



## Australian Banking Association

23 February 2018

Mr Mark Fitt  
Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100, Parliament House,  
Canberra ACT 2600

Email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Fitt,

### [Inquiry into the Treasury Laws Amendment \(Enhancing Whistleblower Protections\) Bill 2017](#)

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide a submission to the Inquiry into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 ('the Bill').

The banking industry fully supports the introduction of a stronger and more effective whistleblowing regime and therefore supports the Bill, however, we have significant concerns about the change to the definition of 'eligible recipients of a disclosure' from the definition foreshadowed in the Exposure Draft.

The Bill expands the exposure draft definition of 'senior manager' to include all supervisors and managers of an eligible whistleblower who is an employee of the relevant entity. This is a fundamental change that radically expands the number of staff who can receive disclosures. We believe the change undermines the intentions of the rest of the Bill, could create significant risks for both whistleblowers and recipients and has problematic practical consequences. Our concerns are outlined in more detail below.

### [Whistleblowing reforms](#)

ABA member banks have undertaken significant reforms in the past few years to put in place comprehensive whistleblowing programs which include clear reporting and investigative processes, details of the reporting channels including anonymous disclosure and organisational support available to whistleblowers.

In December 2016, the ABA released Guiding Principles on Whistleblower Protections to help banks ensure their internal whistleblower policies meet the highest standard of whistleblower protections and that they have a robust and trusted framework for escalating and responding to concerns. These Principles are attached as an appendix to this submission<sup>1</sup>.

As found in Guiding Principle 4.4 the banking industry believe that it is imperative "that the whistleblower program provides a number of specific channels for the whistleblower to report concerns (for example, independent internal reporting area and/or external third party reporting area, i.e. legal firm or consultancy that are contactable by phone, post, email, online and/or apps)."

The definition of 'eligible recipients of a disclosure' as it is currently drafted has the effect of substantially increasing the number of eligible recipients. However, as Guiding Principle 4.4 alludes to, the industry strongly believes that the success of a whistleblower program depends not on the number of eligible recipients but on the availability of multiple channels for disclosure and on these channels and the whistleblowing policy being easily accessible and well communicated to all employees.

In fact, it is the opinion of the banking industry that a substantial increase to the number of eligible recipients is likely to have a negative impact on the success of a whistleblower program.

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<sup>1</sup> [https://www.ausbanking.org.au/images/uploads/ArticleDocuments/149/Final\\_Whistleblower\\_Guiding\\_Principles-Dec-2016.pdf](https://www.ausbanking.org.au/images/uploads/ArticleDocuments/149/Final_Whistleblower_Guiding_Principles-Dec-2016.pdf)



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### Rational for support of Exposure Draft definition

The Exposure Draft definition of eligible recipient if applied in a major bank, we estimate would typically cover 200-300 staff. We believe that this number strikes the right balance between making whistleblowing accessible and ensuring adequate protection for the whistleblower and speedy resolution of the issues.

The necessity for whistleblowing legislation is as a system of last resort. It should come into play when normal channels of issue resolution – ie. approaching your line manager - have failed, or the person making the disclosure is not confident that the issue can be resolved through normal channels. Banks encourage staff to bring issues to the attention of their line managers as a matter of course, and see whistleblowing as an important structure to assist employees where they are not comfortable using that approach. Seeing whistleblowing in this light, supports our proposition that disclosures should be confined to a limited number of people, as defined in the Exposure Draft.

### Comments on the legislation – definition of ‘eligible recipient’

The ABA and our members believe it is critical that employees and others<sup>2</sup> have the confidence to raise problems and speak up. Whistleblowers need to know their anonymity will be protected and their disclosure thoroughly investigated. It is the experience of our members that whistleblowers prefer to make disclosures through defined whistleblowing reporting channels including a limited number of ‘eligible recipients’ who ensure that their identity is protected and the matter is properly investigated.

We have significant concerns about the expanding the definition of ‘eligible recipients of a disclosure’ to include ‘in relation to a disclosure of information by an individual who is an employee of the body corporate - a person who supervises or manages the individual’. The Exposure Draft proposed that a whistleblowing disclosure could be made internally to a ‘director, secretary or senior manager’ of a business (see section 1317AAB(2)(c) - ‘whistleblower disclosees’ of the draft legislation). The ABA and the banking industry supported this definition.

