



TRANSPARENCY INTERNATIONAL AUSTRALIA

Affiliate of Transparency International, the coalition against corruption

**Submission on
Corporate Law Economic Reform Program
CLERP9: Corporate Disclosure
“Whistleblower” Protection**

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Transparency International Australia

ABN 23 068 075 525

Executive Summary

- 1 Transparency International Australia (**TI Australia**) is the Australian national chapter of Transparency International (**TI**), the global coalition that brings together civil society, business and governments. TI is the only international non-governmental organisation devoted to combating corruption. TI, through its International Secretariat and more than 80 independent national chapters around the world, works at both the national and international level to curb both the supply and demand sides of corruption. At the national level, TI chapters work to increase levels of accountability and transparency. TI recognises that accountability can only be achieved where information is readily available through effective disclosure. An important element in securing effective access to information is the availability of protection for those making public interest disclosures, colloquially called whistleblowers.
- 2 TI Australia supports actions that are aimed at improving whistleblower protection in Australia. In particular, TI Australia supports the introduction of a corporate whistleblower scheme to encourage the reporting of corporate wrongdoing and to support governance. However, TI Australia believes whistleblower protection should not be limited to the reporting of corporate malpractice. A whistleblower protection scheme is also required to protect disclosures in relation to the Commonwealth public sector.
- 3 It is fundamental to any corporate whistleblower scheme that from a policy perspective the legislation establishing the scheme clearly and expressly acknowledges the legitimacy in disclosing corporate wrongdoing.
- 4 The primary focus of any whistleblower scheme ought to be on the disclosure itself rather than the whistleblower. Accordingly, it is preferable that the scheme treats the person's reasons for making a disclosure as irrelevant, provided the disclosure is not known by the person to be false.
- 5 In relation to the elements of any whistleblower protection scheme:
 - (a) Protection must not be limited to reports or disclosures made to ASIC;
 - (b) The scheme ought to encourage internal reporting;
 - (c) Protection must extend to the reporting of breaches or suspected breaches of any law to which the organisation is subject;
 - (d) Consideration should also be given to according protection to the reporting of breaches or suspected breaches of internal codes of practice;
 - (e) Protection must not be limited to employees but should extend to any person making a disclosure regarding corporate wrongdoing;
 - (f) Consideration must also be given to including provisions that recognise the legitimate interests of persons who are the subject of a protected disclosure;
 - (g) It should be an offence to knowingly make a false report. However, a reasonable and honestly held suspicion or belief in the veracity of the reported information ought to be sufficient to attract protection under the scheme;
 - (h) Where retaliation or reprisal occurs because a person has made a protected disclosure, the scope of protection must not be limited to the employment context but should be cast more broadly;
 - (i) The whistleblower must be protected from harassment and intimidation, as well as from action causing injury, loss or damage;

- (j) Remedies, including exemplary damages and injunctive relief, must be available to the whistleblower in relation to unlawful retaliation or reprisal;
 - (k) The scheme must provide for immunity (with some limitations) to be accorded to the whistleblower;
 - (l) Absolute privilege must be available as a defence in the event of a defamation action taken in respect of a protected disclosure;
 - (m) The identity of whistleblowers must be protected to the maximum extent possible. To support this requirement, it must be offence to unlawfully reveal protected information;
 - (n) The process for making and handling protected disclosures must be clearly set out in the legislation establishing the scheme;
 - (o) Persons and bodies that are designated as approved recipients of protected disclosures must have a duty to investigate protected disclosures (including those made anonymously) but may decline to investigate disclosures that are trivial, frivolous, vexatious, or “stale”;
 - (p) It is good practice to include in any whistleblower scheme an obligation on the recipient of the disclosure to report back to the whistleblower on the findings of the investigation and any steps taken.
- 6 Other matters relevant to any whistleblower protection proposal include:
- (a) resourcing issues;
 - (b) the undesirability of having multiple schemes; and
 - (c) transparency and accountability mechanisms, including reporting obligations and monitoring processes.

