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By Email

Dear Ms Holmes

Whistleblowers Bill: Response to questions on notice

We refer to:

1 our submission on the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (**Bill**) dated 23 February 2018 (**Submission**); and

2 the questions provided on notice by the Senate Economics Committee under cover of your email dated 2 March 2018 (**Questions**).

We are grateful for the opportunity to provide further comments on the Bill in response to the Questions.

To the extent you would like to discuss any aspect of our Submission or below responses to the Questions in further detail, we would be pleased to provide assistance.

1 Response to Questions

1.1 Question 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?

This Question does not appear to relate to our Submission. Accordingly, without further information, it is not appropriate for us to make any comment in response. If we are provided with further information, we are happy to consider a response.

1.2 Question 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?

Whilst we have seen some media reports over time, we are not aware of the specific details of, and circumstances surrounding, Mr Morris' disclosure of the "Commonwealth Financial Planning Scandal". Accordingly, we are not in a position to comment on this Question.

1.3 Question 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?

This Question does not appear to relate to our Submission. Accordingly, without further information, it is not appropriate for us to make any comment in response. If we are provided with further information, we are happy to consider a response.

1.4 Question 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?

We consider that the compensation provisions in s 1317AD and s 1317AE of the Bill are sufficiently broad to contemplate loss, damage or injury of the nature described by subsection 337BB(5) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO**).

Given the broad scope of the Court's power to determine appropriate remedies, it does not appear to be necessary to specifically require the Court to have regard to this issue. We would assume that, if relevant, a claimant would lead the relevant evidence in relation to such loss which could then be considered by the Court in the ordinary course.

Accordingly, in our view, it is unnecessary to single out any likely period of resulting unemployment as a factor for consideration and this in fact may not be appropriate unless evidence is led as to the likely period of unemployment. We consider it more appropriate that such evidence, if relevant, be led by the individual seeking compensation as part of their broader claim.

Notwithstanding this, if subsection 337BB(5) of the FWRO is proposed to be replicated in the Bill, we recommend that as a minimum, an express duty on the part of the whistleblower to mitigate their loss also be inserted. This reduces the likelihood that the compensation provisions under the Bill will be used by individuals to claim significant compensation in circumstances where they do not make efforts to seek alternative employment (see our response to Question 6).

1.5 Question 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?

In the time available, we have found limited legal guidance on the interpretation of "engage in conduct" outside of its use under the misleading and deceptive conduct provisions contained in the Australian Consumer Law. Section 2(2) of the Australian Consumer Law expressly defines "engaging in conduct" as "*doing or refusing to do any act*". The term "refusing to do any act" in turn is defined to mean "*refraining (other than inadvertently) from doing that act; or making it known that that act will not be done*".

On a plain reading of the words, "engage in conduct", as well as on the interpretation adopted by the Australian Consumer Law, there necessarily appears to be a requirement that there be some conscious action on the part of the perpetrator either by act or

omission. In particular, any refusal to do an act will only be caught under the Australian Consumer Law if it was not inadvertent.

In contrast, we consider that a formulation which merely contemplates that "any detriment" that has been caused by any "act or omission" could capture a significantly broader range of conduct, including inadvertent acts or omissions which may only be remotely linked to the victimising conduct. In our view, it is inappropriate to extend the significant penalties under the compensation provisions of the Bill to acts and omissions which can somehow be identified as, whether directly or indirectly, being a contributory factor to *any* detriment.

1.6 Question 6

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

Given the potentially significant compensatory orders that may be made under the Bill, we recommend that an express duty be imposed on individuals seeking compensation for victimising conduct to demonstrate that they have taken reasonable steps to mitigate any loss, damage or injury suffered by them as a result of the victimising conduct.

This is particularly salient in the context of orders for compensation relating to loss of income as a result of victimising conduct (see Question 4).

The Bill provides significant additional protections to whistleblowers, and it is important that these are appropriately balanced such that purported whistleblowers do not simply seek to rely on the benefit of compensation orders without taking steps to mitigate any alleged loss. We consider that, as a matter of public policy, individuals should not be permitted to claim significant compensation which could have been reasonably mitigated in whole or in part.

1.7 Question 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?

We consider the current position contained in the Bill to be appropriate on the basis that ASIC and APRA are the corporate regulators that have responsibility for administrating company and financial services laws in Australia.

Given that the underlying intention of the Bill is to encourage disclosure of misconduct in the corporate and financial sector, and makes specific reference to the disclosure of conduct that is in contravention of corporate and financial services laws, our view is that ASIC and APRA are most appropriately positioned to deal with disclosures likely to be made under the regime proposed by the Bill. We expect that ASIC and APRA will have the requisite depth of knowledge and experience with respect to the corporate and financial regulatory environment to appropriately deal with disclosures under the Bill. We see efficiencies in encouraging ASIC and APRA as the first instance recipients of disclosures to regulators, rather than encouraging reporting to a more disparate range of regulators or law enforcement authorities like the AFP.

This is not intended to undermine the role that the AFP has in enforcing Commonwealth laws generally. Rather, this role is already contemplated by s 1317AAE(2), which authorises the disclosure of protected disclosures under the Bill to the AFP (e.g. by APRA / ASIC and other 'eligible recipients' to the AFP). However, while we consider it appropriate that the Bill contemplates disclosures to the AFP to enable it to perform its functions, we consider it is unnecessary to impose an additional administrative burden on

the AFP in connection with receiving and responding to purported disclosures under the Bill at first instance.

