

# ACCOUNTABILITY AND THE PwC TAX LEAK SCANDAL

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4/7/2023

## Abstract

A major tax leak scandal has engulfed PwC Australia in 2023. The PwC Internal Investigation and the PwC Internal Governance Review are being conducted as a result. Ten Accountability Concerns arise about those internal reviews.

Accountability Concern (1): Too little was done too late.

Accountability Concern (2): The terms of reference are not transparent.

Accountability Concern (3): The PwC Internal Governance Review is not an 'independent review'.

Accountability Concern (4): To what extent will the findings of the PwC Internal Investigation be made available to stakeholders?

Accountability Concern (5): Will information ascertained by the internal reviews be subject to claims of legal professional privilege?

Accountability Concern (6): Will the PwC Internal Investigation and the PwC Internal Governance Review be 'managed' or 'contained'(?)

Accountability Concern (7): Will the findings be subject to independent checking and verification?

Accountability Concern (8): Is there a contingent threat of prosecution if false or misleading statements were to be published about the internal reviews?

Accountability Concern (9): The value of the internal reviews will much depend on the sanctions imposed and the remedies applied as a result.

Accountability Concern (10): Scapegoating is a risk.

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## **A Introduction – The PwC tax leak scandal, PwC Australia’s internal reviews, and concerns about accountability**

1. A scandal has engulfed PwC Australia in 2023. The scandal is the subject of an interim report by the Senate Finance and Public Administration References Committee, *PwC: A calculated breach of trust* (June 2023) (**PwC Tax Leak Scandal**):<sup>2</sup> The scandal had these origins (footnotes omitted):

1.2 In January 2023, media reports brought to light that accounting, auditing, and consulting firm PwC and one of its partners, Mr Peter Collins, had been investigated and received sanctions from the Tax Practitioners Board (TPB).

1.3 From 2013 to 2016, Mr Collins received confidential information from Treasury consultations and through his engagement with the Board of Taxation in relation to Australia's forthcoming anti-avoidance tax laws.

1.4 Despite having signed multiple confidentiality agreements, Mr Collins intentionally shared this confidential information with PwC partners and others both in Australia and overseas.

1.5 In sharing this confidential information, Mr Collins sought to assist existing and potential new clients of PwC to avoid the anti-avoidance tax laws to be introduced in 2016—putting at risk \$180 million per year of tax to be paid in Australia. Further, 'Project North America' generated new income of at least \$2.5 million for the first tranche of PwC's services in assisting clients to sidestep the new laws.

2. In 'An open letter from PwC Australia acting chief executive Kristin Stubbins' (29 May 2023) (**PwC Open Letter**)<sup>3</sup> PwC Australia referred to two internal reviews on accountability being undertaken as part of the

<sup>2</sup> Parliament of Australia, The Senate, Finance and Public Administration References Committee, *PwC: A calculated breach of trust*, June 2023, at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Consultingservices/PwC\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Consultingservices/PwC_Report).

<sup>3</sup> 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 paper, which is limited to the internal reviews launched in 2023.

response to the PwC Tax Leak Scandal:<sup>4</sup>

- 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 two external law firms. 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. A public statement is expected soon.
  - 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.<sup>5</sup> PwC says in the Open Letter that the full review report, including recommendations, will now be published. It is unclear from publicly available information what the terms of reference are.
3. The PwC Internal Investigation and the PwC Internal Governance Review seek to restore trust in the integrity of PwC Australia by showing internal accountability for misdeeds in the past and prevention of future possible misdeeds. The Open Letter and other PwC statements reported in the media raise questions as to whether these processes demonstrate accountability, as to both process and presentation of outcomes.<sup>6</sup>

<sup>4</sup> *PwC: A calculated breach of trust*. For background media reports see: ‘PwC engaged in “multi-year cover up” over tax leaks’, AFR, 21 June 2023, ‘PwC partner leaked federal tax plans to clients’, A, 23 January 2023, 1; ‘What is the PwC tax scandal? Who is Peter-John Collins? Who knew about it? Why does it matter?’, ABC News, 5 June 2023, at: <https://www.abc.net.au/news/2023-06-05/pwc-pricewaterhousecoopers-government-tax-leak-scandal-explained/102409528>; ‘PwC billed millions from leaks’, AFR, 3 May 2023, 1; ‘The inside story of PwC’s tax scandal’, AFR 6-7 May 2023, 20; ‘Panic inside PwC’, AFR, 13-14 May, 2023; ‘Michael Pascoe: Waiting for other PwC shoes to drop all over Canberra’, The New Daily, 31 May 2023, at: <https://thenewdaily.com.au/finance/2023/05/31/michael-pascoe-pwc-canberra-fallout/>.

<sup>5</sup> “Financial penalty” looms over PwC as ex-CEO announces exit’, AFR, 15 May 2023.

<sup>6</sup> Accountability is one fundamental concern. Another is the root causes of aggressive tax minimisation in Australian accounting firms; see eg M Anesa, N Gillespie, P Spee & K Sadiq, ‘The legitimisation of corporate tax minimisation’ (2019) 75 *Accounting, Organizations and Society* 17.

4. Ten accountability concerns (**Accountability Concerns**) are reviewed:
- Accountability Concern (1): too little was done too late;
  - Accountability Concern (2): the terms of reference are not transparent;
  - Accountability Concern (3): the PwC Internal Governance Review is not an 'independent review';
  - Accountability Concern (4): to what extent will the findings of the PwC Internal Investigation be made available to stakeholders?
  - Accountability Concern (5): will information ascertained by the internal reviews be subject to claims of legal professional privilege?
  - Accountability Concern (6): will the PwC Internal Investigation and the PwC Internal Governance Review be 'managed' or 'contained'(?)
  - Accountability Concern (7): will the findings be subject to independent checking and verification?
  - Accountability Concern (8): is there a contingent threat of prosecution if false or misleading statements were to be published about the internal reviews?
  - Accountability Concern (9): the value of the internal reviews will much depend on the sanctions imposed and the remedies applied as a result;
  - Accountability Concern (10): scapegoating is a risk.

Some of these Accountability Concerns have arisen already. Others are potential. All are discussed in Part C below. That discussion includes comments on the implications for each Accountability Concern of the spin-off by PwC Australia of its consulting business (**PwC Spin-Off**) on 1 July 2023.<sup>7</sup>

<sup>7</sup> 'PwC finalises \$1 sale of its government business to Allegro', SMH 4 July 2023. For background see 'PwC Australia appoints new CEO Kevin Burrowes; intent to divest Government Business to Allegro Funds', PwC Australia, 25 June 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-appoints-new-ceo-kevin-burrowes-intent-to-divest-government-business-to-allegro-funds.html>; 'Bell tolls: PwC global takes over', AFR, 26 June 2023, 1; 'PwC split could change firms forever', AFR, 26 June 2023, 48; 'PwC finalises \$1 sale of its government business to Allegro', SMH 4 July 2023.

5. Internal investigations and reviews are a prevalent means of organizational self-regulation. Part B below gives background.
6. Part D concludes by looking ahead. The PwC internal reviews are black 'holes in a galaxy of public, government and private responses to the PwC Tax Leak Scandal.
7. 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 of internal investigations and reviews**

8. Internal investigations and reviews developed in the industrial and pre-industrial world as a tool of organisational self-regulation.<sup>8</sup> They have become increasingly common. They differ widely in numerous respects, namely: 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'.<sup>9</sup>
9. 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<sup>10</sup> 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

<sup>8</sup> See WB Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 6 Adel LR 361, 383-385.

<sup>9</sup> One 'self-cleaning' solvent is S Arrowsmith, H Priess, & P Friton, 'Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?' (2009) 18 Public Procurement Law Review 257.

<sup>10</sup> *Corporations Act 2001* (Cth) s 180.

