CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

10 February 2017

The Treasury
Langton Crescent
PARKES ACT 2600

Email: whistleblowers@treasury.gov.au

Dear Sir/Madam,

Review of tax and corporate whistleblower protections in Australia

Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) welcomes the opportunity to make a submission on the consultation paper, *Review of tax and corporate whistleblower protections in Australia* that was released by the government on 20 December 2016 (**Consultation Paper**).

Chartered Accountants ANZ supports the introduction of tax whistleblower protections. Whistleblowers not only draw the attention of regulators to behaviours which may be unlawful, they can change cultures within organisations and improve management practices. Individuals who report misconduct deserve to be supported and protected.

We have focused our submission on commentary in relation to proposals for the corporate sector (Appendix 1) and the questions in the Consultation Paper relating to proposed protections for tax whistleblowers (Appendix 2). At Appendix 3 we set out further information about Chartered Accountants ANZ.

Should you have any queries concerning the matters discussed in our submission, or wish to discuss them in further detail, please contact me via email at: michael.croker@charteredaccountantsanz.com or telephone (02) 9290 5609.

Yours sincerely

Michael Croker
Tax Leader Australia
Chartered Accountants Australia and New Zealand

APPENDIX 1: COMMENTARY IN RELATION TO CORPORATE WHISTLEBLOWER PROTECTIONS

Categories of qualifying whistleblowers

We see value in extending the definition to include former employees. Reprisals or retaliation, including damage to reputation, are possible even after an employee departs.

It may be necessary to consider time limits (depending on how the overall legislation is framed) if there is any danger that the extension of the definition could led to ex-employees reporting old matters which may no longer be relevant due to management corrective action, change of personnel, process, or laws and regulations.

We support clarifying the definition of contractors.

Good faith obligation

We support moving from a "good faith" test to the test that the whistleblower must have some reason and evidence to presume that a breach of legislation has occurred. We support the test proposed – disclosure is based on an honest belief held on reasonable grounds that the information shows or tends to show wrongdoing has occurred. We also support this in relation to tax whistleblowing provisions, as set out in Appendix 2.

We note that this test is not "objective", as one person's view of honest and reasonable will be different to another. We also suggest that rather than "wrongdoing" the test refers to a breach of legislation. Even this approach will have difficulty however in some contexts (for example, there are anti-avoidance provisions triggered by reference to a taxpayer's purpose or principal purpose, something which the whistleblower may not truly know and which requires detailed investigation by the Commissioner of Taxation).

This means that the test may deter some employees as they may not have capability or capacity to determine what legislation may have been breached. Nonetheless, we believe it would be a rare situation where an employee was aware of a serious breach and was not senior enough to identify the legislative provision and make a reasonable determination that the provision was breached.

Anonymous disclosures

For the reasons outlined in more detail in our response to the tax questions at Appendix 2, we support the ability for anonymous disclosures and for protections in relation to such disclosures. We note that some electronic tools already exist which facilitate such disclosures.

To whom to disclose

We agree with an approach that supports internal notification in the first instance, followed if necessary by disclosure to a government agency. There can be difficulty for a potential whistleblower in understanding which agency is most appropriate (e.g. Australian Securities and Investment Commission (ASIC), Australian Prudential Regulation Authority, Australian Charities and Not-for-profit Commission, Australian Taxation Office (ATO), police, Australian Competition & Consumer Commission etc.), so we support the ability of government agencies to communicate disclosures to the correct agency (confidentially) if the initial approach is inappropriate.

We do not believe that provisions should extend to external disclosure as currently we believe the opportunities for misuse of such provisions would outweigh any potentially rare occurrences when a government agency does not appropriately manage a disclosure. We expand on this point in our response to the tax questions at Appendix 2.

Compensation

We believe it is important for compensation arrangements to be clearly defined. Claims should be heard and determined through a public office rather than by court action.

