Whistleblower bill questions: Replies by Dr David Chaikin

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?

For all practical litigation purposes, the criminal liability and civil remedies provisions in the Bill are separate. This is not a problem.

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

There is a widespread misconception concerning the hypothetical as to whether Jeff Morris would have received protection under the Bill. Firstly, under the existing law, Morris would not have received protection because his disclosures to ASIC were made when he was no longer an employee of Commonwealth Financial Planning Ltd. In contrast, the Bill expands protection to include former officers and staff, such as Morris. Secondly, under the existing law, Morris would not have been entitled to protection in relation to his initial anonymous complaints, but under the Bill anonymous disclosures are protected. Thirdly, the Commonwealth Bank did not investigate, nor disclose to ASIC that it had received a whistleblowing disclosure from Morris because it believed that it was precluded from doing so by the law. This interpretation is open on the current provisions in the Corporations Act 2001 (Cth), as it is with the parallel regimes under the banking, insurance and superannuation laws. However, the Bill allows companies to investigate whistleblower disclosures without breaching the confidentiality provisions, and for companies to communicate this information to ASIC so that they can take appropriate action. Fourthly, under the existing law Morris would not have been entitled to any protection in relation to his disclosures to the media. However, the Bill allows for media disclosure in exceptional circumstances, where there is an imminent risk of serious harm or danger to public health or safety, or to the financial system. It is likely that on the facts scenario faced by Morris at that time, that he would have qualified for emergency disclosure under the Bill, in that there was an imminent risk of serious harm to the financial system. The argument is that systemic violations of the law in a major financial institution may constitute a threat to the reputation, safety and stability of the financial system. Fifthly, there are additional provisions in the Bill which would have changed the legal and factual matrix in the case of Morris. Under the Bill a whistleblower is required to give advance notice of the intention to make an emergency disclosure, to the regulator that originally received the disclosure, thereby assuming that protection will not be lost as a result of an incorrect assumption that the regulator is either not doing anything at all, or not doing anything which is effective – an assumption made by Morris because ASIC was not forthcoming with information about its investigative and enforcement action in relation to the matter, largely because Morris' disclosure was not a protected disclosure under the existing whistleblower regimes, but also because at the time ASIC had not dealt with many whistleblower reports, had no office of the whistleblower, and had no established policy on the release of information to whistleblowers. In summary, none of the above mentioned immunities and protections were available at the time of the

Morris case, so that if the facts were repeated a very different outcome would be most likely.

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 appropriate balance is found in the Bill.

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?

I do not believe that s 337BB(5) of the Fair Work (Registered Organisations) Act 2009 should be used as a model for constraining the court in deciding issues of compensation under the Bill. My strong preference is that in regard to whistleblowers the judiciary should be given maximum discretion under the Bill so that it can fashion an appropriate order taking into account the particular circumstances and facts as revealed by the evidence.

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?

I am not familiar with the reasons why the legislature used a different test in the Public Interest Disclosure Act 2013 Cth (PIDA) and the Fair Work (Registered Organisations) Act 2009 Cth (FWRO). However, the formulation under the Bill which requires that the whistleblower engages in conduct would seem to be appropriate and necessary for a cause of action for civil liability. In order to show that the defendant regulated entity caused the detriment to the whistleblower, it is inevitable that in the vast majority of cases there would need to be a particularisation of the conduct engaged by the defendant which caused the detriment.

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

If the compensation provisions are to be effective it is vital that the legal and evidential burdens be imposed on the regulated entity. It is suggested in one of the submissions that there is no cogent reason for the reversal of burden of proof under s 317AE(2), that the ordinary processes of discovery and cross examination are sufficient tools for whistleblowers to prove their claims, and that it is likely that the Bill as currently drafted would not limit 'the likelihood of perverse claims.' If these arguments are accepted, then this Bill will not be worth the paper that it is written on. The whole point

