# KPMG submission

## *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*

## Referred for inquiry on 8 February 2018

23 February 2018

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# Executive Summary

KPMG welcomes the opportunity to make a submission to the Senate Economics Legislation Committee's inquiry in relation to the *Treasury Laws Amendment (Enhanced Whistleblower Protections) Bill 2017* (the Bill").

The Bill presents an important opportunity to support the strengthening of a constructive workplace culture in Australia. The objects of the Bill generally align with this. However we have some recommendations which, if followed, would enable the Bill to better influence business and taxpayer culture.

Our comments draw on KPMG's practical experience obtained through operating a confidential whistleblower hotline service (KPMG *FairCall)* for a range of Australian private and public sector organisations.

**Recommendations relating to the *Corporations Act 2001* elements of the Bill**

*Recommendation 1:*

Defer the effective date of the legislation to 1 January 2019 in order to align with the date by which certain entities are required to have a whistleblower policy in place.

*Recommendation 2:*

Modify the definition of "*eligible recipient*" such that it excludes a supervisor or manager of an employee of the regulated entity where the regulated entity is required to have a whistleblower policy. For other regulated entities, include a disclosure to an *"authorised person"* of the entity in the category of authorised disclosures for the purpose of the confidentiality obligations.

*Recommendation 3:*

Clarify the application of the Bill to foreign corporations, confirming that it only applies to those with operations, assets or employees in Australia.

*Recommendation 4:*

Consistent with current statements in the EM, the Bill should specify that matters purely falling within the ambit of the *Fair Work Act 2009* and other workplace, anti-discrimination or occupational health and safety legislation cannot be the subject of an eligible disclosure.

*Recommendation 5:*

Exclude from the scope of the *Corporations Act 2001* any disclosure which qualifies for protection under the *Taxation Administration Act 1953*.

**Recommendation relating to the *Taxation Administration Act 1953***

*Recommendation 6:*

Modify the definition of a disclosure to an eligible recipient (ie to someone other than the Commissioner of Taxation) to restrict it to non-compliance with a tax law where the non-compliance was either deliberate, or due to recklessness or lack of reasonable care. In addition, in order to discourage the disclosure of trivial matters directly to the Commissioner of Taxation, the Commissioner should provide public guidance on the nature of disclosures that the Australian Taxation Office is likely to take action on.

# Detailed comments

## 1. General

1.1 KPMG welcomes the opportunity to make a submission to the Senate Economics Legislation Committee's inquiry in relation to the *Treasury Laws Amendment (Enhanced Whistleblower Protections) Bill 2017* (the Bill").

1.2 The Bill presents an important opportunity to support the strengthening of a constructive workplace culture in Australia. Indicators of such a culture are that the organisation not only encourages the disclosure of information relating to suspected misconduct to authorised staff, but then also investigates and acts on that information. In addition, an organisation with a constructive culture both protects the confidentiality of the whistleblower and takes measures to prevent victimisation in consequence of the whistleblower's actions.

1.3 The objects of the Bill appear to align with the objective set out in 1.2 above. However we have some recommendations which, if acted on, would better enable the Bill to positively influence business and taxpayer culture, and enhance protection for eligible whistleblowers.

1.4 Our comments draw on KPMG's practical experience obtained through operating a confidential whistleblower hotline service (KPMG *FairCall)* for a range of Australian private and public sector organisations.

1.5 We are concerned that the Explanatory Memorandum (EM) to the Bill significantly understates (at $15.4 million on average per year over 10 years) the likely compliance costs to regulated entities and taxpayers of complying with the Bill as currently drafted.

The expenditure on training staff (both as potential whistleblowers and as potential eligible recipients) and establishing a whistleblower policy, based on the cost of internal resources and professional fees, would be significant. It could exceed the aggregate of the EM's 10-year average amounts in the first year alone. Additional costs would arise in later years to refresh the training and the policy on a regular basis as experience with the legislation grew.

## 2. Recommendations relating to the *Corporations Act 2001* ("Corps Act")

2.1 *Commencement of the Bill should be deferred to 1 January 2019*

The Senate will not debate the Bill until after the Committee has delivered its report on 16 March 2018. It is possible that the Senate may require material changes to the Bill in order for it to be passed. This would leave regulated entities with little time to train their staff in how to validly make and respond to whistleblower disclosures, before the legislation is intended to take effect on 1 July 2018. There would also be a difficult six-month period during which the whistleblower protections technically apply, but regulated entities are not required to have a policy in place that informs staff about how it works to protect them.

