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10 February 2017

The Treasury
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Email: whistleblowers@treasury.gov.au

Dear Sir/Madam

SUBMISSION TO THE REVIEW OF TAX AND CORPORATE WHISTLEBLOWER PROTECTIONS IN AUSTRALIA

This is a submission to the *Review of tax and corporate whistleblowing protections in Australia*, dated 20 December 2016 (**Review**).

Introduction

Dwyer Harris is a commercial law firm specialising in the areas of financial services, corporate regulation, antitrust/competition and consumer protection.

This submission represents our views based on our experience working for regulators in Australia and in the United States operating in the context of various whistleblower laws; working with whistleblowers who have disclosed potential wrongdoing; conducting regulatory investigations and prosecutions resulting from information provided by whistleblowers; and acting for corporations the subject of investigations initiated by information provided by whistleblowers.

Our comments are confined to chapter 8 of the Review dealing with corporate whistleblowing protections. We have not attempted to answer every question posed in the Review, but have made comments under subject headings which generally align with those in the Review.

We would welcome the opportunity to provide further information or submissions, especially on the topic of a whistleblower reward scheme operating in the financial services sector.

Protecting whistleblowers

We consider that there is a need to have consistent and uniform laws protecting whistleblowers from retaliation and providing appropriate redress. In our view, the uniform standard of whistleblower protection should be substantially similar to those contained in the *Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)* (**FWROB**).

In addition to Part 9.4AAA of the *Corporations Act 2001 (Cth)* (the **Corporations Act**) (ss 1317AA to 1317AA), the *Public Interest Disclosure Act 2013 (Cth)* (**PIDA**) and the

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amendments made by the FWROB, there are also important existing whistleblower protections such as:

- the general protection provisions (s 340) of the *Fair Work Act 2009 (Cth)*. This section has been previously utilised by whistleblowers (see *Evans v Trilab* [2014] FCCA 2464);
- breaches of corporate codes of conduct and whistleblower policies which are incorporated by reference into employment contracts; and
- existing occupational health and safety laws, which prohibit bullying (among other things).

We submit that any new legislation should harmonise with these existing provisions, and not detract from rights already available. These rights may also need to be extended to other categories of disclosers (see section of qualifying whistleblowers below).

Office to deal with whistleblower claims of retaliation and compensation

The Review canvasses whether the Australian Securities and Investments Commission (**ASIC**) could be an advocate for corporate whistleblowers who disclose to it.

In our view, this is not appropriate in the current legislative scheme. ASIC's role is to investigate potential contraventions fairly and impartially without fear or favour. Sometimes a regulator needs to cast a critical eye over the information provided by a whistleblower, and, in our view, should not also be put in the position of having to defend or advocate for the person.

We note that in the United States, the whistleblower program of the Securities and Exchange Commission (**SEC**) set up under the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (**Dodd Frank**) established an "Office of the Whistleblower" to administer the whistleblower rewards program. Should a comparable reward program be established for corporate whistleblowers in Australia, it may be appropriate to set up a similar Office of the Whistleblower at ASIC.

Similarly, the Review has sought comment on whether the Financial Ombudsman Service, or similar external dispute resolution scheme (**EDR**) may be an appropriate body to resolve disputes and compensation claims by corporate whistleblowers. We note that currently, the Financial Ombudsman Service and the Credit & Investments Ombudsman are awaiting the outcome of the review into EDR schemes. To the best of our knowledge, determining whistleblower disputes about compensation is not currently a service offered by either EDR scheme. To adopt this responsibility would require training or skill acquisition. Additionally, the monetary limits currently applicable to the EDR schemes may well need to be modified or expanded to take into account additional heads of compensation, particularly if the whistleblower's damages are for loss of earning potential or unemployment over a substantial period of time.

We consider that a central office for dealing with whistleblower complaints about retaliation and compensation across all industry sectors should be established. The Review should give consideration to locating an Office of the Whistleblower in the Fair Work Commission, which already indirectly deals with matters involving whistleblowers arising out of breaches of the general protections. The Fair Work Commission has mediation processes, and if matters proceed to hearing, an adverse costs order cannot be made against a party unless the action was commenced vexatiously.

This model is consistent with arrangements to protect whistleblowers in the private and public sectors in other countries. In the UK the *Public Interest Disclosure Act 1998 (UK)*

forms part of the *Employment Rights Act 1996 (UK)*. In the US, the Whistleblower Protection Program is located in the United States Department of Labor, Occupational Safety and Health Administration (**OHSA**). This program deals with complaints about retaliation from whistleblowers under approximately 22 United States federal laws.[1]

Qualifying whistleblowers

We consider that the definition of whistleblowers who qualify for statutory protection from retaliation should include former employees and service recipients.

