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18 September 2019

By email: whistleblower.policy@asic.gov.au

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Submission – Regulatory Guide 000: Whistleblower Policies

Thank you for the opportunity to provide feedback on the draft Whistleblower Policies Regulatory Guide 000 (**RG 000 and Guidance**).

General comments on RG 000

Corrs Chambers Westgarth is an independent Australian law firm. We advise a wide range of leading public and private corporations which operate domestically and internationally on their whistleblowing obligations, including the recent changes introduced via the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (**Whistleblower Protections Act**).

The comments we make in the submission reflect matters which our firm has identified as warranting consideration. This submission also builds upon issues that we have discussed with our clients and issues which they have raised, following consideration of the Guidance.

In the lead up to and following the *Whistleblower Protections Act*, we have seen a rapid increase in clients seeking advice on their obligations under Australian whistleblowing legislation. This includes publicly listed and large proprietary companies required to have a whistleblower policy under the *Whistleblower Protections Act*, as well as organisations which are putting in place a policy to ensure that whistleblowing concerns are handled in accordance with legislative requirements and for internal guidance and consistency.

Policies are a common tool used by organisations to ensure employees understand their legal obligations, as well as to set good standards of practice. However, the content of those policies is generally a matter for an organisation to determine.

In comparison to other jurisdictions, a legislative requirement for an organisation to have and maintain a whistleblower policy which prescribes in detail the matters which must be dealt with in the policy, such as that imposed by section 1317AI of the *Corporations Act 2001* (Cth) (**Corporations Act**), is unusual.

Given the diverse range of organisations that are subject to the whistleblowing requirements, we consider it would be appropriate for the Guidance to encourage each organisation to implement a policy that best suits their business requirements and is fit for purpose within the context of that business. The level of detail prescribed by ASIC's Guidance is, in our view, likely to lead to policies that adopt and follow the Guidance to ensure compliance with this, rather than the development of policies that are fit for purpose and designed to achieve the desired legislative outcomes, which is a sub-optimal position.

Further, we expect that those organisations which are subject to the whistleblowing laws but are not subject to the section 1317AI policy requirements will use ASIC's Guidance as a benchmark when formulating their policies, resulting in similar adverse outcomes.

We understand that an objective of the *Whistleblower Protections Act* is to help uncover misconduct that might not otherwise be detected; this is facilitated by an organisation having in place a transparent whistleblower policy, in doing so, such a policy will ensure that disclosers are aware of the protections afforded to them. The goal of RG 000 is to support organisations to adopt a whistleblower policy which is compliant with the obligations under section 1317AI, is able to be applied consistently across the organisation, and is accessible to employees and other eligible whistleblowers at all levels of the organisation and externally.

We consider the legislative purpose, and the purpose of RG 000, is best achieved if an organisation has a single whistleblower policy which is able to be applied to all employees, contractors and other eligible disclosers across an organisation, and which is simple enough to be clear and accessible to managers and employees at all levels.

In our view, the goals of the *Whistleblower Protections Act* are most effectively achieved by policies that are straightforward to apply and able to be easily understood and explained. Policies which are detailed, complex and consequently lengthy provide a barrier to accessibility and are difficult for organisations to implement consistently. The greater the complexity of the policy and the more detailed the procedures which are included, the higher the likelihood that the policy will be misunderstood and/or misapplied internally. When policies are not applied consistently, employees inevitably lose confidence in the system and thereby the objective of the legislation will be undermined.

To the extent that a formal whistleblower policy is not sufficient to ensure that the organisation manages whistleblowing in a competent and appropriate manner, it may be appropriate for an organisation to supplement its policy with more detailed procedures and training. However, these should be in addition to, and not included in, the policy itself, and should allow the policy to be aligned with the entity's activities, scale, size and complexity.