1 Background

Transparency International Australia (**TI Australia**) is the Australian national chapter of Transparency International (**TI**), the global coalition against corruption with a presence in over 80 countries. TI is dedicated to increasing both government and private sector accountability and curbing both international and national corruption. TI believes that corruption is one of the greatest challenges of the contemporary world. Since TI's launch in 1993, corruption has become a global issue and the World Bank among others has credited TI's key role in achieving this.

TI is the only international non-governmental organisation devoted to combating corruption and brings civil society, business, governments and international organisations together in a powerful global coalition.

TI, through its International Secretariat and more than 80 independent national chapters around the world, works at both the national and international level to curb both the supply and demand sides of corruption.

In the international arena, TI raises awareness about the damaging effects of corruption, advocates policy reform, works towards the negotiation and implementation of multilateral conventions and subsequently monitors compliance. TI has facilitated the development of new global standards, for example by the banking sector and the accounting and engineering professions as well as new business integrity principles for transnationals with the support of companies like Rio Tinto and BP Amoco.

At the national level, TI chapters work to increase levels of accountability and transparency, monitoring the performance of key institutions and pressing for necessary reforms in a non-party political manner. TI does not expose individual cases but focuses on prevention and reforming systems in an effort to make long-term gains against corruption. TI Australia was launched in 1995 and has built a broad-based coalition including some 30 organisations from ANZ Bank and BHP Billiton to World Vision and government agencies and academic institutions. It was widely applauded for its role in the formulation of Australia's law implementing the OECD Convention to criminalise bribery of foreign public officials, which is recognised as being among the best of its type. This law was the catalyst for the first wholesale reform of Australia's federal law on domestic bribery for nearly 100 years.

TI recognises that accountability can only be achieved where information is readily available through effective disclosure. This applies to the public and business sectors and indeed also to the voluntary sector. An important element in securing effective access to information is the availability of protection for those making public interest disclosures, colloquially called whistleblowers.

For these reasons, TI Australia wishes to make a submission on that aspect of the CLERP 9 Corporate Governance Reform Proposals relating to “whistleblower” protection.

2 The CLERP 9 Proposals

Proposals relating to “whistleblower” protection are included in Part 10 of CLERP 9, namely:

10.4 Reporting of Breaches to ASIC

To improve reporting of breaches of the corporate law, it is proposed that the law be amended so that any company employee who reports a suspected breach of the law to ASIC receives qualified privilege and protection against retaliation in employment.

This should directly assist ASIC in its enforcement of the law and in ensuring that the market receives corrected information where misstatements have been made. It should also help deter those who might otherwise be tempted to break the law.

There is a risk that protection for company employees could lead to some false reports about financial misconduct being made, tying up valuable resources of the regulator and the company. The provision would therefore protect company employees reporting suspected breaches of the corporate law to ASIC in good faith on reasonable grounds.

In the United States, the Sarbanes-Oxley Act contains penalties of fines or imprisonment for up to 10 years for employers who knowingly, with the intent to retaliate, take action against an informant, including interference with his or her employment or livelihood, for providing truthful information to a law enforcement officer about matters relating to the commission or possible commission of a federal offence. There is also a provision that allows civil action for compensation to be taken by employees if they have been victimised by their employer due to their unlawful activities in assisting investigators with corporate fraud.

Proposal 35 – Reporting of breaches to ASIC

The Government will amend the law to provide qualified privilege and protection against retaliation in employment for any company employee reporting to ASIC, in good faith on reasonable grounds, a suspected breach of the law.

3 Commonwealth whistleblower protections ought to extend to the private and public sectors

TI Australia supports actions that are aimed at improving whistleblower protection in Australia. In particular, TI Australia supports the introduction of a corporate whistleblower scheme to encourage the reporting of corporate wrongdoing and to support corporate governance.

However, TI Australia believes that whistleblower protection should not be limited to the reporting of corporate malpractice. A whistleblower protection scheme is also required to protect disclosures in relation the Commonwealth public sector.

Accordingly TI Australia urges the Government to consider embracing whistleblower protections for disclosures relating to the Commonwealth public sector as well as to the private sector in Australia. By way of example, the UK Public Interest Disclosure Act 1998 aims to promote accountability and sound governance in organisations across the private and public sectors.

