CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

15 December 2009

Corporate Whistleblowing Discussion Paper
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: whistleblowing@treasury.gov.au

Dear Minister Bowen

Improving protections for corporate whistleblowers

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, it is focused on improving organisational performance and transparency. Its members have a thorough working knowledge of and deal on a day-to-day basis with compliance with the Corporations Act.

We welcome the opportunity to comment on the options paper: *Improving protections for corporate whistleblowers* (the paper). CSA members support legislation that encourages the disclosure of wrongdoing in companies, and believe that stakeholders, including individual employees and their representative bodies, should be able to freely communicate to senior management, the board and regulators their concerns about illegal or unethical practices and their rights should not be compromised for doing this.

General comments

The paper notes that the current provisions governing the protection of whistleblowers in the Corporations Act are poorly regarded and infrequently utilised. The shortcomings in the current regime are highlighted, with only four disclosures to the Australian Securities and Investments Commission (ASIC) having been made since the provisions were introduced. The paper questions whether the provisions are sufficient to overcome the incentives for company employees and others to maintain silence in the face of misconduct or illegal activity.

CSA notes that there are two main types of disclosure covered by the whistleblowing legislation: disclosure of misconduct to directors, secretaries and senior managers of companies; and disclosure to ASIC. CSA notes that low levels of disclosure to ASIC indicate do not mean that whistleblower protection is not useful or effective within companies. As a matter of good corporate governance, many companies have created structures for dealing with internal reporting of misconduct or illegal activity. Given that there is no requirement in the Corporations Act to report whistleblowing activities within companies, the extent of the use that has been made of the current provisions within companies cannot be easily identified.

Issue A: Who can qualify for protection as a whistleblower?

In principle, CSA supports access to protection being extended to former employees, who could suffer detriment when searching for alternative employment if their former employer spoke against them. In principle, CSA also supports access to protection being extended to suppliers,

although we note that care would need to be taken to ensure that such protection was not misused for commercial advantage. While any existing contract for the supply of goods and services to a company would provide protection for the reporting of any misconduct, it is important to ensure that such protection extends to the acquisition of services from a company, as well as any situation where a contract does not exist (for example, an adviser to the company may not have a contract in place).

However, CSA's preferred position is not to create a prescriptive and potentially arbitrary list of those qualifying for such protection, which could well exclude whistleblowers who should be protected and would require constant scrutiny to ensure it covers all relevant parties (option A1).

CSA recommends that protection be extended to any person who makes a good faith disclosure of alleged corporate wrongdoing to an appropriate corporate officer or regulator. That is, the test for qualifying for protection should not be connected to the capacity in which the discloser has access to the information (for example, the status of the individual as an employee, adviser or supplier) but to the information itself and the disclosure being made in good faith.

An example of the limitations of the current provisions is that an employee of one company in a corporate group who makes a disclosure concerning misconduct in a related body corporate in the group does not qualify for protection. Whistleblower protection should not hinge on the technicalities of an employment arrangement.

Another example would be in the case of a whistleblower individual being a casual employee. It is becoming increasingly common for companies to use casual employees. Often, such persons are employees of a third-party employment services or contracting company, and the technical employment status of a person should not affect a person's access to protection should they be aware of and make a disclosure of misconduct.

Issue B: Defining a 'subsidiary' for the purposes of whistleblower protection provisions of the Insurance Act

CSA supports consistent definitions across different legislation.

CSA recommends that the definition of 'subsidiary' for the purposes of the whistleblower protection provisions of the Insurance Act be made consistent with the definition of subsidiary under the Corporations Act (option B1).

Issue C: What issues can be disclosed under whistleblower protections?

CSA does not believe that a whistleblower should be required to have nuanced knowledge of applicable legal and regulatory frameworks to know which regulator or law enforcement agency they should make their disclosure to in order to qualify for protection. For example, an employee should not have to ponder if misconduct by a senior executive is a breach of the Corporations Act, or the Trade Practices Act, or taxation legislation etc before bringing the misconduct to the attention of ASIC or the company. It is a strong disincentive to making disclosures if employees or concerned members of the public feel they require legal advice before making any such disclosure.

The current provisions expect an unrealistic level of sophistication on the part of whistleblowers in relation to their ability to analyse and understand which legislation and which regulator covers apparent corporate misconduct. Information about misconduct or illegal activity could be imperfect, and technical legal analysis of particular conduct by a discloser should not be required. CSA believes that there should be an overarching framework that supports the disclosure of all alleged misconduct or illegal activity. **CSA recommends** that a stand-alone, general whistleblower protection would effect this more readily than regulator or legislation-

specific protection. CSA notes that in the US and the UK there is general provision for allegations of misconduct made in good faith, and such allegations do not attract retribution.

