acsi

23 February 2018

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

Submission lodged online via My Parliament

ACSI SUBMISSION ON THE TREASURY LAWS AMENDMENT (ENHANCING WHISTLEBLOWING PROTECTIONS) BILL 2017

On behalf of the Australian Council of Superannuation Investors (ACSI), I am pleased to make this submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017.

We have a strong interest in ensuring that corporate whistleblowing systems are robust. Research suggests that 39 per cent of fraud is detected through internal whistleblowing systems compared to 16.5 per cent through internal audit systems.[1] There are many other types of misconduct which impact company value and reputation beyond fraud which can also be picked up with effective whistleblowing systems. However, research on whistleblowing systems demonstrates that they are only effective if there are robust safeguards for those who speak up.[2]

This submission follows recommendations we provided to the Parliamentary Joint Committee on Corporations and Financial Services in February 2017, where we raised a set of priorities for whistleblowing reform from an investor perspective. We are pleased to note the Bill addresses many of the issues we raised as well as some other important elements.

The Bill makes some significant steps forward as it:

- Allows for anonymous disclosures
- Removes the good faith requirement and replaces it with the requirement that the reporting person must have 'reasonable ground to suspect' the wrongdoing alleged or disclosed occurred
- Expands protections and redress available to whistleblowers who suffer reprisals and improves access to compensation
- Widens the categories of people who can gain protection for reporting wrongdoing including current and former officers, employees and suppliers
- Broadens the types of wrongdoing to which protections apply
- Creates an offence of 'victimisation' with an expanded list of what amounts to detriment.

We fully support these elements.

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[1] The American Association of Certified Fraud Examiners research indicates that 39.1 per cent of fraud is detected through internal whistleblowing systems (compared to 16.5 per cent of internal audit systems). American Association of Certified Fraud Examiners, *Developing an Integrated Anti-Fraud, Compliance, and Ethics Program* (2018) <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/review/diafp/08-Implementing-a-Whistleblower-Helpline.pdf>.

[2] Latimer, Paul and Brown, AJ, 'Whistleblower Laws International Best Practice', (2008), 31 (3) *UNSW Law Journal*, http://www.austlii.edu.au/au/journals/UNSWLawJl/2008/40.pdf 766.

About ACSI

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) issues on behalf of our members. Our members include 37 Australian and international asset owners and institutional investors. Collectively, they manage over $1.6 trillion in assets and own on average 10% of every ASX200 company.

Our members believe that ESG risks and opportunities, including corporate culture, have a material impact on investment outcomes. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them. Through ACSI, our members collaborate to achieve genuine, measurable and permanent improvements in the ESG practices and performance of the companies they invest in.

As fiduciaries, it is incumbent upon our members to consider all long-term investment drivers, including how a company is performing on ESG issues. Our members want companies to adopt high standards of governance, transparency and compliance on material ESG risks.

Our staff undertake a year-round program of research, engagement, advocacy and voting advice. These activities provide a solid basis for our members to exercise their ownership rights.

Our research in this area

We recently undertook detailed research on corporate culture and whistleblowing and codes of conduct in the ASX200. Our research highlights gaps between leading and existing whistleblowing practices. We found that 38 ASX200 companies (19 per cent) do not include whistleblowing information in their code of conduct, 91 companies (45 per cent) do not disclose if they offer anonymity and 71 companies (24 per cent) do not make a statement that retaliation is not acceptable. The attachment to this letter provides additional detail about our study. Given our knowledge of whistleblowing policies and practice among the largest listed companies, our intention is to provide a practical perspective on how the draft legislation can be improved.

Summary of recommendations

We recommend that the following issues be addressed in the revisions to the Bill:

1. **Include a requirement for annual public disclosure on whistleblowing policy implementation**: Section 1317AI of the Corporations Act requires a public company to have a policy and to make it available to officers and employees. Section 1317AI (5) sets out requirements for the policy. We recommend that listed companies be required to publicly disclose their whistleblowing policy and report annually to shareholders on policy implementation. This would enhance transparency about whistleblowing which can contribute positively to corporate culture.

