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Ernst & Young
8 Exhibition Street
Melbourne VIC 3000 Australia
GPO Box 67 Melbourne VIC 3001

Tel: +61 3 9288 8000
Fax: +61 3 8650 7777
ey.com/au

The Treasury
Langton Crescent
PARKES ACT 2600
Attention Jodi Keall

10 February 2017

Email: whistleblowers@treasury.gov.au

EY Submission on the Treasury Review Of Tax And Corporate Whistleblower Protections In Australia 20 December 2016

Dear Sir / Madam

EY welcomes the opportunity to provide comments on the Treasury Review Of Tax And Corporate Whistleblower Protections In Australia released on 20 December 2016 ("**Review**") - [link](#).

Our comments are limited to selected issues. The review separates corporate and tax whistleblower issues and our responses are in the sequence of the questions.

Options for enhancing corporate whistleblower protections

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

Response – Yes we agree with this proposed expansion for the reasons set out in Consultation Paper.

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?

Response – We support this clarification.

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

Response – Not to our knowledge.

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.

Response – We believe that this requires further consideration. In our role as auditors we do receive from time to time, reports from whistleblowers; these are most often allegations of fraud, particularly financial reporting fraud. In our view any allegation of fraud by officers of a company, even if it relates to an area, such as money-laundering that is not regulated by the Corporations Act will be protected by the framework under the whistleblower provisions of that Act. This is because it relates to the misconduct of an officer of a company and may include false accounting. Therefore, in our role as auditors we are of the view that the current provisions are adequate. We also support the recommendation to exclude matters solely related to personal grievances, although in practice we have not experienced complaints of this nature.

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

Response – We have no evidence that potential whistleblowers have been deterred by the current provisions and therefore do not suggest any change is required.

6. Should anonymous disclosures be protected?

Response – We note that, in our role as auditors we rarely receive anonymous reports. We do however support the suggested changes to ensure that anonymous disclosures are protected.

7. 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?

Response – We support this proposal.

8. Should regulators be able to resist production of this information under warrants, subpoenas or Freedom of Information processes?

Response – In seeking to limit the further dissemination of the anonymous disclosure this may assist in protecting the whistleblower.

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?

Response – We see no reason to broaden the inclusions, except possibly to allow reporting to relevant regulators such as APRA and AUSTRAC. The recipients of whistleblowing reports need to be persons or entities with an oversight or governance responsibility over the company subject to the report.

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.

Response – We do not support this proposal. We believe that it provides too much discretion to a whistleblower to go public in cases where presumably the company, ASIC and/or the auditors have considered that public disclosure is not warranted. In our view, the ability to report to the auditor, and for the auditor to report under S. 311 of the Corporations Act (as noted on page 22) is sufficient.

11. What are the risks of extending corporate whistleblower protections to cover disclosures to third parties? How might these risks be managed?

Response – As noted in our response to question 10, we do not support broadening the protections in this way. We believe that it creates a risk of making public information that is confidential, such as market sensitive information for listed companies, personal information or commercially sensitive information.

12. Do you believe there is value in a 'tiered' disclosure system being adopted similar to that in the UK?

Response – We do not support this for the reasons set out in our response to question 10 above.

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

Response – We see no basis for such exemptions.

14. Should disclosure be allowed for the purpose of seeking professional advice about using whistleblower protections, obligations and disclosure risks (as suggested by the review of AUSPIDA)?

Response – Whistleblowers should be allowed to take legal advice prior to and during the time they are reporting under the whistleblower provisions.

In relation to auditors, we believe there is a need to change the legislation, to help auditors deal with the whistleblower reports they receive. The law at present states that an auditor or a member of the audit team in receipt of a communication can only report to ASIC, APRA or the AFP. This is highly unsatisfactory as it does not facilitate the proper evaluation and follow-up of the issue raised by the whistleblower. "A member of the audit team" may be a relatively junior auditor and will generally

have no experience of whistleblower reports, and may not have the authority to undertake investigations, or the experience or authority to determine whether the matter should be reported to ASIC, APRA or the AFP. In addition, the risk of inadvertent disclosure may be elevated as the individual does not know how to respond to the matter. Further there is risk of no-action being taken.

We strongly recommend that the Act is amended to allow the auditor to consult the partner responsible for the audit, the Firm's partner with overall responsibility for quality and risk management of the audit practice and the Firm's legal counsel.

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

Response – Consideration should be given to strengthen the protections and avoid unnecessary dissemination of information that may lead to a disclosure of the whistleblower's identity.

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

Response – All recipients of the information.

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?

Response – No comment.

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?

Response – There should be an ability to investigate the matter, however, the extent of any disclosure should be restricted to avoid deterring whistleblowers.

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?

Response – Auditors in receipt of whistleblower reports find it very challenging to conduct an effective investigation without jeopardising the identity of the whistleblower. There is a risk that some complaints may go uninvestigated as a result of this concern. Obviously the auditor could report the matter to ASIC however in reality ASIC may also be limited in their ability to investigate without disclosure. In practice an auditor will request consent but the request may be declined or be unanswered. We recommend that consent is obtained prior to disclosure to other parties who may be investigating the allegations.

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?

Response – No comment.

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?

Response – No comment.

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.

Response – No comment.

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?

Response – No comment.

24. How should compensation be funded?

Response – No comment.

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

Response – No comment.

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

Response – No comment.

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

Response – No comment.

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

Response – No comment.

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?

Response for questions 29 to 32 – We believe that a disclosure regime like that imposed by the business conduct rules of the FCA is good practice and that voluntary compliance with a regime of this nature should be strongly encouraged. We do not support making it mandatory unless there is evidence, from the UK, or elsewhere, that these requirements have increased the level and quality of whistleblowing. In the absence of such evidence, it is unlikely the benefits will exceed the costs.

