17 September, 2019

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ACC Australia: Submission on Consultation paper 321 and Draft Guidance

Dear Ms Uy and Mr Hackett

Thank you for the opportunity to provide feedback on Consultation paper 321 and Draft Guidance. The Association of Corporate Counsel (ACC), is a global bar association with more than 45,000 members that promotes the common professional and business interests of in-house counsel who work for corporations, associations, and other organizations. ACC Australia is the Australian chapter of ACC and is the peak body for in-house lawyers working for corporations, governments and not-for-profit organisations in Australia.

In Australia, in-house lawyers constitute approximately 30% of the total Australian legal profession, making our role as the 'voice of in-house lawyers' a vital one for furthering the advancement of the profession. ACC Australia has close to 4,000 members working across 2,000 organisations ranging from the ASX top 100 companies through to Federal, State, Local government departments and not-for-profit (NFP) organisations.

As legal advisers to their organisations in the corporate/government/NFP environment, ACC Australia members play a critical role in the application of whistleblower laws and protections in this country. Their in-depth involvement in dealing with whistleblowing issues within their respective workplaces places them in a prime position of having both sound legal knowledge and a thorough understanding of regulatory impacts within organisations, industries and the broader economy. As in-house counsel are often responsible for maintaining their

companies' legal and regulatory compliance, ACC members are often responsible for ensuring their organisations comply with the law in relation to whistleblowers, and more importantly take steps to ensure that whistleblowers are safe to report instances of suspected corporate wrongdoings. ACC has supported and commented on whistleblower legislation and regulations in Australia, the United States and the European Union.

Introduction

ACC Australia (ACC) acknowledges the importance of having internal policies and procedures in place to support and protect staff who make or may make disclosures about wrongdoing. ACC very much appreciates that ASIC has also included some good practice guidance that goes beyond the mandatory requirements of the law and provides companies with ASIC's view of what are best practices in establishing whistleblower programs.

ACC wishes to offer three points of feedback and comment on Consultation paper 321 and Draft Guidance:

- First, we are pleased to see that ASIC good practice guidance expresses a preference for internal reporting.
- Second, we find the ASIC good practice guidance on roles and responsibilities under a whistleblower policy overly prescriptive and think ASIC should revise this section to be more principles-based.
- Finally, we request further guidance on protections that might be afforded to in-house legal counsel (IHLC) when the IHLC themselves are put into a position where they feel it necessary to become whistleblowers.

When whistleblowers report through internal corporate mechanisms, corporate compliance is strengthened

In the Draft Guidance good practice section RG 000.62, it states that it is good practice for an entity's policy to encourage its employees and external disclosers to make a disclosure to the entity in the first instance. ACC fully agrees with and supports this good practice. Whistleblowing is an important factor for improving, supporting and ensuring legal and regulatory compliance of companies. Internal reporting is crucial for companies to rectify potential wrongdoings inside their businesses. No other entity is as able to execute change as quickly and thoroughly as the company itself. Therefore, we also endorse the good practice statement at RG 000.29, which states that it is good practice for an entity's policy to include a statement about the importance of disclosures to the entity's risk management and corporate governance framework. We would suggest the addition of the work "internal" before the word "disclosures" as a way to further reinforce the importance of internal reporting and encourage such reports to be made.

ASIC's good practice guidance regarding whistleblower program roles and responsibilities should be less prescriptive

The draft guidance contains numerous "good practice" recommendations for the roles and responsibilities that companies should include in their whistleblower programs. ACC submits that this section of the guidance is overly prescriptive and does not take into account that many companies subject to the Corporations Act already have whistleblower programs that function well and meet the regulatory requirements of multiple jurisdictions. Good practice guidance based on principles – the results ASIC would like to see as a result of a company's policies – would be better in this section than the prescriptive recommendations about how roles and responsibilities should be assigned amongst various corporate functions.

