FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

23 February 2018

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Sir / Madam

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide comments to the Senate Economics Legislation Committee regarding the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 and Explanatory Memoranda.

The FPA supports the introduction of improved protections that encourage whistleblowers to disclose information to help identify and address misconduct and wrongdoing in the financial services sector and more broadly. The proposed legislation goes a long way to improving the current system.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on [redacted] or [redacted]

Yours sincerely

[redacted]

Heather McEvoy
Policy Manager
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and more than 5,700 are CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Mark Vincent, deals with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules required of professional financial planning practices. This is being exported to 24 member countries and 175,573 CFP practitioners of the FPSB.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or working toward, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional designations, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board

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FPA submission to

Senate Economics Legislation Committee

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Code monitoring schemes

Under s921X of the Corporations Act, the Minister established a new standards setting authority, the Financial Adviser Standards and Ethics Authority (FASEA). s921U(2)(b) of the Act states that: FASEA must, by legislative instrument, make a Code of Ethics that financial planners must comply with.

A compliance scheme is a scheme under which compliance with the Code of Ethics by relevant providers covered by the scheme is monitored and enforced (s921G(1)). A monitoring body for a compliance scheme must monitor and enforce compliance with the Code of Ethics by any relevant provider covered by the scheme (s921G(2)). ASIC approval of the Code compliance scheme, and the monitoring and enforcement of the Code through the Code monitoring body, is required under s921K.

Professional bodies may fill the role of a Code monitoring body.

As the FASEA Code is made by legislative instrument, it meets the disclosable matter requirements under s1317AA(5)(c)(ix) of the whistleblower Bill:

> *(5) Without limiting subsection (4), this subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information indicates that any of the following….has engaged in conduct that:*
>
> *(c) constitutes an offence against, or a contravention of, a provision of any of the following:*
>
> *(i) this Act;*
>
> *(ix) an instrument made under an Act referred to in any of subparagraphs (i) to (viii);*

Eligible disclosures can be made to ASIC under s1317AA(1)(b) and to eligible recipients under 1317AAC(1). However professional bodies, even in their (potential) capacity as a Code monitoring body, do not meet the eligible recipient requirements.

Under the Act, Code monitoring bodies have mandatory reporting obligations to its licensee members and ASIC. This creates a gap in the protections afforded to whistleblowers for the disclosure of the same piece of information depending on the entity to whom the disclosure is made and how that information is handled, which may discourage disclosure to professional bodies restricting their ability to fulfil their role as Code monitoring bodies.

We note that 131AAC(3) states:

> '*The regulations may prescribe persons or bodies that are eligible recipients in relation to all regulated entities, or in relation to a class or classes of regulated entities*'.

While this provides the potential for professional bodies that become a Code monitoring body to be included as an eligible recipient, relying on the regulations creates uncertainty for professional bodies in relation to the Code monitoring body requirements, and confusion for potential whistleblowers. Inclusion in the Act would provide greater certainty.

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Recommendation

Amend s1317AA to include FASEA Code compliance schemes and Code monitoring bodies approved by ASIC under s921K of the Corporations Act.

1317AA Disclosures qualifying for protection under this Part – (5)(d)

While we note that s1317AA(5) is not intended to limit subsection (4), we question the restriction of s1317AA(5)(d):

> *constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more*

We question why the whistleblower protections are limited to breaches of other Commonwealth laws "punishable by imprisonment for a period of 12 months or more".

A suspected wrongdoing of a minor breach of the law may be an indicator of a more serious offence. Similarly, addressing misconduct in relation to a minor breach could also stop the behaviour from becoming a more serious breach of the law, serving to protect consumers.

Some Commonwealth laws, such as Social Security laws specifically state imprisonment periods not exceeding 12 months.

Whistleblowers should be encouraged to make disclosures and should be protected regardless of the penalty attached to an offense of a particular provision within the law.

Recommendation

Amend s1317AA(5)(d) to state: …*constitutes an offence against any other law of the Commonwealth.*

Section 1317AAD Emergency Disclosure

Section 1317AAD of the Bill proposes expanding the application of whistleblower protections to cases where the information is disclosed to media and parliamentarians if certain conditions have been met. The following table serves to highlight some concerns in relation to these conditions.

