AUSTRALIAN INSTITUTE of SUPERANNUATION TRUSTEES

Exposure Draft: Treasury Laws Amendment (Whistleblowers) Bill 2017

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AIST Submission

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AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the $700 billion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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Executive summary

AIST supports the creation of a consolidated whistleblower protection framework and we welcome the measures detailed in the exposure draft legislation. We provide the following recommendations:

- We support the creation of a centralised whistleblower protection framework and the proposed definitions of 'whistleblower' and 'disclosable conduct' in the exposure draft bill. These measures will enhance the protection regime overall by making it easier for disclosers to rely on the protections in the framework.
- We support a requirement for large proprietary companies (including superannuation funds) to have a whistleblower policy in place however the requirement should be consistent with existing legal requirements to avoid unnecessary duplication of the law. A suitable transition timeframe should also be put in place.
- It is important that whistleblowers are able access to multiple disclosure channels, however potential whistleblowers should be encouraged by organisations to use their internal whistleblower procedures before making a disclosure to third parties or regulators.
- Both the proposed whistleblower protection framework and measures outlined in the exposure draft bill must be reviewed no longer than two years after the provisions start to apply. A post-implementation review is necessary because of the complexity of the reforms and to ensure that any adverse impacts of the measures are rectified swiftly.
- The bill should be amended to require the Minister to consider a number of principles prior to exercising his or her power to prescribe persons or bodies that can receive whistleblower disclosures.
- The integrity of the framework would be strengthened if the types of redress available to whistleblowers following victimisation are set out in legislation.
- While we support the development of a new whistleblower protection framework, the new framework should be accompanied by an examination of corporate misconduct in the banking sector. This is necessary because a strong whistleblower framework on its own cannot prevent misconduct and other factors such as poor workplace culture and poor leadership can increase the likelihood of misconduct.

Introduction

The Australian Institute of Superannuation Trustees (AIST) welcomes the opportunity to comment on the exposure draft *Treasury Laws Amendment (Whistleblowers) Bill 2017* and accompanying exposure draft explanatory materials.

The existing whistleblower protection framework has been criticised as being limited and overly complex.[1] The reforms are intended to address identified flaws in the current system by expanding the coverage of the framework and increasing the protections available to whistleblowers.[2]

We are supportive of the reforms in principle however there are a number of issues associated with the measures that must be addressed.

Strong whistleblower framework is essential

Superannuation is a high value industry, with an increasing profile. According to APRA, since 1996 superannuation assets have grown by over $1.7 trillion dollars and at 30 June 2016 superannuation assets were $2.1 trillion dollars.[3] The industry is expected to grow to over $3.2 trillion dollars by 2035 and represent 130% of Australia's gross domestic product.[4]

The profit-to-member superannuation industry invests heavily in corporate Australia and their ability to provide optimal returns to members depends, in part, on the performance of organisations operating in Australia, in particular those listed on the Australian Stock Exchange.

Poor workplace culture is a major driver of corporate wrongdoing and impropriety therefore it is important for organisations to develop and maintain a positive workplace culture. While poor culture can increase the likelihood of wrongdoing, a strong whistleblower protection framework can still help prevent and detect misconduct as well as promoting stability within the system.

[1] Explanatory materials to the exposure draft, p 9 at [1.13].
[2] Explanatory materials to the exposure draft, p 8 at [1.11].
[3] Australian Prudential Regulation Authority (2017). *Annual Superannuation Bulletin.* [online] Available at: http://tinyurl.com/yc8hrwgn [Accessed 3 Nov. 2017].
[4] Maddock, R. (2014). *Superannuation asset allocations and growth projections*. 17 February 2014. [online] Sydney: Financial Services Council, p.6. Available at: https://tinyurl.com/yaj5r8nj [Accessed 30 October 2017].

The need for a strong whistleblower framework is essential because whistleblowing can have a number of positive impacts including:

- Promotes organisational stability: Whistleblowing helps organisations detect poor culture or practices and ultimately address those issues before they spiral out of control, or develop to such a point where the organisation's stability is compromised.
- Reduces exposure to fraud: Whistleblowing can save an organisation money. Consider the well documented case of unauthorised foreign currency trading at an Australian Bank, which caused losses of $360 million dollars.[5] These losses were ultimately detected by a whistleblower.
- Presents the last line of defence within an organisation: Whistleblowing can step in when regulatory oversight and good governance fails.
- Stops wrongdoing and enables an organisation to take corrective action quickly, which can prevent the development of reputational issues, fines, lawsuits, employee dissatisfaction, and enhanced regulatory scrutiny.
- Contributes to the overall risk management framework of the entity.
- Detects issues, ultimately equipping organisations to address corporate governance weaknesses and improve its internal management.
- Exposes corruption because those who blow the whistle are in the privileged position of seeing how the organisation operates behind the scenes.

