23 February 2018

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100, Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Mr Fitt

Treasury Laws Amendment (Whistleblowers) Bill 2017
Proposed amendments to the Corporations Act 2001

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations (NFPs) and the public sector. Our members have a thorough working knowledge of the Corporations Act 2001 *(the Corporations Act*). We have drawn on their experience in our submission.

General comments

Governance Institute has strongly advocated for reform of whistleblower protection legislation. We have been involved in the consultation process for the review of tax and corporate whistleblower protections and appeared before the Parliamentary Joint Committee (PJC) Inquiry into whistleblower protections.

Governance Institute supports the national research project led by Griffith University, independently funded by the Australian Research Council and involving three other universities and 21 other supporting organisations across Australia and New Zealand. The research project is focused on identifying current and potential best practice in organisational management of whistleblowing and aims to support evidence- based law reform and the criteria to determine whether a whistleblower process works.

Governance Institute considers that whistleblowing has a critical role to play in identifying, stopping and preventing misconduct in the corporate sector. However, we note that it should be seen as just one, albeit vitally important, aspect of companies' overall programs to ensure compliance with regulation and to detect and prevent misconduct. Our members' experience is that whistleblowing usually occurs when other avenues that should already exist within corporations to deal with misconduct have been exhausted, failed or do not exist.

Governance Institute considers that the success or failure of a whistleblower program depends on the culture of the relevant organisation and of those who handle the whistleblower disclosure. Culture cannot be legislated. While the introduction of improved whistleblower protections represents a step in the right direction, our view is that the legislation will work more effectively if organisations, executives and boards develop and support cultures which

encourage employees to speak up and report misconduct and, importantly, have programs and systems which deal with disclosures in a timely, transparent and appropriate manner. Our view is that the question for boards is whether the culture is known and understood and whether the actual culture (the lived culture) represents the necessary and desired culture. It is an essential element of governance for a board not only to promote the desired culture, but also to understand if there is any disjunction between the desired and stated culture and the actual culture, for it is only the actual culture — the enacted values — that ultimately matter.

As part of our work in developing the discussion about culture, Governance Institute recently partnered with the Institute of Internal Auditors, Chartered Accountants Australia and New Zealand and The Ethics Centre to launch *Managing culture — A good practice guide* in December 2017. This practical guide argues that the role of boards is to determine the purpose, values and principles of the company, that the CEO and senior management have the responsibility for implementing the desired culture and that personnel in human resources, ethics, compliance and risk functions all have a role to play in embedding values and ethics. We commend the guide to the Committee. A link to the report is included here https://www.governanceinstitute.com.au/knowledge-resources/guidance-tools/managing-culture-a-good-practice-guide/ and we have also included the PDF as an attachment.

We consider that the current provisions governing the protection of whistleblowers in the Corporations Act are poorly regarded and infrequently used. We commend the Government for the improvements to whistleblower protections included in the bill in particular:

- the expansion of the definition of eligible whistleblower in section 1317AAA to include former officers, employees and suppliers and associates
- replacing the 'good faith' requirements with a more appropriate test of 'reasonable grounds to suspect'
- broadening the classes of wrongdoing to which the whistleblower protection provisions apply
- allowing a whistleblower to seek compensation for damage caused irrespective of criminal victimisation
- allowing for anonymous disclosure, and
- including new provisions to protect a whistleblower's identity.

We reiterate our support for the expansion of the compensation framework and note that, contrary to the recommendations of the PJC report, the bill does not provide for any reward scheme. Governance Institute does not support bounty or reward schemes providing financial rewards to corporate whistleblowers.

Governance Institute notes that the proposed amendments to the Corporations Act are in line with commitments originally made by the Government in 2016 and are not intended to represent a response to the PJC. We also note that the Government's recently formed Expert Advisory Panel is considering the draft legislation as part of the first phase of its work which will include assessing it against the PJC report.

The bill does not address a number of the issues identified by the PJC, namely, the recommendation for one scheme covering the private sector and a lead agency such as an Office of the Whistleblower to undertake the whistleblower protection role and implement the new scheme. Governance Institute supports the implementation of a stand-alone, general whistleblower protection regime in its own Act (applicable to the private sector) rather than an approach which inserts the same provisions in multiple pieces of legislation (which will be the consequence of the passing of this bill). Governance Institute also recommends that a separate ombudsman or Office of Whistleblowing would be the most effective advocate for

whistleblowers. We hope that these recommendations are adopted in a subsequent tranche of legislation and we look forward to engaging with Government as part of that process.