CSA believes that it is important to distinguish between protecting the whistleblower who has made a disclosure of misconduct or illegal activity in good faith and any action taken in response to that disclosure. **CSA recommends** that a disclosure should be able to be made to any Commonwealth regulator or law enforcement agency. If that regulator or agency considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate body. CSA does not believe whistleblowers should be expected to know to which regulator a disclosure should be made.

CSA therefore recommends that whistleblowers have access to protection provided they make a disclosure concerning illegal activities that ASIC or other law enforcement agency can investigate (modified option C1). Any disclosure of unlawful activity should not be confined to ASIC.

Issue D: Should motive affect whether a whistleblower qualifies for protection?

CSA members believe that good faith should go to the genuineness of the discloser's belief in the information being disclosed and not the motives of the individual making the disclosure. That is, the motive of the whistleblower is not relevant, but the information genuineness of their belief concerning the alleged illegal activity is relevant.

For example, an individual could make a disclosure concerning illegal activity being undertaken by a senior executive who is conducting an affair with the discloser's spouse. The disclosure could be prompted by a strong emotional response to discovery of the affair, but if there is a genuine belief in the integrity of the information concerning the illegal activity then the disclosure should be considered to be made in good faith. The motive for making the disclosure is irrelevant.

CSA recommends that maintaining the emphasis on a disclosure being bona fide is essential, but supports any amendment to the legislation that clarifies that the good faith test goes to the genuineness of the belief in the information being disclosed and not to the motive for making such a disclosure (modified option D2). If information is knowingly or recklessly fabricated, no protection should be available, but if there is a genuine belief in the veracity of the information, despite any secondary motive held by the discloser, then protection should be available. For example, CSA notes that baseless allegations made simply for the purpose of gaining whistleblower protection would not be granted protection when the element of good faith is preserved. Furthermore, CSA notes that the allegations need not be upheld for protection to be available to whistleblowers, but they must be genuine to meet the good faith test.

CSA notes that if the element of good faith is removed then it might possible to make malicious or reckless allegations without regard to their truth. CSA does not believe that a person making false allegations with malicious intent should be protected. That is, CSA does not believe that an individual making a disclosure in bad faith should be protected. However, when the good faith test is directed at the genuineness of the belief in the integrity of the information being disclosed and not at the motive for disclosing it, then the question of motive is irrelevant.

Issue E: Should anonymous disclosures qualify for protection?

CSA notes that it is impossible to offer protection to an unknown person. CSA members believe that protection can only apply once the whistleblower has identified him or herself but that the order of disclosure of the information concerning illegal activity and identity should not determine whether an individual is afforded protection.

For example, a whistleblower could anonymously contact ASIC to disclose information concerning illegal activity and only disclose their identity at the close of the conversation or in a subsequent conversation. They should not be denied protection because their identity was revealed after the disclosure of misconduct, rather than before it.

CSA recommends that a whistleblower should qualify for protection at the point they disclose their identity or their identity becomes known to another individual within the organisation. CSA notes that the issue is not simply one of a whistleblower's identity becoming known to ASIC, as there could be instances when the identity of a whistleblower can be readily determined within a company, given that the information disclosed could only have come from one source. Therefore, it is important that not only should qualification for protection not be contingent on timing, but it should also not be contingent on the whistleblower revealing his or her identity. Qualification for protection should arise both where the whistleblower identifies him or herself or their identity becomes known through other means.

Issue F: Should a court be able to order the production of documents which reveal a whistleblower's identity?

CSA recommends that ASIC and others should generally not be compelled to disclose documents that reveal the identity of the discloser, but that if ASIC is relying on the documents to bring proceedings against a company or an individual then it should be required to disclose them. It is an essential element of natural justice that a person knows the case being made against them and the identity of their accusers. It would be unjust not to allow a person access to all the case made against them in order to protect the identity of a whistleblower. On the other hand, ASIC should not be required to disclose the identity of a whistleblower if, while information from the whistleblower may have prompted ASIC's initial investigation, that information is not part of ASIC's case.

This goes beyond the proposal put forward in option F2, where the applicant is required to establish the significance of the documents to their case.

Issue G: What confidentiality restrictions should apply to those receiving disclosures second-hand?

