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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: economics.sen@aph.gov.au

Dear Sir/Madam,

I write in relation to the request for stakeholder views on the Treasury Laws Amendment (Whistleblowers) Bill 2017 (the Bill) and supporting Explanatory Memorandum.

As you may be aware, Maurice Blackburn made a submission to both the recent Treasury and Joint Committee on Corporations and Financial Services inquiries in to whistleblower reforms. We also provided feedback on the exposure draft of this Bill.

Furthermore, I personally provided evidence to the Joint Committee regarding our submission and related matters.

I appreciate this opportunity to make a submission and would welcome the opportunity to discuss any aspects of this submission further with Committee members.

Yours faithfully

[redacted]

Josh Bornstein
MAURICE BLACKBURN

Maurice Blackburn submission to the Senate Standing Committees on Economics in relation to the Treasury Laws Amendment (Whistleblowers) Bill 2017 (the Bill) and supporting explanatory material.

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in employment and industrial law, superannuation, personal injuries, medical negligence, dust diseases, negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The firm also has a substantial social justice practice.

Our Submissions

Maurice Blackburn Lawyers (Maurice Blackburn) contends that the current legislative framework in Australia lacks protection for those who are brave enough to come forward as whistleblowers, and abysmally fails to provide incentives when the potential negative consequence to the individual is considered.

To this end, we have provided considered response to each of the inquiries leading to the development of the Bill which is now before the Senate.

We are disappointed that the Government has chosen to disregard the input offered as feedback to the exposure draft and supporting documentation.

In this submission, we reiterate the core elements of our previous advice, especially in areas where the Bill has moved away from the considered recommendations of the Joint Committee for Corporations and Financial Services, and the Xenophon Agreement.

We maintain that whistleblowers should be protected and rewarded, not punished.

A comprehensive, robust whistleblower regime is critical in ensuring the highest standards of governance across the private, public and not-for-profit sectors.

There is a grave danger that this Bill is a missed opportunity to raise standards of conduct in the private sector, to protect those heroes that come forward, and ensure they have dignity in their lives after taking such a big step forward.

The proposed package of reforms

We acknowledge the broad commitment of the Government to pursuing a whistleblower regime for the private sector. We also acknowledge that the timeline for the reform places pressure on the processes informing the development and drafting of the legislation.

We also note the recent report of Transparency International[i] which demonstrates that Australia is slipping in its standing as an exemplar of anti-corruption. Initiatives such as the adoption of a strong regime of whistleblower protection are necessary to arrest this slide.

We acknowledge the work done by the Parliamentary Joint Committee for Corporations and Financial Services (the PJC) in developing their comprehensive report and as a result, the critical input into the development of this new regime.

The Government is clearly committed to establishing this new regime – including through the establishment of the Expert Advisory Panel - and we supported them in the intention.

The media statement by the Minister for Revenue and Financial Services on 23 October 2017 provides a distinction between a first and subsequent stage of the Expert Panel's work.

The statement confirmed that the Panel was to assess the draft legislation against the recently released report of the Parliamentary Joint Committee on Corporations and Financial Services into Whistleblower protections in the corporate, public and not-for-profit sectors (PJC Report), and would provide advice to Government on how the draft legislation measures up against the PJC Report's recommendations.

We urge the Committee, as part of its deliberations, to satisfy itself that the Expert Advisory Panel has sufficiently acquitted its role in ensuring the outputs of the PJC Report have been embedded in the Bill.

This work of the Expert Advisory Panel is a critical reference point for our submission.

The Xenophon Agreement

In November 2016, an Agreement was struck between the Australian Government and Senator Nick Xenophon to enhance whistleblower protection in the private and public sectors. [ii]

That agreement, as tabled in the Senate on 21 November 2016, states that a Parliamentary Committee inquiry will consider "Compensation arrangements in whistleblower legislation across different jurisdictions, for example the bounty system used in the United States" and "issues associated with internal disclosures".

The agreement goes on to state:

> "That following the tabling of the Parliamentary Committee report, if the report recommends adopting stronger whistleblower protections in the corporate and public sectors, the Government will establish an expert advisory panel to expedite the development and drafting of legislation to implement whistleblower reforms in the corporate and public sectors"

It also states that legislation will be introduced in to Parliament by December 2017 "consistent with the recommendations of the Parliamentary Committee and the Expert Advisory Panel".

The PJC has reported on these matters and the Expert Advisory Panel has been established by the Minister.

A key issue in the drafting of this legislation is whether it is "consistent" with the PJC Report's recommendations.

