

Mr Anthony Watson

11 February 2024

**Submission to the Senate Legislation Economics Committee
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (“the Bill”)**

1. This submission addresses Schedule 2 of the Bill – Extending tax whistleblower protections.

My Background

2. I am a chartered accountant and a solicitor. From 1984 to 2017, I worked for Greenwoods & HerbertSmithFreehills (“Greenwoods”). I was a partner from 1989 till 2017. Greenwoods was a preeminent Australian tax advisory firm. It was acquired by Price WaterhouseCoopers in 2022, and is now known as PriceWaterhouseCoopers Tax Services Pty Ltd (“PwC”).
3. I am a whistleblower who made protected disclosures to the ATO in relation to the \$300m Lendlease tax fraud in its retirement village business. That fraud is described in Appendix A.

Submission Summary

A. Schedule 2 – PwC Response – Extending tax whistleblower protections

4. Schedule 2 was announced on 6 August 2023 as part of the Government’s response to the PwC tax leaks scandal. Schedule 2 amends the Taxation Administration Act 1953 (“the TAA”) to extend whistleblower protections to eligible whistleblowers who make disclosures to the Tax Practitioners Board and other supportive entities.
5. Schedule 2 is slated to commence on a date after Royal Assent.
6. Parliament intends that the protection of whistleblowers be given and assured from the time the whistleblower makes a protected disclosure. In the 6 August 2023 Announcement, the Ministers stated:

We will:

- *Remove limitations in the tax secrecy laws that were a barrier to regulators acting in response to PwC's breach of confidence;*
- *Enable the ATO and Tax Practitioners Board to refer ethical misconduct by advisers (including but not limited to confidentiality breaches) to professional associations for disciplinary action;*
- *Protect whistleblowers when they provide the Tax Practitioners Board with evidence of tax agent misconduct;...*

B. The problem with Schedule 2 is that the protection of whistleblowers will not be available when Parliament intends that it should be available

7. Protection of a whistleblower who makes a protected disclosure to the TPB after the Bill becomes law will be undiscovered and denied.
8. The effect of the Full Federal Court decision in *Watson v Greenwoods & Freehills Pty Ltd* and *Lendlease* is that the protection, intended by Parliament to be available to a whistleblower who makes a disclosure after Royal Assent, will in fact only be available to a whistleblower who suffers detrimental conduct after Royal Assent. The timing of the disclosure will be irrelevant.
9. Parliament should legislate that protection is given upon the making of the protected disclosure, and that the timing of any detrimental conduct is irrelevant.

The Importance of Whistleblowers

10. It is in everybody's interest that we protect those who call wrongdoing. Professor AJ Brown, Professor of Public Law and Policy at Griffith University and a board member of Transparency International, appeared before the Parliamentary Joint Committee on Ethics and Professional Accountability on October 6th. Professor Brown said: "*Since I last appeared before this committee in 2017 we have certainly completed a lot more research which confirms that whistleblowing is the single most important and significant way in which wrongdoing comes to light...It does not matter which industry or which sector of the economy, or which institutions, we are talking about.*" The best defence, and the best deterrent, against wrongdoing of all types is the whistleblower.
11. Our current whistleblower laws were introduced into the Corporations Act and the TAA in 2019 after the Senate Economics Legislation Committee had inquired into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, and

released its Report in March 2018. The Government responded to that Report in March 2019. The Parliamentary Joint Committee on Corporations and Financial Services had inquired into and reported on the adequacy of whistleblower protections in Australia in September 2017. The Government responded to that Report in April 2019. By the time Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 received Royal Assent on 12 March 2019, scores of politicians had spoken of the importance of whistleblowing, and the strength and efficacy of today's laws.

12. The 2019 year seemed to promise genuine protections for whistleblowers. In 2019, the Parliamentary Assembly of the Council of Europe resolved: *Disclosing serious failings in the public interest must not remain the preserve of those citizens who are prepared to sacrifice their personal lives and those of their relatives, as has happened too often in the past. Sounding the alarm must become a normal reflex of every responsible citizen who has become aware of serious threats in the public interest.*
13. The Revised Explanatory Memorandum ("the EM") to the (Enhancing Whistleblower Protections) Bill noted that the new tax whistleblower regime is *intended to encourage individuals to disclose information to the ATO on tax avoidance behaviour and other tax issues*. The TAA was amended to "*create a regime to protect and compensate individuals who report breaches of the tax law*".