The Explanatory memoranda states that: '*In some situations, wrongdoing may be of such gravity and urgency that disclosure to a journalist or a parliamentarian is justified*' (2.56). This is in direct contrast to the consideration of the same issue (ie. the disclosure of information to parliamentarians and journalists) under the taxation laws in Schedule 1 Part 2. The EM states:

> *3.39 The confidentiality of taxpayer information is a critical element of the tax system and public disclosures could compromise complex investigations by the ATO and other enforcement bodies. They could also cause the release of commercially sensitive, misleading or incomplete information into the public domain, and unwarranted reputational damage for*

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> *entities and shareholders if, following an investigation, no breach of tax laws or under-payment of tax is found.*
>
> *3.40 In addition, providing protection for disclosures of taxpayer affairs to a journalist or a member of parliament may encourage vexatious disclosures, particularly in relation to taxpayers who are individuals.*

The concerns articulated in 3.39 and 3.40 equally apply to other Commonwealth laws, including corporations laws, and investigations undertaken by authorities such as ASIC, APRA, the AFP, and AUSTRAC.

The EM also states that this provision is "….*intended to cover the unusual situation where a whistleblower has made a disclosure to a regulator about a situation the whistleblower reasonably believes presents an imminent risk of serious harm and, after a period that is reasonable in all the circumstances, the regulator has not taken action to address the risk* (2.57).

An eligible whistleblower may not themselves have the skills to appropriately make this assessment. Further the emotional investment involved in whistleblowing may impair the judgement of the eligible whistleblower. The whistleblower may also only be privy to a small piece of the information in relation to the investigation about the misconduct and misconstrue the length of an investigation as inaction on the part of the regulator or authority. The information disclosed by the discloser may only be one source of information and be part of a larger and wider investigation involving multiple authorities and/or disclosures by multiple eligible whistleblowers. This may significantly hinder an authority's ability to provide feedback to the discloser about the investigation, or its actions in relation to the disclosure, due to the potential risk of inadvertently disclosing information that may lead to the identity of another whistleblower and breaching the whistleblower protection provisions in this Bill.

A whistleblower may also interpret 'action' as laying a charge, ignoring the time and sensitivities of some investigations.

Emotional and hasty disclosure to third parties of qualifying information can significantly hinder sensitive investigations and in particular impact future prosecutions of offenders. This includes information disclosed anonymously by a whistleblower to a journalist or members of Parliament.

Section 1317AAD(1) states:

> *(a) the discloser has previously made a disclosure of that information (the **previous disclosure**) that qualifies for protection under this Part under subsection 1317AA(1); and*
>
> *(b) a reasonable period has passed since the previous disclosure was made; and*
>
> *(c) the discloser has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately; and*
>
> *(d) after the end of the period referred to in paragraph (b), the discloser gave the body to which the previous disclosure was made a written notification that:*
>
> *(i) includes sufficient information to identify the previous disclosure; and*

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(ii) states that the discloser intends to make an emergency disclosure; and

(e) the emergency disclosure is made to:

(i) a member of the Parliament of the Commonwealth, a State or a Territory; or

(ii) *a journalist.*

However it is unclear as to what constitutes 'reasonable' time under (1)(b) and believe consideration must be given to the sensitivities of an investigation as discussed above.

We are also concerned about the whistleblower's capacity to make a clear determination in relation to (1)(c).

While (1)(d) requires the eligible whistleblower to provide a notice to the body of the previous disclosure, there is no requirement to include a timeframe of the intended emergency disclosure. It also does not provide ASIC / APRA / AFP with the opportunity to respond to the notice provided by the eligible whistleblower. The eligible whistleblower should be required to wait a set period of time for a response from the body. If they do not contact/respond to the whistleblower within the set period the whistleblower should then be permitted to make emergency disclosure

It is concerning that there are no requirements placed on the recipients of the emergency disclosure. The recipient of the emergency disclosure (ie MP or journalist) should be required to contact relevant body that received the previous disclosure (eg, ASIC, APRA, AFP, AUSTRAC) prior to making a public disclosure of the information as this could jeopardise the investigation and inadvertently identify the whistleblower.

These changes may also assist the whistleblower in understanding their obligations in order to qualify for protections under the Bill should they choose to make an emergency disclosure, and the potential risks they face if they make such an disclosure without meeting these requirements. It is suggested all members of Parliament should understand the circumstances under which a whistleblower would qualify for protections under this Bill, prior to accepting an emergency disclosure. This is to enhance the protection of the whistleblower and the politician.

