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CRICOS Provider No. 00114A

8 February 2017

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

Dear Secretary

Inquiry into Whistleblowing Protections

We are legal academics in the Law School at Flinders University of South Australia, with a research focus in the area of corporate whistleblowing.¹

Submission on Terms of Reference Item (d): Compensation arrangements, bounty systems

We have researched in particular the range of incentives that might be offered to encourage whistleblowers to come forward, and to compensate them for doing so. In our view whistleblowing incentives and protections involve multidimensional policy considerations, but a well-developed framework of incentives will undoubtedly strengthen whistleblower structures overall, with positive regulatory outcomes.

As part of any Australian consideration of the potential to introduce a 'bounties' system we believe there are a number of important policy factors to consider. Some of these are highlighted below.

¹ Brand, V, (2016) 'Still "Insufficient or Irrelevant": Australia's Foreign Bribery Corporate Whistleblowing Regulation', 39(3) *University of New South Wales Law Journal* 1072-1095; Lombard, S & Brand, V, 'Corporate Whistleblowing: Public Lessons for Private Disclosure', (2014) 42 *Australian Business Law Review*, 351-366; Brand, V., Lombard S & Fitzpatrick, J, 'Bounty hunters, whistleblowers and a new regulatory paradigm' (2013) 41 *Australian Business Law Review* 292-307.

1 Importance of holistic approach

We believe that financial rewards for whistleblowing could fulfil a valuable function in encouraging those in possession of information about wrongdoing in an organisation to come forward. However, we recognise that the availability of a whistleblowing financial incentive on its own will not necessarily be sufficient to encourage all potential whistleblowers to disclose information about wrongdoing. Instead, such a mechanism can form an integral part of a well-developed, nuanced whistleblowing regulatory framework that also, importantly, provides for confidentiality and protection against retaliation.

2 Parameters of 'financial reward' for whistleblowing

We suggest that any reform in this area should take into consideration that whistleblowing financial incentives that might be offered can take different shapes. A wide spectrum potentially exists which includes cash payments ('bounties'), compensation, as well as non-prosecution agreements (or 'cooperation discounts') – each presenting its own challenges and benefits. For example, a 'bounty' as a percentage of a fine imposed on the wrongdoer, where the fine isn't significant, or where the wrongdoer ends up in jail, would offer small consolation to a whistleblower who lost his/her employment. On the other hand, where a 'bounty' is potentially significant, it might be more attractive to access the 'reward' that way, rather than perhaps having to engage in a lengthy court process to claim compensation.

3 Eligibility to access reward

Another factor to consider is the eligibility of particular whistleblowers, such as company officers, to access the rewards scheme. The US model, for example, does permit company officers to access whistleblowing financial incentives, but only under particular circumstances, compared to 'ordinary' whistleblowers whose access to a whistleblowing bounty wouldn't be restricted in the same way.

4 Administrative effectiveness and fairness

We believe that the practical success of a potential whistleblowing rewards scheme would require a framework that provides administrative effectiveness and fairness. Any reform in this area would be meaningless if a whistleblower who was in theory eligible for a financial incentive found it difficult to access the reward in practice. In this regard it is also important to ensure that provision is made for whistleblowers to be kept informed and to be provided with reasons in relation to decisions. An advocacy service could fulfil an important function in enhancing accessibility of the rewards scheme.

5 Impact of whistleblowing financial incentives on internal systems

The potential governance benefits of well-developed internal whistleblowing systems are generally recognised. We suggest that any regulatory changes that provide for whistleblowing rewards should be developed in such a way that the value and effectiveness of internal whistleblowing systems are not undermined. In particular, concerns have been raised by commentators that a bounties system

might encourage whistleblowers to bypass internal reporting systems within organisations. However the use of the date of any internal report as the basis for determining the date of a disclosure for the purposes of attributing a reward (as in the US SEC system) addresses this concern, ensuring those whistleblowers who report internally first are not disadvantaged.

A further possible issue identified in relation to rewards is that the presence of a bounty system could create incentives to delay a report of wrongdoing in order to allow further misconduct, increasing the possible penalty imposed and any reward ultimately available. However, delay in making a report carries the risk of a potential reward being obtained by another whistleblower who reports in a more timely manner, ensuring an intrinsic incentive exists to report as soon as possible.

6 Value of comparison with other jurisdictions

A comparison with like regimes in operation elsewhere, including those that are now well-established (United States) and more recently devised (Ontario, Canada) can provide useful guidelines in relation to devising such systems.

The recent decision of the Ontario Securities Commission in Canada to adopt bounties provides particularly current policy and empirical insights. In June 2017 the Flinders Law School, in conjunction with the University of Melbourne's Centre for Corporate Law and Securities Regulation, will host a seminar at which Canadian and Australian academic and regulatory experts will consider a range of issues key to the development of a robust bounties policy analysis. In particular, the seminar will consider the Canadian experience and look at the ways in which whistleblowing rewards schemes might operate in Australia, generating valuable insights into current reform considerations.

Comment on Senate Economics References Committee's paper: Corporate Whistleblowing in Australia

We note that the Committee welcomes submitters' views on the issues identified in the paper on Corporate Whistleblowing in Australia released by the Senate Economics References Committee in 2016. We have the following specific comments on that paper:

- Item 1: in our view, a new approach to compensating whistleblowers ought to be considered, with reference to the range of policy considerations outlined above in this submission;
- Item 2: we see value in 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 internal systems;
- Item 3: as previously indicated, we support the introduction of a rewards system. To the extent that this may be inconsistent with Australian culture (something we do not hold a final view on) we see this as a positive, and not a limiting, factor. Further, in our view, community attitudes to whistleblowing activity have undergone radical change in the past decade, and are likely to evolve still further;

- Item 4: we strongly support the creation of an advocacy service for whistleblowers;
- Item 5: there is a clear need, in our view, to expand the category of protected whistleblowers and the scope of relevant disclosures;
- Item 6: we support the capacity to disclose anonymously; and
- Item 7: we do not support the retention of a ‘good faith’ hurdle to accessing whistleblower protections.

Review of Tax and Corporate Whistleblower Protections in Australia Consultation Paper

We have made separate submission to the Treasury in relation to the Review of Tax and Corporate Whistleblower Protections in Australia Consultation Paper released on 20 December 2016. As we understand submissions received in respect of the Consultation Paper will be provided to the Parliamentary Joint Committee, we have not replicated our comments on the Paper in this submission.

Conclusion

We recognise not all commentators favour whistleblowing bounties or compensation schemes in their various possible guises. However, the sophistication and the reported success of the US SEC system, the serious and widespread consideration being given to this idea in various jurisdictions, and its adoption in a comparable jurisdiction (Ontario) demonstrate the value such a measure could add to a well-developed whistleblowing regulatory framework.

We are happy to provide further details of the Flinders Law School/Centre for Corporate Law & Securities Regulation Whistleblowing Bounties seminar, or to answer questions on our research, if this would assist the Committee.

Yours sincerely

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