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Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Secretary

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

Thank you for the opportunity to provide a submission on the *Treasury Laws Amendment (Enhancing Whistleblower Protections) 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 41,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

1. OVERVIEW

The AICD welcomes reform to strengthen Australia's whistleblowing laws. Strong systems for whistleblowing support strong standards of governance.

As we have noted in consultations in February and November 2017, the existing protections afforded to corporate whistleblowers are clearly inadequate and require reform to broaden and strengthen their coverage.

We note that many of the recommendations made by the AICD in previous consultations have been accommodated in the Bill. These include broadening the definition of discloser (including anonymous disclosures) and the range of topics to which protection will be afforded, replacing the 'good faith' test, strengthening the compensation framework and increasing corporate penalties for victimisation, among others.

Consequently, the AICD supports many of the reforms proposed in this Bill, which we consider will strengthen the whistleblowing framework.

However, the AICD is concerned that several aspects of the Bill may detract from its effective operation, to the detriment of companies and whistleblowers.

Our submission addresses how these aspects could be resolved through:

- Amending the definition of 'eligible whistleblowers' so that effective protections are extended to whistleblowers without bringing in categories of person (such as relatives) that would complicate compliance with the framework without clear benefit;
- Refining the definition of 'eligible recipients' to ensure that the designation is only applied to people who are in an appropriate position and to prevent extending the responsibility for handling disclosures to people who may not be appropriately qualified (recognising the penalties that can flow from mishandling);
- Addressing the onus of proof proposed in the compensation framework;
- Further review of proposed emergency disclosures to third parties; and
- Reducing the prescription proposed in the requirement for companies to have whistleblowing policies, to ensure the focus is placed on protecting whistleblowers and incentivising companies to establish systems for dealing with disclosures while accommodating the unique operational environment of each entity.

2. AICD RECOMMENDATIONS

2.1 DEFINITION OF 'ELIGIBLE WHISTLEBLOWERS'

The AICD welcomes the extension of whistleblowing protections to additional categories of persons set out in 1317AAA(a) – (f). In our view, whistleblower protections should be extended to any person who may:

- Have 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.

The AICD considers that this has been done effectively through 1317AAA(a) – (f).

However, the addition of relatives (1317AAA(g)), and the dependents of people associated with an Entity and the dependents of their spouses (1317AAA(h)) raises concerns.

Extending whistleblowing protections to dependents and spouses as proposed could present a number of challenges for companies in complying with the law, as it is likely that these people:

- Will generally have second-hand access to information concerning wrongdoing and are unlikely to have access to the context and information necessary to form 'reasonable grounds' for suspicion of wrongdoing;
- Would be difficult (and in some cases impossible) for an Entity to identify, correspond with and protect unless they are also people who could be captured in 1317AAA(a) – (f); and
- Are not likely to require the protections of a whistleblower framework unless they are also people who could be captured in 1317AAA(a) – (f).

In some circumstances, persons captured in 1317AAA(g) and (h) could be used as a proxy for taking a reprisal against a whistleblower. For example, where an employee of an Entity is a whistleblower and their spouse is also an employee of the Entity, the Entity may take a reprisal against the spouse as a means of threatening or intimidating the whistleblower.

While it is appropriate that these people be protected under the framework, we are concerned that the drafting in the Bill does not achieve this effectively. The Bill only extends protections to these people where they are eligible whistleblowers themselves, which for the reasons outlined above may be impractical.

The AICD recommends that the Bill be clarified so that:

- relatives (1317AAA(g)), and the dependents of people associated with a whistleblower regulated and the dependents of their spouses (1317AAA(h) are not eligible whistleblowers; but
- where these categories of person may also be a person described in 1317AAA(a) – (f), they are afforded the protections of the whistleblowing framework.

2.2 DEFINITION OF ELIGIBLE RECIPIENTS

The AICD agrees that there must be a range of people to whom a disclosure can be made. In our view, these people should be clearly identifiable, accessible to whistleblowers and trained (or reasonably capable of being appropriately trained) to respond to disclosures.

As currently drafted, the Bill extends the people to whom a disclosure can be made to include, where a disclosure is made by an employee, "a person who supervises or manages" that person (1317AAC(e)).

The AICD is concerned that this expanded definition will place an unreasonable burden on companies and will not assist in incentivising effective and robust internal systems with capable recipients of whistleblowing disclosures.

Identifying and responding to a whistleblowing disclosure, including taking the necessary steps to ensure the protection of the whistleblower and, if necessary, the concealment of their identity, may not be a suitable responsibility for managers and supervisors in all circumstances. The AICD considers that companies should have the flexibility to put in place processes and systems that provide accessible and appropriately trained individuals to whom disclosures can be made.

As currently drafted, the Bill would increase the number of eligible recipients substantially. For larger Entities, it would create thousands of additional eligible recipients. As drafted, the Bill will place an enormous burden on Entities to ensure that all supervisors are appropriately trained and supported to deal with protected disclosures, and risks diminishing the effectiveness of the new protections through dilution.

The AICD recommend that 1317AAC(e) be removed.

The intersection between this part of the Bill and the 'emergency disclosure' provisions also merits attention. Recognising the enormous reputational risk posed to companies by disclosures of wrongdoing being made to third parties, the AICD is concerned that the conditions required prior to making an emergency disclosure could be relatively easily met if a disclosure was made internally to a person not appropriately qualified to handle it.

If 1317AAC(e) is not removed from the Bill, the proposed emergency disclosures provision should be amended to ensure that disclosures must first be made to one of the other recipients outlined in 1317AAC prior to an emergency disclosure being made.

2.3 COMPENSATION FRAMEWORK

The AICD welcomes a stronger 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) could 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 strong evidentiary threshold for Entities while also ensuring that compensation is available to whistleblowers who suffer damage as a result of making a protected disclosure.

We also note that as a matter of principle, the AICD does not support reversals of onus of proof, as outlined in previous consultations.

2.4 Emergency disclosures

As we have noted in previous consultations, where Entities or regulators fail to address issues of corporate wrongdoing appropriately and danger to the public good is imminent, there may be circumstances where emergency disclosure to third parties should be protected.

We note that protecting disclosures to limited and qualified third parties, even in the most extreme of cases, presents a material and potentially irrecoverable risk of harm to Entities.

Considerable care must be taken to protect corporates from the risks of reputational damage and industrial espionage, and to avoid diminishing the incentives for whistleblowers to disclose internally. While the Bill attempts to balance these risks, the AICD considers that further consultation and review of these provisions would be appropriate.

2.5 Whistleblower policies

Having sound whistleblowing policies and procedures is good governance. The AICD agrees that all organisations should have robust internal frameworks which aim to detect, address and ultimately prevent corporate wrongdoing. As noted, we consider that strong and effective whistleblowing protections are a contributor to good governance outcomes.

In our view, one of the benefits of enhancing the protections afforded to whistleblowers is that it will clearly encourage Entities to incentivise internal disclosures by making them easy and safe for whistleblowers. We are opposed, however, to prescribing specific internal policies required of companies in legislation.

The AICD considers that section 1317AF would risk shifting the focus of the regulatory framework towards 'tick the box' compliance. We consider that stronger protections and penalties will address the policy objectives of the reform, and do not support legislative extension into internal policies.

The AICD recommends that section 1317AF be removed.

3. CONCLUSION

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

LOUISE PETSCHLER
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