Whistleblowing is an issue that is not limited to the private sector. In both the public and the private sectors, people can become aware of malpractices in situations where the public, or the public interest, is put at risk. Whistleblowers can play an important role in alerting the public to such malpractices which can include (amongst others) misrepresentations, misreporting, dangerous practices, fraud and corrupt conduct. Governments in Australia, including New South Wales¹, Queensland², Victoria³, Tasmania⁴ and the ACT⁵, already have legislation in place establishing broad-based whistleblower protection schemes applicable to those respective State public sectors. South Australian legislation⁶ applies to both public and private sector organisations. The Commonwealth must also address whistleblower protection in relation to its own activities.

TI Australia's further comments in this submission focus on the CLERP9 Proposals regarding corporate whistleblowing. However, TI Australia's comments are also applicable (with appropriate modifications) to whistleblowing in the Commonwealth public sector. In this respect, TI Australia's submission should be read as applying more broadly than just to whistleblowing in the corporate environment.

4 The legitimacy in disclosing malpractice

It is fundamental to any whistleblower scheme that from a policy perspective the legislation establishing the scheme clearly and expressly acknowledges the legitimacy in disclosing corporate wrongdoing.

In his landmark book on whistleblowers in Australia⁷, Quentin Dempster identifies the issue:

... Instead of being an asset to the corporate authority, those individuals in possession of unpopular truths can find themselves and their careers in jeopardy.

...

One fact emerges: the failure of authority to recognise whistleblowing as a positive and constructive force. Vested interests, be they political or economic or maintained for the pursuit of power alone, have little capacity to make concessions.

...

¹ Protected Disclosures Act 1994 (NSW)

² Whistleblowers Protection Act 1994 (Queensland)

³ Whistleblowers Protection Act 2001 (Victoria)

⁴ Public Interest Disclosures Act 2002 (Tasmania) – commencement date yet to be proclaimed

⁵ Public Interest Disclosure Act 1994 (ACT)

⁶ Whistleblowers Protection Act 1993 (SA)

⁷ Dempster, Quentin, “**Whistleblowers**” ABC Books for the Australian Broadcasting Corporation, 1997, pp 1-2

For the manifest public benefit of their actions whistleblowers deserve recognition.

It is important that people are encouraged to “blow the whistle” in appropriate circumstances and that appropriate protections are institutionalised to protect the whistleblower from reprisals and retaliatory action.

Legislation directed at implementing a whistleblower protection regime must:

- encourage and facilitate disclosures of malpractice and improper conduct;
- provide protection for persons who make those disclosures;
- provide protections for persons who may suffer reprisals or retaliatory action in relation to those disclosures; and
- provide for the matters to be properly investigated and dealt with.

The primary focus of any whistleblower scheme ought to be on the disclosure itself rather than the whistleblower. Accordingly, it is preferable that the scheme treats the person’s reasons for making a disclosure as irrelevant, provided the disclosure is not known by the person to be false. Vexatious disclosures cannot be ignored, however, and it is recognised that any scheme might wish to exempt vexatious disclosures from the requirement to be investigated.⁸

5 What disclosures should be protected?

5.1 Protection must not be limited to disclosures to ASIC

The CLERP9 proposal is limited in its application to disclosures to ASIC. This is inadequate.

Although ASIC may be the appropriate reporting body with respect to alleged breaches of the Corporations Act 2001, the introduction by the Commonwealth of a corporate whistleblowing scheme ought to recognise that there are a range of bodies to which it might be appropriate for an individual to make a disclosure about the conduct of a corporation.

Consideration ought to be given to protecting disclosures made to bodies other than ASIC, including other regulators (Federal, State and Territory), law enforcement agencies and auditors.

5.2 The scheme ought to encourage internal reporting

There are sound policy reasons to encourage corporations:

- to take responsibility for eradicating corporate wrongdoing; and
- to establish their own internal processes to deal with disclosures of malpractice and wrongdoing.

Those people who do “blow the whistle” to an outside body often only do so because the environment in which they are operating does not encourage them to speak up.

