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the legal profession

International Bar Association
Anti-Corruption Committee
Submission to
Australian Senate Economic Legislation Committee
Treasury Laws Amendment
(Enhancing Whistleblower Protections Bill) 2017

23 February 2018

Contents

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1 Introduction

1.1 *International Bar Association*

(a) The International Bar Association (**IBA**) is the global voice of the legal profession and includes over 80,000 of the world's leading lawyers and 190 Bar Associations and Law Societies worldwide as its members.

(b) The IBA has had a longstanding interest in, and advocacy of, issues concerning transparency and probity in the public and private sectors and steps that countries around the world can take to combat foreign bribery and corruption and serious financial crime. Critical to this work is the manner by which governments and business respect and treat those (employees and others) who blow the whistle on suspected corporate or financial crime.

1.2 *IBA Anti-Corruption Committee*

(a) The IBA's Anti-Corruption Committee (the **Committee**) draws its members from around the world made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants with legal qualifications. The Committee members are made up of experienced practitioners practicing in the area of foreign bribery and anti-corruption compliance, investigation, prosecution and defence. The spread of the group cover the expertise both the common law and civil jurisdictions. This membership gives the Committee a unique opportunity to comment upon important initiatives that affect anti-bribery and anti-corruption laws, policies and how they are implemented and enforced around the world and in particular countries.

(b) The Committee is pleased to take this opportunity to make a submission to the Australian Senate Economics Legislation Committee on the proposed reforms to private sector whistleblower protections set out in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (the **Draft Whistleblower Bill**).

(c) The Committee has made a number of submissions to the Australian Government and to Senate and Parliamentary Committees that are relevant to this submission. They include the following:

(i) Submission to the Australian Parliamentary Joint Committee on Corporations and Financial Services (the **Joint Parliamentary Committee**) Inquiry into Whistleblower Protection Laws dated 10 February 2017 (the **February 2017 Submission**);

(ii) Supplementary Submissions on Whistleblower Protections – Questions on Notice to the Joint Parliamentary Committee dated 24 April 2017; and

(iii) Supplementary Submission to the Joint Parliamentary Committee to questions on Notice Concerning the Fair Work (Registered Organisations) Amendment Bill 2014 dated 18 May 2017.

2 Executive Summary

2.1 *Proposed New Whistleblower Protections*

(a) Whistleblowers play a critical role in society. They expose misconduct and hold those in influence and power accountable. Unfortunately, Australia has a patchy record in the way whistleblowers are treated. Robust whistleblower protections are important in fostering a culture of integrity, transparency and accountability. The Committee made this submission to the Joint Parliamentary Committee[1]:

> There have been numerous reports, inquiries and research done over the years that have looked at this question, and yet still the messenger and the message are attacked, and the underlying conduct seems not to be addressed or, if it is addressed, it is addressed privately and out of the public spotlight.
>
> Protections in the private sector have generally been non-existent…Whistleblowers face a large number of severe sanctions on and processes of adverse consequences for them. They are real, they are emotional and financial, and they can affect people for many years thereafter, when all they were doing, invariably, was their job, by reporting something that they observed to the company by which they were employed, and they, in turn, became the target of an attack—from the company or from those engaging in the behaviour—to suppress it.

(b) Subject to the comments made in this Submission, the Committee endorses the proposed reforms in the Draft Whistleblower Bill.

2.2 *Further Reforms*

(a) The Committee believes there are at least two significant matters that remain outstanding, which are:

(i) The question of rewards; and

(ii) The establishment of an independent agency to represent whistleblowers.

In the February 2017 Submission, the Committee made the following recommendations to be considered by the Joint Parliamentary Committee[2]:

(i) **Recommendation 4** – A statutory office similar to the US Securities Exchange Commission (**SEC**) Office of the Whistleblower should be established, with adequate

[1] Joint Parliamentary Committee, *Whistleblower Protections*, September 2017, clause 2.15, page 9.

[2] February 2017 Submission, clauses 2.2(b)(iv) and (viii), pages 6 and 7.

funding and resources, to operate at a truly independent advocate for whistleblowers.

(ii) **Recommendation 8** – While members of the Committee's working group has a difference of opinions on the notion of rewards, principally because of the potential for abuse and vexatious claims being made to pursue rewards, on balance, the Committee supports a statutory scheme of rewards to incentivise whistleblowers to disclose improper or illegal conduct. The Committee believes that with lessons learned from the operation of the US rewards system administered by the SEC Office of the Whistleblower, appropriate checks and balances can be put in place so that genuine disclosures are encouraged while frivolous or vexatious disclosures are identified as early as possible. The focus should clearly be on effecting cultural change by encouraging an atmosphere of effective reporting and annual reports by companies of all wrongdoing reported under their policies (with the identity of whistleblowers anonymised). Where a whistleblower makes a disclosure and the claims disclosed are substantiated, either within the company or externally by a regulator or a court, the company should not only be required to pay compensation but should also be required to establish and promote an internal confidential advisory helpline and any other support facilities within the company to promote effective whistleblowing in the future.

