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By Email

Dear Andivina and Greg

Consultation Paper 321: Whistleblower policies

1 Introduction

Allens welcomes the opportunity to comment on ASIC's draft guidance for entities that must have a whistleblower policy, *Regulatory Guide 000: Whistleblower policies* (***Draft Guidance***), and the issues raised in Part B of *Consultation Paper 321: Whistleblower Policies* (***CP 321***).

Whistleblowers play an important role within organisations and society more broadly and we wholeheartedly support a robust legislative regime that protects them from detriment, including the whistleblower policy requirement to which a number of our clients are subject. We welcome the best practice Draft Guidance as an important resource that organisations can refer to when drafting, implementing and maintaining a whistleblower policy that complies with the legislation.

In preparing this submission, we have had regard to our own experience advising public companies, large proprietary companies and superannuation trustees on complex risk and compliance matters including numerous whistleblower reports, our experience arising from having trained a number of eligible recipients in relation to their whistleblower obligations and the feedback provided to us by clients who are subject to the new whistleblower protections contained in Part 9.4AAA of the *Corporations Act 2001* (Cth) (***Corporations Act***) and Part IVD of the *Taxation Administration Act 1953* (Cth) (***Taxation Act***).

We have provided our detailed response to each question posed in Proposal B1 of Part B of CP 321 in Schedule 1 to this letter. Our submission does not cover Part C of CP 321, which relates to proposed relief for public companies that are small not-for-profits or charities.

In making this submission, there are a number of policy considerations that frame our detailed comments in Schedule 1:

(a) the purpose of the new whistleblower laws is to ensure that people who expose themselves to significant personal and financial risk in disclosing corporate and tax misconduct are protected from harm;

(b) the purpose of the whistleblower policy requirement is to ensure that eligible whistleblowers can make disclosures in a way that will be protected, are aware of protections available and understand how the entity in question will deal with their disclosure;

(c) to uphold this purpose, a company's whistleblower policy should adopt straightforward, plain English that is as accessible as possible and able to be understood by the people it is seeking to protect;

(d) many public companies and large proprietary companies already have a whistleblower policy and some existing policies apply to their global operations; and

(e) public and large proprietary companies have experience in drafting and implementing policies across a range of areas within their businesses in light of the entity's nature, size, scale and complexity of the entity's business which govern their organisation, set the culture and tone of the business and form part of the entity's brand and identity.

2 Summary

Our key observations are as follows:

(a) the Draft Guidance is helpful in identifying what should be contained in a whistleblower policy;

(b) the Draft Guidance should avoid a legalistic approach to policies that summarises legislation, and instead encourage policies to be concise and adopt plain English;

(c) multinational entities would benefit from further Draft Guidance in relation to updating their existing global whistleblower policies in light of the Australian laws;

(d) the Draft Guidance would benefit from a greater delineation between providing guidance on what is legally mandatory and what is required to meet those mandatory standards, and what is 'good practice' by moving away from the word *should* in describing that guidance;

(e) the description of the investigations exception to the confidentiality obligation at RG 000.138 should be reworded to ensure it aligns with the legislation; and

(f) a number of the best practice recommendations would be practically very onerous for entities to adopt, and this should be reflected in the Draft Guidance by acknowledging this is the case or paring back those recommendations.

Thank you for considering our submission. We would be happy to discuss the issues raised in our submission in further detail with you if that would be of any further assistance.

Yours sincerely

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Schedule 1

Questions in Part B of CP 321

Proposal B1

ASIC's proposal to give:

(a) guidance on the matters that must be addressed by an entity's whistleblower policy under s1317AI(5); and

(b) some good practice guidance (which is not mandatory) on establishing, implementing and maintaining a whistleblower policy.

B1Q1 Do you agree with our proposed guidance in Section B of draft RG 000? If not, why not?

Generally, yes, however there are some key areas where the guidance could be clarified.

(a) Accessibility

For whistleblower policies to work effectively, it is essential that they communicate to potential and actual whistleblowers in a way that is as accessible as possible. In our view, the level of detail and prescription in the Draft Guidance about what should be included in a policy puts the accessibility of a company's whistleblower policy at risk. The Draft Guidance could better reflect that internal policies are intended to be practical documents that guide employees and stakeholders, using accessible language, in relation to how the relevant entity operates.

