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Committee Secretary
Parliamentary Joint Committee
on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

10 February 2017

Dear Sirs

Whistleblower protections in the corporate, public and not-for-profit sectors

On 30 November 2016, the Senate referred an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors to the Joint Parliamentary Committee on Corporations and Financial Services for report by 30 June 2017 (**Inquiry**).

Whistleblowing is considered one of the most effective means to expose and remedy corruption and other wrong-doing in the public and private sectors.[1]

Clifford Chance welcomes the opportunity to provide submissions in relation to the Terms of Reference established for the Inquiry.

Clifford Chance

We are one of the world's pre-eminent law firms, with more than 3,300 lawyers across five continents led by a single integrated partnership. We have been named the number 1 law firm in Chambers Global Top 30 for the past three consecutive years (2014 to 2016).

We have significant experience working with clients globally in relation to whistleblower matters. Amongst other things, we have undertaken extensive work advising clients in relation to whistleblower reforms, including the recent UK. Financial Conduct Authority (**FCA**) and Prudential Regulation Authority (**PRA**) whistleblower reforms in the financial services sector.

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[1] Simon Wolfe, Mark Worth, Suelette Dreyfus, A. J. Brown, 2014, Whistleblower protection laws in G20 countries, Blueprint for Free Speech, viewed 18 January 2017, <https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pd>.

Terms of Reference

Our views and recommendations expressed below are confined to the Australian commercial and jurisprudential context. Further, the content of our submission is not intended to be exhaustive, nor does it constitute legal advice.

1. *The development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, taking into account the substance and detail of that contained in the Registered Organisation Commission (ROC) legislation passed by the Parliament in November 2016.*

   Australia's current whistleblower regime is fragmented, partial and under-utilised. A new, comprehensive regime which promotes appropriate whistleblowing, including through robust protections, would benefit Australia in our view.

   We have considered the (ROC) legislation passed by Parliament in November 2016. Our recommendations take into account its substance and detail, while also factoring in the differences of the corporate, public and not-for-profit sectors.

2. *The types of wrong-doing to which a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors should apply.*

   There is a balance to be struck as to the types of wrong-doing that should attract protection, including financial compensation (see part 4). The key features of any regime, such as adequate resourcing, and attracting relevant and reliable information, may be adversely affected by an over-extended regime.

   At a minimum, protections (which should be robust, and extend beyond the prevention of employer reprisals to include immunities, etc) should apply to:

   (a) individuals or entities (whether or not they report anonymously (see part 11)) who are:

      (i) current or (recently) former appointees, officials, officers, employees, volunteers, contractors, financial services providers, accountants, tax advisers, clients, auditors or business partners;

      (ii) who hold an "honest belief" (i.e. an objective test) irrespective of whether a disclosure is made in "good faith" based upon:

(A) "reasonable grounds", which should be more than opinions or rumours, made to either their employer, a designated person/entity (e.g. Ministers, etc) or the Whistleblower's Office (a new entity that we suggest should be created - see part 5); or

(B) "clear and convincing grounds" made to a third party/media (see part 9), unless the disclosure to the third party is for the purpose of making a report to the Whistleblower's Office, and not for profit, e.g. workers who receive payment from a media organisation.

We note a tiered disclosure regime exists in the UK in the sense that disclosures to different categories of recipients are permissible in various, different circumstances prescribed by statute. Each tier, which starts with employers and ends with the public, requires an increasingly higher threshold to be met for disclosures to be protected (see part 9); and

(b) who provide factual information, as opposed to an unsubstantiated allegation, which discloses an actual or potential:

(i) indictable criminal offence, for the corporate and not-for-profit sectors, whether on an individual or entity level;