If the commencement of the Bill were deferred until 1 January 2019, this would align with the date by which certain regulated entities are required to have a whistleblower policy in place. By that time, regulated entities may also have a better understanding of what the "Phase 2" elements of the federal government's whistleblower protection agenda might be. Each of these factors would contribute to the regime being better understood and consequently more beneficial to the Australian community at the time it first took effect.

**Recommendation 1:**
At item 2, column 2 of subsection 2(1) of the Bill, replace *"1 July 2018"* with *"1 January 2019"*.

2.2 *Remove supervisor / manager from being an "eligible recipient" in certain cases*

Proposed subsection 1317AAC(1) identifies that the supervisor or manager of an employee of a body corporate would be an "eligible recipient" in relation to a disclosure by that employee in relation to the body corporate. The supervisor would then be subject to the obligation to protect the confidentiality of the discloser, as set out in proposed section 1317AAE, and the consequential penalties for failing to do so.

If the supervisor, in investigating the matter, accidentally revealed information that could lead to the identification of the whistleblower, he or she would breach section 1317AAE, and would bear an evidential burden in seeking to benefit from any relief under proposed subsection 1317AAE(4).

This could lead to instances where the supervisor concludes that he or she would incur too much personal risk by escalating the matter, and to consequently take no action or refer the matter directly to a regulator. It would be unreasonable to expect that all bodies corporate could undertake the necessary training programs to ensure that supervisors and managers were adequately prepared to deal with eligible disclosures in a way that would enable them to comply with proposed section 1317AAE.

This problem can be substantially mitigated by:

i) Removing the "manager or supervisor" from the category of eligible recipients, for those entities required to have a whistleblower policy ("WB policy"). The WB policy would, as required by paragraph 1317AI(5)(b), provide employees of the regulated entity with information on how to make a disclosure to the identified "authorised persons" of the entity (who may include nominated managers and supervisors with appropriate training); and

ii) Including an "authorised person" in the category of persons to whom an "authorised disclosure" can be made for the purpose of subsection 1317AAE(2). This would enable the supervisor or manager to pass the disclosed information on to the authorised person, without risk of breaching section 1317AAE. It would be realistic to expect that bodies corporate (of a size not required to have a WB policy) could provide training to their supervisors and managers to ensure that whistleblower disclosures are escalated solely to such authorised persons.

**Recommendation 2:**

Modify paragraph 1317AAC(1)(e) to read:

(e) *in relation to a disclosure of information by an employee of the body corporate (not being a body corporate to which section 1317AI applies) – a person who supervises or manages the individual*

Modify subsection 1317AAE(2) to include an additional paragraph:

(..) *is made to a person who is an authorised person for the purpose of paragraph 1317AAC(1)(d) or paragraph 1317AAC(2)(f) in relation to the regulated entity*

Alternately, the Governor General should make a regulation to prescribe such persons for the purpose of paragraph 1317AAE(2)(e).

2.3 *Clarify the foreign entities which are covered by the Bill*

There is considerable uncertainty about which foreign corporations paragraph 1317AAB(b) would apply to. Paragraph 51(xx) of the Constitution provides that the Parliament may make laws in relation to foreign corporations, however it does not describe any practical, territorial limitations on that power. Considerable confusion could arise among foreign companies, including those without any operations in Australia, if this element of the "regulated entity" definition remains as drafted.

We consider that the objects of the Bill would be best served by providing greater clarity in the definition of "regulated entity".

It would be reasonable for the definition to be restricted to any foreign corporation which is not otherwise registered under the Corporations Act, and is carrying on an enterprise in Australia (for example, within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* ("GST Act"), or which owns assets in Australia.

In addition, the Bill would benefit from making it clear that a company whose sole purpose was to act as trustee of a trust is also a regulated entity.

**Recommendation 3:**

Paragraph 1317AAB(a) should be modified to read as follows:

*A company, including a company whose sole activity is as the trustee of one or more trusts;*

Paragraph 1317AAB(b) should be modified to read as follows:

*A corporation to which paragraph 51(xx) of the Constitution applies, and which also:*

*i)* *carries on an enterprise in Australia (within the meaning of the A New Tax System (Goods and Services Tax) Act 1999), or*

*ii)* *Owns assets which are situated in Australia,*

*iii)* *Has employees who perform services for the corporation in Australia; or*

*iv)* *Is the trustee of a trust whose activities include any of those mentioned in subparagraphs (i), (ii) or (iii) of this paragraph*

2.4 *The Bill should specifically exclude workplace grievance matters from coverage under the Corps Act whistleblower protections*

Paragraph 2.202 of the EM includes the following statement:

*"This feedback was addressed in the Explanatory Memorandum by making it clear that workplace grievances are not within the scope of protected whistleblower disclosures."*

However we can find no additional statement in the EM, insofar as it relates to the Corps Act, which provides this clarification.

