Tax and Corporate Whistleblower Protection Project

C/o – Ms Jodi Keall

Senior Advisor

Financial System Division

The Treasury

100 Market Street

Sydney NSW 2000

Email: whistleblowers@treasury.gov.au

Dear Minister O’Dwyer

**Review of Tax and Corporate Whistleblower Protection in Australia**

The Institute of Public Accountants (the IPA) is one of Australia’s peak accounting bodies and we welcome the opportunity to comment on the ‘Review of Tax and Corporate Whistleblower Protection in Australia’ (Hereafter ‘Review’).

The IPA is a professional organisation for accountants who are recognised for their practical, hands-on skills and a broad understanding of the total business environment. Representing more than 35,000 members and students in Australia and in more than 80 countries, the IPA represents members and students working in industry, commerce, government, academia and private practice. More than 75 per cent of our members work in or with small business and SMEs and are recognised as the trusted advisers to these sectors.

 While we acknowledge that whistleblowing now plays a significant role in contemporary regulatory processes (Singer 1992; Wolfe et al., 2014; Roberts et al., 2011), we also recognise the need for introducing greater protection reforms for tax whistleblowers as well as more extensive reforms for existing corporate whistleblowers. In this respect we applaud the Federal Government’s whistleblower reform initiatives in line with the broader government commitment to create more transparency and accountability in Australian business, and the ever-growing need to be on par with legislative initiatives in comparable overseas jurisdictions. Our members are practitioners who have significant responsibilities in their day-to-day operations, but also have wider obligations to uphold and preserve public interest, the cornerstone of modern societies.

We provide comments on the reform initiatives relating to tax whistleblowers, as the intended reforms relate more to our membership and indeed, the clientele for which they represent. Notwithstanding, however, we have also commented extensively on initiatives which extend the protection reforms for corporate whistleblowers, taking into account public interest and ethical perspectives, which we believe is also important to our members. Our initial recommendations for a long-term solution in respect of tax and corporate whistleblower protections, as well as similar protections afforded through other Commonwealth legislation, is that consideration be given to the establishment of an independent oversight agency. This should involve the issue of a further discussion paper exploring the most effective legislative architecture that would accommodate the formation and administration of an independent oversight body. In the interim however and for the sake of remedying serious short-comings in existing whistleblower protection provisions in corporate and tax legislation in the immediate short-term period, we see no reason why provisions of the Corporations Act cannot be amended to be consistent with (and include), aspects of other existing whistleblower protections in Australia, such as for example;

* Legislation relating to financial institutions (such as banks, insurance companies, superannuation fund managers, etc) supervised by the Australian Prudential Regulatory Authority (APRA), the
* Public Sector Disclosure Act (PIDA) as well as the
* Fair Work (Registered Organisations (Amendment Act)).

Our comments also take cognisance of recent evaluations of Australian protections, including the G20 Evaluations of Public and Private Sector Protections, the Australian Senate Committee evaluation of corporate sector protections, and the Statutory Review of the AUD-PIDA.

Our responses to the Review are provided in accord with the headings and questions in the request for feedback documentation, and are thus not in any order of preference for either tax or corporate whistleblower protection reforms.

**Options for Enhancing Corporate Whistleblower Protections**

**Categories of qualifying whistleblowers**

**General commentary – qualifying whistleblowers**

We agree that Australia does appear to lag behind whistleblower protections currently in place within the Australian public sector and comparable offshore jurisdictions, particularly in respect of the categories of qualifying whistleblowers within the Corporations Act. We also agree that an extension of the definition of persons that qualify as ‘whistleblowers’ would provide further incentives for persons to come forward with information on suspected misconduct and breaches of legislation.

**Questions:**

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

Yes, we believe that it is in the public interest to expand existing categories of whistleblower, particularly if the proposed amendments lead to further credible disclosures that result in more timely prosecutions for misconduct and breaches of the law. We also believe, consistent with the recommendation of the Senate Economics References Committee (Committee) in 2014, that the proposed amendments will provide greater clarity, and remove any doubt or ambiguity relating to which persons would qualify as whistleblowers (particularly in grey areas such as unpaid workers).

