

24/02/2017

Tax and Corporate Whistleblower Protection Project
C/- Ms Jodi Keall
Senior Advisor
Financial Systems Division
100 Market Street
Sydney NSW 2000

Email: whistleblowers@treasury.gov.au

Dear Madam

RE: DELOITTE SUBMISSION REVIEW OF TAX AND CORPORATE WHISTLEBLOWER PROTECTIONS IN AUSTRALIA

Deloitte welcomes the opportunity to make this submission on the consultation paper "*Review of tax and corporate whistleblower protections in Australia*" that was released on 20 December 2016. We also thank Treasury for the opportunity to attend the two roundtable discussions regarding this consultation paper.

Deloitte has also taken the opportunity to make a submission to the Senate Economics References Committee Issues Paper "Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence".

Objective and framework

We support the need to improve Australia's whistleblowing framework in order to encourage and facilitate the making of disclosures, ensure disclosures are appropriately dealt with, enable whistleblowers to be protected and supported, and to prevent and punish the victimisation of whistleblowers.

Deloitte supports moving toward a unified whistleblower framework in Australia. However, we appreciate that the current environment, legislative structure and proposed timeline for introducing protections for tax whistleblowers may mean that this objective may need to be phased over time. Accordingly, we submit that any amendments to legislation or regulation in the interim should seek to increase consistency across the various Federal whistleblower regimes.

On the basis that the overall aim should seek to achieve consistency and harmonisation of the whistleblower framework, many of our comments relate to both corporate and taxation whistleblowing. Accordingly, where we refer to 'business' we appreciate that this may only include 'corporations' where the suspected wrongdoing relates to the Corporations Act, but may refer to a variety of entity structures or persons in relation to taxation whistleblowing.

Interaction of professional obligations

In our view, following the introduction of any legislation, a further step to achieve consistency will require professional bodies to assess and resolve any differences between the legislation and current or proposed codes of conduct.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/au/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

The entity named herein is a legally separate and independent entity. In providing this document, the author only acts in the named capacity and does not act in any other capacity. Nothing in this document, nor any related attachments or communications or services, have any capacity to bind any other entity under the 'Deloitte' network of member firms (including those operating in Australia).

Liability limited by a scheme approved under Professional Standards Legislation.

Member of Deloitte Touche Tohmatsu Limited

Internal company procedures

In our experience, an effective element of a whistleblower framework aimed at achieving the necessary culture change is an accountable internal reporting process aimed at encouraging disclosure of suspected wrongdoing within a business. This framework should operate as a triage system whereby a business's internal reporting process and people can allow grievances to be managed appropriately e.g. by providing necessary training to a human resources practitioner to, in the first instance recognise reports that are employee grievances, and then to be able to recognise matters that should be investigated as likely breaches of the law/serious misconduct. Further, these breaches would then require an independent senior executive/non-executive board member to review/ratify decisions on behalf of the business.

This model should include the ability to demonstrate impartiality in decision making. Persons undertaking the investigation role require a specialised skill set. A business should have the option to employ external investigators if the appropriate skills are not available within the organisation.

Training must be provided to both the staff operating the system and to all other personnel in relation to the use of the system.

The appointment of a Whistleblower Protection Officer (WPO) is recommended. The WPO should have sufficient authority to adequately protect the whistleblower's welfare and should be independent of and not subordinate to those tasked with managing disclosure investigations.

However, whilst encouraging businesses to set up appropriate internal procedures, we recognise that consideration needs to be given as to the effect of the proposed changes on small business and not for profit organisations, which may not be of sufficient scale to implement an internal reporting framework. Therefore, we recognise that there should also be an available reporting channel to a regulator or independent whistleblower advocate such as "An Office of Whistleblower". We would see that office as being able to replicate an internal company process by being able to triage reports and manage where they should be reported for appropriate further investigation.

Categories of Qualifying Whistleblower

We support expanding the definition of the categories of "whistleblower" to include a business's former employees, contractors, financial services providers, legal advisors, accountants and unpaid workers. We would also welcome clarification of the term 'business partners' prior to including that term.

In particular, we recommend that whistleblowing protections be specifically extended to registered tax agents and registered BAS agents.

"Good Faith" obligation to be replaced by an objective test

We support the replacement of the current Good Faith reporting requirement, although, as noted in the consultation paper, we agree it could lead to an increase in vexatious disclosures and disclosures from people with 'ulterior motives'.

However, whilst self-interest of the whistleblower could be a part of the motive for disclosing information, the removal of the good faith obligation should still encourage whistleblowers to disclose matters and remove the burden from them to prove they were not acting purely in self-interest. The introduction of a requirement that disclosure be based on an honest belief, held on reasonable grounds will align protections with the RO Act, PIDA and some international protections.

However, we believe that that a review of the Corporations Act 2001 (the Act) is required to avoid the risk that inconsistent language is used in different sections of the law where the intent of the law is the same. By way of example, we note that the auditor reporting obligations as set out in section 311 of the Act states "if an auditor is aware of circumstances that (i) the auditor we has reasonable grounds to suspect amount to a contravention of this Act". Is this intended to be the same as an honest belief, held on reasonable grounds?

