# CONSULTATION ON WHISTLEBLOWERS BILL

## SUBMISSION

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Online Submission

Dear Committee Secretary

## Submission: Whistleblowers Bill

This is our submission on the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (**Bill**).

## 1 General observations

Our firm has extensively advised clients on the application of existing whistleblower laws. We have also considered in detail and provided an earlier submission to Treasury on the exposure draft of the *Treasury Laws Amendment (Whistleblowers) Bill 2017* (**Exposure Draft**). In the period before and after the making of that submission, we have advised clients on the potential implications of proposed amendments to whistleblower laws for their organisations.

Drawing upon this experience, we are grateful for the opportunity to provide a submission on the Bill.

As a general matter, we are supportive of the intention of the Bill, which is aimed at improving protections for whistleblowers in the corporate and financial sectors. Our comments are designed to improve aspects of the Bill, with a view to striking the right balance between protecting whistleblowers and allowing companies to respond to disclosures that are raised.

We would be pleased to discuss any part of our submission with you.

## 2 Feedback on matters identified in the Bill

### 2.1 Disclosures to supervisors and managers (s 1317AAC(1)(e))

**HSF Recommendation 1:** Section 1317AAC(1)(e) be deleted or, in the alternative, amended to instead specify certain prescribed positions within an organisation to whom a disclosure may be made that are better equipped to appropriately handle a disclosure (such as the Head of Risk, Head of Human Resources and/or any Whistleblowing Protection Officer).

We are generally supportive of providing whistleblowers with a number of channels through which to make a disclosure, in order to facilitate the making of a disclosure. In this regard, there is an obvious tension between facilitating a whistleblower to make a disclosure easily, as against the need for a disclosure to be dealt with appropriately once received (which is clearly in the whistleblower's interest), with a risk that the former ends up compromising the latter.

In our view, the inclusion of supervisors and managers in s 1317AAC(1)(e) as individuals to whom disclosures can be made is too broad, given the number of individuals in an organisation that would ordinarily be captured within this category, and problematic for the reasons set out below.

First, given the broad range of individuals that could be categorised as supervisors or managers within an organisation, even where such individuals receive training in relation to their obligations under whistleblowing legislation, we expect that a number of these

individuals will have limitations in their skills and ability to appropriately manage a disclosure (e.g. in terms of exercising appropriate judgment and allocating time within their 'day jobs' to deal with a disclosure). This position should be contrasted to other individuals classified as 'eligible recipients', such as officers, auditors, actuaries, or other authorised personnel who, by virtue of the nature of their positions, will ordinarily be better equipped to handle disclosures.

Secondly, given the seriousness of the matters constituting 'disclosable conduct' (which includes for example conduct that breaches certain Commonwealth laws or which represents a danger to the public or the financial system), if such disclosures were able to be made to supervisors or managers, we would expect that they would, as a matter of course, need to be appropriately escalated to the other types of individuals identified as 'eligible recipients'. In order for such escalation to be permissible, the consent of the whistleblower would need to be obtained, which results in an unnecessary hurdle that could be avoided by ensuring disclosures are at first instance made directly to such individuals.

Thirdly, there appears to be an inherent conflict in allowing disclosures to be made to a supervisor or manager who is required to supervise or manage employees in relation to their performance and conduct, where such management, by its nature, may necessarily amount to an employee suffering a 'detriment'. Whilst such 'detriment' would ordinarily constitute 'reasonable management action' (e.g. under the bullying provisions of the *Fair Work Act*]), it could nevertheless amount to a breach of the victimisation provisions in the Bill as currently drafted, given there is currently no exception applicable to 'reasonable management action' (see section 2.3(b) below). Further a 'reverse onus' applies under the current drafting of the Bill, such that the onus would be on the relevant supervisor or manager to prove that they did not take any management action against an employee on the basis of a whistleblower disclosure, which is likely to unfairly burden such individuals in this context.

