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Committee Secretary
Senate Economics Committee
Department of the Senate
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Parliament House
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Dear Committee Secretary

RE: Inquiry into Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007

We refer to the inquiry of Senate Economics Committee into the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007* (**Bill**). IFSA has previously commented on a draft Bill released for consultation on 11 May 2007. We had made a number of comments on that draft Bill a number of which were reflected in changes made to the Bill introduced into the Parliament on 21 June 2007.

IFSA is a national not-for-profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 140 members who are responsible for investing over $1 trillion on behalf of more than ten million Australians. Members' compliance with IFSA Standards and Guidance Notes seek to ensure the promotion of industry best practice.

The following comments on the Bill are limited to matters of continuing concern to IFSA members in respect of proposed changes in relation to life insurance, superannuation and *Corporations Act 2001* (**Corporations Act)** requirements.

1. Whistleblower Protection – Items 44, 62, 115, 154

The Bill proposes to introduce statutory protection for whistleblowers. In addition to providing protection to whistleblowers, the Bill proposes to make it an offence to victimise whistleblowers or to breach confidentiality requirements in relation to whistleblowers. Whistleblowers that are victimised are entitled to compensation.

We support the extension of the Whistleblower provisions but those requirements should be aligned with the relevant existing requirements under the Corporations Act. Whistleblower provisions should be consistent in their application and operation. It should be clear when they apply and, they should only apply in situations where the misconduct or improper state of affairs relates to a material or significant breach of the entity's or an individuals obligation under the relevant Act. While the draft provisions are modelled on Part 9.4AAA of the Corporations Act,

there is a fundamental difference in the basis on which the provision operates, which significantly changes the practical operation of the protections.

While the provisions of the draft Bill circulated by the Treasury for comment have been amended in light of industry comment, the amendments made do not align the provisions under the respective laws and, if not corrected, we consider that the new requirements will have serious and extensive unintended consequences, and will undermine the purpose of the whistleblower provisions.

Difference – align requirements

A basic condition for whistleblower protection under the Corporations Act is that a person has reasonable grounds to suspect that the information indicates that the company or an officer or employee of the company "**has, or may have, contravened a provision of the Corporations legislation**" (section 1317AA(1)(d)). It is an objective test.

This allows a company to determine with some certainty whether such protection will apply. However, the proposed equivalent provisions in the draft amendments introduce a subjective test that purports to attract the same level of protection to a person who discloses to one of the named persons (eg APRA, the auditor, the actuary, a director, a senior manager) information where both of the following tests are met:

- The information concerns **misconduct, or an improper state of affairs or circumstances** in relation to the regulated entity, and
- the discloser merely "**considers that the information may assist [the person to whom disclosure is made] to perform the person's functions or duties in relation to the body corporate or a related body corporate**".

The above test creates serious unintended consequences for the following reasons:

- It covers a potentially massive spectrum of conduct. For example:
  - "misconduct" could include relatively minor misdemeanours, or inappropriate conduct outside the realm of prudential regulation (such as sexual harassment of one staff member by another, or inappropriate conduct at an office function).
  - an "improper state of affairs or circumstances" is not measured by any materiality or relationship to the prudential framework, but rather could include benign or inconsequential issues.
- The second limb of the test is virtually irrelevant as, presumably every discloser will meet this test – ie they would not supply the relevant information unless they believed that it may assist the person to whom disclosure is made.

In addition, no policy reason has been supplied for the divergence from the Corporations Act style test.

IFSA recommends that relevant provisions be amended to align the requirements with those of section 1317AA(1)(d) of the Corporations Act . That is, that a person has reasonable grounds to suspect that the information indicates a contravention of the relevant law. In summary, the test:

1. should be consistent with the Corporations Act requirements;
2. should be an objective test ie "reasonable grounds to suspect", rather than a subjective test of "the discloser considers"
3. should relate only to significant and materially damaging conduct, rather than any misconduct at all, and
4. should relate only to a potential breach of the legislation within which it appears.