Comments on section B1: Proposed guidance on establishing, implementing and maintaining whistleblower policies

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

1.1 We and our clients welcome the proposed Guidance to assist with the establishment, implementation and maintenance of a policy that complies with the legislative requirements. However, we and our clients have the following concerns about the Guidance in its current form:

(a) As noted above, for a policy to be effective, it must be accessible and appropriate to the organisation and its workforce. This important objective may not be able to be achieved if organisations feel compelled to implement policies which contain the level of detail required by the Guidance, taking into account the size, sophistication, resources, and level of internal human resources and risk management capability within the organisation.

(b) In some areas, it seems the Guidance may extend an organisation's apparent obligations beyond the requirements of applicable legislation without making this clear.

1.2 The following areas are examples of where, in our view, the Guidance may go beyond what the legislation requires to be included in the prescribed policy under section 1317AI:

1.2.1 Matters the policy applies to – Who can provide advice on or receive a protected disclosure

(a) We have two observations about the Guidance for organisations about how to satisfy the requirement under section 1317AI(5)(b) to identify who within, and outside, the entity can receive a protected disclosure (RG 000.57 – RG 000.71):

(i) We endorse the good practice guidance in RG 000.62, and acknowledge the importance of encouraging eligible whistleblowers to make a disclosure to the entity in the first instance. Early reporting of concerns, in a safe and secure manner, is an essential part of any organisation's effective risk management and corporate governance framework. We also acknowledge the need to emphasise to a potential eligible recipient, that they can make a disclosure directly to regulatory bodies if they would prefer (RG 000.63).

(ii) We acknowledge the need to include in a policy a statement to the effect of RG 000.68 (that an 'emergency disclosure' or 'public interest disclosure' can be made to a journalist or Member of Parliament, in certain circumstances). We consider that the additional criteria included in section 1317AAD(2) (eg. the requirement to wait 90 days after first reporting the matter to the regulator) indicates a legislative intention that this should be a 'last resort' approach to resolving a matter. It will also generally not be in an organisation's best interest to encourage

emergency or public interest disclosures. More importantly, it is less likely to be an avenue that will lead to prompt resolution of the matter. We suggest this should be indicated in any policy, and in the Guidance. We agree with the suggestion in the good practice guidance that it would be appropriate for the policy to either refer potential eligible whistleblowers to the legislation or recommend that these individuals seek advice before making such a disclosure, given the additional criteria that such a report needs to meet in order to qualify for protection. However, in our submission, it would not be appropriate for a policy to say more than this (which is arguably anticipated by the inclusion of RG 000.69 and RG 000.70 in the Guidance).

1.2.2 Matters the policy applies to – Disclosable matters

(a) The Guidance provided regarding the definition of '*disclosable matters'* is very broad and it is difficult to imagine a situation that will not potentially be covered by the *Whistleblower Protections Act*.

(b) In particular, the Guidance requires a whistleblower policy to provide that disclosable matters may involve conduct that does not contravene any law (at large). For example:

(i) **"RG 000.41** An entity's policy should explain that disclosable matters include conduct that may not involve a contravention of a particular law. For example, 'misconduct or an improper state of affairs or circumstances' may not involve unlawful conduct in relation to the entity or a related body corporate of the entity but may indicate a systemic issue that the relevant regulator should know about to properly perform its functions. It may also relate to dishonest or unethical behaviour and practices, conduct that may cause harm, or conduct prohibited by the entity's standards or code(s) of conduct." [emphasis added].

(ii) **"RG 000.42** An entity's policy should also explain that information that indicates a significant risk to public safety or the stability of, or confidence in, the financial system is also a disclosable matter, even if it does not involve a breach of a particular law." [emphasis added].

(c) A key objective of the legislation is to encourage individuals to report potential wrongdoing. However, it has been understood in the business community that the 'wrongdoing' was to be in relation to the conduct of the entity, in respect of its corporate, financial and tax obligations as opposed to the conduct of individuals towards each other. Therefore, complaints that would normally be dealt with by HR would fall outside the new regime.