The Protection offered to Whistleblowers and the Availability of that Protection

14. The two significant protections offered to whistleblowers become important only when the whistleblower is seeking compensation in proceedings. They are the reversal of the burden of proof, and the non-award of costs.
15. The EM explained the reversal of the onus of proof: *The reversal of the onus of proof recognises the well documented propensity of organisations that are the subject of a disclosure of wrongdoing to accuse and victimise the whistleblower, citing reasons other than the disclosure for their actions. It also recognises the actual knowledge of the reasons for, and conduct of, any victimising conduct will lie exclusively with the defendant in these cases.*
16. And the EM explained the non-award of costs in these terms: *Legal costs can be prohibitive to any person seeking compensation for damage, and the risks of being ordered to pay the costs of other parties to the proceedings may deter whistleblowers from bringing the matter to court.*
17. The protections were legislated by Parliament to apply in accordance with a specific application provision:

“Application

The amendments made by this Part apply in relation to disclosures that:

- (a) are made at or after 1 July 2019; and
- (b) relate to matters that occur or occurred before, at or after 1 July 2019.”

18. The EM described the application of the protective amendments in these terms:

“The amendments will apply in relation to whistleblower disclosures made on or after 1 July 2019, including disclosures about events occurring before 1 July 2019.”

The Federal Court’s interpretation of the availability of the protections

- 19. Lendlease was the biggest client of Greenwoods for twenty years. I had worked on Lendlease matters at Greenwoods since 1984; it was my entire working career. I was lead partner on Lendlease since 1990.
- 20. I made several protected disclosures to the ATO after 1 July 2019 in relation to the Lendlease \$300m fraud in its retirement living business.
- 21. The ATO audit of the fraud is nearing finalisation. Primary tax and penalties will be in the hundreds of millions.
- 22. I commenced proceedings in April 2022 against Lendlease and PwC in the Federal Court under the TAA whistleblower protections.
- 23. Lendlease and PwC sought to strike out my claim for whistleblower protection under the TAA. Lendlease and PwC said that although my protected disclosures were made after 1 July 2019, they themselves had committed the fraud before 1 July 2019, and had victimised me (by removing me as head of the Lendlease account, and sacking me) before 1 July 2019.
- 24. A stated question was referred to the Full Federal Court. It asked if the whistleblower compensation provisions of the TAA (ss 14ZZZ and 14ZZZA) apply to detrimental conduct that was engaged in before 1 July 2019. Counsel for PwC and Lendlease successfully argued to the Federal Court: *The court should reject any argument that the amended provisions are intended to apply simply because the pleaded disclosure answers the description in the legislation.*
- 25. The Federal Court has rewritten and replaced Parliament’s test. Parliament had legislated to protect those who made disclosures after 1 July 2019. The Federal Court has substituted the test, so that the protection is available only to those who are victimised on or after 1 July 2019. A simple example demonstrates this:

*Lisa and Linda are identical twins, working for BigBank. They become aware BigBank is carrying out a tax fraud. On 30 June 2019, Lisa and Linda tell their boss. Lisa is dismissed immediately. Linda is dismissed the following day (1 July 2019). They tell the ATO on 1 July 2019. As interpreted, Linda is entitled to protection under the TAA's whistleblower rules. Lisa has no protection. The *only* difference between them is the date of dismissal. The *timing* of their disclosures is irrelevant.*

This identical problem will arise under Schedule 2 of the Bill

26. A critical issue for this Committee is that the identical problem will arise here. The sections affording protection for disclosures to the ATO (14ZZZ and 14ZZZA) are the *same* sections which will afford protection for disclosures to the TPB.
27. A disclosure made to the TPB after commencement will *not* attract protection unless the whistleblower was victimised after commencement.
28. Right now, tax frauds and schemes are being carried out around Australia. Some frauds will be concluded; some will be in progress; and some frauds will be in formation. Parliament wants those frauds exposed. To encourage disclosures, Parliament offers to protect those who make the disclosures. It does not matter, and nor should it matter, when the fraud was or is perpetrated, or when the whistleblower suffered.
29. The only act that helps society is the disclosure. If a disclosure is made, protection must be assured.
30. The US IRS offers a bounty to individuals who disclose information about tax frauds which are successfully prosecuted. The discloser need not have suffered any victimisation. The *only* requirement is that the discloser makes the disclosure. It is more laudable to protect an unrewarded discloser than to reward an unharmed one. It demonstrates why the timing of any detrimental conduct is irrelevant.

There have been no successful whistleblowing cases in Australia. Ever.

31. The inaccessibility of whistleblower protections is a regrettable trend in Australia. Recently, the Human Rights Law Centre reviewed every whistleblower case to go to judgment in Australia. There has not been a single successful judgment for a whistleblower under our public or private whistleblower regimes.
32. This Committee can ensure Parliament reinstates the intended application and efficacy of Australia's whistleblower laws.

33. The author would be pleased to provide any further information the Committee requires, including a draft of suggested amendments.

AJ Watson