Australian Government
The Treasury

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Mr Wayne Poels
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and Cabinet
One National Circuit
BARTON ACT 2600

Email: helpdesk-obpr@pmc.gov.au

Dear Mr Poels

REGULATION IMPACT STATEMENT – FINAL ASSESSMENT SECOND PASS

I am writing in relation to the attached Regulation Impact Statement (RIS) prepared for the *Treasury Laws Amendment (Whistleblowers) Bill 2017*.

I believe the RIS meets best practice requirements and is consistent with the ten principles for Australian Government policy makers.

In particular, the RIS addresses the seven RIS questions:

What is the problem?

Combating corporate crime is a longstanding law enforcement and public policy challenge. Corporate crime is estimated to cost Australia more than $8.5 billion a year[1], and accounts for approximately 40 per cent of the total cost of crime in Australia.

Whistleblowing plays a critical role in uncovering corporate crime. It is a significant means of combating poor compliance cultures, as it ensures that companies, officers and staff know that misconduct can be reported. In many cases, corporate crime is only detected because individuals come forward, sometimes at significant personal and financial risk.

To reduce these risks and encourage disclosures, whistleblowers are often afforded legal protections in relation to their disclosure. If the protections are inadequate or unclear, a whistleblower may be discouraged from sharing information due to fears of personal or professional reprisal.

Why is Government action needed?

The current protections give whistleblowers in the corporate sector few incentives to come forward with their information. Being spread across multiple statutes, their coverage is fragmented, inconsisent and their

[1] The estimates refer to figures quoted in Attorney General Department, 2016, *Improving enforcement options for serious crime: Consideration of a Deferred Prosecution Agreements scheme in Australia. Public Consultation Paper* (page 4) available at: https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf

application is complicated. Having regard to this, a number of domestic and international evaluations recommended strengthening them.

What policy options are being considered?

To this end, the following policy options are available to the Government.

Option 1: Maintain the status quo.

Option 2: Reform whistleblower protections in the *Corporations Act 2001* (Corporations Act) only.

Option 3: Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

What is the likely net benefit of each option?

Option 1 - **Maintaining the status quo**

This option results in the current corporate whistleblower protections continuing to be sparingly used and little incentive for insiders to share potentially important information with regulators and law enforcement agencies. This option does not impose a regulatory cost on any entity. However, the benefits the will follow an improved whistleblower protection regime will not be realised.

Option 2 - **Reforming whistleblower protections in the Corporations Act only**

This option strengthens protections for people who report breaches of the Corporations Act. As such, this option encourages whistleblowers to come forward.

However, by amending the Corporations Act only (in isolation of other statutes which relate to banking, insurance and superannuation) these reforms have limited scope as they only provide protections for whistleblowers making disclosures in relation to breaches of the Corporations Act, as opposed to breaches of any other financial sector legislation within the remit of ASIC and APRA or corporate misconduct more generally . This fragmented legislative setting continues to result in:

- a lack of certainty for whistleblowers as to the operation of the whistleblower laws and the protections available to them;
- gaps in protections in the existing law which result from the current piecemeal approach; and
- inconsistent approaches to handling disclosures between different statutes and regulators.

The regulatory cost of this option is expected to be approximately $15.6 million per annum in total.

Option 3 – **Reforming and consolidating into the Corporations Act whistleblower currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosure of corporate misconduct more generally.**

This option significantly strengthens and aligns whistleblower protections for people reporting breaches of financial sector legislation within ASIC and APRA's areas of responsibility and corporate misconduct more generally.

In addition to the benefits of Option 2, Option 3 ensures a consistent approach to whistleblower protections in the corporate and financial system and greater certainty of protection for whistleblowers who are now guided by a single statue when inquiring about their protections. This reduces the risk of a

whistleblower having no statutory protection if he/she discloses misconduct that is not captured by the existing, fragmented regime.

The regulatory cost of this option is expected to be approximately $15.4 million per annum in total. This figure is slightly lower than Option 2, as the consolidated whistleblower regime will be more easily interpreted by companies when developing their whistleblower policies.

Who will be consulted and how will they be consulted?

On 20 December 2016, the Minister for Revenue and Financial Services released the Review of tax and corporate whistleblower protections in Australia consultation paper. The paper sought public comment to assist the Government with the introduction of appropriate protections for tax whistleblowers and in assessing the adequacy of existing whistleblower protections in the corporate sector.

In addition, the Parliamentary Joint Committee on Corporations and Financial Services undertook an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. Its final report, tabled on 13 September 2017 made a number of recommendations to strengthen whistleblower protections.

These consultations informed the development of final legislation, which was released for public consultation on 23 October 2017 as the Treasury Laws Amendment (Whistleblowers) Bill 2017. The Bill contains provisions related to both corporate whistleblowers (consistent with Option 3), and tax whistleblowers. Targeted consultation with industry stakeholders informed the regulatory impact calculations in the RIS.

In addition, the Government established a panel of experts which provided feedback on the draft legislation. The panel also assessed the recommendations made by the Parliamentary Inquiry in the context of the legislation.

What is the best option from those considered?

The Government's preferred option remains to strengthen and consolidate into the Corporations Act whistleblower protections currently available across the financial system under legislation within the remit of ASIC and APRA, and expand protections to disclosures of corporate misconduct more generally (Option 3).

Maintaining the status quo (Option 1) will not impose any additional regulatory costs. However, under these circumstances, protections available to corporate whistleblowers will remain inadequate.

Reforming whistleblower protections in the Corporations Act only (Option 2) would represent a significant improvement in Australia's corporate whistleblower protections. However, this legislative setting would remain fragmented, inconsistent and confusing for potential whistleblowers, and will not provide for broad coverage of disclosures of corporate misconduct. The effectiveness in encouraging whistleblower disclosures would be limited. Therefore, Option 2 will not effectively address the policy problem.

In contrast, extending the protections across financial system legislation and corporate misconduct generally and consolidating into the Corporations Act (Option 3) would simplify and improve the effectiveness of Australia's corporate whistleblower protections. Option 3 and is more likely to deter corporate crime and also results in lower expected compliance costs to industry compared to Option 2.

How will the chosen option be implemented and evaluated?

Legislation is required to implement this proposal. As above, the reforms will be introduced as part of the Treasury Laws Amendment (Whistleblowers) Bill 2017.

The success of the whistleblower protection reforms will be evidenced by an increase in protected whistleblower disclosures which instigate or materially assist investigation and prosecution of corporate crime.

The change in regulatory burden on business has been quantified using the Regulatory Burden Measurement framework and an appropriate consultation plan is described. A regulatory offset has not been identified. However, Treasury is seeking to pursue net reductions in compliance costs and will work with affected stakeholders and across Government to identify regulatory burden reductions where appropriate.

I am satisfied that the RIS addresses the concerns raised in your letter of 10 November 2017. Specifically, the RIS presents the potential benefits of the reform options without putting an estimated figure on the expected reduction in corporate crime. In addition, the RIS now more specifically identifies the sources of stakeholder feedback.

Accordingly, I am satisfied that the RIS now meets best practice consistent with the Australian Government Guide to Regulation.

I submit the RIS to the Office of Best Practice Regulation for formal assessment.

Yours sincerely

Diane Brown
Acting Deputy Secretary
Markets Group