THE TAX LEAK SCANDAL

ACCOUNTABILITY CONCERNS ABOUT PWC AUSTRALIA’s INTERNAL REVIEWS

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Snapshot

A major tax leak scandal has engulfed PwC Australia this year. Two internal reviews are being conducted as a result: the PwC Internal Investigation and the PwC Internal Governance Review. The internal review process adopted raises concerns about accountability. Ten Accountability Concerns are discussed in this discussion paper.

A Overview and summary

1. In ‘An open letter from PwC Australia acting chief executive Kristin Stubbins’ (29 May 2023) (PwC Open Letter) PwC Australia refers to two internal reviews on accountability that are now being undertaken as part of their response to the tax leak scandal.

1 Principal, Brent Fisse Lawyers, Sydney; Honorary Professor, University of Sydney; Affiliate, Centre for Commercial Law and Regulatory Studies, Monash University. Thanks are due to colleagues for very helpful comments. All the usual disclaimers apply. One is that this is a discussion paper, not a legal advice. Another disclaimer is that there are no known conflicts of interest: for example, the author is not acting for PwC, the Government, or anyone else in this matter. Another is set out at p 3, [6].

2 At: https://www.pwc.com.au/media/2023/open-letter-from-pwc-australia-acting-ceo-kristin-stubbins-230529.html. The Open Letter also refers to a review in 2021 of the effectiveness of PwC Australia’s tax governance and internal control framework. The Open Letter states that: the review was ‘conducted by former Australian Taxation Office (ATO) official Bruce Quigley’; ‘[t]he ATO participated in this review’; and ‘all recommendations were implemented, including prohibiting market facing partners from participating in confidential tax consultations’. That review is not discussed in this discussion paper, which is limited to the internal reviews launched in 2023.

• The first is an internal investigation ‘into who may have shared or misused confidential information in connection with these matters’ (PwC Internal Investigation). This inquiry is being assisted by an external law firm. It is unclear from publicly available information what the terms of reference are. It is also unclear what details about the findings will be made public.

• The second is ‘an independent review of the firm’s governance, accountability and culture’ (PwC Internal Governance Review). This review is to be led by Dr Ziggy Switowski AO, a prominent businessman, and completed in September 2023. PwC said on 15 May 2023 that a summary of the review findings would be made public. PwC now says in the Open Letter that the full review report, including recommendations, will be published. It is unclear from publicly available information what the terms of reference are.

2. A reasonable inference may be that the prime objective of each of the PwC Internal Investigation and the PwC Internal Governance Review is to help restore trust in the integrity of PwC Australia by projecting to the public an image of internal accountability for misdeeds in the past and prevention of future possible misdeeds. Is that objective likely to be achieved? Achievement of that objective would require public acceptance that PwC has demonstrated accountability for addressing misdeeds and their source. However, the Open Letter and other PwC statements reported in the media raise questions as to whether these processes demonstrate accountability, both as to process and presentation of outcomes.

3. Ten accountability concerns (Accountability Concerns) are reviewed:

• PwC Australia ‘did too little too late’ (PwC Open Letter);

• the terms of reference of the PwC Internal Investigation and the PwC


Internal Governance Review are not public;

- the PwC Internal Governance Review is not an ‘independent review’ — it is a review by an independent contractor whom PwC Australia has engaged;

- lack of clarity as to the extent to which the findings of the PwC Internal Investigation will be made available to the AFP, the Tax Practitioners Board, the Australian Parliament, and the public;

- lack of clarity as to whether information ascertained by the PwC Internal Investigation and the PwC Internal Governance Review will be subject to claims of legal professional privilege

- a risk that the PwC Internal Investigation and the PwC Internal Governance Review might be ‘managed’ and ‘contained’;

- absence of published commitment that the findings of the PwC Internal Investigation and the PwC Internal Governance Review will be subject to independent checking and verification;

- the incentives to PwC Australia to ensure the veracity of the PwC Internal Investigation and the PwC Internal Governance do not include the contingent threat of prosecution if false or misleading statements were published;

- the value of the PwC Internal Investigation and the PwC Internal Governance Review will much depend on the sanctions imposed and the remedies applied as a result; and

- as in case of many internal reviews, there is the risk of scapegoating.

Some of these Accountability Concerns have arisen already. Others are potential. All are discussed in Part C below.

4. Internal investigations and reviews are a prevalent means of organizational self-regulation. See Part B below for background.

5. The internal reviews at PwC Australia have a long way to run. Part D looks ahead.

6. Nothing in this discussion paper suggests that any offences or other breaches of law or equity have occurred. Investigation, public or private, does not imply criminal or civil liability.
B Internal Investigations and Reviews by Corporations and Other Organisations

Nature and prevalence

7. Internal investigations and reviews developed in the industrial and pre-industrial world as a tool of organisational self-regulation. They have become increasingly common. They differ widely in numerous respects: their objectives; who conducts them; the type of unlawful or unethical conduct under scrutiny; the range and rank of the individuals investigated; the process adopted; the extent of disclosure; the sanctions and remedies that result from them; and the degree of assistance or assurance provided to stakeholders. They have various tags. The most common are: ‘board review’, ‘special investigation’; ‘special audit’; ‘voluntary disclosure’; ‘self-disclosure’; ‘self-investigation’; ‘compliance review’ and ‘self-cleaning’.

