



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

20 July 2007

Mr Peter Hallahan
Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Hallahan

**Financial Sector Legislation Amendment (Simplifying Regulation
and Review) Bill 2007**

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. In Australia we represent over 8,000 governance professionals working in public and private companies. Many of our members are company secretaries who are able to receive information from a whistleblower under the *Corporations Act 2001*. Many are officers as defined under the Act. We have drawn on their experience in the formulation of this submission.

Alignment of provisions with Corporations Act

CSA notes that the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007 introduces a consistent framework of protection for whistleblowers across the prudential Acts. The amendments align with similar provisions in the Corporations Act.

The following Acts are to be amended by the new Bill, by having whistleblower provisions inserted.

- *Banking Act 1959* – Part VIA – disclosures regarding misconduct or an improper state of affairs or circumstances, and the whistleblower considers that the information may assist a specified person (including regulators or senior managers with the body corporate). Differs from s 1317AA of the Corporations Act which specifically identifies the company secretary
- *Insurance Act 1973* – Part IIIA, Div 4 – disclosures may be made to actuaries or auditors
- *Life Insurance Act 1995* – Part 7, Div 5 - disclosures may be made to actuaries or auditors
- *Superannuation Industry (Supervision) Act 1993* – Part 29A – disclosures may be made to actuaries or trustees, but not members of audit teams. Disclosures can also be made to the relevant regulatory authority.

The provisions being inserted to these Acts is similar to that already contained in Part 9.4AAA of the Corporations Act. Specifically:

- whistleblowers must act 'in good faith' and identify themselves before making disclosures
- whistleblowers must be in relevant classes of persons as specified in the relevant legislation, that is employee, officer (the term 'officer' has the same meaning as in the Corporations Act (subsection 52A(4))
- the information being disclosed must have particular characteristics, for example suspected breach of legislation in Corporations Act, or concerning misconduct, improper state of affairs or circumstances for entities regulated by APRA
- disclosures must be made to classes of persons listed in the relevant legislation. In the Corporations Act, recipients for the company include a director, secretary or senior manager or person authorised to receive disclosures. However, the provisions in the Acts listed above do not expressly include the company secretary as one of the specified recipients
- in the absence of consent by the whistleblower, their identity and information can only be passed to specified persons and agencies.

In the Bill, the recipients for the company include a director or senior manager or person authorised to receive disclosures. As it will depend on the facts whether a company secretary comes within the definition of senior manager, disclosure to a company secretary may result in the whistleblower not being protected. The failure to expressly include company secretaries in the relevant classes of persons is odd, given that their position within a company, and governance role, may make them likely recipients for disclosures. In addition, company secretaries commonly form a critical part of management teams and are particularly well placed to be intimately aware of corporate policies and decisions that might represent breaches of the law. Further, any whistleblowing policies created by a company will probably be constructed in consultation with the company secretary.

Protection of whistleblowers

CSA lodged a submission on the CLERP 9 Bill noting that while the proposed legislative provisions provided protection for reporting to ASIC, they did not extend to protect employees and others raising matters within the organisation, and accordingly did not encourage such reporting. We were pleased to see, therefore, that the final drafting of the provisions relating to whistleblowing in the Corporations Act provided for protection of employees and others raising matters within the organisation.

Problem with confidentiality of disclosures

However, the 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 (within certain named categories, including company secretaries) 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 (with similar restrictions proposed in the Bill in relation to the other legislation).

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. 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 recommendations

CSA recommends that the opportunity be taken to not only address these issues in redrafting the relevant provisions in the Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007 concerning the confidentiality of disclosures, but also to amend the relevant provision in the Corporations Act. This would not only ensure that the relevant provisions in the Bill would provide for a recipient to discuss any disclosure with other senior officers (with such persons to be limited in order to protect the whistleblower), but it would also ensure that companies had the opportunity to quickly remedy a contravention. CSA believes that preventing companies from such quick and decisive action does not assist in developing an ethical culture or one that promotes probity.

CSA recommends that the provisions being inserted to the prudential Acts in relation to whistleblowing be amended to provide for a company secretary to discuss a disclosure with other senior officers 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 further recommends that a similar amendment be made to Part 9.4AAA of the Corporations Act.

CSA also recommends that the Bill be redrafted to clarify that the recipients for the company authorised to receive disclosures include the company secretary.

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

Yours sincerely

A handwritten signature in black ink that reads "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy
CHIEF EXECUTIVE