The inclusion of ‘...a person who supervises or manages the individual’ significantly increases the number of people who may receive protected disclosures from a limited number of authorised and well-trained officers to potentially thousands of people depending on the size of the financial institution. One major bank has indicated this change would increase eligible recipients to up to 10,000 people.

The potential consequences of the current definition of ‘eligible recipients’ include:

- by increasing the number of eligible recipients so substantially, there is a significant increase in the risk that the confidentiality of whistleblowers’ identities will not be maintained
- placing risk and undue pressure and responsibilities on junior managers or supervisors, particularly, given the increased penalties and enforcement regime
- detracting from the management and investigation of genuine whistleblowing disclosures by slowing down investigations and remediation of issues
- there is a risk that managers and supervisors may treat most workplace grievances as whistleblowing disclosures to ensure they are personally and criminally protected, slowing down the process to resolve everyday grievances
- in cases of fraud or criminal behaviour, a substantial increase in recipients who are not specially trained in this area, creates risks that evidence could be tampered with or destroyed before proper investigations can be conducted
- creating a very significant training and compliance obligation at a scale that increases the likelihood of inconsistent practice or breaches, and
- challenges in ensuring that knowledge and training standards are maintained (given staff turnover).

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<sup>2</sup> Others includes contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees.



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We believe if the definition in the legislation remains it could undermine the integrity of the framework that the Government is trying to embed in corporate Australia.

### Recommendation

Our suggestion is to replace Schedule 1, Item 2 subsection - 1317AAC (1)(e)) with 'authorised whistleblowing officer/s and senior manager' (as defined by Corporation Act).

An **authorised whistleblowing officer** means a person designated by the body corporate to routinely handle eligible disclosures, and develop, implement, and oversee body corporate's compliance with the requirement of the Act.

This means that a certain number of individuals (senior managers) would be captured by their office or function in the organisation, and the organisation can choose to broaden the range of eligible recipients in a way that is fit for purpose in their business.

If you have any queries regarding the issues raised in our submission, please Amanda Pullinger, Policy Director, [REDACTED]

Yours sincerely,

[REDACTED]

Christine Cupitt  
**Executive Director, Policy**

## Guiding Principles – Improving Protections for Whistleblowers

### Background

Australia's banks are putting in place comprehensive new measures to protect customer interests, increase transparency and accountability and build trust and confidence in banks.

One of these measures is to ensure that banks have the highest standard of whistleblower protections as well as appropriate policies and a robust, trusted framework for escalating and responding to concerns.

An effective whistleblowing policy and program is one aspect of a bank's overall approach to ensure compliance with regulation and prevent and detect misconduct. Not only is the whistleblowing policy part of the internal control and risk management framework of banks, it is an important part of driving continuous improvement within banks and ultimately improving outcomes for customers. It is critical that employees and others<sup>1</sup> have the confidence to raise problems and speak up.

The following guiding principles have been identified as encapsulating the core elements of an effective whistleblowing policy to assist the ongoing enhancement of whistleblowing programs by banks and banking groups. The guiding principles will be evaluated and updated over time to reflect changes in legislation, ongoing research, and developments in whistleblowing practices.

### 1. Purpose

- 1.1 The purpose of a whistleblowing policy is to encourage and support the reporting of suspected or actual misconduct or unlawful activity within an organisation, and to protect the whistleblower from any retaliation that may arise as a result of their disclosure.
- 1.2 An effective whistleblower policy is a key element of a culture of ethical behaviour, strong corporate governance and an effective compliance and risk management program. It helps protect the interests of customers as it acts as an effective deterrent to poor conduct or organisational behaviour. Poor management of whistleblowing can lead to poor outcomes for customers, a loss of trust by employees, customers, regulators, shareholders and the general public, financial loss and reputational damage.
- 1.3 Banks recognise that an effective whistleblowing policy helps a business to learn about problems, improve their practices, and reduce business risks. The application of these guiding principles will help improve whistleblowing programs and provide greater consistency for the protection of whistleblowers across banking groups.
- 1.4 The guiding principles are aimed at achieving the highest standard of whistleblower protection based on an assessment of current global banking industry whistleblowing policies.

### Principles

### 2. Bank executives demonstrate strong and visible leadership

The tone from the top is critical to maintaining trust in the whistleblower policy. Clear policies, roles and responsibilities and recognition of the importance of the program should be part of the senior management and organisational culture.