Generally, policies are short documents that busy people can read quickly and that all staff and stakeholders can comprehend easily. The Draft Guidance, if adopted in full, would lead to a much longer policy than is usually seen (and would more closely resemble a 'standard' or 'procedure'). Further, it at times directs entities to include lengthy explanations of defined terms and specific provisions of the Corporations Act (see, for example, RG 000.12, RG 000.53, RG 000.64, RG 000.97, RG 000.138). We think the Draft Guidance should emphasise accessibility, and the need to tailor a whistleblower policy to the nature of an entity's business and the audiences that may rely on the policy. The Draft Guidance should take a higher level approach to ensure that a good practice whistleblower policy aligns with other policies within an entity, without having to refer to specific provisions of legislation.

(b) Multinationals

We note that the good practice guidance contemplates a standalone whistleblower policy for multinational entities at RG 000.36. We have advised multinational clients on the modification of existing global policies to suit the new regime in Australia and think it would be useful for the Draft Guidance to include some detail on how multinationals could navigate the interplay between the Australian whistleblower regime and those in other jurisdictions to which such entities are also subject. Multinationals often address competing regulatory obligations in different jurisdictions with a single policy. It would be helpful to know, for example, whether ASIC's standard of good practice is met by modifications to an existing global whistleblower policy.

The Draft Guidance could recommend that entities that operate in other countries may annexe a schedule or addendum to their global whistleblower policy to allow for the prescriptive requirements of the Corporations Act to be fulfilled, without affecting the operation of a global whistleblowing policy (which may be drafted more broadly to ensure compliance with more than one whistleblower regulatory regime).

Multinationals would also benefit from guidance on the extraterritorial reach of Australia's whistleblower laws. There is a lack of clarity in the legislation as to whether the regime applies to disclosable matters that occur in whole, or in part, in foreign jurisdictions. Addressing this ambiguity in the Draft Guidance would be instrumental for multinationals seeking to prepare and implement effective whistleblower policies in accordance with the Australian whistleblower laws.

(c) Group entities

Similarly, we have advised several large corporate groups which consist of multiple legal entities that, on one view of the legislation, might each separately require a whistleblower policy. In practice, eligible whistleblowers are unlikely to appreciate the distinction between the corporate group and each entity within it and adopting multiple policies for each entity within a corporate group is likely to cause confusion.

For this reason, the Draft Guidance could clarify that adopting a single group policy that applies to other entities within the group may be appropriate unless the particular circumstances suggest that an eligible whistleblower might expect the entity to have its own separate policy (for example, because the nature of the entity within the group is such that it operates separately and generally does not associate itself with the group, other than by the fact of its ownership).

For the same reasons, it would also be beneficial for the Draft Guidance to clarify which persons should be considered 'senior managers' for the purpose of the legislation within a group structure. In our view, and in the experience of our clients, it would be clearer for potential eligible whistleblowers if the persons to whom they can report under the policy are limited and obvious in number and title. It would be appropriate in these circumstances to limit 'senior managers' for the purpose of whistleblower reports to those persons the group considers to be 'senior managers' of the parent entity.

(d) Mandatory versus good practice

Currently, the Draft Guidance contains paragraphs in relation to what matters *must* be addressed and what matters *should* be addressed. Underneath those paragraphs it also has a "Good practice guidance" section with further recommendations. The Draft Guidance acknowledges that the good practice guidance is not mandatory.

However, many of the recommendations beginning with a *should* in the Draft Guidance that do not fall under the "Good practice guidance" are also not mandatory and it would be less confusing for the reader if these recommendations were moved to the "Good practice guidance" section. Further, use of the word *should* in this context has the potential to lead entities and others to believe that entities are legally required to include the Draft Guidance that is described in this way.

For example, RG 000.120 recommends that policies *should* explain fourteen different matters in relation to detrimental conduct, including in relation to support services, assessing risk of detriment, strategies to help a discloser "minimise and manage stress, time or performance impacts or other challenges resulting from the disclosure of the investigation", specific steps to prevent detriment, steps to be taken after detriment has occurred and suggestions that go beyond the scope of the whistleblower laws including "allow the discloser to take extended leave" and "develop an alternative career development plan". While we don't disagree with the suggestions, we do think that saying all entities subject to a whistleblower policy requirement *should* take on the burden of implementing them is a step too far.

Expressions that may be better suited to non-mandatory guidance in place of *should* are *could, might*, *may wish to*, *may consider* or *are encouraged to*.