Fourthly, a conflict may also arise for a supervisor or manager in dealing with a disclosure, in that the disclosure may relate to other staff members in the team or involve a matter over which the supervisor or manager has some functional responsibility. Again, in this circumstance, it would be appropriate that the 'eligible recipient' of such a disclosure be one of the other personnel identified who would ordinarily be expected to handle the disclosure in a more independent and objective manner.

Given the foregoing, in our view, it is appropriate that supervisors and managers are not classified as 'eligible recipients', but rather are left to appropriately supervise and manage employees on a day-to-day basis, with disclosures to be made to the other proposed 'eligible recipients' who would ordinarily be expected to handle the disclosure in a more appropriate manner.

Accordingly, we suggest that s 1317AAC(1)(e) be deleted. We consider that other measures within the Bill, such as the requirements with respect to the promulgation of the whistleblower policy, will adequately deal with informing whistleblowers who within an organisation they can make a disclosure to.

In the alternative, s 1317AAC(1)(d) should be amended to prescribe certain positions within an organisation to whom a disclosure can be made that would be better equipped to appropriately handle disclosures, having regard to the nature of the nature, seniority, experience and skill set of those positions (for example, the Head of Risk, Head of Human Resources and/or Whistleblowing Protection Officer).

## 2.2 Circumstances in which a compensation order may be made (s 1317AD(1)(b))

**HSF Recommendation 2:** Section 1317AD(1)(b) should be revised to delete the words 'may have made' or 'or could make' [a disclosure], such that a whistleblower must have actually 'made' or 'proposed to make' a disclosure in order to seek an order for compensation for alleged victimising conduct taken against them.

In our view, the scope to bring claims under s 1317AD(1)(b) for victimising conduct engaged in by a person on the basis they had a belief or suspicion that a person 'may have made', or 'could have made' a disclosure, is too broad and uncertain.

It is understandable that conduct can amount to victimisation where a whistleblower 'has made' or 'proposes to make' a disclosure and the person alleged to have engaged in victimising conduct is aware of this fact. However, as a practical matter, the fact that a whistleblower 'may' or 'could' make a disclosure is likely to be entirely within the knowledge of the whistleblower and, in our view, lacks a sufficient causal nexus to any victimising conduct that may be alleged. It is also likely to give rise to practical difficulties for a person responding to a claim to positively prove that they did not have a belief that the whistleblower 'may' or 'could' make a disclosure.

Accordingly, we consider the proposed provision goes too far and is likely to increase the risk of a proliferation of unmeritorious claims and unfairly increase the burden on respondents in discharging the 'reverse onus' (see section 2.3 below). On this basis, it should be amended in our view to delete the words 'may have' or 'could make' [a disclosure].

## 2.3 Reversal of onus of proof and costs protection (to just the applicant) (s 1317AE(2) and s 1317AH)

**HSF Recommendation 3:** Section 1317AE(2) should be deleted or, in the alternative, s 1317AE(2)(a) be revised to specify that the claimant bears the onus of proving the matters set out in s 1317AD(2).

**HSF Recommendation 4:** Section 1317AD(1)(a) should be subject to a defence where the relevant 'conduct' amounts to 'reasonable management action', similar to defences available under workers compensation legislation for psychological injury and the bullying regime under the Fair Work Act.

**HSF Recommendation 5:** Regulator guidance on what constitutes 'reasonable precautions' and 'due diligence' for the purposes of the defence in s 1317AE(3) should be developed and issued prior to the commencement time.

**HSF Recommendation 6:** Section 1317AH should be revised to provide equivalent cost protection to respondents to claims.

(a) 'Reverse onus'

The Bill proposes at s 1317AE(2) that a 'reverse onus' of proof will apply where a whistleblower "*adduces or points to evidence that suggests a reasonable possibility*" that a person has engaged in victimising conduct that causes them detriment or which constitutes a threat to cause them detriment. In this circumstance, the relevant person who has engaged in the victimising conduct (or, where that person is a company, any employees of that company who have been involved in such victimising conduct), must prove that they have not engaged in victimising conduct because of any belief or suspicion on their part as to a disclosure a whistleblower made, may have made, proposed to make or could have made.

