FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

3 November 2017

Manager
Financial System Division (corporate)
Corporate and International Tax Division (tax)
The Treasury
Langton Crescent
PARKES ACT 2600

Email: whistleblowers@treasury.gov.au

Dear Sir / Madam

Exposure Draft Treasury Laws Amendment (Whistleblowers) Bill 2017

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide comments in response to the Exposure Draft Treasury Laws Amendment (Whistleblowers) Bill 2017 and Explanatory Material.

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.

However, we are concerned about some of the unintended consequences that the proposed regime may have on the necessary enforcement and disciplinary activity professional bodies undertake to ensure members adhere to professional standards, including Codes of Conduct.

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 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

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 5,600 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 150,000 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, 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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Treasury Laws Amendment (Whistleblowers) Bill 2017

FPA submission to

Treasury

3 November 2017

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Implications for enforcing professional standards

As detailed in our original submission to Treasury in relation to the proposed whistleblower regime, the FPA like other professional bodies, enforces its professional standards via a system of surveillance, audits, and most importantly complaints investigations.

In most professions, regulation is a dynamic interaction between government-imposed legal requirements, business-imposed rules of work, and enforceable professional obligations. Each of these systems of regulation have the potential for overlap with each other.

Professional standards serve to strengthen the accountability of financial services providers when servicing the needs of Australians by complementing the legal obligations under the relevant laws. Professional standards go beyond the requirements of the law and therefore play a vital role in protecting consumers. A key consumer protection element of professional standards lies in their enforceability through compliance and disciplinary measures. Professional standards and codes play a vital role in both improving upon the law and the way it is applied, as well as providing improved consumer protections in the way they clearly identify professional expectations.

The FPA first adopted a binding Code of Ethics and Rules of Professional Conduct in 1992. Supporting our professional standards, the FPA Compliance Handbook states:

> *As a condition of FPA membership, members sign a declaration agreeing to abide by the FPA Code of Ethics.*
>
> *Practitioner members acknowledge and agree that the substance and contents of any charge for violation of the FPA Code of Ethics and Rules of Professional Conduct against a member and the action taken in respect of such a charge, may be notified to any relevant government or statutory authority, and the disciplinary finding published with or without disclosure of the name of the member in the official publication of the Association by notification to the members of the Association.*[2]

Just like the application of statutory regulation, professional regulation is a combination of stated rules and supporting regulations. As the governing entity of a professional association, the FPA Board is empowered by the FPA Constitution to make rules and regulations that govern member behaviour. In addition to governing member behaviour, these rules place obligations on the FPA to monitor behaviour and enforce the regulations according to specific requirements. This activity is undertaken by the FPA's Professionalism Division. The division oversees the development and application of standards, as well as the active investigation of complaints and general investigation of malpractice risks in the membership. In addition to a Professional Accountability team, the FPA has a formally constituted and independently chaired Conduct Review Commission which follows a private tribunal model for disciplinary proceedings against members.

Part of our disciplinary process involves receiving information from individuals about suspected breaches of our professional standards. This can be done either directly or anonymously via our FPA Confidential service. Generally such information is disclosed by individuals and entities about other financial planners or licensees.

[2] FPA Compliance Handbook- A Handbook of Compliance Best Practice for Financial Planners 5.2 Apr/97

Important to this consultation is the type of information that is disclosed to the FPA. It is very common that information disclosed about a suspected breach of our professional standards also relates to a suspected breach of a law that would be captured under the draft legislation for the proposed whistleblower regime. For example, a breach of our Practice Standards would usually also be a breach of the best interest obligations in the Corporations Act. While our professional standards and the requirements on financial planners set in the law cross over, the focus of our investigatios is on the suspected breach of our Code of Professional Practice.

While ASIC is recognised as a whistleblower disclosee under s1317AAB(1), professional bodies sit outside of the proposed legislation and do not fall within the definition of whistleblower disclosee (s1317AAB) or eligible whistleblower (s1317AAD).

This means that the disclosing party and the information they disclose to the FPA, would also not be covered for the FPA investigation. If the disclosing party also disclosed the same information to ASIC, the person/entity and the disclosed information would be covered for ASIC's investigation.

As a non-Government entity, professional bodies cannot guarantee the confidentiality of disclosed information as there is a risk of being compelled to produce the information by law – such as by subpoena or other legal process. Therefore, the FPA's investigative processes requires that we obtain consent from the complainant about disclosing the information provided in order to effectively investigation claims of misconduct. This includes substantiated misconduct that is referred to our Conduct Review Commission for determination, and the publication of the resulting CRC outcome. This consent includes potential disclosure of the complainant's identity or information that could identify the complainant as confidentiality cannot be guaranteed.

We are concerned that as information disclosed to the FPA could potentially relate to both a breach of our professional standards (outside the whistlblower regime) and a breach of the Corporations Act (inside the whistleblower regime), that this dichotomy would jeopardise FPA's ability to investigate claims of misconduct that relied on such information.

This raises the questions as to the expectations of how entities, such as professional bodies, who may receive information that falls under the whistleblower regime is to treat such information and the person or entity who discloses the information.

Recommendation

The FPA seeks clarity on the expectations of how information and whistleblowers are to be treated when disclosures are received by professional bodies.