8. Internal investigations and reviews are part of the standard toolkit of internal controls in modern organisations. In the case of corporations, directors may breach their duty to exercise care and diligence if they fail to use them. Internal investigations and reviews often stem from investigation of unlawful conduct by enforcement agencies and journalists. They are a conventional way of handling adverse publicity. They are promoted actively by law firms and consultancies as a service provided by them. The resulting experience is vast and wide-ranging. So is the relevant literature, which comprises scholarly works, ‘how to’ descriptions of best practices and pitfalls, many reports, guidance by enforcement agencies, and ‘infomercials’.

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7 Corporations Act 2001 (Cth) s 180.
9. Internal investigations and reviews may be contrasted with external reviews by regulators or governmental inquiries. Examples of such external reviews include reviews conducted by the Tax Practitioners Board,9 APRA,10 AMCA,11 licensing and gaming authorities,12 and royal commissions and other special commissions of inquiry.13

Examples of internal investigations and reviews

10. A famous example of how internal reviews can work well is the review by Gulf Oil into foreign corrupt practices at the company in the 1970s.14 A report was prepared for Gulf Oil by John J. McCloy (McCloy was a distinguished lawyer, diplomat, banker, and advisor to several presidents). That report was cited by John C Coffee Jr as a model for


9 See further ‘Voluntary Disclosure Programs’.
12 Eg, APRA, Report into irregular currency options trading at the National Australia Bank, 23 March 2024, US SEC, Form 6-K, at: https://www.sec.gov/Archives/edgar/data/833029/000110465904010032/a04-3790_16k.htm.
13 Eg, State of Victoria, Royal Commission into the Casino Operator and Licence, Report, October 2021.
corporate pre-sentence reports, in “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment”, a renowned article published in the Michigan Law Review in 1981: 15

[The report] detailed in specific and unemotional terms the extent of the internal falsification and deliberate deception of the Gulf board by senior Gulf management. That deception fostered Gulf’s extensive program of domestic and foreign political payments. The impact of the McCloy Report on the Gulf board was immediate and substantial; it triggered internal reforms within Gulf and hastened the resignation of some apparently culpable senior officials.

Equally important, the McCloy study, although written in dry and hyper-precise tones, was picked up by the media. It was republished by the popular press, and it became a paperback bestseller. 16 Undoubtedly, it also supplied the raw material for other more journalistic treatments of the same topic. Clearly, this theme of intrigue among senior corporate management has a certain fascination for a substantial public audience. To be sure, this audience will still buy gasoline from Gulf, but economic injury to Gulf is neither necessary nor desirable once the censure is shifted onto the individual.

11. An infamous example of how internal reviews can backfire unless they are robust is the review of the Juukan Gorge disaster by Rio Tinto in 2020. 17 Public outrage prompted the board of directors to conduct a review of the company’s heritage management processes. The board’s report, published in August 2020; identified serious deficiencies in the company’s processes and work culture and recommended a £4 million reduction in pay for the CEO, Mr Jean-Sébastien Jacques, and two other senior managers. The report provoked institutional investors (super funds) to complain and urge the board to take stronger action. Rio Tinto announced, on September 11, 2020, that the CEO and the two other executives would leave the company.

12. There are many other examples. They include the review by NAB into a foreign currency trading scandal and the inquiry by 7-Eleven into workers’ entitlements:

• NAB went through a $360 million currency trading scandal in 2004. The CEO and Chairman of the board resigned when the scandal emerged. NAB then commissioned a review by PwC Australia. The PwC report found that four traders had used the practice of smoothing profits and concealing losses for more than two years and possibly since 1998. The PwC report reviewed the causes and recommended improvements to NAB’s controls. The four ‘rogue’ traders were dismissed and another four employees left the bank. A prudential report by APRA released about two weeks after the PwC report set out a root cause analysis and recommended remedial measures. The PwC report was accepted by the NAB Board. The report was challenged by a dissenting director, Mrs Catherine Walters AM, in what became a bitter dispute.

• A wages panel, headed by former ACCC chairman Professor Allan Fels, was established to assess workers' entitlements following revelations that 7-Eleven was underpaying many employees. The panel was later dumped. Professor Fels said that the panel was sacked. A statement by 7-Eleven said that the wages panel had ‘agreed to transition the claims process for past under-payment of wages by franchisees to an independent unit within 7-Eleven’.

24 Ibid.
25 Ibid.
Criteria for assessing internal reviews

13. In terms of accountability, what makes a good or bad internal review of suspected or known unlawful or unethical conduct in a large firm? What outcomes should be expected? Criteria of evaluation are implicit in the Accountability Concerns discussed in Part C below. Also relevant are the criteria applied by leading enforcement agencies when considering internal reviews and voluntary disclosures by corporations. The criteria published by the AFP and the United States Attorneys’ Offices are set out below.

(a) **AFP Corporate Cooperation Guidance (2021)**

14. The AFP published *Corporate Cooperation Guidance* in 2021. The Guidance sets out the criteria applied by the AFP when considering the relevance and weight to be given to cooperation by a firm where it suspects that an offence has been committed on its behalf.

15. The AFP Guidance was prepared in consultation with the Attorney-General’s Department, the Commonwealth Director of Public Prosecutions, and the Australian Securities and Investments Commission. The stated aim is: ‘to further an understanding of how the public interest factor of cooperation at the investigation stage might be assessed.” The guidance ‘is not intended to, nor does it, create legally enforceable rights, expectations or liabilities.