1. **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, particularly the contractor provisions which need further clarification in respect of unpaid workers.

1. **Are there any other types of whistleblowers that should be included, and if so, why?**

Yes, we believe that the existing definition of persons that can qualify as ‘whistleblowers’ should be extended to include ‘outsiders’ other than contractors. This initiative would be in-line with potential reforms allowing ‘anonymity’ of the whistleblower. Outsiders could be defined as persons who are not associated with the entity, but are ‘in possession’ of important and sensitive information relating to the entity or its employees. This would be similar to legislation which regulates market misconduct, particularly the insider trading provisions of the Corporation Law. An insider is defined in s1043A of the Corporations Act, as a person in possession of sensitive information inter alia. Thus, in a strict literal reading of the law, whether a person in possession of information is an insider or outsider, is irrelevant in determining whether a breach of the law has occurred.

**Subject matter of disclosures covered by the whistleblower**

**General commentary – subject matter of disclosures**

At present, the protection provisions apply only to disclosures in relation to corporate legislation, which can be perceived as a technical impediment for ASIC to adequately undertake its responsibilities. This is because, apart from the Corporations Act, ASIC also has responsibility conferred on it by other statutes, i.e., not covered by the Corporations Act. The IPA agrees that the subject matter limitation in the Corporations Act should be amended to include a broader ‘subject matter’ definition so that ASIC is able to undertake its responsibility relating to potential breaches of *any* law administered by ASIC. This approach would also align with existing whistleblower provisions within the Fair Work (Registered Organisations) Amendment Act), particularly the definition of ‘disclosable conduct’ which extends application to an offence against *any* the law of the Commonwealth. We note however, that in order to avoid a wave of personal grievances and other insignificant matters being reported, it may be necessary to include some form of ‘objective test’ to ensure credibility of the information and seriousness of the matters being reported. In terms of the seriousness of the matter, we refer to a useful criterion that warrants some consideration, i.e., within the statutory derivative action provisions of Part 2F. 1A of Corporations Act 2001. To qualify for the granting of leave of the court (so as to mount an action), the matter to be heard **must be worthy of being tried**. Moreover, consistent with these themes, we envisage that further studies could be undertaken to determine the extent to which personal and insignificant matters are being reported to ASIC, which will provide support for inclusion of an objective test. The IPA, along with its research partners, are well equipped to undertake research of this nature.

**Good faith obligation – is it effective?**

**General commentary – good faith**

The ‘good faith’ provisions of the Corporations Act require that the informant make the disclosures in *good faith* and have reasonable grounds to suspect that either the company or its employees, have breached (or might have breached) the Corporations Act. This requirement places the onus on the informant to make a judgment call which might be a difficult and subjective task and might thus deter potential informants to report genuine and important concerns regarding the relevant entity. Moreover, it would seem from academic research and responses to government issues papers (Brown, 2014) that the ‘good faith’ requirement is ‘out of date and inconsistent with Australia’s public sector whistleblowing legislation as well as best practices legislative approaches elsewhere’. The IPA suggests that further research be undertaken to assess whether good faith provisions have relevance in establishing the credibility of information or whether it is merely a mechanism for establishing the motives of the informant, in which case, it should be removed. However, it should further be noted that the inclusion of an objective test (see above) may override the need to have a disclosure based purely on good faith? In this regard, an objective test may for instance, require disclosures to be based on ‘an honest belief held on reasonable grounds, that the information disclosed shows or tends to show that wrongdoing has occurred’ (Review, p39). There are two elements to this test, ‘honest belief’ which arguably is subjective in nature in that it encompasses a subjective state of mind (Langford and Ramsey, 2015 pp174-175), but also ‘on reasonable grounds’, which the court is likely to assess based on reasonableness, measured in terms of a reasonable person acting in similar circumstances.

