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

via email to corporations.joint@aph.gov.au

Dear Mr Hodder

Inquiry into Whistleblower Protections – Questions on Notice

Thank you for the opportunity to present at the recent hearing of the Parliamentary Joint Committee on Corporations and Financial Services' (**the Committee**) Inquiry into Whistleblower Protections. The Australian Institute of Company Directors (**AICD**) is delighted to provide an answer to questions on notice posed by Senator Xenophon during that hearing.

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

Question 1:

"I ask all witnesses present to consider the legislation that was passed at the end of last year and which will come into force, I think, on 2 May. To the extent that you wish to, could you provide a critique of it—where you think it could be improved, where you think it will work well and where you think it could work better."

Senator Xenophon, *Hansard,* p. 30

The AICD broadly supports the recent amendments to the *Fair Work (Registered Organisations) Act 2009* (Cth) (**the RO Act**) and considers that it would be appropriate for these amendments to serve as a template for reforms either to the *Corporations Act 2001* (Cth) (**the Corporations Act**) or to another standalone Act that establishes a unified whistleblowing framework.

Repeal of Section 337A(a) – The requirement of 'good faith'

The RO Act amendments repealed the qualifying requirement that disclosures must be made in 'good faith' (s 337A(a)) in order to be considered a protected disclosure. The AICD supports the removal of this requirement as a precondition to accessing whistleblower protections because it is, on balance, a disincentive to whistleblowing.

The amendments to the RO Act remove the requirement that disclosures be made in good faith, which the AICD commends. However, the AICD recognises the need for an appropriate hurdle to prevent the extension of protection to meritless disclosures.

In place of good faith, the AICD supports an alternative requirement (suggested by the Senate Standing Committee on Economics' review on the performance of ASIC) which would require that, to be protected, a disclosure:

- "is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or
- shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes."[1]

The AICD believes that this would more effectively achieve the balance between promoting disclosures broadly and preventing meritless disclosures. Because of the more objective nature of the test, it effectively evades the problems associated with 'good faith' which are outlined on page 6 of our original submission.

Operation of the test

A discloser would only need to satisfy one of the two limbs to qualify for protection.

The first limb requires that a discloser honestly believes that the information shows or tends to show wrongdoing. As this test is predicated on the discloser's 'belief', it arguably presents a higher threshold than 'reasonable grounds for suspicion' alone, while still providing protections for whistleblowers holding an honest belief that the disclosure shows or suggests wrongdoing (even if the disclosure itself is subsequently shown to have no merit). However, the belief must be based on 'reasonable grounds', meaning there is some objective basis on which it is formed.

The second limb provides that if the facts of the disclosure show or tend to show wrongdoing (on an objective basis), the belief of the discloser is not relevant to the test. As a result, this test is purely objective and the evidentiary basis on which this disclosure is made would need to be stronger.

Question 2:

"…and you may want to take this on notice, yesterday the Media, Entertainment & Arts Alliance, in relation to the issue of disclosures to media, said that if senior management did not know about it, their corporate reputation would not be damaged to the extent that they think it would, because they will say, 'We're aware of it now; we want to fix it.' Could you look at that evidence, once the Hansard is out, and reflect on that."

Senator Xenophon, *Hansard,* pp. 30 – 31

The AICD's position on disclosures to third parties

It is always preferable that disclosures are made internally before they are directed externally. The goal of an effective whistleblowing framework should be to encourage companies (though not by means of statutory requirement) to establish and maintain systems for internal disclosure that capture, address and ultimately seek to prevent corporate wrongdoing.

However, it must be acknowledged that, at times, both companies and regulators can fail in their attempts to address corporate wrongdoing. The AICD acknowledges that there may be extraordinary circumstances in which it is appropriate for protections to be extended to disclosures made to third parties, such as the media.

Strict criteria would need to be applied in assessing whether protections should be extended to disclosures made to third parties. Further commentary on potential criteria is included on page 10 of our original submission.

[1] Senate Standing Committee on Economics, June 2014, 'Review of the Performance of the Australian Securities and Investments Commission', Part 3, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index> (accessed 5 January 2017)

However, the AICD strongly recommends that further consultation on a proposed model would be necessary before extending protections to disclosures mare to third parties such as the media. Our commentary in relation to this question is limited to disclosures made to the media.

Remediation as a means to prevent reputational damage

The AICD has reviewed the evidence provided to the Committee by Mr Chesher of the Media, Entertainment and Arts Alliance (**MEAA**) referred to in this question and evidence provided on this topic specifically by Mr Bornstein, Director/Principal of Maurice Blackburn Lawyers (recorded in Hansard for the Committee's hearings on Thursday 27 April 2017, beginning on page 44). After consultation with the committee office we consider that it is likely that Senator Xenophon intended to refer to evidence presented by Mr Bornstein, and our comments address this evidence.

Mr Bornstein puts forward the view that a whistleblower should be able to make a disclosure to the media if the regulator has failed to address an instance of corporate wrongdoing within a timely manner, without first exhausting systems of internal disclosure.

We have not addressed our concerns with this proposal in this answer as it is not the focus of the question on notice. The AICD reiterates our strong recommendation that companies should have the opportunity to respond to reports of corporate wrongdoing in the first instance.

In the evidence he presented to the Committee, Mr Bornstein suggested that a company could recover from reputational damage by admitting that they did not know about the wrongdoing and by undertaking to address it.

The AICD notes several issues with this assumption:

- Addressing allegations of wrongdoing in the media is an unnecessary drain on corporate resources that could be better spent addressing alleged wrongdoing;
- Allegations of corporate misconduct may be widely reported, even if unverified – by comparison, action taken by a company is unlikely to be reported in the same terms and as such companies would not have the opportunity to recover from reputational damage in the way assumed;
- Allegations of corporate misconduct may (even if found later to be baseless or fabricated) cause reputational damage to an individual or company that could be so significant that it may be very difficult to repair;
- Damage to a company's reputation could occur at a critically important or market sensitive time (such as during takeover or IPO), causing consequential damage that extends beyond reputation and which may be irreparable;
- If a company has not been given prior opportunity to address and respond to allegations of wrongdoing, it may take time for internal investigations to confirm reported wrongdoing and consider action, during which time a company may not be able to fully respond to allegations of misconduct in the media and the consequences of damages to reputation that would flow; and
- Recognising the growth of online journalism, participatory journalism and citizen journalism (such as through the use of social media and blogs), there is uncertainty about who can be defined as the 'media', whether they are able to satisfactorily assess the veracity of a disclosure, adherence to the MEAA Journalist Code of Ethics, or whether they could be identified in the case of erroneous reporting (as some citizen journalists' identities are unknown).

On balance, the AICD believes it is not realistic to suggest that damage to a company's reputation would be ameliorated by the company admitting to and undertaking to address misconduct. This assumption underestimates the potential impact of media reporting of

wrongdoing for companies and does not contribute towards the desired goal of incentivising companies to detect, address and ultimately prevent instances of corporate misconduct.

We hope our comments will be of assistance to you. Should you wish to discuss any aspect of this submission, please contact our Senior Policy Adviser, via or .

Yours sincerely

LOUISE PETSCHLER
General Manager, Advocacy