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Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Fitt

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 – Response to Questions on Notice of 2 March 2018

Thankyou for the Questions on Notice from the Committee, dated 2 March 2018.

Please find my responses attached.

Thankyou again for the opportunity to assist the Committee.

Yours sincerely

[redacted]

A J Brown
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Program leader, Public Integrity and Anti-Corruption

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 – Professor A J Brown

Responses to Questions on Notice

1) In relation to point C1 in your submission, can you provide an example of what the consequences of a lack of separation of criminal liability and civil remedies would be?

1.1. Is there a lack of separation in the Bill?

Yes.

Contrary to evidence given to the Committee by Kate Mills of Commonwealth Treasury (6 March), the Bill does **not** already separate the grounds for establishing criminal liability (sanctions) and for obtaining civil remedies, to the extent necessary to make those remedies reasonably accessible. If that was the case, the Parliamentary Joint Committee would not have needed to recommend the separation of these grounds in the *Fair Work (Registered Organisations) Act* 2009 [2016] on which the Bill's provisions are based, as well as any further legislation such as this (Recommendations 10.1 and 10.2).

The Parliamentary Joint Committee's report identified where the problematic conflation of grounds occurs in previous legislation (to which Ms Mills did not respond).

In this Bill, it occurs in s.1317AD(1)(b)&(c) which require, for a claim for civil remedies to be made out, that *(i)* the respondent must have a 'belief or suspicion' that the claimant made a disclosure and *(ii)* this 'belief or suspicion' must be the 'reason' or part of the reason for damaging conduct. In other words, for civil remedies to flow, the court must be satisfied that the respondent's "state of mind" was such that the conduct was undertaken for the specific reason that the claimant made a disclosure.

Dr David Chaikin's evidence of 6 March, otherwise supporting the workability of the provisions as proposed, confirmed that this "state of mind" must be present. (The separate question of who must prove or disprove this state of mind is dealt with below.)

The origin of these requirements lies in their inclusion as grounds for the criminal offence of reprisal – or, in this Bill, 'victimisation', under s.1317AC(1). I will explain below how this has evolved, what its consequences are, and why it is problematic.

However, it should also be noted (as per section C1 of my submission), that this express state of mind requirement for civil remedies is married with language which, implicitly and certainly for all purposes in lay interpretations and practical implementation of the Act, carries further imputations of "intent". Terms such as 'victimisation' (the criminal offence here), 'victimising conduct' (giving rise to civil remedies here), or, elsewhere, 'reprisal' or 'retaliation', all carry a clear implication that a particular state of mind should be present in connection with the detrimental acts or omissions involved. That is, that the defendant (criminal) or respondent (civil) acted or failed to act, in the damaging way, as a direct reaction or response to the disclosure.

This language is consistent with express requirements that the defendant/respondent's awareness of the disclosure must be a 'reason' for the detrimental act, and may be appropriate for the criminal offence. However, it has ceased to be appropriate or sufficient for capturing the grounds for civil remedies, and now seems to clearly explain the failure of previous provisions. It is especially inapposite in the uniquely limiting form that the Commonwealth, alone, has begun to adopt and now proposes for this Bill.

In short, while these express and implied state of mind requirements are apposite for criminal liability, and should also give rise to civil liability where they are present, civil remedies should not be **limited** to circumstances where a court or tribunal is satisfied that they are present. Rather, civil remedies should also be available wherever *any* detriment or 'damage' (the term used by Ms Mills on 6 March, and in the Exposure Draft of the Bill, but no longer in the current Bill) flows as a result of the disclosure, whether intended or negligent, and whether it is an act or an omission. These may range from:

- acts intended to punish; to
- failures to act to prevent or limit punishing behaviour by others; to
- simple mistakes in the handling of disclosures that unintentionally expose a whistleblower to added stress, psychological harm, employment disadvantage or reputational damage; to
- an entirely passive failure to support a whistleblower through an otherwise well-handled disclosure process, even in the absence of any direct "reprisal" risk, again leading to stress, psychological harm, performance and employment impacts which can prove terminal, through no fault of their own.

1.2. Practical consequences of narrowing civil remedies with a "state of mind" requirement as proposed

The grounds in s.1317AD(1)(b)&(c) and associated language have both **legal consequences**, in terms of the inability of many deserving claimants to obtain remedies from a court; and **practical consequences** within organisations, related to but also independently of these legal effects.

Our research and all my experience indicates the practical effects are just as, if not more important than the legal ones. They flow because, within organisations, the focus on whether anyone intended to cause or allow the harm – which is the natural result of a requirement that a respondent must have acted detrimentally for the specific reason of the disclosure – has a range of counterproductive effects. It places managers and organisations on the defensive; obscures what may in fact be the real causes of detrimental outcomes (e.g. simply poor response systems and management decisions); and reduces the incentives for organisations to be prepared to make good the damage to their employees without first requiring this express or *de facto* intent to cause harm, to be actually proved.

