

16 February 2017

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

Email: whistleblowers@treasury.gov.au

Dear Ms Keall

Review of Tax and Corporate Whistleblower Protections in Australia

The Insurance Council of Australia¹ (the Insurance Council) appreciates the opportunity to provide a submission in response to the Treasury's consultation paper, *Review of tax and corporate whistleblower protections in Australia* (the Consultation Paper). The existing legislative protections for whistleblowers play an important role in reinforcing corporate accountability.

The Insurance Council is, in principle, supportive of measures to strengthen these protections where required to ensure that they provide satisfactory protections for whistleblowers. However, we would be concerned about any extension of the protections to disclosures to third parties, including the media. To minimise the compliance burden for industry, changes to the numerous pieces of legislation providing similar protections for whistleblowers should be consistent.

Given the number of regulatory matters currently open for consideration, the industry has not comprehensively reviewed the issues raised in the consultation paper. While we can comment on the scope of the protections, the Insurance Council would be keen to comment on the detail of any future reforms.

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. September 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$44.1 billion per annum and has total assets of \$120.5 billion. The industry employs approximately 60,000 people and on average pays out about \$124.6 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

Scope of corporate whistleblower protections

Under the existing whistleblower provisions contained in Part 9.4AAA of the *Corporations Act 2001* (the Corporations Act), to qualify for protection, the person making the disclosure must be either a current officer or an employee of, or a contractor to, the company. The Consultation Paper canvasses options to expand the definition of “whistleblower” to include former officers, employees and contractors. The Consultation Paper also questions whether anonymous disclosures should be protected. While the Insurance Council has not identified any issues with expanding the definition of “whistleblower”, we suggest that the current good faith obligation, in some form, should be retained.

The Corporations Act currently requires that disclosures are made “in good faith” and the whistleblower has reasonable grounds to suspect that a breach of a provision of the corporations legislation has occurred. As noted in the Consultation Paper, this requirement was originally included to minimise the risk of personal grievances being reported. If the categories of protected individuals were to be expanded to include former employees/contractors and anonymous disclosures allowed, this heightens the need for measures to reduce the likelihood of malicious reporting. The Insurance Council would be supportive of consideration of a more objective test, such that disclosure is based on an honest belief that the information disclosed shows misconduct.

Under the existing provisions, disclosures are protected if they are made to the Australian Securities and Investments Commission (ASIC), the company’s auditor, or nominated persons within the company. The Insurance Council is concerned about suggestions in the Consultation Paper that the entities to whom protected disclosures are made could be broadened to include third parties such as the media, members of Parliament and union representatives. ASIC is best placed to review disclosures, determine whether misconduct has occurred and commence litigation or stipulate sanctions where appropriate. We question the utility of broadening protections to disclosures made to third parties who would not be in a position to take similar action. We are particularly concerned that encouraging disclosures to the media increases the risk that the whistleblower is exposed to exploitation and victimisation outside of the company’s control.

The current protections apply if the disclosure relates to a breach of the Corporations Act or *Australian Securities and Investments Commission Act 2001*. Relevant to the general insurance industry, similar protections apply in relation to a breach of the *Insurance Act 1973*. If the Government decides to make amendments to the whistleblower provisions in the Corporations Act, similar amendments should also be made to the Insurance Act for consistency.

Establishing protections for tax whistleblowers

The Consultation Paper proposes a comprehensive tax whistleblower regime based on the existing protections under the *Public Interest Disclosure Act 2013* and the Corporations Act. The Insurance Council acknowledges the limitations presented in the Consultation Paper around existing protections for tax whistleblowers. We are, in principle, supportive of aligning the corporate and tax whistleblower protections. In this regard, it is important for the design of the protections for tax disclosures to closely reflect the final form of the protections for corporate disclosures.

The Consultation Paper queries the extent to which the Commissioner should be able to use information disclosed to make income tax assessments. We note that, under a self-assessment system, processes to ensure taxpayers are accorded procedural fairness and the resolution of disputes are essential. These processes are particularly important if disclosures were to be used by the Australian Taxation Office (ATO) to make or amend income tax assessments.

Internal company procedures

The Consultation Paper queries whether there is merit in requiring companies to put in place systems for internal disclosures. The Insurance Council submits that mandating internal disclosure systems would impose an unnecessary regulatory burden as most insurers already have existing established processes in place.

The Australian Prudential Regulation Authority (APRA), through its prudential standards, already requires certain processes for dealing with whistleblower disclosures. For example, Australian Prudential Standard *CPS 510 Governance* provides that certain persons (including current and former employees and contractors) cannot be constrained or impeded from disclosing information, discussing issues or providing documents under their control to APRA of relevance to the management and prudential supervision of the institution. In addition, *CPS 520 Fit & Proper* requires regulated entities to have in place a Fit and Proper Policy to allow whistleblowing if a person believes that a responsible person does not meet the regulated institution's fit and proper criteria.

Rather than a mandating disclosure systems, research on best practice may assist companies to benchmark and improve on their existing processes. ASIC may play a role in facilitating research and developing best practice guidance.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO