

KPMG submission

Treasury Discussion Paper

Review of tax and corporate whistleblower protections in Australia

Parliamentary Joint Committee on Corporations and Financial Services

Whistleblower protections in the corporate, public and not-for-profit sectors

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Executive Summary

We welcome the opportunity to comment on the Treasury discussion paper on *Review of tax and corporate whistleblower protections in Australia* published by Treasury on 20 December 2016.

This submission will also be lodged with the Parliamentary Joint Committee on Corporations and Financial Services and its inquiry into *Whistleblower protections in the corporate, public and not-for-profit sectors*.

Many of the insights and recommendations in this submission are drawn from KPMG's experience operating a confidential whistleblower hotline (KPMG *FairCall*). Since its establishment in 1998, the KPMG *FairCall* service has handled over a thousand confidential whistleblower matters pertaining to fraud or other types of misconduct. The service currently receives around 150 to 200 reports per year spanning a broad range of private and public sector organisations.

Our overall observations are as follows:

- Australia needs to strengthen the legislative protections for whistleblowers in order to address the many inconsistencies and weaknesses evident in current whistleblower regimes. Australia should pursue a longer term goal of adopting one simple, uniform whistleblower regime across the Federation;
- However, legal reform is only one piece of the puzzle. Legislative change must be supported by better whistleblower programs within our Australian organisations, and widespread cultural change around the stigma that is often associated with whistleblowing;
- We need to help Australian organisations to help themselves, and in doing so, we must promote a culture that supports speaking up and does not tolerate retaliation or reprisals against whistleblowers. Whistleblowers should be encouraged to report matters internally in the first instance, if they feel comfortable doing so. External reporting channels should be made available for use in circumstances where internal channels have failed, or the whistleblower fears retribution.

Key KPMG recommendations for a new tax whistleblower regime are:

1. Whilst we support a single whistleblower reporting channel, we believe only a subset of those informants and the information they provide should be, or will be capable of being, within the legislative scope of the new regime.

The regime should not contain a bounty system.

2. We would recommend concentrating on a less ambitious regime that does not run the risk of over promising on the protections afforded and the compensation arrangements that are available.

The final design of the regime should be cognizant of longer term options, namely, being conducive to being rolled into a comprehensive whistleblower regime with a single whistleblower agency.

3. We would recommend that the regime adopts a notion of tax avoidance that contains elements of dishonesty and does not rely on the technical provisions of Part IVA in the Income Tax Assessment Act 1936.

4. The regime should be directed towards disclosures of more serious breaches of tax laws.

5. Deeper consideration needs to be given to whether the regime should apply to foreign taxes.

6. We support the proposition that the identity of the tax whistleblower should be subject to confidentiality with only limited exceptions.

7. In designing the regime, careful consideration needs to be given to the type of information that might be received by the ATO and there needs to be some limited checks and balances over its use.

In addition, the regime should be actively encouraging that internal whistleblowing mechanisms are used at first instance where they exist.

Key KPMG recommendations for enhancing the corporate whistleblower regimes are:

8. Protection should be extended to a wider group of individuals (particularly individuals in current or former employment and contracting roles).

9. The subject matter of disclosures should be extended to cover a broad range of reportable wrongdoing that materially harms or threatens the public interest.

10. The 'good faith' requirement should be replaced with an objective test requiring the disclosure to be made 'on reasonable grounds'.

11. Anonymous disclosures should be eligible for protection.

12. A 'tiered' disclosure system should be adopted enabling information to be reported to a number of contact points through internal and external reporting channels.

The whistleblower should be encouraged to follow an appropriate escalation process.

13. The circumstances under which whistleblower information may be disseminated should be clearly articulated in the legislation for all parties.

14. Further consideration should be given to whether the regimes should explicitly require organisations to take reasonable steps to ensure that no person under their control engages in victimisation of whistleblowers, and to take appropriate measures against those responsible for any such victimisation.

15. Compensation mechanisms should be clearly defined.

16. Organisations should be encouraged to put in place a comprehensive whistleblower program (commensurate with their size and nature of operations).

We recommend that 'better practice' guidance is provided to organisations by an appropriate regulatory authority.

17. A dedicated whistleblower agency should in the longer term be established.

Detailed comments

1.0 General

- 1.1 KPMG welcomes the opportunity to comment on the Treasury discussion paper (DP) on *Review of tax and corporate whistleblower protections in Australia* published by Treasury on 20 December 2016. This submission will also be lodged with the Parliamentary Joint Committee on Corporations and Financial Services and its inquiry into *Whistleblower protections in the corporate, public and not-for-profit sectors*.
- 1.2 Our submission focuses on a number of key issues rather than attempting to provide specific responses to each of the 58 questions listed in the DP or the specific terms of reference of the inquiry.
- 1.3 Given that the Government has already indicated its intent to introduce with effect from 1 July 2018 new tax whistleblower (Tax WB) protections and the DP provides a holistic outline of these proposals, our detailed comments focus firstly on the proposed Tax WB protection rules in Chapter 9 of the DP. Comments then follow on other options for enhancing corporate whistleblower (Corporate WB) protections which are covered in Chapter 8 of the DP.
- 1.4 **High level observations.** At the outset, however, we wish to make a number of high level observations, namely:-
- We are supportive of introducing a Tax WB regime and enhancing the existing Corporate WB regimes;
 - We are supportive of introducing a uniform WB regime and this option should be further pursued;
 - A key issue with any WB regime is finding the right balance between the benefits and costs in such a regime when it comes to drafting the actual legislative provisions. The devil will be in the detail;
 - We are not supportive of introducing bounty systems that provide monetary rewards in WB regimes.