Whilst we support facilitating bona fide whistleblowers to bring a meritorious claim in relation to victimising conduct arising from a disclosure, we are concerned that the combination of the 'reverse onus', the scope to bring claims under s 1317AD(1)(b) for victimising conduct engaged in when there is a belief or a suspicion that a person 'may have made' or 'could have made' a disclosure, and the removal of any cost consequences for whistleblowers under s 1317AH should they bring a claim (unless it can be shown they instituted proceedings vexatiously or without reasonable cause or acted unreasonably, which is a high bar), may result in unmeritorious claims being brought which cause respondents to incur significant and unnecessary legal costs, including in the course of any discovery and evidence. These concerns are enhanced in a context where a whistleblower may be concurrently subject to 'reasonable management action' (discussed below at 2.3(b)) for separate performance or conduct issues.

We understand the initial attraction of a 'reverse onus' is that a whistleblower may not be in a position to necessarily prove intent on the part of persons who engage in conduct that leads to damage on their part. However, in our view, this can be achieved through mechanisms such as discovery and the cross-examination of witnesses in the ordinary course. We do not see any cogent reason for departing from the basic principle of the Australian adversarial legal system that 's/he who asserts must prove'. Accordingly we consider that s 1317AE(2) should be removed.

If the 'reverse onus' in s 1317AE(2) is not removed, we consider that subsection (a) should at the very least be revised to specify paragraph 1317AD(2) in addition to paragraph 1317AD(1)(a), such that the claimant bears the onus of proving any alleged involvement of officers or employees such that they are not subject to a 'reverse onus' of proof (as distinct from their employer).[1]

The proposal in s 1317AE(2) is analogous to the 'reverse onus' of proof in the 'general protections' jurisdiction under the *Fair Work Act 2009* (Cth), which has seen an increasing escalation of claims being brought under that jurisdiction. For example, in its Annual Report 2016-2017, the Fair Work Commission reported that 3,729 general protections claim involving dismissal were made in 2016-17, compared with 2,879 in 2013-14 (an increase of 30% in 3 years).

The Productivity Commission, in its 'Workplace Relations Framework – Inquiry Report' dated 30 November 2015, observed the following in relation to the 'general protections' jurisdiction:

> *"Unlike the specific unfair dismissal provisions, [the General Protections] provide uncapped compensation, which provides incentives to use them as a more lucrative avenue for compensation for dismissals. Moreover an employee dismissed for underperformance or breaching workplace codes of conduct has strong incentives to claim that some other non-permitted reason was the true basis for the dismissal (for example, because they had complained about some aspect of management) even if this claim was confected. These factors may have been one of the accelerants for the very rapid growth of dismissal cases under the General Protections. (Dismissal cases account for nearly 80 per cent of total General Protections cases).*
>
> *This is not to say that many cases are not genuine. However, a well-functioning system should be designed to limit perverse outcomes, not just because this*

[1] This is consistent with the High Court's interpretation of a provision in identical terms to the proposed s 1317AD(2) in *Yorke v Lucas* (1985) 158 CLR 661. In *Yorke v Lucas* (at 667 and 668) the majority stated that the language of 'aided, abetted, counselled or procured' and 'involved in a contravention' in a civil statute imports the language of criminal law and therefore requires an intention to contravene on behalf of the person to whom accessorial liability is sheeted home. If the Bill is to use such language in s 1317AD(2), then in order to maintain a consistency of interpretation across statutes using identical language, the claimant should be required to prove the relevant person's involvement.

> *avoids inefficient and unfair outcomes, but to shore up its integrity. Regulations that lack credibility do not serve the interests of employees with a strong basis for their claims."*

In our view, consideration should be given to limiting the likelihood of perverse outcomes which may arise from the combination of s 1317AE(2), s 1317AD(1)(b) and s 1317AH of the Bill. As noted above, we suggest that this be achieved through the removal of s 1317AE(2). However, failing that, we consider s 1317AE(2)(a) should be amended as per the above. Additionally, we consider that s 1317AD(1)(a), s 1317AD(1)(b) and s 1317ADH should be amended as per the below.

