

3 November 2017

Ms Jodi Keall
Senior Adviser
Financial System Division
The Treasury
Level 5, 100 Market Street
SYDNEY NSW 2000

Dear Jodi,

RE: Exposure Draft – *Treasury Laws Amendment (Whistleblowers) Bill 2017*

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission on the Treasury's Exposure Draft – *Treasury Laws Amendment (Whistleblowers) Bill 2017*.

APESB is governed by an independent board of directors whose primary objective is to develop and issue, in the public interest, high-quality professional and ethical pronouncements. These pronouncements apply to the members of the three major Australian professional accounting bodies (Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants).

Overall comments

APESB strongly support the Treasury developing proposed legislation to strengthen the tax and corporate whistleblower protections in Australia. APESB believes the proposed legislation is a positive step towards creating the right environment and appropriate protection for whistleblowers in Australia to report suspected or actual illegal activity.

We also support the substantial improvements to the existing legislation for whistleblowers in the private sector. In particular, the inclusion of provisions which recognise the need for an individual to consult with a lawyer and the enforcement of the anonymity of whistleblowers.

APESB believes the introduction of the mandatory requirement for all public companies and large proprietary companies to have a whistleblower policy is a positive reform. This requirement will assist entities in developing robust corporate governance systems while also providing a mechanism and useful guidance to individuals who may wish to report suspected or actual illegal activity.

APESB has recently issued new professional standards for accountants when they are faced with circumstances involving suspected or actual non-compliance with laws and regulations (NOCLAR). A high-level summary of the new requirements is set out below.

We favourably note that there are some parallels between the proposed legislation and the NOCLAR provisions which will facilitate accountants disclosing matters to regulators if it is likely to lead to substantial harm and it is in the public interest to do so.

APESB Standard on Non-Compliance with Laws and Regulations

In May 2017 APESB released a professional standard on *Responding to Non-Compliance with Laws and Regulations* ([NOCLAR](#)) which apply to members of the three professional accounting bodies in Australia. These provisions provide professional accountants with the ability to set aside the fundamental principle of confidentiality where there are suspected illegal acts that may lead to substantial harm.

The professional standard provides a framework for accountants to respond to NOCLAR committed by their clients or employers. Professional accountants will be required to consider actual or suspected breaches of laws and regulations and take appropriate action to deal with these instances. Initially accountants will need to report to management or those charged with governance at their client or employer.

If management or those charged with governance do not take appropriate action to address the suspected non-compliance matter, then the professional accountant can consider reporting it to an appropriate regulatory authority. In certain circumstances, the professional accountant will be allowed to report a matter directly to an appropriate regulatory authority if it is likely to lead to substantial harm and it is in the public interest to do so. In doing so the accountant needs to consider financial risks and their own personal safety. They will also need to consider whether there is protection from civil, criminal or professional liability or retaliation.

APESB believes the proposed new whistleblowing legislation will help mitigate some of these risks and may encourage accountants to report actual or suspected NOCLAR.

The new NOCLAR provisions, which align to international standards, have been incorporated into [APES 110 Code of Ethics for Professional Accountants \(APES 110\)](#) and become effective from 1 January 2018.

While APESB is overall supportive of the proposed legislation there are matters which we believe require further consideration. These matters are set out in the Specific Comments section below.

Specific comments

APESB believes that the following matters require further consideration by the Treasury:

1. Additional resources to support implementation of the legislation

APESB supports the proposed changes to the legislation but is concerned whether sufficient additional resources have been allocated to regulators to ensure the effective implementation of this legislation.

Over the last two months APESB has been engaging with a range of stakeholders and professional accountants to educate them on the new NOCLAR requirements. A common concern raised by a range of stakeholders was the resourcing and ability of regulators to deal with matters reported to them. This concern had two key aspects – whether the regulators were aware that professional accountants would be reporting to them, and do the regulators have the resources and appropriate systems and processes in place to handle the matters reported to them.

The issue identified by stakeholders of the resourcing of regulators to handle reported matters may be amplified when this legislation comes in force and greater numbers of individuals are encouraged to report disclosable matters. APESB encourages the Treasury

to consider how the regulators will be supported, such as through the allocation of further resources or the establishment of a separate authority body which will handle the implementation of this legislation.