2. **Establish a reasonable filter against individual and employment grievances:** As it currently stands, company whistleblowing policies and procedures could get bogged down with more types of wrongdoing allegations than was not the intent or purpose of the proposed amendment. We are concerned that this will undermine the workability of the revised legislation.

3. **Clarify the separation of the bases for criminal liability and civil remedies:** The Parliamentary Committee recommended clear separation of the bases for criminal liability and civil remedies in the new legislation and existing law. This is not fully addressed in the Bill. The consequence may be that there is a lack of incentive for employers to take whistleblowing as seriously as they should.

4. **Make civil penalties available when there has been a failure to support or protect a whistleblower whatever the individual intent, belief or reason has been**: The Bill does not include consequences for those who fail to protect a whistleblower, to provide support, to manage predictable risks of detriment or ‘turn a blind eye’ to detrimental actions.

5. **Establish appropriate protection for third party (e.g. media or public) disclosures:** The Bill does not provide protections for third party (media or other) disclosures where any public interest disclosure has been made and no action has been taken within a reasonable amount of time.

In addition to these recommendations, we are concerned that the Australian Securities and Investments Commission (ASIC) and the Australian Federal Police (AFP) are not sufficiently resourced to fulfil their proposed responsibility to monitor and enforce the whistleblowing scheme. This needs to be addressed in their budgetary allocations.

Detailed feedback and recommendations

1. Include a requirement for annual public disclosure on whistleblowing policy implementation

We are concerned that the Bill does not refer to policy implementation and has no mechanism to allow stakeholders to validate implementation. In our experience, it is easy for companies to issue policies, but common for them to fail to properly implement those policies. This is supported by our research (see Attachment).

There is growing interest by companies in reporting on ESG issues because it helps to build their corporate reputation with customers, comply with regulation and demonstrate risk management.[3] Better performing companies are already reporting on the implementation of their whistleblowing policies and procedures. We recommend that the Bill include a requirement for listed companies to publicly disclose their whistleblowing policy and report annually on how the policy is being implemented. This would be consistent with leading practice.

2. Establish a reasonable filter against individual and employment grievances

We believe that the threshold for the circumstances in which a protected disclosure can be made is set too low in the Bill. It does not provide a filter against employees who seek protections on issues that are purely personal or workplace grievances (for which legal processes and rights already exist). The focus of whistleblower protections should only be on public interest concerns (which may also include grievances but should not be solely based on these).

The Bill risks company whistleblowing policies and procedures being bogged down with more types of wrongdoing allegations than was the intent or purpose of the proposed amendment. If this is left unchanged, this could severely undermine the workability of legislation.

3. Clarify the separation of the bases for criminal liability and civil remedies

In our February 2017 submission, we recommended that there be clear separation of the bases for criminal liability and civil remedies and existing law. This is not fully addressed in the Bill. The consequence may be that there is a lack of incentive for companies to take whistleblowing as seriously as they should.

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[3] Mathew Nelson, 'The Importance of Nonfinancial Performance to Investors' (25 April 2017) Harvard Law School Forum on Corporate Governance and Financial Regulation <https://corpgov.law.harvard.edu/2017/04/25/the-importance-of-nonfinancial-performance-to-investors/>.

It is likely that what is unclear in the law will be even more unclear in practice. As drafted, the Bill does not make it clear whether conduct giving rise to rights of civil or employment compensation need to be as serious and deliberate as conduct giving rise to criminal liability or an associated civil penalty order for victimisation. We believe that the grounds giving rise to civil liability should be broader than those giving rise to criminal liability.

We recommend that the Bill be revised to clarify the differences in detriment under criminal liability and civil remedies and for detrimental acts under the criminal code be narrower than under the civil code.

