Min-it Software

Financiers Assocation of Australia

Joint Submission –

ASIC CP321: Whistleblower policies

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Background Information

This submission is made on behalf of the Financiers Association of Australia ("FAA") and Min-It Software ("Min-It") clients.

We welcome the opportunity to submit this submission on ASIC's consultation on Whistleblower policies.

The FAA, having been established since the 1930's, is an organisation for individuals and companies involved in the fields of finance and credit provision. The FAA's members are either non-ADI credit providers, providing personal loans, mortgage financiers or business financiers.

A number of the FAA numbers hold both an Australian Financial Services Licence ("AFSL") as well as an Australian Credit Licence ("ACL") with conditions enabling them to act as both a credit assistance provider and a credit provider.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-IT Software is a leading loan management software supplier to the micro-lending sector of the Australian market. Additionally, it has a number of clients providing motor vehicle finance as well business loans and consumer leases.

Whilst the majority of Min-it clients hold credit provider ACL's, a small number do hold an ACL with conditions enabling them to act as both a credit assistance provider and a credit provider.

The vast majority of Min-It's clients are not affiliated with any industry association.

Our concerns

Rather than respond specifically to all the questions, we shall detail our main concerns.

Small proprietary company definition

Whilst the majority of the FAA members and Min-It clients will not be affected by this legislation, there are some that could be should the proposed definitions be implemented.

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 ("WPA") requires public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy and make it available to their officers and employees by 1 January 2020. Our concerns lie primarily in the definition of "small proprietary company".

In our view, the definition for a small proprietary company is not well defined. Section 45(A) (2) of the Corporations Act states to be a small proprietary company, it must meet at least two of the following characteristics:

- the consolidated revenue for the financial year of the company and any entities it controls is less than $50 million;
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than $25 million; and
- the company and any entities it controls has fewer than 100 employees at the end of the financial year.

It doesn't state which two. In our view, the drafting could be vastly improved by meeting either:

- the consolidated revenue for the financial year of the company and any entities it controls is less than $50 million; or
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than $25 million;

and

- the company and any entities it controls has fewer than 100 employees at the end of the financial year.

The Consultation Paper ("CP") notes at 31 on page 16 that ASIC will only grant relief from the requirement to have a policy in limited circumstances "if the benefits in encouraging good corporate culture and governance are outweighed by reduced flexibility and unnecessarily high compliance costs". Given the WPA is stated as applying to large proprietary companies, the inference being taken is that any proprietary company not meeting the definition of a small

company must be a large company. We do not agree with this presumption. With the exception of meeting the requirement for fewer than 100 employees, the thresholds contained in the definition for a small proprietary company for what constitutes large proprietary companies should be doubled.

Unlisted public companies

The requirement for all public companies to have a whistleblower policy appears unfair when viewed in relation to the exemption for small proprietary companies. For example, one of our members has:

- an unlisted public company;
- $3 million turnover; and
- 7 employees.

We question why such entities should not be exempt also. It adds an additional cost burden and compliance requirement to small businesses for little apparent reason other than they are a public company. We have no issue with the requirement applying to listed entities but we recommend ASIC applying the exemption to unlisted public companies where they meet identical criteria as would apply to small proprietary companies.

Protection of anonymity

Although the draft policy does contain guidance that suggests ASIC is happy for a whistleblower policy to discourage whistleblowing in certain circumstances, we note the draft regime gives the protection of anonymity to complaints that may be made vexaciously or maliciously without penalty. For example, we are aware of numerous instances where companies may offer a dishonest employee the ability to resign rather than face possible criminal charges or go down a route of unfair dismissal due to dishonesty. Other examples may occur in the event of disgruntled business partners or where divorce proceedings that are in train.

These provisions give such former aggrieved employees or executives the ability to later scurrilously attack the company's business, reputation and integrity with almost total impunity.

This may lead to unintended consequences. We believe such claimants should be subject to a penalty regime to be determined where vexacious or malicious intent can be shown.

Not-for-profits and charities

Based entirely on past media attention, it is our view that most not-for-profit entities and charities should not, as a matter of principle, be exempted from the requirement to have a whistleblower policy. We believe it is important that the public have a high level of trust in such organisations but there have been a number of past instances that have revealed wrongdoings of all kinds by executives, administrators and staff of such entities.

For this reason, as this is merely a policy requirement, it is probably appropriate to assist only small charities having annual revenue of less than $250,000 with an exemption.