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**International Bar Association
Anti-Corruption Committee**

**Supplementary Submission to
Questions on Notice
Fair Work (Registered Organisations)
Amendment Bill 2014
18 May 2017**

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International Bar Association Anti-Corruption Committee

Supplementary Submission to Questions on Notice Fair Work (Registered Organisations) Amendment Bill 2014

1 Introduction

1.1 *International Bar Association*

- (a) The International Bar Association (**IBA**) Anti-Corruption Committee (the **Committee**) made a submission dated 10 February 2017 (the **Submission**) to the Joint Parliamentary Committee on Corporations and Financial Services (the **Joint Parliamentary Committee**) in relation to its review of whistleblower protections in Australia in the corporate and not-for-profit sectors.
 - (b) On 11 April 2017, the Joint Parliamentary Committee sent the Committee a series of Questions on Notice.
 - (c) The Committee provided its response to the Questions on Notice dated 24 April 2017 (the **Response Notice**).
 - (d) Mr Robert Wyld, on behalf of the Committee, appeared before the Joint Parliamentary Committee on 28 April 2017. During the course of the hearing, the Joint Parliamentary Committee put certain questions on notice to the Committee, with a request that they be answered by 18 May 2017.
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2 Questions on Notice

2.1 *Scope of Fair Work (Registered Organisations) Amendment Bill 2014*

- (a) The question on notice from the Joint Parliamentary Committee was expressed in the following terms¹:

If you could, please be as prescriptive as you wish to be in how you think it [the whistleblower protections in the *Fair Work (Registered Organisations) Bill 2014*] could be rolled out in the corporate and public sectors and what differences there could be. Because of course you have the *Public Interest Disclosure Act* that applies to the public sector. That is all I really want to ask you, on notice. If you could get something to the committee by 18 May, that would be useful. This is a process that I believe will lead to that broader reform, and we want to get it as right as we can in the coming weeks.

- (b) The Committee's Submission made a number of broad recommendations for reform of whistleblower protection laws in the private and not-for-profit sectors. The Committee's recommendations were reinforced in its response to the Questions on Notice dated 24 April
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¹ See Proof Committee Hansard Friday 28 April 2017 at page 16.

2017 when looking at the best practice criteria for whistleblowing legislation which was set out in a report entitled *Breaking the Silence; Strength of Witnesses in G20 Whistleblower Protection Laws Report* published by Simon Wolfe and others. In the Committee's opinion, to the extent possible, there should be a consistent approach across the private and not-for-profit sectors for whistleblower protections.

2.2 The Corporate Sector

- (a) The Committee has reviewed the contents of the Bill in relation to the amendments for registered organisations in respect of the whistleblower regime set out in the Bill.
- (b) The Committee supports those amendments, and sees no reason why they should not apply to the private sector, subject to the Committee's Submission and Response Notice and the comments below.

2.3 The Not-for-Profit Sector

- (a) The Committee has reviewed the contents of the Bill in relation to the amendments for registered organisations in respect of the whistleblower regime set out in the Bill.
- (b) The Committee supports those amendments, and sees no reason why they should not apply to the not-for-profit sector, subject to the Committee's Submission and Response Notice and the comments below.

2.4 Other Matters

- (a) The Committee has prepared a table detailing the relevant provisions set out in the Bill together with the Committee's comments on the application of those provisions to the private and not-for-profit sectors. That table is set out in **Annexure A** to this Supplementary Submission.
- (b) In Section 337BA(2)(c), detriment is to include "*alteration of an employee's position to his or her detriment*". That appears to use the concept of detriment within the definition of that very word. The Committee considers that the use of the word "detriment" in the definition could perhaps be amended to read "disadvantage".
- (c) Sections 337BD and 337BE set out certain offences in respect of civil penalties and criminal penalties respectively for conduct that constitutes "*taking a reprisal*" or "*threatening to take a reprisal*". The Committee believes, while acknowledging that there is a modest term of imprisonment for the criminal offences, the amount of the financial penalties in the Bill are too low. The Committee considers that the penalties should be substantially increased to the amounts reflected in the table in Annexure A to this Submission.
- (d) The Bill is focused on registered organisations and reporting to the oversight body for such organisations, a point noted in testimony to the Joint Parliamentary Committee². As the Committee noted in its Submission and from testimony before the Joint Parliamentary

² See Committee Proof Hansard Transcript 23 February 2017, Associate Prof Katherine Hall at page 28.