These practical effects can be seen in the experience under existing Australian laws. In this regard, it must first be appreciated that there is little evidence that *any* existing compensation provisions in Australian public sector whistleblowing laws actually work. There is widespread concern that they are a "dead letter", given the rarity of litigation and the even greater rarity of success. Few if any people consider that this is because compensable detrimental outcomes are not occurring. Rather, there are problems with the history and casting of these provisions, which point directly to the dangers in this Bill.

Which laws suffers these problems?

The first, most obvious reason why some laws have not worked, is where civil compensation provisions have been ***expressly and deliberately*** framed to shadow the criminal offence of victimisation – in effect, a criminal injuries compensation provision. This is the position under the current *Corporations Act* whistleblowing provisions since 2004 (current ss.1317AC and AD), and allied legislation, which this Bill seeks to rectify (but which for all the reasons laid out here, does not succeed in doing).

However, a second reason why compensation provisions appear not to have worked, is that even where there is no *express* dependency on criminal acts having occurred before there are also grounds for civil remedies, legislation has involved a ***conflation*** of the grounds for criminal sanctions and civil remedies which are similarly limiting (of the kind taken even further by the Commonwealth in this Bill).

For example:

- **Queensland**'s *Whistleblower Protection Act 1994* created a broad entitlement to civil remedies for 'reprisal' (s.43), but the definition and grounds for what constituted a reprisal (s.41) were always for both the criminal offence (s.42) and the civil remedies. In both cases, liability arose if a person caused 'detriment to another person ***because,*** **or** ***in the belief that***, anybody has made, or may make, a public interest disclosure' (sub-s.41(1)) (emphasis added).

  The breadth of the term 'because' should have been enough to allow a wide range of claims, but never did so. Due to the structure of the provisions, one concern was that there might be uncertainty as to whether civil action could genuinely be launched independently of any criminal prosecution. So, in the replacement *Public Interest Disclosure Act 2010* (Qld), sub-s.42(5) was added:

  > Proceedings for damages may be brought under this section even if a prosecution in relation to the reprisal has not been brought, or can not be brought, under section 41.

  This clarification was then also added to the *Public Interest Disclosure Act 2013* (Cth) (s.19A); to the *Fair Work (Registered Organisations) Act* 2009 [2016] (s.337BF); and is proposed for this Bill (s.1317AF).

  Dr Chaikin's submission suggests this provision is guaranteed to overcome any problem, if there is one. Unfortunately, experience suggests Dr Chaikin is wrong. Since 2010, this clarification has made no difference in Queensland. Still, very few cases are attempted, and none have been successful, alongside few (and no successful) applications for relief to the Queensland Civil and Administrative Tribunal. More recently there have been successful applications for interlocutory relief in just one case in the Queensland Industrial Relations Commission.

  The conclusion of the Queensland Ombudsman (Review, 2016, pp.73-74) was that the presence of the high criminal standard for proving a 'reprisal' was continuing to act as a barrier to effective investigation and resolution of 'detrimental actions' which did not entail any direct intent or "state of mind" (the other meaning of 'reprisal' under the conflated definition).

  Consequently, the Queensland Ombudsman has recommended a new 'administrative redress scheme for disclosers, witnesses and other parties who have experienced detriment as a result of their involvement in the making, assessment or investigation of a PID' (Recommendation 33), which would no longer be dependent on the concept of implicitly deliberate or direct 'reprisal' (or 'victimisation').

- **New South Wales** experience confirms the problem. The *Protected Disclosures Act 1994* (NSW) initially contained only a criminal reprisal provision (s.20), with no civil compensation provision until 2010 (*Public Interest Disclosures Act 1994* [2010], s.20A). Again, due to the definitional structure, 'reprisal' remained the basis for both the criminal offence and rights to civil damages, to the extent that it is not *any* detriment flowing from the disclosure that can give rise to civil action and relief, but only 'detrimental action… that is substantially in reprisal' for the disclosure.

In 2016, the NSW Ombudsman conducted an audit of reprisal investigations, and confirmed that at a practical level, for whistleblowers and within agencies, this regime was causing few if any remedies to flow to whistleblowers for detriment suffered. Not only has there been no known litigation, but even within agencies, when any apparent detriment was investigated (and only 25% of such cases were), the focus was on whether the detriment could constitute a criminal offence. Once it was concluded that no such criminal reprisal had occurred, no further action was taken by the agency, and it was assumed there was also no basis for other remedies.