(b) Defence of 'reasonable management action'

In our experience, victimisation-style claims are often made by individuals who are subject to 'reasonable management action', including on the basis of a subjective view that such management action is because of a prohibited reason, or as a tactical measure to seek to counter such management action.

With a view to the likelihood of limiting perverse outcomes which may arise under the proposed legislation, and regardless of the position taken in relation to the 'reverse onus' under s 1317AE(2), we consider that s 1317AD(1)(a) should be subject to a defence, with the onus on the respondent to make out the defence, where the relevant 'victimising conduct' amounts to 'reasonable management action' in relation to a whistleblower. We consider this would assist in deterring any unmeritorious claims and is analogous to defences available under workers' compensation legislation for psychological injury and the "bullying" regime under the *Fair Work Act*.

There is extensive guidance available as to what constitutes 'reasonable management action', including a body of case-law, under the workers' compensation and bullying regimes. For example, under the bullying regime, 'reasonable management action' may include performance management processes, disciplinary action for misconduct, informing a worker about unsatisfactory work performance or inappropriate work behaviour, asking a worker to perform reasonable duties in keeping with their job and maintaining reasonable workplace goals and standards.

Where the defence of 'reasonable management action' is established, we propose that s 1317AD(1)(a) would not be made out and accordingly, even where a 'reverse onus' is retained under s 1317AE(2), such 'reverse onus' would not be activated.

(c) Defence of 'reasonable precautions' and 'due diligence'

We welcome the inclusion of a defence in s 1317AE(3) which excludes an order for costs or other remedy against an employer where the employer has taken 'reasonable precautions, and exercised due diligence, to avoid victimising conduct' on the part of an employee.

We recommend that regulator guidance be provided on what will constitute 'reasonable precautions' and 'due diligence' for the purposes of this provision. For example, this may involve taking steps to ensure all employees are aware that victimising conduct is prohibited under whistleblower laws via company-wide training, and having appropriate processes in place to respond to and protect whistleblowers. In this regard, reference could be had to applicable workplace health and safety legislation[2] or guidance notes from the regulators regarding what constitutes "reasonable precautions/due diligence" in the safety context.

(d) Costs orders

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[2] For example, section 27(5) of the *Work, Health and Safety Act 2011* (NSW).

Finally, if s 1317AH is to be retained with respect to costs orders, we consider it should also extend to respondents, such that neither party to a proceeding may be ordered to pay costs incurred by another party except where proceedings were commenced or responded to (as applicable) in the circumstances stated in s 1317AH(3).

This position is analogous to the position with respect to cost orders under the *Fair Work Act* (see, for example, section 611). We do not see any basis to only extend cost protection to one party to a dispute only, as currently proposed by s 1317AH. Such a proposal will lead to an unequal playing field and the risk of a proliferation of unmeritorious claims. It would also be an unusual position to be taken under law.

### 2.4 Confidentiality (s 1317AAE)

**HSF Recommendation 7:** Section 1317AAE(2) be revisited to authorise disclosure in situations where there is a genuine belief that the disclosure is necessary to prevent an imminent risk to health and safety.

**HSF Recommendation 8:** Section 1317AAE(4)(b) be amended to extend to disclosures reasonably necessary for the purposes of reporting on the findings of investigations conducted in accordance with that section and taking [necessary/appropriate] remedial action. Regulator guidance should also be provided as to what will constitute ‘all reasonable steps’ for the purposes of protecting a whistleblower’s identity in the course of conducting an investigation under that section.

**HSF Recommendation 9**: The maximum penalties for a breach of the confidentiality provisions be reduced where there is no associated breach of the victimisation provisions.

