

Business
Council of
Australia



SUBMISSION

Review of tax and corporate whistleblower protections in Australia

FEBRUARY 2017

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The Business Council of Australia is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

This is the Business Council of Australia's submission to The Treasury's *Review of tax and corporate whistleblower protections in Australia*. Treasury is conducting this review to assess the adequacy of current corporate whistleblower protections. Treasury's review complements the *Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors* parliamentary inquiry that is due to report by 30 June 2017.

Key points

- The Business Council supports strengthening Australia's whistleblower protection regime for individuals reporting credible information about corporate misconduct.
- This inquiry is an opportunity to address gaps in the current framework and bring protections into line with international best practice.
- Any changes to protections should be informed by evidence of best practice (including from the current study by Griffith University) and developed in accordance with the government's best practice regulation framework to avoid creating unnecessary red tape.

Australia needs effective whistleblower protections

Corporate and tax misconduct is not only damaging to the business that is the victim of the offence, it is detrimental to the entire economy. Corporate and tax misconduct erodes trust between market participants and also throughout the wider public. The end result of corporate and tax misconduct is lower investment, lower returns to shareholders, lower employee wages, lower government revenue and higher consumer prices.

Whistleblowers play an important role in helping detect instances of corporate and tax misconduct. In many instances, employees and contractors of a business are the first parties to detect any wrongdoing. Without an effective framework that protects whistleblowers, the reporting of these instances of misconduct will be discouraged due to a concern of professional and personal retribution.

This review is an opportunity to bring Australian whistleblower laws into line with international best practice and provide greater regulatory certainty for whistleblowers and companies. The challenge is to balance protection of genuine whistleblowers with the need to quickly establish the credibility of information and protect businesses and other employees from wrongful or vexatious reporting.

Current laws

Whistleblowers are currently protected under Part 9.4AAA of the *Corporations Act 2001*, which provides a whistleblower protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure that the whistleblower has made. Part 9.4AAA also includes a prohibition against the victimisation of the whistleblower, and provides a right to seek compensation if damage is suffered as a result of that victimisation.

In order to be protected, the whistleblower must make the disclosure of misconduct to ASIC, the company's auditor, or certain persons within that company. Part 9.4AAA also

makes it an offence for a company, the company's auditors, or an officer or employee of that company to reveal the whistleblower's disclosed information or identity.

However, Part 9.4AAA has been criticised on the basis that in order to qualify for whistleblower protection, the person making a disclosure cannot do so anonymously. Furthermore, Part 9.4AAA does not protect disclosures made by former employees and requires that a whistleblower's disclosure is made in 'good faith'.

General comments

The current scope of Part 9.4AAA has been criticised on the grounds that there are potentially legitimate examples of whistleblowing disclosures that are currently not protected under the law. The discussion paper makes a number of proposals to expand the scope of existing protections to more persons and types of conduct, and to improve whistleblower procedures.

While a number of these changes are worthy of consideration, they need to be consistent with the government's best practice regulation framework so the law achieves its objectives whilst limiting the regulatory burden and risks to businesses and their employees. The law needs to be clear so that all parties are aware of the rules and how they will be enforced.

An effective whistleblower framework is also one that discourages the making of vexatious, malicious and nuisance allegations. Not only are such allegations damaging to the company that is targeted by such conduct, the credibility of all information can be damaged in such an environment and regulatory resources are more likely to be wasted.

Griffith University is currently conducting a major study into whistleblower practices in Australia. The evidence collected from this study should be used to inform policy design. Any whistleblowing regime that the government eventually produces should be the subject of careful consideration, with draft legislation exposed for commentary and appropriate discussion.

Proposals worthy of further consideration

- The replacement of the 'good faith' requirement with a more objective test would provide greater clarity. For example, an objective standard could be met if the whistleblower held an honest belief, on reasonable grounds, that the information disclosed shows or tends to show that wrongdoing has occurred, or will occur.
- The expansion of the scope of whistleblower protections to apply to a broader range of people – such as former employees, unpaid workers, auditors and clients of the company – would protect more people who may be privy to credible information about potential wrongdoing that should be disclosed.
- Whistleblower protections could be expanded to apply to a broader range of laws administered by the Commonwealth, while potentially allowing for disclosures to be provided to other regulatory organisations (such as the APRA or the Australian Federal Police).
- Mechanisms that allow for anonymous disclosures to be made should be considered. To allow for further investigation by a regulator, anonymous whistleblower reports could be made through an identifiable legal advisor or trusted third party.

- Legislation prohibiting any person from engaging in retaliatory conduct against a whistleblower could provide the necessary deterrent to companies that are considering engaging in retaliatory conduct against whistleblowers.
- Whistleblowers could be given access to low-cost mechanisms to access compensation and remedies, rather than relying on the court system. Provided the application is made on reasonable grounds, consideration should be given to removing the potential of an adverse costs order that might discourage potential whistleblowers from coming forward with potentially credible information.

Other proposals

- A single law that harmonises public and private sector whistleblower protection frameworks has the potential to unnecessarily restrict the development of an appropriately designed whistleblower protection framework for the private sector.
- The proposal to offer monetary rewards for whistleblowers runs the risk of increasing the incidence of malicious or vexatious accusations being made by whistleblowers. There should be no need for rewards if there is a working whistleblower regime that can properly establish the credibility of information provided and which adequately protects and compensates whistleblowers.
- Internal whistleblower systems are best left to individual businesses. A one-size-fits-all approach for private companies under the law would lack the flexibility needed and could create unnecessary compliance costs.

The *Whistling While They Work* research project led by Griffith University will make recommendations on responding to whistleblowers that private businesses may wish to adopt. Furthermore, Recommendation 3.1 in the ASX Corporate Governance Principles recommends that listed entities have a code of conduct for its executives, senior executives and employees. It suggests that the code should, 'Identify the measures the organisation follows to encourage the reporting of unlawful or unethical behaviour. This might include a reference to how the organisation protects "whistleblowers" who report violations in good faith.' The Code refers to Australian Standard 8004-2003 *Corporate governance – Whistleblower protection programs for entities*. Therefore, there is already significant guidance for companies that wish to obtain guidance on how to design their internal whistleblower frameworks.

Conclusion

Treasury should be applauded for putting forward a comprehensive, ambitious and detailed reform proposal package. While the Business Council believes that many of these proposals warrant further consideration, it is important that further industry consultation is undertaken when the range of options has been narrowed down. It is in everyone's interest to increase the ability of companies and regulators to detect corporate misconduct, and to protect the whistleblowers that play a role in this detection.

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