As acknowledged at paragraph RG 000.13, a whistleblower policy should be aligned to the nature, size, scale and complexity of the entity's business. We agree with this observation, and note that an entity that in good faith adopts a best practice whistleblower policy but later has difficulty implementing it could be more susceptible to a compensation order in relation to detrimental conduct than an entity that adopts a more minimalistic policy (see s1317AE(3)(b) of the Corporations Act, which provides that the *extent to which the employer gave effect to that policy* is something a court may have regard to when deciding whether to make an order). We therefore recommend that the Draft Guidance provides a further comment in this paragraph referring to s1317AE(3)(b) and acknowledging that some entities may not be adequately resourced to adopt the best practice recommendations contained in the Draft Guidance, or may prefer to adopt different processes.

(e) Investigations exception to confidentiality

At RG 000.138, the Draft Guidance does not correctly explain the investigation exception to the confidentiality obligation at s1317AAE(4) of the Corporations Act, which provides conditions around disclosing *information that is likely to lead to the identification* of the whistleblower, rather than what is reported in the Draft Guidance for disclosing *information that is contained in a disclosure*. Information contained in a disclosure is not necessarily also likely to lead to the identification of the whistleblower.

B1Q2 **Do you agree that the information that must be covered by a whistleblower policy, as set out in s1317AI(5), has been adequately addressed in our proposed guidance? If not, please provide details.**

Yes, however as noted above, the Draft Guidance at times goes well beyond what is required at law and adopting the Draft Guidance in full may lead to a policy that is not read or readily understood by its intended audience.

B1Q3 **Do you agree that the matters we have included in our proposed guidance will be useful in helping entities to establish, implement and maintain a robust and clear whistleblower policy? If not, please provide details.**

The good practice guidance component of the Draft Guidance is generally helpful, but recommends a number of measures that would be practically onerous to introduce. These measures might be better described as 'best practice' outside of the legislative requirements, rather than good practice that reflects the legislative requirements.

For example:

(a) RG 000.122 – 129 recommends that businesses establish a risk assessment framework for assessing and controlling the risk of detriment. The recommendation suggests that it is best practice to analyse each risk, analyse the severity of possible consequences, develop strategies to prevent or contain risks, and continue this process throughout the investigation as the risk of detriment may shift as the investigation progresses.

(b) RG 000.166 – 177 recommends businesses have extensive mechanisms in place to monitor the effectiveness of whistleblower policies, including immediate notifications for the board audit and risk committee in the event of serious matters, and periodic reports containing statistics on the frequency of disclosures and data on employees' comprehension of the whistleblower policy. While these are concrete ways of assessing the risk of detriment and monitoring the effectiveness of whistleblower policies, we are concerned that fully implementing the mechanisms described here in the Draft Guidance

as 'good practice' may actually represent a significant practical burden for smaller entities.

(c) RG 000.73 recommends a number of 'roles and responsibilities'. It is helpful that the Draft Guidance emphasises that it is ultimately the board's responsibility for ensuring an entity has an appropriate risk management framework in place, and that a whistleblower policy should outline key roles and responsibilities. However, the Draft Guidance recommends identifying ten different roles for persons connected with the company's whistleblower policy. While the Draft Guidance does state that in practice, a whistleblower protection officer and regular internal reporting employee may be the same person, we are left with the impression that good practice directs entities to bring in additional resources and add new responsibilities to job descriptions throughout the company, even if this was not the intention behind the Draft Guidance.

We think the Draft Guidance would benefit by adopting our recommendations contained above in relation to moving away from using the word 'should', acknowledging that some entities will not be resourced well enough to adopt all of the recommendations or may have other resourcing priorities, and that 'good practice' must be considered in the context of the nature, size, scale and complexity of the entity's business. We further recommend that ASIC consider paring back some of the recommendations currently contained in the Draft Guidance, such as those identified above.

B1Q4 Do you agree with our proposed guidance that an entity's whistleblower policy should focus on disclosures of information that qualify for protection, rather than reports about all issues and concerns, in relation to the entity? If not, please provide details.

Many of our clients have adopted a whistleblower policy that encourages employees to broadly report any concerns without fear of repercussions and then goes on to explain when those disclosures are protected at law. The Draft Guidance suggests they should not do this and instead have a much narrower and more legalistic policy which only applies to disclosures that qualify for protection under the new laws. We think this has the potential to encourage legalistic policies that make it very difficult for employees to understand what is covered by the policy. In addition, ASIC has recently emphasised the importance of good corporate culture. Having a culture which encourages employees to report any and all concerns, regardless of whether they qualify for protection at law, is an important part of organisational culture.

