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By E-mail

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Your Ref

File No. 011910372

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Dear Ms Uy and Mr Hackett

Submission on Consultation Paper 321: Whistleblower Policies

Arnold Bloch Leibler (**ABL**) is pleased to provide this submission in response to the Consultation Paper 321 – *Whistleblower Policies* and the associated draft Regulatory Guide 000 – *Whistleblower Policies* (**Draft Guidance**) released by the Australian Securities and Investments Commission (**ASIC**) on 7 August 2019.

Summary

ABL supports ASIC's efforts to provide practical guidance on how entities can establish robust and clear whistleblower policies for the purpose of encouraging disclosure of wrongdoing.

We agree with ASIC that a whistleblower policy will not be meaningful and effective unless it is implemented consistently and applied in practice.

However, we are concerned that the Draft Guidance is overly prescriptive which, in our experience, can contribute to a complacent compliance culture and a 'tick the box' mentality within entities.

The fundamental risk, we believe, is that if an entity is to adopt all of ASIC's recommendations and 'good practice' guidance, the resulting whistleblower regime implemented by the entity will not achieve the desired outcome of improving risk management and corporate governance. Whistleblower policies will be too long, detailed and complex which will potentially discourage employees to disclose wrongdoing.

We are also concerned that, while ASIC makes it clear that its good practice guidelines on how an entity should establish, implement and maintain a whistleblower regime are not mandatory, real world pressures on companies will effectively render them so.

Clarity is the key

The central purpose of a whistleblower policy is to encourage disclosure of wrongdoing (and to deter wrongdoing in the first place).

As ASIC states in its Draft Guidance, it is good practice for a whistleblower policy to be clear and easy to understand for the user of the document, and should cater to different users.

However, there appears to be a fundamental inconsistency between this recognition and the approach taken by ASIC in the body of the Draft Guidance. If an entity were to adopt all of ASIC's recommendations and guidance, that entity's whistleblower policy would be too long, detailed and complex for most employees to follow and would potentially discourage them from disclosing wrongdoing they have observed.

ASIC's own research in relation to prospectus drafting for IPOs (Report 540) supports the view that brevity and plain language in entities' documentation makes them more user friendly and, ultimately, more effective. The research found that the length of a prospectus "*contributed to difficulties in understanding the document or even attempting to read large parts of it*".

In the same way, many employees could well face the same difficulties in comprehending, let alone acting on, a long-form whistleblower policy.

In finalising its Draft Guidance, we recommend that ASIC should be mindful to advise entities how to develop and communicate clear, concise whistleblower polices that comply with the new obligations under the Corporations Act. We also recommend ASIC reassess the extent to which its good practice guidance should form part of the whistleblower policy which is provided to employees.

'Good practice' guidance

An option that ASIC might consider in simplifying the Draft Guidance is to rename the additional advice currently described as 'good practice' guidance.

While the Draft Guidance states that the good practice guidance is "not mandatory", the reality is that if an entity doesn't incorporate advice described as 'good practice' guidance into its whistleblower policy, the entity's board risks being criticised for failing to follow best practice.

This concern is particularly relevant for listed entities who will need to publicly disclose their whistleblower policies in order to meet 'recommendations' under the ASX Corporate Governance Principles.

In the current environment, where proxy firms readily condemn listed entities for not following Corporate Governance Principles to the letter, entities will be afraid to adopt a whistleblower policy that only satisfies the mandatory guidance.

The Draft Guidance, in its current form, risks resulting in a 'one size fits all' approach to whistleblower compliance that will not achieve its laudable intention.

It is overly prescriptive both in terms of the content of an entity's whistleblower policy and the way in which the entity goes about establishing, implementing and maintaining that policy.

In order for a whistleblower regime to be effective it is critical that policies do not become standardised. Provided that an entity complies with the Corporations Act, it should be a matter for the board to design and implement an appropriate whistleblower regime that is most suitable to be effective in the context of its particular circumstances.

The focus of ASIC's final guidance – which should be reinforced throughout the regulatory guide – should be on encouraging entities to adopt a process that is most likely to have the desired impact under the new whistleblower legislation because it is aligned with the entity's culture, pre-existing internal procedures and corporate governance framework, organisational structure, size and geography.

ABL welcomes the opportunity to provide further submissions and participate in further consultation in respect of the Draft Guidance.

Yours sincerely
Arnold Bloch Leibler

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Partner