(a) Investigations

We are pleased to see the inclusion of a new s 1317AAE(4) in the Bill clarifying that it is not an offence to disclose information other than the identity of the discloser, if such disclosure is reasonably necessary for the purposes of conducting an investigation into disclosable matters under the legislation, and provided that all reasonable steps have been taken to reduce the risk that the discloser will be identified as a result of the disclosure.

This new section provides additional flexibility in investigating whistleblower disclosures as, under existing legislation, it can be impracticable for an investigation to proceed in circumstances where a whistleblower’s consent cannot be obtained (whether they decline to give that consent, or the company is unable to contact the whistleblower to obtain their consent), given the possibility that information likely to lead to their identity may inadvertently be disclosed (e.g. in the context of the nature of the disclosure and/or the individuals involved).

However, s 1317AAE(4) is silent on whether further disclosure is permitted for the purposes of reporting on findings made as a result of an investigation undertaken into disclosed matters and/or taking appropriate remedial action as a result of such findings. It is in the public interest that a company be able to take these steps in response to a disclosure. Accordingly, we suggest that s 1317AAE(4) be extended to permit further disclosure where such disclosure is reasonably necessary for these purposes (with the relevant individuals to whom a disclosure is on-disclosed still being subject to the confidentiality requirements under the Bill). This would ensure that investigation findings are capable of being reported to appropriate individuals in a company (e.g. the Board, consistent with their governance and oversight role), so that appropriate remedial action

can be taken in response. Currently, without obtaining the whistleblower's consent, this is not possible and may place the company in the invidious position of having investigated a disclosure and not being able to report on the findings in a confidential manner or take appropriate remedial action.

In order to report on, or action the findings of, an investigation, a company would instead need to rely on the whistleblower providing their consent to the further disclosure. In this situation, it is reasonably foreseeable that a whistleblower may not wish to provide their consent or may wish to 'vet' investigation findings as a condition to providing their consent, which could lead to confidentiality and victimisation concerns (e.g. in respect of evidence provided by other individuals in the course of the investigation). A company may, as a consequence, be prevented from reporting and acting on its findings following an extensive investigation, if the whistleblower does not provide their consent or the findings are not in a form that is satisfactory to the whistleblower.

To ensure that whistleblowers are appropriately informed, it may be that they are required to be notified where a disclosure is made on the basis for the purposes of reporting or taking appropriate remedial action, say, within 7 days.

We also consider that all stakeholders will benefit from guidance on what constitutes 'all reasonable steps' for the purposes of protecting a whistleblower's identity in the conduct of an investigation. In the case of companies, this would allow for greater confidence in being able to investigate a matter within the bounds of the legislation. Further, having guidance available on this point will also reassure whistleblowers that there is a minimum standard applied in relation to any investigation undertaken into their disclosure in order to protect their identity.

(b) Disclosures to prevent a risk to health and safety

In our view, the confidentiality requirements proposed by the Bill under s1317AAE should expressly permit a disclosure to be passed on without the consent of the whistleblower for the purpose of ensuring the health and safety of another person, whether that be the whistleblower, employees, persons the subject of a disclosure, a third party or the general public. This is particularly an issue if disclosures are permitted to be made to "managers and supervisors" as currently proposed by the Bill, in that they would not necessarily have the authority and resources to be able to respond to a health or safety risk.

In our view, such a disclosure should be authorised where there is a genuine belief that the further disclosure is necessary to prevent an imminent risk to health and safety. If a disclosure is made to a person in such circumstances, we would propose that they would still be subject to the proposed confidentiality requirements and would accordingly not be able to disclose the relevant matters set out in s 1317AAE(1) without the whistleblower's consent.

Without this authorisation, a company may not be able to take action that is necessary from a health and safety perspective in response to a disclosure or, if our proposed amendment to s 1317AAE(4) is not accepted, in response to a disclosure where an investigation is undertaken (for example, to implement appropriate risk management protocols or meet any reporting obligations). In our view, this may result in a health and safety issue that could have been avoided and which may place a company in breach of its obligations under work, health and safety legislation. To ensure that whistleblowers are appropriately informed, it may be that they are required to be notified where a disclosure is made on the basis there was a risk to health and/or safety, say, within 7 days.