Further Amendment required

The Bill also provides the Parliament with the opportunity to improve the drafting of the existing Whistleblower provisions in the Corporations Act. Currently, the provisions put significant limitations on the ability of a person to whom information is disclosed to either (i) investigate the allegations made, or (ii) communicate the allegation to more senior people within the organisation so that the organisation can effectively respond to the issues raised.

IFSA recommends that a change be made to these proposals, and to the Corporations Act, to allow the organisation a reasonable discretion to disclose certain information for the fair and reasonable purposes of investigating the issues, provided due care is taken to protect the identity of the discloser.

2. Streamlining breach reporting - Items 171

This measure reduces the current duplication in relation to breach reporting requirements across insurance, superannuation and managed investments, and is supported. There are, however, technical issues in the current drafting of Item 171 of the Bill which amends section 912D of the *Corporations Act 2001* (**Corporations Act**).

Breach reporting to ASIC

(1) As drafted the provisions have the potential to result in uncertainty and confusion as to which if any breaches need to be separately reported to ASIC. Proposed section 912D(1B) effectively provides that a breach of the requirements of sections 912A or 912B must be made to ASIC within 10 business days.

Proposed subsection 912D(1D) provides that subsection (1B) does not apply if the body is regulated by APRA in relation to the breach and notification of the breach is made to APRA by an auditor or actuary within 10 business days of the breach. The provision effectively means that breaches regulated by APRA but not reported by an auditor or actuary within 10 business days of the breach will have to be reported to ASIC where they breach sections 912A or 912B. It appears that this is sought to be addressed by proposed section 912D(1C).

Proposed subsection 912D(1C) provides that reports made to APRA that are within the terms of an agreement between APRA and ASIC are also taken to be lodged with ASIC. This in our view is inappropriate and amounts to the relegation of defacto legislative requirements to an agreement between regulators. The agreement is not a legislative instrument yet will effectively determine for the purposes of section 912D what information lodged with APRA does not need to be lodged with ASIC but will be taken to be lodged with ASIC. The form of the proposed amendment is inappropriate.

For the purposes of simplicity and clarity **IFSA recommends** that subsection (1D) be deleted and subsection (1C) be replaced with:

> (1C) A report that a licensee is required to lodge under subsection (1B) is taken to have been lodged with ASIC if:
>
> (a) the licensee is a body regulated by APRA in relation to the breach; and
> (b) the report is received by APRA.

This would ensure that where a breach is reportable both to APRA and ASIC, that reporting the breach only to APRA will meet the licensee's obligations.

Timing of breach reports

The Bill amends the Corporations Act so that the current period of 5 business days within which to report a breach to ASIC under section 912D is extended to 10 business days.

This new proposed time period will apply to all AFS Licensees and not just Life Companies and Superannuation Trustees. The proposal which reduces the 14 days period currently under the SIS Act to 10 business days, and increases the 5 days to 10 business days under the Corporations Act is supported. However, the issue remains as to the actual commencement time/date of the obligation to report is unclear.

IFSA recommends that the time for the obligation to report commence from the date on which the breach is first notified to the most senior decision maker responsible for such matters and determined to be material. We acknowledge Treasury's concerns with possibly manipulation of the time period (eg not providing the report to the most senior decision maker) and would support a reasonableness test being incorporated into the provision.

3. APRA may determine Prudential Standards - Items 56-59

Section 32 of the Insurance Act currently allows APRA to apply Prudential Standards generally across the industry or to a specified class of entities. The proposed amendment extends APRA's ability to make Prudential Standards to a single entity or groups.

In its current form, the Prudential Standard would only be challengeable under the process outlined in the Legislative Instruments Act. That is, during the consultation process and as a last resort in the Parliament through the disallowance process.

Given that the power can be directed at and have significant impact on a single insurer or corporate group's operations, it is closer in character an administrative decision and should, therefore, be reviewable decision. **IFSA recommends** that section 32 not be extended in its current form.

We would be pleased to provide further information or clarification on any of the matters raised. Should you require further assistance we can be contacted on 02 9299 3022.

Yours sincerely

David O'Reilly
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Investment & Financial Services Association