(b) The Joint Parliamentary Committee supported these recommendations and recommended an independent whistleblower authority be created and a reward scheme be established. Neither of these recommendations appear in the Draft Whistleblower Bill.

(c) The Committee again recommends that they be considered as now is the perfect time to solidify meaningful and real reforms to Australia's private sector whistleblower protections. Not only will the existing reforms in the Draft Whistleblower Bill add weight to the cause of whistleblowers, but the creation of a really independent authority and the prospect of rewards will incentivise whistleblowers to come forward and report corporate misconduct with the belief that they will be respected and protected. In turn, companies will increasingly realise that a meaningful response to internal complaints is the best way to respond to allegations of corporate misconduct rather than putting up the barricades, attacking the messenger and hoping to survive the reputational storm clouds sweeping over those involved.

3 Detailed Review of Proposed Legislative Reforms

3.1 *Previous IBA Anti-Corruption Committee Submissions*

(a) The Committee has made of number of earlier submissions on these matters, see clause 1.2(c) above.

(b) These submissions have each supported changes to legislation to enhance private sector whistleblower protection laws. We do not repeat the matters set out in detail in the earlier submissions. Rather, we focus on the proposed statutory reforms and refer to, where relevant, the Committee's earlier submissions

3.2 *Disclosures and Disclosable Matters*

(a) The Committee supports the broad definition of what qualifies as a disclosure: namely, any conduct that infringes the identified statutes or otherwise "*constitutes an offence against any other law of the Commonwealth*" punishable by imprisonment for 12 months or more.

(b) The Committee supports the removal of a "*good faith*" criteria determining whether a whistleblower can make a protected disclosure. The Committee supports the threshold that a discloser (of information) has "*reasonable grounds to suspect*" that the information (the subject of the disclosure) concerns misconduct or an improper state of affairs of a relevant regulated entity.

(c) The Committee considers that if the qualification test is any Commonwealth offence with punishment of 12 months imprisonment or more, the Australian Federal Police (**AFP**) should be identified as a disclosing agency in section 1317 AA(1)(b) of the Corporations Act 2001 (Cth) (the **Corporations Act**), as the AFP is responsible for investigating criminal offences against Commonwealth laws.

3.3 *Eligible Whistleblowers*

(a) The Committee supports the definition of who is an "eligible whistleblower".

(b) It is important, in the Committee's opinion, that the category of eligible whistleblowers include current and former individuals together with a relative or dependent of such a person (as it is these persons who invariably have to deal with the emotional and financial consequences of whistleblowing activity and its impact on a family or other personal relationships).

3.4 *Regulated Entities*

(a) The Committee supports the scope of entities defined as "regulated entities".

(b) The Committee believes that not only should, for example, a "company" be a regulated entity, but that separate companies in a group, as "associates" (as that term is defined in the Corporations Act), should be included in the definition. This would be consistent with an individual as an eligible whistleblower who is "an associate of the regulated entity" (see proposed section 1317AA(e) of the Corporations Act[3]) and to those who are defined as an "eligible recipient" (see proposed section 1317AAC(1) of the Corporations Act).

3.5 *Eligible Recipients*

(a) The Committee supports the scope of who is defined as an "eligible recipient" of a relevant protected disclosure.

[3] Sections 10 to 17 of the Corporations Act define "associates" and section11 provides for the following – if a primary person is a company, the associate reference includes a director or secretary of the body, a related body corporate and a director and secretary of a related body corporate.

(b) The Committee noters that an "eligible recipient" is now to include "a person who supervises or manages" an individual (who makes a protected disclosure)[4]. This appears to the Committee to be very broad and potentially capturing every level of supervisor (even of the most junior level) in a manner that might not be intended by the reforms. Some thought might be given as to whether the extent of eligible recipients is appropriate.

3.6 *Emergency Disclosures*

(a) The Committee supports the concept of an "emergency disclosure" in proposed section 1317AAD of the Corporations Act.