(c) Penalties

We consider that the maximum penalties for a breach of the confidentiality provisions (being $200,000 for an individual and $1 million for a corporation) could be considered

excessive in circumstances where a breach of the provisions occurred inadvertently and no detriment was suffered by a whistleblower. On this basis, whilst we understand the rationale to impose these penalties in relation to a breach of the victimisation provisions, we consider they are excessive for breaches of the confidentiality provisions alone, noting there is a reasonable probability of inadvertent (yet well-intentioned) breaches of the confidentiality provisions occurring. A two-tier system may apply where a breach of the confidentiality provisions that is accompanied by a breach of the victimisation provisions results in the proposed maximum penalty being available. However, for a breach of the confidentiality provisions alone, we consider the appropriate penalty should be re-assessed.

## 2.5 Extending the scope of disclosable conduct (s 1317AA(4) and (5))

**HSF Recommendation 10:** The proposal, in s 1317AA(4) of the Bill, to extend disclosable conduct to include information that concerns 'misconduct' or an 'improper state of affairs or circumstances' in relation to the corporate entity, should be revisited. The sub-section should either be deleted, or clear definitions of these expressions should be included in the Bill.

We support the proposed expansion of the scope of disclosable conduct, in s 1317AA(5) of the Bill, to include conduct that constitutes an offence under a range of identified legislation, as well as an offence under any Commonwealth law that is punishable by imprisonment for a period of 12 months or more. The existing whistleblower provisions in the *Corporations Act 2001* (Cth) only relate to contraventions of the *Corporations Act* and *ASIC Act 2001* (Cth), and in our view are too limited in scope.

However, we are concerned at the proposal, in s 1317AA(4) of the Bill, to extend disclosable conduct to include information that concerns *'misconduct'* or an *'improper state of affairs or circumstances'* in relation to the corporate entity.

The term *'misconduct'* is uncertain in its scope and operation. Case-law that has considered the expression (in a range of legislative contexts) suggests that it likely requires something more than *'mere incompetence'*,[3] but that it has a wider meaning than conduct that is illegal or reprehensible.[4] In a professional disciplinary context, the term refers to conduct that falls short, to a significant degree, of the standard of conduct observed or approved by persons in the relevant role of good repute and competency.[5]

The phrase *'improper state of affairs or circumstances'* is even more problematic in terms of the uncertainty, and potential width, of the conduct and situations it may cover.

We acknowledge that these phrases are utilised in some current Acts.[6] However, our concerns with the proposed s 1317AA(4) are primarily two-fold:

- First, in order for the whistleblowing provisions to be effective, and for whistleblowers to receive the protection they deserve, it is essential that the provisions are clear in their operation. It will detract from, if not damage, the utility of the legislative provisions if the whistleblower, and the person to whom the disclosure is made, lack clarity as to whether the provisions have been engaged. Phrases such as *'misconduct'* and *'improper state of affairs or circumstances'*, especially if left undefined, will lead to uncertainty.

[3] See, for example, *Mathieu v Higgins* [2008] QSC 209.

[4] *Yedway Pty Ltd v Owners Corporation of Strata Plan 62871* [2009] NSWSC 8.

[5] See, for example, *Adamson v Queensland Law Society* [1990] 1 Qd R 498.

[6] See, for example, s 336A of the *Superannuation Industry (Supervision) Act 1993* (Cth).

- Secondly, we are concerned that s 1317AA(4) will capture a wider range of conduct than is intended. The Bill Explanatory Memorandum indicates that the provision is intended to cover *'serious offences*' against other Commonwealth laws, as well as *'conduct that may not be in contravention of particular laws'*. It is apparent that expressions like *'misconduct'* and *'improper state of affairs or circumstances'* (if left undefined) will extend well beyond such 'serious offences', have uncertain scope in respect of *'conduct that may not be in contravention of particular laws'*, and potentially apply to a range of corporate and employment issues that should clearly fall outside the whistleblowing regime.