Rewards

A reward system would be a substantial departure from current Australian policy and would raise a number of difficulties encountered in jurisdictions – notably the United States of America – where reward mechanisms currently exist. While we are not against the proposal, we believe it is more important for legislative changes to focus on strengthened and enhanced process and protection in the first instance.

Internal company procedures

We do not support legislation setting out internal company procedures. We note that the UK Financial Conduct Authority (FCA) has responsibility for financial services entities. Applying an approach followed by the FCA to the general Australian market is not appropriate.

Legislation

We support new statute, which mirrors the *Public Interest Disclosure Act 2013* as far as applicable, covering all whistleblowing matters in relation to the corporate sector. This would require the removal of related provisions from the *Corporations Act 2001*and other statute.

Communications around the new whistleblower regime

We think it would be (to say the least) an unfortunate policy outcome if the new whistleblower regime was simply legislated without careful consideration of the communication and implementation aspects. The new legislation is likely to have many supporters from certain groups within society, especially the media, which often cast whistleblowers as exemplary citizens providing great service to society at high personal cost. This is indeed sometimes the case.

However, the bigger prize on offer is that Australia's new approach to whistleblower protections will change the internal cultures of organisations and create new or improved ethical frameworks for decision-making at all levels of management. As has been pointed out by commentators such as Dennis Gentilin (himself a whistleblower of irregularities in the financial services sector), there are strong links between what he calls "ethical resilience" and the prosperity of organisations[1].

We believe it is this broader beneficial policy feature of the new whistleblower legislation which should figure prominently in the sponsoring Minister's communications around the legislation. Otherwise, there is a risk that the legislation will be seen in some quarters as additional red tape on employers which simply panders to certain groups within our society which have long supported whistleblowers (i.e. groups which rely on disclosures to support their own particular endeavours).

[1] Refer Dennis Gentilin, *The Origins of Ethical Failure*, March 2016.

APPENDIX 2: QUESTIONS IN RELATION TO PROPOSED PROTECTIONS FOR TAX WHISTLEBLOWERS

38. Are the proposed categories of persons who can be a tax whistleblower appropriate?

The Consultation Paper proposes that a tax whistleblower is defined as any person who:

- Is, in relation to the taxpayer in question, a current or former:
  - employee of the entity, organisation or business;
  - unpaid worker;
  - contractor;
  - financial service provider;
  - accountant;
  - auditor;
  - tax agent*, legal advisor* or consultant*;
  - business partner or joint venture*;
  - client* of a financial service provider, accountant or auditor; tax agent, legal advisor or consultant; and that
- The person provides information about behaviour that they believe, on reasonable grounds, amounts to actual or potential tax avoidance, evasion or other breaches of tax law.

As a starting point, we agree with aligning the proposed definition of a tax whistleblower with the expanded *Corporations Act 2001* definition as recommended by the Senate Economics Committee[2] Whistleblower protections are appropriate not only for employees/contractors/office bearers of a taxpayer entity/organisation/business but also for specific individuals that are likely to have access to information and awareness of tax avoidance behaviour or a breach of tax laws.

We do, however, question the likelihood of clients of financial providers, accountants etc to a taxpayer entity, organisation or business being aware of behaviour or breaches by the taxpayer entity.

For the proposed definition of a tax whistleblower, we recommend that the term “joint venture participant” be used instead of “joint venture” as a joint venture is not a person / individual

39. Are there any other categories of individuals that should be included or excluded?

As accountants, tax agents, legal advisors etc. can encompass organisations as well as individuals, we recommend that employees of those organisations be clearly included in the definition of tax whistleblower. This in turn raises the need for such organisations (and perhaps professional associations like ours) to develop procedures and forums for the employees to raise their concerns internally or with a trusted counsellor.

[2] As part of its 2014 Inquiry into the Performance of ASIC.