16. To the writer’s knowledge, PwC Australia itself is not the subject of investigation for an offence (as a partnership, PwC Australia is not subject to corporate criminal liability). Nor is it clear whether the findings and

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26 These reflect relevant desiderata in the Accountability Model developed in *Corporations, Crime and Accountability*, chs 5-6. The relevant desiderata include reflection of the concept of reactive corporate fault. See further B Fisse, ‘Reactive Corporate Fault’, in E Bant (ed), *The Culpable Corporate Mind* (Hart 2023) ch 7.

27 Note also the requirement of full, frank and truthful disclosure under paragraph 23(f) of the ACCC immunity and cooperation policy for cartel conduct.


evidence generated by the PwC Internal Investigation will be volunteered to the AFP or other enforcement agencies. However, the AFP is investigating the possibility of offences by individuals acting on behalf of PwC Australia.\(^{30}\) The criteria set out in the *Corporate Cooperation Guidance* are relevant to what the AFP is likely to make of the PwC Internal Investigation when conducting that investigation. The criteria are also relevant to how the PwC Internal Investigation is likely to be seen by the jury of public opinion.

17. The Introduction to the Guidance explains that the level of cooperation provided by a corporation during an investigation is one of the key public interest factors to be considered by the CDPP in making decisions with respect to corporate suspects under:

a. the Prosecution Policy of the Commonwealth (Prosecution Policy), and

b. the Best Practice Guideline: Self-reporting of foreign bribery and related offending by corporations.

18. The level of cooperation is relevant in these basic ways:

Where a corporation adopts a genuine and proactive approach in cooperating with investigating agencies upon learning of the possible offending, it is likely to tell in favour of the corporation being treated more leniently. Similarly, adopting an adversarial or obstructionist approach to the investigation is likely to tell in favour of prosecuting the corporation, subject to the Prosecution Policy.\(^{31}\)

19. The AFP *Corporation Cooperation Guidance* sets out indicators of cooperation (in paragraph 9):

Genuine and proactive cooperation means providing assistance to investigating agencies that goes above and beyond compliance with legal obligations. It includes:

a. advising relevant agencies as soon as practicable after potential offending is discovered, including regulatory agencies in relation to civil contraventions

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\(^{31}\) AFP *Corporation Cooperation Guidance*, [3].
b. providing full and frank disclosure to investigating agencies about the relevant conduct and the corporation’s role

c. advising investigating agencies of relevant information and evidence without waiting for it to be formally requested

d. identifying suspected wrong-doing and criminal conduct together with the individuals responsible, regardless of their seniority or position in the corporation

e. identifying and preserving available evidentiary material including evidence located overseas

f. providing evidentiary material to investigating agencies promptly and in an evidentially sound format

g. identifying and making available relevant witnesses

h. encouraging employees, officers, agents and associates to cooperate in the investigation

i. supporting employees, officers, agents and associates to provide witness statements and give evidence

j. giving evidence (via relevant persons associated with the corporation) in any related proceedings

k. taking a cooperative and practical approach to assisting any ancillary investigation or resolving any action taken against the corporation that is related to the corporation’s misconduct, including under the Proceeds of Crime Act 2002 (POC Act) or other proceeds of crime proceedings

l. taking a cooperative and practical approach to any legal professional privilege (LPP) claims

m. excluding possible suspects (such as senior officer holders) from any decision making in relation to the investigation, and

n. providing investigating agencies with copies of internal investigation reports prepared by or on behalf of the corporation (including by its legal representatives).

20. The AFP Corporation Cooperation Guidance states that genuine cooperation is inconsistent with:

   a. protecting specific individuals or unjustifiably blaming others;

   b. putting subjects on notice and creating a danger of tampering with
evidence or testimony;
c. silence about selected issues;
d. misuse of LPP claims, and
e. tactical delays or information overloads.\textsuperscript{32}

21. The AFP \textit{Corporation Cooperation Guidance} deals with several further particular topics including: independent investigation and verifying information provided by a corporation; preserving and providing material; dealing with witnesses and individuals; and approach to legal professional privilege.

22. Is the PwC Internal Investigation consistent with the AFP \textit{Corporation Cooperation Guidance}? For instance, did PwC Australia advise relevant agencies as soon as practicable after potential offending was discovered (see factor a. in paragraph 9 of the \textit{Corporation Cooperation Guidance})? See the discussion in Part C(1).

\textbf{(b) United States Attorneys’ Offices Voluntary Self-Disclosure Policy (2023)}

23. The AFP \textit{Corporation Cooperation Guidance} states that the approach taken is like that that taken by the AFP’s international counterparts (paragraph 9).

24. The United States Attorneys’ Offices Voluntary Self-Disclosure Policy (USAO VSD Policy)\textsuperscript{33} is one example. The Standards of voluntary self-disclosure under that Policy are:

\textbf{A. Standards of Voluntary Self-Disclosure}

Decisions about whether a disclosure constitutes a VSD will be made by the USAO based on a careful assessment of the circumstances of the disclosure on a case-by-case basis and at the sole discretion of the USAO. The USAO will require that a disclosure meet each of the following standards for it to constitute a VSD under this policy:

1. \textbf{Voluntary}: VSDs only occur when the disclosure of misconduct is made voluntarily by the company. A disclosure will not be deemed a VSD under

\textsuperscript{32} Id, [10].
\textsuperscript{33} At: \url{https://www.justice.gov/d9/2023-03/usao_voluntary_self-disclosure_policy_0_1.pdf}. 
this policy where there is a preexisting obligation to disclose, such as pursuant to regulation, contract, or a prior Department resolution (e.g., non-prosecution agreement or deferred prosecution agreement).