(ii) "disclosable conduct", as defined in the *Public Interest Disclosure Act 2013*, for the public sector. The report to Parliament on the effectiveness of the *Public Interest Disclosure Act 2013* of 20 October 2016 found that the categories of "disclosable conduct" were too broad and that this mechanism to capture wrong-doing could be confined. However, the categories of "disclosable conduct" should be more onerous than that for other sectors, as breaches of the trust reposed in public servants are perceived by the public as very serious;

(iii) breach of the key punitive sections of the following legislation (all of which will be in the "public interest", to pick up on a recent UK issue):

(A) *Corporations Act 2001*, including the Listing Rules;

(B) *National Consumer Credit Protection Act 2009;*

(C) the main banking, insurance and superannuation legislation set out in the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007*;

(D) *Competition and Consumer Act 2010*;

(E) *Income Tax Assessment Act 1936* and related taxation laws;

(F) *Anti-discrimination Act 1977;*

(G) *Bankruptcy Act 1966;*

(H) *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*;

(I) *Work Health and Safety Act 2011*; and

(J) *Environment Protection and Biodiversity Conservation Act 1999*; or

(iv) action which could cause substantial risk to public health and safety.

3. *The most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law.*

Preferably, there would be new legislation that comprehensively incorporates whistleblower protections. This approach would be clearer and more streamlined than seeking to amend the existing patchwork of legislation; would be "user-friendly" to assist whistleblowers' understand their rights (and should clearly specify matters to which protections will not apply, e.g. matters of national security); and can incorporate additional matters, such as the creation of an independent Whistleblower's Office (see part 5). This approach will require revoking or harmonising existing legislation, such as the *Public Interest Disclosure Act 2013*. Employment legislation may also need to be amended to import whistleblower protections, which occurred in the UK with the advent of the *Public Interest Disclosure Act 1998.*

4. *Compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America.*

We consider appropriate financial compensation arrangements are an important and necessary feature of any regime to ensure that whistleblowers are appropriately

supported and incentivised, including for any loss suffered as a result of their disclosure. Under the U.S. regulatory system, whistleblowers have a significant financial incentive to bring matters to the attention of the regulators. The U.S. Securities and Exchange Commission's dedicated Whistleblower's Office can award eligible individuals who disclose information which leads to an enforcement action in which over USD 1 million in sanctions is ordered up to 30% of the money collected. In the U.S. Fiscal Year 2016 that office awarded USD 57 million to 13 whistleblowers.

Whilst the U.S. favours a bounty system, there are a number of other ways in which compensation could be structured, including on the basis of loss of reasonably expected income (which is not necessarily lifetime income), where whistleblowing would affect a person's ability to continue their employment (as opposed to continuing with an existing business services arrangement). Like the U.S. regime, we consider compensation should not be limited to individuals in Australia.

Whistleblowers may jeopardise their personal circumstances, including their employment status, relationships, personal safety and well-being by taking action. It is likely that many potential whistleblowers hold concerns about the potential consequences of reporting which are likely to be alleviated by an appropriate financial compensation regime. While there may be concerns about the practical and moral hazards associated with the compensation of whistleblowers (e.g. opportunistic reporting, illegally obtaining information, etc), these risks can be managed, and are preferable to an under-utilised regime. Culpable whistleblowers, who may have helpful and relevant information, may be encouraged to report by incentives other than financial compensation, such as immunity or leniency (see part 10).

The (UK's) PRA and FCA joint report to the Treasury Select Committee in July 2014 concluded that a U.S.-style bounty system *"benefited only the small number whose information leads directly to successful enforcement action...They provide nothing for the vast majority of whistleblowers"*. (There is no provision for the payment of financial incentives to whistleblowers in the UK.) There are a number of reasons why Australia might consider a compensatory mechanism that is not linked to regulatory enforcement outcomes, which are inherently uncertain and feature penalties that are significantly less in Australia than other jurisdictions such as the U.S. This approach would also remove some of the potential for distortions from bounties (e.g. bypassing internal mechanisms, entrapment, etc), including those which separately arise through the U.S.' *qui tam* provisions, which enable an individual to sue on behalf of the Government and claim a percentage of the overall reward (as opposed to directly from regulatory enforcement action). A whistleblower fund could be set up (perhaps similar

to the Fair Entitlement Guarantee for employees of insolvent companies), partially funded by enforcement action recoveries which result from whistleblower disclosures.