Effective regime for anonymous disclosures

The Xenophon agreement required that a Parliamentary Committee consider issues relating to internal disclosures.

A key aspect of internal disclosures is the capacity to make anonymous disclosures.

The Explanatory Memorandum supports anonymous disclosures and specifically cites the United States laws relating to anonymous disclosures.

The Explanatory Memorandum does not, however, fully consider how the anonymous disclosures are made (paragraph 2.61 etc).

We respectfully request the Committee consider the operation of the US Securities and Exchange Commission (SEC) arrangements in the United States and specifically the highly effective arrangements involving lawyers.

The 2016 Annual Report to the US Congress of the SEC Dodd Frank Whistleblower Program outlines this in a succinct form:

> *Whistleblowers are not required to be represented by counsel unless they choose to file their tips with the Commission anonymously. Approximately half of the award recipients were represented by counsel when they initially submitted their tips to the agency. Certain of the individuals who were not represented by counsel at the time they submitted their tip subsequently retained counsel during the course of the investigation or during the whistleblower award application process (although retaining counsel is not required to file for a whistleblower award). Almost one quarter of the award recipients submitted their information anonymously to the Commission through counsel.*[iii]

Unfortunately the Explanatory Memorandum limits the role of lawyers to the provision of legal advice to the whistleblower, or representation in relation to the operation of the new whistleblower regime (paragraphs 2.24, 3.34 and 3.35 of the Explanatory Memorandum).

We also refer the Committee to the submission of Jordan Thomas, the architect of the SEC program, to the Joint Committee Inquiry. He states:

> *5) The Three Pillars of the SEC Whistleblower Program*
> *After extensive research of other whistleblower regimes, the SEC Whistleblower Program was founded on three core principles: the ability to report anonymously, enhanced employment protections and the potential to receive monetary awards. Each pillar has been important to the success of the program and collectively inspired corporate whistleblowers to report possible securities violations that they would not have otherwise reported to the Commission. In the recent University of Notre Dame US and UK Financial Industry Survey (Exhibit B), 89% of financial service professionals reported that would be willing to report wrongdoing given protections and incentives, such as those offered by the SEC.*[iv]

This capacity to report anonymously is critical to the effectiveness of the program.

The risk in the current legislative proposal is that the regime will not function effectively in providing anonymity, despite the best of intentions.

There are also specific hindrances upon the conduct of lawyers under the current arrangements.

As submitted previously, alleged wrongdoers should be prevented from suing whistleblowers or their lawyers in circumstances where the whistleblower has provided incriminating confidential information to lawyers in litigation against the alleged wrongdoer.

In *AG Australia Holdings v Burton and Anor (2002),* a whistleblower was sued for talking to class action lawyers for shareholders in breach of a confidentiality agreement.

Burton has had a chilling effect on whistleblowers in the context of civil litigation, with lawyers understandably now very reticent to talk to whistleblowers.

It is contrary to the interests of justice for wrongdoers to be protected from the consequences of unlawful behavior in this way, and the recent IOOF matter illustrates how *Burton* is being abused.

In this case, the whistleblower sent incriminating documents to ASIC, Senators and Fairfax Media and subsequently provided these documents to Maurice Blackburn at the time when our lawyers were investigating a potential class action on behalf of shareholders in IOOF against the company for breaches of the Corporations Act. IOOF sued Maurice Blackburn to restrain it from acting in the class action but did not pursue the whistleblower or Fairfax Media. It seems clear that the true purpose of the suit was to avoid the class action, or at least to frustrate it, and to increase the costs involved in its pursuit, in an attempt to mitigate IOOF's liabilities to its shareholders.

Maurice Blackburn proposed an amendment to the Exposure Draft of the legislation which would protect whistleblowers and lawyers from this type of unfair suit. In particular, the law should explicitly provide that there can be no liability for a breach of confidence in the following circumstances:

- A person (whistleblower) has information which they believe, demonstrates, or provides evidence that tends to demonstrate, that a company or person has engaged in unlawful conduct; and
- Another person or persons (claimant/s) has claims against the alleged wrongdoer in relation to the relevant unlawful conduct; and
- The claimant has sought legal advice in relation to the pursuit of those claims from a lawyer (the lawyer);
- The lawyer should be permitted by law to obtain from the whistleblower confidential information or confidential documents belonging to the alleged wrongdoer for the following purposes:
    - To advise the claimant in relation to litigation or contemplated litigation;
    - To take a proof of evidence for the purposes of determining whether to call the whistleblower as a witness at the trial and in order to prepare for examination of that witness;
    - To obtain documents for tender as evidence in the trial.
- Any informal documents obtained by the lawyer from the whistleblower may only be used for those purposes and otherwise protected by the usual implied undertaking.