Committee, there should be one Commonwealth statute covering the field for private and not-for-profit sector whistleblower protections³. The Committee strongly believes that it is desirable for consistency and for transparency across the private and not-for-profit sectors that the whistleblower protection laws should be consistent and the same. It would, in the Committee's opinion, be detrimental to the success of any reforms if different protection regimes applied to different sectors in the country or in different industry sectors. That position is only likely to highlight a risk that a genuine whistleblower may, depending upon the conduct in question, fail to be properly protected if he or she does not fit neatly into a narrow, industry or sector focused definition.

- (e) In terms of civil remedies, Section 337BB(4) of the Bill allows for the fact that not only may the target whistleblower make an application to a court, but so may certain nominated officials identified under relevant legislation. This clearly raises the question across the private and not-for-profit sectors who, other than a whistleblower, should be charged with making such an application. In its Submission⁴, the Committee believed that there should be an independent agency established, or a statutory office created, with clear statutory rights and powers to act in the name of and for whistleblowers (akin to the powers of the Registered Organisations Commission referred to above). The Committee believes there should be one independent agency, not separate bodies or commissions focusing on discrete sectors or industries. That is simply a recipe for excessive cost, differences in approach to legal issues and overall confusion.
- (f) This has been a point covered in many of the submissions to the Joint Parliamentary Committee together with whether or not the Australian Securities and Investments Commission (**ASIC**) should be the body empowered to act in the name and on behalf of whistleblowers. In ASIC's testimony to the Joint Parliamentary Committee, it makes it clear that any new whistleblowing regime should be supported by an independent oversight agency, such as, in ASIC's view, the Commonwealth Ombudsman⁵. This body needs to be more than a mere oversight body. It should be a body which, properly funded and resourced, acts as the clearing house for whistleblower complaints and acts as applicant in any court proceedings (as contemplated by the terms of the Bill referred to above). The Commonwealth Ombudsman office is an office to resolve disputes. Its own website says the following:

Our aim is to resolve complaints impartially, informally and quickly. If we cannot assist with a particular complaint, we will explain why, and suggest other avenues for resolving the matter.

We cannot override the decisions of the agencies we deal with, nor issue directions to their staff. Instead, we resolve disputes through consultation and negotiation, and if necessary, by making formal recommendations to the most senior levels of government.

³ See Committee Proof Hansard Transcript 23 February 2017, Associate Prof Katherine Hall at page 28 where an overarching regime was described as preferable, while the ACCC noted strong arguments for a single, comprehensive national whistleblower scheme (see Committee Proof Hansard Transcript 27 April 2017, Mr Bezzi at page 60.

⁴ Submission, section 8.3.

⁵ See Committee Proof Hansard Transcript 27 April 2017, Mr Price, ASIC Commissioner, at page 60.

The Committee does not believe the Commonwealth Ombudsman is the right type of oversight body or indeed, one that according to its own charter, is an agency robust enough to target entities in the private and not-for-profit sectors on behalf of whistleblowers and where necessary, to commence and run legal proceedings.

- (g) The Committee has previously covered the question of compensation and rewards in its Submission⁶ and the role of the exemplary damages orders⁷ that a court might make. The majority of submissions to the Joint Parliamentary Committee supported substantially improved compensation rights (to be paid, it appears, upon a claim of victimisation, discrimination or reprisal) but were more hesitant if not hostile towards the notion of rewarding the voluntary disclosure of corporate or not-for-profit misconduct. For example, The James Ethics Centre noted in its testimony that people should simply do the right thing and report misconduct as a reward scheme would be “*inconsistent with the duty to act in good faith for the benefit of an employer or in the public interest in the case of a public servant*”⁸. That view is, in the Committee’s opinion, perfectly sensible in the perfect world. Unfortunately, the real world is not perfect, not everyone is motivated by altruistic reasons and experience demonstrates that those who report corporate misconduct, whatever duty might or might not exist, are often treated in a discriminatory, unfair and hostile manner and in many cases, are simply made to feel so uncomfortable or unhappy at work that they leave. If they do not leave, their positions are often reviewed and reclassified with a redundancy letter arriving in their in-box. The Committee respects the differences of views in terms of the introduction of a reward system. It would mark a major innovation and change in the Australian legal landscape. That of itself, is no reason not to do it. The Committee remains of the opinion, as expressed in its Submission, that an independent rewards system, supporting a reformed compensation scheme, is a desirable reform in Australia for the benefit of those in the community to stand up to report misconduct.