1317AAD(1)(e) permits an emergency disclosure to be made to a member of the Parliament of the Commonwealth or of a State or Territory parliament, or a journalist.

However journalists and members of Parliament may not have the necessary knowledge of the relevant industry or skills to determine if their own actions may put the eligible whistleblower at risk. Innocuous pieces of information or enquiries can give rise to suspicion about the whistleblower's identity and can cause irreparable professional and personal damage. Acting on the information by such third parties can also jeopardise investigations conducted by legal authorities about the suspected misconduct, harm future prosecutions, and place the third party at risk of future litigation.

The new regime should require journalists and members of Parliament who receive information from an eligible whistleblower, to contact the relevant authority prior to taking action in relation to the disclosed information.

Section 1317AA(5)(c) defines disclosable matters as conduct that constitutes an offence of a provision of any of the following:

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(i) this Act;
(ii) the ASIC Act;
(iii) the *Banking Act 1959*;
(iv) the *Financial Sector (Collection of Data) Act 2001*;
(v) the *Insurance Act 1973*;
(vi) the *Life Insurance Act 1995*;
(vii) the *National Consumer Credit Protection Act 2009*;
(viii) the *Superannuation Industry (Supervision) Act 1993*;
(ix) an instrument made under an Act referred to in any of subparagraphs (i) to (viii); or

(d) constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or

It does not include conduct relating to State or Territory laws. We therefore question the relevance of permitting emergency disclosures to State or Territory politicians.

Recommendation

Provisions for emergency disclosures to journalists and members of Parliament, should require these third parties to contact the relevant authority (such as ASIC, APRA or the AFP) in relation to the disclosed information prior to acting on the information, to ensure any ongoing investigations and future prosecutions are not jeopardised.

Such disclosures should be limited to politicians (including members of Parliament and Senators) in the Commonwealth Parliament.

1317AI Whistleblower policies

The FPA supports the requirement in 1317AI for certain organisatons to have a whistleblower policy. We note the EM states:

> 2.203 *Other feedback sought clarification as to how large companies will satisfy the requirement of making their whistleblower policy available to all eligible whistleblowers. In response to this, the legislation was amended to require that whistleblower policies are to be made available to employees and officers only.*

The FPA oppose this change as it ignores the structure of the Australian Financial Services Licensing (AFSL) regime. Due to the AFSL regime in the Corporations Act, the structure of the advice market is unique - it has a large number of small businesses who hold and operate under their own AFSL (approximately 57% of licensees have 10 advisers or less[2]); but there is also a large number of small business financial planning practices that are authorised and operate under the AFSL of a large dealer group, but run their own separate business. Many authorised representatives operate under some of the policies set by their ASFL. While an authorised representative is not an employee or officer of the AFSL company, they may be in a position of whistleblower (against their licensee) and are captured under the definition of eligible whistleblower in the Bill.

[2] Based on FAR dataset

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Such dealer groups also usually have employed advisers. Both employed and authorised representatives may play the role of whistleblower in relation to their employer and/or the entity that holds the AFSL they operate under.

Authorised representatives, as well as all other whistleblowers who are afforded the whistleblower protections under the Bill, should have access to the company's whistelblower policy. Limiting access to the company's whistleblowing policy to current employees and officers, significantly disadvantages and discourages other potential whistleblowers, particularly former employees, authorised representatives and contractors.

Recommendation

Amend sections 1317AI(1)(b), (2)(b), (3)(b), and (5)(f) to require the company to 'make that policy available to people who may be eligible whistleblowers in relation to the company'.

Amend the appropriate section of the Explanatory Memoranda to state that the company may satisfy the requirement in section 1317AI by making the policy available (for example) via their company intranet / authorised representatives / contractor or supplier login website, via email, or other means that is accessible to eligible whistleblowers in relation to the company.

Subsection 1317E(1) (after table item 45)

This section makes it a civil penalty contravention to disclose a whistleblower's identity (under item 45A), or victimisation of a person in relation to a qualifying disclosure (under item 45B).

However item 45 relates specifically to insider trading. The amendments under 1317E(1) imply that the whistleblower protections become a subset of insider trading, when the new whistleblower protections regime apply generally to misconduct and potential breaches of all Commonwealth and State and Territory laws, not just insider trading.