Compensation

Lack of compensation if retaliation does occur can provide a strong disincentive to whistleblowers. Therefore, Deloitte supports changes to the existing compensation process to compensate where a whistleblower has been victimised for being a whistleblower. Issues such as any reduction in salary, changes to remuneration packages (other benefits including non-monetary benefits in addition to salary), and, (subject to former employees being included as a category of whistleblower) failure to provide references to former employees, and costs incurred or losses/damages suffered as a result of or in relation to their disclosure, should be considered when assessing the compensation to be provided. This process should be available for cases where the whistleblower is either in whole or part involved in the behaviour complained of, provided they co-operate fully with relevant authorities in any prosecution or other remedial action. However, we believe the compensation a whistleblower receives should not place them in a better position financially than they would otherwise have been in, as this in effect becomes a reward for whistleblowing.

In cases where there is disagreement over the compensation to be provided, we suggest there should be an ability to take the matter before the Federal Court for adjudication.

Rewards

We do not support the introduction of financial rewards to whistleblowers because of the risk of encouraging unreliable or speculative claims by people motivated by potential monetary gain. This could undermine the integrity of any reporting mechanisms by attracting the aggressive pursuit of whistleblower claims where the prevention of misconduct becomes secondary to the monetary value of any potential reward.

In the case of tax matters, it may be seen as a departure from the current public debate regarding taxpayers paying their 'fair share of tax' if some of those taxes, which contribute to the public funding, are then paid to the whistleblower as a reward.

Anonymous Disclosures

Deloitte supports the proposal to extend whistleblower protections to anonymous disclosures. Anonymous disclosures should not prejudice the manner in which the allegation is handled. In our experience of running a whistleblower service, we have found many whistleblowers are reluctant to identify themselves. Denying them the right to remain anonymous risks missing reports of information which reveals inappropriate conduct. While we support anonymous disclosures we acknowledge this may limit the investigators ability to substantiate allegations due to lack of evidence. However, such disclosures create intelligence which would otherwise be unavailable if anonymity were not available to whistleblowers. We recognise that where a disclosure has been reported anonymously, it can be difficult to keep an anonymous whistleblower apprised and informed of the progress of the investigation.

Disclosure to the company's auditor

We note that the paper acknowledges that the current protections are limited to disclosures made to ASIC, the company's auditor, or nominated persons within the organisation. We recommend that consideration is given to the current drafting of the legislation as it pertains to disclosure to the company's auditor, and in particular section 1317AE. It is imperative that the legislation allows a member of the audit engagement team, to whom a disclosure is made, to consult with more senior members of the team on the disclosure. In addition, it should provide for the audit partner to consult internally to assist in evaluating the disclosure and in determining the appropriate course of action.

Third Party Disclosure

We understand the some instances may require whistleblower disclosure to a third party. We believe it is essential to define what or who will be considered a 'third party'. For example, consideration should be given to including disclosure to a registered tax agent (similar to disclosure to an auditor) as a protected third party disclosure.

It may be appropriate for third parties to have obligations in regard to the information they receive from the whistleblower. There is a risk that the third party may come into possession of false/misleading information or may use the information in a manner which is unforeseen and unacceptable to the whistleblower. Third parties should be made accountable for actions they take in regard to information received from a whistleblower.

Victimisation

We recommend that the civil remedies are amended through the adoption of a provision similar to section 337BA and of the Fair Work Registered Organisations Amendment Bill 2016, which defines what constitutes taking a reprisal, and Section 337BB, which lays out the "Civil Remedies" available.

The protection of whistleblowers would be further enhanced if the current penalty for victimisation of whistleblowers (25 penalty units or imprisonment for 6 months or both) was reviewed. We believe these penalties do not provide a sufficient deterrent nor do they reflect the serious nature of the offence. We further suggest consideration should be given to holding the company liable if an offence occurs, and not just its employees.

Taxation whistleblowers

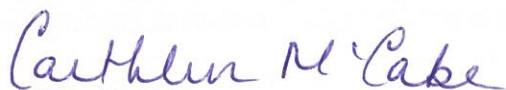
As stated earlier, our commentary in this submission reflects our view that the framework for the protections of whistleblowers should apply to taxation whistleblowers. We support the introduction of specific provisions to introduce categories of taxation whistleblower and protect the identity of a taxation whistleblower so that, regardless of the channel used by the taxation whistleblower to report e.g. internal, to a third party or directly to the Australian Taxation Office (ATO), they can receive the appropriate protections to ensure that any disclosures can be properly investigated without revealing their identity.

When considering taxation whistleblowers further matters that may be considered include:

- Individual taxpayers: a disclosure in relation to an individual taxpayer may also be a protected disclosure in relation to taxation matters even though the taxpayer is not carrying on business. For example, an individual taxpayer may have rental properties that are not being disclosed in their income tax returns and a qualifying whistleblower may make a disclosure about this fact
- Registered tax agents or BAS agents: it could be argued that registered tax agents and BAS agents may breach the Tax Agent Services Act 2009 section 30-10(6) Code of Conduct in relation to confidentiality if making a disclosure. While the general whistleblower protections should apply to protect the registered agent from action against breaching this obligation, we recommend that the Act be amended to make it clear that the obligation is not breached if the registered agent makes a protected disclosure to the ATO.

Should you have any queries concerning our submission, please contact me via email on cmccabe@deloitte.com.au or by phone on (02) 9322 7288.

Yours faithfully



Caithlin Mc Cabe

Partner

Deloitte Touche Tohmatsu