Whistleblowing and an examination of corporate misconduct

While we support the development of a whistleblower protection framework, a framework on its own cannot prevent corporate misconduct and wrongdoing. Therefore we believe it is important to examine why corporate misconduct occurs in the first place, so that measures can be taken to prevent it.

The impact of corporate misconduct cannot be understated, misconduct in Australia's banking sector has:

- Caused system wide instability.
- Caused significant consumer losses as consumers almost always bear the cost of misconduct.
- Eroded trust in both the system and government.

[5] Dellaportas et al, 'Leadership, Culture and Employee Deceit: The Case of the National Australia Bank' (2007) 15(6) *Corporate Governance: An International Review* 1442, pp23 – 24.

- Negatively impacted retirement outcomes.

A report released by the Australian Council of Trade Unions[6] contains a detailed list of a number of Australian banking scandals that occurred in 2017, highlighting the need ensure that there is a continued focus on the culture and other drivers of poor conduct within Australian banks.

Significant banking scandals include:

- 2017: The Commonwealth Bank of Australia is alleged to have contravened provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The regulator argued that the bank did not comply with its own AML/CTF program, did not assesses the risks posed by its intelligent deposit machines, did not submit transaction reports on time to the regulator and failed to lodge suspicious matter reports.[7]
- 2017: The CEO of Barclays bank attempted to uncover the identity of an anonymous whistleblower within the bank. The conduct prompted two of Britain's financial regulators to investigate the bank and the CEO for alleged breaches of the United Kingdom's whistleblowing laws.
- 2016: An ASIC report revealed that major Australian banks charged their customers financial advice fees without actually providing that advice. Compensation is tipped to reach over $178 million.[8]
- 2016: A whistleblower revealed that the CommInsure division of the Commonwealth Bank of Australia engaged in misconduct, including the use of out-dated medical definitions within their insurance policies.[9]
- 2008 – 2017: A whistleblower revealed that the Commonwealth Bank of Australia's financial planning arm engaged in misconduct.

[6] Australian Council of Trade Unions (2017). *Banks Aren't Super*. [online] Available at: http://tinyurl.com/ya4terzy [Accessed 1 Nov. 2017].
[7] Australian Transaction Reports and Analysis Centre (2017). *AUSTRAC seeks civil penalty orders against CBA.* [online] Available at: https://tinyurl.com/yc2v38fw [Accessed 1 Nov. 2017].
[8] Australian Securities and Investments Commission (2017). *Financial advice: Fees for no service.* [online] Available at: http://tinyurl.com/yauap73z [Accessed 1 Nov. 2017].
[9] Australian Securities and Investments Commission (2017). *Report on ASIC's Investigation into The Colonial Mutual Life Assurance Society Limited.* [online] Available at: http://tinyurl.com/y7ttzxh3 [Accessed 1 Nov. 2017].

Key issues

Post-implementation review of the proposed framework

We support the majority of the measures outlined in the exposure draft bill however a post-implementation review of the framework and measures is necessary.

The proposed reforms resemble the most significant and widespread change to the Australian whistleblower framework. The reach of the proposals and their complexity means that a number of adverse consequences may arise as a result of the reforms. These risks are not merely hypothetical. For example the *Public Interest Disclosure Act 2013* was reviewed a number of years after it came into effect, and the independent review found that the kinds of 'disclosable wrongdoing' defined in the Act were drafted too broadly, and unintentionally protected employment related grievances.[10]

We submit that the framework and measures contained in the bill should be reviewed two years from the date at which the legislative provisions start to apply (expected to be 1 July 2018).[11]

Redefining the scope of the existing whistleblower framework

We support measures to create a single whistleblower protection framework outlined in the exposure draft explanatory materials.[12] We note that the proposal will see two almost identical schemes operating concurrently, the *Corporations Act 2001* regime and the *Taxation Administration Act 1953* regime. The measures to consolidate the regime will:

- Provide certainty to whistleblowers.
- Reduce confusion, complexity and overlap between applicable protections in different areas of the financial system, which may contain subtle differences.
- Remove the need to consider multiple sources of protections and decide which regime is the best to disclose under.

