

3 November

Ms Jodi Keall
Financial System Division
100 Market Street
Sydney NSW 2000

via email: whistleblowers@treasury.gov.au

Dear Ms Keall

Exposure Draft: Treasury Laws Amendment (Whistleblowers) Bill 2017

Thank you for the opportunity to provide a submission on the *Treasury Laws Amendment (Whistleblowers) Bill 2017* (Cth) (**Bill**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

1. SUMMARY

The AICD welcomes the government's commitment to reform Australia's whistleblowing laws to broaden and strengthen their coverage. Strong systems for whistleblowing promote strong standards of governance. On balance, the reforms proposed by this Bill will strengthen the corporate whistleblower framework in a way that benefits both whistleblowers and Australia's corporate community.

However, the AICD is concerned that there are several proposals in the Bill that may detract from the successful operation of the framework or which may not effectively achieve its policy intent. Our submission contains recommendations about how these could be addressed.

2. AICD'S RECOMMENDATIONS FOR IMPROVEMENT

2.1 DEFINITION OF 'ELIGIBLE WHISTLEBLOWERS'

The AICD welcomes the extension of whistleblowing protections to additional categories of person. As a general principle, the law should aim to cover any person who may:

- Have insider information that meets the qualifying requirements for making a protected disclosure in the course of their association with a 'whistleblower regulated entity' (**Entity**); and
- Require access to protections and/or compensation as a whistleblower.

To this end, the AICD supports the addition of the categories of person set out in 1317AAD(a) – (f). The AICD recommends protections also be extended to 'unpaid workers' to ensure that

volunteers are included within the scope of the law. This would assist in ensuring that not-for-profits are more effectively covered by the framework.

The AICD also supports the concept of protection against reprisal for the spouses, children and dependents of whistleblowers on the basis that these categories of person could be used as a proxy in place of taking reprisal against a whistleblower.

However, assuming this is the intention of the Bill, it is not effectively achieved by the current drafting in 1317AAD(g) and (h).

At present, the Bill extends protections to spouses, children and dependents who become whistleblowers themselves. The drafting of the Bill suggests that these people are not otherwise also captured by categories 1317AAD (a) – (f) and so must be whistleblowers (or potential whistleblowers) in order to receive protections.

This would effectively enable spouses, children and dependents of any person set out in 1317AAD(a) – (f) to make protected disclosures, which presents a number of problems:

- As these people will likely only have second-hand access to information concerning wrongdoing and will not have access to contextual information available through more direct association with the business, they are unlikely to be able to form ‘reasonable grounds’ for suspicion of wrongdoing;
- An Entity could not reasonably be expected to ensure protection from detriment for people in these categories as they may not be known to the Entity and (unless they are also captured by categories 1317AAD (a) – (f)) they would likely not require access to protections;
- The aim of the whistleblowing framework is to encourage internal disclosures in the first instance and these categories of person may not be eligible to or capable of doing so; and
- Entities may not be able to appropriately engage and communicate with such people about the substance of their disclosure and actions taken in response owing to restrictions in confidentiality or privacy.

The AICD recommends that it should be made explicit both in the Bill and Explanatory Memorandum (**EM**) that the intention of the legislation is to protect spouses, children and dependents of whistleblowers. These protections should also be limited to people who also have an association with the Entity (that is, they are also officers, employees or contractors etc. of the Entity).

It should also be made clear that such people (unless they are also captured by categories 1317AAD (a) – (f)) are not eligible for protection as whistleblowers themselves.

2.2 DEFINITION OF DISCLOSABLE CONDUCT

The AICD supports the broadening of the definition of disclosable conduct set out under ‘other disclosable conduct’ (1317AA(3)). The policy goal of this definition should be to capture a sufficiently broad range of wrongdoing so that whistleblowers can feel confident that if they witness serious wrongdoing, they will be protected by the law should they chose to make a disclosure. This is effectively done by section 1317AA(3).

The AICD also welcomes the removal of the requirement that disclosures must be made in good faith and supports the introduction of a more objective test.

However, the AICD is concerned that the new catch-all definition of wrongdoing under 'misconduct or improper state of affairs or circumstances' (1317AA(2)) is too broad and will also present difficulties for whistleblowers and Entities in determining the limits of its application.

The broad definition proposed by 1317AA(2) may inadvertently capture disclosures concerning minor misconduct such as employment-related grievances or interpersonal disputes which are not intended to be the focus of this framework. This definition may also unintentionally capture conduct not related to the Entity – for example, misconduct by an employee of an Entity that is not related to their employment, such as personal traffic offences or littering.

Responding to disclosures such as these, including protecting the whistleblowers that make them, would distract companies from addressing more serious instances of corporate wrongdoing which is the proper focus of the Bill. This may also undermine the ability of Entities to effectively manage the performance of their staff if protections are provided to whistleblowers where their disclosure relates to minor misconduct or employment-related grievances.