We are especially concerned about the practice recommendations made with respect to whistleblower protection and investigation officers, as the description of multiple roles in this area may be at odds with current company practices. For example, many companies operate their whistleblower programs out of their compliance departments, with their chief compliance officer having ultimate responsibility for the resolution of whistleblower reports. Investigations of these reports may be run out of the compliance department, the legal department, or some other corporate function, depending on the nature of the report. ASIC's good practice for an entity to assign the roles of whistleblower protection officer and whistleblower investigation officer to different individuals who act independently of each other would disrupt a number of well-established corporate compliance and whistleblower programs. Likewise, we disagree that the whistleblower protection officer should report directly to the entity's board as a good practice – this is something that will greatly depend upon how an entity's overall compliance program is structured and the individual who is filling the function of the whistleblower protection officer. Companies should be able to determine the best arrangement of roles and responsibilities for their whistleblower programs for their needs without having to consider this overly prescriptive good practice guidance from ASIC.

What ASIC could offer in good practice guidance are the principles it would like a whistleblower program to be based upon when it comes to how the program is structured. For example, instead of recommending that there be a protections officer and an investigations officer and protection officer have a line of reporting to the board, ASIC could recommend that whistleblower programs be structured in a way to ensure the individuals responsible for protecting whistleblowers and investigating their claims are able to exercise independent judgment and have a method through which they can escalate problems to the board of directors. We recognize that ASIC's good practice guidelines are not binding upon companies, but given that this is new legislation and ASIC is the regulator of the companies, ASIC's interpretation of good practice will certainly be given much weight in case of a violation of the whistleblower laws.

Specific Issues facing IHLC who may become whistleblowers

ACC submits that ASIC should give consideration to the particular circumstances of IHLC. IHLC's have a professional duty to give independent legal advice to the organisations they serve. Their advice will usually be subject to legal professional privilege. Senior IHLC's may also oversee compliance functions and, with them, whistleblower programs. They may receive reports from external whistle-blower services, and, on occasion as trusted advisers, they may individually receive information from whistleblowers directly.

There are open issues as to whether an IHLC will breach their duties of client confidentiality, client fidelity and cause an unauthorised waiver of the client's LPP if they become an external whistleblower.

The intent of the Act is probably that IHLC should be immunised from any detriment, retaliation or adverse professional consequence regarding a protected disclosure but this is not explicit or beyond doubt either under the Act or relevant professional conduct rules.

For example, the answer differs in different US jurisdictions such as New York and California. In one an IHLC will be struck off for making a statutorily permitted disclosure, in the other they won't.

Injunctions can issue in the US regarding the disclosure of corporate documents by whistleblowing IHLC, especially LPP information.

These issues are neither simple nor trivial. The only solution to them, given the current law, must be legislative.

Consider then the position of an in-house counsel coming upon a legal non-compliance in the course of their employment. Currently the in-house counsel would be motivated by their legal duties to their employer and the Court to advise their organisation of: the issue (confidentially and protected by legal professional privilege); the steps necessary to ensure that the non-compliance is notified, escalated, and rectified as required by policy and law; how internal policies, practices, procedures and controls might be updated, reinforced, relaunched etc to avoid recurrence; and what action could be taken in relation to the counselling, discipline or dismissal of involved staff in accordance with law, i.e. after being afforded procedural fairness and complying with any applicable industrial instrument.

Failure to advise in these regards (and escalate within the corporation if appropriate) would leave the in-house counsel at risk of action for breach of their legal duties and/or for professional misconduct and discipline, including possible exclusion from the practice of law potentially indefinitely. Should the employer fail to agree to rectify the breaches or comply with the law and the IHLC wanted to

disclose those breaches under the whistleblower provisions, however, the IHLC could end up in the conflicted position of disclosing the corporate breaches, but by doing so, potentially breaching their employment and/or professional duties of confidentiality, trust and fidelity to client, and waiving the client's legal professional privilege. There could be legal and professional consequences to these actions. Specific guidance protection for IHLC is required in this situation.

Additionally, in such circumstances, an IHLC should be entitled to avail themselves of an independent 'ethical advice service', free of charge. Similarly, an IHLC should be able to avail themselves of independent legal advice, paid for by the company (their employer).

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Please do not hesitate to contact Chris Drummer, Director, Policy and Advocacy, ACC Australia and Asia Pacific at c.drummer@acc.com if you wish to discuss this submission further.

We look forward to continuing to work with ASIC as your considerations progress.