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'.<sup>11</sup>

10. 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,<sup>12</sup> APRA,<sup>13</sup> AMCA,<sup>14</sup> licensing and gaming authorities,<sup>15</sup> and royal

<sup>11</sup> See eg John C Coffee, Jr, *Gatekeepers: The Professions and Corporate Governance* (OUP, 2006); J C Coffee, Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, 2020); J Braithwaite, *Macrocriminology and Freedom* (ANU Press, 2022) ch 9; B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (CUP, 1993); B Fisse & J Braithwaite, *The Impact of Publicity of Corporate Offenders* (SUNY Press, 1983); P Gottschalk, *The Convenience of Corporate Crime* (De Gruyter, 2023) chs 3-13; D Gentilin, *The Origins of Ethical Failures: Lessons for Leaders* (Routledge, 2016); MH Bazerman, *Complicit: How We Enable the Unethical and How to Stop* (Princeton UP, 2022); J O'Brien & G Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart, 2013); BF McNeil, BD Brian & L Demsky (eds), *Internal Corporate Investigations* (ABA, 4<sup>th</sup> ed, 2018); CD Shearing & PS Stenning (eds), *Private Policing* (Sage, 1987); JC Wolff, 'Voluntary Disclosure Programs' (1979) 47 Fordham LR 1057; ICLG, 'Corporate Investigations Laws and Regulations 2023', 16 January 2023, at: <https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations>; Gilbert +Tobin, 'ICLG - Corporate Investigations 2023', 17 January 2023, at: <https://www.gtlaw.com.au/knowledge/iclg-corporate-investigations>; Jones Day, 'Corporate internal investigations best practices, pitfalls to avoid' (2013) at: <https://www.jonesday.com/-/media/files/publications/2013/01/corporate-internal-investigations-best-practices-p/files/corporate-internal-investigations-best-practices-p/fileattachment/cii-best-practices-pitfalls-to-avoid2.pdf>; AFP, *Corporate Cooperation Guidance* (2021) at: <https://www.afp.gov.au/sites/default/files/PDF/AFPCorporateCooperationGuidance.pdf>.

<sup>12</sup> See further 'Voluntary Disclosure Programs'.

<sup>13</sup> Eg, TPB, 'Peter-John Collins', 23 December 2022, at: <https://www.tpb.gov.au/tax-practitioner/tax-agent/39805002>.

<sup>14</sup> ACMA is empowered to issue remedial directions under the *Broadcasting Services Act 1992*, *Interactive Gambling Act 2001*, *Radiocommunications Act 1992*, *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. ACMA typically requires that the entity in breach appoints an independent auditor to conduct a root cause analysis of the issue that caused that breach. Failure to appoint a qualified independent auditor is a breach of the remedial direction. The breaching entity must report progress against the recommendations in the audit report. See ACMA, 'Regulatory guide No 4: Remedial directions', Issued August 2011, Updated February 29023; Direction in relation to subsections 14(3) and 15(1) of the *Telecommunications Service Providers (NBN Service Migration) Determination 2018*, 9 June 2021.

<sup>15</sup> 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](https://www.sec.gov/Archives/edgar/data/833029/000110465904010032/a04-3790_16k.htm).

commissions and other special commissions of inquiry.<sup>16</sup>

### Examples of Internal investigations and reviews

11. 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.<sup>17</sup> 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 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:<sup>18</sup>

[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.<sup>19</sup> 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.

12. 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.<sup>20</sup> Public outrage prompted the board of directors to conduct a review of the company's heritage management processes. The board's report,

<sup>16</sup> Eg, State of Victoria, Royal Commission into the Casino Operator and Licence, *Report*, October 2021.

<sup>17</sup> Eg, Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, 1 February 2019.

<sup>18</sup> (1981) 79 Michigan Law Review 387, 430-431.

<sup>19</sup> John J McCloy, *The Great Oil Spill: The Inside Report, Gulf Oil's Bribery and Political Chicanery* (Chelsea House Publishers, 1976).

<sup>20</sup> The summary here relies heavily on the account in T Bowley & JG Hill, 'The Global ESG Stewardship Ecosystem', EGLI, Law Working Paper N° 660/2022, October 2022, 19-23.

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.

13. 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.<sup>21</sup> The CEO and Chairman of the board resigned when the scandal emerged. NAB then commissioned a review by PwC Australia.<sup>22</sup> 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.<sup>23</sup> 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<sup>24</sup> 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.<sup>25</sup>
- A wages panel, headed by former ACCC chairman Professor Allan Fels, was established to assess workers' entitlements following

<sup>21</sup> See 'Heads roll at NAB over foreign exchange scandal', SMH, 12 March 2004.

<sup>22</sup> See 'Heads roll at NAB over foreign exchange scandal', SMH, 12 March 2004.

<sup>23</sup> PwC Australia, *Investigation into foreign exchange trading losses at the National Australia Bank*, 12 March 2004, US SEC, Form 6-K, at: [https://www.sec.gov/Archives/edgar/data/833029/000110465904007304/a04-3429\\_16k.htm](https://www.sec.gov/Archives/edgar/data/833029/000110465904007304/a04-3429_16k.htm).

<sup>24</sup> 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](https://www.sec.gov/Archives/edgar/data/833029/000110465904010032/a04-3790_16k.htm).

<sup>25</sup> 'Show us draft PwC report, says Walter', SMH 28 April 2004; Documents provided to House Economics Committee by Mrs Catherine Walter AM, at: [https://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=efpa/apra04/subs/sub1.pdf](https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=efpa/apra04/subs/sub1.pdf).



revelations that 7-Eleven was underpaying many employees.<sup>26</sup> The panel was later dumped. Professor Fels said that the panel was sacked.<sup>27</sup> 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’.<sup>28</sup>

### **Criteria for assessing internal investigations and reviews**

14. In terms of accountability, what makes a good or bad internal investigation or 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.<sup>29</sup> Also relevant are the criteria applied by leading enforcement agencies when considering internal reviews and voluntary disclosures by corporations.<sup>30</sup> The criteria published by the AFP and the United States Attorneys’ Offices are set out below.

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

15. The AFP published *Corporate Cooperation Guidance* in 2021.<sup>31</sup> 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.

16. 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

<sup>26</sup> ‘7-Eleven: Former ACCC chairman Allan Fels hits out after wages panel dropped’, ABC News, 12 May 2016.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> 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.

<sup>30</sup> Note also the requirement of full, frank and truthful disclosure under paragraph 23(f) of the ACCC immunity and cooperation policy for cartel conduct.

<sup>31</sup> At:

<https://www.afp.gov.au/sites/default/files/PDF/AFPCorporateCooperationGuidance.pdf>.

enforceable rights, expectations or liabilities.

17. 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).<sup>32</sup> Nor is it clear whether the findings and 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.<sup>33</sup> 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.
18. 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.
19. 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

<sup>32</sup> See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (CUP, 2011), 223-224; B Fisse, 'Alleged misuse of confidential ATO information by PwC Australia – Possible Enforcement Responses', 19 May 2023, [14], at:

<https://brentfisse.com/wp-content/uploads/2023/05/Alleged-Misuse-of-Confidential-ATO-Information-by-PwC-Australia-Possible-Enforcement-Responses-19-May-2023.pdf>. The contention in 'Sukkar dismisses calls to sanction PwC over leaking scandal', AFR, 24 January 2023, is unpersuasive: there are cogent policy reasons for having corporate liability as well as individual liability; see *Corporations, Crime and Accountability*, 31-50. Incorporated entities within the PwC group are subject to corporate liability for offences and breaches of civil penalty provisions but incorporated entities do not appear to have been at the root of the PwC Tax Leak Scandal.