of the reversal of the burden on proof is to change the balance of power between the alleged abuser, which will frequently be a powerful company, and the abused individual whistleblower, who in nearly every case will have few resources to pursue his or her claims. It is an exaggeration to suggest that the forensic tools of discovery and cross examination will equally serve the interests of the whistleblower as a reversal of the burden of proof. The impact of these forensic tools is uncertain and unlikely to produce the quality of evidence needed by a whistleblower to sustain his or her claim. Moreover, the process of discovery is often manipulated by a powerful adversary to drown the plaintiff whistleblower in documents (with the risk of an unethical defendant not giving proper discovery), and at the same time legal advisors to the whistleblower will face severe tactical disadvantages in that they will have to depend on the defendant company to call material witnesses, or even worse, where a witness is not called by the defendant, being forced to call a potentially hostile witness. Finally, although there may be a risk of perverse claims being made by whistleblowers, this is not a sufficient reason to destroy the most important protections of the Bill.

It is also argued in one of the submissions, that if the Bill is not amended to remove the reversal of the onus of proof, a new defence of 'reasonable management action' should be available to regulated entities. This argument suggests that whistleblowing is sufficiently similar to bullying where under the Fair Work Act there is a defence of reasonable management action. To suggest an analogy between bullying and whistleblowing so as to justify a new defence is drawing a long bow. The defence has been specifically crafted to deal with bullying in the workplace, and is not appropriate in the context of whistleblowing. Further, the proposed defence will allow defendants to avoid taking measures to protect the whistleblower (as is required under the defence in s1317AE(3)), and thereby undermine the whistleblower protection regime.

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?

Although s1317AA(1) appears to limit protection to disclosure to ASIC and APRA this is not necessarily the case, given that there is power to expand the range of Commonwealth bodies under regulations. Moreover, it would seem that ASIC and APRA will become the original gateways for whistleblowers to supply their disclosures, and that ASIC and APRA will then channel such disclosures to the appropriate government or regulatory agency, which could include the AFP.

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

It is not clear why additional protections are needed where whistleblowers use the services of a lawyer or a union. In the case of a lawyer, there are adequate protections in that the disclosure will be protected if it is made 'to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation' of the whistleblowing provisions (s 1317AA(3)). This is a formula used in a wide variety of legislation, and it is not obvious why the Bill should depart from the common legislative practice.

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?

The s1317AE(3) defence provides a practical way that employers can show that they have taken all reasonable measures to protect whistleblowers from reprisals. The defence is available to all employers, not just for employers in public companies. In order to satisfy this defence, the employer will need to give serious attention to its internal whistleblowing procedures. The employer would need to prove that it has taken 'reasonable precautions', and 'exercised due diligence' in avoiding the victimising conduct. This is likely to mean that the employer would need to demonstrate that its general systems and procedures are designed to protect employee whistleblowers as a whole against reprisals, and also that in the particular fact situation, it took a series of steps through a 'due diligence process' to avoid the victimising conduct.

In contrast, the imposition of a duty on companies to support or protect whistleblowers may have an unintended consequence of imposing onerous, complex and costly obligations on companies. Let us take an example where an employee claims a whistleblower protected status, while other employees claim that they are the victims of malicious and venal allegations. Should an employer have a duty to support only one class of employees and not another? Employees owe a duty to all employees under work and safety legislation, and it is not clear whether a specific legal duty to support or protect whistleblowers is necessary or desirable.

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? What is your view on the breadth of this provision?

I believe that s1317AAC(1)(e) is likely to be interpreted broadly so as to include any person who gives instructions to the employee, either directly or indirectly, or is regarded as being in a position of influence or as responsible for any of the employee's conditions of work, including his or her employment, health and safety, and any other legal obligation to the employee. This should not be a problem particularly in public companies and large proprietary companies, given that such companies will be required to have a whistleblower policy under s1317AI which will provide information to employees as to whom disclosures should be made.

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?

The PIDA Act, Division 2, and FWRO Act, Division 3, provided a detailed scheme which mandates the investigation of reprisals. The need for a comprehensive investigation scheme arises because of the unique position and values of the public service, and in the case of the registered organisations, the need arises from the findings of the Heydon Royal Commission. The same considerations do not apply to regulated entities.