

17 February 2017

Tax and Corporate Whistleblower Protection Project

C/- Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
SYDNEY NSW 2000

Dear Sir/Madam,

RE: Consultation Paper - *Review of tax and corporate whistleblower protections in Australia*

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission on the Treasury's Consultation Paper - *Review of tax and corporate whistleblower protections in Australia*.

APESB and the co-regulatory environment for the Australian accounting profession

APESB is governed by an independent board of directors whose primary objective is to develop and issue, in the public interest, high-quality professional and ethical pronouncements. These pronouncements apply to the members of the three major Australian professional accounting bodies (CPA Australia (CPAA), Chartered Accountants Australia and New Zealand (CA ANZ) and the Institute of Public Accountants (IPA)).

The Australian accounting profession exists in a co-regulatory environment, which involves APESB, the three professional accounting bodies and applicable regulatory authorities (e.g. ASIC). As the independent standards setter, APESB's role is to set the standards and the Board's mandate does not cover compliance and enforcement.

The three professional accounting bodies and regulatory authorities are responsible for monitoring and enforcing compliance of professional accountants including conducting disciplinary actions for breaches of these standards.

Overall comments

APESB commends the Government for this initiative to review the tax and corporate whistleblower protections in Australia. As the consultation paper notes the current protection offered to whistleblowers, excluding the public service provisions, is very limited and should be strengthened to encourage individuals to report instances of potential or suspected illegal activity.

APESB supports the Government efforts to develop statutory protections for whistleblowers. APESB believes that there is an opportunity to consider broader reforms such as implementing standalone legislation that provides whistleblower protection across a wider range of circumstances rather than limiting the provisions through inclusion in existing instruments and thus creating a complex legislative environment.

The consultation paper itself notes that there is a broad range of corporate activity in Australia which is not covered by the Corporations Act. Therefore limiting the changes to this instrument will see no protection for whistleblowers who wish to report on matters such as work, health and safety, or environmental matters.

APESB supports the expansion and clarification of the categories of qualifying whistleblowers in the *Corporations Act 2001* to cover accountants, those providing a wide variety of financial services and other parties. We note that the proposed amendment would provide statutory protections to a broader range of parties, including accountants and auditors, and would encourage parties to report instances of suspected or potential illegal activity.

Professional accountants will shortly have new professional reporting obligations when they are faced with suspected or actual non-compliance with laws and regulations (NOCLAR). An outline of these proposed provisions is set out below. The current status of the whistleblower protection in Australia may discourage accountants from disclosing matters under these proposed professional obligations.

APESB strongly believe that whistleblower protections for all sectors should at least be consistent with the current public service legislation or comparable international legislation, such as what is in place in the United Kingdom and United States. This will create the right environment and protection for whistleblowers in Australia to report suspected or actual illegal activity.

Proposed APESB Standard on Non-compliance with laws and regulations

After an extensive six year consultation the International Ethics Standards Board for Accountants (IESBA) have released an international standard *Responding to Non-Compliance with Laws and Regulations* (NOCLAR) to govern the professional conduct of the global accounting profession. These provisions provide accountants with the ability to set aside the fundamental principle of confidentiality and disclose matters to a regulator or oversight body if there is compelling evidence that reporting the matter would be in the public interest.

APESB has commenced the process to implement these reforms in Australia. [An exposure draft](#) was issued in December 2016 to amend [APES 110 Code of Ethics for Professional Accountants \(APES 110\)](#) to incorporate these provisions in the Australian Code.

This proposed professional standard will strengthen the professional framework for accountants to respond to NOCLAR committed by their clients or employers. Under these proposed provisions, professional accountants are required to consider actual or suspected breaches of laws and regulations and take appropriate action to deal with these instances.

In certain circumstances, the professional accountant will be allowed to set aside the fundamental ethical principle of confidentiality under APES 110 and report a matter to an appropriate regulatory authority if it is in the public interest. In doing so the accountant should also consider their own personal safety and whether there is protection from civil, criminal or professional liability or retaliation.

Accordingly, if there is strong whistleblower protection in Australia this in turn will provide the proper legislative environment and statutory protection for professional accountants to report NOCLAR to regulatory authorities. In the absence of strong whistleblower provisions in Australia for corporate and other activity, a professional accountant who is considering reporting an actual or suspected NOCLAR will have to consider this significant risk (i.e. lack of statutory whistleblower protection) in their decision making process on whether or not to report a matter and it may potentially be the deciding factor.

The public comment period for the APESB Exposure Draft on NOCLAR closes on 15 March 2017.

Specific comments

APESB responses to selected questions from your consultation paper are included in Appendix A for your consideration.

Concluding comments

We trust you find these comments useful in your final deliberations. Should you require additional information, please contact APESB's Chief Executive Officer, Mr Channa Wijesinghe at channa.wijesinghe@apesb.org.au.

Yours sincerely

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

The Hon. Nicola Roxon
Chairman

APPENDIX A

APESB's Specific Comments

APESB has not responded to all questions in the consultation paper. APESB's responses to selected questions in the consultation paper are as follows:

Categories of qualifying whistleblowers

1. Do you believe that the Corporations Act categories of whistleblower should be expanded to former officers, staff and contractors?

Yes. APESB believes that the whistleblower categories under the *Corporations Act 2001* (the Act) should be expanded to include people other than current officers and staff who may have information about a potential misconduct, such as accountants, those providing a wide variety of financial services and other parties. This will provide an incentive to former employees and contractors to report a potential wrongdoing and be covered by the statutory protections under the law.

2. Should it be made clear that the categories include other people associated with the company such as a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners?