Former employees may still indirectly suffer retaliation from the corporation, particularly if they are applying for employment and need references.

Service recipients may see changes in practices, processes, pricing or procedures which may well indicate possible corporate wrongdoing. Service recipients may need protection from retaliation if the company decides to terminate supply, cancel a licence or remove the whistleblower from a distribution channel.

In respect of the Corporations Act, for example, the inclusion of former employees and service recipients as "disclosers" could be achieved by amending section 1317AA(1)(a) of the Corporations Act as follows (proposed amendments are underlined) and adding an additional subsection:

*A disclosure of information by a person (the **discloser**) qualifies for protection under this Part if*:

(*a) the discloser is:*

(i) an officer of a company; or

(ii) an employee of a company; or

(iii) a person who has a contract for the supply of services or goods to or from a company; or

(iv) an employee of a person who has a contract for the supply of services or goods to or from a company;

Add a new section 1317AA (2)

For the purposes of Part, the following definitions apply:

"Officer" include a former officer.

"Employee" includes former employees, volunteers and workers who do not receive remuneration.

[1] The OSHA enforces the whistleblower provisions of more than twenty whistleblower statutes in the United States. The provisions protect employees who report violations of various workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, consumer finance and securities laws. The OSHA will investigate allegations of retaliation and can issue orders awarding compensation, or in cases where the employer does not pay, file proceeding on behalf of the employee to obtain compensation. For a summary of the statutes covered by OSHA whistleblower program see https://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf

"A contract for the supply of services or goods to or from a company" includes a contract for personal, professional or financial services.

If the Review recommends an expansion of whistleblower provision to other Commonwealth legislation, similar provisions would need to be inserted into each respective Act.

Unified regime

The Review canvasses whether government should implement expanded subject matter disclosure across a wide range of regulatory areas. In our view, this should be assessed on a case by case basis in consultation with the relevant regulatory agency involved.

If whistleblower provisions are to expand across a wide range of regulatory areas, two operational options for this are:

1. an omnibus agency which would be a "one-stop shop" for disclosure of potential wrongdoing across multiple regulatory areas. The central agency would pass on disclosed information to the responsible regulator. The omnibus agency would also deal with any issues of whistleblower retaliation or compensation; and

2. disclosure to the relevant regulator, with a central "office of the whistleblower" dealing with any claims of retaliation or compensation.

We submit that an omnibus agency would have operational difficulties in practice. One of the biggest challenges for regulators is to determine quickly what is important and actionable information when the agency is receiving thousands of communications each day. We are concerned that an omnibus agency would multiply this problem and may well slow down the processing of disclosed information and commencing investigation. Disclosing directly to the regulator responsible for the legislation means the agency can more rapidly assess its intelligence worthiness and seek appropriate follow up information.

While we appreciate that there may be some possible confusion among whistleblowers as to which agency to contact, we believe this can be overcome by proper communication and publicity.

We recommend a model where disclosures are made directly to relevant regulator and any issues relating to retaliation or compensation be dealt with by a central "office of the whistleblower".

Subject matter of disclosures

In our view, disclosable information should be information which, if substantiated, would give rise to a criminal offence, a failure to comply with the law or a specific risk to health and safety. As such, we consider the current provisions of the Corporations Act to be sufficient in this regard. However, we suggested that section 1317AA(1)(d) of the Corporations Act should be amended to include the *National Consumer Credit Protection Act 2009 (Cth)*.

Good faith obligation

We suggest that section 1317AA((1)(c) of the Corporations Act which requires that the discloser makes the disclosure in good faith be removed. Good faith goes to the subjective motives of a person rather than to the importance and quality of the information disclosed. We suggest that the "good faith" standard be replaced by an objective standard of *"honest belief, on reasonable grounds, that the information disclosed shows or tends to show a*

contravention of the Corporations legislation or the National Consumer Credit Protection Act 2009."

Anonymous disclosures

Anonymous reporting provides greater protections to the whistleblower and may result in more people disclosing than would otherwise be the case if identification was required.

Anonymity can also encourage frivolous or unhelpful disclosures which tax agency resources.

Information about a whistleblower, their position and seniority within the organisation, their skills, access to information and professional obligations can assist an agency in assessing the quality of the information provided.