<sup>33</sup> 'PwC tax leaks scandal referred to Federal Police', AFR, 24 May 2023; 'PwC leaks scandal referred to police', AFR, 25 May 2023, 1. See earlier, 'AFP "should investigate" PwC leaks', AFR, 18 May 2023.

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.’<sup>34</sup>

20. 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
- 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

<sup>34</sup> *AFP Corporation Cooperation Guidance*, [3].

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).
- 21. 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.<sup>35</sup>
- 22. The *AFP 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.
- 23. Is the PwC Internal Investigation consistent with the *AFP 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 *Corporation Cooperation Guidance*)? See the discussion in Part C, Accountability Concern (1).
- (b) United States Attorneys' Offices Voluntary Self-Disclosure Policy (2023)**
- 24. The *AFP Corporation Cooperation Guidance* states that the approach taken is like that that taken by the AFP's international counterparts (paragraph 9).

<sup>35</sup> Id, [10].

25. The United States Attorneys' Offices Voluntary Self-Disclosure Policy (USAO VSD Policy)<sup>36</sup> is one example. The Standards of voluntary self-disclosure under that Policy are:

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

<sup>36</sup>

At: [https://www.justice.gov/d9/2023-03/usao\\_voluntary\\_self-disclosure\\_policy\\_0\\_1.pdf](https://www.justice.gov/d9/2023-03/usao_voluntary_self-disclosure_policy_0_1.pdf).

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.

26. 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, Accountability Concern (1).

### **C Accountability Concerns About the PwC Internal Investigation and the PwC Internal Governance Review**

27. 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
28. 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 PwC Tax Leak Scandal.<sup>37</sup> 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.

#### **Accountability Concern (1) – Too little too late**

29. The first Accountability Concern is that PwC Australia did too little too late. That is recognised in the PwC Open Letter.<sup>38</sup> It has also been lanced in

<sup>37</sup> 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.

<sup>38</sup> At: <https://www.pwc.com.au/media/2023/open-letter-from-pwc-australia-acting-ceo-kristin-stubbins-230529.html>.

the media, as in this piece:<sup>39</sup>

It's hard to go past PwC for a showcase example of how an internal problem can become a spectacular public relations disaster if it continues to be badly handled rather than cauterised.

30. 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 much earlier when PwC Australia initially had reason to suspect that misconduct had occurred.<sup>40</sup>
31. The Senate Finance and Public Administration References Committee was struck particularly by: 'the incorrect application of legal professional privilege to tens of thousands of potentially incriminating documents'; and 'the conspicuous failure to report a serious breach of confidentiality when PwC had a legal obligation to do so [under the *Tax Agent Services Act 2009*]'.<sup>41</sup> The Committee concluded that 'PwC engaged in a deliberate strategy over many years to cover up the breach of confidentiality and the plan by PwC personnel to monetise it'.<sup>42</sup>
32. The delay by PwC Australia in acting 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.
33. 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.<sup>43</sup> Robert Keeling, a Partner of Sidley

<sup>39</sup> 'It's hard to buy into PwC's repair efforts', AFR, 27 June 2023, 2.

<sup>40</sup> See *PwC: A calculated breach of trust*, [1.42]-[1.45], [1.75], [1.77]-[1.78], [1.81], [1.86]; 'No way to manage a crisis', AFR, 20-21 May 2023, 15. See also 'PwC's cultural straitjacket', AFR, 20-21 May 2023, 14; 'Partners fear firm descending into civil war', AFR, 29 May 2023, 4; 'PwC Should Face Consequences For Brazen Breach Of Trust', B& T Magazine, 7 June 2023, at: <https://www.bandt.com.au/pwc-should-face-consequences-for-brazen-breach-of-trust/>; 'More than PR clichés', Spectator, 17 June 2023, at: <https://www.spectator.com.au/2023/06/more-than-pr-cliches/>; 'PwC brings in lawyers amid tax crisis probe', The Australian, 20 June 2023, 13; 'It's hard to buy into PwC's repair efforts', AFR, 27 June 2023, 2; 'The Great Unravelling', AFR, 1-2 July 2023, 22; 'PwC's irrepressible altruism', AFR, 3 July 2023, 40; 'Labor slams PwC on conflict scandal', The Australian, 3 July 2023, 2; 'The "Departing Dozen" walk the PwC plank', SMH, 3 July 2023.

<sup>41</sup> *PwC: A calculated breach of trust*, [1.79]-[1.82].

<sup>42</sup> *PwC: A calculated breach of trust*, [1.81].

<sup>43</sup> A principle endorsed by PwC itself: 'Our dedicated US team with typical response time of minutes/hours can help you determine facts quickly and

Austin in the Washington DC office, has expressed that standard principle in this way:<sup>44</sup>

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.

34. 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.
35. The PwC Spin-Off cannot cure the delay that has occurred in the internal review process at PwC Australia. Nor will it thwart independent inquiry into the PwC Tax Leak Scandal. Inquiries by two committees of the Parliament of Australia will press on. The AFP investigation will continue. In terms of PwC's rational self-interest, delay in managing the scandal has led to a fire sale for \$1.<sup>45</sup> Contrast the orderly creation of the Accenture consulting business by Arthur Andersen well before Arthur Andersen was driven out of business after the Enron scandal.<sup>46</sup>
36. PwC Australia announced on 3 July 2023 that 'eight partners have exited or are in the process of being removed from the partnership' as a result of findings made in an internal investigation (**PwC Eight Exiting Partners Announcement**).<sup>47</sup> These eight partners are in addition to four former

accurately', at: <https://www.pwc.com/us/en/services/consulting/cybersecurity-risk-regulatory/forensics/internal-and-external-investigations.html>.

<sup>44</sup> 'Corporate Internal Investigations' (2017) at: <https://www.sidley.com/en/insights/publications/2017/12/corporate-internal-investigations>.

<sup>45</sup> See 'Bell tolls: PwC global takes over', AFR, 26 June 2023, 1.

<sup>46</sup> See 'Arthur Andersen: An Accounting Confidence Crisis', Auburn University, at: <https://harbert.auburn.edu/binaries/documents/center-for-ethical-organizational-cultures/cases/arthur-anderson.pdf>.

<sup>47</sup> 'PwC Australia exits eight partners for professional or governance breaches', PwC Australia, 3 July 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html>;



partners who were previously named by PwC Australia as being involved in confidentiality breaches. The PwC Eight Exiting Partners Announcement states that it has ‘reached conclusions in its investigation into the handling of confidential Treasury information and past failures in professional, ethical or leadership responsibilities’ and that ‘whilst further work in some areas remains ongoing, these conclusions are an important milestone’. The overtures quoted in the last sentence are fine-sounding. Will they have much impact?<sup>48</sup>

### **Accountability Concern (2) – Terms of reference are not public**

37. 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.<sup>49</sup> The general scope of the internal reviews has been indicated, but few details have been given.
38. This lack of transparency does not inspire confidence that the internal reviews will fully examine and uphold internal accountability at PwC Australia for the PwC Tax Leak Scandal in a transparent way.
39. The PwC Internal Investigation is an internal investigation ‘into who may have shared or misused confidential information in connection with these matters’.<sup>50</sup> 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 to be interviewed?
40. The PwC Internal Governance Review is ‘an independent review of the firm’s governance, accountability and culture’.<sup>51</sup> This statement does not

‘PwC Australia removes multiple partners, including former chief executive Tom Seymour, over tax leak scandal’, ABC News, 3 July 2023; ‘PwC names eight partners involved in tax scandal’, AFR, 4 July 2023, 3..

<sup>48</sup> Consider eg “A painful extraction”: Labor Senator Deborah O’Neill slams PwC as more staff depart over tax leaks scandal’, Sky News Australia, 3 July 2023; ‘The “Departing Dozen” walk the PwC plank’, SMH, 3 July 2023.