## 2.6 Disclosure of identifying information to courts and tribunals (s 1317AG)

**HSF Recommendation 11:** Section 1317AG be amended to expressly clarify that it prohibits disclosure to a court or tribunal of the identity of, or identifying information about, a whistleblower, unless the whistleblower has provided consent or their identity is no longer confidential.

The Bill includes a provision directed to ensuring that the protection of a whistleblower's identity is not extinguished by discovery of documents or other processes in court proceedings (s1317AG). In our view, the drafting of this proposed section should be clarified in two respects.

First, the heading of s1317AG suggests that this section reads as a 'prohibition' while the language of the substantive section that '…the discloser or any other person is not to be required' to disclose or produce certain information appears to suggest that there is some scope for discretion on the part of the discloser or other person. The drafting should make clear that a person 'must not' disclose to a court or tribunal the identity of, or identifying information about, a whistleblower.

Second, this prohibition should be qualified to allow for disclosure to a court or tribunal where the whistleblower has provided consent or their identity is no longer confidential.

## 2.7 Emergency disclosures (s 1317AAD)

**HSF Recommendation 12:** Section 1317AAD should be amended to remove journalists from the list of persons to whom an emergency disclosure can be made.

The Bill includes a provision that allows a discloser to qualify for protection if the disclosure is an 'emergency disclosure' made to a member of Parliament or a journalist (s 1317AAD).

A disclosure to a journalist or member of Parliament can only be made if the disclosure has been made to a prescribed regulator, a reasonable period has passed, the discloser has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately and the discloser has given notice to the prescribed regulator of its intention to make an emergency disclosure.

We consider this provision to be appropriate in its application to disclosures to a member of Parliament but inappropriate and counterproductive with respect to disclosures to the media. In our view, disclosure to the media should not result in any greater protection than is normally afforded to any person providing information to the media and accordingly, journalists should not be included in the list of persons to whom an emergency disclosure can be made in s 1317AAD.

It is in the best interests of all stakeholders (other than the media) that the whistleblowing framework encourages whistleblowers to provide their information:

1. to the company first, recognising that provided the company acts appropriately, it is in the best position to both take action and to protect the whistleblower; and

2. where necessary (because the company fails to act) or appropriate (because, in the circumstances the whistleblower is concerned about the company's willingness to act and to protect the whistleblower), to the regulator; and then

3. as a last resort, in the circumstances outlined in 1317AAD, to a member of Parliament.

Members of Parliament, while not ideally placed to consider and address whistleblower complaints, will be able to apply an objective mindset when considering the information and will have the influence to ensure that action is taken where appropriate.

By way of contrast, the media will always have an inherent vested interest in publishing information in a manner which is sensationalised. They will not have any inherent interest in protecting the reputations of those concerned (including the whistleblower) or achieving an effective but non-public rectification of the conduct at the heart of the complaint.

We appreciate that journalists will endeavour to proceed with integrity and fairness but their perspective cannot help but be prejudiced by the inherent interest they will have in publication. Accordingly, the general principles should apply, including that freedom of speech and defamation should continue to operate unaltered and a whistleblower should, if they wish to disclose information to the media, recognise that they will not be afforded special protection in respect of that disclosure.

If s 1317AAD is not amended to remove journalists from the list of persons to whom an emergency disclosure can be made, we propose that:

- a further provision is included that expressly requires a whistleblower to make a disclosure internally to the company before they make a disclosure to the media. This will ensure the preservation of the integrity of internal company whistleblowing processes, and encourage these to work effectively.
- the definition of 'journalist' be narrowed on the basis it is currently too broad and would, for example, capture individuals who publish a blog no matter how reprehensible or sensationalist it was, provided it was operated on a "commercial basis".[7] For example, the definition could be amended to require that any journalists as defined (or their employer) are constituent bodies of the Australian Press Council.

