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Parliamentary Joint Committee on Corporations and Financial Services
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Your reference

Our reference

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By email: corporations.joint@aph.gov.au

Dear Parliamentary Joint Committee Members

INQUIRY INTO WHISTLEBLOWER PROTECTIONS

We thank the Committee for the opportunity to make this submission on whistleblower protections, a topic of key importance in supporting the integrity of Australia's corporations and financial institutions. Our submissions focus on a selection of the topics identified for consideration by the Committee: internal disclosure regimes, whistleblower advocates, keeping whistleblowers informed, and the "good faith" requirement.

EXECUTIVE SUMMARY

1 We make the following recommendations:

1.1 ***Internal disclosure***: That the Australian Securities and Investments Commission (**ASIC**) publish regulatory guidelines to assist Australian and foreign corporations conducting business in Australia put in place and maintain effective systems for internal disclosures. That could be accompanied by reform which offers corporations that have done so some reduction in liability for issues revealed through such systems (subject to the satisfaction of appropriate conditions). There should also be legislative reform to ensure that the prohibitions on further dissemination of protected disclosures (currently an offence) do not operate to prevent internal investigation of a whistleblower's complaint.

1.2 ***The requirement for a whistleblower advocate:*** That the federal government establish an independent body to support and advocate for whistleblowers. This function should not be performed by ASIC (or any other regulator with responsibility for investigating alleged corporate misconduct), given the significant capacity for that to create conflict of interest, or at least the appearance of conflict.

1.3 ***Keeping whistleblowers informed***: That where ASIC has received information from a whistleblower, it implement practices to keep the whistleblower informed of progress in investigating their disclosures, but in a way consistent with confidentiality and procedural fairness requirements to ensure that investigations are not compromised.

1.4 ***The 'good faith' requirement:*** that the 'good faith' requirement contained in the *Corporations Act* 2001 (Cth) (the **Corporations Act**) provisions regarding protections for whistleblowers be removed. Instead, whistleblowers should be required to fulfil either a subjective or an objective test concerning their disclosure in order to qualify for protection.

OVERVIEW

2 While the terms of reference call for submissions on a broad range of issues pertinent to potential whistleblowing reforms, we have confined our submissions to the following areas, each flagged as an issue for consideration in the Senate Economics References Committee's Issues Paper "*Corporate Whistleblowing in Australia*" (the **Issues Paper**):

2.1 Internal disclosures;

2.2 The requirement for a whistleblower advocate;

2.3 Keeping whistleblowers informed; and

2.4 The 'good faith' requirement.

INTERNAL DISCLOSURES

Current guidance on internal disclosures

3 The Issues Paper raises for consideration whether corporations should be required to put in place systems to facilitate internal disclosure of potential misconduct, as one way of strengthening the existing protections in Part 9.4AAA of the *Corporations Act*.

4 The *Corporations Act* provides protections for whistleblowers who make disclosures to ASIC, a company's auditor or certain company officers. However, it does not prescribe any particular procedures for setting up proper internal processes for handling whistleblower disclosures. By comparison, the *Public Interest Disclosure Act* 2013 (Cth) (**AUS-PIDA**) prescribes that principal officers of public agencies "*must establish procedures for facilitating and dealing with public interest disclosures relating to the agency*" that must comply with the standards determined by the Ombudsman.[1]

5 While there is some guidance offered by ASIC,[2] the Australian Securities Exchange (**ASX**)[3] and via the Australian Standard on Whistleblower Protection Programs (AS 8004-2003) on setting up internal systems to facilitate whistleblowing, that guidance is somewhat limited.

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[1] *Public Interest Disclosure Act* 2013 (Cth), sections 59 and 74.

[2] ASIC, *'Whistleblowers: company officeholder obligations'*, http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/, accessed on 19 December 2016.

[3] Australian Securities Exchange's Corporate Governance Council, *'Corporate Governance Principles and Recommendations'*, 3rd edition (2014) at page 20.

6 Nevertheless, a number of Australian companies already have in place whistleblowing programs for their employees, which provide avenues and protection for whistleblowers within their organisations.[4] The Australian Government's discussion paper concerning tax whistleblower protections cites a private research project, supported by ASIC and others, as giving preliminary indications that "*a high number of organisations have some form of whistleblower procedures but that there is no uniform approach.*"[5]

Advantages of internal disclosure regimes

7 Corporations have an obvious interest in encouraging early internal reporting of wrongdoing. Early internal detection allows organisations to proactively investigate the alleged wrongdoing and take appropriate remedial action. Companies who fail to implement proper policies and procedures regarding whistleblower complaints are at greater risk of complaints being escalated externally (either to a regulator or other third party) before the company has that opportunity, with all the attendant legal, regulatory and reputational risks that come with such escalation.

