6 November 2017

Jodi Keall
Financial System Division
The Treasury

By email: whistleblowers@treasury.gov.au

Dear Ms Keall

Draft legislation to implement single whistleblower protection regime

The Financial Services Council (**FSC**) welcomes the opportunity to make a submission on the draft legislation to implement a single whistleblower protection regime.

The FSC has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

The FSC is supportive of many of the changes proposed in the draft legislation.

However, we have concerns about the proposal in the draft legislation to protect whistleblowing disclosure to Parliamentarians and the media (see paragraph 1.54 of the Explanatory Memorandum (EM)). This is for the following reasons:

- Parliamentarians and media personalities represent diverse and often competing interests; some are quite explicit, even proud, of their opposition to others in the same profession. This rarely if ever occurs with regulators.
- Regulators have codes of conduct and employment conditions that would require certain standards of behaviour are met; these standards would include concepts such as diligence, balance, impartiality, confidentiality and use of due process. By contrast:
    - the development of universal or model Codes of Conduct for members of Australian Parliaments is an ongoing work as we understand it; and
    - the application of broader standards to the media depends on employer requirements or the adoption of industry codes.
- There is constant debate over some Parliamentarians and media personalities failing to meet community standards and expectations. The public criticism Parliamentarians and the media make of each other can be strident, malicious and even distasteful, often with a highly partisan flavour. While regulators are sometimes subject to public criticism it is not of the same tenor.
- A whistleblower's anonymity cannot be guaranteed. However a disclosure to a regulatory may well have a greater degree of protection than disclosures to the media or to Parliamentarians.[1]

[1] The EM implies whistleblowing disclosures to a Parliamentarian may be publicly released. This implication is in paragraph 1.57 of the EM which states a disclosure to a Parliamentarian may be covered by Parliamentary privilege.

If confidentiality is lost then it would be very difficult to protect every party to the investigation from retaliation.

- For highly technical information contained in whistleblowing, regulators are much better placed to understand this information, place it in appropriate context, and understand if it truly represents misconduct. The media and Parliamentarians are generally less well placed to make these judgements, and may well have to defer to regulators for opinions and views on the information disclosed in any event.
- A whistleblower can make a protected disclosure to a number of parties including regulators and auditors. It is hard to see how whistleblowing relating to 'imminent risk of serious harm' would be ignored by multiple parties.
    - The draft legislation and EM provide for protected disclosures to the media after only one disclosure to a regulator (paragraph 1.54 of EM). This does not provide adequate incentive for the whistleblower to try all other avenues (including internal disclosure) before disclosing to the media or Parliamentarians.
- There are several vague and undefined aspects to the proposal: this includes the "reasonable grounds" of "believing" there is "imminent risk of serious harm or danger to public health or safety, or to the financial system" and this disclosure must occur after a "reasonable period" has passed (see section 1317AAC of draft legislation). The vague and undefined nature of these tests helps none of the potential parties to whistleblowing and could be subject to expensive litigation.
    - A business subject to whistleblowing to the media could litigate on the meaning of every one of the tests cited, at great cost to the whistleblower and making the supposed protections for the whistleblower ineffective.
- The draft legislation also does not require the whistleblower to determine whether the first disclosure to the regulator has been acted on or ignored before disclosing to the media or a Parliamentarian. As a result, the whistleblower could make a disclosure to the media while an investigation is underway, which may prejudice that investigation.
- The draft EM provides compelling arguments against a protection for disclosures to media or Parliamentarians relating to tax (paragraphs 2.30–32 of EM). However, the stated arguments against disclosure of tax information could equally apply to disclosure of non-tax information:
    - information can be sensitive and can be protected by law;
    - disclosure could result in release of commercially sensitive, misleading or incomplete information, and unwarranted reputational damage;
    - disclosure could jeopardise complex investigations; and
    - protection of disclosure could encourage vexatious disclosures.
- Division 137 of the Criminal Code prohibits misleading disclosures to regulators but this does not apply to disclosures to a third party.[2]
- The EM indicates that many disclosures under existing broader whistleblower rules in the public sector relate to employment grievances rather than serious misfeasance or misconduct (see paragraph 1.10). If this pattern is reflected in the private sector, this (further) increases the concerns about disclosure to the media and Parliamentarians.

The FSC therefore recommends that the proposed protections for whistleblowing to Parliamentarians and the media be removed. If disclosure to Parliamentarians were to be introduced, then we would like to see further discussion around the parameters of such disclosure — for example, the person has taken all reasonable steps in the circumstances to first advise and obtain an appropriate and reasonable response from regulatory authorities and some indicators to be placed on the concept of 'reasonableness' in these circumstances.