It is important that the two schemes resemble each other as far as practicable in order to reduce confusion for whistleblowers.

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[10] Phillip Moss, *Review of the Public Interest Disclosure Act 2013* (15 July 2016) Department of Prime Minister and Cabinet <http://tinyurl.com/je2rxqv> 7.
[11] Explanatory materials to the exposure draft, p 35 at [1.124].
[12] Explanatory materials to the exposure draft, p 16 at [1.34] – [1.37].

Expanding the scope of disclosers qualifying for protection

We support the definition of 'eligible whistleblower' in the exposure draft legislation. One of the major criticisms of the current whistleblowing framework is that the definition of a 'whistleblower' is too narrow and effectively prevents potential whistleblowers from receiving adequate protection. This criticism has been raised by multiple parties.[13]

The exposure bill expands the current definition of whistleblower and now includes trustees, custodians and investment managers of superannuation entities within the meaning of the *Superannuation Industry (Supervision) Act 1993.* This broad expansion recognises the role that outsourced service provision plays within the superannuation context, and acknowledges that some of these providers have an intimate relationship with the fund itself and therefore may have knowledge of events that can be defined as 'reportable conduct'.

The expanded definition will enable a greater number of persons to rely on the protection framework, thus promoting individuals to come forward and report actual or suspected wrongdoing by organisations. The new definition also aligns with the best practice principle that the legislative definition of a whistleblower should be broad.[14]

Persons to whom a protected disclosure can be made

The exposure bill proposes to expand the class of persons to which a protected disclosure can be made. It identifies particular persons within superannuation entities that can receive whistleblower disclosures, as well as persons outside the organisation that can receive disclosures such as third parties and regulators.

While it is important that whistleblowers are provided access to multiple disclosure channels, potential whistleblowers should be encouraged to utilise an organisation's internal whistleblower procedures before making a disclosure to third parties or regulators.

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[13] The Treasury, *Improving Protections for Corporate Whistleblowers* (October 2009) <http://tinyurl.com/guwa87g> p 8 ; Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) 209.

[14] Wolfe et al, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws* (October 2015) Blueprint for Free Speech <http://blueprintforfreespeech.net/>.

It is appropriate for individuals to consider making an internal disclosure in the first instance because:

- It promotes the efficient allocation of resources. There may be adverse public policy outcomes if each disclosure was required to be handled by a third party when it may be more appropriate for that disclosure to be addressed through the organisation's own internal processes.
- The organisation may be able to address the concern in a timely and responsible manner. A well intentioned company that is dedicated to ensuring its own stability and reputation would be in the best position to review whistleblower disclosures given its access to information and knowledge of its own operations and staff.

However, there may be situations where it is unsuitable for a whistleblower to utilise internal mechanisms. This would include situations where the nominated internal recipient may be involved in the wrongdoing in question, or the wrongdoing involves a serious contravention of the law and it is in the public interest to disclose to a third party such as a regulator. In these circumstances it is important for whistleblowers to have access to external mechanisms.

We believe that it would be appropriate for an organisation's whistleblower policy to encourage potential whistleblowers to use the company's internal processes and procedures if they have concerns about misconduct. This encouragement would be beneficial because it would be inefficient and costly to require a third party or regulator to handle every whistleblower disclosure, especially when some disclosures may be relatively minor.

Furthermore, a well-intentioned company committed to ensuring its own stability and a positive workplace culture would be in the best position to review whistleblower reports of wrongdoing.

Definition of disclosable conduct

The existing whistleblower protection framework contains a narrow definition of 'disclosable conduct', which limits the ability of whistleblowers to rely on the protections contained in the framework. We believe the narrow definition should be broadened, consistent with the best practice criteria contained in the *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws* report prepared by the Blueprint for Free Speech.[15] That report highlights a broad legislative definition of reporting wrongdoing is best practice.

[15] Wolfe et al, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws* (October 2015) Blueprint for Free Speech <http://blueprintforfreespeech.net/> p3.

We support the expanded definition of disclosable conduct contained in the exposure draft bill and believe the measures will enhance the protection regime overall by making it easier for disclosers to rely on the protections in the framework.

Access to compensation for whistleblowers that suffer reprisal

Fear of retaliation is often the biggest barrier to a whistleblower making a disclosure,[16] therefore it is critical that if there is retaliation, the whistleblower is entitled to receive redress. We note that redress can take many forms, such as financial compensation or an apology.

The right to access redress under the existing framework is deficient in many aspects; for example in order to receive any form of redress the whistleblower must first prove that they have been subject to victimisation. This can be very difficult because the criminal standard of proof is applied.