2. **Timing of the Disclosure:** A disclosure will only be deemed a VSD when the disclosure is made to the USAO:

   a. “prior to an imminent threat of disclosure or government investigation,” U.S.S.G. § 8C2.5(g)(1);
   
   b. prior to the misconduct being publicly disclosed or otherwise known to the government; and
   
   c. within a reasonably prompt time after the company becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness.

3. **Substance of the Disclosure and Accompanying Actions:** For a disclosure to be deemed a VSD under this policy, the disclosure must include all relevant facts concerning the misconduct that are known to the company at the time of the disclosure.

   The USAO recognizes that a company may not be in a position to know all relevant facts at the time of a VSD because the company disclosed reasonably promptly after becoming aware of the misconduct. Therefore, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at the time.

   The USAO further expects that the company will move in a timely fashion to preserve, collect, and produce relevant documents and/or information, and provide timely factual updates to the USAO. Should the company conduct an internal investigation, the USAO expects appropriate factual updates as that investigation progresses. See JM § 9-28.700.

25. **Is the PwC Internal Investigation consistent with the Standards of Voluntary Self-Disclosure in the USAO VSD Policy?** For instance, did PwC Australia disclose the misconduct reasonably promptly to enforcement agencies (see Standard 2c.). See the discussion in Part C(1).
C  Accountability Concerns About the PwC Internal Investigation and the PwC Internal Governance Review

26. As things stand, the PwC Internal Investigation and the PwC Internal Governance Review seem unlikely to provide sufficient assurance of internal accountability to help restore trust in PwC Australia. Ultimately the proof of the pudding will be in the eating, but the recipe now on the table of public opinion is open to question. Ten Accountability Concerns are discussed below.

27. It should be made crystal clear at the outset that the Accountability Concerns arise because the PwC Internal Investigation and the PwC Internal Governance Review are not purely private internal reviews. They relate to PwC Australia’s public relations response to the tax leak scandal. The PwC Open Letter is an open letter to the public as well as to other stakeholders. The description in that Open Letter of the steps taken by PwC Australia impliedly represents to the Australian public as well as to other stakeholders that those steps manifest accountability. That representation to the public impels public scrutiny.

(1)  Too little too late

28. The first Accountability Concern is that PwC Australia did too little too late. That is recognised in the PwC Open Letter.

29. The qualification ‘with the benefit of hindsight’ in the PwC open Letter is appropriate: PwC Australia should have conducted an internal inquiry and taken disciplinary and other preventive action years earlier when PwC Australia initially had reason to suspect that misconduct had occurred.

30. The delay by PwC Australia in taking action is inconsistent with the importance attached by enforcement agencies to the promptness of disclosure. See the AFP Corporate Cooperation Guidance, paragraph 9a.; and USAO VSD Policy, Standard 2c.

34 See eg, ‘PwC PR blitz a mere house of straw’, SMH, 30 May 2023, 6; ‘PwC’s latest grand apology falls flat’, AFR, 30 May 2023, 40.
31. The delay is also inconsistent with the standard principle, endorsed widely by law firms and consulting firms, that internal investigation into misconduct be conducted promptly.\(^{37}\) Robert Keeling, a Partner of Sidley Austin in the Washington DC office, has expressed that standard principle in this way:\(^{38}\)

> From the moment an allegation of potential wrongdoing is reported, prompt action is vital to understanding the conduct at issue, preventing future misconduct, and promoting a culture of transparency and compliance within the company.

32. The main reasons for promptness in conducting internal investigations into suspected misconduct are:

- prompt action is an indication that a firm’s response to misconduct is genuine and not contrived;
- delay in investigation dims recollection of relevant facts by those involved in the misconduct or witnesses to it; and
- dragging out internal investigations is a waste of time better spent on commercially productive activities.

(2) Terms of reference are not public

33. A second Accountability Concern is that the terms of reference of the PwC Internal Investigation and the PwC Internal Governance Review have not been made public. The general scope of the internal reviews has been indicated, but few details have been given.

34. This lack of transparency does not inspire confidence that the internal reviews will fully examine and uphold internal accountability at PwC for the tax leak scandal in a transparent way.

35. The PwC Internal Investigation is an internal investigation ‘into who may have shared or misused confidential information in connection with these

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PwC’s statement does not reveal whether the investigation will look at possible offences under the Criminal Code or seek to identify whether breaches of contractual or equitable confidentiality obligations have occurred. Nor does the statement address whether the investigation will extend to any partner or member of the Executive Board who knew or ought to have known of the misuse of confidential information or the sharing of that information. What are the types of conduct to be investigated? By whom? Are clients included?

36. The PwC Internal Governance Review is ‘an independent review of the firm’s governance, accountability and culture’. This statement does not reveal the scope of the review or any focal points of inquiry. For example, given that some partners implicated in the conduct in question have left PwC, will the review look at the question of past and future clawback or deferred remuneration mechanisms for managing the risk of unjustified remuneration? Another relevant question is whether the review should examine whether PwC should cease to be a partnership and become incorporated, with the result that directors’ duties and other safeguards under the Corporations Act would then apply.