Corporations ought to be encouraged to develop cultures that allow employees to speak out:

⁸ Refer to section 8.2 of this submission for further comment in this regard.

- without fear that the disclosure will have adverse repercussions; and
- in the knowledge that good faith reports will be investigated.

Internal reporting by an employee ought to attract the same protection from reprisal and retaliatory action as an external disclosure.

5.3 Protection must not be limited to breaches or suspected breaches of the Corporations Act 2001

CLERP9 proposes that whistleblower protection extend to suspected breaches of the law. In proposing that ASIC be the body to which disclosures be made, there is a concern that the proposal might be read as being limited to disclosures relating to the Corporations Act.

TI Australia believes that, as a minimum, protection should extend beyond breaches or suspected breaches of the Corporations Act and extend to breaches or suspected of any legislation (Federal, State or Territory) and any principles common law that apply to the organisation. Consideration should also be given to according protection to disclosures relating to breaches of internal codes of practice.

6 Who should be protected?

6.1 Protection must not be limited to employees

Limiting the availability of whistleblower protection to employees would hamper the effectiveness of the scheme. It is quite conceivable that there could be persons other than employees with knowledge of or suspicions about corporate malpractice or wrongdoing.

Contractors, external consultants and customers are all examples of the sorts of stakeholders who may become aware of matters that would warrant falling within the scope of protection to be offered by a corporate whistleblower scheme.

It would be a deficiency in the scheme if those types of persons had no avenue in which to make a protected disclosure. That would be the case if the scheme were to be limited to employees.

6.2 The interests of impugned individuals must also be considered

In devising a whistleblower scheme, consideration must also be given to including provisions that recognise the legitimate interests of persons who are the subject of a protected disclosure.

6.3 It should be an offence to knowingly make a false report

To preserve confidence in and the integrity of the scheme, it is recommended that the making of a false report, in the knowledge that the information is false, should be an offence. A reasonable and honestly held suspicion or belief in the veracity of the reported information ought to be sufficient to attract protection under the scheme.

7 The scope of protections

7.1 The protections must not be limited to retaliation in employment

The scope for retaliatory action and reprisal extends beyond the employment relationship. Accordingly, the protections offered ought to be cast more broadly than protecting individuals against retaliation in employment.

First, the individual making the disclosure might not be an employee. Under the proposal, such a person would not attract any protection under the scheme.

Secondly, limiting the protection to retaliation in employment would not deter other reprisal action being taken against the discloser. For example, in an Enron-type situation, the auditor who initially raises the alarm ought not be the subject of adverse bias in relation to any subsequent professional engagements.

7.2 The whistleblower must be protected from harassment and intimidation as well as from action causing injury, loss or damage

Because retaliatory action against whistleblowers can take many forms, the scope of protections must be carefully considered. Whistleblowers must be protected from harassing and intimidating conduct as well as from the obvious actions causing injury, loss or damage. Such actions and conduct against a person who has made, or is intending to make, a protected disclosure must be an offence under the scheme. The offence ought to carry with it meaningful penalties as a deterrent.

It should be sufficient that a reason for the retaliation or reprisal is the fact that the person has made, or is intending to make, a protected disclosure. It should not be necessary to show that disclosure was the sole or dominant reason for the retaliation or reprisal.

7.3 Remedies must be available in relation to unlawful retaliation or reprisal

Many whistleblower schemes are strengthened by having provisions that enable whistleblowers to seek compensation against persons who take detrimental actions against them. Such damages ought to be in addition to any other remedies that the person may have against the retaliator. Any scheme ought to expressly provide that damages able to be awarded against a retaliator include exemplary damages.⁹

A whistleblower ought also be able to obtain an injunction to restrain unlawful retaliation or reprisal.

7.4 Immunity ought to be accorded to the whistleblower (although in some situations the immunity may be limited)

The integrity of any whistleblower scheme requires that a person making a disclosure under the scheme ought to be protected from civil and criminal liability arising as a result of making the disclosure. This should extend to immunity for any alleged breach of confidentiality or privilege.¹⁰

⁹ For example, see Whistleblowers Protection Act 2001 (Victoria), section 19

¹⁰ However, consideration must be given to the extent to which the confidentiality of or privilege that attaches to information and documentation is preserved for other purposes.

