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Briefing note February 2017

Decibels down under – major whistleblower reforms being considered

Significant reforms to Australia's whistleblower laws in the corporate, public and not-for-profit sectors are likely to emerge as a result of an inquiry by the Joint Parliamentary Committee on Corporations and Financial Services (**Inquiry**).

The inquiry process is underway, with the Inquiry to consider public submissions and undertake hearings between now and the 30 June 2017 deadline for its report. How far the Inquiry embraces some of the more controversial proposals, including the introduction of compensation arrangements and whether to extend such arrangements to culpable whistleblowers, will be closely followed.

Overview

It is widely recognised that Australia's current whistleblower laws are inadequate and that significant reforms are long overdue. The Inquiry provides the opportunity for Australia to adopt a new, comprehensive regime which promotes appropriate whistleblowing, including through robust protections. In doing so, Australia has the benefit of considering differing approaches that have been adopted in other jurisdictions, including the US and the UK.

In this briefing note we identify some of the key issues that the Inquiry will be considering under its terms of reference and areas where reforms are likely. As with any Inquiry process, views will differ and some of the recommendations are likely to attract dissent and controversy.

Types of wrongdoing

The Inquiry will consider the types of wrongdoing to which a comprehensive whistleblower protection regime should apply across sectors.

There is a balance to be struck in terms of the types of conduct to which protections should apply, mindful of the risk of an overextended regime, including the resources required to support it.

At a minimum, protections should apply more broadly than the current regime, which focuses on protecting current employees. Whistleblowers should also be entitled to make anonymous disclosures and legislative provisions should exist to project the identities of whistleblowers who wish to remain anonymous.

Arguably a broader class of individuals (including former employees, certain advisers and volunteers) who hold an "honest belief" (i.e. an objective test) based upon "reasonable grounds" or "clear and convincing grounds" when making a report to the media (see further below) should be entitled to protections where they provide factual information, as opposed to unsubstantiated rumour or opinion, which discloses an actual or potential:

- indictable criminal offence, for the corporate and not-for-profit sectors, whether on an individual or entity level;
- act of misconduct, which should be defined broader than an indictable offence, for the public sector, as breaches of the trust reposed in public servants are perceived by the public as serious;
- breach of the key punitive sections of certain legislation, including the *Corporations Act 2001, Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and *Income Tax Assessment Act 1936*; or

- action which could cause substantial risk to public health and safety.

Financial compensation

The Inquiry has sought feedback as to compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the US.

At the moment there is no financial compensation regime in Australia for whistleblowers. (Although, whistleblowers are entitled to seek damages for breaches of protections.) There is no provision for the payment of financial incentives to whistleblowers in the UK.

"Australia will focus on the different US and UK approaches to whistleblower protections to see what aspects might work for it"

Angela Pearsall, Partner

Under the US regulatory system, whistleblowers have a significant financial incentive to bring matters to the attention of the regulators. The US Securities and Exchange Commission's Office of the Whistleblower established in 2011 can award eligible individuals who disclose information which leads to an enforcement action in which over US$ 1 million in sanctions is ordered up to 30% of the money collected. In the US Fiscal Year 2016 that office awarded US$ 57 million to 13 whistleblowers. (Payment can be made to foreign nationals.) In that period, Australia was the foreign country that provided the third most tips, behind Canada and the UK. Australia's position has risen from US Fiscal Year 2015, when Australia was in fifth place. Total tips themselves have increased each year since 2011.

Whether financial compensation arrangements should be introduced in Australia, and if so what form they should take, is a topic on which views may differ significantly. Many see systems that support and incentivise whistleblowers, including through appropriate financial compensation arrangements, as an important and necessary feature of any regime, including to ensure that whistleblowers are compensated for any loss suffered as a result of their disclosure.

Whilst the US 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.