37. Contrast the detailed terms of reference published by the AFL in October 2022 for an independent investigation of inappropriate conduct by the Hawthorn Football Club. The investigation, by a panel of independent investigators, relates to allegations of inappropriate conduct by the

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39 PwC Open Letter.
40 PwC Open Letter.
41 See eg, ‘Luke Sayers missing from PwC tax scandal’, 16 May 2023, 40; ‘Those “directly involved” in tax leak have left the firm: PwC chief’, AFR, 4 May 2023, 1.
Hawthorn Football Club (including by its coaches, football operations staff, independent contractors, management and/or board), directed towards some players on its playing list and in particular affecting First Nations players, their families and/or their intimate partners. The terms of reference set out the matters which are the subject of the Investigation, the matters upon which recommendations are sought, a procedure for mediation of disputes, and a process plan for the conduct of the Investigation. Sadly, the internal review was not completed; a threat was made to some complainants who then took the matter to the Human Rights Commission.  

(3) **PwC Internal Investigation and PwC Internal Governance Review are not independent**

38. A third Accountability Concern is that the internal reviews are not independent. The PwC Internal Investigation is an internal investigation conducted with the assistance of outside law firms. The PwC Internal Governance Review is not an ‘independent review’ as asserted in the PwC Open Letter. It is a review conducted by an independent contractor whom PwC has engaged. PwC Australia appears to have chosen reputable people to conduct the PwC Internal Investigation and the PwC Internal Governance Review. However, independence is a different quality from that of repute.

39. Of course, lack of full independence is inevitable in internal reviews. Moreover, hundreds of good and useful internal reviews have been conducted by independent contractors. The Great Oil Spill inquiry and report is an illustrious example. Another is the reform of internal controls by Allied Chemical after the Kepone toxic spill disaster; that internal reform followed comprehensive and innovative recommendations by Arthur D Little, a consulting firm.

40. The internal reviews by PwC Australia are not subject to the control and direction of an enforcement agency or the Government. If they were, less

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45 The Great Oil Spill, as discussed in Part B above.

46 Discussed in The Impact of Publicity on Corporate Offenders, ch 6.
would be left to the discretion of PwC Australia. For instance, compliance undertakings with enforcement agencies such as the ACCC, ASIC and ACMA typically include some control over the selection of the reviewer who is to perform a compliance review. An example is the recent undertaking by CBA to ACMA in the wake of contraventions of the *Spam Act 2003* (Cth).\(^47\) Note the control in clause 5.2 of the Undertaking:

> CBA undertakes to seek written approval from the ACMA for the appointment of the proposed Independent Consultant within 20 business days after the Commencement Date. If the ACMA does not approve the choice of Independent Consultant, CBA will repeat this process until it has the ACMA's written approval.

41. The controls on independent monitors in deferred prosecution agreements in the US are more robust. Consider the US DOJ Revised Memorandum on Selections of Monitors in Criminal Division Matters (1 March 2023).\(^48\) The Revised Memorandum includes: principles for determining whether a monitor is needed in individual cases; terms of monitorship agreements; arrangements for the Criminal Division Standing Committee on the Selection of Monitors, and rules for the nomination and selection of monitors and the avoidance of conflicts of interest. Part of the selection process is that the company to be subject to an independent monitorship nominate a pool of three qualified monitor candidates, one of whom is selected by the Standing Committee. One of the rules relating to the avoidance of conflicts of interest is the requirement of a written certification by the company that that it will not employ or be affiliated with the monitor, the monitor’s firm, or any of the personnel or entities assisting in the monitorship for a period of not less than three years from the date of the termination of the monitorship.

42. The requirement of a cooling off period is not included in the CBA undertaking to ACMA. Nor have I seen it in ACCC compliance undertakings. It is unclear if a cooling off period is included in the


engagement contract between PwC Australia and Dr Switowski.

43. Given that the PwC Internal Investigation and the PwC Internal Governance Review are not subject to the control and direction of an enforcement agency or the Government, what should be done to help ensure that the reviews are comprehensive, objective and robust? Some possible mechanisms are discussed below in relation to the seventh Accountability Concern, which is about verification.

(4) **Will the findings of the PwC Internal Investigation be disclosed to the AFP, the Tax Practitioners Board, the Australian Parliament, and the public?**

44. A fourth and potential Accountability Concern is the lack of clarity as to the extent to which the findings of the PwC internal reviews will be made known to the AFP, the Tax Practitioners Board, the Australian Parliament, and the public. Information suppressed is public accountability denied.

45. The PwC Open Letter indicates that the report of the PwC Internal Governance Review will be made public. The previous offer was to make a summary available.49

46. It remains to be seen what if any findings of the PwC Internal Investigation will percolate into channels of enforcement and public scrutiny. No indication is given by the PwC Open Letter. More recently PwC reportedly has said that it will cooperate with the further investigation by the Tax Practitioners Board that is underway.50 It is unclear at present what form that cooperation will take. Will it include disclosure to the Board of the findings of the PwC Internal Investigation? Will disclosures to the Board be made public by PwC Australia? By the Tax Practitioners Board?51

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49 “Financial penalty” looms over PwC as ex-CEO announces exit’, AFR, 15 May 2023. The proposal to provide only a summary was criticised: see eg, ‘Name the “tax leak 50″, says senator’, AFR, 17 May 2023, 36.