Such findings then represent a huge obstacle for a whistleblower seeking civil damages, because the agency has already amassed all the evidence that even if detriment occurred due to the handling of the disclosure, it was not actually caused 'in reprisal' for the disclosure.

x The first two reports from the *Whistling While They Work 2* project, which I lead (www.whistlingwhiletheywork.edu.au), and which are extensively cited in the PJC report, confirm that while many organisations may now have (or claim to have) processes for responding to detrimental outcomes with criminal or disciplinary action against reprisors, comparatively few organisations have processes for remediating or compensating their whistleblowers for the detriment experienced, even in the public sector. This is a firm indicator of the way in which statutory obligations have been perceived and interpreted, at operational levels.

Contrary to some evidence given to the Committee, I do not have confidence that the lessons of this research have been properly taken into account in the formulation of this Bill to date, even though they clearly informed the Parliamentary Joint Committee.

This experience shows the ***practical effect*** of the conflation of grounds and associated language; while also helping explain why compensation provisions of this kind are currently a "dead letter". It indicates that as long as the risk of civil liability continues to be interpreted through the lens of criminal reprisal or victimisation offences, individuals and organisations will continue to focus first on whether there is evidence of a criminal reprisal, and only turn to questions of their responsibility to remediate, compensate or prevent – if at all – in so far as the conduct is similarly deliberate or directly 'victimising'.

Is the Commonwealth's proposed approach different, or better?

Yes, it is different, but only worse.

The formulation proposed in ss.1317AC and AD in this Bill, relating to 'victimisation' and 'victimising conduct', is based on the way that ss.13-19 of the *Public Interest Disclosure Act 2013* (Cth) define 'reprisal'. This particular formulation is a unique creation of the Commonwealth in and since 2013, differing from the State legislation above.

It is worse because, whereas the above problems flow from implications and interpretations, the present Commonwealth approach *expressly* requires that the respondent have the necessary state of mind before civil liability can be imposed (i.e. the respondent must have the same 'belief or suspicion' of the disclosure, and it must be a 'reason' for the damaging conduct, in the same manner as the criminal offence).

Given this, in light of the history above, it seems no surprise that there is also little sign of civil remedies beginning to flow under the *Public Interest Disclosure Act 2013* (Cth) (as noted by the Moss Review, 2016). The same result should be expected under this Bill, as currently proposed, also taking into account the issues below.

Australia is already unique in proposing to conflate these criminal and civil grounds in this way – as seen from the submissions of Professor Tom Devine (Government Accountability Project, USA; Submission 23) and Professor David Lewis (United Kingdom; Submission 7), both recommending against this course.

As further confirmation, see Attachment 1 to these Responses – *A Best Practice Guide for Whistleblowing Legislation*, just published worldwide by Transparency International (March 2018). As can be seen, in this guide, criminal 'sanctions' for reprisals and 'relief for unfair treatments' are presented entirely separately, with the latter (civil remedies) based not only on any evidence of the respondent's motivations but on any causal link or connection between the whistleblowing and the unfair outcome (p.54).

Why did Australia go down this road in the 1990s? The answer appears to be the historical fact that we were one of the first countries to adopt criminal sanctions for reprisals in our first raft of State whistleblowing legislation, and innocently also tried to then base our civil remedies in the same provisions, or added them later. This is in contrast to jurisdictions such as the USA and UK, where the focus commenced, and remains, on civil and employment remedies, rather than criminal sanctions; and hence the same conflation of grounds has never been quite the same problem.

Significantly, the *Fair Work (Registered Organisations) Act* 2009 [2016] has only a lesser version of the problems above and below, because it is slightly different – it precludes the Court from making a compensation order if satisfied that none of the respondent's reasons for the detrimental actions included 'belief or suspicion' that the claimant made a disclosure (sub-s.337BB(2)). So, this state of mind is not necessarily required before an order can be made, but it can be raised as a conclusive defence if the respondent can prove that it was absent (unless it is also shown that irrespective, they failed to fulfil a duty to support and protect the claimant: sub-s.337BB(3), below).

While still convoluted, that treatment of the issue is preferable to the present Bill, or the *Public Interest Disclosure Act 2013* (Cth). By contrast, as already indicated, these go further by requiring that the court can never order compensation **unless** satisfied the respondent had the proscribed state of mind.

1.3. What would be the specific legal consequences?

In addition, the problem will have at least two major legal consequences:

- Many claimants will remain at a sufficiently serious disadvantage, even with a reverse onus of proof (and especially the one proposed), to the extent that many deserving claimants will be unlikely to try and even fewer succeed;
- The structure and language of the provisions will continue to limit the interpretation of 'victimising conduct' to prioritise deliberate and direct acts of harm, over failures to fulfil duties (e.g. to support, protect and properly manage the disclosure and investigation processes) which then result in harm, even though no individual may have ever intended harm to be caused.

Why won't the reverse onus of proof sufficiently fix it?

It has been argued that if there is a problem, the proposed reverse onus of proof (s.1317AE(2)) would fix it – because if a respondent wishes to resist a claim, the onus passes to them to demonstrate that no such state of mind was present (i.e. that they had no belief or suspicion that a disclosure was made, or that this provided no part of the reasons for the detrimental action). It has also been suggested that this is generally difficult.