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 US. This approach would also remove some of the potential for distortions that may be created by bounties (such as potentially encouraging whistleblowers to bypass internal mechanisms). A whistleblower fund could be set up, 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 in order to claim compensation. Consideration ought to be given as to whether it is appropriate for whistleblowers who are culpable (see further below) to receive financial compensation.

Key Issues

- Australia is currently considering significant reforms to whistleblower laws in the corporate, public and not-for-profit sectors.
- Key considerations will include whether financial incentives should be offered to whistleblowers, whether whistleblowers should be able to make anonymous disclosures and whether disclosures to the media should entitle whistleblowers to statutory protections.
- Clifford Chance made a public submission on 10 February 2017. You can access our full submission by clicking this link.

Whistleblowers' Office

The Inquiry will consider recommendations that a Whistleblowers' Office should be established akin to the dedicated office run by the US Securities and Exchange Commission.

An Australian Whistleblowers' Office could be tasked with responsibilities including:

- receiving disclosures on wrong-doing which may be subject to whistleblower protections;
- 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;

- having limited powers to investigate breaches of protections, issue infringement notices for minor contraventions and issue enforcement proceedings (including for compensation for whistleblowers); and
- administering the whistleblower fund, including awards of compensation.

The Whistleblowers' Office should be able, but not obliged, to investigate and commence legal action for breaches of whistleblower protections.

Media whistleblowers

Feedback was sought in relation to the circumstances in which public interest disclosures to third parties or the media should attract protection.

It seems appropriate that certain disclosures to the media should attract protection, however, given the potential for unintended consequences including distorted whistleblower priorities, harm to the affected organisation (and others), and adverse impact on investigations (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 assist to mitigate these risks. As in the UK, consideration should be given to an exception for disclosures of an exceptionally serious nature. Otherwise, as we have stated above, there should be a higher evidentiary threshold for protections to apply to disclosures made to the media.

Culpable whistleblowers

Potential whistleblowers with knowledge of wrongdoing may be complicit in it. Often such people will have important and centrally relevant information and, accordingly, should be encouraged to disclose despite their involvement in the wrongdoing. Mechanisms by which to achieve this could include immunity or reduced penalties. A limited form of the new UK deferred prosecution regime could be implemented (in this regard, see our previous briefing) or alternatively legislation could be created requiring judges to take into account when sentencing the importance and weight of the whistleblower's evidence and other related factors (such as cooperation).

Next steps

Submissions to the Inquiry closed on 10 February 2017.

The Inquiry will now hold hearings, with the first such hearing scheduled to take place on 23 February 2017 in Brisbane. Currently, the Inquiry is to provide its report by 30 June 2017.

- We expect the Inquiry to pay close attention to the whistleblower regimes in the US and UK, which have each developed in different directions, for e.g. with respect to whether financial incentives should be given.
- We have undertaken extensive work advising clients in relation to whistleblower reforms in other jurisdictions.
- Please contact us if you wish to know more about these matters.

Angela Pearsall
Partner - Sydney

T: + 61 2 8922 8007
E:angela.pearsall
@cliffordchance.com

Diana Chang
Partner - Sydney

T: +61 2 8922 8003
E: diana.chang
@cliffordchance.com

Tim Grave
Partner - Sydney

T: + 61 2 8922 8028
E: tim.grave
@cliffordchance.com

Liam Hennessy
Senior Associate - Sydney

T: + 61 2 8922 8504
E: liam.hennessy
@cliffordchance.com

Jenni Hill
Partner - Perth

T: + 61 8 9262 5582
E: jenni.hill
@cliffordchance.com

Alistair Woodland
Partner - London

T: + 44 20 7006 8936
E: alistair.woodland
@cliffordchance.com

Chris Stott
Senior Associate - London

T: +44 20 7006 4231
E: chris.stott
@cliffordchance.com

Robert Rice
Partner – New York

T: +1 212 878 8529
E: robert.rice
@cliffordchance.com

Clifford Chance, Level 16, No. 1 O'Connell Street,
Sydney, NSW 2000, Australia

www.cliffordchance.com