<sup>49</sup> See ‘PwC caught hiding terms of secret “review”’, The Klaxon, 23 June 2023.  
<sup>50</sup> PwC Open Letter.

<sup>51</sup> PwC Open Letter.

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,<sup>52</sup> 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 will 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.<sup>53</sup>

41. 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.<sup>54</sup> The investigation, by a panel of independent investigators, relates to allegations of inappropriate conduct by the 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

<sup>52</sup> See *PwC: A calculated breach of trust*, [1.66]; '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.

<sup>53</sup> See 'Alleged misuse of confidential ATO information by PwC Australia – Possible Enforcement Responses', [24]; L Ribstein, *The Rise of the Uncorporation* (OUP, 2009); S Kells, 'Irresistible logic is behind imminent splits in the big four accounting and audit firms', *The Mandarin*, 1 August 2022, at: <https://www.themandarin.com.au/195974-irresistible-logic-is-behind-imminent-splits-in-the-big-four-accounting-and-audit-firms/>; M Cohen, 'Why The Big Four Should Adopt A Corporate Structure', *Forbes*, 5 July 2022, at: <https://www.forbes.com/sites/markcohen1/2022/07/05/why-the-big-four-should-adopt-a-corporate-structure/amp/>; 'Big four consulting firms use partnership structure to avoid scrutiny', AFR, 11 December 2019. An inquiry into this and related questions has been announced: Parliament of Australia, Joint Committee on Corporations and Financial Services, 'Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry', at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/ConsultancyFirms](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/ConsultancyFirms); 'PwC tax leaks trigger new inquiry into big four partnerships', AFR, 23 June 2023.

<sup>54</sup> AFL, 'Terms of Reference for Independent Investigation of Allegations of Inappropriate Treatment of Hawthorn Football Club Players and their Families', 21 October 2022, at: <https://resources.afl.com.au/afl/document/2022/10/20/ec26c687-76c6-4f64-b88a-bde3592df7ba/221020-Terms-of-Reference-and-Process-Plan-FINAL.pdf>.

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.<sup>55</sup>

42. The PwC Spin-Off compounds the uncertainty surrounding the terms of reference of the PwC Internal Investigation and the PwC Internal Governance Review. Have the terms of the reference changed as a result of the PwC Spin-Off? For example, have the terms of reference for the PwC Internal Governance Review been changed to exclude examination of past and present governance questions about the consulting arm of the business that is to be sold?

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

43. 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.<sup>56</sup>
44. 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.<sup>57</sup> 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.<sup>58</sup>
45. The internal reviews by PwC Australia are not subject to the control and

<sup>55</sup> ‘Hawthorn AFL racism complainants reveal themselves in open letter’, The Guardian, 2 June 2023, at: <https://www.theguardian.com/sport/2023/jun/02/hawthorn-afl-racism-complainants-reveal-themselves-in-open-letter>.

<sup>56</sup> Independence is also a different quality from that of *accuracy*: see KH Michels, ‘Internal Corporate Investigations and the Truth’ (2009) 40 Seton Hall LR 83.

<sup>57</sup> *The Great Oil Spill*, as discussed in Part B above.

<sup>58</sup> Discussed in *The Impact of Publicity on Corporate Offenders*, ch 6.

direction of an enforcement agency or the Government. If they were, less 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).<sup>59</sup> 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.

46. 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).<sup>60</sup> 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.
47. 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

<sup>59</sup> ACMA, Investigation report, infringement notice and enforceable undertaking: Commonwealth Bank of Australia - June 2023, at: <https://www.acma.gov.au/publications/2023-06/report/investigation-report-infringement-notice-and-enforceable-undertaking-commonwealth-bank-australia-june-2023>.

<sup>60</sup> At: <https://www.justice.gov/criminal-fraud/file/1100366/download>.

engagement contract between PwC Australia and Dr Switowski.

48. 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.
49. An additional element of external review has been added by the involvement of Allegro in the PwC Spin-Off. Presumably Allegro has carried out a due diligence inquiry. However, Allegro is not unconflicted given the interest it has as a buyer and as an investor in a corporation that would enter into consulting contracts with the Commonwealth and State and Territorial governments. Moreover, Allegro's due diligence inquiry would have been focused on the consulting arm of PwC Australia, not PwC Australia's other business, which is much larger. Ultimately, whatever may be said in Allegro's due diligence report, presumably disclosure of that report to governments or the public would be resisted by Allegro and PwC Australia unless disclosure were compelled by law.

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

50. 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
51. 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.<sup>61</sup>
52. 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

<sup>61</sup> "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.

has said that it will cooperate with the further investigation by the Tax Practitioners Board that is underway.<sup>62</sup> 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?<sup>63</sup>

53. Accordingly, the Senate Finance and Public Administration References Committee has recommended that:<sup>64</sup>

PwC cooperate fully and openly with all investigations and inquiries into this matter, including the investigations by the Australian Federal Police and the Tax Practitioners Board. (Recommendation 1)

PwC be open and honest with the Australian Parliament and people, and with the international community, by promptly publishing accurate and detailed information about the involvement of PwC partners and personnel (including names and positions) in the matters canvassed in this report. (Recommendation 2)

54. The PwC Spin-Off does not seem likely to change Accountability Concern (4) in relation to PwC Australia's non-consulting activities. However, it may have a negative impact on disclosure relating to the conduct of partners and employees who move over to the new Allegro consulting entity. Depending on the provisions of the sale agreement between PwC Australia and Allegro, PwC Australia may have no control over what is disclosed by Allegro or the new consulting corporation in relation to the conduct of those partners and employees.
55. The PwC Eight Exiting Partners Announcement<sup>65</sup> states that 'the firm is committed to working cooperatively with all relevant regulatory bodies'. It remains to be seen how full the cooperation will be.

<sup>62</sup> 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.

<sup>63</sup> 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.:

<sup>64</sup> *PwC: A calculated breach of trust*, [1.116]-[1.117];

<sup>65</sup> 'PwC Australia exits eight partners for professional or governance breaches', PwC Australia, 3 July 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html>.

**Accountability Concern (5) – 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**

56. 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.
57. PwC Australia has been criticised by the ATO and now by the Senate Finance and Public Administration References Committee for using legal professional privilege to hinder inquiries by the ATO.<sup>66</sup> 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.
58. 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.<sup>67</sup>
59. 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

<sup>66</sup> *PwC: A calculated breach of trust*, [1.76]; 'PwC scandal drives rethink of privilege rules', AFR, 2 June 2023, 29; 'Global giant faces loss of confidence', SMH, News Review, 3 June 2023, 26-27.

<sup>67</sup> [2022] FCA 278. See further Clayton Utz, 'Privilege and multidisciplinary partnerships: Federal Court hands down critical privilege guidance', 14 April 2022, at: <https://www.claytonutz.com/knowledge/2022/april/privilege-and-multidisciplinary-partnerships-federal-court-hands-down-critical-privilege-guidance>. On waiver of legal professional privilege, see *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208.

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.
60. 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.
61. The PwC Spin-Off does not seem likely to change the position as regards possible claims of legal professional privilege by PwC Australia in relation to PwC Australia’s non-consulting activities or pre-sale consulting activities. The due diligence inquiry by Allegro in relation to PwC Australia’s consulting activities may be subject to a claim of privilege by Allegro, and/or a claim of joint privilege by Allegro and PwC Australia.
62. The PwC Eight Exiting Partners Announcement<sup>68</sup> states that ‘the firm is committed to working cooperatively with all relevant regulatory bodies’. It remains to be seen what that will mean in relation to possible claims of legal professional privilege.