However, the Bill's defenders appear to have overlooked the fact that, for the above reason, the grounds in s.1317AD(1)(b)&(c) also provide a respondent with a powerful **incentive** to make this argument, as a sure-fire way to knock out a claim. This is because, unlike in other legislation, the state of mind is a necessary element. It is also factually incorrect that in many cases, the respondent's onus would be difficult to discharge.

For example, Dr Chaikin's submission is correct that the proposed, vaguely-worded reverse onus will still ensure that many respondents concede and settle claims early, rather than defend them, in cases where a claimant has reasonable evidence that the disclosure was a definite or likely factor among the respondent's reasons for the detrimental action. In other words, the reverse onus will work sometimes, perhaps often.

However, the state of mind requirements in s.1317AD(1)(b)&(c) also mean that unless the claimant has such evidence, then when the onus reverses, if the respondent simply chooses to give a persuasive account of their own *reasons* for the detrimental action, they will remain in an advantageous position because these remain uniquely within their own knowledge. Especially in the many instances where true reasons are not documented, but other factors such as the deteriorating performance of a whistleblower are easily documented, convincing testimony from the decision-maker can still easily satisfy a court.

Moreover, this is a line of argument which most claimants can see, well ahead of time, will only result in further damage to their own reputation and personal well-being, with no certainty of success (much like the traditional position of complainants in sexual assault trials). Even under civil rules of procedure, and even with this reverse onus of proof, an argument regarding the state of mind of the respondent will still be at risk of being determined simply by the court's assessment of their credibility (for example, by believing their direct evidence that the entire reason they sacked a whistleblower was lack of confidence in their performance, or their unsuitability for their job, not any belief or suspicion that they may have blown the whistle).

The reasons why this will be the outcome in many cases, and why many of the whistleblowers who most deserve these remedies will walk away before putting themselves through the further trauma of fighting for them, were well articulated by Mr Jeff Morris in his evidence of 6 March.

This is why the reverse onus of proof as proposed is insufficiently robust to level the playing field. A tailored version of the reverse onus of proof identified internationally as successful, such as set out in part C3 of my submission, recognised by the OECD, supported by Professors Devine and Lewis, and now also recommended by the attached Transparency International guide, would be a clearer, more certain way of levelling the playing field than that currently proposed.

Implicit narrowing of the range of compensable acts

The final consequence of the underlying problem, even if addressed above, is that the focus on "state of mind" and the language of victimisation or reprisal – as against unfair detriment or damage – narrows the types and range of conduct that will be commonly understood by stakeholders and courts as compensable under these provisions.

This can be further addressed by making it explicit that compensation can flow wherever there is a failure to fulfil a duty to support or protect – irrespective of how the damage then manifests, in a causal sense. That is, the damage may come from individuals who undertake reprisals, who otherwise would not have; or it may come passively, from undue psychological harm, stress or loss of employment advantages accruing from deterioration

in the whistleblower's personal wellbeing and performance, which could and should have been prevented through appropriate support and management decisions.

While this range might be argued to be covered in theory by existing provisions, the structure, grounds and language of the proposed approach remains at odds with the broad principle that any harm for which a person or organisation can justifiably be held responsible, should give rise to an entitlement to seek damages.

For all these reasons, the structure and language of ss.1317AC and AD in this Bill, and ss.13-19 of the *Public Interest Disclosure Act 2013* (Cth), need to be recast in order to satisfy the intended objectives – as recommended by the Parliamentary Joint Committee.

2) Had this bill been law at the time, would Jeff Morris's disclosure of the Commonwealth Financial Planning Scandal have satisfied the threshold in the bill of an 'imminent risk of serious harm or danger to public health or safety, or to the financial system'?

Not in my assessment – certainly not at the time when his disclosures were made, and probably not even in retrospect, on the most generous assessment of the importance and significance of his disclosures.

I found the Department of Treasury's belated attempts to explain why Mr Morris' disclosure might be covered, to be totally unconvincing (Evidence of 6 March). The argument rests on the idea that in so far as the interest shown in Mr Morris' disclosures by ASIC *may* have provided evidence that there was a "systemic" problem in one financial institution, or perhaps in one section of the financial services industry, that this would qualify as an 'imminent risk of serious harm or danger… to the financial system'.

The provision is expressed in terms of 'the financial system', as a whole, not singular institutions nor even sections of the industry. Further, no argument has even been attempted as to why this scale of risk, to the system, represented one of 'imminent' serious harm or danger – i.e. that some kind of specific cataclysmic event could be prevented by the disclosure (as opposed to simply having a past and current pattern of criminal offences and other serious client harm, properly addressed).

