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Committee Secretary
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

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Dear Secretary

ACCC submission to the Inquiry into Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

I welcome the opportunity to make a submission to the Senate Economics Legislation Committee *Inquiry into Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (the Bill) (the Inquiry). In February 2017, we made a related submission to the Parliamentary Joint Committee on Corporations and Financial Services [Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors](#)¹. This submission should be read in conjunction with that earlier submission (a copy of which is attached).

The Australian Competition and Consumer Commission (ACCC) is Australia's national competition and consumer protection enforcement agency. Our role is to enforce compliance with the *Competition and Consumer Act 2010* (CCA) and the Australian Consumer Law with a view to ensuring that Australia's market economy works for the benefit of all Australians.

Contraventions of the CCA often involve coercive or covert behaviour that is difficult to detect and litigate without the assistance of whistleblowers. While we have an [ACCC immunity and cooperation policy for cartel conduct](#) that provides for criminal and civil immunity to the first eligible party to disclose cartel conduct, strengthening Australia's whistleblower protection regime is likely to give those considering disclosing information greater certainty and the confidence to approach the ACCC. Enhanced whistleblower protections is likely to lead to increased detection of contraventions of the CCA, higher quality material being provided to us and enable us to achieve investigative efficiencies.

Therefore, we support the introduction of a national whistleblower protection regime that is broad and inclusive. To make such a regime effective:

- The class of persons that can qualify for protection under the whistleblower regime should be broad:

¹ <https://www.accc.gov.au/system/files/ACCC%20submission%20-%20Inquiry%20into%20whistleblower%20protections.pdf>

- The scheme should apply to any person that provides or proposes to provide information to a regulator or law enforcement body that could assist a government agency in its investigation of potential breaches of the law.
- The scheme should not be limited to persons that have or have had a commercial relationship with the disclosed upon entity.
- Protection should be linked to the type of information disclosed not the state of mind or beliefs of the discloser.
- The scheme should apply to information provided about potential breaches of a Commonwealth or State or Territory Law.
- Protection should be available even where the disclosure is not made to the “correct regulator”.
- The scheme should protect whistleblowers for positive acts of retributions and omissions (e.g. a refusal to renew a contract for reasons of assistance being given to authorities) and *threats*
- The scheme should provide discretion for the regulator or law enforcement body to take action on behalf of the discloser for retributive acts, omissions or threats.

The Bill, if passed, will be an important step in moving to a national whistleblower protection scheme. It provides greater and more consistent protections for a broad range of whistleblowers seeking to disclose contraventions of a range of financial sector legislation.

However, the Bill could be improved by:

- Providing protection for the disclosure of civil and criminal contraventions of a broader range of legislation
- Expressly stating that detriment (section 1317AC(6)) can include acts, omissions and threats
- Expressly empowering prescribed regulators to take action on behalf of a whistleblower for detriment suffered by the whistleblower because of a disclosure.

The ACCC should not be listed as a prescribed body in the current Bill

While it runs counter to our above view that whistleblowers should not be required to disclose to the “correct regulator” to receive protection, on balance, we support the ACCC not being listed as a prescribed body² in the current Bill.

The Bill is limited to providing protection for disclosures about contraventions of the listed financial sector legislation, which does not include the CCA. Disclosures about conduct that breaches the CCA will only be protected if the disclosure relates to a criminal offence punishable by 12 months or more imprisonment³. Therefore, only disclosures made to ASIC or APRA about cartel conduct and a limited amount of other misconduct⁴ are eligible for protection under the Bill.

The number of cartel conduct disclosures made to ASIC or APRA are likely to be small. However, if we are listed as a prescribed body, it is possible that we would receive a high

² Under Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 section 1317AA(1)(b).

³ Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, section 1317AA(5)(d).

⁴ Other misconduct in the CCA punishable by 12 months or more imprisonment includes: failure to comply with, or proving false or misleading information in response to, compulsory information gathering powers (sections 133G, 155(6A), 160, 162); ACCC staff improperly disclosing protected information (sections 95ZP and 95ZQ, Pt 10 section 10.89); failure to cooperate with search and seizure functions (sections 135L and 154R) and misuse by ACCC staff of search and seizure powers (section 154Z).

volume of disclosures that would need to be referred to ASIC, APRA or elsewhere. This referral process is likely to lead to unnecessary delay and concern for the whistleblower.

On those small number of occasions that ASIC and APRA do receive a protected disclosure about cartel conduct it is critical to ensure that there is no legal or logistical barriers to ASIC, APRA and the ACCC cooperating and sharing information.

The Bill could be improved by protecting disclosures about other serious misconduct likely to impact the financial sector

As noted above, we support including the CCA in the list of legislation at section 1317AA5(c). If the CCA was included we would support the ACCC being a prescribed agency. Including the CCA would provide for the protection of other serious misconduct including:

- exclusive dealing
- misuse of market power
- concerted practices that substantially lessen competition
- unconscionable conduct
- misleading representations

These classes of misconduct are detrimental to Australian consumers, businesses and the economy and protecting disclosure of information relating to such conduct would improve our ability to detect and prevent it.

An example of conduct relevant to the financial sector that would qualify for a protected disclosure if the CCA were included in the Bill is false or misleading representations about real estate wealth creation strategies like those engaged in by [We Buy Houses Pty Ltd](#)⁵.

On 11 August 2017, the Federal Court found that We Buy Houses Pty Ltd (We Buy Houses) and its sole director, Rick Otton, made false or misleading representations in promoting a number of wealth creation strategies involving real estate.

The Court found that We Buy Houses did not have a reasonable basis for representing that, by following its strategies, consumers could:

- buy a house for \$1, without needing a deposit, bank loan or real estate experience, or using little or none of their own money
- create passive income streams through property and quit their jobs
- build a property portfolio without their own money invested, new bank loans or any real estate experience, and
- start making profits immediately and create or generate wealth.

The Court found that We Buy Houses failed to sufficiently inform consumers that the strategies could only realistically be successfully implemented by a consumer who already owned real estate, or who was able to finance a bank loan.

The Court also found that Mr Otton had made false or misleading representations that he had successfully implemented the wealth creation strategies he taught. In addition, a book authored by Mr Otton, and websites operated by We Buy Houses and Mr Otton, included testimonials from 'students' claiming they were able to buy a house for \$1 which the court found were false or misleading.

⁵ <https://www.accc.gov.au/media-release/property-spruiker-made-false-or-misleading-representations>

Passage of the Bill should not preclude further consideration of strengthening Australia's whistleblower protection regime

As noted above we support the introduction of a broad-ranging whole-of-economy whistleblower protection scheme.

Whistleblowing often involves significant personal and professional risk to the discloser. These risks are a powerful disincentive and often prevent people from coming forward and, therefore, regulators and law enforcement bodies from detecting and preventing serious misconduct. While we recognise the Bill is a useful step on the way to a comprehensive scheme I hope that further reforms to strengthen Australia's whistleblower protections continue to be considered.

Should you wish to meet or otherwise discuss this matter further, please contact Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, 02 9230 9130.

Yours sincerely



Rod Sims
Chairman