 **Questions**

1. **Should the scope of information disclosed be extended?**

Yes. The IPA believes that the scope of information should be extended, either through relevant changes to the Corporation Act (as articulated above) or through the introduction of a separate statute resulting in the establishment of a separate independent body, such as a private sector whistleblower body. As discussed in the Review documentation, the new legislation would be a counterpart to the AUS-PIDA. We note, however, that the latter option would be our preference, i.e., creation of an independent body along with uniform whistleblower provisions that would apply to any Commonwealth legislation. This would greatly simplify existing laws that are currently fragmented across several different laws and jurisdictions. Further research would need to be undertaken to determine whether the establishment of an independent body to administer new uniform ‘whistleblower’ legislation, could be a feasible option in Australia. Research examining similar initiatives in offshore jurisdictions, could also provide the basis for the most appropriate legislative and operational architecture for the proposed independent body. Further discussion of these initiatives would depend on the results of research and could thus form the basis of further submissions. Notwithstanding, the IPA would envisage the establishment of a body similar to the very successful ‘Crime Stoppers’, which is an independent not-for-profit organisation that works alongside the relevant policing authorities at state or federal levels.

1. **Should the good faith requirement be replaced by an objective test requiring the disclosure to be made on reasonable grounds?**

Yes, as discussed above, the ‘good faith’ requirement should be replaced with an objective test, based on reasonable grounds.

**Anonymous disclosures**

**Questions**

1. **Should anonymous disclosure be protected?**

Yes. This would make corporate law provisions consistent with the RO Act and the AUS-PIDA as well as international protections, such as the UK-PIDA.

1. **Should the information provided by anonymous whistleblowers also be subject to rules limiting further dissemination of the information if the information might reveal that person’s identity?**

Yes, the IPA agrees with this proposal, but further protections should also be included to protect the identity of the informant in circumstances where the nature of the information disclosed can potentially expose the source, i.e., the informant, by default, is or is likely to be the only possible source from which the information has been obtained.

1. **Should regulators be able to resist production of this information under warrents, subpoenas or Freedom of Information processes?**

The IPA has no immediate response to this question

**To whom should the information be disclosed?**

**Questions 9 – 14**

The IPA has no immediate responses to these questions

**Protection of the whistleblowers identity and procedural fairness**

**Questions**

**15**. **Is there a need to strengthen protections of a whistleblower’s identity, and if so, what specific amendments should be considered?**

 Yes, the IPA believes that the corporate whistle blower provisions need strengthening and could be similar to the protection clauses in the RO Act and AUS-PIDA. More frequent application of s127 of the ASIC Act should also be considered in certain circumstances where there is a heightened danger that the informant’s identity could be revealed, i.e., by imposing additional constraints on the use of the information to third parties.

**16. To whom should the provisions apply to - Government agencies who receive the information or all recipients of the information or both?**

 Yes, the provisions should apply to government agencies and all recipients.

**17. Should courts and tribunals be allowed access to information provided the confidential character of the information and the whistleblower's identity is maintained through the use of bespoke judicial orders?**

 Yes, no further commentary.

**18. How should any additional protections of a whistleblower's identity be balanced by the need for a company or agency to investigate the wrongdoing and also to ensure that procedural fairness is afforded to those alleged to have engaged, or been involved, in wrongdoing?**

 The IPA has no immediate response to this question.

**19. Should consent by a whistleblower be required prior to disclosing the information to people or entities for the purposes of investigating a matter? If so, in what circumstances should consent be obtained?**

 Yes, consent should be given by the whistleblower. No further commentary is provided in response to this question.

**Protection against retaliation**

**Questions**

**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?**

Yes, similar provisions to ROA Act and the AUS-PIDA.

**Compensation arrangements**

**Questions**

**21. Do the existing compensation arrangements in the Corporations Act need to be enhanced? If so, what changes should be made to ensure whistleblowers are not disadvantaged?**

 Yes, by introducing further measures to protect the identity of the informant (as discussed above) and providing a clearer pathway for remediation and compensation should assist with not revealing the informant’s identity. Yes, the IPA agrees that the compensation arrangement be amended to be in line with similar provisions in the RO Act and AUS-PIDA.

**22. Does the existing legislation provide an adequate process for whistleblowers to seek compensation? Should these be aligned with the AUS-PIDA and the RO Act? Please include an explanation for your answer and identify what changes, if any, are needed and why.**

 Existing legislation does not provide adequate pathways for whistleblowers to seek compensation. The IPO believes that for consistency, the compensation arrangements should be similar to the relevant provisions in the RO Act and the AUS-PIDA.