50 See ‘PwC will cooperate with tax agent regulator’s probe into leaks’, AFR, 31 May 2023; ‘PwC faces new probe into tax leak scandal’, AFR, 1 June 2023, 6.

51 The track record of the TPB on transparency is not strong; see eg, ‘Senate’s; path to unmask “secret” PWC partners’, AFR, 22 May 2023, 10; ‘New tax board chair wanted to withhold emails’, AFR, 27-28 May 2023, 2.”
Lack of clarity as to whether information ascertained by the PwC Internal Investigation and PwC Internal Governance Review will be subject to claims of legal professional privilege

Another potential Accountability Concern is the lack of clarity as to whether information ascertained by the PwC Internal Investigation and the PwC Internal Governance Review will be subject to claims of legal professional privilege.

PwC Australia has been criticised by the ATO for using legal professional privilege to hinder inquiries by the ATO. There is a risk that the PwC Internal Investigation and the PwC Internal Governance Review will make use of legal professional privilege to circumscribe and limit the extent of disclosure of the information generated by those inquiries.

The Federal Court decision in Commissioner of Taxation v PricewaterhouseCoopers in 2022 clarified the application and limits of legal professional privilege in large multi-disciplinary firms.

It is also worth noting the guidance given by the AFP Corporate Cooperation Guidance (2021) on the use of legal professional privilege (LPP) in internal reviews. The guidance is partly this:

36. An assessment of a corporation’s level of cooperation will ultimately turn on whether all relevant facts have been disclosed in a timely manner and in a suitable form for use by investigating agencies. A decision to waive LPP would likely indicate a high degree of cooperation from a corporation.

37. However, it is no reflection on the level of cooperation if a corporation makes genuine claims of LPP over sources of information relevant to an investigation, as long as all relevant facts are ultimately disclosed. …

40. Conversely, a corporation is unlikely to be viewed as genuinely cooperating in the investigation if it:

a. is not forthright in resolving claims of LPP


b. makes “blanket” claims of LPP over large data and document sets

c. structures its internal investigations in a way that facilitates improper claims of LPP over relevant material, or

d. claims LPP over material that advances a crime or fraud.

51. As mentioned earlier, the AFP is investigating the possibility of offences by individuals acting on behalf of PwC Australia. The criteria set out in the Corporate Cooperation Guidance are relevant to what the AFP is likely to make of the PwC Internal Investigation when conducting its own investigation. The criteria are also relevant to how the PwC Internal Investigation is likely to be seen by the jury of public opinion.

(6) Risk that the PwC Internal Investigation and PwC Internal Governance might be ‘managed’ and ‘contained’

52. There is a risk that the PwC Internal Investigation and the PwC Internal Governance Review might be ‘managed’ and ‘contained’. Persons who face the possibility of being held accountable have an incentive to fight against perceived enemies. Lawyers usually act in what they perceive to be the best interest of their clients.

53. PwC in the US has issued guidance on how to manage independent monitors in deferred prosecution agreements. The PwC guidance note, ‘Independent monitors: How to manage, if not avoid, the disruption’ is instructive. That is not sinister. Such guidance is understandable and often given by law firms and consulting firms.

54. The main hazard is that persons in danger of being held accountable may strive to protect themselves, as by giving misleading information or half-truths, refusing to cooperate, or leaving the firm.

55. Another consideration is that lawyers will shape the PwC Internal Investigation and the PwC Internal Governance Review in ways they believe to be in the best interest of their client/s. This is not to suggest that


55 The former CEO of PwC Australia was criticised in the media for inconsistent statements about the tax leak scandal before he resigned. See e.g. ‘PwC scandal feeds a false narrative’, AFR 5 May 2023, 42; ‘Tom Seymour’s PwC tax scandal backlash’, AFR, 5 May 2023, 44; ‘Tom Seymour conducts PwC’s cluster fiasco’, AFR 8 May 2023, 40; ‘PwC chief Seymour steps down over tax leaks scandal’, AFR, 9 May 2023, 1.
the shaping will be unlawful or unethical. It is merely to point out the obvious that the facts, when they emerge, will be at least partly the result of review processes that lawyers working for PwC Australia on the internal reviews have designed and applied.56

56. Various possible delaying tactics are conceivable, including giving persons subject to investigation ‘Rolls Royce’ natural justice and other rights.57 However, it is difficult to see how delaying tactics would be in PwC Australia’s rational self-interest.

(7) Independent checking and verification of findings?

57. Another Accountability Concern is the absence of published commitment that the findings of the PwC Internal Investigation and the PwC Internal Governance Review will be subject to independent checking and verification. They are unlikely to be audited by another accounting firm. The internal reviews are not supervised by an independent monitor. No provision seems to have been made for independent review. Furthermore, as explained below, no enforcement agency has direct oversight of the PwC Internal Investigation or the PwC Internal Governance Review.

58. First, the relevant events are not subject to the compulsory information-gathering power of ASIC under s 13(1) of the Australian Securities and Investment Commission Act 2001 (Cth). That power is limited to investigations that ASIC thinks to be expedient for the due administration of the corporations legislation.