Later parts of this submission provide our rationale for these views.

2. Proposed tax whistleblower protection rules

Chapter 9 of the DP provides a summary of how the proposed Tax WB rules might apply. The 2016-17 Budget papers indicated a potential start date of 1 July 2018.

KPMG is supportive of the Government's desire to improve the protections for Tax WBs so they are not open to reprisals or financial risks. We consider an effective Tax WB regime can assist businesses in promoting ethical tax behaviour as well as assisting in tax compliance management. Currently, there is a mistaken belief that legal protection is afforded when tax disclosures are made under the Corporate WB rules and thus it is timely to modernise the rules.

2.1 High level design points. We think the following points are relevant in the overall design of a Tax WB regime:-

- The Australian Taxation Office (ATO) already has in place a confidential tax referral process. It places few practical constraints on who can provide information and what information can be given to the ATO. The ATO decides what, if anything, is done with the information received and feedback to the informant is intentionally limited;
- Discussions with the ATO suggest that whistleblowers overwhelmingly utilise the anonymous option, the process is being used to lodge concerns beyond the taxes administered by the ATO but the concerns are often directed at less serious offences;
- It would make sense to avoid multiple reporting channels if a new Tax WB regime is introduced. In addition, the ATO is likely to be reticent for any new regime to actually narrow its sources of information, or, for the new regime to impose a more onerous obligation on the ATO to investigate and inform;
- However, we think it is unlikely any new Tax WB regime will be able to provide legislative protection (as opposed to existing administrative protection) to all potential ATO informants. Moreover, some of the potential information that in theory could be received by the ATO may now require some legislative constraints imposed on its use in order to protect the whistleblower but also in the interests of

procedural fairness and natural justice. It may also be the case, in the interests of streamlining all whistleblowing processes in the longer term that the ATO is not even the initial point of contact for future tax referrals;

- Addressing any ‘unintended consequences’ of a Tax WB regime will be important. For example, the benefits in promoting ethical tax behaviour by protecting advisors (e.g. tax agents) who whistleblow on current and former clients (and vice versa) needs to be balanced against the existing benefits of confidentiality which should promote full and frank discussions between advisor and taxpayer;
- We do not believe the Tax WB regime should contain a bounty system. We consider it will just encourage the wrong behaviours and, as the DP demonstrates, the overseas experience is hardly a glowing endorsement of such systems.

In our view, whistleblowing should be considered a public good which is not associated with personal gain. A bounty system may encourage whistleblowers to report directly to the relevant regulator and by-pass internal reporting mechanisms. This is not an efficient use of public resources and has the potential to actually detract from the regulators’ ability to focus on the most serious breaches. A bounty system is likely to result in whistleblowers demanding more information on the outcomes of the investigation, whereas confidentiality considerations should prevail. Finally, a bounty system is not likely to be relevant across the full range of offences, yet whistleblowers may gravitate towards breaches that offer financial rewards.

2.2 Recommendation 1

- (a) Whilst we support a single whistleblower reporting channel, we believe only a subset of those informants and the information they provide should be, or will be capable of being, within the legislative scope of the new Tax WB regime.
- (b) Designing the Tax WB regime will also need to be cognizant of any competing objectives such as taxpayer/advisor confidentiality.
- (c) The Tax WB regime should not contain a bounty system.

Other observations on some of the matters discussed in Chapter 9 of the DP on the proposed Tax WB regime are noted below.

2.3 **Definition of tax whistleblower.** We support the idea of a Tax WB being more broadly defined and further clarified in light of the current experiences in other regimes.

At present anybody may choose to use the ATO's tax referral process and we do not see any need for this to change. Further, under the proposed regime a Tax WB may remain anonymous. Thus, whether somebody is, or is not, a Tax WB as defined under the new regime (and what their real motivations are) may end up being moot points once anonymous reporting is accepted as being necessary component of the regime.

On the other hand, it is our view some constraints and further guidance on who can be a Tax WB would be appropriate in a new regime that is offering enhanced legal protections.

Even so, there appears to be little point in finely crafting a new legislative Tax WB definition that is broad in scope without simultaneously considering what legislative retaliation protections are practically available under the regime and what compensation options will be given if those protections are breached.

If ultimately the legal protections will be limited to individuals, or if not actually limited to individuals, will only cover actions that are focussed on employment dismissal, personal discrimination, property damage etc then we suspect this will shape the practical scope of the Tax WB regime. Moreover, in some instances, legal protections may need to extend to organisations that employ the whistleblower or use their services, as well as other third parties facing retaliation when in fact they are not even the whistleblower. It could actually end up being misleading and confusing if there is a broad Tax WB definition but much narrower legal protections.