Similarly, Dr Chaikin's evidence suggested that he believed that any disclosure which could impact significantly on the 'reputation' of financial institutions or the financial system, as Mr Morris' clearly did, could raise questions regarding the stability of the system, sufficient to qualify as a disclosure of an 'imminent risk of serious harm or danger… to the system'. In my view, this is unlikely to the point of absurdity.

The question was asked of Department of Treasury as to whether it had consulted with Mr Morris on whether he considered he would be covered by the Exposure Draft provisions, prior to putting forward a provision whose applicability he would challenge. Ms Mills responded that Treasury was dependent on submissions to its consultations to identify such issues, i.e. that it was up to Mr Morris or others to make such submissions. The Committee should note that irrespective of whether or not Mr Morris made a submission, Treasury received at least one relevant submission (that of Transparency International Australia), making explicit that this provision would not achieve its intended purpose, for exactly these reasons.

Moreover, this provision also fails to fulfil its objectives in three fundamental ways that go far beyond Mr Morris' case:

- Even if tenuous arguments can be mounted in Mr Morris' case, they would not serve to assist the wide range of other cases that would never meet these thresholds, because they have nothing directly to do with financial services or the financial 'system' (whatever that actually is).

  The obvious example available to the Committee is the case of Mr James Shelton (foreign bribery by Securency International Limited) from whom you have a submission and to whom I referred in my submission and my oral evidence.

  If the Committee intends to express a view regarding the workability of this provision, it needs to explain why – even if it thinks Mr Morris would be covered – it is appropriate for disclosures about financial services to attract this particular level of protection, but not equivalent disclosures about other types of wrongdoing, which may actually be far more serious; or the full range of crimes otherwise intended to be covered by the whistleblowing 'protections' in the Bill.

- As mentioned in my evidence – the objectives of the Bill are not served by setting any legal threshold which will necessitate a huge, expensive and uncertain legal argument over its applicability to the facts of the case, in this basic way.

  Only lawyers will benefit, and not deserving whistleblowers who are forced to fight a massive legal battle in order to have a *chance* of accessing the protections; and certainly not the public interest. The tests should be drawn up so as to minimise, not maximise this kind of uncertainty, given that the whistleblower must have already satisfied the criteria of having made a public interest disclosure which did not meet with timely or appropriate regulatory action.

- It was suggested in evidence that whistleblowers can still access "other" protections, such as "common law" protections, irrespective of this Bill.

  Please note the relevant evidence in my submission (Part C5), and in particular the conclusion reached by the Senate Select Committee on Public Interest Whistleblowing, in 1994, that even at that stage, any applicable common law protections had been so eroded or become so uncertain, that it was clear that legislative protection was needed.

  In my view, an argument such as mounted by the Department of Treasury – in effect, that this legislation is not the place to provide such protections and set out such thresholds – misses a major purpose of having this legislation in the first place. The broad public expectation is certainly that this is one of the key purposes to be served by such legislation. The best way for the Parliament to confirm publicly aired fears that these protections are simply a sham, would be to accept that argument.

Are there other provisions in the bill that would have meant that Mr Morris would not have received the protection under the bill?

Not beyond the other problems I have suggested with the Bill, in my submission and these responses – which affect all whistleblowers, including but not limited to Mr Morris.

3) In your submission you cite a number of existing provisions regarding external disclosures in other bills. Where do you believe the appropriate balance lies for external disclosures?

The Parliamentary Joint Committee arrived at an appropriate balance, in my view, when it recommended that disclosures to the media or other third parties be protected where there is 'a risk of serious harm or death' or where *any* public interest disclosure 'has been made to a law enforcement agency and, after a reasonable length of time, no action has been taken' (Recs 8.5 and 8.6; par 8.41).

Existing other precedents are useful for identifying some key guidance on what is reasonable, notably:

- Possible timeframes for 'a reasonable length of time';
- Provisos that the protections only extend to as much information as is necessary to have the disclosure acted upon, i.e. not other (e.g. purely defamatory) purposes; and
- Relevant considerations for any court or tribunal when assessing whether the further/public disclosure was, in all the circumstances, reasonable.

The replacement provision would not be difficult to draft, by appropriately qualified and experienced people who actually understand the policy objectives, once those policy objectives are clarified.

4) The bill does not seem to replicate subsection 337BB(5) of the *Fair Work (Registered Organisations) Act 2009* which relates to compensation:

> ***If the reprisal wholly or partly consists, or consisted, of the respondent terminating, or purporting to terminate, the target's employment, the Court must, in making an order mentioned in paragraph (1)(a) [i.e an order for compensation], consider the period, if any, the target is likely to be without employment as a result of the reprisal. This subsection does not limit any other matter the Court may consider.***

Do you believe that this is a desirable provision to include?

Yes.

In evidence on 6 March, the Department of Treasury responded to this question by saying that this provision was already included in section 1317AB or section 1317AD of the Act, and therefore did not need to be added/incorporated.