- 2.1 Whistleblowing is an essential part of building and actively fostering a culture of speaking up about problems and business risks. The whistleblower policy should clearly articulate the purpose and positive elements of the program, the commitment by the bank to identifying and

<sup>1</sup> Others includes contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees.



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responding to reported concerns and commitment to a culture of continuous improvement within the banking group. The policy will only work if senior executives, managers, employees and others have trust in the process.

- 2.2 The whistleblower policy should be approved and endorsed by the Board of Directors and the Executive Management team:
  - The Board of Directors should approve the policy and make sure it is adhered to.
  - The bank's Executive Management team should be responsible for the oversight, implementation and communication of the whistleblowing policy.
- 2.3 An individual with a sufficient level of authority within the banking group or 'executive champion' should be responsible and accountable for the implementation and effectiveness of the program.
- 2.4 The whistleblowing policy should be linked to the banking group's Code of Conduct.
- 2.5 While respecting anonymity and complying with the law, the whistleblowing policy should provide for regular reporting to the Board or delegated committee on the effectiveness of the program as well as any material incidences and the status of any ongoing material investigations.<sup>2</sup>

### 3. The whistleblower policy allows for disclosures on a range of issues from a range of people with a connection to the bank

The scope of the whistleblower policy should be broad, allowing disclosures from people with a connection to the banking group.

- 3.1 The whistleblower policy allows for disclosures from a range of people with a connection to the bank on a range of issues. The range of people should include employees, contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees.<sup>3</sup>
- 3.2 The range of issues able to be reported and responded to under the whistleblower policy includes an activity, conduct or state of affairs, that is illegal, unethical or improper. For example, allegation of criminality (e.g. theft, fraud), harassment, unethical behaviour, failure to comply with a legal obligation, suspected or actual misconduct and significant breaches of a licensee's policies or code of conduct.
- 3.3 The whistleblower policy is designed to protect a whistleblower who acts honestly, reasonably and with genuine belief over the conduct, action or state of affairs of an individual or group. The bank will focus on the quality of the information concerning the misconduct or unlawful activity, not the motivation of the whistleblower.

<sup>2</sup> It may be difficult in some circumstances for the information disclosed to be communicated through the particular governance channels. Banks should exercise their judgement about getting the right balance between maintaining strict anonymity and confidentiality (in accordance with these guiding principles) and being able to report to employees as part of awareness raising about the whistleblowing program and promoting the desired culture of the banking group. It may not be possible to send general communications across a bank about a specific whistleblowing incident.

<sup>3</sup> Disclosures raised by external third parties are to be investigated to the extent possible. It should also be acknowledged that the banking group will not be able to provide the same level of protection for external third parties and former employees as it does to employees and contractors.



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#### 4. Banks provide clear guidelines on the reporting and investigation process

The reporting and investigation process in the whistleblower policy should facilitate open and honest communications by whistleblowers. Anonymity and independent support should be provided as requested and to the extent possible.

- 4.1 The reporting and investigation process is clearly documented in the whistleblower policy with clear procedures, roles and responsibilities and details the organisational support that is available.
- 4.2 The whistleblower policy provides for anonymous disclosures.
- 4.3 The whistleblower policy has explicit acknowledgment that the whistleblower may communicate with regulators at any time in relation to the suspected or actual misconduct or unlawful activity.
- 4.4 The whistleblower program provides a number of specific channels for the whistleblower to report concerns (for example, independent internal reporting area and/or external third party reporting area, i.e. legal firm or consultancy that are contactable by phone, post, email, online and/or apps).
- 4.5 There are separate roles and responsibilities for the investigation of whistleblowing disclosures and the protection and support of whistleblowers. These are different functions and should operate independently of each other. To protect the whistleblower it may be appropriate, in some circumstances, for the investigation and protection functions to be conducted by one person. Banks will need to ensure appropriate practices are in place to protect the anonymity of the parties involved.
- 4.6 The whistleblower policy clearly identifies the limited roles within the bank with whom information disclosed by a whistleblower can be shared (for example, the whistleblower investigation officer), and explains that a whistleblower covered by a bank's policy consents to such limited sharing of the information if the circumstances allow<sup>4</sup>.
- 4.7 The program is structured and adequately resourced to be effective and ensure that disclosures are investigated and responded to in a timely manner and independently of the area of the business concerned.
- 4.8 The program will ensure that, while observing obligations of whistleblower confidentiality and protections, natural justice will be followed, with the person subject to the whistleblowing allegation given the right to respond and also informed of the outcome, as appropriate.
- 4.9 Banks value the whistleblower and the information they disclose. The whistleblower will receive acknowledgement of the disclosure and they will be updated in relation to timeframes and next steps during the investigation and advised of the final outcome, where appropriate.