The measures in the exposure draft legislation go some way to address these deficiencies by making it easier for whistleblowers to access compensation if they have suffered damage after they have made a disclosure. However we are concerned that the legislation does not clearly set out what constitutes 'compensation' and does not make it clear what other types of redress whistleblowers can seek if they suffer damage as a result of making a disclosure.[17]

In order to provide certainty to whistleblowers and to clearly articulate what types of redress are available the legislation should include a non-exhaustive list of the types of redress that whistleblowers can seek.

We note that the *Fair Work (Registered Organisations) Amendment Act 2016* sets out a list of potential orders that a court can make following the victimisation or threatened victimisation of a whistleblower, including:

- Requiring the payment of compensation for the loss, damage or injury suffered.
- A positive or negative injunction.
- An apology.
- Reinstatement of position.
- The payment of exemplary damages.
- Any other order the court thinks appropriate.

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[16]David Banisar, *Whistleblowing: International Standards and Developments* (February 2011) <http://tinyurl.com/jypsjm5> 8.

[17] Proposed s 1017AD (3) of the *Corporations Act 2001.*

The integrity of the framework would be strengthened if the types of redress available to whistleblowers was set out in legislation. This is critical because the presence of strong redress mechanisms in legislation sends a positive message to potential whistleblowers that they are valued and are making a genuine contribution to the overall stability and integrity of corporate Australia by exposing wrongdoing.

Requiring large proprietary companies to have a whistleblower policy

The measures in the exposure draft bill require public companies and large proprietary companies to:[18]

> *Have a policy with information about the protections available to whistleblowers, as well as how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures, and any matters prescribed by regulation; and to make this policy available to people who may be eligible whistleblowers in relation to the company.*

The exposure draft bill will require the policy to:[19]

- Set out the information and protections available to whistleblowers.
- Provide an overview of how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection under the *Corporations Act 2001* or to whom the disclosure relates.
- Any other matters prescribed by the regulations.

Under the *Corporations Act 2001* many RSE licensee companies would be classified as large proprietary companies (based on consolidated revenue of the RSE licensee and any RSEs under its control and other factors).

We support a requirement for large proprietary companies to have a whistleblower policy in place however the requirement should be consistent with existing legal requirements to avoid unnecessary duplication of the law.

Under APRA's Prudential Standard SPS 520 – *Fit and Proper* regulated superannuation funds must have a fit and proper policy in place that contains adequate provision to facilitate whistleblowing about a responsible person. This requirement is narrow in that it only requires a policy for

[18] Explanatory materials to the exposure draft, p 33 at [1.115]; proposed s 1317AF (2)–(4) of the *Corporations Act 2001.*
[19] Proposed s 1317AF (4) of the *Corporations Act 2001.*

whistleblowing about responsible persons. Therefore we support the requirement for funds to develop internal policies to facilitate effective management of all disclosures.

It is also important that a suitable transition timeframe be put in place as superannuation funds will need considerable time to develop meaningful whistleblower policies. The draft exposure legislation proposes that all public companies and large proprietary companies have whistleblower policies in place by 1 January 2019. Given the current legislative cycle, and the amount of regulatory change occurring within the superannuation sector in particular, we believe that the requirement to have a policy in place should not take effect until 1 January 2020.

Ministerial powers

The exposure bill provides the Minister with wide reaching powers. This includes the power to prescribe persons or bodies that can receive whistleblower disclosures. We support this power because it is vital that the whistleblower protection framework has a degree of flexibility in it in order to ensure that it can continue to protect whistleblowers adequately as corporate Australia matures.

However, the draft bill should be amended to entrench a set of principles that the Minister must have regard to before exercising his or her power. A principle based overlay is beneficial because it ensures that any development or change to the whistleblower framework is done in a meaningful way consistent with the overarching purpose to improve the framework.

We believe that the Minister should be required to have regard to the following principles when exercising his or her discretion:

- Accessibility: The ability of an eligible whistleblower to access the proposed recipient must be assessed. This consideration is important as there may be certain circumstances where it is impracticable to disclose to a proposed recipient. For example the recipient may be a government department with limited consumer facing functions and with no experience in dealing with whistleblower disclosers.
- Effectiveness: The ability of the proposed recipient to act on that information when received must be considered. It would be of limited utility to appoint a recipient that does not have the necessary skills to deal with the disclosure.
- Efficiency: The Minister should have regard to the financial cost associated with prescribing an additional recipient.

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