This evidence appears to be incorrect, as no such provision is found in those current sections, nor in the Bill. The appropriate place for it to be added, along with any other mandatory or relevant considerations for the court when considering civil remedies, would be within the proposed s.1317AE between sub-sections (2) and (3).

5) Unlike the position in both the Public Interest Disclosure Act and the *Fair Work (Registered Organisations) Act 2009*, the perpetrator needs to "engage in conduct" in order to contravene the provisions in this bill rather than merely cause "any detriment" by "act or omission"? Which formulation do you believe is preferable?

At law, the phrase 'engage in conduct' is not a problem within the Corporations Act 2001, because section 9 of the Corporations Act (dictionary) defines *"engage in conduct "* to mean: "(a) do an act; or (b) omit to perform an act."

While this is common in legislation, in my view this question provides another small example of the benefit of a single private sector Act, in which – due to their importance – 'omissions' could be more explicitly included in the relevant sections, themselves, rather than buried in a definition in the same Act, hundreds of pages away.

I agree this is an important issue due to the range of types and causes of detriment or damage at which the provisions should be aimed, as discussed above and below.

6) In addition to your submission, are there further comments you wish to provide about the provisions for compensation under the bill?

No.

7) What is your view on the position that, under the bill, disclosures are protected if they are made to ASIC or APRA but not to the AFP or other regulators?

In my view the preferable approach would be to:

- list all key independent Commonwealth regulators in this Bill who are likely to receive any significant number of relevant disclosures, including especially the Australian Federal Police and ACCC; and
- add a small number of provisions which would achieve the effect of making clear that (a) where a regulator receives a disclosure that relates to their own responsibilities, it is protected; and (b) where it relates or may relate to the responsibilities of a different regulator, it is also protected but the regulator's responsibility is limited to referring that disclosure either to the other regulator or to the lead/oversight agency (in the first instance, this appears to be ASIC), or both; unless the lead/oversight agency actually asks or directs them to do more.

It remains especially odd that the AFP was proposed to be expressly listed as an eligible recipient in the Exposure Draft of the Bill, but then removed – when any Commonwealth criminal offence carrying a sufficient penalty can be the subject of a disclosure.

This outcome means that under this Bill, either:

- whistleblowers who currently go to the AFP will have to be told by the AFP to make their disclosure first to ASIC or APRA, and then have it referred back to the AFP, to ensure the protections attach; or
- the AFP will have to be prescribed by regulation as an eligible recipient, in which case why not just include them in the Act in the first place.

The same is true for the other regulators.

Basic provisions clarifying the key roles and responsibilities of all regulators, in handling disclosures, would be a preferable way of dealing with this. This is part of the reason why a single, larger private sector Act is still warranted. However, this Bill could also do much better in setting up some of those basic mechanisms, in the interests of an effective scheme from the outset, if we want it to actually work.

8) Do you believe that further protections could be provided for whistleblowers who seek the assistance of a lawyer or their union?

Yes.

While I do not regard this to be a critical failing in the present Bill, I consider that the ultimate Act should include protection for disclosures made to any person or body for the purpose of seeking any relevant form of professional assistance with respect to what to do about the disclosure, or with respect to receiving support or accessing protections in the context of the disclosure or its investigation. This could also therefore be incorporated in the Bill at this stage, if desired.

I agree with Recommendation 25 of the Moss Review (2016) of the PID Act:

> The Review recommends that the PID Act be amended to protect disclosures for the purposes of seeking advice and professional assistance about using the PID Act in the same way that disclosures to lawyers are protected.

Mr Moss referred to unions, Employee Assistance Programmes, and professional associations as examples. The benefit of such a provision is that it would not only ensure that union members can access the available supports, but others – for example, internal auditors who seek help from their professional association, corporate counsel from the Law Society, company secretaries from the Governance Institute, etc.

I see no reason why it should not be the same under this regime.

I also note the submission of the Institute of Internal Auditors that amendments are needed to ensure clarity around their role in the Bill

9) Subsection 1317AE(3) in the bill provides that a court must not make an order under paragraph (1)(b) if an employer establishes that it took reasonable precautions and exercised due diligence to avoid the victimising conduct. How does this provision compare to the imposition of a duty to support or protect?

This provision is a direct copy from sub-s.14(2) of the PID Act 2013.

No, the inclusion of this provision does not substitute for the value of more directly and positively recognising a failure to fulfil a duty to support or protect, as a basis for civil liability, in the manner of sub-ss. 337BB(3) and (6) of the *Fair Work (Registered Organisations) Act 2009*.

If redrafted, it could work effectively in support of that duty. Presently, however, as a copy from other legislation, it appears to have been thrown into the Bill without much regard for exactly how it would interact with other provisions to ensure the intended result. In particular, there is also no clear relationship with the requirement imposed on public and

larger companies to have 'policies' which include 'information about how the company will support whistleblowers and protect them from detriment' (s.1317AI(5)(c)).