Notwithstanding our preference for whistleblower protection provisions to be contained in a stand-alone whistleblower act, we provide our comments on the current bill below.

Governance Institute recommends to the Committee that the passing of this bill be considered a first step towards a whistleblower protection scheme contained in its own act.

Definition of eligible whistleblower

Governance Institute notes that since the exposure draft the definition of eligible whistleblower has been expanded to include a 'relative' which is defined as including a parent, brother, sister or remoter issue or ancestor. Governance Institute's preferred position is not to create a prescriptive or arbitrary list of those qualifying for whistleblower protection which could well exclude whistleblowers who should be protected and would require constant scrutiny to ensure it covers all relevant parties. We consider also, that expanding the category of family members entitled to whistleblower protection to such a broad group may lead to practical difficulties implementing the whistleblower policy. Commonsense will need to be applied by both companies and regulators when considering the application of this broader category.

Definition of eligible recipient

We note that in the current bill the class of persons to whom an employee of an organisation may make a disclosure has been expanded from the provisions in the exposure draft to 'a person who supervises or manages the individual' (section 1317AAC (e)). This dramatically extends the number of persons to whom a protected disclosure may be made.

One benefit of expanding the category of eligible recipients is to safeguard disclosures which are commonly made by whistleblowers to their immediate supervisor or manager. Arguably, without such protection, whistleblowers who make disclosures to their manager or supervisor (a common method of reporting wrongdoing) may be unable to claim protection from reprisals as they have not made their disclosure to the designated recipient. Clearly, this would be an undesirable outcome and would be contrary to the legislative intent of encouraging internal disclosure of misconduct and protecting whistleblowers.

However, Governance Institute has concerns about the practical implementation and workability of a whistleblower policy which has such a broad class of eligible recipient. This is particularly the case in light of the onerous obligations as to confidentiality which apply to protected disclosures and the negative impact on the whistleblower if disclosures are not handled correctly. Medium and large organisations may have many hundreds or indeed thousands of employees who supervise or manage staff and therefore deemed eligible recipients of whistleblower disclosures. Training such a large number of managers and supervisors to identify and handle whistleblower disclosures is impractical and costly for many organisations and will also mean that relatively junior staff could receive disclosures. The internal systems of control and whistleblower policies and procedures of many companies are unlikely to currently provide for such a large category of eligible recipients.

The current bill requires whistleblower policies to include the following matters:

- information about whom disclosures that qualify for protection may be made to, and how they may be made

- information about how the company will support whistleblowers and protect them from detriment
- information about how the company will investigate disclosures that qualify for protection
- information about how the policy is to be made available to officers and employees of the company.

Each organisation will be required to design a whistleblower policy which is fit for purpose and complies with the Act. We consider that organisations are best placed to decide the details of their whistleblower policy including the people within the organisation who are authorised to receive disclosures that may qualify for protection. The whistleblower protection policy will need to fit within the company's existing governance and risk framework.

An organisation which has an appropriate number of authorised persons to whom disclosures may be made (in accordance with section 1317AAC (d)) should not, in practice, also be required to have large numbers of deemed eligible recipients (particularly bearing in mind the other categories of eligible recipients in section 1317AAC). Governance Institute considers that requiring supervisors and managers of employees to be eligible recipients will be unworkable in practice.

Governance Institute recommends that a company be subject to the requirement to authorise an appropriate number or category of persons to receive whistleblower disclosures and that the issue of what is appropriate be determined having regard to the ability of an employee to easily and confidentially make internal whistleblower disclosures which will trigger the company's whistleblower protection obligations. These authorised persons will be eligible recipients, in addition to the other categories of recipients such as company officers, auditors and actuaries.

Disclosable conduct

In our submission to Treasury dated 15 February 2017 we noted that expanding the scope of subject matter requirements may have the consequence that personal grievances and human resource matters are caught up in the whistleblower process. Our view is that any provision governing disclosable conduct should exclude matters relating solely to personal employment-related grievances that are better dealt with through existing processes.

Governance Institute recommends that the definition of disclosable conduct be clarified to specify that certain matters, such as personal employment-related grievances, are not intended to be disclosures which qualify for whistleblower protection. **We further recommend** that this clarification of the definition be included in the bill and not confined to the explanatory memorandum.

Third party disclosure

Governance Institute is on record as recommending against legislation providing protection for whistleblowers disclosing to the media or members of parliament. We note that recent changes have been made to the bill requiring whistleblowers to satisfy certain steps before making a disclosure to the media or parliamentarian.

