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Dear Diane

Guiding Principles — Improving protections for whistleblowers

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations (NFPs) and the public sector. Governance Institute members support legislation that encourages the disclosure of wrongdoing in companies, and believe that stakeholders, including individual employees and their representative bodies, should be able to freely communicate to senior management, the board and regulators their concerns about illegal or unethical practices and their rights should not be compromised for doing this.

Governance Institute welcomes the opportunity to comment on the Australian Bankers' Association (ABA) *Guiding Principles— Improving Protections for Whistleblowers* (the Principles).

We commend the ABA for developing the Principles, which will assist in building trust in the banking sector among the banks' key stakeholders and the general public. We consider that the Principles are consistent with the elements of an effective compliance program, for example, buy-in from leadership and tone from the top; effective policy/procedures; reporting/investigation process; and training and communication. We also consider that the Principles incorporate key features of good governance such as tasking the board with responsibility for approving the policy and ensuring it is adhered to. The ABA is also to be commended for allowing for disclosures about a wide range of issues, including unethical and improper behaviour and significant breaches of policies and codes of conduct, from a broad range of people extending beyond employees to contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees. We support the Principles providing for protection to be extended to any person who makes a good faith disclosure of alleged corporate wrongdoing.

Governance Institute also supports the ABA in its focus on providing protections (confidentiality and protection against retaliation), which is critical, and protecting whistleblowers who act honestly, reasonably and with a genuine belief in the information being disclosed, rather than on the whistleblowers' motivation in providing the information. That is, we agree that any Principles guiding a whistleblowing program should clarify that the motive of the whistleblower is not relevant, but the genuineness of their belief concerning the alleged illegal activity is relevant.

Governance Institute makes the following comments as regards specific aspects of the Principles.

Introduction

The Principles as currently drafted could apply to any organisation that wanted to adopt an effective whistleblowing policy. Governance Institute considers that the context in which these Principles have been prepared should be more clearly highlighted in the document, that is, the Principles have been developed to protect the interests of customers, following concerns about the disadvantage to customers of misconduct within banks. However, at present, customers are referenced in the Introduction in the first sentence only, which states that 'Australia's banks are putting in place comprehensive new measures to protect customer interests ...'. This reference is to a broad set of measures, rather than specifically to the Principles.

In the Introduction, the Principles state that 'It is critical that employees and others have the confidence to raise problems and speak up'. The footnote clarifies that 'Others includes contractors, consultants, suppliers, third party providers, secondees, brokers, auditors and former employees'. While we recognise that the Principles also clarify on pp 2-3 that they do not follow the United Kingdom system, which includes reporting by members of the public, as 'Australian banks, ombudsman schemes and regulators have well established and effective complaints handling and external dispute resolution processes that can be accessed by members of the public who wish to advise of suspected or actual misconduct or unlawful activity', the absence of customers beyond one mention in the first sentence (and paragraph 1.2 in Purpose) means that a key function of the Principles is unstated.

There is a strong emphasis in the Principles on protecting whistleblowers against retribution, which we support. We recognise that customers will not be internally penalised, as might employees or other stakeholders. However, a whistleblower who sees suspected or actual misconduct that disadvantages a customer should be able to make a disclosure and also gain protection from retribution. As presently drafted, the Principles do not clarify this.

Governance Institute recommends that the Introduction of the Principles should be amended to explicitly state that a key focus of a whistleblowing policy is to protect the interests of customers, which ultimately protects the interests of the organisation.

Purpose

In addition to being a key element of a culture of ethical behaviour, strong corporate governance and an effective compliance and risk management program, an effective whistleblowing policy also acts as a deterrent to poor conduct. We consider that bank employees are less inclined to engage in questionable conduct if they are aware that an effective whistleblowing program is embedded in the organisation. We therefore recommend that a reference to deterrence to poor conduct as a key element of an effective whistleblower policy be included in paragraph 1.2 of the Purpose.

Principle 3: Disclosure

As noted above, Governance Institute of the view that the Principles should highlight the need to protect the interests of customers.

We recommend that the ABA include (potentially under principle 3.2) suspected or actual misconduct that disadvantages a customer in the range of issues able to be reported and responded to.

Principle 3.1 refers to the whistleblower policy allowing for disclosure about a wide range of issues encompassing a range of people connected to the banking group and contains a list of

the range of people this applies to. Principle 3.2 then lists the range of issues able to be reported and responded to under the policy. However, the title does not reflect this order.

Governance Institute recommends that the title of Principle 3 be reordered so that it reads: 'The whistleblower policy allows for disclosures from a range of people with a connection to the bank on a range of issues'. Alternatively, the order of Principles 3.1 and 3.2 could be reversed, and the title could remain as it currently stands.

Principle 2: Bank executives demonstrate strong and visible leadership

Good governance requires board oversight of the whistleblowing policy and program. This in turn requires reporting to the board, usually via the audit and risk committee. We recognise that the board has the discretion to decide to which committee it delegates oversight and receipt of reporting, should such delegation occur.

The chair of an audit and risk committee would expect regular reports on the effectiveness of the whistleblowing program and also reports of any material incidences, even where full details of an incident may not be able to be disclosed. Importantly, the board should receive reporting without filtering by management of material incidences. It should not be a matter of management discretion as to whether the board receives such reports.

We recommend that a new paragraph be added to Principle 2 to provide for regular qualitative and quantitative reporting to the board or delegated board member (s) or committee on the effectiveness of the whistleblowing program as well as any material incidences and the status of any ongoing material investigations, even where full details of an incident may not be able to be disclosed. We note that a matter should not have to be called a whistleblowing complaint to be included in a whistleblowing report. This is a separate matter from paragraph 2.5, which covers summaries of whistleblower disclosures, where possible, reported through strict and transparent governance channels.