(d) The above examples appear to extend the protections available under the *Whistleblower Protections Act* in a way that is not consistent with the legislative intent (unless there is evidence of 'misconduct or an improper state of affairs' under section 1317AA(4), which must be systemic by nature and/or constitute 'misconduct' as the term is defined in the *Corporations Act*).

(e) Although the *Whistleblower Protections Act* confirms that personal work-related grievances are not protected disclosures and remain within the jurisdiction of the *Fair Work Act 2009* (Cth), the Guidance is broader. In part this is attributable to the use of the term 'misconduct' at large, instead of the more confined term that is defined in the *Corporations Act*.

(f) In particular, we note:

(i) Disclosable matters involve information that the discloser had reasonable grounds to suspect misconduct, or an improper state of affairs. 'Misconduct' is expressly defined by section 9 of the *Corporations Act* and includes fraud, negligence, default, breach of trust, and breach of duty. Subsection 1317AA(5) sets out specific conduct that amounts to an offence under the listed legislation, or carries a penalty of 12 months imprisonment or more as being misconduct in this context. The concept of an 'improper state of affairs' is not defined in the legislation, but the Revised Explanatory Memorandum at [2.34] states that it "may not involve unlawful conduct but may indicate a systemic issue that would assist the relevant regulator in performing its functions."

This is a distinct and considerably narrower concept than 'misconduct' as that term is commonly used in relation to the management of employee conduct, and to identify conduct of a significant level of seriousness.

(ii) The Guidance notes at RG 000.53 that the policy should explain when a disclosure about, or including, a personal work-related grievance still qualifies for protection. For example, if:

- a personal work-related grievance includes information about misconduct, or information about misconduct includes or is accompanied by a personal work-related grievance (mixed report);
- the entity has breached employment or other laws punishable by imprisonment for a period of 12 months or more, engaged in conduct that represents a danger to the public, or the disclosure relates to information that suggests misconduct beyond the discloser's personal circumstances. [emphasis added].

(iii) Again, it is not clear from the Guidance whether the term 'misconduct' as it is used here relates to the term as inclusively defined in the *Corporations Act*, rather than misconduct at large. The majority of HR complaints raise alleged breaches of the employer's Code of Conduct and are likely to include complaints of discrimination, bullying, harassment or victimisation. This type of conduct is unlikely to fall within the definition of 'misconduct' in the *Corporations Act*, but would appear to be covered by the Guidance. This is an expansive interpretation which does not appear to be supported by the terms of the legislation. We recommend that the Guidance should make it explicit that 'misconduct' has the meaning given to it in the *Corporations Act*.

(g) In addition, we note the reference to the example of "employment or other laws punishable by imprisonment" in RG 000.53. With the exception of an offence under the *Work Health and Safety Act 2011* (Cth) (which applies to very few employers), there are no federal employment laws that provide for criminal sanctions. However, by suggesting that a report about a personal grievance could be a protected disclosure if the entity has "breached employment laws," the Guidance may lead organisations to treat such complaints as a whistleblower complaint, when this does not appear to be required.

(h) A practical consequence of the extension of the types of 'misconduct' beyond the apparent scope of the legislation is that organisations will need to revisit many HR policies dealing with such matters, and how general HR complaints are handled.

(i) For example, a Chief Operating Officer (**COO**) receives a complaint about bullying and victimisation by a colleague. There is no request by the employee to remain anonymous and, in any event, the COO is aware that HR have previously investigated the allegations and found the allegations unsubstantiated.

(ii) Normally, the matter would be instinctively passed back to HR for further investigation. The inference in the Guidance that the conduct is a disclosable matter – which we consider is highly unlikely – would prevent the issue being passed back to HR as that may be a breach of the confidentiality provisions of the *Whistleblower Protections Act*, unless consent has been given by the reporter.

(iii) In relation to HR matters, organisations that adopt the extended view of misconduct in the Guidance are likely to find that their ability to investigate complaints, and particularly complaints where it is essential that the identity of the respondent is disclosed, is hindered in a way that does not appear to be consistent with the legislative intent.