40. Do you consider the proposed protections for a tax whistleblower's identity to be appropriate?

To encourage whistleblowers to come forward, the identity of a tax whistleblower and the disclosure of any information which is capable of revealing their identity should be subject to confidentiality with certain exceptions as proposed in the Consultation Paper.

Another exception we suggest including is the disclosure of information that may reveal a whistleblower's identity to a court for the purpose of proffering evidence in court proceedings against the taxpayer by the Commissioner of Taxation. Where the evidence of the whistleblower would substantially help the Commissioner of Taxation's case against the taxpayer, the ATO should be able to reveal the information to the court, since the court has its own processes which can maintain the confidentiality of the whistleblower's identity.[3] From a taxpayer's perspective, such information also enables contrary evidence to be prepared and presented to the court, and for the Commissioner's administrative decision-making processes to be challenged where appropriate.

41. Do you consider the proposed protections against retaliation for tax whistleblowers to be appropriate?

According to the Consultation Paper, it is proposed that the tax whistleblower protections against retaliation match those provided by the *Public Interest Disclosure Act 2013* (PIDA) including immunity from criminal, civil and administrative liability for the commission of or involvement in any contravention of the tax law. It will also be a criminal offence to take or threaten to take a reprisal and within the whistleblower's rights to be granted compensation for detriment suffered due to reprisal.

Under the PIDA, qualifying disclosures entitle public sector whistleblowers protection from:

- Exposure of their identities (to prevent discriminatory treatment, termination of employment, or enforcement of other contractual remedies (such as damages for breach of contract), physical injury and intimidation); and
- Immunity from criminal, civil and administrative liabilities from making the disclosure (including disciplinary action, defamation and banning, but not actions for perjury).[4]

Matching the tax whistleblower protections with those under the PIDA is appropriate given a number of experts told the Senate committee during the inquiry into the performance of ASIC that in many respects, PIDA represented a best-practice approach to whistleblower legislation[5]. In fact, a June 2014 report, *Whistleblower Protection Rules in G20 countries: The Next Action Plan*, assessed Australia's public sector whistleblowing legislation as having the highest rating for 11 of 14 criteria and the middle rating for the three remaining criteria.

That said, we note that the ATO, in its own March 2016 submission to the statutory review of the PIDA conducted by Philip Moss AM voiced a number of concerns which we feel would reflect the

[3] According to the Consultation Paper on p24
[4] See Subdivision A of the PIDA,
[5] Senate Economics References Committee, Issues Paper, *Corporate whistleblowing in Australia: ending corporate Australia's culture of silence* (28 April 2016), p23

concerns of other, private sector employers[6]. Our point here is that the practical experiences in applying PIDA should be taken on-board in the development of new whistleblower guidelines.

42. Should the scope of disclosures protected be determined by an objective test requiring the disclosure to be made on 'reasonable grounds'?

The Consultation Paper proposes that to qualify for protection a tax whistleblower must disclose the information to the ATO and have reasonable grounds to suspect actual or potential tax avoidance behaviour or a breach of tax law.

We agree with the Consultation Paper. To be effective, the scope of disclosures protected should be determined by a test based on an honest belief held on reasonable grounds that information shows or tends to show the defined wrongdoing, i.e. the breach of legislation.

Submissions provided in the 2014 report by the Senate References Committee Inquiry into the Performance of ASIC, reveal that the existing 'good faith' requirement is not a useful concept in whistleblowing legislation. Motives are notoriously difficult to identify and may well change in the process of reporting. It is much easier to rely on an objective test to identify the wrongdoing.[7] As noted previously, we think this is particularly relevant in a tax context where purpose-based tests are found.