⁶ Submission, Recommendations 7 and 8 and section 7.

⁷ Submission, sections 4.1, 4.2 and 5.2(d).

⁸ See Committee Proof Hansard Transcript 27 April 2017, Dr Simon Longstaff, The James Ethics Centre at page 4.

**INTERNATIONAL BAR ASSOCIATION
ANTI-CORRUPTION COMMITTEE**

**SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN JOINT PARLIAMENTARY COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES
REVIEW OF WHISTLEBLOWER PROTECTIONS IN THE PRIVATE AND NOT-FOR-PROFIT SECTORS**

ANNEXURE A

REVIEW OF WHISTLEBLOWER PROTECTIONS IN *FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014*

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
Section 6	Definition of disclosable conduct means an act or omission that contravenes or may contravene a provision of the Act (the <i>Fair Work (Registered Organisations) Act 2009</i>), the <i>Fair Work Act 2009 (FWA)</i> or the Competition and Consumer Act 2010 (CCA) or constitutes or may constitute an offence against a law of the Commonwealth	Yes This is broader than the Corporations Act 2001 (CA) definition IBA ACC Recommendation 2	Yes IBA ACC Recommendation 2
Sections 230B, 230C, 230D, 230E and 230F	Addition of the words “or former officer” or “former employee” or “former member” who may make a protected disclosure	Yes	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
Section 230G	Addition of who may make a protected disclosure to a person who has or had a contract for the supply of services or goods to an organisation (or a branch of an organisation) or with an officer or employee of an organisation (or branch)	Yes	Yes
Section 230H	The requirement that the discloser has reasonable grounds to suspect that the information indicates “disclosable conduct” by an organisation or branch of an organisation or an officer or employee of the organisation or branch of the organisation	Yes The existing test of “good faith on the part of the discloser in the CA should be abolished. IBA Recommendation 3	Yes IBA Recommendation 3
Section 230J	Disclosure is made by a relevant person if made to “the official” by the discloser’s lawyer	Yes	
Section 337BA	Definition of what constitutes taking a reprisal with a definition of detriment Taking a reprisal is based on the person undertaking the conduct who “believes or suspects” or “should have known” that the discloser had made, may make, proposes to make or could make a protected (or qualified) disclosure	Yes Note the definition of detriment in s.337BA (2) (c) includes detriment to include “alteration of an employee’s position to his or her detriment”. Perhaps the word “detriment” in this context should be amended to read “disadvantage”.	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
Section 337BB	<p>Outlines the regime for civil remedies where the Federal Court or Federal Circuit Court may on the application of an applicant, make orders against a respondent who took or threatened to take or is taking or threatening to take a reprisal against a target.</p> <p>Compensation orders (including a consideration of how long the target may be without employment) and injunctions may be made by the court and any other order as determined by the Court.</p> <p>An application may be made by the target or nominated individuals holding certain statutory offices under the Act or the <i>Fair Work (Building Industry) Act 2012</i>.</p> <p>Orders may be made against persons who aided, abetted, counselled or procured the conduct, induced the conduct, failed to fulfil a duty to prevent the conduct or take reasonable steps to do so, been knowingly concerned in or a party to the conduct or conspired to effect the conduct.</p>	<p>Yes</p> <p>IBA Recommendation 7 supported a statutory system of compensation. This proposal with broad court powers and a right of nominated persons to bed the applicant (not the target whistleblowers) is a considerable improvement.</p>	<p>Yes</p>