(iv) For example, a COO receives a complaint about sexual harassment. To ensure that the individual complies with his or her obligations they should ask the employee to consent to their complaint being passed to the Whistleblowing Protection Officer and/or the Whistleblowing Investigation Officer. If consent is refused, or the employee does not wish their identity to be disclosed, arguably the COO cannot take the matter any further.

(v) Such an interpretation is inconsistent with industry practice and arguably is inconsistent with an organisation's duties under the *Work Health and Safety Act 2011* (Cth), where complaints will be investigated regardless of whether the employee wishes to remain anonymous or consents to the matter being investigated.

(vi) We do not think that such a broad interpretation of 'disclosable matters' is the intention of the legislature and, therefore, it should be clarified within the Guidance. In doing so, we suggest consideration be given to

exempting any unlawful conduct that is already covered by the *Fair Work Act 2009* (Cth) and other federal laws.

(vii) We also note that officers and directors have obligations under the *Corporations Act*, including being required to act in their company's best interests. We would welcome further clarity on whether an allegation that they have bullied, harassed, or discriminated against an employee, would constitute a protected disclosure.

1.3 The following are examples of information that we suggest should not be included in a policy (although it may be appropriate to address such matters in another document).

1.3.1 Roles and responsibilities

(a) **RG 000.12** provides that an entity's whistleblower policy should also include information about the protections provided in the tax whistleblower regime under the *Taxation Act Administration Act 1953* as recommended by the Explanatory Memorandum.[1] However, section 1317AI(5) of the *Whistleblower Protections Act* only provides that the policy should contain information about the protections under '*this Part'*. This does not, in our view include the protections already provided under the tax regime. To do so will add a further layer of complexity to the policy. We suggest that while protections under the tax regime are referenced, the detail should be contained in separate guidelines.

(b) **RG 000.73** provides that the policy should outline the key roles and responsibilities under its whistleblower policy. We consider that setting out this information within the actual policy, may detract from the overall objective of encouraging individuals to report potential wrongdoing. Governance issues are matters typically managed by an entity's management and/or Board and are unlikely to assist a whistleblower.

(c) **RG 000.74** while practically in smaller entities it may be easier to appoint the same person to the role of Whistleblowing Protection Officer and Whistleblowing Investigation Officer, the two roles have different functions and typically are not held by the same individual due to the potential for a conflict to arise.

1.3.2 Identity Protection

(a) **RG 000.107** provides that the policy should outline the measures an organisation has in place for ensuring confidentiality. The balance of this section describes secure record-keeping and information sharing procedures that should be adopted. It is not clear from the Guidance whether this level of detail should be included in the policy.

[1] 2.145 of the Revised Explanatory Memorandum to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2008

(b) There are significant practical issues with a requirement for this level of detail in the policy. In particular, changes in technology, processes or personnel are a frequent occurrence in many organisations. Any such changes that may affect particular confidentiality measures will need to be reflected in frequent updates to the policy.

(c) We agree, the confidentiality provisions are key to giving employees confidence in the system to encourage reporting. However, we do not consider that documenting the mechanics of how this will be achieved, will assist this aim. It would be helpful if the Guidance could clarify ASIC's expectations.

1.3.3 Protection from detrimental acts or omissions

(a) **RG 000.120** provides the policy should explain how the entity will, in practice, protect disclosers from detriment. The content of this guidance is lengthy and very detailed. Again, for simplicity, employees should be made aware that they will be protected from detriment. Employees should also be notified of what to do if they believe that they have been the victim of such conduct. It would also be appropriate to outline how this will be achieved in separate guidance for those with obligations to protect eligible whistleblowers from detrimental conduct.

1.3.5 Handling and investigating a disclosure

(a) **RG 000.132, 134 & 144** provide that the policy should outline the steps the entity will take after it receives a disclosure and provide transparency about the investigation process and timeframe.