For example, if retaliation protection does not extend beyond individuals, or if it does, it does not cover protection for breach of contract, it is difficult to see why a number of the proposed Tax WBs as defined in the DP could ever risk using the regime.

Indeed, in some cases, even if expansive protection was afforded in Australia, it may not prevent legal retaliation in a foreign jurisdiction for breach of contract.

It is noted that a number of the proposed Tax WBs as defined in the DP may have conflicting obligations under existing regulatory regimes (e.g. tax agent services) or professional ethical standards. Thus, whilst it will be tempting to adopt a simple, broad

Tax WB definition, it may end up creating considerable confusion if these conflicts are not addressed in the legislative design phase.

Accordingly, the scope of the legislative protections and compensation arrangements to be offered should be resolved before settling on the final Tax WB definition.

We support the basic logic of the DP, namely, to broaden the scope of the legislative protections so as to better protect a wider group of individuals (particularly individuals in current or former employment and contracting roles).

However, beyond this, the regime would need offer contractual protection (and most likely compensation rights for reputational reprisals) to cover a much wider group potential whistleblowers. It would also need to resolve any conflicting regulatory and ethical obligations. Even if this is achievable, there are still likely to be practical impediments.

2.4 **Recommendation 2**

- (a) We would recommend concentrating on a less ambitious regime that does not run the risk of over promising on the protections afforded and the compensation arrangements that are available.
- (b) The final design of the Tax WB regime should be cognizant of longer term options, namely, being conducive to being rolled into a comprehensive WB regime with a single WB agency. This longer term option should also facilitate greater assistance to potential whistleblowers by increasing the ability for them to access lower cost advice and compensation hearings.

2.5 **Technical concept of tax avoidance.** What is the tax behaviour that should be the focus of the Tax WB regime? We support the idea of the Tax WB regime focussing egregious tax behaviours. There are two issues here. The first lies in the concept of tax avoidance. The second on the notion of potential tax avoidance.

The concept of tax avoidance is not a simple one. The late 1970s saw the rise of the distinction between tax evasion which was fraudulent and clearly breaking the law and tax avoidance which was carried out in some sense lawfully, but arose because of a deficiency in the law.

The leading tax academic in the 1970s and 1980s, Professor Parsons, noted that while tax avoidance is sometimes used to describe tax evasion, his preferred use is “the non-

payment of tax when the law does not say that tax should be paid, though the policy of the law says that it should.”¹ This was to be distinguished in his mind with what was the then new Part IVA which is the foundation of the legal notion of tax avoidance.

For Professor Parsons, tax avoidance in the sense of Part IVA arose “if a person acts in a way that justifies an inference that he acted as he did because he wanted, for himself or for another, the relief from tax that would attend his actions. There is tax avoidance in this sense even though neither the words of the law *nor the policy of the law* would say that his actions should give rise to a greater tax liability.”²

The delineation between the two concepts of anti-avoidance place different weight on the importance of the policy of the law. Our notion of tax avoidance, in Part IVA, is essentially about taking action to try to gain a tax benefit. Usually this action will not be in accordance with the tax policy of the law, although it will be in accordance with the substantive tax law itself. *However, there will be times when the anti-avoidance provision could apply when the action taken is both in accordance with the policy of the law and the words of the law itself.*

The ATO recognise this. The notes of a Consultative NTLG workshop on Part IVA on 18 July 2013 on the ATO website address this. The question was put to the ATO that if a taxpayer adopted “self-help” to work around poorly drafted legislation such that the outcome was clearly in accordance with tax policy, would the ATO apply the anti-avoidance provision? The ATO’s answer is as follows:

“Is it open to the Commissioner to ignore the application of Part IVA where a structure has been implemented to deal with an outcome that a taxpayer perceives to have been unintended by Parliament? Answer: No. To the extent that an entity puts in place a structure to ‘work around’ an apparent problem and that structure delivers a tax benefit, then, depending on the facts, Part IVA could apply. Nothing in the legislation immunises a taxpayer from the application of Part IVA on the basis that the purpose of a scheme was to circumvent a legislative rule that might be thought to be undesirable or unintended.

What is intended to be highlighted here is that the technical notion of anti-avoidance is a complex one. It is not synonymous with egregious tax behaviours. It could even

¹ Professor Ross Parsons, *Income Taxation in Australia*, 1985 p 829

² Op cit

embrace self-help (which is in accordance with the substantive tax law) to achieve an outcome that is also in accordance with tax policy.

This raises the question of whether the notion of anti-avoidance in the Tax WB regime should contain an element of dishonesty. Complex transactions are constantly reviewed by advisors, legal counsel and courts on whether Part IVA could apply to reconstruct the transaction (i.e. whether the anti-avoidance provisions in Part IVA could apply). Reasonable people could form different views. It would seem that this is not the intended scope of the Tax WB provisions.