4. **Make civil penalties available when there has been a failure to support or protect a whistleblower whatever the individual intent, belief or reason has been**

The Bill limits civil compensation to "victimising conduct" against whistleblowers. A court would have to be satisfied that a reason for the damaging conduct was a criminal or near-criminal intention to do harm. This would mean that even whistleblowers such as Sally McDow at Origin Energy, who we understand lost her job after using the company's whistleblower system to expose serious and dangerous alleged compliance breaches at Origin's gas and oilfields, may not be eligible to receive compensation. McDow was apparently bullied and intimidated after making her disclosures (her case was settled in 2017).[4]

The Bill provides that remedies may be obtained from anyone who aided or abetted "victimising conduct", but does not extend to those who failed to fulfil a duty to support the whistleblower. This can be resolved by amending s1317AD to require companies to have policies which include "information about how the company will support whistleblowers and protect them from detriment". This will make it clear that companies have a duty to provide support and protection.

5. **Establish appropriate protection for third party (eg media or public) disclosures**

In the Bill, third party disclosures (including whistleblowers who go to the media) are referred to as "emergency disclosures". The implication is that the Bill may not protect third party (media or otherwise) disclosures that are made after an initial public interest disclosure has been made but there has been no action within a reasonable period of time.

The conditions required to meet the criteria for "emergency disclosures" set a threshold that "the discloser has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately". If we apply this threshold to the case of Commonwealth Bank whistleblower Jeff Morris (where individuals lost retirement savings because of poor financial advice but could not be deemed to be a 'threat to the financial system or a danger to public health or safety'), third party protection would not apply.[5] This is clearly not the intent of the Bill and we recommend that this threshold be lowered.

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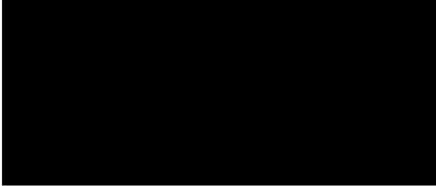
[4] Adele Ferguson, 'Whistleblower protections need to be fixed', *The Australian Financial Review* (on line), 10 December 2017 <http://www.afr.com/business/whistleblower-protections-need-to-be-fixed-20171210-h01zxn>.

[5] Ibid.

For more information

We will be following the progress of the inquiry with interest and would be happy to answer any questions the Committee may have about our submission. Please contact me or Holly Lindsay, ACSI's Manager, Research and Engagement (if you wish to discuss our submission.

Yours sincerely



Louise Davidson
Chief Executive Officer
Attachment

ATTACHMENT: SUMMARY OF ACSI RESEARCH ON WHISTLEBLOWING IN ASX200 COMPANIES[6]

Research summary

We conducted a desktop analysis of publicly available codes of conduct and whistleblowing policies of the ASX200 companies, in addition to a review of the relevant literature. We accessed the information from web sites of the ASX200 between January and March 2017.

What makes an effective whistleblowing system?

Extensive guidance exists on whistleblowing system effectiveness. In addition to upholding the principles of anonymity, confidentiality and no retaliation, the guidance recommends 24-hour availability in all relevant languages, accessibility to contractors and suppliers (where relevant to contractual arrangements) and third party management and oversight.[7]

Leading practice also suggests that company boards should be provided with reports by management which monitor a range of metrics including the rate of use of the system, the rate of substantiated claims and the areas of the company (both in terms of business line and geography) that are most frequently implicated in the reports.

In a May 2017 report, Brown and Lawrence published results from a survey of whistleblowing practices which identified the importance of dedicated support strategies for protecting staff who raise wrongdoing concerns.[8] They also highlighted the importance of remediation policies for whistleblowers that suffer reprisals or other detrimental impacts. We would like to see these factors included in Australian whistleblowing legislation as it moves towards becoming law in 2018.[9]

Overview of our analysis

We found that thirty-eight ASX200 companies (19 per cent) do not mention whistleblowing in their code of conduct. However, a total of 60 ASX200 companies (30 per cent) disclose that they have standalone whistleblowing policies outside their code of conduct. Of these, we were able to locate 39, which we included in our analysis. Where we could not locate a standalone document, our analysis was based on the whistleblowing content in the code of conduct.

