usefully adapted for the corporate sector.