We do acknowledge that it is likely to prove impractical to draft the law to achieve this outcome by placing the onus on the whistleblower to determine whether or not the threshold has been met. Rather, we see the ATO as having a role to focus its investigations on egregious tax behaviours and the accompanying guidance to whistleblowers should also make it clear that the focus is on serious offences.

2.6 **Recommendation 3**

We would recommend that the Tax WB regime adopts a notion of tax avoidance that contains elements of dishonesty and does not rely on the technical provisions of Part IVA in the Income Tax Assessment Act 1936. However, whistleblowers are not expected to have satisfied themselves on this point before they come forward.

- 2.7 **Potential tax avoidance.** The use of the word “potential” [tax avoidance] as proposed in the DP again raises questions as to the scope of the Tax WB regime. If the Tax WB regime is also intended to capture potential transactions whether or not they are in realistic contemplation then we doubt this is warranted and we query what the ATO can realistically achieve once given this type of information?
- 2.8 **Trivial breaches of tax law.** The DP is intending to also cover the reporting of all “other breaches of tax law”. Thus for example, trivial errors in tax computations now come within scope of the Tax WB regime. We consider that such an approach runs the real risk of falling into the exact trap alluded to earlier on in the DP, namely, a spate of disclosures on insignificant matters that the ATO will have little interest in.

2.9 **Recommendation 4**

The Tax WB regime should be directed towards disclosures of more serious breaches of tax laws. The continuation of the ATO's existing tax referral processes means there will still be an avenue to anonymously disclose other tax breaches.

- 2.10 **What are the taxes that should be the focus of the Tax WB regime?** The DP proposes that the Tax WB regime will be in respect of Commonwealth taxes administered by the ATO. In the short term, this seems appropriate given it encompasses our major tax bases and there are inherent limitations in attempting to cover other taxes within our Federation. The longer term goal should be for more comprehensive coverage of serious offences within our Federated regulatory systems. Consideration could be given to whether foreign taxes should or should not be covered under the Tax WB regime. We suspect the jurisdictional limitations of any Australian legislative protections may be a practical impediment in this case. On the other hand, the mere fact that any disclosures may cover foreign taxes should not preclude Australian legislative protections.

2.11 **Recommendation 5**

Deeper consideration needs to be given to whether the Tax WB provisions should apply to foreign taxes. Our predisposition is that it should, but only if the scope is for egregious tax behaviour.

- 2.12 **Protection of a tax whistleblower's identity.** We support the basic proposition that the identity of the whistleblower and any information given that is capable of revealing their identity should be subject to confidentiality (including in matters before the courts) with only limited exceptions. We would, however, make the following additional observations:
- The DP's proposed Tax WB regime suggests that the primary reporting channel will be to the ATO but would extend to internal whistleblower mechanisms. Later on in this submission we recommend that the Tax WB regime may in fact be better served if it actively encouraged (but did not mandate) the use of internal whistleblower mechanisms as the primary reporting channel in first instance.

In these circumstances, the final design of the regime needs to carefully consider what are the additional compliance costs (and penalties) being imposed on not only the ATO (which already has well established secrecy protocols) but also on businesses to protect a whistleblower's identity. It would be unfortunate if those compliance costs (and penalties) actively discouraged the establishment of internal whistleblower mechanisms, albeit we recognise that identity protection needs to be of paramount concern;

- In the context of a whistleblower regime that is focussed solely on tax, it seems odd to have a revelation exception in respect of the whistleblower's identity to "avert imminent danger to public health or safety". This may well be appropriate under a single, comprehensive regime covering all forms of whistleblowing, but appears superfluous for a more limited Tax WB regime. We also consider the other revelation exception "to prevent imminent violation of any criminal law" will require careful drafting so that it does not actively discourage the whistleblowing of any tax offences that can give rise to criminal offences.

2.13 **Recommendation 6**

We support the proposition that the identity of the Tax WB should be subject to confidentiality with only limited exceptions.

2.14 **Information to be disclosed and the surrounding processes.** In this regard, we make the following observations:-

- We support the proposition alluded elsewhere in the DP, namely, a potential whistleblower should be able to seek their own advice before acting and should be able to provide to that person the information that they wish to disclose. This should be possible without fear of losing the Tax WB regime protection, without fear of giving up anonymity or that the information may now be discoverable by other means. Indeed, an authorised representative of the whistleblower should also be able to lodge the disclosures;
- Ideally, the Tax WB regime would be crafted where a potential whistleblower's rights are clear from the face of the guidance and seeking advice is unnecessary (or can be provided by the WB agency itself).