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<sup>4</sup> In Australia, there are legislative obligations in relation to confidentiality and a person who discloses information from a whistleblower outside those obligations of confidentiality or who victimises a whistleblower on the basis of that information may be guilty of a criminal offence. Obligations of confidentiality around information from a whistleblower must be strictly observed by banking groups, including in their reporting.





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## 5. Banks provide support and protections for whistleblowers

The whistleblower policy must articulate the standards for protecting and supporting whistleblowers during and after the process. Retaliation against a whistleblower will not be tolerated.

- 5.1 The whistleblower policy prohibits actions that disadvantage the whistleblower personally or financially in retaliation against their disclosure. All reasonable steps must be taken to protect whistleblowers from retaliation or adverse action related to the disclosure, including matters relating to their employment. It should be acknowledged that a banking group will not be able to extend the full level of protections set out in the whistleblower policy to whistleblowers who are not directly employed by the banking group at the time the disclosure is made, for example, protection of their employment conditions.
- 5.2 Retaliation against a whistleblower will not be tolerated. The whistleblower policy will detail clear processes for reporting and responding to retaliation or threats of retaliation against a whistleblower. It will detail organisational and individual behavioural expectations relating to whistleblowing. There are explicit and relevant responses to people exhibiting unacceptable behaviour towards whistleblowers and disciplinary action may be taken against any person responsible for such behaviour.
- 5.3 If the whistleblower is found to have been materially involved in the misconduct or unlawful activity, they may not be protected in relation to their role in that misconduct or unlawful activity (although in some cases the making a disclosure may be a mitigating factor).
- 5.4 Banks will have in place appropriate internal processes to investigate a matter where a whistleblower thinks they have not been treated fairly or has concerns about adverse action related to their employment.
- 5.5 The whistleblower policy provides support for whistleblowers through the banking group's employee assistance program, with additional support provided if required by the whistleblower.
- 5.6 Protection against retaliation and support is also provided to employees who are part of the whistleblowing investigation team.

## 6. The program is known, accessible and effective training is provided

The whistleblower program, including how to report suspected or actual misconduct or unlawful activity and the protections afforded to whistleblowers, is known and understood by all senior executives, managers, employees and others across the banking group. Raising awareness and providing training should be embedded in the banking group's business, operational risk and culture frameworks.

- 6.1 The whistleblower policy is easily accessible by all senior executives, managers and employees and the program is communicated regularly to ensure broad awareness across the banking group. The summary of the policy and contact points for the whistleblowing program are published on the banking group website so that others covered by the policy (i.e. non-banking employees) can access the program.
- 6.2 The whistleblower program is part of mandatory training for all employees (for example, as part of an induction program). Specialist training should be provided for executives, senior managers and employees responsible for key elements of the program (for example, training of employees charged with investigating whistleblower complaints and supporting the whistleblower).
- 6.3 Banks should consider how best to communicate their whistleblowing policy internally, including through the bank's intranet and/or other employee communications. Communications should



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not compromise anonymity for whistleblowers, but aim to promote transparency around the program and consequences.

## 7. Ongoing monitoring

Banks will monitor the awareness and effectiveness of the whistleblower program to ensure continuous improvement and adherence to the highest standards in whistleblowing practices.
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- 7.1 Banks have whistleblowing policies consistent with these guiding principles and communicate their whistleblowing policies internally and externally (for example, as part of their corporate responsibility reporting and the bank's website).
- 7.2 Banks will need to design and implement mechanisms to monitor and measure the effectiveness of the program as well as the awareness and attitude of employees and others, towards the whistleblower policy and program.
- 7.3 Banks should consider seeking regular and independent assessment of the effectiveness of the whistleblowing policy and program and ensure that a process exists to embed improvements as a result of these findings, and other internal audits or reviews.