2. Limited scope for whistleblower disclosees

The proposed amendments to the *Corporations Act 2001* allow the disclosure of matters to specific whistleblower disclosees (listed in s.1317AAB). This includes regulators such as ASIC, APRA and the ATO. However, there are other regulators who are not currently listed in the proposed section that APESB believe should be whistleblower disclosees. These include AUSTRAC, the Fair Work Ombudsman, EPA, and Worksafe. It is not clear from the exposure draft whether these bodies would be specifically included in the regulations. APESB encourage the Treasury to clarify this matter before the legislation and associated regulations are finalised.

3. Expansion of qualifying/eligible whistleblowers

The explanatory memorandum to the exposure draft states that the proposed legislation will expand the extant categories of qualifying whistleblowers to include former employees and officers. However, the form of this expansion is not drafted clearly in the proposed legislation. The proposed s.1317AAD of the *Corporations Act 2001* lists the individuals who would be considered eligible whistleblowers under the new reforms. This section only refers to individuals in the current role.

We note that Section 1317AA(1)(a) provides the mechanism to include individuals who formerly acted in these roles by including the words 'or has been'. However, this is not easy to understand and there is no link from s.1317AAD to s.1317AA(1)(a). APESB believes this is confusing for users of the legislation, and the intent could be clarified by including an additional list point in s.1317AAD for individuals who have formerly held the roles set out in s.1317AAD(1)(a) – (f).

4. Conflict with *Tax Agent Services Act 2009*

APESB is supportive of whistleblower protection being applied to the disclosure of reportable taxation matters. However, we are aware that s.30-10(6) of the *Tax Agent Services Act 2009* does not allow a tax agent to disclose client matters to a third party. This would preclude tax agents being able to report disclosable matters to the ATO.

APESB believes the Treasury and the Government should clarify whether tax agents are allowed to report matters of non-compliance by their clients to the ATO either through specific inclusion in the *Taxation Administration Act 1953* or by amending the *Tax Agent Services Act 2009*.

5. Definition of key terms

APESB is supportive of the inclusion of parameters such as 'reasonable period' and 'imminent risk of serious harm' to help individuals determine whether it is appropriate to disclose matters to a whistleblower third party disclosee. The new NOCLAR standard issued by APESB which apply to professional accountants include a similar parameter, being the concept of 'substantial harm' which is used to determine when it is appropriate to

report to a regulatory authority in the absence of appropriate action by the management or those charged with governance of the entity.

Our recent stakeholder engagement activity in respect of NOCLAR highlighted that while the parameter was useful, stakeholders required further guidance to clarify what would be considered a matter that could cause substantial harm.

Based on our experience of addressing this feedback from stakeholders, APESB encourages the Treasury to provide additional guidance or information on the terms 'reasonable period' and 'imminent risk of serious harm' to clarify when it is appropriate to report to a whistleblower third party disclosee.

6. Clarification on disclosable matters

APESB supports the scope of disclosable conduct in s1317AA being broad. However, there are parameters in this section which we believe potential whistleblowers may not be able to easily determine, such as whether an offense is punishable by imprisonment for a period of 12 months or more and therefore falls into the protection offered under this legislation.

APESB understands that this measure may have been included to highlight that only significant matters should be reported. But in the longer term this complexity may lead to a situation where there will be minimal reporting in respect of whistleblowing as currently experienced in Australia.

APESB suggest that the words 'punishable by imprisonment for a period of 12 months or more' be replaced with a concept such as substantial harm to a range of stakeholders. By using a concept like substantial harm, it removes the complexity and makes the legislation easier for private citizens to understand (subject to our concerns raised at point 5 above). The issue is that if the current form of this proposed legislation is complex and leads to a determination that is difficult to conclude upon then this is likely to discourage potential whistleblowers from reporting disclosable matters.

Concluding comments

We trust that you find these comments useful in your final deliberations. Should you require any additional information, please contact APESB's Chief Executive Officer, Mr Channa Wijesinghe at channa.wijesinghe@apesb.org.au.

Yours sincerely



The Hon. Nicola Roxon
Chairman