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Tax and Corporate Whistleblower Protection Project

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

CPA Australia Ltd
ABN 64 008 392 452

Level 20, 28 Freshwater Place
Southbank VIC 3006
Australia

GPO Box 2820
Melbourne VIC 3001
Australia

Phone 1300 737 373

Outside Aust +613 9606 9677

Website cpaaustralia.com.au

Online: whistleblowers@treasury.gov.au

Dear Jodi

Review of tax and corporate whistleblower protections in Australia

CPA Australia welcomes the opportunity to respond to the above Consultation Paper. CPA Australia represents the diverse interests of more than 160,000 members in 118 countries. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders. We make this submission on behalf of our members and in the broader public interest.

CPA Australia is a partner organisation of the research project '[Whistling While They Work 2](#)' and is represented in its research team. We consider whistleblowing important in identifying and dealing with wrongdoing in organisations. We support a whistleblowing infrastructure that manages whistleblowing effectively in stopping wrongdoing and protecting the whistleblower.

CPA Australia supports the passing of comprehensive legislation that covers all private sectors and industries, including not-for-profit entities, and extends the definition of whistleblower to anyone who has a reasonable belief that wrongdoing is occurring, regardless of differences in distance from the entity and time.

We are of the view that carving-out certain activities, thresholds or people who may disclose undermines the credibility and effectiveness of a sound whistleblowing system and places the onus on the whistleblower to comprehend, assess and respond to varying legal and reporting frameworks.

We support the establishment of an agency or commission that would be responsible for the receipt of whistleblowing disclosures, provides support and advice to people considering blowing the whistle, and those who have blown the whistle and oversees whistleblower protection.

Further, we would like to bring to your attention the new requirements of the international Code of Ethics for Professionals Accountants, which is adopted in Australia in APES 110 *Code of Ethics for Professionals Accountants* (Code), in relation to how professional accountants should respond when they identify a suspected illegal act in their engagements with clients or employers. The new requirements are currently being adopted by the Accounting Professional and Ethical Standards Board and will apply to our members and those of the other professional accounting bodies.

The Code's new framework *Responding to Non-compliance with Laws and Regulations* (NOCLAR), requires all our members, whether they are in public practice or not, to consider reporting a suspected illegal act to an appropriate authority when they do not have a legal obligation to do so.

While the Code allows accountants to override the principle of confidentiality and disclose suspected illegality to an appropriate authority when it is not illegal to do so, it cannot offer any protection from harm or liability.

We therefore consider the development of a comprehensive whistleblowing protection system important in ensuring that our members (and the community generally) who disclose a suspected illegal act to an appropriate authority, in the public interest, do not face civil or criminal liability and personal harm.

We also consider important the emphasis not only on the protection of the whistleblower, but also on compelling the recipient, within the entity and/or the recipient authority, to respond to the disclosure in a timely and effective manner.

Categories of qualifying 'whistleblowers'

We support a definition of 'whistleblower' that is as broad and inclusive as possible and covers any disclosure of a suspected misconduct, that is not a personal grievance, and is a consequence of an employment or client relationship in any capacity, both current and past.

Subject matter of disclosures covered by whistleblower protections

CPA Australia supports a single legislative regime that covers all subject matters. We do not think the onus should be on the whistleblower to identify the multiple pieces of applicable legislation and available protections. We think the establishment of a single Commonwealth recipient of disclosures would be appropriate, without the imposition of any materiality, or other thresholds, on reportable conduct.

Good faith obligation

We do not think 'good faith' is an appropriate test for whistleblowing and we support its removal, noting that this requirement currently applies under s 1317AA(1)(e) of Part 9.4AAA of the Corporations Act 2001 and is often mentioned as explaining the limited number of actions arising out of this protection.¹

We are of the view that the motivation of the whistleblower is not an important consideration in identifying and dealing with wrongdoing. We support a test that is associated with the veracity of the suspicion, rather than the motivation of the whistleblower, such as 'reasonable grounds'. Advancement of this more liberal approach to protection is all the more germane from an accounting profession perspective, particularly in light of the positive advancement made in combatting bribery of foreign officials now contained in Division 490 (False dealing with accounting documents) of the Criminal Code Act 1995.

Anonymous disclosures

CPA Australia does not identify any compelling reason to exclude anonymous disclosures from whistleblower protection. As stated, we support a whistleblowing infrastructure that encourages reporting of any misconduct by making available identifiable, confidential and anonymous disclosures. We can envisage situations where an anonymous disclosure is the only feasible alternative. We support the protection of anonymous whistleblowers, when the identity of the discloser is revealed, including by not disseminating information that may reveal the identity of the whistleblower to other parties.

To whom information may be disclosed

CPA Australia supports the disclosure of information to third parties in some circumstances, including when the internal recipient's response has been ineffective, or inadequate, or when the risk of immense harm to stakeholders is imminent.

¹ A significant case however is *ASIC v Dawson Nominees Pty Ltd* [2008] FCAFC 123.

Protection of whistleblower's identity and procedural fairness

CPA Australia supports the imposition on an entity of a duty to protect whistleblowers, in addition to the duty not to harm. Our view is informed by the likely implicit nature of retaliation or psychological harm. Importantly, whistleblowers need to be afforded protection from liability.