43. Do you agree that tax whistleblowers should be able to disclose information anonymously?

Whistleblowers take significant personal and financial risks in disclosing insider information and allowing them to whistleblow anonymously through their lawyers or other trusted intermediaries will enable them to disclose information to the ATO without fear of being discovered by the entity accused of the breach of legislation. Whistleblowers' experiences reveal that once their identity is revealed, they lose their job, suffer damage to their reputation and may find it difficult to find employment again.[8]

Enabling whistleblowers to disclose tax avoidance behaviour or a breach of tax law anonymously will make it easier for them to make the initial approach to the ATO. At the end of the day, what is important is the information that will lead to investigation into tax avoidance behaviour or breach of tax law, rather than the identity of the person disclosing it.

We acknowledge however the practical difficulties of maintaining anonymity and the likelihood of informal enquiries (or finger-pointing behaviour) as to the whistleblower's likely identity. In a tax context for example, clients are typically represented by a small coterie of tax advisers and so the relevant principals and employees of such tax service providers are likely to come under suspicion from the client taxpayer. Even though no particular whistleblower is ever identified by the client taxpayer and no attempt is made to harm any particular individual, we expect that such suspicions may on occasions lead to new tax advisers being appointed for reasons said to be unconnected to the whistleblowing event.

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[6] Refer: https://www.dpmc.gov.au/sites/default/files/pid-submissions/submission-ato.pdf
[7] Senate Economics References Committee, Issues Paper, *Corporate whistleblowing in Australia: ending corporate Australia's culture of silence*, p40-41
[8] See e.g. A Ferguson, 'Chilling tale of Origin Energy whistleblower', *Sydney Morning Herald*, 25 January 2017

44. How should the claim process for tax whistleblower compensation work?

No comment at this stage.

45. Are the proposed remedies for tax whistleblowers that are disadvantaged as a result of making a disclosure sufficient?

As mentioned above, whistleblowers take significant personal and financial risks in disclosing information. Whistleblowers who expose tax avoidance behaviour or a breach of tax law should be entitled to compensation if their disclosure leads to damage to their reputations and they are unable to find future employment or lose clients.

As tax agents, legal advisors, accountants and consultants can be companies, large partnerships and other entities, these businesses could also suffer repercussions (e.g. claim of damages from breach of contract by a client, damage to reputation) from an employee whistleblower's disclosure. Consideration should be given as to an appropriate remedy for them.

Indeed other third parties may be subject to retaliation (this is possible where the actual whistleblower is anonymous) and thus the proposed remedies need to extend beyond the whistleblower themselves.

46. Do you agree with tax whistleblowers only being protected when disclosing information to the ATO to preserve the confidentiality of tax protected information?

To preserve the confidentiality of tax protected information, it is appropriate that tax whistleblowers should only be protected when disclosing the information to the ATO. Protection should also be extended to disclosing information to a lawyer to allow a whistleblower to disclose anonymously at first instance (see response to question 47).

Professional organisations such as ours need to consider the role we should play in helping our members whose work results in them considering whether to blow the whistle on a taxpayer client (i.e. there could well be a role for trusted intermediaries such as Chartered Accountants ANZ).

47. Should tax whistleblowers be able to receive the proposed protections when disclosing to internal or external individuals?

Tax whistleblowers protection should be available to whistleblowers who disclosed information on tax misconduct to internal individuals if it is part of an 'internal' whistleblowing mechanism. We recommend that policy-makers seek to develop an understanding of existing mechanisms which can be found within many of Australia's large accounting firms.

Consistent with the recent whistleblower changes to the *Fair Work (Registered Organisations) Act 2009* (section 337A), to enable a person to remain anonymous, protection should be available where the disclosure is made to the person's lawyer who then discloses the information to the ATO.

We agree with the proposal in the Consultation Paper that the protections should not extend to 'external' recipients such as the media or members of Parliament due to the need to preserve the confidentiality of tax protected information. Disclosing information to the media or members of parliament will not assist the ATO in its investigation into potential tax misconduct

48. To what extent should the Commissioner be able to use information disclosed under the proposed tax whistleblower system to make income tax assessments?