Once properly drawn, the provisions should:

1. Recognise a failure to fulfil a duty to support and protect, as a basis for remedies (if detriment of whatever relevant kind has occurred);
2. Empower the tribunal to relieve the respondent (including an employer) of some or all of their liability, if they can show that they tried to discharge this duty or managed to discharge at least part of it (being some of the intended effect of sub-s.1317AE(3));
3. Ensure that mandatory considerations for the tribunal in deciding (1) and (2) include: (i) whether or not the respondent (employer) has established any processes or procedures for supporting and protecting its whistleblowers (whether as required by s.1317AI(5)(c) or otherwise, e.g. its own volition), (ii) the adequacy of those processes or procedures, taking into account any relevant standards or guidance published by the relevant regulator(s) or others, and (ii) the extent to which the employer actually followed or implemented those processes or procedures.

The sub-section is currently not sufficiently helpful in discharging point 2, because it provides a conclusive defence to the employer (there can be **no** compensation order) even though the question of how *well* the employer discharged their duty will inevitably be something for the tribunal to weigh up. Does it mean that the employer gets this benefit, if 'any' reasonable precautions were taken, or should it be 'all' reasonable precautions? What is a reasonable precaution? Should it be satisified if 'any' due diligence was shown, or should it be 'all' due diligence? Etc.

The redrawn provisions can and should also make clear at what point the respondent should raise this defence. Part C3 of my submission, setting out a clearer and more robust basis for a reverse onus of proof, suggests that the employer be required to establish that it discharged its duties to support and protect as part of its burden under that section (currently s.1317AE(2)(b)), if relevant to the claim. This is to be preferred to the risk of employers holding back, and attempting to first disprove other parts of the claim (e.g. by attacking the whistleblower in the manner set out earlier), and then trying to raise this defence only after the first attempt fails. The provisions should work to assist the tribunal in deciding the case in its totality, in the first instance.

Finally, the Department of Treasury gave evidence that more positive recognition of the existence of duties to protect and support, by making failure to fulfil these a clear basis of liability, was not required because these duties and associated remedies could already be found in other legislation. This begs two questions:

- Where? and
- If we think those duties and remedies are already sufficiently clear and accessible, why do we think that whistleblower protection legislation is even needed – or at least, why do we think it needs civil remedy provisions that go to these issues, or are wider than simply criminal reprisal compensation provisions?

It may be that in some circumstances, other legislation such as workplace health and safety legislation, or the general protections of the *Fair Work Act* do provide whistleblowers with some basis for relief. The best way to recognise this and manage any choice of law issues is to provide for whistleblowers to be able to pursue any rights under this Act in those tribunals, along with any rights under other legislation, with the proviso that whichever

forum they choose, they cannot then seek to relitigate the same questions again in another forum. Sections 22-22A of the PID Act 2013 provide an example.

There is also no risk of this basis of relief undercutting or compromising any rights in other legislation, provided it is cast in general terms and properly linked with the other provisions of this Bill which provide guidance on the type and content of the duties involved, as suggested above.

However, the fundamental fact remains that if other legislation requiring employers to provide and maintain a safe working environment, or common law requirements, were enough to convey the duties and provide access to the remedies that are needed in this field, then again, we would not need legislative protection for whistleblowers. Accordingly, such evidence again misses one of the major purposes of having this legislation in the first place. The broad public expectation is that these are key purposes which need to be served by the legislation, if it is to be credible.

Fortunately, we have now have the precedent of the *Fair Work (Registered Organisations) Act 2009* to show it is possible. The Committee will be interested to note that the recognition of this duty has now been identified as among world's best practice, in the new Transparency International guide to legislation at Attachment 1 (pp.36-37).

10) In the light of other submissions that have been made to the committee, do you have a view on the scope or wording of paragraph in 1317AAC(1)(e) of the bill, which provides for a disclosure to be received by 'an individual who is an employee of the body corporate – a person who supervises or manages the individual'?

Do you believe that this extends to all supervisors in a chain of responsibility?

Not necessarily. While it would probably be implied that the paragraph means anyone who 'directly or indirectly' supervises or manages the individual, and not only direct supervisors, it would be preferable for this to be explicit (as is the case in sub-s.17(1)(d) of the *Public Interest Disclosure Act 2010* (Qld): '(d) if the person is an [employee] of the entity—another person who, directly or indirectly, supervises or manages the person').

What is your view on the breadth of this provision?

As indicated in my oral evidence, the provisions identifying 'eligible recipients' serve two purposes: (1) to ensure that protections cover all intended disclosures, by identifying the point at which, if a disclosure is made, these protections commence; and (2) to identify to employees and organisations, the persons or entities to whom disclosures should be able to be made.