Yes. The Act should make it clear that the categories include other people who have dealings with a company, such as former employees, service providers, accountants and auditors, unpaid workers and business partners. This will ensure that there is no ambiguity as to who qualifies as a whistleblower and who can access the statutory protections under the law.

The consultation paper notes that company auditors do not need to be included in the list of qualifying whistleblowers as there is an existing separate mandatory disclosure requirement. The APESB note that this only applies to audits conducted under the Corporations Act. Therefore the list of qualifying whistleblowers should include auditors, to ensure auditors who perform audits that are not governed by the Corporations Act, such as environmental auditors, are afforded the same protection.

Subject matter of disclosures covered by whistleblower protections

4. Should the scope of information disclosed be extended? If so please indicate whether you agree with any of the options discussed above, and why. If you do not believe any of the above options should be considered please explain why not and whether there are any other options that could be considered instead.

Yes, we support the extension of the scope of disclosable information as the current scope is restrictive.

We believe that there are strong merits to the introduction of a single general whistleblower regime, in particular, amending the Act to broaden the scope of disclosable information as it will simplify the law thereby assisting regulators such as ASIC with its investigative work. We are of the view that this will address the difficulties that potential whistleblowers experience in respect of fragmented legislation where there are numerous statutes with separate whistleblower regimes.

APESB note the consultation paper raises the concept of materiality as a way of ensuring that only significant matters will be reported. Within our exposure draft on NOCLAR we

have included a compelling public interest test which would limit the reporting of irrelevant matters. This test could be used as an alternative mechanism to the concept of materiality. However, this must be balanced with whether the matter is illegal (e.g. a facilitation payment) and must be reported.

Good faith obligation – is it effective?

5. Should the ‘good faith’ requirement be replaced by an objective test requiring the disclosure be made on ‘reasonable grounds’?

Yes, we believe that the ‘good faith’ requirement should be replaced by an objective test that requires disclosure based on ‘reasonable grounds’. This will still encourage whistleblowers to disclose matters and remove the burden of whistleblowers having to prove they were not acting purely in self-interest.

To whom information may be disclosed

9. Should the specified entities or people to whom a disclosure can be made be broadened? If so, which entities and people should be included?

To encourage potential whistleblowers to come forward, it is important that they are able to avail of assistance to address any issues they may have in relation to disclosure of information. Potential whistleblowers may want to obtain legal advice, and accordingly lawyers should be included in the list of specified entities or people to whom a disclosure can be made.

10. Should whistleblowers be allowed to make a disclosure to a third party (such as the media, members of parliament, union representatives, and so on) regardless of the circumstances? In the alternative, should such wider disclosures be allowed but only if the company has failed to act decisively on the information provided? Are there alternative limitations that should be considered? Please give reasons for your answers.

We are of the view that a suspected wrongdoing should be first reported to the company, to provide them with the opportunity to first address the issue. We believe that those charged with the company’s governance of the entity (generally the Board of Directors) and its management are primarily responsible in ensuring that reports of potential misconduct are appropriately actioned and whistleblowers are afforded adequate protections.

However, if the company or the entity does not take appropriate action, we believe that third parties to whom disclosures can be first made should be to regulatory or oversight bodies.

13. Should there be any exceptions in this context for small private companies?

Consideration should be given to small private companies as these organisations may not have the appropriate structure and suitably qualified personnel to address reports of potential misconduct. It is also possible that the owners and/or managers may have committed the suspected misconduct. In these circumstances, reporting directly to an appropriate regulatory authority or obtaining legal advice from a lawyer may be a better option for the whistleblower.

Protection against retaliation

20. Is there a need to strengthen the current prohibition against the victimisation of whistleblowers in the Corporations Act? If so, should these be similar to those which exist under the AUS-PIDA and RO Act?

The provisions that apply in Australia should be consistent across all legislative instruments. Therefore APESB believes the provisions should be strengthened to at least be comparable with the AUS-PIDA and RO Act.

Internal company procedures

29. Do you believe there is merit in requiring companies to put in place systems for internal disclosures? If so, what form should this take?

There is merit in requiring companies to put in place systems for internal disclosures. APESB note that the ASX Corporate Governance Principles and Recommendation's state that an organisation's Code of Conduct should address how they will protect whistleblowers who report matters in good faith.

For professional accountants in public practice (accounting firms), this is a mandatory professional requirement which requires the following:

- Firms should establish clearly defined channels for their personnel to raise concerns and come forward without fear of reprisals within their policies and procedures.
- Firms are mandated to take appropriate actions in dealing with complaints and allegations including disciplinary actions for repeated offences.
- Effective and well-publicised complaint systems in firms are recognised as a safeguard to deter unprofessional or unethical behaviour.
- Embedding in the firms' risk management framework the quality control policies and procedures including those that relate to dealing with complaints and allegations.

The professional obligations noted above are contained in the following APESB pronouncements:

- [APES 110 Code of Ethics for Professional Accountants](#) (APES 110);
- [APES 320 Quality Control for Firms](#) (APES 320) and
- [APES 325 Risk Management for Firms](#) (APES 325).

The mandatory obligations under APES 320 apply to all accounting firms, regardless of size. However, APES 320 recognises the practical difficulties that may be experienced by small firms with few partners or sole practitioners. In these circumstances, APES 320 (paragraph 123) specifies that smaller firms may use the services of a suitably qualified external person or another firm to carry out investigations into complaints and allegations.

Protection of a tax whistleblowers identity

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

APESB agrees with the proposed protections for tax whistleblowers to ensure unwarranted disclosure of their identity.