**Accountability Concern (6) – Risk that the PwC Internal Investigation and PwC Internal Governance might be ‘managed’ or ‘contained’**

63. There is a risk that the PwC Internal Investigation and the PwC Internal Governance Review might be ‘managed’ or ‘contained’. Persons who face the possibility of being held accountable have an incentive to avoid detection or put obstacles in the way.<sup>69</sup> Lawyers usually act in what they

<sup>68</sup> ‘PwC Australia exits eight partners for professional or governance breaches’, PwC Australia, 3 July 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html>.

<sup>69</sup> See further M Baer, ‘When the corporation investigates itself’, in J Arlen (ed), *Research Handbook on Corporate Crime and Financial Misdealing* (Edward Elgar, 2028) ch 13; A Jordanoska, ‘Regulatory Enforcement Against Organizational Insiders: Interactions in the Pursuit of Individual Accountability’ (2021) 15(2) *Regulation & Governance* 298.



perceive to be the best interest of their clients.

64. 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.<sup>70</sup> That is not sinister. Such guidance is understandable and often given by law firms and consulting firms.
65. The main hazard is that persons in danger of being held accountable may strive to protect themselves, as by giving misleading information or issuing half-truths, refusing to cooperate, or leaving the firm.<sup>71</sup>
66. 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 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.<sup>72</sup>
67. Various possible delaying tactics are conceivable, including giving persons subject to investigation 'Rolls Royce' natural justice and other rights.<sup>73</sup> However, it is difficult to see how delaying tactics would be in PwC Australia's rational self-interest.
68. The PwC Spin-Off is likely to 'contain' the extent to which the PwC Internal Investigation and the PwC Internal Governance Review relate to pre-sale

<sup>70</sup> At: <https://www.pwc.com/us/en/services/consulting/cybersecurity-risk-regulatory/library/forensics-today.html>.

<sup>71</sup> 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.

<sup>72</sup> 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).

<sup>73</sup> Concern has been expressed in the USA about the rights of employees in corporate crime investigations: see e.g. LK Griffin, 'Compelled Cooperation and the New Corporate Criminal Procedure' (2007) 82 NYULR 311; SW Buell, 'Criminal Procedure Within the Firm' (2007) 59 Stanford LR 1613; B Garrett, 'Corporate Confessions' (2008) 30 Cardozo LR 917.

activities of the consulting arm of the business. Control of the consulting activities will pass to a new corporation to be formed by Allegro. It is unclear whether the Executive Board of PwC Australia will have any ongoing influence over the new consulting corporation. It is also unclear to what extent there will be transitional services and other contracts between PwC Australia and the new consulting corporation. What degree of control could be exercised through them?

### **Accountability Concern (7) – Independent checking and verification of findings?**

69. 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.<sup>74</sup>
70. First, the compulsory information-gathering power of ASIC under s 13(1) of the *Australian Securities and Investment Commission Act 2001* (Cth) apply to the matters specified, including investigations that ASIC thinks to be expedient for the due administration of the corporations legislation. ASIC is examining possible professional misconduct by authorised representatives of an AFS licensee, PricewaterhouseCoopers Securities Limited. That examination is limited to financial service conduct under the AFS licence scheme<sup>75</sup> and does not extend more widely to all conduct within the scope of the PwC Internal Investigation and the PwC Internal Governance Review.

<sup>74</sup> Other types of contingent threat include adverse publicity and action by the Accounting Professional and Ethical Standards Board. As to the former, see eg, 'Super funds' boycott of PwC grows', AFR 13 June 2023, 3. As to the latter, see 'Ethics board declares PwC tax case a "breach of standards"', Accountants Daily, 8 June 2023, at: <https://www.accountantsdaily.com.au/regulation/18634-ethics-board-declares-pwc-tax-case-a-breach-of-standards>.

<sup>75</sup> See *Corporations Act 2001* (Cth) s 912A(1); ASIC, Regulatory Guide 104, AFS licensing: Meeting the general obligations, June 2022. The limited scope of the AFS licence scheme is illustrated by 'ASIC spares PwC financial services licence', *The Australian*, 28 June 2023, 15.

71. 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 Law (eg misleading conduct under s 18, unconscionability under s 21, misleading representation under s 29) are at most peripheral to the PwC Tax Leak Scandal.
72. Thirdly, the powers of the National Anti-Corruption Commission (NACC) 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?

73. The PwC Internal Investigation and the PwC Internal Governance are directed at conduct on behalf of PwC Australia. If the NACC decides to intervene, its scrutiny would be limited to 'corrupt conduct' as defined in the *National Anti-Corruption Commission Act 2022*. In relation to conduct by PwC Australia, scrutiny would be limited to conduct that adversely affects, or could adversely affect, 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. The honesty or impartiality of persons dealing with public officials is not the direct focus. (In my view, partners or employees of a firm acting as advisers to the Commonwealth are not 'public officials' within the narrow definition of a 'public official' in s 10(2) of the Act.)
74. 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. Another worthwhile requirement would be certification of adoption of and compliance with the Australian Public Service *Code of Conduct*.<sup>76</sup> The certifications 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.<sup>77</sup>

75. The proxies for checking and verification by an enforcement agency, as outlined above, could well be used in relation to the new consulting corporation created by the PwC Spin-off. For instance, the new consulting corporation could be required to provide an integrity report that sets out the connection with the PwC Tax Leak Scandal of any former partners, employees or agents of PwC Australia who are now engaged by the corporation. The integrity report would include a certification by the board of the new consulting corporations that the integrity report is full, frank and truthful. This and other desirable certifications (including certification of adoption of and compliance with the Australian Public Service *Code of Conduct*) would need to be structured 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.

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

76. 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

<sup>76</sup> *Public Service Act 1999* (Cth), s 13.

<sup>77</sup> Care would be needed to reflect the elements of the offence under s 137.1 of the Criminal Code (Cth).

or misleading statements about the internal reviews were to be published.

77. 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<sup>78</sup> would not come into play. Nor would offences of failing to comply with compulsory information-gathering notices be relevant.<sup>79</sup>
78. 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 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).<sup>80</sup>
79. 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:<sup>81</sup>

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.

<sup>78</sup> 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).

<sup>79</sup> Eg, *Competition and Consumer Act 2010* (Cth) s 155(5).

<sup>80</sup> *Australian Cartel Regulation*, 223-224.

<sup>81</sup> US DOJ, 'U.S. Department of Justice Resolves 2019 Deferred Prosecution Agreement Breaches with Ericsson', Press Release, 2 March 2023, at: <https://www.ericsson.com/en/press-releases/2023/3/u.s.-department-of-justice-resolves-2019-deferred-prosecution-agreement-breaches-with-ericsson>.

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.

80. As discussed in respect of Accountability Concern (7), proxy mechanisms could be deployed to help reduce Accountability Concern (8). Where PwC Australia is the contractor, a proxy mechanism would be a required certification that the findings of the PwC Internal Investigation and the PwC Internal Governance Review are full, frank and truthful. Where the contractor is the new consulting corporation created by the PwC Spin-Off, the corporation could be required to disclose and certify in an integrity report the exact connection with the PwC Tax Leak Scandal of any former partners, employees or agents of PwC Australia who are now engaged by the corporation. In both cases, an additional desirable certification would be that the contractor has adopted and complied with the Australian *Public Service Code of Conduct*. In both cases, the certifications required would need to be structured 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.

**Accountability Concern (9) – What sanctions and remedies will emerge as a result?**

81. 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.