If amended as above to remove doubt, paragraph 1317AAC(1)(e) is appropriately broad for the first purpose, as it confirms that if a disclosure is made by an employee to their immediate supervisor (or a higher supervisor), the protections commence, irrespective of what then happens. This is vital because irrespective of whom a whistleblower *should* perhaps disclose to in any individual circumstance, a majority are likely to continue to disclose first to immediate supervisors; and it is at that point that risks and dangers commence, especially if, unknown to the employee, the supervisor is themselves complicit in or has reason to be defensive about the matters involved in the disclosure.

Problems arise with respect to the second purpose. Whether or not it has proved problematic in the public sector, in the private sector it could well be problematic to frame this provision so as to give the wrong impression that every supervisor is necessarily competent to receive and handle any kind of disclosure. All supervisors should have the necessary basic skills and knowledge that if an allegation of wrongdoing comes to their attention (just like customer complaints, health and safety incidents or workplace disputes), they know they need to do something about it, and who is appropriate to talk to or to take over the matter. However, if expectations regarding the responsibilities of first and second level supervisors are too high, then other risks arise, along with a potentially unrealistic burden on companies to try and achieve those expectations. This has been the subject of many submissions to the Committee.

If in doubt, the first purpose is more important than the second purpose, and should not be compromised. However, a better solution may be to amend the Bill to better distinguish between these two purposes, to ensure each is properly met.

For example, paragraph 1317AA(2)(b) and the heading of this sub-section could be amended to more clearly achieve the first purpose, by providing that a disclosure qualifies for protection if: (b) the disclosure is made to an officer or employee in a position of responsibility in the regulated entity, or who has a function of receiving or taking action on the type of information being disclosed in relation to the regulated entity, in either case including but not limited to an eligible recipient as defined by s.1317AAC.

It could also be made clear that a person 'in a position of responsibility' includes any person who directly or indirectly supervises the person making the disclosure.

Section 1317AAC, identifying classes of eligible recipient, could then be refined to more accurately cover the range of persons whom, in all circumstances, should be both able and capable of receiving disclosures as defined by the Bill. As noted earlier, this could expressly include internal auditors, for example. It should still provide that the CEO and any senior executives or managers are eligible recipients, along with specifically authorised officers, but would not then need to capture all supervisors and managers (provided paragraph 1317AA(2)(b) is appropriately cast).

There may be other solutions, or variations on this solution, that could address these issues.

11) Can you provide further detail about the effect of an obligation to investigate disclosures and reprisals, described in recommendation 12.4 of the PJC Inquiry into whistleblowers? What does this bill provide in relation to this obligation?

This bill provides nothing by way of direct obligation to investigate disclosure or reprisals, on the part of regulated entities or the prescribed regulatory authorities. The strongest *implication* that regulated entities should investigate disclosures lies in the proposed statutory requirement upon public and larger companies to have policies which include 'information about how the company will investigate disclosures that qualify for protection' (1317AI(5)(d)).

Under a full legislative scheme, of the kind recommended by the PJC, I would envisage that for private and not-for-profit sector employers or organisations:

- The objects of the Act would include that of ensuring that public interest disclosures are investigated and/or properly dealt with and resolved by regulated entities and relevant regulatory agencies;

- There could be a broadly framed statutory obligation on the CEOs or management of regulated entities to ensure that disclosures (where internally made) are appropriately investigated or otherwise dealt with – for example by confirming that a failure to do so without reasonable excuse would be a breach of the duties of company officers or directors;
- There would be a duty upon the relevant regulatory agencies to ensure that appropriate assessment, investigative or resolution action is taken with respect to those disclosures that come to their attention, supported by (i) an obligation to inform the oversight agency (whistleblowing protection authority) of the numbers of disclosures, the actions taken and the outcomes obtained, and (ii) an obligation to inform the whistleblower as to the action taken (unless reasonable circumstances exist as to why this would be impractical or not in the interests of justice), consistently with the PJC's Recommendation 8.3;
- There would be a duty on the oversight agency (whistleblowing protection authority) to assist regulated entities with minimum guidance on how to fulfil their investigative obligations with respect to disclosures, bearing in mind that these obligations are, for the most part, not new and typically already laid out in the existing regulations and compliance standards relating to the relevant wrongdoing;
- There would be minimum public reporting requirements by the relevant regulatory agencies and/or the oversight agency (whistleblowing protection authority), regarding the outcomes from those disclosures that they handle, to ensure that the scheme is functioning.

The same would automatically be true of reprisals or alleged detrimental acts, omissions, or failures to support and protect. I hope this assists the Committee.

12) You have been quoted in the AFR as describing this bill as "more a sideways than a forward step on key issues", and have cited a selection of areas where this is the case in your submission. Are there further areas of the bill where you think this is the case?

No – not beyond the areas already identified in my submission, my oral evidence or these responses.