Almost all ASX50 companies (92 per cent) and 116 (77 per cent) ASX51-200 companies discuss whistleblowing in their code of conduct. Key features and results are presented in Table 1.

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[6] This is an excerpt from a forthcoming research paper which will be published in March 2018 at: https://www.acsi.org.au/publications-1/research-reports.html.

[7] K, Kobi, 'Elements of an Effective Whistleblower Hotline', Harvard Law School Forum on Corporate Governance and Financial Regulation (October 2014) <https://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline/> and CSA Group, 'Whistleblowing systems - A guide', (2016) <http://shop.csa.ca/en/canada/risk-management/whistleblowing-systems-a-guide/invt/whistleblowing-guide>.

[8] AJ Brown and Sandra Lawrence, Strength of Organisational Whistleblowing Processes-Analysis from Australia (May 2017) <http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2017/05/WWTW2-Strength-of-whistleblowing-processes-report-Australia-Griffith-University-2May2017.pdf>.

[9] Australian Government, The Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017- Exposure Draft <https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/>.

Anonymity
Twelve ASX50 companies (24 per cent) did not specify that whistleblowers can choose to remain anonymous, while 79 of the ASX51-200 (53 per cent) did not disclose if anonymity was permitted. Where anonymity is offered, companies typically explain that it is not possible to maintain anonymity in all situations and offer to support and protect the whistleblower in these circumstances. For example, one company states that "it will do everything possible to protect the whistleblower's identity and will not disclose identity without their consent." This company adds that if the matter proceeds, in "a very few cases" it may not be possible to ensure complete confidentiality.

Preventing retaliation
Fear of retaliation is a major barrier to whistleblowing and a statement indicating that retaliation is not acceptable is essential. The majority (76 per cent) of ASX50 companies formally state that retaliation is not acceptable but only 91 ASX51-200 companies (61 per cent) do so.

To be effective, companies need to offer dedicated support strategies for protecting staff who raise wrongdoing concerns. In addition, it is important to have remediation policies for whistleblowers who suffer reprisals or other detrimental impacts.

24-hour availability
It is often easier for employees and other stakeholders to use whistleblowing systems outside of work hours. Thirty-six ASX50 companies (72 per cent) allow whistleblowers to make disclosures at any time but only 67 ASX51-200 corporations (45 per cent) do so.

Suppliers and contractors
Depending on the company and that role that suppliers and contractors take in the business, they may gain insights into the activities of a company in a way that employees may not. It is valuable for companies to encourage them to report inappropriate behaviour where they observe it. Only 22 ASX50 companies (44 per cent) and 35 ASX51-200 companies (23 per cent) encourage or allow contractors and suppliers to report wrongdoing through the company's whistleblowing system.

Table 1: Features of whistleblowing systems (number of companies and percentage)

	ASX 50	ASX51-200	ASX200
Location of whistleblowing policy			
Mentioned in the code of conduct	46 (92%)	116 (77%)	162 (81%)
Standalone document	26 (52%)	34 (23%)	60 (30%)
Whistleblowing system features			
Anonymity	38 (76%)	71 (47%)	109 (55%)
24-hour availability	36 (72%)	67 (45%)	103 (69%)
Statement that retaliation not acceptable	38 (76%)	91 (61%)	129 (86%)
Accessible to suppliers and contractors	22 (44%)	35 (23%)	57 (38%)

Assessment
Given that whistleblowing is intrinsically linked to ethical conduct, it is surprising that there are 38 ASX200 companies that have no reference to whistleblowing in their code of conduct. We believe that it is essential for

whistleblowing systems to offer three key features: anonymity, 24-hour availability and a statement that retaliation is not acceptable. It is also essential that any formal commitment is supported in practice. For example, if employees learn or hear that retaliation does occur and anonymity is not respected, a whistleblowing procedure is less likely to be used.

Our research shows that only 33 ASX50 companies (66 per cent) and 63 ASX51-200 companies (44 per cent) offer anonymity, 24-hour availability and a commitment that retaliation is not acceptable. On this basis, we conclude that there is significant opportunity to improve listed company whistleblowing systems.