Protection against retaliation

CPA Australia encourages the development of a system that provides seamless protection to whistleblowers. We also encourage consideration of protection against spillover or mistaken retaliation, against those who may be, or be perceived to be, assisting or on the side of the whistleblower, or be a whistleblower, when in fact they are not. In many instances, retaliation is passive or implicit and it may be undertaken by different people within the organisation.

Whistleblowers may also be threatened or harassed, so the protections available should cover any behaviour that harms or threatens to harm.

CPA Australia supports the review of the protection afforded to whistleblowers to improve protection from retaliation but also from failure to be adequately protected by the entity. Clarity on the process available to seek compensation whilst also eliminating the cost burden for doing so is also required.

Compensation arrangements

Given the varied forms of retaliation and harassment to which whistleblowers may be subjected, it is important that there are appropriate, adequate and accessible compensation arrangements. The number of cases that end up with the whistleblower unable to obtain further employment is not immaterial and the effect on individual whistleblowers can be devastating. We need to ensure that those who act in the public interest do not have to sacrifice their career and wellbeing.

In relation to compensation, evidence generally indicates that organisational compensation arrangements are absent or ineffective. We support the establishment of a single whistleblowing authority to oversee receipt, protection and compensation, as this is likely to eliminate the hurdles for seeking compensation through the courts, as well as reduce costs.

Internal company procedures

We support the development of a new Australian Standard on Whistleblowing to replace AS 8004 – 2003: *Whistleblower protection programs for entities*. We also think it is important that governance codes and frameworks adequately address whistleblowing and set clear principles and guidelines for entities to effectively manage whistleblowing as part of their risk management framework and code of ethics. We would also encourage measurement and reporting of whistleblowing-related activities to the Board and its relevant committees and more broadly within the entity, within the boundaries of privacy and confidentiality obligations.

Organisations of any size and sector should have appropriate systems to enable the disclosure of any misconduct. We acknowledge the argument that the need to have a whistleblowing system is a failure in that a culture where people feel free to voice concerns is lacking and protection is necessary so that people find the courage to speak up.

However, while some organisations may be able to create an environment where employee voice is encouraged and rewarded, this cannot be ensured across time and within its different parts. So we consider that an effective whistleblowing system is an effective safeguard that assists all entities to identify and deal with wrongdoing. Nevertheless, we do not consider that an internal whistleblowing system should be mandated. Instead, it should be included in governance and risk management regimes, potentially within an 'apply or explain' or 'if not, why not' approach, as adopted by the ASX Corporate Governance Principles and Recommendations.

Oversight agency responsible for whistleblower protection

CPA Australia supports the establishment of an oversight agency together with a coherent legislative framework, to oversee private sector whistleblowing. A single, dedicated agency or commission can develop the skills and expertise to deal with responding to the disclosure and protecting the whistleblower.

Scope of reforms

We support a coherent and comprehensive regime that would apply across sectors and activities.

Proposed protections for tax whistleblowers legal professional privilege

CPA Australia is not in favour of an approach where whistleblower protections would override legal professional privilege. Such an approach would be both inappropriate. It would also be out-of-step with the approach taken by other countries.

For example, the UK's Public Interest Disclosure Act 1998 (PIDA) does not override the legal professional privilege belonging to a third party. It provides that 'A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.'²

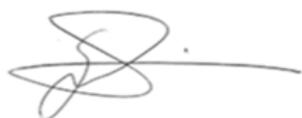
New Zealand takes the same approach under the Protected Disclosures Act 2000, that is, a whistleblower is also not protected from disclosures made that are protected by legal professional privilege.³

The USA also takes a similar approach – 'In sum, despite huge whistleblowing bounties, the sanctity of the attorney-client privilege trumps allegations of regulatory violations or other wrong-doing. Accordingly, corporate counsel who "squeal" on their employers (current or former) run the risk of breaching legal obligations and other sanctions.'⁴

Notwithstanding CPA Australia's comments above, and for completeness reasons, we also draw the Review's attention to the fact that in some circumstances there are exceptions to legal professional privilege. For example, the exceptions apply where the privilege has been waived, it is in the public interest,⁵ where a statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority, or the communication is for the purpose of facilitating a fraud or crime.⁶

If you require further information on our views expressed in this submission, please contact Dr Eva Tsahuridu, CPA Australia on +61 3 9606 5159 or by email at eva.tsahuridu@cpaaustralia.com.au.

Yours sincerely



Stuart Dignam

General Manager - Policy & Corporate Affairs

² See s43B(4) <http://www.legislation.gov.uk/ukpga/1998/23/section/1>

³ <http://www.ombudsman.parliament.nz/what-we-do/protecting-your-rights/protected-disclosures-whistle-blowing>, and <http://www.legislation.govt.nz/act/public/2000/0007/latest/DLM53924.html>

⁴ <http://legalsolutions.thomsonreuters.com/law-products/news-views/corporate-counsel/the-intersection-of-whistleblowing-ethics-and-in-house-counsel>

⁵ For example see the *Freedom of Information Act 1982* (Vic)

⁶ <http://www.vgso.vic.gov.au/content/understanding-legal-professional-privilege#ExceptionstoLegal>