The AICD recommends that 1317AA(2) be removed, or otherwise redefined to include a test of sufficient seriousness consistent with the type of misconduct listed in 1317AA(3).

2.3 DISCLOSURES TO THIRD PARTY DISCLOSEES

The AICD is concerned about the proposal to extend protections to disclosures made to 'third party disclosees' (**third parties**) in certain circumstances.

There are many risks to companies associated with extending protections to disclosures made to third parties outlined in our previous submissions.

It is worth noting again, however, that few controls are imposed on the use of information from a whistleblower once it has been passed on to third parties. Importantly, there is no guarantee that disclosures made to third parties will ensure, consistent with the broader intent of the Bill, that disclosures are dealt with in the public interest.

The reputational risk to Entities who are the subject of false or misrepresented disclosures brought to public attention is extreme. There is a significant imbalance in such situations between the relative ease with which a disclosure can be made and the potential harm that may be done to an Entity. We are not convinced that the checks and balances proposed in the Exposure Draft adequately address these risks.

The Bill already includes substantive measures which, if enacted, will strengthen the operation of Australia's corporate whistleblowing framework. The proposals contained in the Bill will require Entities to respond appropriately to disclosures and better support regulators to investigate instances of corporate wrongdoing.

Given these substantive improvements, the AICD questions whether it is necessary to extend protections to disclosures made to third parties. In our view, the intent of the framework should be to support a system of internal and regulatory disclosures first, and it is incumbent on the government to ensure that regulators are appropriately resourced to investigate and respond to

serious disclosures in a timely and effective manner. We recommend that the government give further consideration to this issue.

However, if the government intends to extend protections to disclosures made to third parties at this time, the AICD recommends that the legislation be amended to require that disclosures must be made to a regulator before they can progress to a third party

2.4 COMPENSATION FRAMEWORK

The AICD welcomes the development of a more detailed consultation framework for whistleblowers that suffer damage as a result of their disclosure. However, there are some aspects of the framework that may be unworkable in practice.

Onus of proof

The AICD is concerned that the onus of proof that falls to the 'first person' in 1317AD(1)(d) would be impossible to satisfy in most circumstances.

There is a strong inference that when an action is taken in relation to a person who has made a disclosure, the disclosure is the motivating reason behind the action. In reality, there may be many situations in which a legitimate business reason compels an Entity to take action against a person even though (and not because) they have made a disclosure.

From an evidentiary perspective, an Entity would struggle to discharge the onus of proving that its actions were motivated independently of the complaint, particularly where the complaint could have an adverse impact on the Entity.

The AICD recommends that that 1317AD(1)(d) be amended so that the burden of proof to the first person is to demonstrate that their **primary or dominant reason** for the conduct was not their knowledge of the victim's status as a whistleblower or potential whistleblower.

This would set a more appropriate evidentiary threshold for Entities while also ensuring that compensation is available to whistleblowers who suffer damage as a result of making a protected disclosure.

As a matter of principle, the AICD does not support reversals of onus of proof. For that reason, we recommend that 1317AD(4) be amended so that the claimant bears the onus of proving the matters in paragraph (1)(a) – (d).

2.5 Whistleblower policies

As a matter of good practice, the AICD believes that all companies should have sound internal whistleblowing policies and procedures that aim to detect, address and ultimately prevent corporate wrongdoing.

One of the central goals of the whistleblowing framework should be to encourage companies to make internal disclosure easy and safe for whistleblowers. This will help to ensure that misconduct is addressed as early as possible, ideally before it becomes the subject of regulatory intervention. Strengthening the protections available to whistleblowers, in the way outlined by the Bill, will be sufficient to encourage companies to do this.

The requirement set out in 1317AF would shift the focus of the framework to the detriment of whistleblowers, Entities and the public. Such a requirement would also direct regulatory resources away from more impactful endeavours such as investigating wrongdoing, protecting whistleblowers and prosecuting those who victimise them.

Although the AICD does not think that it is necessary to include a statutory requirement for Entities to have a whistleblowing policy, the policy components listed in 1317AF(1)(a) and (b) are not unreasonable in practice. The AICD does not see a need for further details to be included by regulation (as provide for in 1318AF(4)(c)), and recommends that further consultation be undertaken if additional requirements are proposed.

3. CONCLUSION

The AICD wishes to express its concern with the two-week consultation period provided on this Bill. Improving Australia's corporate whistleblowing framework is an important law and governance reform, and one that the AICD strongly supports. It is important that consultation timeframes allow stakeholders to provide meaningful contributions on significant reform matters.

We hope our comments will be of assistance in the review and further development of this Bill. If you would like to discuss any aspect of this submission, please contact Lucas Ryan, Senior Policy Adviser, on (02) 8248 6671 or lryan@aicd.com.au.

Yours sincerely



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