Principle 4: Reporting and investigation

Governance Institute considers that whistleblowing plays a critical role in identifying and stopping misconduct in the banking sector, but notes that it should be seen as a small, but vitally important, aspect of a company's overall program to ensure compliance with regulation and prevent and detect misconduct. An effective whistleblower policy cannot substitute for good internal controls and risk management processes. Our members' experience is that whistleblowing usually occurs when other avenues that already exist within organisations to deal with misconduct have been exhausted or failed or do not exist. A system of effective internal controls and risk management processes should enable employees to report issues of concern before they escalate into whistleblowing disclosures. A key role in relation to disclosures is the audit and risk committee, which is responsible for oversight of risk management and internal control.

While we recognise that paragraph 4.4 states, 'There are a number of specific channels available to the whistleblower for reporting and escalating concerns', we recommend that the ABA amend the Principles to provide that the whistleblower policy is part of the banks' existing policies and procedures of internal control and risk management, which would normally have oversight by the audit and risk committee or other appropriate committee. A whistleblowing policy and processes should be designed to promote the efficient and effective reporting of issues, including implementing controls that support a reporting channel hierarchy or a reporting process map, for example:

1. If possible and depending on the nature of your question or concern, first speak to your direct line supervisor or manager.
2. If you cannot speak to your line manager for whatever reason (for example, you don't feel comfortable or the concern relates to the manager), you should consider raising

your question or concern with a trusted business representative (for example, internal audit, compliance, legal).

3. If you feel you may be victimised or would prefer to anonymously report misconduct, then raise your concern in [company's] anonymous reporting channel/tool.

In order to eliminate ambiguity, we also recommend that Principle 4.3 be amended to read '*The whistleblower policy has explicit acknowledgement that the whistleblower may.....*'.

Governance Institute notes the importance of the policy providing for the whistleblower to feel free to communicate with regulators at any time in relation to the suspected or actual misconduct or unlawful activity. However, as stated above, we consider that as a matter of good corporate governance the banks should have effective structures for dealing with internal reporting of misconduct or illegal activity, which should make employees feel comfortable about fearlessly reporting wrongdoing.

Governance Institute considers the issue of resourcing and capacity to be critical to the effectiveness of a whistleblowing program. There is no better way for a bank to confirm its seriousness about making employees and others feel comfortable about fearlessly reporting wrongdoing than to provide adequate investment in resourcing of the program. Often, an issue is not handled well because provision has not been made to deal with any incidences that may arise, and employees are suddenly charged with addressing an issue while sustaining their dedicated responsibilities. This can lead to mishandling and escalation of an issue. Adequate resourcing and clarity of structure is critical to the success of a whistleblowing program.

While Paragraph 4.5 refers to the policy providing for the program to be structured and resourced to be effective, Governance Institute recommends that this could be strengthened.

Further to this, we note that detail on roles and responsibilities is covered in multiple sections of the Principles. The ABA may wish to consider a stand-alone Principle dealing with resourcing, structure, roles and responsibilities, and training in those roles and responsibilities, in order to provide clarity on these important issues and to highlight their importance.

We note that Principle 4.4 provides for the whistleblower to be taken to understand that it may be necessary for the disclosure to be shared with certain people or roles within the banking group. Principle 2.6 provides that a whistleblower consents to sharing of the disclosure if the circumstances allow. Governance Institute questions whether any whistleblowing policy is capable of 'deeming' the whistleblower to consent to sharing the information which they disclosed to third parties, particularly in light of the current provisions of the Corporations Act that impose confidentiality requirements on companies and their employees concerning whistleblower disclosures. We recommend that the ABA consider revising these paragraphs to accommodate the current prohibitions in the Corporations Act on sharing disclosures.

Principle 6: Training

Paragraph 6.2 currently provides for 'specialist training for executives, senior managers and employees responsible for key elements of the program'. Our members note that one of the major deficiencies in whistleblowing programs is the skills of those involved in internal investigations and those engaging with the whistleblower. Therefore, appropriate training or its absence can affect the effectiveness of any investigation undertaken by the organisation into the complaints as well as the treatment of the whistleblower.

Governance Institute recommends that an additional paragraph be included in the Principles providing for the training of employees charged with investigating whistleblower complaints and supporting the whistleblower.

Principle 7: Reporting framework

Governance Institute is of the view that the subheading 'Reporting framework' is not an appropriate descriptor of this Principle. The Principle deals with the banks' internal processes of monitoring and assessment of the whistleblower program, rather than reporting (currently dealt with in Principles 2 and 4).

We recommend that Principle 7 be retitled as 'Ongoing monitoring', as this more accurately reflects the content of this Principle.

Governance Institute notes that Principle 7.2 requires banks to design and implement mechanisms to monitor the awareness and effectiveness of their whistleblower programs and policies. We consider that in order to adequately monitor awareness of the banks' whistleblowing policies and the effectiveness of their programs, the banks will need to actively monitor the attitudes of their employees. That is, an important factor in the success or otherwise of a whistleblowing program is how employees feel about it. In large and complex organisations, this is difficult to assess without formal mechanisms in place to capture those sentiments.

We recommend that Principle 7.2 be amended to provide also for the monitoring and measurement of the attitudes of the banks employees toward the whistleblower programs and policy.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Fox', with a stylized flourish above the 'x'.

Judith Fox FGIA
National Director, Policy & Advocacy