A further reservation we have in relation to policies focusing on disclosures of information that only qualify for protection under the new Australian laws is that this is unlikely to be workable for multinational companies, where in foreign jurisdictions most disclosures are unlikely to qualify for protection under the Corporations Act (and would therefore, if the whistleblower policy was updated to only apply the Corporations Act, not be protected under the multinational's whistleblower policy). This concern provides further support for our recommendation that ASIC should provide guidance on multinational companies annexing an 'Australian-specific' schedule or addendum to its global whistleblower policies, although we think the best solution would be to allow entities to continue their practice of adopting a high level policy that does not contain specific references to provisions of Australian-specific legislation.

In training a number of eligible recipients across large public companies, it has become apparent that there is some confusion around where the line falls between misconduct or an improper state of affairs and a personal work-related grievance, especially in circumstances where what appears to be a work-related grievance later emerges to be something more systemic within the organisation. It would be good if the Draft Guidance could provide comfort to entities that where a disclosure initially falls within the realm of a personal work-related

grievance then it is acceptable to not treat it as a whistleblower-protected disclosure, even if it later emerges that it has uncovered a "disclosable matter" under s1317AA(4). We illustrate this potential dilemma in the following Example Scenario.

Example Scenario

Consider a case where an employee reports receiving an unfair performance review from her supervisor. She thinks the performance review is inaccurate and she has reasonable grounds to suspect that her supervisor is punishing her because she was recently invited on a date by him and she told him that she was not interested. Feeling embarrassed about raising these matters, at the time of making her report she does not offer any explanation for what she thinks has motivated the supervisor to act in this way, other than to complain that her performance has been exemplary and she deserves a better evaluation. Her company therefore, entirely appropriately, treats the complaint as a personal work-related grievance.

During the course of the workplace investigation that follows, by speaking to a number of witnesses in the department who have observed the employee's performance, a handful of women complain that the supervisor has a reputation for punishing female staff who reject his sexual advances. Further, the previous HR member responsible for that team, who was good friends with the supervisor outside of work, routinely refused to investigate these issues when raised in the past. The investigation into the personal work-related grievance has now uncovered something that is potentially more significant and it is less clear that the matter would be considered a personal work-related grievance under the legislation. However, the aggrieved employee's company in following its whistleblower policy has (entirely appropriately) not treated her initial complaint as falling within its whistleblower program. We think entities would be comforted by some acknowledgement from ASIC in the Draft Guidance that these circumstances may arise.

B1Q5 **Do you agree with our proposed guidance that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity? If not, please provide details.**

Yes.

B1Q6 **Is the proposed good practice guidance useful and appropriate? If not, please provide details.**

We refer to our responses at B1Q1 and B1Q3.

The Draft Guidance usefully provides practical suggestions for facilitating whistleblower reports made anonymously (eg, by making hotlines or anonymised email addresses available). While the Draft Guidance states that policies should recommend anonymous disclosers maintain an ongoing two-way dialogue with the recipient of their disclosure, we think readers could benefit from further guidance on how to navigate the practical difficulties of investigating anonymous whistleblower reports where a two-way dialogue is not established. Further, we recommend including in the Draft Guidance that a policy could provide that anonymous disclosures could be more difficult to investigate. It would be useful for eligible whistleblowers to have that information before deciding on what basis they will make a disclosure.

B1Q7 **Do you agree with our proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false reporting? If not, please provide reasons.**

Yes. Whistleblower protections apply only insofar as the person making the disclosure has reasonable grounds to suspect that misconduct or an improper state of affairs or circumstances has occurred. They do not apply to persons who do not meet that threshold.

Whistleblower policies should be able to encourage whistleblowers to come forward and at the same time discourage false reporting.

B1Q8 **Do you agree with our proposed good practice guidance that smaller entities (particularly those with a limited number of employees) should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures? If not, please provide details.**

We believe it is a good idea to encourage smaller entities to engage third party services that have the requisite knowledge and experience in dealing with whistleblowing disclosures and investigations. This will assist in whistleblower laws being upheld and at the same time protect the entity by involving a third party that is more likely to appropriately deal with disclosures.