A low threshold should exist for this new form of compensation regime; a whistleblower should not have to establish a breach of whistleblower protections (e.g. they suffered an adverse employment action; see part 6) in order to claim compensation. The characterisation of protected disclosure in part 2 above will provide some materiality threshold; however, this should receive ongoing scrutiny to manage resources. A compensation cap could also be considered to manage resources, although if set too low it could dissuade senior employees with access to relevant information from reporting. Practically, such a regime would also require a whistleblower to forgo anonymity (see part 11).

Whistleblowers' existing ability to recover damages for breaches of whistleblower protections should continue. This form of compensation should complement existing remedies, e.g. reinstatement, protection against litigation, etc. A reverse burden of proof should apply, as in the UK employment tribunal once all the necessary elements of the whistleblowing claim are established by the whistleblower on the balance of probabilities. Both whistleblowers and the Whistleblower's Office (which we suggest in part 5) should be able to seek compensation and costs, with the latter also able to seek civil and criminal penalties. The Fair Work Commission and the Federal Court should be seized of jurisdiction, as is the case under the *Public Interest Disclosure Act 2013,* but measures should be built into legislation to protect anonymity and confidentiality.

5. *Measures needed to ensure effective access to justice, including legal services, for persons who make or may make disclosures and require access to protection as a whistleblower.*

A Whistleblower's Office should be established akin to the dedicated office run by the U.S. Securities and Exchange Commission. It should be subject to standard processes that apply for each disclosure made to it, and tasked with responsibilities including:

- receiving disclosures on wrong-doing which may be subject to whistleblower protections, (and advising the whistleblower if they are not);
- passing relevant information to regulatory agencies for their investigation as appropriate (e.g. to ASIC for possible breaches of *Corporations Act 2001*) – but it would not undertake such investigations itself;

- advising whistleblowers and potential whistleblowers as to their rights;
- ensuring whistleblowers are kept informed and updated;
- protecting whistleblower's anonymity unless limited exceptions apply (e.g. it is necessary to prevent a substantial risk to the public);
- have limited powers to investigate breaches of whistleblower protections, issue infringement notices for minor contraventions and issue enforcement proceedings (including for compensation for whistleblowers);
- have powers to review organisations' compliance with the relevant legislation;
- administer the aforementioned whistleblower fund, including what compensation should be awarded (subject to merits review); and
- reporting obligations and a policy development/education role.

These measures should be separate from, and in addition to, any organisation's internal whistleblowing arrangements (see part 7).

Such a specialised body would remove some of the existing impediments for potential whistleblowers. These include identifying both their rights and the correct investigative agency to whom to make reports, and provide assurance that they are dealing with a neutral body that can protect their interests. It will also facilitate anonymous reporting (see part 9) and ensure resource efficiency, given the existing separate focus of bodies such as ASIC and the Commonwealth Ombudsman. We note ASIC's concern were its role to be extended as expressed to the Parliamentary Joint Committee on Corporations and Financial Services on 25 November 2016.

6. *The definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability.*

The definition of "detrimental action and reprisal", in the context of whistleblower protection, should be satisfied upon the proving of three elements similar to the general U.S. position:

1) First, the employer knew, suspected or should have known the whistleblower had engaged or planned to engage in a protected activity, e.g. reporting a breach of tax legislation.

2) Second, the whistleblower suffered an adverse employment action. Whilst what constitutes adverse employment action should be dependent on the circumstances, some regulatory guidelines might assist; s337BA of the *Fair Work (Registered Organisations) Amendment Act 2016*, which provides examples (e.g. dismissal, injury, etc) is a useful starting point, and could potentially be broadened to include the pursuit of contractual/tortious remedies by the wrong-doer, e.g. for breach of confidentiality obligations by the whistleblower.