8 Wider benefits of a developed internal disclosure structure include enhanced public confidence in the integrity of corporations (which is of particular significance to ASX listed entities), and also a decreased reliance on ASIC resources to receive, investigate and (if warranted) prosecute complaints.

Strengthening internal disclosure regimes

9 Given the intrinsic benefits of having in place an internal whistleblowing program, the question is whether mandating the existence of such a program (or additionally, the manner in which such a program should operate) is necessary or appropriate.

10 The difficulty with doing so is that a 'one size fits all' approach is unlikely to be effective for all Australian and foreign corporations conducting business in Australia. The size, structure and industries within which corporates operate are all variables which may impact how to design and implement an internal program that is most likely to be effective within a given organisation. A rigid set of rules, or rules set in isolation from the broader compliance environment relevant to a particular organisation, runs the risk of being costly and ineffective.

11 Rather than mandating internal whistleblowing programs and how they should operate (whether as an AUS-PIDA style regime or otherwise), a more pragmatic, and likely more effective, approach is to offer additional regulatory guidance on how such programs may be best designed and implemented, and identification of some core principles to be taken into account in doing so. For example, after a period of public consultation, ASIC could offer more detailed and practical guidance to entities on the implementation and maintenance of internal whistleblower systems that properly record, investigate and resolve whistleblower complaints. Taking such an approach would enable corporations to ensure whistleblower programs were tailored to their particular circumstances, integrated with existing compliance programs, and

[4] By way of example, see: Wesfarmers, *'Whistleblower Policy'*: https://www.wesfarmers.com.au/docs/default-source/corporate-governance/whistleblower-policy---may-2015.pdf?sfvrsn=6, accessed 3 February 2017. See also the Australian Bankers' Association Final Report, *Review of Whistleblowing Protections by Australian Banks*, August 2016, which surveys the programs of a number of Australian banks.

[5] Australian Government, *'Review of tax and corporate whistleblower protections in Australia'*, 20 December 2016, at page 16.

connected with the most effective ways to communicate to relevant stakeholders the existence and functioning of the program.

12 Coupled with such guidance, we see merit in legislative reform which offers corporations reduced liability if they have put in place an internal whistleblower structure which reflects the core principles identified in the proposed ASIC guidance, and resulted in the reporting of the misconduct which gives rise to the relevant liability.[6]

13 ASIC guidance could also usefully explain how ASIC will exercise specific powers under the *Corporations Act* with respect to whistleblowers.

Facilitation of internal investigation following disclosure

14 Currently, section 1317AE of the *Corporations Act* makes it an offence for recipients of protected disclosures to further disclose that information, other than to a regulator or with the consent of the discloser. There is scope for this broad prohibition to work in a way that hinders legitimate internal investigation of the whistleblower's complaint. We think consideration should be given to the amendment of section 1317AE to avoid that outcome (for example, by way of enabling internal disclosure of relevant details of the allegation, but not the identity of the whistleblower, to persons appointed to investigate the allegations, who are not themselves the subject of those allegations or required to report directly or indirectly to alleged wrongdoers).

Challenges to internal disclosure presented by potential reform

Allowing disclosures to third parties

15 Part 9.4AAA of the *Corporations Act* does not currently extend protection to corporate whistleblowers who make disclosure to third parties, such as the media.

16 An internal whistleblower program is most effective when well known within the organisation; and when there is confidence that disclosures made under the program will be considered seriously and the whistleblower treated appropriately. Ultimately that knowledge and confidence can only develop if the program is actually utilised by whistleblowers, at least in the first instance. Extending protection to disclosures to third parties such as the media may work against maximising the benefit of an internal program.

17 We recognise that there will be situations where external reporting to ASIC is warranted or necessary, such as where internal disclosure is not acted upon or is not reasonable (for instance, where the perpetrator of the alleged misconduct is centrally involved in the internal whistleblower reporting structure). However, what distinguishes both ASIC, and the other persons currently able to receive protected disclosures (the company's auditor, and officers of the company itself) is their ability to forensically investigate the allegations made. In contrast, while third parties such as the media, a union or a member of parliament may have capacity to bring to bear pressure and attention to the alleged misconduct identified by the whistleblower, they are far less well placed to conduct that sort of investigation. For that reason, we do not

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[6] Professor AJ Brown has made some additional suggestions for appropriate preconditions to qualifying for such reduced liability: see the Senate Economics References Committee, Issues Paper '*Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*' at page 44.

recommend that the current categories of entities capable of receiving protected disclosures be expanded.