59. Secondly, the compulsory investigation power of the ACCC under s 155 of the Competition and Consumer Act 2010 (Cth) does not seem relevant. That power is limited to the matters specified in s 155(2) (eg contraventions of the Act). Possible breaches of the Australian Consumer

56 It is beyond the scope of this discussion paper to discuss the extent to which information control by lawyers occurs generally or is appropriate. See further JC Coffee, Jr, ‘How to Deter Corporate Crime Like We Mean It’, Project Syndicate, 13 November 2020, at: https://www.project-syndicate.org/onpoint/how-to-punish-corporate-crime-by-john-c-coffee-2020-11; K Mann, Defending White-Collar Crime: A Portrait of Attorneys at Work (Yale Univ Press, 1985).

Law (eg misleading conduct under s 18, unconscionability under s 21, misleading representation under s 29) are at most peripheral to the tax leak scandal.

60. Thirdly, the powers of the National Anti-Corruption Commission to compel the production of document and hold hearings are limited to ‘corrupt conduct’ as defined by s 8(1) of the *National Anti-Corruption Commission Act 2022* (Cth). ‘Corrupt conduct’ includes:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:

(i) the honest or impartial exercise of any public official’s powers as a public official; or

(ii) the honest or impartial performance of any public official’s functions or duties as a public official.

To what extent do the PwC Internal Investigation and the PwC Internal Governance relate to ‘corrupt conduct’ within the scope of the NACC’s scrutiny?

61. The PwC Internal Investigation and the PwC Internal Governance are directed at conduct on behalf of PwC Australia, not corrupt conduct related to public officials. If the NACC decided to intervene, its scrutiny would be limited to the intersection between PwC Australia’s internal reviews and the honest or impartial exercise of any public official’s powers or the honest or impartial performance of any public official’s functions or duties. That intersection seems to be narrow.58 The criterion under s 8(1)(a)(i) and (ii) of the *National Anti-Corruption Commission Act 2022* is the honesty or impartiality of how public officials exercise their powers or perform their functions and duties. It is not whether others have abused the trust reposed in them by public officials. In any event, the NACC may decide not to intervene, or to intervene by focusing on the conduct of public officials in the tax leak scandal.

62. If no enforcement agency has sufficient direct oversight of the PwC Internal Investigation or the PwC Internal Governance Review, is there some kind of proxy for checking and verification by an enforcement agency? A possible proxy would be a requirement of integrity certification in Commonwealth or State or Territorial government procurement contracts where PwC Australia is the contractor. For instance, certification that the findings of the PwC Internal Investigation and the PwC Internal Governance Review are accurate and not misleading could be required of the Executive Board of PwC Australia in contracts between the Commonwealth, or a State or Territory, and PwC Australia. The certification would be structured in such a way as to enable the application of an offence under the Criminal Code, or an offence under State or Territorial criminal law, if a certification were false or misleading.  

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(8) Incentives to PwC Australia to ensure the veracity of the PwC Internal Investigation and the PwC Internal Governance Review?  

63. The incentives to PwC Australia to ensure the veracity of the PwC Internal Investigation and the PwC Internal Governance Review do not include the contingent threat of prosecution for false or misleading statements if false or misleading statements were published.  

64. The PwC Internal Investigation and the PwC Internal Governance Review are not set up to produce information to the Commonwealth Government or a Commonwealth enforcement agency like the ACCC. Accordingly, the offence of knowingly providing false or misleading information to a Commonwealth entity would not come into play. Nor would offences of failing to comply with compulsory information-gathering notices be relevant.  

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65. It is possible that misrepresentations about the integrity of the PwC Internal Investigation and the PwC Internal Governance Review might be challenged as misrepresentations in contravention of s 29 of the

59 Care would be needed to reflect the elements of the offence under s 137.1 of the Criminal Code (Cth).  
60 For the Commonwealth, see especially Criminal Code (Cth), s 137.1. The offence of giving false or misleading information to a Commonwealth entity is punishable by a maximum prison term of 12 months. For eg NSW, see Crimes Act 1900 (NSW), s 192C (obtaining property belonging to another), s 192E (fraud).  
61 Eg, Competition and Consumer Act 2010 (Cth) s 155(5).
Australian Consumer Law or as unconscionable conduct in contravention of s 21 of the Australian Consumer Law. Breaches of the Australian Consumer Law would expose those who committed the breaches to individual liability. However, PwC would not be liable (it is a partnership, not a corporation).62

66. Contrast the truth serum injected by the threat of prosecution in deferred prosecution agreements in the USA. Consider what happened to Ericsson as a result of non-compliance with the information requirements under a 2019 deferred prosecution agreement with the US DOJ.63

Ericsson (NASDAQ: ERIC) today announced that it has reached a resolution with the U.S. Department of Justice (DOJ) regarding non-criminal breaches of its 2019 Deferred Prosecution Agreement (DPA). Under the agreement, and as provided for by the DPA, LM Ericsson will enter a guilty plea regarding previously deferred charges relating to conduct prior to 2017. In addition, Ericsson will pay a fine of $206,728,848. The entry of the plea agreement will bring the 2019 DPA to an end.

In 2019, Ericsson entered into the DPA to resolve previously disclosed Foreign Corrupt Practices Act (FCPA) violations relating to conduct in several countries between 2010 and 2016. Since the start of the DPA, the DOJ has not alleged or charged Ericsson with any new criminal misconduct, and no new illegal conduct has been alleged or charged today. As previously announced in October 2021 and March 2022, however, the DOJ notified Ericsson that it had failed to provide documents and information to the DOJ in a timely manner and had not adequately reported to the DOJ information relating to a 2019 Iraq-related internal investigation.