**23. What would be the most appropriate mechanism for administering the compensation process? Should it rely on whistleblowers having to make a claim or someone else as advocate on their behalf?**

The IPA has no immediate response to this question

**24. How should compensation be funded?**

The IPA supports the Financial Ombudsman’s Model, where public and private funding from financial licensees are used to compensate informants. However, further research may be necessary to determine the most appropriate model in the Australian context, and whether there should be a mix of public and private funds.

**25. Should whistleblowers be required to bear their own and the opponent's legal costs when seeking compensation or have the risk of adverse costs order removed as per recent amendments to the RO Act?**

It would seem an inequitable situation for informants to bear their own legal costs as well the opponent’s legal costs, particularly given that information has been disclosed voluntarily in the interest of the public. Removal of adverse costs orders may resolve this problem.

**Whistleblower rewards**

**Questions**

**26. Should financial rewards or other types of rewards be considered for whistleblowers? Why or why not?**

 The IPO supports the introduction of a properly structured reward system assuming other whistleblower reforms (as mentioned above) are concomitantly put in place. Consistent with the evidence provided by current research, while some informants will disclosure information based on a sense of moral duty, we believe that the power of financial rewards is more likely to create a healthy climate for further reporting (see Atiq, 2014).

**27. If so, what options should be considered in establishing a rewards system?**

The IPO suggests that further research be undertaken to establish the most appropriate reward systems.

**28. If a reward system is established, how should it be funded?**

The IPO suggests that further research be undertaken to establish the most appropriate funding mechanisms.

**Internal Company Procedures**

**Questions**

**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?**

Yes. We believe that some form of internal procedures for internal disclosures should be in place. We further believe that the voluntary framework for whistleblowers promulgated by Australian Standard AS- 8004-2003, which includes a 15-point checklist, is an appropriate model.

**30. Mandating internal disclosure systems for companies would impose a higher regulatory burden but the benefits may outweigh the costs. Would you support a move to a mandatory system? Please give reasons**

No. We would not support a move to a mandatory system for internal disclosures. We believe that mandating internal procedures would increase the already overburdened reporting framework, especially for our members, who primarily deal with small to medium enterprises. Moreover, it is our view that the introduction of financial reward systems will encourage more whistleblowers to come forward which will in turn result in more firms voluntarily adopting internal procedures fearing the possibility of prosecution and reputational damage.

**31. Should systems for internal disclosure be considered for all companies, irrespective of size or should there be an exception for small proprietary companies, as defined in the Corporations Act? Please explain why.**

Yes. We believe that internal disclosure for all companies be considered, however, as mentioned in response to question 30 above, a voluntary framework should be encouraged, thus allowing small to medium entities the option of opting out given their size or relevance to their particular circumstances.

**32. If internal procedures are required should any breach of these be the subject of internal disciplinary action or should responsibility for enforcement be undertaken by ASIC or another external regulator? What would be a potential mechanism for oversight and monitoring of internal company procedures by a regulator? Could it be modelled on the UK FCA's approach?**

The IPA has no immediate response to this question

**Oversight agency responsible for whistleblower protection**

**Questions**

**33. Should the Corporations Act establish a role for ASIC or another body to protect the interests of and generally act as an 'advocate' for whistleblowers?**

 This is a difficult question to answer without further research regarding the role of the corporate regulator. Moreover, given that the government is currently reviewing funding models due to concerns with respect to current and future resourcing issues, it may not be appropriate to extend the role of ASIC if it is unable to fully undertake its current obligations.

**34. Should alternate private enforcement options be considered?**

Yes. The IPA believes that a comprehensive whole of private sector whistleblowing model, together with the establishment of an independent oversight agency, should be considered. These bodies would be counterparty to the existing AUS\_PIDA framework. This arrangement would not only take advantage of economies of scale, but would ensure that disclosures would be managed in a fair and consistent manner.