82. The PwC Eight Exiting Partners Announcement<sup>82</sup> indicates that eight partners have exited or are in the process of being removed from the partnership' as a result of findings made in an internal investigation.<sup>83</sup> Does internal disciplinary action lie ahead for other partners? For employees?
83. PwC Australia's internal disciplinary power may be limited in relation to former partners or employees. Some persons who allegedly may have been implicated in the PwC Tax Leak Scandal, or have failed to prevent or respond to it promptly, have left PwC Australia or may do so as a result of the PwC Spin-Off.<sup>84</sup> Those persons may be beyond PwC Australia's effective disciplinary reach.<sup>85</sup> This raises the question of whether, as a matter of good governance, PwC Australia has a clawback or deferred remuneration mechanism for dealing with this problem.<sup>86</sup> If it does, what is the mechanism? Is it applicable to persons allegedly involved in the PwC Tax Leak Scandal? If so, has it been applied? If it has been applied, to whom?

<sup>82</sup> 'PwC Australia exits eight partners for professional or governance breaches', PwC Australia, 3 July 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html>.

<sup>83</sup> 'PwC Australia exits eight partners for professional or governance breaches', PwC Australia, 3 July 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html>.

<sup>84</sup> See 'Bell tolls: PwC global takes over', AFR, 26 June 2023, 1; 'PwC split could change firms forever', AFR, 26 June 2023, 48.

<sup>85</sup> Consider 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; 'PwC's victims pile up', AFR, 10-11 June 2023, 17, at: <https://www.afr.com/companies/professional-services/pwc-tax-leaks-scandal-gets-even-bloodier-20230609-p5dfab>.

<sup>86</sup> See further: Financial Accountability Regime Bill 2023 (Cth), Part 5; Deloitte, 'Banking Executive Accountability Regime', April 2019, 8-9, at: <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/audit/deloitte-au-audit-bear-reform-240419.pdf>; US SEC, 'Statement on Final Rules Regarding Clawbacks of Erroneously Awarded Compensation', 26 October 2022, at: <https://www.sec.gov/news/statement/gensler-statement-clawbacks-102622>; BA-Appiah & DS Sharma 'Determinants and Consequences of the Severity of Executive Compensation Clawbacks' (2022) 34 Contemporary Accounting Research 2409; M Ronald & JG Gulbenkian, 'The increasing spotlight on clawback and malus', Governance Directions, March 2020, 82; PwC, 'Executive Compensation: Clawbacks', January 2015, at: [http://www.pwc.com/en\\_US/us/hr-management/publications/assets/pwc-executive-compensation-clawbacks-2014.pdf](http://www.pwc.com/en_US/us/hr-management/publications/assets/pwc-executive-compensation-clawbacks-2014.pdf). Clawbacks are required as a remedy in some ASIC enforcement cases; see eg, *Australian Securities and Investment Commission v Port Philip Publishing Pty Ltd* [2019] FCA 1483; *Australian Securities and Investments Commission v National Australia Bank Limited* [2017] FCA 1338, [89].

84. Allegro reportedly will not allow anyone associated with the tax leaks scandal to come across to the new consulting company.<sup>87</sup> That would help to meet the concern expressed above in relation to persons who move over to the new consulting company. But how effective is Allegro's vetting process likely to be? The detailed findings of the PwC Internal Investigation have not been made public. If they are ever made public, will they be robust? How far will the findings extend to managers who did not see any emails but who may have failed in their management responsibilities? Is the vetting process too rushed to get to the truth with due process for those under the spotlight?<sup>88</sup>

### **Accountability Concern (10) – Scapegoating?**

85. The risk of scapegoating generally in internal reviews is notorious.<sup>89</sup> Scapegoating is often used in order to deflect blame and accountability from top management.

86. PwC stood down nine partners and named four partners as having seen relevant emails containing confidential ATO information.<sup>90</sup> The Senate Finance and Public Administration References Committee has wondered about the basis on which PwC decided to select the nine partners to put on leave and the four partners to name.<sup>91</sup> The Committee also commented on 'the widespread confusion caused by multiple versions of lists in circulation with the names of PwC partners and other personnel with alleged involvement in the use of confidential government information to gain new clients and assist existing PwC clients'.<sup>92</sup> Displeasure was expressed about the conduct of PwC Australia in a giving a list of 63 names to the Committee without indicating the extent to which each of the 63 named individuals were involved in the breach of confidentiality and

<sup>87</sup> 'PwC to post higher FY23 revenue as firm grapples with tax leak crisis', AFR, 28 June 2023, 35.

<sup>88</sup> See further "'Grossly inadequate": group claiming to be PwC partners ridicule firm's response to tax scandal', The Guardian, 28 June 2023.

<sup>89</sup> *Corporations, Crime and Accountability*, 153, 183-184; M Catino, *Scapegoating: How Organizations Assign Blame* (CUP, 2023); 'ASIC case exposes Star's blame game', AFR, 14 December 2022, 29.

<sup>90</sup> *PwC: A calculated breach of trust*, [1.66]. [1.68], [192]-[1.93]; 'PwC outs four who saw tax leak emails', AFR 6 June 2023, 3; 'Tarred PwC partner breaks his silence', AFR, 9 June 2023, 40. See also 'PwC's victims pile up', AFR, 10-11 June 2023, 17.

<sup>91</sup> *PwC: A calculated breach of trust*, [1.95].

<sup>92</sup> *PwC: A calculated breach of trust*, [1.96].



the plan to monetise that information.<sup>93</sup> The Committee ‘considers the onus is on PwC to promptly publish accurate information about the involvement of PwC partners and personnel in the interest of the transparency and accountability it claims to be working towards’.<sup>94</sup>

87. The PwC Eight Exiting Partners Announcement<sup>95</sup> does not provide the extent or level of information wanted by the Senate Finance and Public Administration References Committee. A detailed report of internal accountability has been sought by the Committee. Such a report has yet to emerge and it is unclear whether one will ever emerge. The PwC Eight Exiting Partners Announcement has been criticised by Senator Deborah O’Neill (Australian Labor Party) for ‘obfuscation’, lack of detail, lack of transparency, and ‘dribbling out’ of information.<sup>96</sup> The Announcement has also been criticised in the Australian Financial Review Rear Window column.<sup>97</sup>
88. What safeguards are in place in PwC Australia’s internal reviews to help guard against scapegoating?
89. An Accountability Model is set out in *Corporations, Crime and Accountability* for wrongdoing by larger scale organisations.<sup>98</sup> The Accountability Model includes safeguards against scapegoating at the level of corporate internal discipline. The safeguards are essentially these:<sup>99</sup>
- (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;

<sup>93</sup> *PwC: A calculated breach of trust*, [1.97]-[1.98].

<sup>94</sup> *PwC: A calculated breach of trust*, [1.108].

<sup>95</sup> ‘PwC Australia exits eight partners for professional or governance breaches’, PwC Australia, 3 July 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html>.

<sup>96</sup> “A painful extraction”: Labor Senator Deborah O’Neill slams PwC as more staff depart over tax leaks scandal’, Sky News Australia, 3 July 2023. See also ‘The “Departing Dozen” walk the PwC plank’, SMH, 3 July 2023.

<sup>97</sup> ‘No one was at the wheel, says PwC’, AFR, 4 July 2023, 40.

<sup>98</sup> B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (CUP, 1993).  
<sup>99</sup> *Id.*, at 183.

- (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.
90. 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.<sup>100</sup>
91. 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.
92. 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:<sup>101</sup>
- 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.
93. What are the implications of the PwC Spin-Off for the risk of scapegoating in the wake of the PwC Tax Leak Scandal? Safeguards against scapegoating that may be adopted by PwC Australia will not apply to the new consulting corporation unless they are also adopted by that corporation. It is unclear what the new corporation will do about the risk

<sup>100</sup> Id, at 154.