   In the UK, employees are protected from both dismissal and detrimental action; the latter is potentially very wide ranging covering, for e.g. lack of pay or promotion, refusal of training to threats. It has been judicially interpreted as "putting the employee under a disadvantage". There is no test of severity.

3) Third, that the protected activity was the principal cause of the adverse employment action.

Consideration should be given to making employers vicariously liable for the actions of other employees on protected whistleblowers, as is the position in the UK.

The Whistleblower's Office should be able, but not obliged, to investigate and commence legal action for breaches of whistleblower protections. (Inter-regulatory agency memoranda of understanding may need to be created, which could include mechanisms for information sharing, preservation of confidentiality and for deciding which agency is best placed to take action in respect of the matters referred to in whistleblower disclosures.) Aggrieved persons should file complaints initially with the Whistleblower's Office, but then be allowed access to Courts if the complaint is not resolved within a certain time period similar to the U.S. *Sarbanes-Oxley Act* of 2002. A similar precondition is also found under Part IIB of the *Australian Human Rights Commission Act 1986*. Consideration should be given to whether criminal liability should be available for egregious breaches of whistleblower protections, e.g. firing a whistleblower and then advising other potential employers not to hire them.

7. *The obligations on corporate, not-for-profit and public sector organisations to prepare, publish and apply procedures to support and protect persons who make or may make disclosures, and their liability if they fail to do so or fail to ensure the procedures are followed.*

Establishing mechanisms to allow individuals to raise concerns internally and provide protections for them, including anonymity, is vital; in many cases it will be preferable

for organisations proactively to identify, investigate and address issues internally. New legislation should require organisations to establish, publish and apply procedures for whistleblowers (with an appropriate implementation period, during which the Whistleblower's Office can be contacted for assistance and guidance).

Given the scope of the suggested changes, provision should be made for sector-specific guidelines setting out expectations. The UK Department of Business, Energy & Industrial Strategy's Whistleblower Guidance and Code of Conduct for Employers published in March 2015 and the UK PRA and FCA's new rules introduced for financial institutions published in October 2015 are a good start. As is the case for UK financial institutions, having a designated senior advocate within the entity, and a requirement to submit an annual report to the Board on whistleblowing, could be mandatory. Mindful of the regulatory burden for the private sector, a standard set of procedure(s) for a whistleblowing regime could be prepared for adoption. An exception for small proprietary companies as defined under s 45A of the *Corporations Act 2001* should also be considered. Private organisations should not be required to notify every report to the Whistleblower's Office, as this may constitute an appreciable regulatory burden and also overextend the Whistleblower's Office.

A civil penalty regime should be put in place, incorporating mechanisms for adjudication in relation to breaches and the provision of redress as appropriate. The Whistleblower's Office could be given responsibility to monitor and oversee compliance, regarding both the existence of the scheme and its effective operation (as the UK FCA undertakes in its jurisdiction), including powers to request documents, examine individuals and issue infringement notices. Breach reporting and periodic compliance reports to the Whistleblower's Office for organisations specified by regulation should be considered.

8. *The obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures.*

See our response to part 5 above. Ensuring the proper protection of whistleblowers should rest with the recommended Whistleblower's Office. Investigation of the content of whistleblower disclosures should rest with the appropriate agency (e.g. ASIC, AFP, ATO, etc).