Nevertheless, the Tax WB regime should still provide the option of seeking third party advice;

- In the short term, it may be possible for the ATO to offer some limited advice and longer term an independent WB agency may be capable of offering more extensive advice;
- In the interests of both helping the whistleblower but also procedural fairness, natural justice and respecting ownership rights, we believe that the Tax WB regime needs to incorporate some limited checks and balances before any information that is handed over to the ATO can be used in compliance actions;
- To further protect and help the whistleblower, the ATO needs to make an initial assessment of the information received to ensure its use will not inadvertently identify the actual whistleblower;
- Equally, the Tax WB regime does not need the whistleblower to be both informant and investigator and nor should the regime endorse the handing over of documents to the ATO that belong to others and have been accessed without approval;
- The Tax WB regime should provide some limited exceptions to the type of information that the ATO can use in raising assessments. We acknowledge the alternate view that currently the ATO's rights to use information obtained is largely unfettered. However, we believe a line needs to be drawn so as not to sanction a disregard of basic ownership rights and wrongly encourage the whistleblower to take on an investigative role that may actually taint what is later admissible or promote inappropriate behaviours;
- The onus would be on the ATO (not the whistleblower) to consider if any limited exception applied and even if it did the whistleblower would still be entitled to legislative protections;
- In the absence of a longer term solution, namely, an independent WB agency that collects all initial WB information, the ATO should establish internal protocols for assessing the information prior to handing the disclosures over to its compliance areas;

- Further, in the interests of supporting the development of internal whistleblower mechanisms as well as natural justice we believe the Tax WB regime should actively encourage (but not mandate) the use of those mechanisms at first instance. If the WB is at any time dissatisfied with the outcomes they are entitled to go to the ATO;
- Obviously for those organisations that choose not to have internal whistleblower mechanisms, the ATO becomes the primary reporting mechanism.

2.15 **Recommendation 7**

In designing the Tax WB regime, careful consideration needs to be given to the type of information that might be received by the ATO and there needs to be some limited checks and balances over its use. In addition, the Tax WB regime should be actively encouraging that internal whistleblowing mechanisms are used at first instance where they exist.

3. Options for enhancing corporate whistleblower protections

3.1 **Our experience in the whistleblowing field.** Our insights and recommendations are drawn from KPMG's experience operating a confidential, anonymous, whistleblower hotline, *FairCall*. KPMG established the *FairCall* service in 1998 and currently provides the service to a range of private and public sector organisations. The *FairCall* service handles between 150 and 200 whistleblower reports per year.

Whistleblowers (usually employees) typically turn to the *FairCall* service in situations where:

- They do not feel comfortable reporting a matter through the 'normal internal reporting channels'. For example, an individual may not wish to report to their manager or supervisor if that manager or supervisor is thought to be involved in the matter; or they may wish to be anonymous for fear of retribution from their employer; or
- The individual has previously reported the matter through an internal reporting channel, and considers that the matter was not properly addressed.

3.2 **General comments on the proposed changes.** It is our view that stronger whistleblower laws are not only desirable, but necessary, if Australia is to take whistleblowing seriously. However, we are also of the view that the legislation must not be onerous or overly prescriptive. The better outcome for all involved, is if our laws actively encourage Australian organisations to implement and manage their own internal disclosure procedures. The legislation needs to be framed in the context of helping organisations to help themselves – rather than placing further regulatory burdens which increases the risk of organisations taking a 'tick the box' approach to whistleblowing.

3.3 There are clear shortcomings in the current legislative framework. The fragmented approach is unnecessarily complex and likely to ultimately discourage whistleblowers from coming forward due to lack of clarity in relation to their protection rights. Further, there is little incentive for a whistleblower to come forward, if they are required to consult a number of statutes or a lawyer (at their own expense) in order to determine whether they have protection or not.

- 3.4 Numerous media articles have highlighted that the whistleblower protection provisions in the *Corporations Act* are not effective, not used and not understood by many Australians.

It is perhaps then no surprise, that our experience shows, many whistleblowers choose to report their matters anonymously, rather than take their chances with obtaining protection under legislation. Eligibility for protection is simply not clear and whistleblowers may not have the means (or incentive) to engage a lawyer for advice.

- 3.5 With all this in mind, we are of the view that a private sector whistleblower statute, (to compliment the *Public Interest Disclosure Act 2013* (AUS-PIDA) is necessary to drive a cultural shift around whistleblowing in Australia and ensure appropriate legislative coverage for Australian organisations.

- 3.6 Australia now has an opportunity to develop a dedicated statute that reinforces the valuable contribution that whistleblowers can offer in the detection of fraud, bribery, corruption and other types of serious misconduct in our nation. We believe that a simple, effective and comprehensive *Whistleblower Act* (the Act) is the answer. The Act should aim to drive a cultural shift around whistleblowing in Australia, empower organisations to self-regulate and importantly, it must also ensure that protection rights are available to genuine whistleblowers who have ‘reasonable grounds’, and that those protection rights are not abused. Further work will need to be done to determine the optimal legislative provisions to achieve this outcome. Later in this section of the submission, we set out some recommendations for consideration.

- 3.7 **Categories of qualifying ‘whistleblowers’ – are they too narrow?** The DP notes that whistleblower protections under the *Corporations Act* presently only apply to current officers or employees of the company, or contractors who supply services or goods to the company.

Further, the DP notes that there is some ambiguity in relation to whether financial service providers, lawyers, accountants, unpaid workers and business partners qualify under the contractor limb.

In our experience, valuable information relating to the occurrence of fraud and misconduct can be obtained from a range of people with a connection to an organisation, including employees, contractors, consultants, suppliers, third party providers, secondees, unpaid workers, business partners and former employees.