Incentivising whistleblowers

18 In the event Australia implemented an rewards based scheme for whistleblowers, this may undermine internal reporting systems in place by incentivising whistleblowers to bypass those systems. Commentators in the United States have observed these difficulties: "*[t]he SEC has been struggling with how to strike an appropriate balance between wanting to incentivise reporting wrongdoing to the commission and not wanting to undermine the use of companies' internal reporting and compliance mechanisms*".[7] While these submissions do not discuss the merits or otherwise of introducing a reward scheme for whistleblowers, in the event that parliament introduces whistleblower incentives similar to those currently in place in the United States, consideration should be given to mechanisms that require whistleblowers to first raise their concerns internally in order to qualify for rewards.

WHISTLEBLOWER ADVOCATE

19 Potential whistleblowers may face a range of concerns, such as their eligibility for relevant protections, or the need for support if faced with retaliatory behaviour having made a disclosure.

20 Under the *Corporations Act*, ASIC is not empowered to act on behalf of a whistleblower, bring an application on behalf of a whistleblower whose employment has been terminated as a result of a disclosure or bring an action on behalf of a whistleblower for compensation caused by reprisal.[8] More generally, neither the *Corporations Act* nor the *Australian Securities and Investments Commission Act* 2001 (Cth) addresses how ASIC should handle information that is provided by whistleblowers, or interact with whistleblowers. The ASIC website clarifies ASIC's role, stating that ASIC does not decide who is and who is not a whistleblower; cannot provide whistleblowers with legal advice; and that ASIC is not empowered to enforce whistleblower protections.[9]

21 In light of these limitations, some commentators have called on ASIC to do more on behalf of whistleblowers by protecting their interests and acting as their advocate.[10] They contend that such a move would encourage potential whistleblowers, who are confronted with the often daunting prospect of reporting misconduct in face of potential reprisals, imbalances between their legal and financial resources and those of the company, and concerns that their information will not be actioned.

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[7] ABA Section of Litigation, American Bar Association, *'Circuit Split on Dodd-Frank's Whistleblower Protections'*, Sara E. Costello, Litigation News Associate Editor, Volume 4, No 3, Spring 2016 at pages 24 to 25. See in particular the comments made by Amelia Toy Rudolph, Atlanta, GA, co-chair of the ABA Section of Litigation's Book Subcommittee of the Professional Services Liability Litigation Committee which are quoted in that article. Some of the approaches adopted by the SEC to seek to achieve that balance are extracted in the Senate Economics References Committee, Issues Paper '*Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*' at page 29.

[8] ASIC, *'Guidance for whistleblowers'*: http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/, accessed on 31 January 2017.

[9] Ibid.

[10] Senate Economics References Committee, Issues Paper '*Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*' at pages 32 to 36.

22 While support for a whistleblower is appropriate, in our submission, that support should be provided by an independent body dealing with those issues, not ASIC.

23 ASIC's primary role in this context is to receive and investigate misconduct reported by the whistleblower. There is a significant risk that if ASIC also advocates for the whistleblower a conflict of interest will arise; or at the very least, there will be a perception of conflict. By way of example:

23.1 Implicit in advocating for the whistleblower is at least preliminary acceptance of the correctness of the allegations contained in the disclosures made by that whistleblower. From the perspective of company the subject of a complaint, if ASIC is both the whistleblower's advocate and the investigator (even if the two functions are performed by separate persons or units within ASIC), the company may not be (or perceive that it has not been) afforded procedural fairness in circumstances where ASIC forms or appears to form a view regarding the strength of the whistleblower's information prior to commencing or concluding its investigation.

23.2 There is also potential for conflict if, for example, ASIC decides on a course of action for investigating the complaint that does not align with the whistleblower's expectations. In turn, the whistleblower's objections to ASIC's intended approach could compromise ASIC's ability to effectively investigate the complaint.

24 It is difficult to see how, in light of those possibilities, ASIC could function as an effective advocate for a whistleblower.

25 We submit that the potential tension between ASIC properly investigating the complaint and also acting in the best interest of the whistleblower as their advocate, should be avoided. In our view, support should be afforded to whistleblowers in the form of a whistleblower advocate who is independent from ASIC and its investigatory functions. Such a move would ensure that the whistleblower's interests are protected whilst not compromising the effectiveness of ASIC's corporate regulation and enforcement duties. The independent advocate's role could also extend to whistleblowers who make protected disclosures under other federal legislation governing the private sector.[11]

INFORMING WHISTLEBLOWERS

26 As noted previously, critical to the success of a whistleblower system is the whistleblower having confidence that the information that they provide will be acted upon appropriately. AS 8004 2003 and other summaries of best practice for whistleblower programs consistently identify the acknowledgement of the disclosure, and keeping the whistleblower informed of progress, as important elements of any such program.