To this end, the Bill could be amended by expanding the role of a lawyer to making a disclosure on their behalf. This could potentially take the form of an amendment in s.1317AA(3) after "Part" by inserting the words "or providing a statement of anticipated evidence on legal proceedings".

Rewards not compensation

The PJC Report recommendations 11.1 and 11.2 are specific that a reward regime be established, in contrast to just a compensation regime. This is acknowledged in paragraph 1.18 of the Explanatory Memorandum.

However, the Explanatory Memorandum states that there will specifically be a *compensation* regime (paragraph 2.95 etc).

This is a significant departure from the recommendations of the PJC Report and as such, inconsistent with the agreement struck with Senator Xenophon.

The Xenophon agreement specifically states that a Parliamentary Committee is to consider *reward* systems and particularly the bounty system used in the United States.

The agreement also states that the legislation is to be consistent with the Parliamentary Committee's recommendations.

In our previous submissions, we have stated that a bounty system is critical for the effectiveness for any regime given the disproportionate resources and capacity of the wrongdoer.

It is also consistent with the three pillars articulated by Mr Thomas in his submission.

The new regime and as such the legislation needs to establish a reward structure, even if it is modest and limited relative to the United States arrangements.

Effective external disclosures

Paragraph 2.55 etc of the Explanatory Memorandum sets out the preconditions for a whistleblower to make an "emergency disclosure" - a disclosure made in an emergency situation.

We have reservations with the test outline in paragraph 2.56 and specifically the second test based on "imminent risk".

This is an unnecessary and limiting departure from the approach advocated by the PJC, and set out in Recommendation 8.5 of their Report.

Their recommendation is that the test be based on section 26 of the Public Interest Disclosure Act which includes a range of tests and circumstances broader than that proposed in the Bill in section 1317AAD.

Furthermore the PJC Report states:

> *8.41 The committee considers that the instances where it may be reasonable to make a third party disclosure are limited to situations where:*
>
> *- there is a risk of serious harm or death; or*
>
> *- a disclosure in the public interest has been made to an Australian law enforcement agency and, after a reasonable length of time, no action has been taken by the agency.* [v]

By contrast, the Explanatory Memorandum and the Bill require that there has been a "reasonable period" of time with no action and that "there is an imminent risk of serious harm or danger to public health and safety or to the financial system."

This shift from "or" to "and" is also a significant departure from the recommendation.

Clarity regarding "reasonable period" or "reasonable length of time" should also be provided, based on best practice in overseas jurisdictions.

It should be noted that the PJC Report also supports an amendment of section 26 of the Public Interest Disclosures Act to ensure the test is more objective, and any new regime to reflect these changes.

Other issues

In relation to paragraphs 3.50 and 3.51 in the Explanatory Memorandum, we note that there are a range of civil breaches, such as a breach of contract or breach of confidentiality, where the immunity should also apply. But the currently proposed law would not include these breaches.

In a similar context, there are breaches of the Fair Work Act and OHS legislation where immunity should apply but this current formulation would not extend the immunity.

In relation to the amendments detailed in paragraph 2.30 of the Explanatory Memorandum, the qualification of "a penalty of 12 months imprisonment" is inconsistent with the definition of "disclosable conduct" in the *Fair Work (Registered Organisations) Act 2009* which is defined as:

> *…(a) contravenes, or may contravene, a provision of this Act, the Fair Work Act or the Competition and Consumer Act 2010; or*
> *(b) constitutes, or may constitute, an offence against a law of the Commonwealth.*

Section 1 of the Xenophon agreement states that the intent of the PJC's process was, based on the ROC amendments, to "achieve an equal or better whistleblower protection and compensation regime in the corporate and public sectors".

To maintain this 12 month qualification would achieve a lesser set of protections.

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We appreciate the opportunity to make this submission and welcome the opportunity to discuss any details directly with the Committee.

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[i] http://www.abc.net.au/news/2018-02-22/australia-slips-in-global-corruption-rank/9472114

[ii] Agreement between Senator Nick Xenophon and the Australian Government, tabled in the Senate 21 November 2016

[iii] U.S. Securities and Exchange Commission, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program https://www.sec.gov/files/owb-annual-report-2016.pdf, page 18

[iv] Jordan Thomas, *Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry in to Whistleblower Protections*, February 2017

[v] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* September 2017