(b) In our experience, it would not be advisable to require organisations to mandate any timeframes for a response within their policy. It would be appropriate to indicate when key events will take place, for example, that a report will be acknowledged within a particular number of days and, where appropriate, that the whistleblower will receive periodic updates on the progress of the investigation. Depending on the nature of the complaint, an investigation process could take several months to complete. While it may be helpful for the discloser to be aware generally of what an investigation process involves, it is impractical to provide specific timeframes for the investigation and may not be appropriate in some cases.

1.3.6 How investigation findings will be documented, reported internally and communicated to the discloser

(a) **RG 000.146** provides that the policy should outline how the findings from an investigation will be documented and indicate the information that the discloser will receive at the end of the investigation. We do not recommend that this should be a mandated requirement in the policy. Depending upon the nature of the complaint, matters may be documented and reported in different ways and, in some cases, it may not be appropriate to provide details of the outcome to the discloser, particularly where it may involve disciplinary action against an employee.

B1Q2 Do you agree that the information that must be covered by a whistleblower policy, as set out in section 1317AI(5), has been adequately addressed in our proposed guidance? If not, please provide details.

2.1 Yes.

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.

3.1 Please see our comments 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.

4.1 Yes, however as noted above, the description of '*disclosable matters'* is currently very broad with the effect that organisations following the Guidance will be required to treat virtually all complaints as whistleblowing complaints to ensure that they do not inadvertently breach the confidentiality provisions.

4.2 In addition, because the public disclosure and emergency provisions require the whistleblower to have reported the matter to ASIC or APRA in the first instance, there is a heightened risk that regulators will receive a large number of concerns that should be handled internally.

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.

5.1 Yes.

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

6.1 We and our clients welcome the good practice guidance, subject to our comments above.

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.

7.1 Yes. Not only do we agree that this should be included, but that the statement should be expanded to advise that false reporting could lead to disciplinary action being taken against the employee, up to and including termination.

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.

8.1 Many smaller entities will not be able to afford to engage an external service provider. However, we think it useful to identify that such services exist – subject to the matters raised below which may impact on their utility.

8.2 In addition this may not assist with regards to the confidentiality provisions, because the investigation of the matter in a small entity may not be possible without revealing who has reported the disclosure (unless the report was made externally).

8.3 Depending on the nature of the disclosable matter, it may be appropriate for any organisation to engage a third party provider to conduct the investigation. However this should be determined on a case by case basis. It should not be mandatory.

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

9.1 In addition to our comments above, the Guidance could also include what organisations should do in the event that a complaint is first treated as a personal grievance, and then through the investigation it becomes clear that it is actually a disclosable matter. For example, an employee complains about receiving unsolicited pornographic pictures on her work phone from colleagues. Investigations uncover conduct of a criminal nature that would be punishable by imprisonment of 12 months or more.

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

10.1 Please see our comments above.

Comments on section B2: Additional Good Practice Guidance on establishing, implementing and maintaining a whistleblower policy

B2Q1: Do you agree with our proposed additional good practice guidance in Section C of draft RG 000? If not, please provide details.

11 Our clients support and welcome guidance from ASIC regarding what ASIC considers to be best practice in relation to the establishment of a whistleblower policy that complies with the legislation. We welcome the inclusion by ASIC of statements which make it clear that the additional good guidance is “not mandatory”.

12 However, we consider it likely that best practice guidance will become the expected standard. There is a risk that aspects of the Guidance set the bar too high and this will result in a significant compliance burden for some organisations. We suggest that more generalised guidance will permit organisations to design a

policy fit for purpose based on their activities, resources, size and the maturity of their current systems and processes.