Based on various Federal Court decisions[9], pursuant to section 166 of the *Income Tax Assessment Act 1936,* the Commissioner is not only entitled but obliged to use information which is in his possession even if he knows it is subject to a claim for breach of confidence, or is privileged, or is obtained unlawfully.

We are of the view that this principle would extend to information in the Commissioner's possession from a whistleblower. Based on Federal Court commentary[10], section 166 exhibits a policy which explicitly privileges the need to have accurate assessments made on the information available over other private law rights. In our view, this policy should continue to apply to whistleblower information. Accordingly the proposed tax whistleblower protections should not contain any restrictions to the Commissioner's ability to use whistleblower information to make assessments. The corresponding obligation on the Commissioner however is to develop robust published guidelines on how he will manage whistleblower information, noting too the ATO's own previously expressed reservations about the operations of PIDA (see above).

49. Do you consider a reward system should be introduced for tax whistleblowers?

As the United States[11] and United Kingdom[12] experience shows, a reward system will provide more incentive for whistleblowers to come forward. Nevertheless, we are concerned that the potential for financial reward will also encourage frivolous, vexatious or opportunistic claims of potential tax avoidance behaviour or breach of tax laws. There will possibly also be disputes amongst a whistleblowing group of individuals over who in particular is entitled to compensation. Such claims would involve unnecessary investigations and waste time and ATO resources. As set out in our commentary on the proposals for the corporate sector in Appendix 1, we support a focus on strengthening the overall protections in the first instance.

50. If Australia were to introduce a reward systems for tax whistleblowers what structure should the Government consider implementing?

We have not commented on how a reward system should be structured but would be pleased to do so if a decision is made to go down this path.

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[9] *Commissioner of Taxation v Donoghue* [2015] FCAFC 183, *Denlay v FCT* [2011] FCAFC 63 and *Awad v Commissioner of Taxation* [2000] FCA 1288
[10] *Donoghue* at paragraph 74
[11] See IRS Whistleblower Program Fiscal Year 2016 Annual Report to the Congress
[12] See G Topham, 'UK tax authorities pay record £605,000 to informants', *The Guardian*, 15 June 2015

51. Should a whistleblower be entitled to a reward if they participated in the tax avoidance behaviour?

As above.

52. If a reward system were to be adopted should a threshold (i.e. the amount recovered by the ATO) be established to determine when whistleblowers are rewarded?

As above.

53. Do you agree that the proposed tax whistleblower protections should include provisions preventing the disclosure of taxpayer information to the informant?

We agree. We would have thought that the ATO would in any event be prevented from disclosing taxpayer information to the whistleblower (refer the ATO's existing practices in dealing with so-called "dob-in's"). The ATO should be able to conduct its own investigations independent of the whistleblower.

54. Do you agree that the ATO should be prevented from providing whistleblowers with information relating to progress of investigations?

Given the substantial personal and financial risk the whistleblower would have taken to disclose the information, the whistleblower should be entitled to a general status update on the ATO's progress in considering the supplied information.

55. As part of the new protections for tax whistleblowers should an existing body be empowered (or a new body be established) to protect the interests of tax whistleblowers? Should it be empowered to take legal action on behalf of the whistleblowers?

As whistleblowers take a significant risk in disclosing information, it is important that there is an "advocate" to facilitate protection for whistleblowers. Based on commentary in the Issues Paper, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence* (released by the Senate Economics Reference Committee), consideration should be given to establishing an advocate for whistleblowers who would have the standing or power to:

- Act for a whistleblower who is the subject of litigation;
- Bring an application on behalf of a whistleblower whose employer has terminated employment as a result of disclosure; or
- Bring an action seeking compensation for a whistleblower for damage caused by victimisation.

To minimise unnecessary red tape, this advocate for whistleblowers could be established within the ATO, similar to the ASIC established Office of Whistleblower, but legislatively empowered to advocate for whistleblowers.

56. If an oversight body was to be established should it solely focus on tax whistleblowers or act as a wider whistleblower oversight agency?