In particular, we have received a number of disclosures over the years from former employees. Often there is an alleged connection between the termination of their employment and the disclosure at hand. For example, the former employee may have raised their concern internally without success. Following termination, the former employee chooses to report their concern to the *FairCall* hotline, KPMG alerts senior management of the matter and the organisation can appropriately address the issue before it escalates further.

Similarly, we have seen instances where an employee will wait until they resign before reporting suspected fraud or misconduct. The resignation may be for unrelated reasons, however the individual is not willing to ‘blow the whistle’ whilst employed with the organisation for fear of retribution.

As noted in the DP, the *Corporations Act* is currently at odds with other similar legislation in this respect, such as the *Fair Work (Registered Organisations) Amendment Act 2016* (RO Act), AUS-PIDA, the *Public Interest Disclosure Act 1998* (UK-PIDA) and the *US Whistleblower Protection Act 1989* (US WPA) - all of which protect both current and former employees. We are of the view that, at a minimum, the *Corporations Act* must be updated to provide coverage for former employees and contractors.

The DP also raises the question of whether it should be made clear that the categories ‘Employees and contractors’ include other people associated with the company such as a company’s financial service providers, accountants and auditors, unpaid workers and business partners. We are of the view that this would be beneficial to facilitate a broader scope of coverage for whistleblower protections. We note, however, that there may be practical restrictions to the extent by which some of these categories of person could receive effective protection. Section 2 of this submission provides further commentary on this in the context of the specific Tax WB regime.

3.8 **Recommendation 8**

- (a) Legislative changes to the Corporate WB regime should be enacted to extend protection to a wider group of individuals (particularly individuals in current or former employment and contracting roles).

(b) Beyond this, any legislative changes would need to offer effective protection and compensation rights to cover a much wider group of potential whistleblowers and we have doubts this is realistically achievable (see Recommendation 2).

3.9 **Subject matter of disclosures covered by whistleblower protections.** The DP notes that currently, the scope of matters that are eligible for protection is limited to defined subject matter, namely the Corporations legislation, or other specific subject matter under certain statutes. For example the *Banking Act* and *Fair Work Act*.

This is a problem as it creates a scenario whereby a potential whistleblower is likely to have great difficulty determining their eligibility for protection – and even then, their matter may well not fall under any of the statutes. We believe that the narrow scope of subject matter, coupled with the legislative complexities may be discouraging whistleblowers from coming forward, and encouraging those who do come forward to remain anonymous on the presumption that adequate protection is unlikely.

3.10 **Recommendation 9**

(a) The subject matter of disclosures should be extended to cover a broad range of reportable wrongdoing that harms or threatens the public interest. (e.g. including corruption, financial misconduct and other legal, regulatory and ethical breaches)³.

(b) We agree with the DP that a concept of seriousness or materiality could be applied to encourage frivolous matters and personal grievances to be dealt with more appropriately through other existing processes.

3.11 **Good faith obligation – is it effective?** We believe that the most important factor of a whistleblower report is the quality of the information, not the motive behind it.

The DP notes that the good faith requirement is designed to discourage malicious reporting and ulterior motives. Based on our experience dealing with many whistleblowers, we have formed the view that whilst a whistleblower's motives can be useful contextual information, it should not be assumed to have a direct connection with the validity of the information they present. We have seen numerous examples where whistleblower allegations are proven to be substantiated even though the report

³ Wolfe et al., *Whistleblower protection laws in G20 countries*, p3

appears not to be ‘in good faith’. In fact, some might argue that it is these very ulterior motives that might incentivise a whistleblower to speak out when they otherwise would have turned a ‘blind eye’. We agree that the more compelling question is whether the whistleblower has ‘reasonable grounds’ for making the report.

3.12 **Recommendation 10**

The ‘good faith’ requirement should be replaced with an objective test requiring the disclosure to be made ‘on reasonable grounds’.

3.13 **Anonymous disclosures.** KPMG’s *FairCall* service provides whistleblowers with the option of being anonymous or providing their contact details. Between 1 January 2016 and 31 December 2016, 80% of the whistleblowers who contacted the KPMG *FairCall* hotline elected to be anonymous. This includes a proportion of whistleblowers who agreed to provide contact details to KPMG, whilst remaining anonymous to their employer.

Many of the whistleblowers that we speak with indicate that they would not have reported the matter, had they not been given the option of being anonymous. Further, we regularly see anonymous whistleblowers electing to provide their name and contact details, down the track, once they have spoken with a KPMG officer and understood the process to follow.

We recognise that it is more difficult to protect a whistleblower if one does not know who they are. However, it is our view that anonymous whistleblowers should be afforded the peace of mind to know that, should their identity become revealed, during proceedings (either inadvertently or intentionally) that they will be afforded the same protection as if they were to have provided their identity from the outset.

We acknowledge that anonymous reporting can present challenges with the quality of whistleblower information and ongoing communication. However, due to advances in technology, these factors are less of a concern with anonymous whistleblowers now able to communicate more easily and effectively with investigators and other relevant parties, using a secure web platform or over the phone using a unique reference number.