On balance, we favour a system that requires limited disclosure of the identity of the whistleblower to the agency responsible, with appropriate safeguards against disclosure of the person's name and identifying information to third parties. This can presently be done under existing section 127 of the *Australian Securities and Investments Commission Act 2001(Cth)* (the **ASIC Act**) and via confidentiality orders if the matter is before the courts.

One option is third party disclosures through lawyers similar to that provided in the United States system under the Dodd Frank and False Claims Act processes. These provisions allow a whistleblower to disclose anonymously through his or her lawyer, with the person's identity not being disclosed until much later in the process.

In Australia, an obstacle for potential whistleblowers seeking legal assistance to disclose is legal fees which, at the present time, would not be able to be recovered from any award resulting from the disclosure. This obstacle could possibly be mitigated by publicising lawyers who are prepared to assist whistleblowers from community or government legal sources, non-profit governance organisations, private practitioners prepared to work on a pro-bono basis or, with the approval and consent of ASIC, private practitioners operating on a conditional fee agreement basis where any legal fees would be deferred and subsequently recovered as an investigation expense at the end of a successful prosecution or settlement of the matter.[2]

Protection for disclosure to third parties

Disclosure internally or to the relevant regulator should be the priority. Disclosure to the appropriate regulator allows the veracity and strength of the allegations to be tested. In our experience, in some cases, whistleblower information can be incorrect or lacking objectivity. In cases where the agency investigates, it still takes time to plan and execute an investigation.

In our view, protected disclosure to the media or other third parties should be delayed until the relevant agency has had an appropriate opportunity to review and act upon the material. Premature disclosure can jeopardise an ongoing investigation. Additionally, if the disclosure is inaccurate, it can have an adverse impact not only for the individuals involved but also for employees and shareholders generally.

[2] Under section 91 of the *ASIC Act* and section 319 of the *National Consumer Credit Protection Act 2009 (Cth)*, ASIC has the ability to recover the costs of its investigation through the court processes. In addition, ASIC can include payment of the costs or expenses of their investigation in a negotiated enforcement outcome. Costs and expenses are not defined and may well include the legal expenses of a person assisting ASIC in its investigation.

Agencies should engage in better communications with whistleblowers to update them on how the matter is progressing, which might alleviate the concern that nothing is being done about the whistleblower's disclosure. If an agency determines not to take further action, it should report that to the whistleblower in a timely fashion and explain the reasons why no further action is to be taken.

Internal reporting by companies

Requiring companies to have a formal internal whistleblowing policy and to report to ASIC on the operation of that policy, is, in our view, unnecessary because of existing regulation of corporations. Such a policy would create additional regulatory burden on small and medium sized entities, without countervailing benefit.

Under listing rule 4.10.3, companies listed on the Australian Stock Exchange (**ASX**) are required to benchmark their corporate governance practices against the ASX's Corporate Governance Council's Corporate Governance Principles and Recommendations. Recommendation 3.1 requires corporations have a Code of Conduct which includes whistleblower provisions. If a listed company does not implement the recommendations, or departs from them, it is required to explain why to the ASX.

APRA regulated institutions are required to have whistleblower policies.[3] In addition, from July 2017, APRA requires all APRA regulated institution to take reasonable steps to inform directors and employees of the content of the institution's whistleblower policy.[4]

Australian Financial Services Licence (**AFSL**) holders are required to report any significant breach of an AFSL licence or financial services laws under section 912D of the *Corporations Act*, which would include relevant matters raised by a whistleblower. Australian Credit Licence (**ACL**) holders are required to annually certify that they have meet their licence conditions and complied with applicable legislation, and to explain if this is not the case. Employers are also required to abide by general standards in workplace laws. We believe that these current requirements are sufficient reporting on matters which would relate to conduct giving rise to a whistleblower disclosure.

If the Review is minded to recommend the institution of internal whistleblowing policies, we suggest that there be a countervailing benefit afforded to companies by way of a defence or a factor in reducing liability if the policy and procedures were followed by the company.