However, from a practical perspective, ASIC should acknowledge that where an entity is not adequately resourced to provide these resources inhouse, it may not be able to afford to engage an external third party, especially in relation to investigations, which can be time and cost intensive. Additionally, the size of an organisation does not necessarily correlate to how many whistleblower disclosures it may receive. If it has a high volume of disclosures, it may be better served by employing a dedicated in-house function to handle them.

A number of our clients have also been considering how to ensure compliance with the confidentiality obligations contained in the legislation. RG 000.83 acknowledges the importance of compliance with those obligations but could benefit from some additional clarification on when an outsourced function will be subject to those obligations. For example, an online 'hotline' may operate in one of two ways:

- by accepting the report and passing it onto a person employed by the outsourced 'hotline' to triage the disclosure before providing it to the relevant entity; or
- by merely acting as a conduit for the report which is immediately and automatically sent to certain persons at the relevant entity. That is, no person at the outsourced 'hotline' physically receives or reviews the report.

Our view is that while the persons at the outsourced 'hotline' provider who receive the report in the former scenario will be subject to the confidentiality obligations, that should not be the case for the latter scenario. As no person at the outsourced 'hotline' provider receives the report, the 'eligible recipient' of the report is in fact the person at the relevant entity to whom the report is automatically directed. Of course, appropriate security and access controls would need to be in place to protect against inadvertent disclosures or unauthorised access by persons employed by the outsourced 'hotline'.

This is not dissimilar to the approach adopted by the Office of the Australian Information Commissioner in relation to use and disclosure of personal information under the *Privacy Act 1988* (Cth). As set out in paragraph B.144 of the *Australian Privacy Principle Guidelines:*

> In limited circumstances, providing personal information to a contractor to perform services on behalf of the APP entity may be a use, rather than a disclosure (see paragraph B.63–B.68). This occurs where the entity does not release the subsequent handling of personal information from its effective control. For example, if an entity provides personal information to a cloud service provider for the limited purpose of performing the services of storing and ensuring the entity may access the personal information, this may be a 'use' by the entity in the following circumstances:
>
> - a binding contract between the entity and the provider requires the provider only to handle the personal information for these limited purposes
> - the contract requires any subcontractors to agree to the same obligations, and
> - the contract gives the entity effective control of how the information is handled by the provider. Issues to consider include whether the entity retains the right or power to access, change or

> retrieve the information, who else will be able to access the information and for what purposes, the security measures that will be used for the storage and management of the personal information (see also APP 11.1, Chapter 11) and whether the information can be retrieved or permanently deleted by the entity when no longer required or at the end of the contract.

The Draft Guidance would benefit from some clarification on this point and could adopt similar principles to those adopted in the Australian Privacy Principles Guidelines.

B1Q9 Do you have any suggestions on how the guidance in Section B of draft RG 000 can be improved? Please provide details.

See our responses above.

B1Q10 Are there any practical problems associated with our guidance? Please provide details.

ASIC should consider providing guidance to entities on how to deal with whistleblower disclosures that do not relate to them or related body corporates, such as where a company receives a disclosure about a joint venture partner, or a contractor. While the law clearly protects whistleblowers who are not necessarily employees of an entity, it is not clear how eligible recipients at those entities are entitled to act in relation to such disclosures, other than maintaining the confidentiality of the disclosure. For example, the extent to which an entity in this position is able to refer the matter to a third party that may be in a more appropriate position to investigate the matter. Currently, companies that receive whistleblower reports but are not necessarily the subject of those reports have no guidance from ASIC in relation to this issue. Entities seeking to implement and prepare effective whistleblower policies would benefit from guidance on how to handle protected disclosures that originate outside the entity.

We have seen this issue have a unique impact on our audit clients, who may receive disclosures as eligible recipients in relation to other entities. Auditors may receive disclosures about the financial reports or financial position of their clients and it can be unclear whether the disclosure is made to the auditor in their capacity as auditor or as an eligible recipient. Where it is the latter, the auditor presumably must ensure that the entity has an appropriate level of information to investigate the issue whilst also ensuring it complies with the confidentiality requirements of the whistleblower regime. However, where the auditor receives the disclosure in its audit capacity as a matter to investigate as part of its audit processes, the approach may be different and the confidentiality protections would not necessarily be triggered. We assume that audit clients will need to take a common sense approach and, where possible, seek guidance from the discloser about how to proceed. It would be helpful if ASIC could provide a view in the Draft Guidance on how auditors' whistleblower policies should address this issue.