



Australian Government
Inspector-General of Taxation

24 April 2017

Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
Canberra ACT 2600

By email: Corporations.Joint@aph.gov.au

Dear Mr Hodder

Inquiry into Whistleblower Protections – Questions on Notice

I refer to your written request, dated 11 April 2017, to provide answers to three (3) questions and provide the responses set out below.

Legislative provisions in place for protecting whistleblowers who make Public Interest Disclosures (PIDs) to the Inspector-General of Taxation (IGT)

Currently, there are no legislative provisions which enable whistleblowers to make PIDs about agencies which the IGT scrutinises, namely the Australian Taxation Office (ATO) and the Tax Practitioners Board (TPB). The IGT's role with respect to making of PIDs is limited to his own agency.

As you are aware, the legislative regime which provide protections for public officials, who make PIDs, is contained in the *Public Interest Disclosure Act 2013* (the PID Act). The PID Act provides that PID investigations are conducted by the agency who is the subject of the PID but the relevant public officials may approach the Commonwealth Ombudsman (the Ombudsman) if they have concerns with the process or outcomes of that investigation.

Accordingly, ATO or TPB officials, who approach the IGT in relation to making PIDs, are advised to lodge a PID with their agency or the Ombudsman if they wish to avail themselves of the protections under the PID Act. It should be noted, however, that the Government is currently considering a range of recommendations, made in the Moss Review¹, which may expand the role of the IGT in this regard.

Although the *Inspector-General of Taxation Act 2003* (IGT Act) does not contain whistleblower protections, it does contain provisions which seek to protect those, including public officials of the

¹ Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (15 July 2016) available at <<https://www.dpmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf>>.

ATO or TPB, who provide information to the IGT about tax administration issues involving the ATO or TPB. These protections are discussed in the next section.

How section 9 notice provides protection

Where the IGT believes that a person, including an ATO or TPB official, has information which is relevant to an IGT investigation, the IGT may issue a notice which requires that person to provide such information to the IGT (a 'section 9 notice').²

The person who is subject of and responds to a section 9 notice is 'not liable to any penalty under the provisions of any other enactment'.³ In addition, the information so provided, as well as the fact that information was provided, cannot be used as evidence against that person in any proceedings other than those for giving false or misleading information.⁴

Furthermore, under section 39 of the IGT Act, anyone who intended and caused detriment to the person, who provided information to the IGT pursuant to a section 9 notice, is guilty of an offence punishable by six months imprisonment.⁵

It should also be noted that, even without a section 9 notice, persons providing information to the IGT are protected against certain civil proceedings.⁶ However, it may not extend to situations where, for example, the information provided is protected by the tax law secrecy provisions.⁷

The above protections have a number of limitations. Firstly, to achieve maximum protection under the IGT Act, a section 9 notice must be issued but a pre-condition for issuing such a notice is that an investigation must have already been commenced.⁸ To commence an investigation, the IGT must inform the Commissioner of Taxation or the TPB's Chief Executive Officer.⁹ Accordingly, ATO officers have previously felt that they are in an awkward situation and initially make anonymous enquiries about how they may be able to provide information to the IGT without exposing themselves to reprisals.

Secondly, it is unclear who would investigate any breaches, how the result of such investigation would be enforced and what remedies would be available to the person who had provided the information. Such uncertainty may discourage ATO and TPB officials who fear loss of employment if they approach the IGT with their concerns. It should also be noted that section 39 of the IGT Act does not operate where a person consents to the detrimental conduct they have suffered.¹⁰

By contrast, the PID Act provides broader protections to persons making disclosures under its framework. For example, the person making the disclosure cannot be subject to any criminal, civil

² The IGT may issue a notice pursuant to section 9 of the *Ombudsman Act 1976* (the Ombudsman Act) as section 15 of the IGT Act incorporates section 9 into the IGT Act.

³ Subsection 9(5) of the Ombudsman Act, incorporated into the IGT Act by virtue of section 15 of the IGT Act.

⁴ Subsection 9(4) of the Ombudsman Act, incorporated into the IGT Act by virtue of section 15 of the IGT Act.

⁵ Section 39 of the IGT Act.

⁶ Section 37 of the Ombudsman Act, incorporated into the IGT Act by virtue of section 15 of the IGT Act.

⁷ Section 355-25 of the *Taxation Administration Act 1953* provides an offence for unauthorised disclosure, the prosecution of which would be conducted under the rules of criminal procedure (see the *Criminal Code 1995*).

⁸ The information requested must be 'relevant to an investigation', which implies that an investigation must already be in progress. Please note that the IGT may make inquiries before commencing an investigation for the purpose of determining whether or not to do so, however, such inquiries must be directed to the head of the relevant agency (see section 7A of the Ombudsman Act).

⁹ Subsection 8(1) of the Ombudsman Act, incorporated into the IGT Act by virtue of section 15 of the IGT Act.

¹⁰ Paragraph 39(1)(d) of the IGT Act.

or administrative liability for making the disclosure¹¹, including the fact that no contractual sanctions may be imposed on the informant for making the disclosure, for example, a contract to which the person making the disclosure is a party must not be terminated on the basis that the disclosure constitutes a breach of contract.¹² Furthermore, any threat of reprisal for making the disclosure is a criminal offence¹³ and the person who is the subject of the threat may seek compensation and injunctions against such threats.¹⁴

Areas for reform of whistleblower protections

In relation to reforms to the current PID regime, the Moss review may provide useful insights. A particular area raised in that review and with which the IGT has had some experience is the secrecy requirement which provides that no one except the discloser may tell any other person of the content of the PID or the fact that it has been made. Where a person makes a PID and separately shares some information with the IGT about a related tax administration issue, the IGT would be unaware of the PID unless informed by that person. Where the IGT remains unaware of the PID, his investigation may be based on incomplete information.

In terms of protections provided by the IGT Act, a specific issue that could be explored is whether to allow section 9 notices to be issued in a broader set of circumstances, such as for the purpose of deciding whether to commence an investigation. More broadly, some of the limitations and uncertainties mentioned above could be addressed and a good starting point may be to compare them with the provisions of the PID Act that operate in similar circumstances.

I trust that the above is sufficient for your present purposes. Should you require clarification or further queries, please do not hesitate to contact me on .

Yours sincerely

Mr Ali Noroozi
Inspector-General of Taxation

¹¹ Section 10 of the PID Act.

¹² Section 10 of the PID Act.

¹³ Section 19 of the PID Act.

¹⁴ Sections 14 and 15 of the PID Act.