(b) However, the Committee is concerned with the high threshold set out in the proposed reforms. Proposed section 1317AAD(c) reads relevantly as follows:

> "…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…"

(c) The Committee considers that in practice, there are likely to be very few disclosures that, absent an "*imminent risk of serious harm or danger to public health or safety*" can satisfy the test of "*an imminent risk of serious harm or danger…to the financial system*". One has to ask what sort of harm is contemplated by this test. Professor AJ Brown has highlighted the view that a disclosure regime that does not permit disclosures to third parties, including the media, is likely to lack credibility in the eyes of the public and will not promote integrity and transparency[5]. It seems to the Committee that very few individual whistleblower complaints are likely to constitute an imminent risk to Australia's financial system (which is, by most objective standards, considered robust). One has to ask whether recent public financial scandals in the Australian financial sector would ever satisfy that test particularly in circumstances where the relevant company has either ignored an internal disclosure and the internal response should clearly be the priority to move companies to proactively address complaints so there is no need to address them externally[6]. The Committee believes that the proposed threshold, particularly as it concerns the financial system, is far too high and should be relaxed.

3.7 *Confidentiality of a Whistleblower's Identity*

(a) The Committee supports enhanced confidentiality in relation to a whistleblower's identity.

(b) The Committee also supports the fact that an offence against this provision gives rise to a civil penalty.

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[4] Proposed section 1317AAC Corporations Act.

[5] Prof AJ Brown, Griffith University submission to the Parliamentary Committee, Submission 23, attachment 2, pages 8 and 9.

[6] This point was noted by Dr Vivienne Brand, Associate Professor, Flinders Law School, Adelaide, during oral submissions to the Parliamentary Committee, see Hansard Hearings 27 April 2017, page 53.

(c) The Committee also supports the immunity from liability outlined in the proposed section 1317AB(1) of the Corporations Act.

3.8 *Compensation and Other Remedies*

(a) The Committee supports the enhanced compensation regime, the extent of the "detriment" that a whistleblower may suffer to be eligible for compensation and the application of accessorial liability upon an individual where a company engaged in the victimising conduct. In addition, the extent of orders that might be made by a court are appropriate.

(b) The Committee also supports the reversal of the evidentiary burden – so that where a whistleblower points to evidence that "*suggests a reasonable possibility*" of the detriment being caused, the other person bears the onus of proving that the claim is not made out.

3.9 *Disclosure of Identifying Information*

(a) The Committee supports the provision, in proposed section 1317AG, that the discloser who has made a protected disclosure is not required to have his or her identity revealed except where it is necessary to give effect to the revised laws or a court thinks it is necessary in the interests of justice.

3.10 *Legal Costs*

(a) The Committee supports the broad ban on any adverse legal costs order being made against a claimant where a claim arises under the proposed new laws save where a court is satisfied the claim was instituted vexatiously or without reasonable cause or the claimant's unreasonable conduct caused the other party to incur the costs.

3.11 *Whistleblower Policies*

(a) The Committee supports the provision that will require a public company or large proprietary company to have in place a whistleblower policy that addresses the matters set out in proposed section 1317AI of the Corporations Act.

(b) The Committee also supports the offence provision, noting it will be a civil penalty offence against a company that contravenes this requirement.

(c) It is noted that the whistleblower policy requirement will apply on or after 1 January 2019. This is, in the Committee's view, a more than reasonable time for public and large proprietary companies to address their internal policies and procedures to ensure they are consistent with the proposed laws.

4 Other Matters

4.1 *Outstanding Matters*

There are two significant matters that are not addressed in the Draft Whistleblower Bill. They are:

(a) The question of rewards; and

(b) The establishment of an independent agency to represent whistleblowers.

4.2 *Whistleblowers and Rewards*

In relation to the question of rewards, the Committee submits that the following matters might be taken into account.

(a) In the February 2017 Submission, the Committee expressed its view as follows[7]:

> While the Committee recognises the issues both for and against the payment of rewards and/or exemplary damages to whistleblowers, it broadly favours the payment of a reward to a whistleblower pursuant to an independent statutory scheme, subject to appropriate checks and balances governing a whistleblower's entitlement to seek a reward and independent oversight in terms of the assessment of the payment of a reward.

(b) The Joint Parliamentary Committee, after considering the submissions on this topic, formed the opinion that "*a reward system would motivate whistleblowers to come forward with high quality information*" and will at the same time "*motivate companies to improve internal whistleblower reporting systems and to deal more proactively with illegal behaviour*."[8] The Joint Parliamentary Committee favoured a system with a cap on rewards to be determined by a court or other body[9].

(c) In the 2017 Annual Report to Congress on its Whistleblower Program, the US SEC, while noting the significant ongoing reports by whistleblowers to the agency, said this[10]:

> We attribute the public's active interest in the whistleblower program to its three key features that Congress created as part of Dodd-Frank (the enabling reform legislation): the promise of monetary awards to whistleblowers whose information leads to successful enforcement actions, provisions to safeguard whistleblower confidentiality, and enhanced anti-retaliation protections. We believe that these features will continue to incentivize company insiders, market participants, and others with knowledge of potential securities law violations to step forward and report their information to the agency.