No comment.

57. Are there any other protections that should be offered to tax whistleblowers?

No comment.

58. What are the interactions, if any, between these proposed protections and professional advisors' fiduciary including legal professional privilege or ethical obligations?

The ethical obligations of chartered accountants are established in APES 110 Code of Ethics for Professional Accountants (**APES 110**) issued by the Accounting Professional & Ethical Standards Board (**APESB**). In addition, our members who are registered tax agents, BAS agents or tax (financial) advisers would be subject to The Code of Professional Conduct under Subdivision 30-A of the *Tax Agent Services Act 2009* (**TASA**).

APES 110 Code of Ethics for Professional Accountants

Section 140 of APES 110 establishes a requirement for a member to keep information confidential unless the member has authority to make the disclosure or is legally compelled to do so. APES 110 also directs members to seek legal advice prior to disclosing confidential information. APES 110 is based on the Code of Ethics for Professional Accountants issued by the International Ethics Standards Board for Accountants (**IESBA**).

In 2016, after extensive consultation and debate, IESBA issued amendments to the Code of Ethics entitled *Responding to Non-compliance with Laws and Regulations*. These amendments set out a framework to guide professional accountants in what actions to take when they become aware of a potential illegal act, known as non-compliance with laws and regulations (**NOCLAR**), committed by a client or employer. In a nutshell, professional accountants may have an ethical obligation to whistleblow on their clients or employers if it is not illegal to do so.

In December 2016 the APESB issued an exposure draft to amend APES 110 to effectively mirror changes already included in the international code. The amendments will be effective from 15 July 2017 and it essentially permits accountants to set aside the duty of confidentiality under APES 110 in order to disclose NOCLAR to appropriate public authorities in certain circumstances, i.e. whistleblow.

Ultimately, it will be important to compare the NOCLAR obligations under the APES 110 with the specific tax whistleblower protection regime rules to determine if there are inconsistencies and where possible mitigate their impacts.

TASA Code of Professional Conduct

Under subsection 30-10(6) of the TASA "unless you have a legal duty to do so, you must disclose any information relating to a client's affairs to a third party without your client's permission".

Sanctions by the Tax Practitioners Board for failure to comply with the Code of Professional Conduct include a written caution, registration suspension or termination of registration.[13]

In our view, there appears to be no exception to subsection 30-10(6) to allow registered tax agents / BAS agents / tax (financial) advisers to disclose information to the ATO concerning their client's breach of tax laws without breaching their client confidentiality obligation. Nor is there any legal obligation to disclose information to the ATO on a client's tax avoidance behaviour / breach of tax laws.

It may be the case that in particular circumstances the tax agent should not sign or lodge a return if there is a knowing breach of the law, but a tax whistleblower protection regime will extend to circumstances beyond that fact pattern.

Accordingly, any tax whistleblower protections would be ineffective for registered tax agents / BAS agents / tax (financial) advisers if there is no amendment to TASA to allow whistleblowing as they (or their employer) could still lose their livelihood from the termination or suspension of their registration. Furthermore, news of a written caution or suspension could damage the reputation of the tax agent / BAS agent / tax (financial) adviser as a result of the sanctions taken by the Tax Practitioners Board.

Other considerations

Another part of the policy formulation process is the impact of the new whistleblower legislation on professional indemnity arrangements. Any expected rise in insurance premiums resulting from the new whistleblower measures should be outlined in the regulatory impact statement.

Affected organisations such as accounting firm will also need to time to adjust their existing contractual arrangements with clients, suppliers (e.g. technology service providers) and their employees. Examples here include client confidentiality and intellectual property clauses. Again, this should be identified in the regulatory impact statement

[13] Section 30-15 of the TASA

APPENDIX 3

Chartered Accountants Australia and New Zealand is made up of over 100,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over.

Members of Chartered Accountants Australia and New Zealand (CA ANZ) are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business.

We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.