When considering protection mechanisms for anonymous reports, it should also be considered whether elements of the reported information may jeopardise the anonymity of a whistleblower. In our experience, it is not uncommon for a

whistleblower to declare an intention to be anonymous, whilst also inadvertently including information in their disclosure that could result in revealing their identity. Consistent with our views in section 2 on the Tax WB regime, it should be the responsibility of the receiving authority to review the information for such issues, and limit further dissemination of certain components of the report, in order to respect the anonymity wishes of the whistleblower.

3.14 **Recommendation 11**

- (a) Anonymous disclosures should be protected.
- (b) The receiving authority should review the information to ensure anonymity will not be compromised and if necessary, certain elements of the information should not be further disseminated in order to protect the anonymity wishes of the whistleblower.

3.15 **To whom information may be disclosed.** It is our view that whistleblowers should be provided with a range of internal and external reporting channels. However, in the first instance, whistleblowers should always be encouraged to raise concerns internally as we believe this usually provides the most efficient and effective outcome for all parties.

We believe there is merit in adopting a ‘tiered’ disclosure system, which allows disclosure to wider classes of people in extenuating circumstances, or if the initial disclosure has not been acted upon. As noted in the DP, a tiered system would also provide greater incentive for Australian corporates to act quickly and decisively on internal reports, if they know that wider disclosure can be made.

In the event that the initial report is not handled appropriately through traditional internal reporting channels, the whistleblower could report to the Company’s external hotline (if there is one in place), followed by, if necessary, the relevant external authority.

Notwithstanding the system should encourage the use of internal reporting mechanisms, it is appropriate for whistleblowers to be able to disclose direct to the regulator.

3.16 **Recommendation 12**

- (a) A ‘tiered’ disclosure system should be adopted enabling information to be reported to a number of contact points through internal and external reporting channels.
- (b) The whistleblower should be encouraged to follow an appropriate escalation process, where possible.

3.17 **Protection of whistleblower’s identity and procedural fairness.** The DP notes that the *Corporations Act* is silent on whether regulators, enforcement agencies or third party recipients may disseminate whistleblower information further or use it for investigative purposes. The DP further notes that this creates uncertainty and risk for whistleblowers, as well as regulators and enforcement agencies as to what they may legitimately share for investigative or other statutory purposes, which may retard the progress of investigations.

It is our view that clearly there is a need to strengthen protection of a whistleblower identity by clarifying the circumstances and conditions under which information may be further disseminated. Consistent with views expressed in section 2 of this submission on the Tax WB regime, careful consideration is required as to whether there needs to be specific checks and balances introduced over the use of certain information obtained from whistleblowers.

3.18 **Recommendation 13**

The circumstances under which whistleblower information may be disseminated should be clearly articulated in the legislation for all parties. Any such dissemination should occur, only as necessary for investigation or statutory purposes, and under strict confidentiality procedures to maintain the confidential character of the information and the whistleblower’s identity.

3.19 **Protection against retaliation.** It is our view that there is a definite need to strengthen the current prohibition against the victimisation of whistleblowers in the *Corporations Act*.

In our experience, protection against retaliation can be a challenging area. Retaliation against whistleblower is not always obvious or easy to prove. Often retaliation will not fall into neat categories such as ‘discrimination’, ‘termination of employment’,

‘injury’ (as defined in the AUS-PIDA). It can take the form of behaviours such as subtle bullying etc, ‘edging out’ and other such activities that occur over a long period of time following a whistleblower’s report. Another difficulty is that it can be difficult to determine whether negative actions towards a whistleblower are due to the fact that they have ‘blown the whistle’ or other non-related factors such as their performance.

The DP notes that the AUS-PIDA identified reprisals as including discriminatory treatment, termination of employment, injury, intended to punish a whistleblower for making the disclosure. In theory, it also prevents anyone from trying to enforce any contractual or other remedy against them (albeit as noted earlier we suspect this has some practical challenges in the context of a wider group of potential whistleblowers).

The DP further notes that the RO Act, similarly, makes it a criminal offence to take or threaten to take a reprisal, however it has a broader range of defined conduct that is prohibited for this purpose.

In our view, the *Corporations Act* should be amended to strengthen the current prohibition against the victimisation of whistleblowers, and where feasible, this should be in line with the AUS-PIDA and RO Act. However, ultimately, what is really needed is a shift in the culture of organisations. Genuine whistleblowers must be regarded as the ‘look-out on a ship’, rather than the ‘school dobber’. Only then will retaliation against whistleblowers be significantly addressed.

Whilst it is arguable that employers already have the necessary obligations to prevent workplace victimisation, we believe there is merit for a whistleblower regime to clearly state such obligations and the approach of the UK Prudential Regulatory Authority is worthy of further consideration. This requires that firms ‘take all reasonable steps to ensure that no person under the firm’s control engages in victimisation of whistleblowers, and to take appropriate measures against those responsible for any such victimisation’. ‘Reasonable steps’ should be commensurate with the size and nature of the organisation. For larger organisations, reasonable steps may include the provision of clear policies and procedures, awareness training for employees and ultimately sanctions for serious breaches of procedures.