CSA notes that, if our recommendation is accepted that a disclosure should be able to be made to any Commonwealth regulator and, where that regulator considers it is not the appropriate body to investigate the allegation, it should refer it to the appropriate regulator (cross-agency referral), then it is important that parties receiving information second-hand, via the permission of the whistleblower, be subject to the same confidentiality restrictions as the initial recipient (option G1).

However, CSA believes that further amendment is required to the confidentiality restrictions. The current sections regulating whistleblowing in the Corporations Act provide that any qualifying disclosure must be kept confidential. Section 1317AE(1) makes it an offence for a recipient to disclose the identity of the whistleblower, any information likely to lead to identification of the whistleblower, and the information disclosed by the whistleblower. Consent from the disclosing party is required before the information can be passed on. The only passing on of the information without consent that is contemplated by the Corporations Act is disclosure to APRA, ASIC or the Federal Police.

CSA believes that this provision does not foster an outcome that serves good governance. While CSA recognises that it is important to protect the whistleblower, we contend that such protection is at cost to governance and may indeed be inconsistent with the fiduciary obligations of the recipient of the information. We also believe that the provisions, as worded currently, do not align with the Australian Standard AS 8004-2003 on Whistleblower Protection Programs for Entities, which sets out elements for establishing, implementing and managing an effective whistleblower protection program.

One of the objectives of AS 8004-2003 is:

> to enable the entity to effectively deal with reports from whistleblowers in a way that will protect the identity of the whistleblower and provide for the secure storage of the information provided.

The Standard sets out that the whistleblowing policy should clarify that there should be a guarantee that whistleblowers will receive feedback and that the entity is committed to protecting whistleblowers. It also states that any designated recipient of disclosures should have direct, unfettered access to independent financial, legal and operational advisers as required.

The Standard also states that the designated recipient of disclosures:

> should have a direct line of reporting to the chief executive officer (CEO) or other senior executive and, if one is appointed, the audit, ethics or compliance committee or equivalent. In cases where the CEO has been accused of reportable conduct, or where he or she has a close relationship with the person against whom the accusation is made, the [designated recipient of disclosures] should have direct access to the CEO or the committee referred to above.

However, in the Corporations Act, unless the disclosing party consents, the recipient has no opportunity, under the relevant provisions, to discuss the issue with senior officers in order to investigate or remedy any alleged contravention that gave rise to the disclosure. For example, a company secretary may receive a disclosure from an employee in accounting that the CEO is using company funds to renovate his house. At present, the company secretary is unable to discuss this with any colleagues or remedy the misconduct.

This curtailment of an intervention to remedy a contravention limits the usefulness of whistleblowing protection legislation. While acknowledging that there is provision for the recipient to disclose the matter to a regulator, CSA notes that, first, a recipient may be reluctant to contact a regulator, particularly in relation to an alleged contravention that has not been investigated or established and, second, even if a report were to be made to a regulator, having regard to the various demands on regulators, there will not necessarily be timely action, that could be effected if the company itself were able to act.

CSA recommends that these provisions be amended to permit the recipient to disclose information received from a whistleblower to senior officers of the company for the purpose of investigating or remedying the matters raised, provided that the recipient does not disclose without the whistleblower's consent the identity of the whistleblower or information that is reasonably likely to lead to the identification of the whistleblower.

CSA recommends that this could be achieved by deleting s 1317AE(1) (e) (i): 'the information disclosed in the qualifying disclosure'. The prohibition on disclosing the identity of the discloser in s 1317AE (1) (e) (ii) would remain in place.

Issue H: Should prospective whistleblowers be protected for seeking legal advice?

CSA recommends that any disclosure made for the dominant purpose of seeking legal advice on a possible disclosure to a prescribed authority should qualify for protection, regardless of other criteria (option H1).

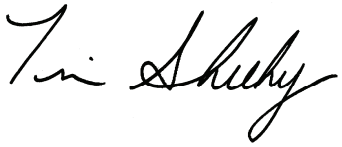
CSA, however, reverts to our earlier point that a framework supporting whistleblowing should not expect any employee or concerned member of the public to have nuanced knowledge of legislation so that they can be certain that any disclosure of misconduct or illegal activities can be acted on or that they will qualify for protection, or seek independent legal advice to be so reassured.

Conclusion

In preparing this submission, CSA has drawn on the expertise of the members of our two national policy committees.

CSA would welcome further contact during the consultation process and the opportunity to be involved in further deliberations.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE