

28 November 2016

Ms Amanda Pullinger  
Policy Director  
Australian Bankers Association  
Level 3, 56 Pitt St  
Sydney NSW 2000



Dear Amanda,

**RE: Draft Guiding Principles – Improving Protections for Whistleblowers**

I refer to your email of 11 October 2016 where you invited feedback from the Finance Sector Union on the consultation draft of the principles developed. I appreciate your patience in allowing an extended consultation period on this very important matter.

The FSU commends the ABA and its members for the commitment to having the highest standard of whistleblower protections and appreciates the implicit acknowledgement of the need to have better protections as embodied in the title of the draft document. This is a significant task.

We have now completed an extensive consultation exercise among our elected local union council members in all states.

While we accept that it might not be deemed appropriate to acknowledge the shortcomings of current protections in this draft, it is important for the industry to confront the shortcomings of the current arrangements. It is through confronting these shortcomings that one can best assess whether the intended principles will serve their purpose.

The union is broadly supportive of section 2, Bank executives demonstrate strong and visible leadership as a positive step towards better practical operation of the whistleblower policies of banks. This added emphasis on practical measures should be matched with stronger reporting and accountability of the operation of the whistleblower policy.

In relation to the note accompanying section 3 of the Draft Guiding Principles and the rationale for not adopting the UK system, it is apparent that contrary to the view expressed in the draft, the current complaints handling systems are not, "effective complaints handling and external dispute resolution processes." This is the only conclusion open to the industry when considering the recent report of the House of Representatives Economics Committee review of banking. The ABA should either find a new rationale for not following the UK model or change course and follow the UK model more closely.

The feedback that we have received has been characterized by a widespread concern that current whistleblower protection policies are not well implemented and any improvement must facilitate an obviously improved practice in order to rebuild trust and confidence in whistleblower protections. The Draft Guiding Principles seem to largely miss this point and much of the document is more focused on broader whistleblower policy rather than improving protections for whistleblowers.

Based on the feedback we've received from our members who work in the industry on a day to day basis it is clear that the first steps in providing improved protections for whistleblowers should include;

1. Strengthened immunity for whistleblowers – we have feedback that suggests that some whistleblowers have been subjected to increased scrutiny that has seen them suffer adverse consequences because of relatively minor procedural infractions that have occurred in the course of discovering the alleged behavior that they have subsequently reported.

The current draft provisions at 5.1 and 5.3, when read together, offer very little certainty to a whistleblower. This can be addressed by amending 5.3 to make it subject to 5.1. The word "serious" should be inserted before the word "misconduct" in 5.3

2. Effective guarantees to whistleblowers – Draft Guiding Principles clause 5.2 is reactive and by failing to proactively defend whistleblowers, this leaves it to the whistleblower alone to report retaliation. The goal must be to prevent retaliation, not just deal with it once it is reported by the whistleblower. We have anecdotal reports of whistleblowers having performance ratings downgraded, performance bonuses denied and onerous new reporting regimes imposed after they have reported gross misconduct and/or illegal activity.

The clause 5.2 should extend a commitment to support and protect the whistleblower for an extended time after they have submitted their reports.

3. Employment protection – the Draft Guiding Principles notes the differences between US and Australian law as a reason for not recommending a compensation scheme for whistleblowers. FSU acknowledges the reality that the US system seems to effectively concede that a whistleblower will lose their job when they blow the whistle. We can do better. However, Australian employment protection law does not cover the field when it comes to whistleblowers. The unfair dismissal jurisdiction of the Fair Work Commission (FWC) does not provide protection to all workers in banks who might become whistleblowers. Some employees are paid above the "high income threshold" of that jurisdiction. Some workers are not "employees" of the banks (e.g. labour hire staff, consultants) and therefore are also beyond the jurisdiction of the FWC.

There should be a compensation scheme for those whistleblowers who suffer financial or employment loss as a result of their whistleblowing. It should be independently administered with funding for the administration covered by the ABA and other relevant industry bodies (e.g. Insurance Council of Australia, ASFA). Claims should be efficiently handled without resorting to legalistic frameworks and compensation awarded should be paid by the relevant bank, insurer, super fund that the work was being performed for. This new body should be developed with a commitment to support from the industry at a new point in section 5 of the Draft Guiding Principles.

Legislation should be enacted federally to give effect to this comprehensive employment protection.

## General Comments

The FSU supports a trusted whistleblower framework operating within our industry as a core element of a healthy work and business culture. Much of the feedback received from our members indicates that the current frameworks and the current policies of the banks lack trust because;

1. Workers have experienced, seen or heard of practices that suggest a significant gap between policy and practice where the policy promises safety but the practice is that being a whistleblower is risky. This includes one employee being warned by middle management not to go ahead with a report. Another employee was subjected to harsh micro-management and new onerous procedures after reporting suspected unlawful activity by a well-liked and high performing co-worker.
2. Some staff who have acted as whistleblowers report that they have not seen or heard what happened with the matter. This has left open the view that nothing happened and this in turn undermines the credibility of both the whistleblower processes and the integrity of bank commitments to ethical business practices.

In response to both the of the above general comments the FSU recommends that part 7 of the Draft Guiding Principles be expanded to include regular reporting of successes flowing from whistleblower reports. While these reports must respect the anonymity of whistleblowers and they must adhere to libel laws, it is possible to report outcomes both specifically to whistleblowers and generally to other employees. This will help build trust and confidence in the whistleblower system. Other than to employees, these reports should be made to an independent statutory body.

Thank you again for the opportunity to consider the Draft Guiding Principles. We are available for further discussion on the matters raised here and in the drafts. Please contact me directly (02 9320 0005) with questions or a suggested time to meet if you believe this would be of assistance.

Yours sincerely



Geoff Derrick  
National Assistant Secretary