13 We would welcome the inclusion of language in RG 000 which explains in more detail the consequences for organisations which fail to adopt the best practice guidance contained in RG 000. It would also assist organisations to understand in what circumstances ASIC would consider it acceptable for an organisation to choose not to adopt some of the best practice guidance. It would also be helpful if ASIC could indicate that it will take into account an organisation's activities, resources, size, funding, degree of dedicated human resources and risk personnel in determining whether the content of a policy is appropriate and sufficient to meet an organisation's obligations under the *Whistleblower Protections Act*.

14 We support and agree with ASIC's guidance in relation to:

- Fostering a whistleblowing culture (RG 000.183 – RG 000.186); and
- Ensuring the privacy and security of personal information (RG 000.187 – RG 000.189).

15 In relation to the guidance provided on the issue of "drafting of the policy", RG 000.191 provides:

> *It is good practice for an entity's whistleblower policy to cater to the different users of the policy. For example, it should include employees based at the entity's head office and employees working at the entity's factory floor.*

16 We support guidance which encourages a clear and concise policy which is drafted in such a way so as to be accessible to, and easily understood by, all levels of employees, including employees who may have special needs or are from non-English speaking backgrounds. We do not understand ASIC to be suggesting that a whistleblower policy should differentiate between different classes of employees; in our view this would result in a policy which is unnecessarily complex. We would welcome additional amendments which clarify this.

Comments on section C: Proposed Relief by Legislative Instrument

C1Q1 Do you consider that the requirement for public companies to have a whistleblower policy would impose a disproportionate regulatory burden on public companies that are small not-for-profits or charities, such that the benefits would be outweighed by the costs that these companies would incur to establish, implement and maintain a whistleblower policy? Please provide reasons.

17 We have been advising numerous public companies that are not for profits or charities (**NFPs**) on their obligations under the *Whistleblower Protections Act*. The NFPs with whom we work are deeply ethical organisations and are extremely committed to having policies and a culture in place that will identify and address improper practices within their operations. However, despite the high levels of

motivation and commitment that we are seeing amongst NFPs, our experience causes us to be concerned that although most NFPs will be capable of preparing a compliant whistleblower policy, many will struggle with the regulatory burden associated with implementing that policy, particularly if they are required to comply with all aspects of the Guidance as it is currently drafted.

18 There is a difficult balance to be struck. On the one hand, NFPs often work with extremely vulnerable sections of the Australian community and generally have access to tax concessions and other economic advantages justified by reference to the public benefit or charitable purpose associated with their work. These are considerations that weigh in favour of requiring NFPs to have a rigorous and compliant whistleblower policy. The competing considerations are that NFPs often operate on extremely tight margins, are generally wholly or primarily reliant on public sector funding or donations (with the uncertainties of cash flow that such reliance brings) and typically have leaner and less experienced management and governance teams than is the case in equivalent sized for profit enterprises. These factors mean that both the cost and the internal resources needed to properly discharge the regulatory burden associated with the *Whistleblower Protections Act* (particularly as interpreted by the Guidance) will be beyond many NFPs.

19 We agree that not all NFPs should be exempt from obligations under the *Whistleblower Protections Act*. In the time available, we have not yet reached a concluded view about the ideal threshold to trigger those obligations. We are in the process of consulting with NFPs with whom we work and propose to send a separate response to **C1Q1** and **C1Q2** by 25 September 2019. In the meantime, we offer the suggestion that (if it has not already done so) ASIC consult with the Australian Charities and Not for Profits Commission to obtain their views on the most appropriate approach for NFPs.

C1Q2 If you consider public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy, do you have any views about:

(a) the most appropriate type of size threshold (e.g. total revenue, total employees or total assets);

(b) the most appropriate threshold value; and

(c) whether more than one type of size threshold should apply? Please provide details

20 See response to C1Q1 above.

Corrs Chambers Westgarth is grateful to ASIC for the opportunity to comment on RG 000. We would welcome any opportunity to meet with you and/or to provide additional verbal and/or written submissions or additional information in support of the views expressed in this letter.

If you have any questions in relation to the matters raised in this submission, please feel free to contact us.

Yours faithfully
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