Under the DPA, the DOJ has the sole discretion to determine that the Company has breached its obligations, and if it makes this determination, it has the ability to prosecute the Company for the past misconduct covered under the DPA. As a result, the Company has entered a guilty plea for the FCPA violations to which it previously admitted as part of the DPA. The Company is not adjusting the long-term financial targets it has given, as it does not expect any material deviations from these.

62 Australian Cartel Regulation, 223-224.
What sanctions and remedies will emerge as a result?

67. The value of the PwC Internal Investigation and the PwC Internal Governance Review will much depend on the sanctions imposed and the remedies applied as a result. This is a potential Accountability Concern about which little can be said until the results become known.

68. One challenge for PwC is the fact that some persons who may have been implicated in the tax leak scandal have left PwC and may be beyond PwC’s disciplinary reach. This raises the question of whether, as a matter of good governance, PwC Australia had in place a clawback or deferred remuneration mechanism for dealing with this problem. If it did, what was the mechanism and how did it apply to persons involved in the tax leak scandal?

Scapegoating?

69. The risk of scapegoating generally in internal reviews is notorious. Scapegoating is often used in order to deflect blame and accountability from top management.

70. PwC came under criticism recently by several partners who objected to being named by the firm as having seen tax leak emails. What

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67 ‘PwC outs four who saw tax leak emails’, AFR 6 June 2023, 3; ‘Tarred PwC partner breaks his silence’, AFT, 9 June 2023, 40. See also ‘PwC’s victims pile up’, AFR, 10-11 June 2023, 17.
safeguards are in place in the internal reviews to help guard against scapegoating?

71. An Accountability Model is set out in Corporations, Crime and Accountability for wrongdoing by larger scale organisations. The Accountability Model includes safeguards against scapegoating at the level of corporate internal discipline. The safeguards are essentially these:

1. pyramidal enforcement where scapegoating or related forms or noncompliance with accountability agreements, orders or assurances result in sanctions which are escalated, if necessary, to a point far beyond the tolerance of rational corporate or managerial self-interest;

2. judicial scrutiny of corporate action when accountability reports are submitted pursuant to accountability agreements, orders or assurances;

3. empowerment of employees with a right to complain about scapegoating to a court and, where relevant, to an internal accountability monitoring committee of the corporate defendant;

4. legal recognition of private systems of justice so as to foster participatory self-determination of issues such as the allocation of responsibility for offences committed on behalf of a corporation; and

5. minimum procedural protections for individuals exposed to internal disciplinary proceedings.

72. There is no entirely satisfactory protection against scapegoating. The modest claim made for the Accountability Model is that it is more likely than other known models of corporate crime enforcement to provide protection where scapegoating is a high risk.

73. Reference of a complaint about scapegoating to an internal accountability monitoring committee or to mediation (see safeguard (3) above) could be included in the PwC Internal Investigation and the PwC Internal Governance Review. Perhaps that safeguard has been adopted for these inquiries.

69 Id, at 183.
70 Id, at 154.
Safeguard (2) above could also be adopted by PwC Australia but without the element of judicial scrutiny. Consider the suggestion in Corporations, Crime and Accountability that proposed internal disciplinary action be vetted openly by those subject to the action proposed against them:

The critical guarantee required is this. At the stage of a draft report for the court being prepared, it should be widely circulated around the organisation and an open meeting held within the organisation to discuss it. All who wished to attend this meeting should be able to do so, with travel expenses met by the organisation. In particular, all persons subject to adverse comment in the draft report should be urged to attend and to invite any witnesses to speak on their behalf.

D  Looking ahead

Internal reviews at PwC Australia have a long way to run. What lies ahead?

The PwC Internal Investigation and the PwC Internal Governance Review may succeed in helping to restore trust in PwC Australia. No right-minded person wants to see another Enron moment of the kind that led to the death of Arthur Andersen, one of the then Big Five.

The internal review process adopted by PwC Australia gives rise to concerns about accountability, as discussed in Part C above. Ten Accountability Concerns raise doubt about the restorative power of the PwC Internal Investigation and the PwC Internal Governance Review.

The PwC Internal Investigation and the PwC Internal Governance Review got off to a bad start. Too little was done too late (Accountability Concern (1)). The terms of reference are not transparent (Accountability Concern (2)). The PwC Open letter and other public statements by PwC Australia raise more questions about accountability than they answer (Accountability Concerns (3)-(10)).

Resolving this self-inflicted mess will be difficult. The turnaround required is a test of commitment to re-building. Fortunately, turnarounds are what consulting firms design and engineer. There is also the possibility that

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71 Id, at 183.
PwC Australia will seize the opportunity to move to a corporate structure under the *Corporations Act 2001* (Cth). ⁷³

80. This discussion paper does not address the question of whether PwC Australia should be subject to a deferred ban agreement akin to a deferred prosecution agreement. That question is discussed in an earlier discussion paper. ⁷⁴

81. Nor does this discussion paper address the adequacy or otherwise of the steps taken to date by governments to strengthen the procurement procedures of the Commonwealth, ⁷⁵ the States and the Territories. ⁷⁶

82. Most fundamentally, the tax leak scandal raises the question of the extent to which consultants should be used instead of the public service to do the work of governments. ⁷⁷ That question has erupted after heating up over many years.

83. Walking backwards, into the future?

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⁷³ See the references at n 42 above.
⁷⁴ *Alleged misuse of confidential ATO information by PwC Australia – Possible Enforcement Responses*.