9. *The circumstances in which public interest disclosures to third parties or the media should attract protection.*

Disclosures to specified third parties or media should attract protection, as this will operate as a safeguard and promote confidence in the regime. Given the potential for unintended consequences including distorted whistleblower priorities, harm to the affected organisation and others, adverse impact on investigations and other action stemming from the disclosures (including evidence degradation), there should be protection mechanisms in place. A modified version of s19 of the *Protected Disclosures Act 1994* (NSW), which requires a potential whistleblower to first pursue official channels and wait a specified amount of time before disclosing to third parties, should mitigate these risks. As in the UK, consideration should be given to an exception for disclosures of an exceptionally serious nature; see s43H *Employment Rights Act 1996*. Additionally, as set out in part 2 above, there should be a higher evidentiary threshold for protections to apply to non-official disclosures, e.g. to the media.

Whistleblower protections should extend to disclosures made by the whistleblower to third parties (e.g. lawyers) for the dominant purpose of receiving advice or for the purpose of assisting the whistleblower with making a protected report to the Whistleblower's Office. This extension of whistleblower protections to potential whistleblowers who wish to remain anonymous, in addition to provisions in the suggested legislation which would permit the Whistleblower's Office to withhold information as to the whistleblower's identity unless compelled by a court (see part 11), as the whistleblower will be able to liaise with the Whistleblower's Office through an agent. Guidelines may need to be created to ensure the integrity of this arrangement.

10. *Any other matters relating to the enhancement of protections and the type and availability of remedies for whistleblowers in the corporate, not-for-profit and public sectors.*

Potential whistleblowers with knowledge of wrongdoing are sometimes complicit in it. For the proposed changes to be effective there should be some mechanism to promote reporting by these people, such as immunity or reduced penalties. They should be entitled to receive immunity for making the disclosure itself, as is currently the case under the *Public Interest Disclosure Act 2013*. This should include immunity in respect of professional ethical obligations, for e.g. auditors (as has been picked up in Singapore's recent *Banking (Amendment) Bill 2016*). Understandably, potential

whistleblowers will be deterred from reporting if this would lead to serious consequences for them. Our view is at odds with section 12 of the *Public Interest Disclosure Act 2013*, which provides that an individual's disclosure of their own conduct does not affect his or her liability for the conduct.

The Commonwealth DPP is able to grant immunity from prosecution. Otherwise, one complementary approach is to make available a limited form of the new UK deferred prosecution regime. This would involve the prosecutor and whistleblower negotiating an agreement regarding penalties with consideration given to the value of the whistleblower's evidence, which then need to be approved by the Courts. We note that the Australian Attorney-General's Department is currently considering a deferred prosecution agreement regime for serious corporate crime. Another approach is to include in legislation sentencing considerations enabling judges to take into account the importance and weight of the whistleblower's evidence and other related factors (such as cooperation) and permit reductions in penalties that would otherwise have been imposed.

11. *Any related matters.*

First, there may be cases where an individual deliberately or recklessly makes false or misleading claims, e.g. to exact personal retribution. Provision should be made in the legislation for the Whistleblower's Office to investigate and refer for prosecution individuals who engage in such behaviour. Section 11 of the *Public Interest Disclosure Act 2013* offers a starting point.

Secondly, anonymous disclosures should be protected for the reasons set out above, in addition to the fact that there may be collateral actions initiated by others, such as litigation funders and plaintiff class action firms who would be interested in information obtained by the Whistleblower's Office through subpoenas and FOI/GIPA requests. The Whistleblower's Office should be obliged by legislation to protect the identities of whistleblowers (and ancillary documents and information) who wish to remain anonymous from methods of compelling evidence, unless compelled by Court order obtained on application. The Whistleblower's Office should also be able to receive anonymous disclosures, including through lawyers. The Whistleblower's Office should be able to refuse to produce information for other important defined grounds, e.g. public interest grounds.

Thirdly, we note that there should be harmonisation with the state legislation already in existence that pertains to whistleblowers. We acknowledge that this may be a complicated and time-consuming process.

We would again like to thank you for considering our submissions in relation to the Inquiry.

If you wish to discuss our submission, please contact Angela Pearsall, Partner at or Liam Hennessy, Senior Associate at

Yours faithfully

Clifford Chance