**Scope of Reforms**

**Questions**

**35. Should reforms be extended to the industries regulated under the other legislation identified above, including the credit legislation? If so, should the reforms be uniform across all similar legislative whistleblowing regimes, even those not named in this paper?**

Yes. If a comprehensive model (as articulated in 34 above) is adopted, the IPA believes that it can also be uniformly applied across industries and legislative regimes.

**Varying legislative approaches**

**Questions**

**36. How the reforms could be best structured**

The IPA recommends that further research should be undertaken to determine the most optimal model; however either Options 3 or 4 could be appropriate structures to achieve the reform objectives.

**Other matters**

**37. Comments on any other matters**

The IPA has no immediate response to this question

**Proposed Protections for Whistleblowers**

**Definition of Tax Whistleblower**

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

Yes, the IPA agrees with the categories of whistleblowers as stated, subject to our comments in question 39 below.

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

Yes, although AUS-PIDA would apply, for further reinforcement, it may also be prudent to include ‘Australian Tax Office employees and contractors’ within the tax whistleblower definition. There have been several instances where Australian Tax Office (ATO) employees were engaged in outside unapproved work and taxation fraud. ATO employees and contractors are also most likely to uncover or become aware of actual or potential tax avoidance being conducted by other ATO employees and contractors. We also believe that ‘*associates*’ should be included as a separate category, given ‘associates are a defined terms in the Income Tax Assessment Act as well the Corporations Act.

Further, in line with our comments above relating to corporate whistle-blowers, it might be appropriate to include persons that are in possession of sensitive information which they believe on reasonable grounds amount to or likely to, a breach of taxation law.

Our final comments relate to the following terms included in the proposed categories; *unpaid workers* and *clients.* We believe the term ‘unpaid worker’ should be further explained – does the term for example, mean persons employed in a voluntary capacity? Does the term include persons undertaking ‘work experience? Further clarification of the term ‘*client*’ should be provided. For example does it employees of clients that may be my entities, organisations or businesses?

**Protection of a Taxpayers Identity**

**Questions**

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

Yes in principle. The whistleblower needs to withdraw consent if there are actual or perceived threats to their wellbeing.

We pose a question here, or perhaps further clarification. Should tax or other advisers included in the proposed category of whistleblowers be protected if they have provided the initial advice upon which the client has taken the directions resulting in misconduct and/or a breach of the law?

**Protection against retaliation**

**Questions**

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

Yes in principle. Proposed protections against retaliation provisions should also clarify the circumstances, if any, which can negate such protection. For instance, does a whistleblower lose protection if disclosure is based on information acquired illegally or in an unauthorized manner?

We pose several questions here, or perhaps further clarification. Do the proposed reforms ensure that protections also apply to employees of suppliers and customers? A further question: Will the cancellation of a contract with a supplier or contractor qualify as a retaliatory action? For example, where the source of the disclosure was a person ‘associated’ with the supplier or contractor?

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

 Yes in principle. However, drafting legal criteria for an objective test which requires disclosure made by whistleblowers to be made on ‘reasonable grounds’ is likely to be difficult to achieve in matters involving ‘potential tax avoidance behaviour’. Assessment of ‘behaviour’ by a whistleblower is most likely to be subjective and inconsistent with the proposed objective test.

**Anonymous disclosures**

**Questions**

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

Yes. Evidence in foreign jurisdictions and indeed in Australia (for example, with anonymous disclosures to the ATO), clearly shows that disclosures made in anonymity-based as well as a rewards-based regimes, play a significant role in increased prosecutions and government revenue (Review documentation, pp21, 27). As discussed in the corporate protections discussion above, caution needs to be exercise in drafting appropriate anonymity provisions, so as to discourage a flood of trivial disclosures or other disclosures being made for the wrong or perhaps more sinister reasons. Notwithstanding, we note in the context of tax disclosures, the Commissioners already has considerable latitude and means under ss263-264 to extract any information.

**Compensation arrangements**

**Questions**

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

The IPA recommends that further research be undertaken, as it is not entirely clear who will bear the costs in matters where a whistleblower is seeking compensation for reprisals through the court system. Currently, each party bears their own costs under the Fair Work Act. This requirement may require modification to accommodate whistleblower tax matters. Consideration may also be given to the possibility of drafting legislative provisions which provide a clearer pathway for whistleblowers to pursue compensation claims.