<sup>101</sup> Id, at 183.

of scapegoating when vetting recruits from PwC Australia to exclude persons associated with the tax leak scandal. Is that vetting subject to due process?<sup>102</sup>

## **D Conclusion – looking ahead**

### **(1) Enron, PwC Australia internal reviews and Accountability Concerns**

94. Resolving the self-inflicted mess of the PwC Tax Leak Scandal will be difficult. The turnaround required is a test of commitment to re-building. Turnarounds are what consulting firms design and engineer.<sup>103</sup> They are spurred by the memory of Arthur Andersen,<sup>104</sup> one of the then Big Five at the time of death. Arthur Andersen was driven out of business after its role as Enron's auditor in the Enron scandal, partly as a result of being convicted for obstruction of justice for its conduct in shredding documentary evidence.<sup>105</sup> It should also be remembered that Accenture was created as a separate consulting business before the Enron scandal inflicted mortal damage on Arthur Andersen.
95. The internal reviews announced by PwC Australia in May 2023 have yet to be completed. Not much is known about them, to this day. They raise numerous concerns about accountability. Many other developments, including an interim report by the Senate Finance and Public Administration References Committee and the PwC Spin-Off, now affect how the internal reviews are likely to be received by the public and by governments.
96. Ten Accountability Concerns, discussed in Part C above, hinder the power of the PwC Internal Investigation and the PwC Internal Governance Review to restore stakeholder trust in PwC Australia. These internal reviews 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, including the PwC Eight Exiting Partners Announcement, raise

<sup>102</sup> Consider "'Grossly inadequate": group claiming to be PwC partners ridicule firm's response to tax scandal', *The Guardian*, 28 June 2023.

<sup>103</sup> See eg, 'Consultants will have the last laugh from EY fiasco', *Financial Times*, 17-18 June 2023, 9.

<sup>104</sup> See 'Will PwC's \$1 deal save the firm?', *ABC News*, 27 June 2023.

<sup>105</sup> See further L Fox, *Enron: The Rise and Fall* (Wiley, 2003), 302-305; *Corporate Crime and Punishment*, 15-20, 156-157; KF Brickey, 'Andersen's Fall from Grace' (2003) 81 *Washington ULQ* 917. Will PwC's \$1 deal save the firm?

more questions about accountability than they answer (Accountability Concerns (3)-(10)).

## (2) Inquiries by committees of the Parliament of Australia

97. Two committees of the Parliament of Australia are conducting inquiries into the PwC Tax Leak Scandal. The Senate Finance and Public Administration References Committee has issued an interim report, *PwC: A calculated breach of trust* (June 2023) and the time for providing a final report has been extended to 30 November 2023.<sup>106</sup> Another inquiry, on Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry, was referred to the Parliamentary Joint Committee on Corporations and Financial Services on 22 June 2023.<sup>107</sup> The Committee intends to report to the Parliament by mid-2024.
98. The interim report of the Senate Finance and Public Administration References Committee has thrown down these gauntlets:

[W]hen is PwC going to come clean and begin to do the right thing?

<sup>108</sup>

[!]s PwC's internal culture so poor that its senior leadership does not recognise right from wrong, and lacks the capacity to act in an honest, open, and straightforward manner?<sup>109</sup>

## (3) AFP investigation

99. The AFP is conducting a criminal investigation into the improper use of Commonwealth confidential information. The statement by Treasury about the referral of the matter to the AFP is not limited to the conduct of Mr Collins but refers also to 'the wide range of individuals within PwC who were directly and indirectly privy to the confidential information'.<sup>110</sup> The

<sup>106</sup> At: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Consultingservices](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Consultingservices).

<sup>107</sup> At: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/ConsultancyFirms](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/ConsultancyFirms). See further 'PwC tax leaks trigger new "big four" inquiry', AFR, 23 June, 6.

<sup>108</sup> *PwC: A calculated breach of trust*, [1.110].

<sup>109</sup> *PwC: A calculated breach of trust*, [1.111].

<sup>110</sup> 'Referral to the Australian Federal Police of the PwC-Collins matter', Treasury, 24 May 2023, at: <https://treasury.gov.au/media-release/referral-australian-federal-police-pwc-collins-matter>.

timing of that investigation is indefinite. The scope of the investigation is fuzzy.

**(4) ASIC on sideline, about to become square leg umpire when new consulting corporation goes in to bat**

100. ASIC is looking at possible regulatory action for professional misconduct against Mr Collins and 160 other PwC personnel who are or were authorised representatives of an AFS licensee, PricewaterhouseCoopers Securities.<sup>111</sup> However, the AFS licence scheme is limited to financial service activities and may not apply.<sup>112</sup> In any event, liability for breach of the AFS licence scheme would not go to the heart of the PwC Tax Leak Scandal; it would be a form of sidewinder liability.<sup>113</sup>
101. The new consulting corporation created by the PwC Spin-Off will be subject to the *Corporations Act* and hence to ASIC's powers under the *ASIC Act*.

**(5) The PwC Spin-Off**

102. The PwC Spin-Off to create a new consulting corporation was announced on 25 June 2023.<sup>114</sup> The announcement followed speculation in the media.<sup>115</sup> and an earlier PwC Australia proposal to 'ring-fence' its consulting business.<sup>116</sup> The deal was signed on 1 July 2023.<sup>117</sup>
103. The new consulting corporation cannot realistically be described as a 'cleanskin'. The questionable culture underlying the PwC Tax Leak Scandal cannot be erased by a buzz word. A change in organisational form or a new brand is not a demonstrated change in culture.<sup>118</sup> Allegro

<sup>111</sup> 'Regulator considers ban on Collins and up to 160 staff', AFR, 23 June 2023, 10.

<sup>112</sup> Already, see 'ASIC spares PwC financial services licence', The Australian, 28 June 2023, 15.

<sup>113</sup> See *Australian Cartel Regulation*, 6.7.

<sup>114</sup> 'PwC Australia appoints new CEO Kevin Burrowes; intent to divest Government Business to Allegro Funds', PwC Australia, 25 June 2023, at: <https://www.pwc.com.au/media/2023/pwc-australia-appoints-new-ceo-kevin-burrowes-intent-to-divest-government-business-to-allegro-funds.html>.

<sup>115</sup> Eg, 'PwC to sell tainted government division', AFR 24-25 June 2023, 1; 'PwC Australia in talks to spin off units damaged by scandal – source'; Reuters, 23 June 2023.

<sup>116</sup> PwC Open Letter; 'Project Bell: how PwC's survival attempt evolved', AFR, 26 June 2023, 12.

<sup>117</sup> 'PwC finalises \$1 sale of its government business to Allegro', SMH 4 July 2023.

<sup>118</sup> See 'PwC Australia asset sale unlikely to solve firm's tarnished reputation', Reuters, 27 June 2023; 'PwC partners step up calls for reform and leadership

reportedly proposes to ‘reset’ the corporate governance standards at the new corporation.<sup>119</sup> Some external directors will be appointed to the board of directors.<sup>120</sup>

104. The PwC Spin-Off is not without risk. One uncertainty is the possible risk that the new consulting corporation might not be able to get sufficient business from governments and other targeted sectors.<sup>121</sup> Another is whether enough PwC Australia partners and staff will be prepared to move to the new consulting corporation.<sup>122</sup>
105. The PwC Spin-Off does not resolve the Accountability Concerns discussed in Part C above. Explanations are given in relation to each of those Concerns.
106. The PwC Spin-Off may make the position about accountability worse in some possible respects:
- It is unclear whether the terms of reference for the PwC Internal Governance Review have been changed to exclude examination of past and present governance questions about the consulting arm of the business that is to be sold.<sup>123</sup> A ‘phoenix’ restructure?<sup>124</sup>
  - PwC Australia would lose power to take internal disciplinary action

purge’, SMH, 30 June 2023; ‘PwC’s failure to disclose Top Education Group conflict “completely unacceptable”, minister says’, ABC News, 28 June 2023. See further M Di Somma, ‘How 6 Factors Critically Influence the Effects of Corporate Scandals,’ (2018) at: <https://markdisomma.com/2017/07/25/6-factors-that-influence-the-effects-of-corporate-scandals/>.