The scheme should expressly provide for absolute privilege in the event of any defamation action taken in respect of a protected disclosure.

However, a person's liability for his or her own conduct ought not be affected by the person's disclosure of the conduct under the scheme. Clearly, an individual ought not be able to trigger whistleblower protections under the scheme and avoid enforcement action in respect of his or her own wrongdoing by seeking to become a whistleblower.

Any immunity from prosecution that a law enforcement authority or a regulator has the power to grant ought not be affected by the whistleblower scheme. Accordingly, if a prosecutor or regulator considers that the case is an appropriate one in which to extend an immunity to the whistleblower, that decision remains with the relevant prosecutor or regulator. The whistleblower scheme itself should not intrude into that decision.

7.5 The identity of the whistleblower must be protected to the maximum extent practicable

The effectiveness of any whistleblower scheme will depend on the ability of the scheme to guarantee the anonymity of the whistleblower. However, TI Australia recognises that at some stage of an investigation, it might be impossible to preserve the whistleblower's anonymity.

In the absence of the whistleblower's consent, the scheme must therefore require the preservation of anonymity to the greatest extent possible in the circumstances. This makes it even more imperative that the scheme be robust in its protections for the whistleblower.

It should be an offence for any person who receives information (including information about the identity of a whistleblower) in the course of a protected disclosure or an investigation of a protected disclosure to reveal that information except for specific purposes set out in the legislation.

The scheme must take into account that some people may prefer to make an anonymous report or disclosure. The duty imposed on approved recipients of protected disclosures¹¹ must also apply to reports or disclosures made anonymously. This is consistent with the focus of the scheme being on the reporting of alleged malpractice rather than being on the whistleblower's identity.

8 The process relating to protected disclosures

8.1 There must be clarity about the process for making and handling protected disclosures

The legislation must clearly set out the process for making a disclosure to attract the protections of the scheme. If individuals have inadequate or imprecise information about the process they will not have confidence in the scheme.

8.2 Recipients of disclosures must investigate

Persons and bodies that are designated as approved recipients of protected disclosures must have a duty to investigate protected disclosures, included those

¹¹ The duty to investigate is discussed in section 8.2 of this submission.

made anonymously. However, approved recipients could have a discretion to decline to investigate disclosures that are:

- trivial,
- frivolous,
- vexatious, or
- “stale” due to the effluxion of time between when person first became aware of the wrongdoing and the time of the disclosure.

8.3 The whistleblower ought to be informed about the investigation and outcomes

It is good practice to include in any whistleblower scheme an obligation on the recipient of the disclosure to report back to the whistleblower on the findings of the investigation and any steps taken. This is likely to reduce the tendency for whistleblowers who feel their disclosures are not being investigated to go public and thereby potentially jeopardising any ongoing investigation.

9 Other suggestions

There are many checks and balances that ought to be included in a corporate whistleblower scheme. It is not appropriate at this time to elaborate on all of those in the context of all of the other corporate governance matters being considered under the CLERP9 Proposals.

However, TI Australia wishes to make note of the following as also being relevant to any whistleblower protection proposal:

- (a) There is a need to provide adequate resources for the effective functioning of the scheme.
- (b) If ASIC were to be designated as the sole recipient of protected disclosures by corporations, additional resources are likely to be required by that body.
- (c) Other arms of the Government are also considering whistleblower protection schemes in other contexts. Without wishing to jeopardise the pace of reform, it would be preferable if those activities could be combined and duplication eliminated. It would be very unfortunate if there were to be multiple whistleblower schemes implemented rather than one overarching scheme with a number of bodies designated as approved recipients of protected disclosures.
- (d) Any scheme ought to include an obligation- to make regular public reports on the functioning of the scheme.
- (e) A properly funded monitoring process ought to be included as part of the scheme so that the scheme’s performance can be properly assessed and continuously improved.