(d) It continues to be the case that the highest number of whistleblower tips to the US SEC Office of the Whistleblower come from the UK, Canada and Australia[11], which begs the question why Australian whistleblowers report conduct to a foreign regulator rather than any Australian agency.

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[7] February 2017 Submission, clause 15.2(b)(viii).

[8] Joint Parliamentary Committee, *Whistleblower Protections*, September 2017, clause 11.56, page 138.

[9] Ibid, clauses 11.58 and 11.59, pages 138-139.

[10] 2017 *Annual Report to Congress, Whistleblower Program*, US Securities and Exchange Commission page 3.

[11] Ibid at page 26.

(e) The Committee is concerned that when a whistleblower appreciates that he or she is alone, against a potentially well-funded company, without an independent agency protecting him or her and has to bring his or her own legal claims for compensation (notwithstanding the adverse costs order protections), it may just be all too hard. The experience from the US is that rewards work, they are not over-inflated, they are strictly assessed by an independent agency and they add real weight to drive behavioural change in the business sector to proactively address corporate misconduct.

(f) The Committee believes that with the current reforms in the Draft Whistleblower Bill, now is the time to enact a structured, capped reward system, as proposed by the Joint Parliamentary Committee. The issue has been reviewed in detail by the Joint Parliamentary Committee and no further reviews are needed. The Committee believes it would be a lost opportunity to not take up this challenge to promote and reward whistleblowers to clearly target corporate misconduct and send an important message to business that what is important is to value your employees and stakeholders and proactively address allegations of corporate misconduct.

4.3 ***Whistleblowers and an Independent Agency***

(a) In relation to an independent agency to represent whistleblowers, the Committee submits that the following matters might be taken into account.

(b) In the February 2017 Submission, the Committee expressed its view as follows[12]:

> A statutory office similar to the US SEC Office of the Whistleblower be established, with adequate funding and resources, to operate as a truly independent advocate for whistleblowers...any Office of the Whistleblower established in Australia should have a clear statutory framework setting out the powers of the Office, how it can deal with and respond to whistleblowers, and the ability to commence civil or criminal cases against a company or an individual where there is alleged retaliation, reprisal or discrimination against a whistleblower.

(c) The Joint Parliamentary Committee, after considering the submissions on this topic, formed the opinion that a Whistleblower Protection Authority should be established to provide a clearing house for whistleblowers bringing forward public interest disclosures, to provide support and assistance to whistleblowers, including by investigating non-criminal reprisals in the public and private sector and taking non-criminal matters to a tribunal or court on behalf of whistleblowers or on its own motion to remedy reprisals or detrimental outcomes[13].

(d) The Committee supports the creation of an independent agency to represent whistleblowers. It is clear, in practice, as the Joint Parliamentary Committee noted, that "*without a mechanism to investigate and seek redress for reprisals, whistleblower protections are only theoretical."*[14] The Committee considers that it is inherently unfair to require an individual whistleblower to pursue litigation in a system that despite the professed protections on legal costs, is manifestly

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[12] February 2017 Submission, clause 15.2(b)(iv).

[13] Joint Parliamentary Committee, *Whistleblower Protections*, September 2017, clause 12.79, page 157.

[14] Ibid at clause 12.71.

and systemically titled in favour of well-resourced companies or taxpayer-funded agencies or departments (in respect to public sector employees)[15]. Even the Australian Securities and Investments Commission, as Australia's corporate regulator, favoured a stand-alone independent oversight agency, with an office of the whistleblower to be the advocate for whistleblowers[16]. The lack of an independent agency merely reinforces the existing perception that whistleblowers are a lonely breed and if the law is to take disclosures of corporate misconduct seriously, it should, as a minimum, create an independent agency to advance and protect the interests of whistleblowers.

(e) The Committee has noted the views of Prof AJ Brown who considered that an independent agency should have an oversight function rather than any investigative and formal prosecution function[17]. The Committee supports the recommendations of the Joint Parliamentary Committee that an independent authority should have both an oversight function and an investigative and non-criminal prosecution function. Without an independent agency being able to act for and on behalf of whistleblowers, the Committee is concerned that these reforms are likely to prove illusory.

[15] Ibid at clause 12.69, a point made strongly by the Joint Parliamentary Committee.

[16] Ibid at clause 12.8.

[17] Ibid at clause 12.23 to 12.25.