



THE TAX INSTITUTE
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14 February 2017

Tax and Corporate Whistleblower Protection Project
C/- Ms Jodi Keall
Senior Adviser
Financial System Division
The Treasury
100 Market Street
SYDNEY NSW 2000

By email: whistleblowers@treasury.gov.au

Dear Ms Keall,

Review of Tax and Corporate Whistleblower Protections in Australia

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Review of Tax and Corporate Whistleblower protections in Australia* Consultation Paper (**Consultation Paper**).

As The Tax Institute's members are involved in the tax industry, we do not propose to comment on the protections offered to corporate whistleblowers, but will restrict our comments to tax whistleblowers, primarily in relation to Section 9 of the Consultation Paper entitled *Proposed Protections for Tax Whistleblowers*. We refer to the specific questions in the Consultation Paper to which we are providing responses below.

Responses to Specific Questions in the Consultation Paper

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

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

The list of categories of persons who may be whistleblowers is stated to align with a recommendation of the Senate Economics References Committee, with the addition of advisers, business partners, and clients of advisers.

We are of the view that legal advisers should be excluded from the definition of 'tax whistleblower' on the basis that legal advisers owe ethical duties to clients and are subject to legal professional privilege, which obligations would be breached if a legal adviser made a disclosure of client information to the ATO.

We also make the observation that, while the Commonwealth may pass a whistleblower law, it is unlikely to be within the Commonwealth's Constitutional power to override the State based legal regulatory systems under which the legal professional privilege arrangements are constructed.

As a result, while, for example, a lawyer might benefit from a whistleblower law in certain respects, they would remain subject to disciplinary proceedings, including a risk of being struck off the roll of legal practitioners for failing to act in their client's best interests. This would have the consequence that the whistleblower protection regime may be somewhat misleading, at least in respect of legal practitioners, in that it would not provide protection against the loss of the lawyer's livelihood. Similar consequences may be relevant to other professions.

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

We agree that protection of the whistleblower's identity is appropriate. Even in the presence of a law which prevents retaliation, there may be, at the least, residual resentment towards whistleblowers. However, we do issue one note of caution in this respect, which is that if the actual whistleblower is not known, because of the identity protection provisions of the whistleblower laws, then a wider group may, in fact, come under suspicion.

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

We agree that the whistleblower should be protected in relation to breaches of tax law which they commit in the course of committing the act of whistleblowing. Further consideration should be given to whether greater protections are appropriate, particularly an obligation to pay compensation which may be largely open-ended.

The interaction between questions 40 and 41 should be considered - if it is unlawful to name the whistleblower, then proceedings for discriminating against the whistleblower may be difficult to maintain. In this context, a suspicion (which is unproven) may give rise to discrimination against the suspected whistleblower, who then cannot take action in relation to that discrimination. In our view, two solutions are possible. Firstly, the prohibition could be relaxed in the context of a prosecution. Second, the whistleblower could consent to the disclosure, in which case the prohibition on disclosure ceases to be

effective. A further alternative is that the protection should extend to those who may come under suspicion, even if they did not actually engage in the whistleblowing activity. It would be anomalous if there were protection for whistleblowing, if the same protection did not extend to those thought to have engaged in whistleblowing, even if they did not in fact engage in such activity.

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

We believe the scope of disclosures should be protected by determining an objective test requiring the disclosure to be made in circumstances where there were reasonable grounds for the disclosure to be made. Questions concerning the whistleblower's motives for making the disclosure are not relevant to this test. A 'good faith' test would necessarily limit the protections and would mean they were not aligned with other whistleblower protections as set out in the Consultation Paper. We note that the ATO receives many disclosures and its role is to determine whether any of these disclosures should be acted upon based on those materials. This acts as a 'check and balance' in relation to those disclosures.

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

We agree that anonymous disclosures should be possible, as presently occurs via the ATO's website. However, if the identity of a whistleblower should come to light, their entitlement to further protection under the whistleblowing law should be limited in the same way as for other whistleblowers.

Question 44 How should the claim process for tax whistleblower compensation work?
Question 45 Are the proposed remedies for tax whistleblowers that are disadvantaged as a result of making a disclosure sufficient?

We do not agree that the Registered Organisation amendments to the *Fair Work Act 2014* (Cth) provide an appropriate comparator. Those amendments are directed at dealing with corruption and misconduct which personally impacts upon members of the organisations in question, such that making the disclosure will be in the interests of other members of the organisation, and should be rewarded, rather than punished, by those members. The justification for tax whistleblowing is not the same (except where fraud or evasion are involved) and deals with matters which are external to the organisation. Having said that, some sort of limited compensation scheme may be appropriate dependent upon the whistleblower being able to show that they have 'clean hands' (eg where they are not acting out of personal spite or enmity) and that there is a reasonable basis for the disclosure to be made.

We also observe that the organisation should not be liable for any consequences which are external to the organisation, and therefore not within its control. For example, if the whistleblower (despite our comments above) was a lawyer, their employer should not be liable for the consequence that the lawyer is struck off the roll, and the employer ought to be able to terminate their employment in that circumstance. Further, the employer should not be liable for compensation associated with the whistleblower's difficulties in gaining new employment, unless the employer has taken steps to prevent the employee from gaining new employment.

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

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

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

We believe that protections should only extend to disclosures to the ATO, and not to other organisations. Any other breach of confidence by the whistleblower should not be protected. The question of 'internal' disclosures is best left for consideration by the internal policies of the employer. One exception may be if the whistleblower makes a disclosure to their supervisor, or to the Board of their employer, and then subsequently to the ATO if that disclosure is ignored. In that circumstance, it would not be appropriate for the employer to be able to rely on the internal disclosure to discipline the employee, when such action operates as a proxy for the employer's wish to discipline the employee for disclosure to the ATO.

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

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

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

Question 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?

We disagree with the establishment of a reward system. If the whistleblower acts in the hope of receiving a reward, it is not clear that they would be acting with integrity and without personal motivation. Similarly, we would oppose rewarding a taxpayer who was involved in creation of the scheme, even if they subsequently disclose the existence of that scheme to the ATO. Further, the introduction of a reward based on actual tax collected risks informing the whistleblower of the outcome of the review, which is

inconsistent with the proposition that the whistleblower should not be provided with information about the outcome of the ATO's investigation.

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

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

In our view, the confidentiality of the taxpayer's tax information should be retained to the greatest possible extent. If the act of whistleblowing created a right to view the tax records of the taxpayer, or to become aware of their tax affairs, this would again create a situation where a whistleblower might choose to make disclosures in the hope of obtaining a personal benefit, namely access to records and information to which they were otherwise not entitled. It would also be inconsistent with any proposal for a reward system that was dependent on the whistleblower having 'clean hands' in the matter.

Question 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?

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

Where the amendments for the proposed tax whistleblower provisions are made to the existing tax law, the Inspector-General of Taxation should be empowered to protect the interests of tax whistleblowers. Should a separate uniform approach to protecting tax and corporate whistleblowers instead be taken, it would make more sense to set up a separate oversight body. However, we are mindful of the significant costs associated with setting up a separate oversight body.

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

No

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

Please see our comments in relation to Questions 38 and 39 above.

Other comments

We submit that some consideration could be given to whether the regime should be made retrospective so as to better align with the corporate whistleblower protections in Australia as set out in the Consultation Paper. We would be happy to assist in any discussions about the suitability in these circumstances of retrospective legislation.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Matthew Pawson', with a long horizontal flourish extending to the right.

Matthew Pawson
President