Notwithstanding the restrictions in the bill on the ability of a whistleblower to seek protection for disclosures made to third parties, we reiterate our view that protection should not be extended to whistleblowers who intentionally make disclosures to the media or to parliament. Whistleblowers should be encouraged to disclose misconduct internally or to the relevant

regulator with authority to investigate and address the misconduct disclosed. In our view, legislation which enables a whistleblower to circumvent the actions of a regulator risks undermining the role of the regulator in investigating and dealing with whistleblower disclosures. As Governance Institute has previously stated, the media has no legal powers to investigate an allegation but does have the capacity to express an opinion on a matter that has not yet been tested. Disclosure to the media and the expression of opinion in the media on the matter could also prejudice an ongoing investigation. What constitutes a 'reasonable period of time' will vary according to the complexity and severity of the subject matter of the disclosure. It may also be unhelpful to have a whistleblower 'second guess' a regulator as to how long is an appropriate time to fully investigate an allegation of misconduct. By way of example, we understand that experience in the UK, is that investigations under the UK Bribery Act can take, on average, four to five years, and are particularly complex and slow in their first year when navigating data privacy laws in multiple jurisdictions.

Extending whistleblower protection to third party disclosures may also work against the provisions which aim to protect the whistleblower. There are few controls imposed or enforced in relation to the ways in which the media use information provided by the public. There is no obligation on the part of the media to maintain confidentiality and protect the whistleblower's identity. Once the disclosure is made to third parties, the risk that the confidential details of the whistleblower are disclosed therefore increases.

Governance Institute recommends that rather than provide for protection for third party disclosures, a more effective way of dealing with whistleblowers who have concerns about how their disclosure is being investigated by the relevant regulatory body is to establish a separate Ombudsman or Office of Whistleblowing to be an effective advocate and support for whistleblowers.

We consider that it is vital to the success of the legislation that the regulators which the draft legislation defines as 'whistleblower disclosees' (ASIC, APRA and the AFP) be provided with broader powers and resources to refer or coordinate investigations. This would ensure that whistleblower disclosures can be investigated in a timely fashion.

Confidentiality of whistleblower's identity

We note that the proposed amendments assist those within a company to investigate whistleblower disclosures by making it clear that it is not an offence to disclose the information, provided that the whistleblower's identity is not revealed.

Governance Institute is on record as supporting the recipient of a disclosure being permitted to disclose that information and discuss the issue with the board or senior officers of the company, for the purpose of investigating or remedying the matters raised. We consider that disclosure of the information in order to conduct investigations should be allowed, even if it reveals the identity of the whistleblower. In many cases, the identity of the whistleblower will be an important piece of evidence in the investigation, or may be inferred or easily guessed by the content of the disclosure. The important issue, is that the identity of the whistleblower remains confidential to those within the company investigating the disclosure or the regulator to which disclosure has been made.

We recommend that the provisions concerning protection of a whistleblower's identity should apply to all recipients of the information.

Legal remedies

We note that in order to make an application for compensation for detriment suffered as a result of a disclosure, a whistleblower will need to commence proceedings under the Corporations Act. Governance Institute supports the establishment of an Office of the Whistleblower to provide assistance and support to whistleblowers and to make applications to the court on their behalf for civil protection remedies.

Application of Whistleblower provisions

We note that the proposed whistleblower provisions are intended to apply from 1 July 2018 and will cover disclosures made and acts of victimisation of whistleblowers from that date. The provisions will apply to all companies regulated by the Corporations Act.

Additionally, all public companies and large proprietary companies will be required to have a whistleblower policy in place by 1 January 2019, or six months after a company first becomes a large proprietary company. The whistleblower protection provisions will therefore capture a wide array of entities including public companies limited by guarantee (which includes charities) and proprietary companies.

Governance Institute recommends that Government provide clear guidance to organisations on the new whistleblower requirements. We also suggest that Government consider extending the implementation date of the provisions for companies limited by guarantee and proprietary companies. This would take account of the fact that many of these entities may require additional time to develop and embed their whistleblower protection policies and adequately train their staff. It will be particularly important for entities to provide training to their whistleblower disclosees as a breach of a whistleblower's confidentiality will subject the entity to a pecuniary penalty. Bearing in mind that failure to have a whistleblowing policy will be a strict liability offence, we recommend that there be a period of transition during which time defaulting companies will be given a period of time in which to comply with the requirements.

Governance Institute would welcome further contact during the consultation process and the opportunity to be involved in further deliberations.

Yours sincerely

Steven Burrell
Chief Executive

Attachment: Managing Culture – A good practice guide