Paragraph 3.18 of the EM relates specifically to the proposed changes to the *Taxation Administration Act 1953* (TAA), and not to the Corps Act. The paragraph indicates that a protected disclosure under the TAA

*"..would not include information about purely workplace related issues that do not suggest misconduct or an improper state of affairs or circumstances…"*

We submit that the above two statements in the EM are insufficient to achieve what appears to be Parliament's objective. The latter appears to be that matters which would purely fall within the ambit of any of:

i) the *Fair Work Act 2009* ("FWA");

ii) related legislation administered by the Fair Work Commission and the Fair Work Ombudsman; or

iii) state and territory legislation covering anti-discrimination and occupational health and safety

should not be covered by the whistleblower protections in the Corps Act. This would be a sensible and pragmatic approach, because it is often not possible to properly investigate or resolve a "workplace issue" without making the identity of the complainant known, and in addition the above workplace legislation already provides appropriate remedies for detriment suffered by a complainant.

Our experience from operating the *FairCall* whistleblower service is that a financial crime disclosure may sometimes also include workplace grievances that would fall within the ambit of the FWA. In this scenario, the disclosure would continue to attract protection under the Corps Act. We propose that where a disclosure purely relates to a workplace grievance matter, it should be dealt with under the FWA or other applicable legislation.

**Recommendation 4:**

Insert new paragraphs 1317AA(1)(d) and 1317AA(2)(d):

*The disclosure does not purely relate to a matter governed by any of:*

*(i) the Fair Work Act 2009;*

*(ii) any related legislation administered by the Fair Work Commission or the Fair Work Ombudsman; or*

*(iii) A law of a state or territory covering anti-discrimination; or*

*(iv) A law of a state or territory covering occupational health and safety.*

2.5 *Remove the overlap between Corps Act and TAA protections and penalties*

As currently drafted, certain eligible disclosures under the TAA would also be capable of being eligible disclosures under the Corps Act.

This would give rise to confusion as to which piece of legislation applies to the whistleblower and the regulated entity or taxpayer.

Given that not all taxpayers are regulated by the Corps Act, we recognise the benefit of having whistleblower protections in both Acts. There would be additional benefit in having clarity about which Act applies to a particular whistleblower situation.

One solution would be to give the TAA precedence over the Corps Act.

**Recommendation 5:**

Insert new paragraphs 1317AA(1)(e) and 1317AA(2)(e):

*The disclosure does not qualify for protection under Part IVB of the Taxation Administration Act 1953.*

## 3. Recommendations relating to the TAA

3.1 *Modify the threshold for disclosures that are eligible for confidentiality protections*

The Bill proposes that the following disclosures would be eligible for protection:

- A disclosure to the Commissioner of Taxation, where the discloser considers that the information may assist the Commissioner to perform his or her functions or duties under a taxation law; or

- A disclosure to an "eligible recipient", where the discloser has reasonable grounds to suspect that the information indicates misconduct, or an improper state of affairs or circumstances, in relation to the taxation affairs of the entity, and the discloser considers that the information may assist the eligible recipient to perform functions or duties in relation to the entity.

Paragraph 3.18 of the EM indicates that *"purely workplace related issues"* are not intended to fall within the scope of the protected disclosure concept. However paragraph 3.19 suggests that *"non-compliance with a taxation law"* may be within the scope of a protected disclosure, without specifying any threshold level of culpability on the taxpayer's part.

There should be no narrowing of the scope of disclosures to the Commissioner of Taxation that would qualify for protection. However it would be beneficial for the Commissioner of Taxation to provide public guidance in due course on the scope of matters that a discloser under subsection 14ZZT(1) could expect the Commissioner to investigate further.

On the other hand, the potential breadth of material that could be the subject of an eligible disclosure under subsection 14ZZT(2) – ie, to someone other than the Commissioner - is disproportionate to the severity of the penalties in proposed section 14ZZW for breaching the confidentiality of the whistleblower.

We believe that taxpayer entities would be more capable of addressing less severe tax issues identified by whistleblowers, if the threshold for this protection was raised. Taxpayers would then be able to address these less severe issues without being limited by concerns about protecting the confidentiality of the person who had identified the issue.

**Recommendation 6:**
Paragraph 14ZZT(2)(c) should be modified to read:
*"the discloser has reasonable grounds to suspect that the information indicates evasion, avoidance, negligence, recklessness or failure to take reasonable care in relation to the tax affairs of the entity or an associate (within the meaning of section 318 of the Income Tax Assessment Act 1936) of the entity; and"*