Code monitoring schemes

The Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 introduced a legislated Code of Ethics for financial advice providers, compliance with which will be monitored by a Code monitoring body. Professional bodies may fill these roles in the future.

The legislated Code will be captured under s1317AA of the proposed whistleblower regime. While ASIC is recognised as a whistleblower disclosee under s1317AAB(1), professional bodies sit outside

of the proposed legislation and do not fall within the definition of whistleblower disclosee (s1317AAB) or eligible whistleblower (s1317AAD).

It is expected that Code monitoring bodies would 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.

Recommendation

The FPA questions and seeks clarity on how professional bodies in their potential role as Code monitoring bodies, should handle disclosures of information in relation to the Code of Ethics legislated under the Corporations Act; particularly in relation to potential Code monitoring body reporting requirements.

Offence to disclose whistleblower's identity

In relation to disclosing the whistleblower's identity, paragraph 2.57 of the draft Explanatory Material states: An exception to this offence ensures that the whistleblower's identity can be provided to the ATO, the AFP or to a person or body that the whistleblower has consented to the information being shared with. This ensures that the wrongdoing that is the subject matter of the disclosure can be properly investigated, and that these agencies can share information for this purpose.

Schedule 1, item 13, subsection 14ZZZC(2) of the draft legislation:

(2) A disclosure referred to in paragraph (1)(b) is authorised under this subsection if it:

(a) is made to the Commissioner; or

(b) is made to a member of the Australian Federal Police (within the meaning of the Australian Federal Police Act 1979); or

(c) is made to a person or body prescribed by the regulations for the purposes of this paragraph; or

(d) is made to someone else with the consent of the discloser.

Section 1317AE proposes corresponding changes to the Corporations Act.

As detailed above, the FPA is close to our members who operate in a variety of roles across the spectrum of financial services firms. As a professional body, we are privy to concerns of misconduct and gather valuable information and data via our formal complaints investigations and our anonymous disclosure service. This can include information which has not been disclosed to ASIC or other such authorities.

The FPA, and other professional bodies, have the capacity to play a unique and helpful role in working with regulators and authorities to identify and investigate potential misconduct. As such, we

recommend professional bodies by prescribed by regulations for the purposes of these provisions as per s1317AE(2)(d) and 14ZZZC(2)(c).

Recommendation

Professional bodies by prescribed by regulations for the purposes of these provisions as per s1317AE(2)(d) and 14ZZZC(2)(c).

Protected disclosures

While we note that s1317AA(3) is not intended to limit subsection (2), we question the restriction of s1317AA(3)(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 Commonwealth "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(3)(d) to: …*constitutes an offence against any other law of the Commonwealth.*

Detriment

Due to the Australian Financial Services Licensing (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[3]); 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. 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.

We believe sections 1317AAD and 14ZZV *Eligible whistleblowers* adequately capture both authorised and employed representatives.

[3] Based on FAR dataset

However we suggest the proposed *Detriment* provisions in sections section 1317AC and 14ZZX(5) do not adequately cover actions against authorised representatives. Detriment toward an authorised representative could include (but not limited to) cancelation of or limitations placed on the authorisation under the AFSL; requiring additional unjustified training (at authorised representatives expense); imposing extra compliance measures.

We suggest detriment of an authorised representative is not adequately covered by "damage to a person's reputation….. or business or financial position", and should be a specific provision under sections 1317AAD and 14ZZV.

Recommendation

Amend the *detriment* provisions under sections 1317AAD and 14ZZV to specifically include authorised representatives.

Whistleblower third party disclosees

Section 1317AAC of the draft legislation proposes expanding the application of whistleblower protections to cases where the information is disclosed to media and parliamentarians.

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 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 future investigations conducted by legal authorities about the suspected misconduct, 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.

Draft provision s1317AAC(1)(c) requires that the discloser [eligible whistleblower] have 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 upon immediately.

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 misconduct and misconstrue the length of an investigation as inaction on the part of the regulator or authority. Emotional and hasty disclosure to third parties of qualifying information can significant hinder sensitive investigations and in particular impact future prosecutions of offenders.

This includes information disclosed anonymously by a whistleblower to a whistleblower third party disclosee.

Recommendation

Whistleblower third parties including journalists and members of Parliament, should be required to contact the relevant authority in relation to the disclosed information prior to acting on the information.

Examples

Chapter 2 of the Explanatory Material includes examples to demonstrate disclosure that is protected under the proposed tax whistleblower regime.

It would provide additional clarity if similar examples were included in *Chapter 1 – Improving protection for whistleblowers in the corporate and financial sectors* of the EM, particularly in relation to the application of protections for authorised representatives operating their own financial planning business and providing financial advice under another entity's AFSL. Example 2.3 in the Explanatory Material may be helpful in this regard:

> *Example 2.3: Protected disclosure about an associate of the entity - Lyn is an employee of Company A. Company A is an associate of Company B because Company A is reasonably expected to act in accordance with the wishes of Company B. Company A is not involved in the day-to-day running of Company B, the companies lodge separate tax returns and have separate auditors. Lyn becomes aware that Company B is not correctly reporting its sales income, in breach of the taxation laws. Lyn discloses this information to a member of Company A's audit team. Lyn is eligible for protection in respect of this disclosure.*

Recommendation

Include examples in Chapter 1 of the Explanatory Material.