

17 September 2019

Andivina Uy
Senior Adviser, Strategic Policy

Greg Hackett
Senior Manager, Office of the Whistleblower

Australian Securities and Investments Commission
Via email: whistleblower.policy@asic.gov.au

Dear Andivina and Greg

[Australian Securities and Investments Commission Consultation Paper 321: Whistleblower policies](#)

On behalf of the Australian Council of Superannuation Investors (ACSI), I am pleased to make this submission in relation to Consultation Paper 321: Whistleblower policies (Consultation Paper).

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) investment issues on behalf of our members. Our members include 39 Australian and international asset owners and institutional investors. Collectively, they manage over \$2.2 trillion in assets and own, on average, 11 per cent of every ASX200 company, on behalf of millions of beneficiaries.

This submission follows recommendations that we submitted to the Parliamentary Joint Committee on Corporations and Financial Services in February 2017, and our submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 in February 2018. In these submissions, we raised a set of priorities for whistleblowing reform from an investor perspective.

As a representative of long-term investors, we strongly support greater robustness in whistleblowing policies and systems. Research on whistleblowing systems demonstrates that they are only effective if there are robust safeguards for those who speak up,¹ Approximately 22 per cent more fraud is detected through internal whistleblowing systems compared to internal audit systems.²

In summary, we support the draft Regulatory Guide. We also suggest a number of additions to enhance the draft. Our detailed comments are set out in this submission. I trust they are of assistance.

Please contact me or Kate Griffiths, ACSI's Executive Manager -Public Policy and Advocacy, should you require any further information on ACSI's position.

Your sincerely

A handwritten signature in black ink, appearing to read 'Louise Davidson', is written over a horizontal line.

Louise Davidson
Chief Executive Officer

¹ Latimer, Paul and Brown, AJ, 'Whistleblower Laws International Best Practice', (2008), 31 (3) UNSW Law Journal, 766.

² The American Association of Certified Fraud Examiners research indicates that 39.1 per cent of fraud is detected through internal whistleblowing systems (compared to 16.5 per cent of internal audit systems). American Association of Certified Fraud Examiners, Developing an Integrated Anti-Fraud, Compliance, and Ethics Program (2018).

Overview

Codes of conduct and whistleblowing systems are key foundations of corporate culture and ethical conduct. In March 2018, we released our research report "[Codes of Conduct, Whistleblowing and Corporate Culture](#)". Our report refers to effective whistleblowing systems upholding the principles of anonymity, confidentiality and no retaliation. Effective systems will be third-party run, available 24-hour in all relevant languages, and accessible to contractors and suppliers.³ Effective design and implementation encourages ethical performance by employees and protects against inappropriate behaviour, however the quality and implementation of these resources is also critical.

Leading practice suggests that company boards should be provided with reports which monitor a range of metrics including the rate of use of the system, the rate of substantiated claims and the areas of the company (both in terms of business line and geography) that are most frequently implicated in the reports.

Our research highlighted gaps between leading and existing whistleblowing practices. Accordingly, we support the proposed Regulatory Guide to encourage good practice in whistleblowing policies. We offer additional perspective on how the draft guidance can be strengthened.

We also support the recommendations on whistleblowing set out in the ASX Corporate Governance Principles and Recommendations 4th edition.

Our response to the consultation questions are set out below.

Response to Section B consultation questions

Draft Regulatory Guide: Section B

Question 1

We welcome guidance that requires disclosure of an entity's whistleblower policy. Generally, we support Section B of the Regulatory Guide and make further, more specific comments below.

- While a standalone whistleblower policy for entities with Australian operations may be warranted in some instances, where entities operate across jurisdictions, we think there is merit in considering having one policy that operates to the highest standard across all jurisdictions (RG 000.36).
- While we agree that the matters not covered by a policy should be clear, it is important not to discourage disclosure. We would suggest making this clear at RG 000.37 so that it reads: "In addition, it should outline the types of matters that are not covered by the policy *without discouraging disclosure.*"
- RG 000.45 should be more balanced by including examples of conduct that may not be unlawful but would still qualify for whistleblower protection, for example, dishonest or unethical behaviour and practices, harmful conduct, or conduct that is impermissible under the entities' standards or code of conduct. Additional examples would add context and be consistent with RG 000.41 that says "[a]n entity's policy should explain that disclosable matters include conduct that may not involve a contravention of a particular law."

K, Kobi, 'Elements of an Effective Whistleblower Hotline', Harvard Law School Forum on Corporate Governance and Financial Regulation (October 2014).

- We suggest that RG 000.48 be expanded to include the effect of false reports on the discloser's reputation, as well as the entity's reputation.
- In addition to including types of disclosure not protected under whistleblower protections, at RG 000.49 we suggest including commentary noting that an entity may wish to encourage additional disclosure in order to set the highest standard of ethical conduct. Legislation sets a minimum standard and comments suggesting that an entity's policies may include broader protection (than that under the Corporations Act) would encourage entities to set a higher standard for protection and support the entity's reputation for ethical conduct.
- At RG 000.62 we suggest including a reference to an entity's culture supporting the safety of disclosers by including a reference to culture, for example "[h]owever, the entity needs to ensure that its *culture*, policies, processes and procedures make it safe for disclosers to do so."
- We consider it good practice for all entities to authorise an independent whistleblowing service provider as an eligible recipient for receiving disclosures. This helps to avoid any potential conflicts of interest and can provide better protections to disclosers. We would therefore encourage all entities to adopt this practice (RG 000.82). It is often easier for employees and other stakeholders to use whistleblowing systems outside of work hours, and therefore we would also encourage reference in the Regulatory Guide to a 24-hour hotline.
- As mentioned above, it is important not to discourage disclosure, and we therefore suggest including reference to this when considering confidentiality (RG 000.119).
- It is important that anonymous disclosure is respected and maintained. Accordingly, a specific reference should be included at RG 000.144 to entities ensuring that anonymity is not compromised when providing regular updates.
- Fear of retaliation is a major barrier to whistleblowing and therefore the Regulatory Guide should emphasise that training should cover the procedures in place to prevent retaliation. Training should also encourage disclosure (RG 000.157 and RG 000.158). RG 000.163 could include reference to training including practical examples demonstrating circumstances where disclosure has led to positive outcomes for the entity and discloser.
- The Regulatory Guide would be enhanced by a signpost to the relevant provisions of the ASX Corporate Governance Principles that recommend disclosure of a whistleblowing policy (Recommendation 3.3) and for the entity to disclose, where appropriate, action taken to promote compliance and whether there have been material breaches of the policy during the reporting period and how they have been dealt with.

Question 4

Our view is that an entity's whistleblower policy should clearly identify the types of disclosures that qualify for protection, and those that do not. However, focus on only the matters that qualify for protection may encourage an overly-legalistic approach. Entities should be focused on encouraging disclosure and understanding any issues. Therefore, it may be useful for entities to include commentary on how the entity addresses matters that do not qualify for protection under the legislation, if they can do so clearly.

Question 5

We agree that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity.

Question 7

We agree the Regulatory Guide could include a statement discouraging deliberate false reporting under an entities' whistleblower policies. However, we also consider such a statement should be drafted in a way that will not discourage disclosers with genuine concerns or where there is doubt.

Question 8

We consider it good practice for all entities to authorise an independent whistleblowing service provider as an eligible recipient for receiving disclosures.