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Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hodder

Inquiry into Whistleblowing Protections – Questions on Notice

Thank you for the opportunity to comment further on issues related to the Committee's work. Our responses to the Questions on Notice follow, in italics. We have limited our comments to those topics in relation to which we have a particular research interest.

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

The summary of best practice criteria broadly includes many desirable attributes. In our view the success of any implementation of these criteria would require careful consideration of the context, particularly with regard to significant differences between public and private sector environments in which they were to be applied.

Further criteria we believe also worthy of consideration are:

- *we see real value (particularly in the corporate sector) in what could be achieved by the simple expedient of mandatory reporting by companies in relation to their whistleblowing practices; a model similar to the ASX Corporate Governance Principles that enabled a light-touch 'if not why not' approach could be especially relevant;*

- *the carefully designed use of whistleblowing financial compensation and rewards; the USA offers a persuasive example of the power of this regulatory mechanism, one which has now been picked up in an influential Canadian jurisdiction.*[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?

A number of these amendments could be directly applied to corporate sector reforms. We particularly support the inclusion of a 'reasonable grounds to suspect' test with no accompanying good faith requirement (see s 337A(c)). This contrasts with the current corporate provision in Pt 9.4AAA of the Corporations Act 2001 *(Cth) that the discloser both have 'reasonable grounds to suspect' a contravention as well as making the disclosure in 'good faith' (ss 1317AA(1)(d) and (e)).*

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

The operations of multinationals always raise the issue of extra-territorial application of legislation. Careful drafting is necessary to ensure appropriate jurisdictional reach. The same considered approach would be required in relation to whistleblowing protections as has occurred in other legislation with obvious international implications (eg foreign bribery regulation). It is also important in the context of whistleblowing regulation that harmonisation occurs with regulatory systems in other jurisdictions (to the extent reasonably possible). Once again, reporting by companies in relation to their whistleblowing practices could play a valuable role, for example, by requiring Australian-domiciled holding companies to report on whistleblowing practices of their subsidiaries incorporated in foreign jurisdictions.

2. Public sector
   a. What are your views on which of the best practice criteria should be considered in any reforms for public sector whistle blowing in Australia?
   b. Are there aspects of the recent ROC amendments for whistleblowing that would be appropriate to include in public sector reforms?
   c. Do you have any comments on the findings made by the Moss review of the Public Interest Disclosure Act 2009?

[1] The Ontario Securities Commission introduced a paid whistleblower program in July 2016. See http://www.osc.gov.on.ca/en/NewsEvents_nr_20160714_osc-launches-whistleblower.htm.

We have limited comments to make on public sector whistleblowing regulation. However, in our view there are significant differences between the public and private whistleblowing environments which need to be recognised in any regulatory reform. In spite of the apparent benefits of a simplified, single whistleblowing system, we do not believe that a 'one-size-fits-all' model could work in practice. The Review of the Public Interest Disclosure Act 2013 (Moss Review) offers very useful insights into factors that ought to be considered in the next iteration of public whistleblowing reforms in Australia. Some of these insights also have relevance beyond the public sector. We note the Moss Review's finding that 'by adopting legalistic approaches to decision-making, the PID Act's procedures undermine the pro-disclosure culture it seeks to create'.[2] *We reiterate our support for the introduction of an 'if not why not' approach to disclosure of the existence of (and details of) internal whistleblowing systems within larger corporations, allowing a flexible regulatory approach while ensuring an increased profile for whistleblowing systems.*

3. Not-for-profit sector
    a. What are your views on which of the best practice criteria should be considered in any reforms for not-for-profit whistle blowing in Australia?
    b. Are there aspects of the recent ROC amendments for whistleblowing that would be appropriate to include in not-for-profit sector reforms?

Our general view in relation to not-for-profit sector whistleblowing reforms is that they should broadly mirror those introduced in the corporate sector, given that the structural basis of the majority of not-for-profits would be a corporate entity. However, here again, we note the important differences between the various sectors under consideration in this review. Even though the structural basis of not-for-profits may be corporate, existing policy preferences to lighten the regulatory burden placed on not-for-profits need to be taken into consideration in any potential whistleblowing reforms.

PIDA Agency, harmonisation and consistency

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?

We support the notion of a centralised whistleblowing clearing-house to remove the challenges faced by potential whistleblowers in determining to whom, how and when they should blow the whistle. As indicated in our submission to the Treasury Review of Tax and Corporate Whistleblower Protections in Australia,[3] *we see clear benefits in the establishment of an*

[2] P Moss, *The Review of the Public Interest Disclosure Act 2013*, 15 July 2016, Commonwealth of Australia, at Executive Summary par 9.
[3] See http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/Review-of-whistleblower-protections.

independent Whistleblower Office, to deal with whistleblower protection. Such an office could provide a central information and advocacy service for whistleblowers. We do not see this office as replacing independent sectoral whistleblowing regulators – for example, ASIC has established an Office of the Whistleblower, and there are obvious attractions in locating a corporate whistleblower office in an agency with an understanding of corporate structures and regulation. However, the remit of ASIC's Office of the Whistleblower is necessarily very different from the confidential guidance and advocacy service that a centralised whistleblowing clearing-house could provide. We note that the New Zealand Ombudsman's whistleblower program appears to incorporate several of these desirable elements and is, in our view, worthy of consideration. Any centralised agency would, however, need to carry a title sufficiently broad to include whistleblowers from all potential sectors. It may be that 'Public Interest Disclosure Agency' is too suggestive of a public sector focus.

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?

We are not in favour of putting all whistleblower protection laws in a single Act. In our view, the advantages of separate systems that can more appropriately cater for the distinctions between public sector and corporate environments outweigh the apparent benefits of a single, unified system.

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?
    a. What arrangements should be in place for companies or not-for-profit organisations that undertake contracts or work for the public sector to ensure that they or their staff or whistleblowers are not subject to conflicting arrangements?

Harmonisation is always desirable when appropriate. It would also facilitate the work of a centralised whistleblowing clearing-house. Here, once again, however, we emphasise our view that one size does not fit all in terms of whistleblowing regulation.

We would be happy to speak further to our comments on these questions, if required.

Yours sincerely

Vivienne Brand & Sulette Lombard