Whistleblower rewards

Whistleblower rewards are used as any incentive to encourage whistleblowers to come forward with information. Information provided via these reward schemes can lead to successful prosecutions, and recover substantial monies owed to government.[5]

In principle, we consider some form of whistleblower rewards scheme operating in Australia may be helpful to encourage whistleblowers to report misconduct, subject to safeguards and

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[3] Prudential Standard CPS 510, Governance, clause 42 provides that "*The Board Audit Committee of an APRA regulated institution must establish and maintain policies and procedures for employees of the regulated institution to submit, confidentially information about accounting, internal control, compliance, audit and other matters about which the employee has concerns. The Committee should also have a process for ensuring employees are aware of these policies and for dealing with matters raised by employees under these policies.*"

[4] See APRA Requirements, Changes to Prudential Standard CPS 520, Fit and Proper at http://www.apra.gov.au/CrossIndustry/Documents/Supervision%20of%20Conglomerate%20Groups%20-%20August%202016%20Response%20letter.pdf

[5] In the financial year 2014, the US Department of Justice recovered approximately USD 6 billion in settlements and judgments as a result of qui tam actions under the *False Claims Act* 31 USC § 3729.

appropriate administration. However, in our view, further detailed analysis and consultation should be undertaken before a whistleblower reward scheme is implemented.

We consider that, before any reward scheme is implemented, a number of policy issues need to be carefully considered. These include:

1. What reward scheme model should operate?

2. Are penalties in Australia sufficient to entice whistleblowers to disclose?

3. What should be the scope of any reward program?

4. What should be required of whistleblowers to obtain an award?

5. Who will administer the reward program?

Below we provide some preliminary comments on these policy issues, and would welcome the opportunity to provide further submissions in the future.

What reward scheme model should operate?

Determining what type of whistleblower reward scheme should operate depends on the overarching objectives of the scheme: is it to deter wrongdoers through criminal and civil enforcement, or is to recover taxpayer funds to the government?

In our experience, there are three primary models of reward schemes:

1. A discretionary award based on the value or quality of the information provided by a whistleblower. An example of this is type of award program is the UK's Office of Fair Trading (**OFT**) financial rewards scheme for information in relation to cartel conduct. This program offers financial rewards to people who have valuable inside information about the existence of a cartel. Under the reward scheme an individual may receive up to £100,000 for providing information on a cartel to the OFT. The amount of the reward depends on a number of factors including:

    a. the value of the information;

    b. the amount of harm to the economy and consumers;

    c. the effort taken in order to give the information; and

    d. the risk taken in order to give the information.

    The reward is discretionary, so if the OFT decides not to use the information, the informant will not get paid. The reward is not available to individuals who have been directly involved in the cartel they are reporting. A similar reward scheme operates in South Korea.[6]

[6] In 2002 the South Korean Fair Trade Commission introduced its cartel information reward program which provides cash rewards to individual whistleblowers who report information on cartels. The original award was up to 20 million WAN (approximately US$19,000) which was increased to 100,000,000 WAN (approximately US$93,000) in 2003. The first several years of the programme where not considered successful, generating fewer than 10 reports in a four year period. The lack of success has been attributed to the negative perception in career about reporting fear of retaliation and low cash rewards. In 2005 the Korean Fair Trade Commission modified the program by increasing the reward up to 1,000,000,000 WAN (approximately US$1 million) and guaranteeing confidentiality.

2. A reward which references the monetary fine or penalties paid to the government as a result of information leading to a successful prosecution or settlement. An example of this is the SEC whistleblower program set up under the Dodd Frank Act. Under this program an eligible whistleblower is entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC, or other related actions brought by regulatory and law enforcement agencies. The information provided by the whistleblower must lead to a successful SEC action resulting in an order of monetary sanctions exceeding US$1 million. A separate fund, called the Investor Protection Fund, has been established to pay awards to eligible whistleblowers. The Hungarian Competition Authority operates a reward scheme for information on cartel conduct based on a percentage of the fine recovered.[7]

3. A private regulator model. An example of this is qui tam actions, where the whistleblower is acting as a "private regulator" recovering money on behalf of a public entity and receives a portion of the proceeds. The United States has a federal qui tam statute, the False Claims Act,[8] and most US states have state-based counterpart legislation. These statutes are used to recover significant amounts of money owed to the government each year, particularly in relation to overcharging in the health and defence industries.

The model, if any, implemented needs to reflect the government's legislative objectives and policy priorities. Our preliminary view would be that if the Review recommended the implementation of a whistleblower reward scheme, it should be similar to the SEC whistleblower scheme enacted under Dodd Frank, as this seems to be most compatible with the current parliamentary focus on compliance in the financial services industry.

Are Australian penalties sufficient to entice whistleblowers to disclose?

Australian has relatively low penalties for corporate misconduct. Accordingly, if Australia was to adopt a reward model which reference the amount of monetary sanctions recovered, the amounts payable to whistleblowers may be relatively small. Government may need to look at increasing monetary penalties for contraventions as part of an overall review of enforcement sanctions, if any SEC type whistleblower reward scheme is proposed.