We pose a question here in the context of compensation. Will the reforms include compensation for reputational damage, or the losses caused by the cancellation of contracts?

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

The nature of damages awarded need to be clarified. Organisations that have damages awarded against them usually have the right to appeal against the quantum of damages awarded. Is this right of appeal available in matters involving damages awarded to whistleblowers?

**To whom information should be disclosed**

**Questions**

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

No, no further comment is provided.

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

This is likely to arise if the whistle blower makes disclosures to work colleagues (internal) or the media (external). Whistleblowers ought to be able to receive the proposed protections if disclosure is internally or made to lawyers if they wish to obtain legal advice or counsellors if they wish to obtain well-being support. Protections for disclosures to outside parties (such as the media) are a more difficult question requiring further research and discussion. Anecdotally, we argue that there have countless examples of disclosures made to the media as a result of ongoing inaction by various institutions, and the frustration that results from lack of prompt and appropriate action by regulators and members of parliament. Arguably also, research would establish that these disclosures are often the genesis of many senate committee enquiries and commissions. The primary focus from the public interest perspective would be encourage whistleblowers to come forward such that activities involving misconduct, fraud or breaches of the law, can be uncovered sooner and actioned expeditiously.

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

The Commissioner generally requires evidence of income and expenditure to make income tax assessments. The nature of the information disclosed needs to be assessed in the context of its evidentiary rather than its symptomatic value.

However, the Commissioner also has extensive powers under ss263-264 of the ITA and is able to investigate rather than merely rely on making income tax assessment based on one source of information. The Commissioner can also use the “Asset Betterment Test” when making assessments without relying on any tangible evidence.  Moreover, the Commissioner already has practices in place when provided with information from third parties – for example, data matching, or sending correspondence to taxpayers in advance advising that the ATO has identified a variance between reported income and data-matched information, along with the power to issue an amended assessment within 28 days subject to additional information provided by taxpayer. Taxpayer also has usual rights/processes to object to an amended assessment

**Rewards**

**Questions**

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

Yes, given the evidence of successful prosecutions and collections in other jurisdictions, ie resulting from increased disclosures following the introduction of financial incentives; in particular, the US (Review documentation, p27). We also believe however that caution needs to be exercised in drafting the reward legislative provisions, as no doubt, in line with positive accounting theory, self-interest will be at heart (Watts and Zimmerman, 1976). We argue that when an attractive reward system is introduced, there will be considerable incentives for so called ‘bounty hunters’ not only to disclose sensitive information for reward, but also to further their self-interest by delaying the disclosure of important information so as to maximize the reward amount. In this sense, the reforms must ensure that checks and balances are in place which deters rapacious ‘bounty hunters’ from exploiting the spirit of the law. We would envisage that reforms include provisions which require the informant to disclose credible and material information as soon as it becomes known, and in circumstances where for certain reasons (criteria to be set) the disclosure could not be made internally.

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

 The IPA suggest that further research be undertaken to develop the most appropriate model in terms being theoretically appealing and in terms of being in line with current practices in other jurisdictions. In the interim however, the IPA suggests that a sliding/marginal scale of net tax collected be more appropriate than a flat rate based on percentage. We also argue that the reward should be capped at a maximum upper limit. Further, it may be necessary to consider whether the payment of a reward should be contingent on a case actually proceeding and is also successful in tax collection. Also, as an aside, to discourage frivolous disclosures, a nominal fee could be paid to the relevant body receiving the information, and refunded should the information prove to be credible and results in a prosecution. The amount of the fee would need to be determined as a separate exercise, but it would need to be sufficiently sizable to deter trivial disclosures.

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

This is a difficult question and would in our view, be a matter for the courts to decide based on the facts of each case. We would envisage however, that facts to be taken into consideration would include the extent of the informants’ participation, and whether the informant knew or should have known that the relevant parties are/were involved in misconduct, fraud or breaches of relevant laws.

**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?**

Yes. The US and UK systems both have similar thresholds. The amount recovered by the ATO needs to be the amount finally recovered from the taxpayer after due process (ie net tax collected).