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
Section 337BC	If a target brings a court application, no cost orders can be made unless the court is satisfied the application was commenced vexatiously or without reasonable cause or the target's unreasonable acts caused the other party to incur the costs.	Yes	Yes
Section 337BD	<p>Sets out civil penalties for:</p> <p>(a) taking a reprisal; and</p> <p>(b) threatening to take a reprisal.</p> <p>The civil penalty is 100 penalty units (presently \$18,000 with one penalty unit being \$180.00)</p>	<p>Yes</p> <p>The IBA ACC considers that the penalties are too low even if calculated per offence.</p> <p>The IBA ACC recommends the penalties for each civil penalty offence be increased to 500 penalty units (or \$90,000).</p> <p>IBA ACC Recommendation 10.</p>	Yes
Section 337BE	<p>An offence is committed if:</p> <p>(c) the person takes a reprisal against another person; and</p> <p>(d) the person's belief or suspicion that a person may have made, proposes to make or could make a protected</p>	<p>Yes</p> <p>The IBA ACC considers that the penalties are too low even if calculated per offence.</p> <p>The IBA ACC recommends the penalties be increased for each</p>	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
	<p>disclosure is the reason or part of the reason for taking the reprisal.</p> <p>The penalty is imprisonment for 2 years or 120 penalty units, or both.</p> <p>An offence is committed if:</p> <ul style="list-style-type: none"> (e) a threat is made to take a reprisal; (f) with the person making the threat intending the second person to fear that the threat will be carried out or is reckless as to that fear; and (g) the person's belief or suspicion that a person may have made, proposes to make or could make a protected disclosure is the reason or part of the reason for taking the reprisal. <p>The penalty is imprisonment for 2 years or 120 penalty units, or both.</p>	<p>offence to 5 years imprisonment or 1,000 penalty units (or \$180,000), or both.</p> <p>IBA ACC Recommendation 10.</p>	
Section 337BF	A person may bring a proceeding or a civil penalty proceeding even if a criminal prosecution has not or cannot be brought.	Yes	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
Section 337BG	The provisions making any protected disclosure not actionable in legal proceedings and the court's civil remedy powers are to have effect despite any other Commonwealth law	Yes	Yes
Section 337C	Provides for the allocation of an investigation to an authorised official, with the authorised official allocated the matter within 14 days and	<p>Yes</p> <p>Any investigation should be truly independent of the organisation or employer of the discloser.</p> <p>The Regulations should detail the manner by which the authorised official can inform the discloser of the state of the investigation and where possible, subject to any adverse findings against a person, what steps will or might occur following the investigation.</p>	Yes
Section 337CA	<p>Details the process of the investigation.</p> <p>The investigator may obtain information from such persons and make such inquiries as he or she thinks fit.</p>	<p>Yes</p> <p>The Regulations should describe any criteria for the investigation including statutory powers for the investigator</p>	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
		to compel production of documents and/or the provision of evidence.	
Section 337CB	<p>The time limit for an investigation shall be 90 days.</p> <p>The Commissioner (under the <i>Fair Work (Registered Organisations) Act</i>) may extend that time as he or she considers appropriate.</p> <p>The discloser must be informed of the extension of time and the reasons for it.</p> <p>A failure to investigate within the time limit does not affect the validity of the investigation.</p>	Yes	Yes
Section 337CC	The Regulations may prescribe procedures and other matters in relation to the allocation of a disclosure and the investigation.	Yes	Yes
Section 337CD	If an authorised official allocated a disclosure suspects on reasonable grounds that some or any information obtained or disclosed is evidence of an offence against a law of the Commonwealth, the States or Territories, it <u>may</u> be disclosed to the police force responsible for such offences (or the ACCC for offences under the <i>Competition and Consumer Act 2010</i>) (and <u>must</u> be disclosed if the offence is punishable by imprisonment for life or for at least 2 years).	Yes	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
Section 337CE	<p>A person is not subject to any criminal or civil liability if the person, voluntarily or otherwise, gives information, produces a document or answers a question when requested by a person undertaking an investigation and the document, information or answer is relevant to the investigation.</p> <p>The immunity does not apply for an offence against sections 137.1 (false or misleading information), 137.2 (false or misleading documents), 144.1 (forgery) or 145.1 (using forged documents) of the <i>Criminal Code Act 1995</i> that relates to the information, document or answer.</p> <p>The immunity does not apply for proceedings for a breach of the designated publication restriction.</p> <p>If the information, document or answer relates to the person's own conduct, the section does not affect his or her liability for the conduct.</p>	Yes	Yes
Section 377DA	A person to whom a protected disclosure is made or an authorised official (or a delegate) is not liable to any criminal or civil proceedings or any disciplinary action for or in relation to any act or omission done in good faith in the performance or purported performance of	Yes	Yes

SECTION OF FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014	CONTENTS OF BILL PROVISION	APPLICATION TO THE PRIVATE SECTOR	APPLICATION TO THE NOT-FOR-PROFIT SECTOR
	any function or in the exercise or purported exercise of any power conferred by these laws.		
Section 337DC	These laws do not affect the law relating to legal professional privilege	Yes	Yes
Section 337DD	<p>These amendments do not by implication, limit the investigative powers on an authorised official by a law of the Commonwealth.</p> <p>These amendments do not detract from any obligations imposed on an authorised official by a law of the Commonwealth.</p>	Yes	Yes