<sup>119</sup> “Partnership buyout” as Bell deal shapes up’, AFR, 27 June 2023, 4.

<sup>120</sup> ‘PwC finalises \$1 sale of its government business to Allegro’, SMH 4 July 2023.

<sup>121</sup> See ‘PwC split could change firms forever’, AFR, 26 June 2023, 48; ‘Firm’s spin-off faces uphill battle to win over public sector agencies’, AFR, 27 June 2023, 4; ‘PwC’s failure to disclose Top Education Group conflict “completely unacceptable”, minister says’, ABC News, 28 June 2023; ‘PwC spin-off counting on census role’, AFR, 28 June 2023, 3; ‘PwC to front clients in next crisis step’, AFR, 4 July 2023, 30.

<sup>122</sup> See ‘PwC fire sale aims to save 1500 jobs’, AFR 27 June 2023, 1; “Grossly inadequate”: group claiming to be PwC partners ridicule firm’s response to tax scandal’, The Guardian, 28 June 2023; ‘PwC to post higher FY23 revenue as firm grapples with tax leak crisis’, AFR, 28 June 2023, 35; ‘PwC cuts partner pay and forces dozens out’, AFR, 29 June 2023; ‘Race to restore credibility’, The Australian, 29 June 2023, 21.

<sup>123</sup> See Accountability Concern (2) above.

<sup>124</sup> See ‘PwC Australia to sell government business for A\$1, appoint new CEO’, Reuters, 25 June 2023; ‘Inquiry chair rubbishes sale of PwC government business’, The Australian, 23 June 2023. A ‘phoenix’ restructure is not necessarily unlawful. See generally ASIC, ‘Illegal phoenix activity’, 31 October 2022, at: <https://asic.gov.au/for-business/small-business/closing-a-small-business/illegal-phoenix-activity/>.

against partners and employees after they join the new consulting corporation unless there is a clawback or deferred remuneration mechanism that would apply to those persons.<sup>125</sup>

**(6) Commonwealth Government at little risk of being out-flanked by the PwC Spin-Off**

107. The Commonwealth Government seems to be at little risk of being out-flanked by the PwC Spin-Off. The recommendations of the Senate Finance and Public Administration References Committee and the Parliamentary Joint Committee on Corporations and Financial Services will not be made until the end of November 2023 and mid-2024 respectively. However, a media report suggests that the new consulting corporation would be unlikely to get much work from the Commonwealth unless it is on the management advisory services panel.<sup>126</sup> The panel was closed in January 2023 and may not be re-opened until October 2025.<sup>127</sup> In any event, the Government has the whip hand. For instance, the Government could impose stringent integrity and other conditions on the new consulting corporation in contracts for Commonwealth work.

**(7) Corporations Act and ASIC Act will apply to new consulting corporation yet not to PwC Australia**

108. One positive aspect of the PwC Spin-off in terms of accountability is that the new consulting corporation will be subject to the corporate governance safeguards under the *Corporations Act 2001* (Cth) and ASIC's powers of investigation under the *Australian Securities and Investments Commission Act*.<sup>128</sup> However, currently there is no indication that PwC Australia will seize the opportunity for PwC Australia to move to a corporate structure under the *Corporations Act*.<sup>129</sup>

<sup>125</sup> See Accountability Concern (9) above.

<sup>126</sup> 'Firm's spin-off faces uphill battle to win over public sector agencies', AFR, 27 June 2023, 4.

<sup>127</sup> See 'Firm's spin-off faces uphill battle to win over public sector agencies', AFR, 27 June 2023, 4. The extent, if any, to which the Government is being lobbied to re-open the panel before October 2025 is unknown to the author. Such lobbying is possible and might work.

<sup>128</sup> See 'PwC restructure sets a platform for survival', AFR, 27 June 2023, 38.

<sup>129</sup> See the references at n 53 above. The editorial 'PwC restructure sets a platform for survival', AFR, 27 June 2023, 38, discusses the value of a corporate structure for the new consulting corporation but strangely neglects to say that PwC Australia should take the same path.

## **(8) Possible investigation by NACC**

109. A complaint about the PwC Tax Scandal has been made by Senator Barbara Pocock (the Greens Party) to the NACC.<sup>130</sup> If the NACC decides to act on this complaint, the inquiry will focus on ‘corrupt conduct’ as defined by the *National Anti-Corruption Commission Act 2022*.<sup>131</sup> It will not be an inquiry into the PwC Tax Leak Scandal generally or accountability concerns specifically.

## **(9) Government contracting**

110. This discussion paper does not address the question of whether PwC Australia should be subject to a possible ban for several years, or a deferred ban agreement akin to a deferred prosecution agreement. That question is discussed in an earlier discussion paper.<sup>132</sup>

111. The discussion here does not tackle the related question of whether the new consulting corporation created by the PwC Spin-Off should be subject to a possible ban for several years, or a deferred ban agreement akin to a deferred prosecution agreement. The slate of distrust cannot be erased by the magic wand of private equity restructure.<sup>133</sup>

112. 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,<sup>134</sup> the States and the Territories.<sup>135</sup> For instance, this paper does not discuss the possibility of the Commonwealth Government insisting, in an amendment to the Commonwealth Procurement Rules, that all contracts above a specified minimum value be entered into by a corporation, not by a partnership or trust.<sup>136</sup> Another

<sup>130</sup> ‘Greens refer PwC scandal to the NACC’, AFR, 3 July 2023, 10.

<sup>131</sup> *National Anti-Corruption Commission Act 2022* (Cth). s 8(1)(a)(i) and (ii).

<sup>132</sup> ‘Alleged misuse of confidential ATO information by PwC Australia – Possible Enforcement Responses’. Some polling shows widespread support for a ban of 2-5 years: ‘Polling: PwC & New Government Contracts’, The Australia Institute, 20 June 2023, at: <https://australiainstitute.org.au/report/polling-pwc-new-government-contracts/>.

<sup>133</sup> See (5) The PwC Spin-Off above.

<sup>134</sup> See eg, ‘Post-PwC rules to force suppliers into confessional’, AFR, 24 May 2023, 30; ‘PwC shut out of future contracts’, AFR 26 May 2023, 1; ‘PwC is now firmly in the Canberra contract doghouse’, AFR, 20 May 2023, 9.

<sup>135</sup> See eg, ‘NSW government temporarily bans all PwC work on tax projects’, 15 2023, at: <https://www.theguardian.com/australia-news/2023/jun/15/nsw-government-temporarily-bans-all-pwc-work-on-tax-projects>.

<sup>136</sup> This is one of the questions to be addressed by the Parliamentary Joint Committee on Corporations and Financial Services in its inquiry, Ethics and



possible safeguard, as mentioned in this paper, would be to require consulting firms that contract with the Commonwealth Government to comply with the Australian Public Service *Code of Conduct*.<sup>137</sup>

**(10) Extent to which consultants should be used instead of the public service to do the work of governments**

113. More fundamentally, the PwC 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.<sup>138</sup> That question has erupted after heating up over many years. Walking backwards, into the future?

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<sup>137</sup> *Public Service Act 1999* (Cth), s 13.

<sup>138</sup> See eg, 'Labor slashes consultants in \$2.9b cost-cutting drive', AFR, 7 June 2023, 4; 'Morrison government spent \$20.8bn on consultants and outsourcing public service in final year, audit finds', The Guardian, 6 May 2023, at: <https://www.theguardian.com/australia-news/2023/may/05/morrison-government-spent-208bn-on-consultants-and-outsourcing-public-service-in-final-year-audit-finds>.