**Disclosure of taxpayer information to the informant**

**Questions**

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

The IPA has no immediate response to this question

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

Yes. The IPA agrees, particularly as this will keep the informant updated re the ongoing status of the case, which will provide the informant with some assurance that something is being done by the relevant body. In turn of course, this will reduce the likelihood of the informant leaking the information to the media or other similar sources. We note however, it would be difficult for the ATO to estimate when the whistleblower will be rewarded in complex investigations as these matters are likely to take a significant amount of time to resolve.

**Oversight agency for tax whistleblowers**

**Questions**

**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 whistleblowers?**

No. Independent body within the ATO needs to be established which directly reports to the Commissioner.

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

Having one oversight agency acting in a wider capacity is most likely to be the most efficient and cost-effective approach.

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

No. Please refer to previous comments

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

This is a tough question which possibly requires a far more lengthy review and discussion. Unlike legal practitioners, whistleblower communications with accounting practitioners and advisors are not privileged, unless a lawyer hires an accountant for the purpose of providing legal advice to the whistleblower. Accountants, including members of the IPA are ethically bound by the public interest as dictated by their respective codes of ethics. Moreover members are bound by strong codes covering confidentially between the practitioner and the client in relation to client matters. Although, public interest must be regarded ahead of the needs of a client or employers interests (the logic underlying basic Utilitarian Theory as advocated by Bentham, 1780), for professional advisors other than legal practitioners, being a whistleblower presents a serious dichotomy. There is an ethical obligation to protect the interests of the client and their right to privacy for professional advisers other than legal practitioners, as well as an overriding obligation to uphold public interest. So, as the saying goes, ‘caught between a rock and a hard place’. In effect, by becoming a whistleblower, practitioners are potentially exposed to litigation for breach of contract and privacy, as well as breaches of the confidentially provisions within the Corporations Act, for client companies.

What needs to be thought through here is whether the concept of professional legal privilege be extended in certain circumstances to professional advisers other than lawyers. This would be a matter for the professional bodies and relevant government agencies to explore further.

**References**

Atiq, E.H., 2014. ‘Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives’ , *The Yale Law Journal*, Vol 123)

Bentham, J. 1780. ‘Introduction to the Principles of Morals and Legislation’, *T Payne and Son, London*

Brown., A.J., 2009. ‘Improving Protections for Corporate Whistleblowers’ Submission to ‘*Improving Protections for Corporate Whistleblowers: Options Paper’*, Attorney-General’s Department , Canberra., October 2009., *Griffith University*

Brown., A.J., 2014. Public Hearing, Submission 343, ‘The performance of the Australian Securities and Investments Commission Australian Government, *The Senate Economic References Committee* Canberra

Commonwealth of Australia., 2016 ‘Senate Standing Committees on Economics, Issues Paper - Corporate whistleblowing in Australia: ending corporate Australia’s cultures of silence’ Treasury*,* Canberra.

Langford, R.T., and Ramsey I.M., 2015, ‘Directors Duty to Act in the Interests of the Company: Subjective or Objective?’ *JBL, Issue 2, Thompson Reuters (Professional) UK Limited and Contributors*

Roberts. P., Olsen. J., and Brown. A.J., 2016.,‘Whistling while they work, towards best practice whistleblowing programs in public sector organisations’, *ARC Linkage Project*

*Griffith University Centre for Governance and Public Policy*, available at <[http://www.whistlingwhiletheywork.edu.au/>](http://www.whistlingwhiletheywork.edu.au/%3E).

Singer, A.W., 1992‘The Whistleblower: Patriot or Bounty Hunter’., 1992, cited in Brooks, L., J. ‘Business and Professional Ethics, for Directors, Executives and Accountants’*,* *Thompson/South Western*

Watts, R.L., and Zimmerman. J. L., 1986. ‘Positive Accounting Theory’, *Prentice-Hall*

Wolfe, S., Worth, M., Dreyfus. S., and Brown. A.J 2014, ‘Whistleblower Protection Rules in G20 Countries: The Next Action Plan, Public Consultation Draft’, *Transparency International Australia*