3.20 **Recommendation 14**

We recommend that further consideration be given to whether whistleblower regimes should explicitly require organisations to take reasonable steps to ensure that no person under their control engages in victimisation of whistleblowers, and to take appropriate measures against those responsible for any such victimisation.

- 3.21 **Compensation arrangements.** It is our view that the compensation arrangements in the Corporations Act need to be enhanced. It is our understanding they are currently not being used, and therefore not effective, due to practicality issues. The DP notes that there is currently no clarity regarding what remedies are available and how the claims process should work. Additionally, no centrally coordinated channel exists to enable whistleblowers to launch a claim for compensation without incurring significant cost and time delays, and compromising their anonymity and confidentiality.

It is our view that whistleblowers should not be worse off as a result of having reported a wrongdoing that they have ‘reasonable grounds’ to believe took place and the current legislative arrangements are inadequate in providing whistleblowers with the means by which to obtain compensation.

3.22 **Recommendation 15**

Compensation mechanisms should be clearly defined. Similar to the UK-PIDA Act, the onus should be on the employer to show a valid reason for any dismissal or detrimental action to a whistleblower. The compensation mechanism should remove the adverse cost risk that a whistleblower faces in bringing a compensation claim.

- 3.23 **Whistleblower rewards.** We are of the view that a bounty system should not be provided to whistleblowers in Australia. Our reasons for this view are set out in section 2 of this submission.

- 3.24 **Internal company procedures.** It is well acknowledged that for many whistleblowers, the benefits of speaking out do not outweigh the risks of doing so. Rather than looking to financially incentivise whistleblower to increase the benefits, it is our view that we need to address the heart of the problem, which is minimising the risk, and a key way to do this is through organisation’s implementing better internal procedures in respect of whistleblowing.

Ultimately, what is needed is a shift in the culture of organisations in Australia in respect of whistleblowing and the stigma attached with it. Management of corporates need to demonstrate ‘tone at the top’, demonstrating through their actions, as well as their words, that whistleblowers will be respected, taken seriously and appreciated and not victimised or discriminated against. How do we shift the culture? Education, awareness and ‘walking the talk’ – this is what is most important. The question is whether these objectives can be achieved through ‘better practice’ guidance or whether mandated internal procedures are necessary.

We are of the view that ‘better practice’ guidance is the appropriate response in the first instance. Organisations should be encouraged to implement a robust whistleblower program so as to encourage their employee’s and other stakeholders to make disclosures internally. This will result in a better outcome for all involved and avoid the negative consequences that may occur if a whistleblower discloses directly to external parties.

3.25 **Recommendation 16**

- (a) Organisations should be encouraged to put in place a comprehensive whistleblower program (commensurate with their size and nature). The program should include appropriate internal disclosure systems.
- (b) We recommend that ‘better practice’ guidance is provided to organisations by an appropriate regulatory authority. Key features of the guidance in the context of very large businesses should include:
 - a whistleblower policy approved and endorsed by the Board of Directors and the Executive Management team that is regularly communicated to staff;
 - the whistleblower program is part of mandatory training for all employees with specialist training for executives, senior managers and employees responsible for key elements of the program;
 - a variety of communication channels available to whistleblowers to report their concerns (including manager/supervisor lines, whistleblower officer and an external anonymous hotline);
 - a variety of mediums of communication for whistleblower to choose from (such as phone, web, email);

- a contact point within the organisation to enable whistleblowers with access to confidential support and advice;
- ongoing communication and feedback with the whistleblower;
- appropriate education and training for those personnel involved in receiving, assessing, and investigating whistleblowing matters;
- transparent reporting on whistleblower matters to Board and Audit/Risk Committees; and
- mechanisms implemented to monitor the awareness and effectiveness of the whistleblower programs and policies. This may include regular and independent assessment of the effectiveness of the whistleblowing program.⁴

3.26 **Oversight agency responsible for whistleblower protection.** The DP notes that the US and UK have specialist whistleblower protection agencies, whilst Australia does not.

We are of the view that there would be benefits from establishing an independent oversight agency for corporate whistleblowing, preferably with coverage across the entire Federation. The role of the oversight agency should focus on providing support to whistleblowers and helping organisations to ensure they have appropriate internal procedures. We believe that an oversight agency would be particularly beneficial if a comprehensive private sector whistleblower statute is developed (to compliment the AUS-PIDA). Having a dedicated oversight agency would also likely increase whistleblower confidence, as well as supporting corporations in navigating through the challenges of addressing whistleblower matters effectively.

3.27 **Recommendation 17**

- (a) A dedicated oversight agency (or specialist office within an existing agency) should in the longer term be established.
- (b) It should seek to protect the interests of, and generally act as an ‘advocate’ for, whistleblowers as well as provide ‘better practice’ guidance to organisations on establishing and managing a robust whistleblower program. We envisage that the

⁴ ABA Guiding Principles – Improving Protections for Whistleblowers, released 2016.

role of such an agency may also include tasks such as providing free advice to whistleblowers and facilitating compensation arrangements.