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CRICOS Provider No. 00114A

17 May 2017

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

Dear Mr Hodder

Inquiry into Whistleblowing Protections – Question on Notice (Transferability of "Registered Organisations" Whistleblowing Amendments)

The following Question on Notice was addressed to us by Senator Xenophon at the Committee's hearing on 27 April 2017:

> *I have a question on notice. Thank you for being here and the work your law school does. Could you consider on notice the amendments that were moved to the registered organisations bill that formed the initial basis of this inquiry with a view to what changes there should be toward improvements in processes so that they can be incorporated for both the public and private sectors? There are some differences between the two, but could you consider that? The ACTU has made some comments, some criticisms, but I think it has been useful for there to be that forensic look at the legislation. If you are minded to do so, that would be useful, and if you could get it to us by mid-May it would be helpful.*

We have reviewed the whistleblowing provisions of the *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) (ROA Act). We reiterate our broad support for the applicability of the concepts underpinning the ROA amendments in a corporate context. Given the limited time available, and our research focus on corporate whistleblowing, we have concentrated on those aspects we consider most significant in relation to corporations.

1) Significant factors in applying ROA legislation to corporate sector

1.1) Relevant regulator

As previously submitted (Response to Questions on Notice: 24 April 2017):

> *We support the notion of a centralised whistleblowing clearing-house to remove the challenges faced by potential whistleblowers in determining to whom, how and when they should blow the whistle...[W]e see clear benefits in the establishment of an independent Whistleblower Office, to deal with whistleblower protection. Such an office could provide a central information and advocacy service for whistleblowers. We do not see this office as replacing independent sectoral whistleblowing regulators – for example, ASIC has established an Office of the Whistleblower, and there are obvious attractions in locating a corporate whistleblower office in an agency with an understanding of corporate structures and regulation. However, the remit of ASIC's Office of the Whistleblower is necessarily very different from the confidential guidance and advocacy service that a centralised whistleblowing clearing-house could provide. Any centralised agency would, however, need to carry a title sufficiently broad to include whistleblowers from all potential sectors. It may be that 'Public Interest Disclosure Agency' is too suggestive of a public sector focus.*

However, we do not suggest that this body would usurp the function of ASIC's Office of the Whistleblower; instead it would only serve to provide a support and clearing-house function. Therefore, in our view the relevant corporate equivalent for the ROA legislation's Commissioner, would be ASIC (or alternative private sector whistleblower regulator).

1.2) Process to access whistleblowing compensation

In order to access compensation under the ROA legislation, the whistleblower would either need to bring their own action, or would otherwise be dependent on one of the entities mentioned under s 337B(4) to bring the action to enable access to compensation. This model runs the risk of resulting in the apparent potential to access compensation becoming meaningless in practice – a whistleblower may elect not to pursue proceedings in light of the pressures already faced by them, while other parties mentioned under s 337B(4) are under no obligation to initiate an action. In addition, in the context of a corporate regulatory environment, no immediate substitute for the Fair Work Ombudsman exists, further comprising the efficacy of the s 337B regime in the corporate context. In general, we suggest that a more pro-active approach to compensate whistleblowers would be desirable.

1.3) Expansion of protection

We endorse the expansion of the definition of whistleblower ('discloser') (s 337AA). Further, we believe consideration could be given to widening the definition further to include all those who have 'reasonable grounds to suspect' (s 337A(1)(c)) instances of disclosable conduct (to the extent they may require protection).

1.4) Delegated legislation

We note that the ROA Act allows for delegated legislation and that detailed procedures may be prescribed in relation to the allocation and investigation of disclosures (s 337CC). The flexibility that this model offers is attractive. Real potential exists to use this mechanism in the corporate context to tie the whistleblowing regulatory regime to evolving corporate practice in relation to internal whistleblowing mechanisms.

2) Constitutional issues

We note that the Constitutional issues associated with extending the ROA Act processes to corporations would require careful consideration.

3) Incidental amendments to ensure consistency with corporate regulatory regime and corporate structures

There would, of course, need to be amendments to a range of provisions to ensure synchronisation between the ROA Act and the corporate regulatory regime. See for instance s 337BB(4) in relation to persons who may make an application under subsection (1) - categories specifically mentioned there would not necessarily be appropriate in the context of corporate whistleblowing. Similarly, s 337(3) (inserted by s 230J ROA Act) demonstrates how these concepts do not align with corporate structures.

We thank the Committee for the opportunity to contribute on these questions and would be happy to answer any further questions if that would be useful.

Yours sincerely

Vivienne Brand & Sulette Lombard