To further motivate whistleblowers to disclose and commence actions, statutes in the United States, such as the False Claims Act, contain multiple damages clauses often mandating treble damages. Australia has a measure of multiple damages calculation in respect of damages arising from cartel conduct.[9] These types of provisions may make the potential penalties, and consequently, the potential reward to the whistleblowers, more attractive.

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[7] In April 2010 Hungary introduced its information rewards program to encourage private persons to report cartel conduct. Under Hungary's informant reward program any natural person who has knowledge of a cartel and provides it to the Hungarian competition authority in written form, will receive an award amounting to at least 1% but no more than 50 million forint (approximately US$238,000) of the fine levied against participants in the cartel. If a participant in the cartel requests leniency, he or she is not also entitled to an informant's award.

[8] *False Claims Act* 31 USC § 3729. The Act provides in part *(a) Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim paid or approved by the Government;. . . or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person*.

[9] See sections 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010 (Cth)*. In summary, for engaging in cartel conduct, a corporation can be fined an amount not exceeding the greater of: $10 million; or if the Court can determine the value of benefits obtained and reasonably attributable to the conduct, three times that value; or if value of benefits cannot be

What should be the scope of a reward program?

A rewards program can target individual offending conduct (such as in the case of rewards for disclosing information on cartel conduct); a specific collection of laws, usually that operate in a particular sector (such as the Dodd Frank Act which offers rewards for information about contraventions of securities laws and Foreign Corrupt Practices Act); or rewards across a wide range of statutes (such as the False Claims Act which applies to any United States federal statute where the government has incurred losses as a result of false claims).

The scope of the rewards program will depend on the policy settings for the government, the cost of operating the scheme and the perceived need to incentivise whistleblowers to come forward to enhance enforcement activity.

In our view, reward schemes which target either specific pernicious behaviour or focus on a collection of specified laws in a particular sector are more effective than a wide ranging general provision.

What should be required of a whistleblower to receive a reward?

Activities required of whistleblowers to obtain an award depend the particular reward scheme. Activities required of whistleblowers to be eligible for a reward range from reporting to the relevant agency, providing documentary or affidavit evidence, cooperation in a prosecution or other enforcement action, to filing a complaint with the court under seal.[10] One common requirement is that the whistleblower must provide "original information" (information not already known to the government or publicly available) and that information is about a possible violation of the law.

Administration of a reward program

Administration of reward programs can be resource intensive. For example the SEC established an Office of the Whistleblower (**OWB**), a separate office with the SEC's Enforcement Division to manage the whistleblower program. The OWB:

- receives information for potential whistleblowers;
- assesses applications for awards against the SEC rules and makes awards;
- manages a separate fund, called the Investor Protection Fund, out of which eligible whistleblowers are paid;
- takes actions in respect of impediments to reporting (such as restrictive agreements); and
- takes action on whistleblower retaliation.

If a similar scheme was set up for whistleblowers reporting on contraventions of the Corporations Act, it is likely a similar office would need to be set up within ASIC to manage the scheme.

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determined, 10% of the annual turnover of the corporation during the period of 12 months ending at the end of the month in which the act or omission occurred.

[10] Under the False Claims Act a whistleblower must file a complaint in the United States Federal Court under seal and then provide the complaint to the Department of Justice. The Department of Justice then decides whether it wishes to take over the case or not. If the Department of Justice intervenes and prosecutes or settles the case, the whistleblower receives between 15 to 25% of the recovery. If the Department of Justice does not prosecute the case, the whistleblower can continue the case without the assistance of the Government. If the whistleblower is successful he or she will receive 30% of the proceeds of the case.

Other policy considerations

If a whistleblower reward program was instituted in Australia, additional policy issues would need to be considered. These may include:

- What happens if the whistleblower is involved in the contravening conduct? Can a whistleblower claim immunity or a discount for cooperation and also be eligible for a reward?

- Will a whistleblower reward scheme threaten criminal prosecutions because it may undermine the credibility of a witness if a jury is aware he or she stands to financial benefit from a successful prosecution?

- Should whistleblowers be able to participate in a reward scheme anonymously or through a lawyer?

- Does a whistleblower reward scheme discourage internal reporting within the corporation first? What steps could be taken to mitigate this risk?

Further assistance

Thank you for the opportunity to provide this submission. Please feel free to contact Kathleen Harris on (02) 8912 2505 should you have any questions or require further information about this submission.

We would welcome to the opportunity to continue to be involved in the Review's considerations as this matter progresses.

Yours faithfully

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