27 At an individual level, there is a natural desire to see that "something is done", particularly where the disclosure has come at a cost for the whistleblower. More generally, some flow of information back to the whistleblower to allow them to see that their disclosure was not simply ignored or forgotten engenders greater confidence in the whistleblower system and

[11] For example, *Banking Act* 1959 (Cth), *Insurance Act* 1973 (Cth), *Life Insurance Act* 1995 (Cth), *Superannuation Industry (Supervision) Act* 1993 (Cth).

may encourage future disclosures by others. All of those considerations apply equally to disclosures to ASIC, as they do to internal disclosures.

28 Once the recipient of a protected disclosure, ASIC should strike a balance between informing the whistleblower of the progress or outcome of the investigation into the allegations made, the effective conduct of the investigation, and preservation of rights of others, including confidentiality and procedural fairness for those against whom wrongdoing is alleged.

29 We consider that the formation of the Office of Whistleblower in late 2014, is a positive development to address previous concerns in relation to ASIC's failure to effectively communicate with whistleblowers.[12] We recommend that rather than introducing a statutory requirement to keep whistleblowers 'in the loop', ASIC should continue to develop and execute a communication regime which strikes the balance between keeping the whistleblower informed and maintaining the integrity of its investigation and the rights of alleged wrongdoers. We consider that the Office of Whistleblower is an appropriate means for performing this function and that its effectiveness should be monitored, including by seeking feedback from whistleblowers.

GOOD FAITH

30 The *Corporations Act* requires that whistleblowers make disclosures in 'good faith' in order to qualify for protection.[13] As stated in the explanatory memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill* 2003 (Cth), the good faith requirement was intended to "*limit the scope for vexatious allegations against employers*", while ensuring genuine whistleblowers were protected.[14] There are also obvious commercial benefits to discouraging malicious and unsubstantiated disclosures which can put corporations to significant expense, both in investigating the allegations and via reputational impact if made public.

31 Commentators have argued that the identification of misconduct and the accuracy of that information should be the primary focus, not the whistleblower's intention.[15]

32 We agree that the good faith requirement appears to be of limited value. An individual's motives can be difficult to determine in any event. The good faith requirement has the potential to deny protection to whistleblowers who otherwise make qualifying disclosures because they have multiple motives for doing so (even though the substance of the information provided merits investigation), and can act as a disincentive to individuals to blow the whistle on misconduct.

33 The *Corporations Act* contains a requirement that a whistleblower have "*reasonable grounds to suspect that the information*" indicates a contravention of the Corporations legislation.[16] That requirement adequately protects against vexatious or malicious disclosures.

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[12] ASIC submissions to the Senate Standing Committee of Economic in relation to the performance of the Australian Securities and Investment Commission: '*Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*' dated August 2013, documented some of ASIC's internal learnings in relation to the inadequacy of its communications with whistleblowers on the CFPL matter.

[13] *Corporations Act* 2001 (Cth), section 1317AA(1)(e).

[14] *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill* 2003, Explanatory Memorandum, 4 December 2003.

[15] See for example Doctor Peter Bowden, *Proof Committee Hansard*, 10 April 2014 at page 54.

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34 In our submission, there should be no 'good faith' requirement before protections under the *Corporations Act* are activated. Consistent with the Senate Economics Reference Committee recommendations in relation to the Performance of ASIC[17] and views expressed by Dr A J Brown, we support the introduction instead of a requirement that one of the following conditions be met in order for a disclosure to qualify for protection:

34.1 The person making the disclosure holds an honest and reasonable belief that the disclosure shows proscribed wrongdoing (the subjective test); or

34.2 The disclosure does show, or tends to show, proscribed wrongdoing, irrespective of the person's belief (objective test).[18]

35 This approach would properly focus on the quality of the information, rather than the motive of the discloser in providing it.

NEXT STEPS

Should the Parliamentary Joint Committee Members have any queries concerning DLA Piper Australia's submissions, please do not hesitate to contact Rani John on or at

Yours sincerely

DLA PIPER AUSTRALIA

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16 *Corporations Act* 2001 (Cth), section 1317AA(1)(d).

17 Senate Economics Reference Committee, *'Corporate whistleblowing: ASIC's performance and issues with current protections, Performance of ASIC'*, Recommendation 15, Chapter 14 at page 223.

18 Professor A J Brown's submissions to the Senate Standing Committee of Economic in relation to the performance of the Australian Securities and Investment Commission, '*Improving Protections for Corporate Whistleblowers*', December 2009.