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Mr Peter Hallahan
Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
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Dear Mr Hallahan,

Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007

The Australian Bankers' Association (ABA) made an initial submission to the Senate Standing Committee on Economics on its inquiry into the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007* on 11 July 2007. This supplementary submission focuses on the whistleblower amendments.

The ABA acknowledges that some changes have been made to the exposure draft Bill circulated by Treasury, following discussion at the industry roundtable on Monday 28 May 2007. However, some uncertainties and practical problems remain, which if not addressed would undermine the usefulness of the whistleblower provisions.

Protection for whistleblowers

The Bill proposes amendments to Part VIA of the Banking Act and other prudential Acts to contain provisions to protect whistleblowers. The whistleblower provisions have been modelled on Part 9.4AAA of the Corporations Act.

Generally, we support the amendment to introduce protections for whistleblowers in the prudential Acts and ensure that whistleblowers act in good faith. However, the amendment creates some uncertainty in the operation and application of the provisions and poses some practical problems relating to the disclosure of information and subsequent response by recipients of the confidential information.

The ABA understands that the intention of introducing the whistleblower provisions into the prudential Acts is to provide consistent protection for whistleblowers and persons who report information under the prudential Acts[1]. The whistleblower provisions relate to the

[1] The prudential Acts are the Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995 and Superannuation Industry (Supervision) Act 1993.

conduct of the body corporate or related body corporate and it is not proposed that the provisions pertain to the conduct relating to the activity of a customer or client of the body corporate or related body corporate.

Lack of alignment between the statutes

Currently the Bill applies protections for whistleblowers where disclosure is made about information concerning misconduct or an improper state of affairs or circumstances in relation to the body corporate; and the 'discloser' considers that the information may assist the 'recipient' perform their functions or duties in relation to the body corporate or a related body corporate.

While the Bill attempts to align the provisions with the Corporations Act, the proposed provisions do not provide that the discloser should have reasonable grounds to suspect that the company may have contravened the relevant legislation. It is the ABA's view that this could have unintended consequences and thereby complicate compliance arrangements for the company. For example, the absence of an objective test relating to a contravention of the relevant legislation could result in the disclosure of minor or immaterial matters or matters not pertaining to a contravention of prudential requirements.

It is unclear the basis for the divergence between section 1317AA(1)(d) of the Corporations Act and the proposed amendments.

Limitation on recipient of information

Currently the Bill makes it an offence for a 'recipient' of the information to disclose the 'confidential information'; which includes the information disclosed by the 'discloser', the identity of the discloser and information that is likely to lead to the identification of the discloser; unless the disclosure is made to APRA, the Federal Police or is made with the consent of the discloser.

While the Bill allows a recipient to contact the regulator, it is likely that a recipient will be reluctant to do so (except perhaps in cases of extreme seriousness), particularly in relation to an alleged contravention that has not been investigated or established and in the absence of undertaking some internal due diligence.

Even if a recipient were to contact a regulator, this is not necessarily the most appropriate, effective or expedient manner in which to address a matter concerning misconduct or an improper state of affairs as raised by a whistleblower. It is the ABA's view that this limitation does not foster good corporate governance practice and restricts the usefulness of the legislation.

In addition, a regulator is more likely to be focused on sanctions. Even though sanctions have a role to play in corporate regulation, an objective of whistleblower protection legislation must also be remedial action. It is the ABA's view that if a matter is raised by a whistleblower within a company there should be an opportunity for the company to investigate and attempt to remedy the matter.

For example, in relation to an accounting disclosure – if a possible contravention is raised within the company before the release of the financial results, remedying the disclosure in a timely manner before the results are released would better serve the interests of shareholders, investors and the market, than subsequent action by a regulator in relation to a misleading accounting disclosure.

In addition, it is also unclear whether the recipient, who may have a duty to act in the best interests of the company, would contravene this obligation by not disclosing the information to another officer to take remedial action.

ABA position

The ABA believes that the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007* should be amended to ensure that the relevant whistleblower provisions are aligned between the Corporations Act and the prudential Acts.

It is the ABA's view that the Bill should contain amendments to the Corporations Act and prudential Acts to ensure that:

- 'Disclosers' have an objective test to maintain reasonable grounds to suspect that the information relates to a significant breach or contravention of the relevant legislation by the body corporate or related body corporate. Disclosure should relate to the conduct of the body corporate or related body corporate as well as the relevant legislation.
- 'Recipients' (including directors, senior managers, officers, employees or auditors of the body corporate or related body corporate) are permitted to disclose the information they receive from a whistleblower so that the recipient is able to fulfil their duties to the company and the company is able to attempt to remedy the matter. Disclosure of the information to another officer should not compromise the protections afforded by the legislation to whistleblowers, nor cast doubt on the duties of those that receive information from whistleblowers.
- 'Confidential information' is treated in an appropriate manner, but without compromising the ability for the company to take decisive, timely action and maintain good corporate governance practices.
- The whistleblower provisions are aligned across the Corporations and prudential Acts.

The ABA would be happy to discuss any of the issues raised in our supplementary submission with you further.

Yours sincerely

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Diane Tate