21 April 2017

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

Email: corporations.joint@aph.gov.au

Dear Mr Hodder

Inquiry into Whistleblower Protections – Questions on notice

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations (NFPs) and the public sector. Governance Institute members support legislation that encourages the disclosure of wrongdoing in companies, and believe that stakeholders, including individual employees and their representative bodies, should be able to freely communicate to senior management, the board and regulators their concerns about illegal or unethical practices and their rights should not be compromised for doing this.

Governance Institute lodged a submission to the Parliamentary Joint Committee Inquiry into whistleblower protections on 10 February 2017.

We refer to your letter of 11 April 2017 requesting answers to questions on notice.

1. **Corporate sector**

a) **What are your views on which of the best practice criteria should be considered in any reforms for corporate sector whistleblowing legislation in Australia?**

Governance Institute is of the view that each of the best practice criteria listed in the attachment to your letter of 11 April should be considered in any reforms for corporate sector whistleblowing legislation in Australia except for item 9. Governance Institute does not support a statutory requirement for putting in place systems for internal disclosure, given the existence of systems for internal disclosure and the diversity of company size and type. We refer to our answers to questions 29,30,31 and 32 in our original submission which deal extensively with this point.

Governance Institute supports confidentiality protections (set out in item 8 of the Best Practice Criterion) which protect a whistleblower but not to the extent that those protections override the ability of the company to deal with the disclosure and investigate the misconduct. We refer to our answers to question 7 in our original submission where we highlighted the concerns which we have about the current Corporations Act provisions which require consent from the

whistleblower before information concerning the disclosure could be passed on. Governance Institute believes that the Corporations Act provisions on confidentiality do not foster an outcome that serves good governance. While we recognise that it is essential to protect the whistleblower, the whole reason for facilitating whistleblowing is to allow unlawful activity and misconduct to be identified, investigated and dealt with.

Our recommendations in this regard are detailed in the answer to question 7 in our original submission".

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?

Governance Institute is of the view that there are many aspects of the recent Fair Work Registered Organisation amendments (ROC amendments) to legislation for whistleblowing that are appropriate to include in corporate sector reforms. We support the provisions which:

- provide for enhanced protections for whistleblowers, so that a broader category of person can make protected disclosures (such as former employees and those contracting with the organisation)
- broaden the matters that attract whistleblower protection to those where a discloser has 'reasonable grounds to suspect that the information indicates one or more instances of disclosable conduct' rather that requiring a whistleblower to be acting in good faith
- broaden the definition of disclosable conduct to an act or ommission that constitutes an offence against a law of the Commonwealth (although we support extending the scope of information that may be disclosed to conduct contravening a state or territory law as well as some conduct that contravenes foreign laws and perverting the course of justice)
- provide for strong anti-reprisal measures
- give a broad meaning to the definition of 'detriment'
- require managers to support whistleblowers rather than simply not punishing them for speaking out
- allow whistleblowers to apply for a range of remedies if they have been financially or mentally harmed by reprisals
- remove the risk of adverse costs orders to the whistleblower in certain circumstances
- allow for statutory officers to take court action on the whistleblower's behalf to apply for civil protection remedies.

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

Governance Institute makes no comment in relation to this matter.

2. Public sector

a) What are your views on which of the best practice criteria should be considered in any reforms for public sector whistleblowing 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?

Governance Institute makes no further comment in relation to this matter and refers the Committee to our original submission.

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 whistleblowing 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?

Governance Institute makes no comment in relation to this matter.

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 initital investigations (eg. Submissions 32, 22). What do you consider to be the potential advantages and disadvantages of such an approach?

In our submission, Governance Institute recommended that a separate Ombudsman or Office of Whistleblowing would be the most effective advocate for whistleblowers. We consider that it will often be inappropriate for ASIC to act as the advocate for a whistleblower as ASIC cannot assess the claims of the whistleblower against the claims of others if it is the whistleblower's advocate. We refer to our answer to questions 33 and 34 in our original submission on this point.

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 refer to the following key recommendations contained in our original submissions:

- a provision in a stand-alone Act — similar to s 29 of the *Public Interest Disclosure Act 2013* (Cth) — be introduced, which defines discloseable conduct as including conduct that contravenes a law of the Commonwealth, a state or a territory as well some conduct that contravenes foreign laws and perverting the course of justice
- a whistleblower should be protected, regardless of which regulator or law enforcement agency they disclose to, and if that regulator or agency considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate body — disclosures of unlawful activity within the corporate sector should not be confined to ASIC or the ATO
- parties receiving information second-hand through a cross-agency referral, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipient
- any provisions in a stand-alone Act ensure that the recipient of a disclosure is permitted to disclose that information to senior officers of the company for the purpose of investigating or remedying the matters raised
- a stand-alone, general whistleblower protection in its own Act would effect this more readily than regulator or legislation-specific protection.

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?

Governance Institute is very supportive of the provisions in the *Public Interest Disclosure Act 2013* (AUS-PIDA*)* serving as a starting point for stand-alone whistleblowing legislation

applying to the private sector, particularly the wide coverage of the misconduct it covers and the disclosers it applies to. We recommend that AUS-PIDA and the ROC Amendments serve as starting points for stand-alone whistleblowing legislation applying to the corporate sector.

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?**

Governance Institute makes no comment in relation to this matter.

Yours sincerely

Steven Burrell
Chief Executive