We also recommend that guidance be provided on what will constitute a "reasonable period" of time for the purposes of the provision. In our view, what is a reasonable period of time will inevitably depend on the complexity of each individual disclosure and whistleblowers should ensure that they have raised any concerns with respect to the delay with the regulator and taken into account the regulator's explanation before being considered as having given the regulator a reasonable period of time.

The scope for the regulator to achieve an outcome in the interests of the whistleblower will, more often than not, be prejudiced by any subsequent disclosure to a third party.

[7] For example, see the finding of contempt against an online blogger in *Doe v Dowling* [2017] NSWSC 202.

## 2.8 Transitional provisions (s 1644)

**HSF Recommendation 13:** Section 1644(1) be amended so that the Bill only applies to disclosures made after the commencement time, in relation to matters that occurred on or after the commencement time (and not beforehand).

**HSF Recommendation 14:** Section 1644(2) be amended to clarify it only applies in circumstances where a disclosure relates to conduct occurring prior to the commencement time and the only damage suffered by a whistleblower after the commencement time is as a direct consequence of the disclosure.

Section 1644(1) provides that the amendments contemplated by the Bill will apply in relation to disclosures made at or after the commencement time (i.e. 1 July 2018) in relation to matters that occurred before 1 July 2018 (amongst other things).

In our view, it is not appropriate for conduct which occurred before 1 July 2018 to be subject to laws that did not exist at the time the relevant conduct was undertaken. This could effectively result in a person being subject to compensation orders for conduct that did not amount to victimisation under law at the time they undertook the relevant conduct. In our view, it is appropriate that any conduct undertaken prior to 1 July 2018 to be subject to the law in force at the relevant time (i.e. the victimisation provisions under existing law).

In the alternative, we consider this section should be clarified to provide that it cannot be relied upon in this circumstance where a whistleblower has previously made a disclosure in relation to the same subject matter (i.e. to prevent a whistleblower "double dipping" so as to seek the benefit of new laws in relation to a disclosure, as opposed to having their disclosure subject to the laws in existence at the time it was originally made in relation to matters that occurred before the commencement time).

Section 1644(2) provides that sections 1317AC, 1317AD and 1317AE (and any other provisions to the extent related) apply to a disclosure that was made before the commencement time which would be protected by the Bill. Paragraph 1.33 of the Explanatory Memorandum clarifies that this provision is subject to conduct occurring or damage being suffered after 1 July 2018. Section 1644(2) is not as clear as the Explanatory Memorandum in this regard, however, having regard to the general principle that legislation does not operate retrospectively unless there is an express intention to the contrary, and in light of the guidance in paragraph 1.33 of the Explanatory Memorandum, we understand that conduct must occur or damage must be suffered after 1 July 2018 in order to activate this provision.

As a practical matter, section 1644(2) gives rise to a question as to what will amount to 'conduct' or 'damage' occurring after 1 July 2018. For example, if a whistleblower makes a disclosure pre-1 July 2018, and alleges they have continued to suffer consequential loss after 1 July 2018 (e.g. on the basis that, in the case of a dismissal, they would have continued to earn their remuneration for a specified period following 1 July 2018), they may seek to claim that they have suffered damage after 1 July 2018 as a result of conduct occurring after 1 July 2018 (e.g. a failure to reinstate them to their employment).

We consider it is one thing for a whistleblower to suffer actual damage after 1 July 2018 (e.g. a termination of their employment) and seek compensation under the Bill in relation to that damage. However, where damage is merely consequential and relates to conduct pre-1 July 2018 (e.g. ongoing loss of income as a result of conduct suffered pre-1 July 2018) we do not consider that a whistleblower should have recourse to compensation orders under the Bill on the basis there would be an overly broad scope to claim compensation no matter how tenuous the link between the conduct and the asserted damage.

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Accordingly, we recommend that section 1644(2) be clarified to provide that it is not activated where only consequential damage is suffered after 1 July 2018 in relation to conduct occurring before 1 July 2018.

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