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 for your answer.

Response – See 29 above.

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 or why not.

Response – See 29 above. We do support the requirement for such systems. If such a requirement were to be imposed, then there should be an exemption for small proprietary companies.

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?

Response – See 29 above.

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?

Response – In our view this warrants consideration. It would be useful to understand the benefits that other jurisdictions have obtained through such an approach.

34. Should alternate private enforcement options be considered instead?

Response – In our view this role is most likely best served by a public body.

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?

Response – In principle we support harmonisation. Whistleblowers should be able to take advantage of one consistent regime.

36. Please provide your views on how the proposed reforms should be best structured and rationale.

Response – As in 35 above, we support a consistent regime.

37. Please comment on any other matters you believe the Government should consider in strengthening the protections available for corporate whistleblowers.

Response – No further comment.

Proposed protections for tax whistleblowers, following Budget decision

Tax whistleblower measures announced in the Budget. As noted in the Review in chapter 9:

*“The Corporations Act only provides protection to whistleblowers who disclose information to ASIC about breaches of corporations legislation. ... The lack of specific protections for tax whistleblowers may discourage disclosures about tax avoidance or evasion and other potential breaches of tax law. Australia is becoming an outlier internationally in this regard. As a result, the Government announced in the 2016-17 Budget new protections **for individuals who disclose information to the ATO on tax avoidance behaviour and other tax issues**. The proposed protections for tax whistleblowers is based off the existing protections offered under AUS-PIDA, the Corporations Act, the RO-Act and other international jurisdictions.”*
(emphasis added)

The Budget decision related to disclosures by individuals to the ATO, not a wider disclosure - [link](#) – a clear policy.

Policymakers have imposed strict confidentiality provisions and secrecy requirements onto the ATO in relation to tax information. As the ATO has explained when releasing limited tax data in relation to larger companies – [link](#) – there are many reasons why companies might pay apparently low tax or no tax and the ATO has very detailed compliance activities in this regard - [link](#). We see that the existing provisions protect Australia’s policy interests.

We are not aware of any defects in the current ATO management of or outcomes of whistleblower information.

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

Response – Yes.

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

Response – See 38 above.

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

Response – Yes.

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

Response – No comment.

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

Response – Yes, an objective test is important to ensure as far as possible that allegations of wrongdoing by whistleblowers are soundly based.

An allegation of wrongdoing, even if it is made only to the ATO, is a serious allegation with consequences for the accused entity. Such allegations are not to be taken lightly or made lightly.

An objective test of reasonableness should, in our view, fairly balance the protections afforded to whistleblowers against the potential reputational damage from allegations of wrongdoing that are lacking in substance.

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

Response – We understand this is consistent with existing processes for disclosures to the ATO.

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

Response – No comment.

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

Response – No comment.

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

Response – Yes

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

Response – The proposed protections should, consistent with the decision announced in the Budget, be available only when disclosing information to the ATO. However, we accept that there may be other circumstances in which it might be appropriate for the protections to apply to disclosures that are made through internal whistleblowing mechanisms or to a tax agent.

For the reasons outlined above and in our responses to Questions 10 and 42, we do not agree that protections should be available in respect of disclosures to any third parties.

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

Response – As noted in the discussion paper, the courts have considered and ruled on the extent to which the Commissioner can use illegally obtained, privileged or confidential information to make income tax assessments. No additional rules would appear to be necessary.

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

Response – No comment.

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

Response – No comment.

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

Response – No comment.

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?

Response – No comment.

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

Response – Yes.

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

Response – Yes.

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?

Response – The Budget decision reflected that the ATO is the appropriate agency, properly resourced and with existing statutory and operational structures, to receive and manage tax whistleblower disclosures. The Inspector General of Taxation, covered by the tax confidentiality and secrecy provisions, provides oversight.

We see no requirement for any new body which would add new overlays of regulation and resulting cost and complexity to the processes.

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

Response – See question 55.

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

Response – No comment.

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

Response – Professional advisers in tax are already heavily regulated, with regulatory regimes including the Tax Agent Services Act which prescribes a statutory code of conduct, various tax penalty obligations, the promoter penalty rules which provide penalties for the promotion of tax positions not reasonably arguable, and the codes of ethics under various regulatory schemes.

Similar considerations and issues arose in respect of a proposed standard for professional accountants released by the International Ethics Standards Board for Accountants (IESBA) "Responding to Non-Compliance with Laws and Regulations", exposure draft (May 2015). That guidance (yet to be finalised) is intended to create a framework to guide professional accountants in deciding how best to act in the public interest when they encounter non-compliance with laws and regulations and their duty to not disclose confidential information. The Ernst & Young Global Limited submission to those proposals, amongst other things, stressed the importance of preserving client trust in accountant/client confidentiality to facilitate open communication between client and adviser, when considering greater whistleblower obligations and rights.

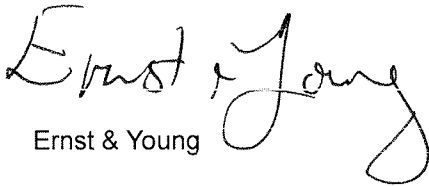
If further tax whistleblower protections were considered necessary, the interactions with all these regulatory and ethical rules would need analysis and further consultation.



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If Treasury plans further consultation on the broader measures or any other aspects of the proposed implementation of the measures, please contact in the first instance Denis Thorn +613 8650 7637 in relation to the Corporate Whistleblower aspects or Tony Stolarek on +61 3 8650 7654 in respect of the tax proposals.

Kind regards,

A handwritten signature in cursive script that reads "Ernst & Young".

Ernst & Young