[2] AICD submission to Review of tax and corporate whistleblower protections in Australia, p11.

There are a number of other comments FSC wishes to make on the legislation, please see the Attachment. In particular, FSC is concerned that the definition of eligible whistleblower is overly broad.

The FSC also has several overall comments on the regime and the supporting arguments:

- The EM states the public and private whistleblower regimes should be harmonised (see paragraphs 1.11 and 1.22 of the EM). However, there are grounds to expect different regimes should apply to the public and private sectors. Money in the public sector belongs to the public, and fraud in the government is in a sense fraud against the general public; this is not true of the private sector. Many issues raised by public sector whistleblowing are matters of legitimate public interest;[3] and this does not necessarily apply to the private sector.
- The EM implies changes to the regime are needed because "there have been few if any prosecutions…under existing whistleblowing regimes" (paragraph 1.8). This is not a reasonable basis for determining whether a legal regime is appropriate or effective. The community generally does not expect Parliament to broaden the definition of a crime just because 'too few' people have been convicted of an offence: there may have been a small number of convictions because there is minimal criminal behaviour.
    - A better argument would show the adverse consequences of an inadequate whistleblower regime: for example crimes that would have been prevented or detected earlier if the regime was better. However, this justification has not been used.
    - One reason there may not have been many prosecutions under existing laws is that companies are dealing with the issues appropriately through internal procedures.

We would be happy to discuss this submission; I can be contacted on (02) 9299 3022.

Yours sincerely,

[signed]

Michael Potter
Senior Policy Manager

[3] See Association of Corporate Council submission to Parliamentary Inquiry into whistleblower protections, p2.

Attachment

FSC has a number of additional comments on the draft legislation and EM:

- The proposed definition of eligible whistleblower appears overly broad. The proposed definition covers a former dependant of the spouse of an employee of a business that has a contract with the whistleblower entity (paragraph 2.26 of EM) — for example the stepchild of a former supplier to a business who no longer lives at home, but was a dependent when the supply to the business occurred; and a person who is the former spouse of a supplier to the business. The breadth of this definition requires greater justification.
    - In general, officers, employees and contractors are bound by confidentiality clauses of their respective contracts and therefore, divulging of any trade or company confidential information would be deemed as a breach of that contract. No such obligation applies to spouses and dependents.
- It is proposed that whistleblowing be protected if it relates to danger to the financial system (see s1317AA(3)(e) and paragraph 1.67 of the EM). This is a broad and vague concept that could be subject to considerable debate. For example, a number of commentators argue the ongoing growth in bank lending is a danger to the financial system; if this (controversial) view is accepted then any and all whistleblowing relating to growth in bank lending would be permissible. It is hard to see that this would be reasonable.
- It is not clear why there is a need for regulation making powers in some sections of the proposed bill, in particular s1317AAB(1) about who a disclosure can be made to. Given the extensive protections for whistleblowing to these bodies, it would be preferable for any additions to the list of disclosees can only be extended by legislation rather than regulation. This will set a higher threshold for changes to this list.
- The proposed s1317AD(1)(b) refers to “damage”. It appears this term was used in error and should instead be “detriment” given the latter term is defined in the section but not used.
- Section 1317AF(1)(b) of the draft legislation requires whistleblower policies to be made available to “people who may be eligible whistleblowers”. We query how practical it is to require a whistleblower policy to be made available to former employees, dependents of spouses of employees, former dependents of spouses of former employees and so on.
    - If the policy were published publicly, this may mean general complaints about the business might be made through the whistleblower channel which would likely diminish the effectiveness of the whistleblowing process.
- The draft legislation proposes that a whistleblowing disclosure can be made internally to a director, secretary or senior manager of a business (see section 1317AAB(2)(c) of the draft legislation). There is a strict requirement for confidentiality on these recipients of information and a broad definition of what is covered by confidentiality. As some of these internal recipients of information may not have detailed knowledge of how to respond to whistleblowing, there is a risk that an internal recipient may make an inadvertent disclosure of confidential information. Therefore, it is recommended that one or more of the following changes be made:
    - narrow the range of eligible disclosees;
    - provide an exception to inadvertent disclosures which do not lead to adverse outcomes for the whistle-blower; and/or
    - provide an exemption for disclosure to a relevant specialist to manage the whistleblowing investigation to its conclusion.