It is reasonably foreseeable that a large number of disclosers may approach the AFP at first instance to make disclosures, given the AFP's relative accessibility. However, given that APRA and ASIC are better equipped to respond to disclosures due to the nature of the disclosures that may be made under the Bill, it is likely that ASIC and APRA will be the more appropriate first recipients of such disclosures and we expect it is likely that the AFP would then seek to refer those disclosures received by it in any case. We do not perceive any utility in introducing the AFP or other regulators as an additional step in this regard.

1.8 Question 8

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

We agree with the introduction of s 1317AA(3) in the Bill which extends protection to disclosures made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of the whistleblowing provisions. As a legal practitioner who receives a disclosure under this provision will be subject to the confidentiality obligations (and penalties in connection with a breach of same) under s 1317AAE of the Bill, we consider this to be adequate protection for whistleblowers.

We note that the FWRO allows disclosures to be made via lawyers, including anonymously. We do not object to this approach though consider, in line with the approach under the FWRO that, where lawyers are permitted to make disclosures on behalf of whistleblowers, protections with respect to costs orders should apply both ways, and not only in favour of the whistleblower as is currently contemplated by s 1317AH of the Bill (see HSF Recommendation 6 of our Submission).

We do not believe it is appropriate to include similar protections with respect to disclosures to union representatives. Unions will have their respective industrial agendas, and we consider it is not desirable to encourage or enable unions to use information obtained as a result of whistleblower disclosure to advance such agendas. We note that such a purpose is not consistent with the intention of the Bill, which seeks to target corporate misconduct as a matter of public interest, and not as a mechanism that is intended to be used to achieve an industrial goal.

1.9 Question 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?

In the time available we have not been able to identify legislation that obliges an employer to support or protect employees. One parallel that might be drawn is with the primary duty under work health and safety legislation, which requires persons conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers (see, e.g. s 19 of the *Work Health and Safety Act 2011* (NSW)).

In our experience, the imposition of a broad duty of the nature contained in work health and safety legislation focuses the subsequent legal inquiry on omissions which often only become apparent with the benefit of hindsight. This is in contrast to the formulation proposed in subsection 1317AE(3) of the Bill, which focuses the legal inquiry on the positive steps that have been taken by an employer to avoid victimising conduct in the first place.

A duty to "support or protect" would also be difficult to quantify in terms of the extent of the obligation to "support or protect". This is of particular significance given the significant penalties that may result from breach.

In our view, the preferable approach is that currently taken in subsection 1317AE(3), which requires an employer to demonstrate that they have taken 'reasonable precautions' and exercised 'due diligence' to avoid the victimising conduct. This approach is similar to steps required to be taken in order to rely on a defence to vicarious liability under equal opportunity / discrimination legislation, e.g. under s 106 of the *Sex Discrimination Act 1984* (Cth), which provides a defence where the employer "*took all reasonable steps to prevent the employee or agent from doing acts*" in contravention of that legislation. In our experience, we have seen that this type of formulation encourages employers to actively implement policies and training so that staff are aware of their legal protections and obligations. We also note that a similar 'due diligence' and 'reasonable precautions' defence exists for companies in relation to breaches of Australian trade sanctions laws. It is also consistent with the 'due diligence' defence to corporate liability under the Commonwealth Criminal Code. Again these provisions encourage companies to actively implement policies and training to ensure compliance with these legal requirements.

The formulation in subsection 1317AE(3) similarly encourages the adoption of best practice processes to prevent victimising conduct. In this regard, we refer to HSF Recommendation 5 in our Submission, which submits that all parties will benefit from published guidance on what constitutes 'reasonable precautions' and 'due diligence' for the purposes of this defence.

1.10 Question 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?

We have commented extensively on the scope of s 1317AAC(1)(e) in HSF Recommendation 1 of our Submission. As noted in our Submission, we consider "a person who supervises or manages the individual" to be too broad in scope, given the number of individuals in an organisation that would ordinarily be captured within this category.

In particular, we agree with an interpretation that this could extend to direct and indirect supervisors in a chain of responsibility, such that individuals in higher positions in the chain may be eligible to receive disclosures from employees within the organisation. On a plain reading of the provision, it is not expressly limited to "immediate" supervisors. As set out in our Submission, we recommend that specific positions be prescribed that are better equipped to appropriately handle a disclosure (such as the Head of Risk or Head of Human Resources and/or any Whistleblowing Protection Officer).

1.11 Question 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?

In our view, it would be neither preferable nor appropriate for an organisation to have an absolute obligation to investigate, including having regard to the nuances in how an organisation may conduct investigations or otherwise respond to a report. Whistleblower

matters can raise unique and complex circumstances which require a specific response that is appropriate in all the circumstances.

We consider it would be preferable for guidance to be published rather than enshrining a particular process in the Bill. This would allow for a more fluid approach that can be suitably responsive to the nature of the disclosure and the particular issues that arise.

We are pleased to see the inclusion of s 1317AAE(4) of the Bill, which suitably enables disclosures to be made in certain circumstances for the purpose of conducting investigations into matters to which a protected disclosure relates. However, this should be amended to extend to disclosure reasonably necessary for the purposes of reporting on the findings of investigations and taking appropriate action, as noted in HSF Recommendation 8 of our Submission, so that a disclosure can be appropriately addressed as required.

2 Contact details

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