

6 November 2017

The Treasury  
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PARKES ACT 2600  
AUSTRALIA  
Email: [whistleblowers@treasury.gov.au](mailto:whistleblowers@treasury.gov.au)  
Attn.: Jodi Keall and Greg Wood

Dear Ms Keall and Mr Wood

**Submission to the consultation on the exposure draft of the Treasury Laws Amendment  
(Whistleblowers) Bill 2017**

## Background

Thank you for the opportunity to submit our views on the exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017.

Regnan represents large institutional investors with over \$73 billion invested in S&P/ASX200 companies, or ~4.5% of this index (at 30 June 2017). These institutions include Commonwealth Superannuation Corporation, BT Investment Management, First State Super, HESTA and VicSuper. Regnan was established to investigate sources of risk and value for long term investors in Australian companies.

One of Regnan's core areas of work, dating from 2003, has been continuous evaluation of the ethical conduct exposures particular to individual companies, discussing risk oversight and management with corporate leaders. This submission is informed by the insights gleaned over hundreds of meetings with company representatives that have formed part of this process.

## Scope

**Regnan strongly welcomes the *strengthening, broadening and harmonising* of legislative provisions proposed by the Treasury Laws Amendment (Whistleblowers) Bill 2017.**

Questions about accessibility; legal and administrative complexity; and fear of consequences are among the issues known to impede individuals who might otherwise report wrongdoing. The proposed changes significantly reduce these impediments.

However the Draft Bill's provisions continue to exclude a range of situations where public interest disclosures may be foreseeably deterred by legal complexity and an imbalance of power between

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discloser and alleged wrongdoer. We see no reason that Whistleblower protections under the Corporations Act should not encompass these situations:

1. **Disclosures** about likely breaches of instruments not mentioned at 1317 AA. For instance, breaches of
  - State-based laws, such as Trade Practices legislation;
  - Non-legislative directives – such as court orders or enforceable undertakings;
  - Commonwealth legislation NEITHER listed at 1317 AA (3) (c) NOR not punishable by imprisonment of 12 months or more NOR posing “danger to the public or to the financial system.”

The Bill as drafted limits the conditions under which protected disclosures can be made. It falls to a whistleblower to evaluate whether wrongdoing qualifies as *disclosable conduct* before they can be confident in protections under the Act (including the protection offered for disclosures made to a legal advisor – a circular result).

This is inconsistent with the overarching objective of eliciting the higher levels of disclosure that would increase prevention, detection and deterrence of wrongdoing.

2. **Disclosers** not mentioned at 1317 AAD, including:
  - Customers and potential customers;
  - Third parties having occasion to observe breaches or likely breaches.

Individuals need not be in an employment or contractual relationships with whistleblower-regulated entities in order to observe disclosable conduct. Third parties can be deterred from reporting misconduct due to the ability of large organisations to exploit an imbalance of power in retaliation (regardless of whether or not the organisation would actually do so).

We see no reason that the protections and provisions afforded by the Draft Bill should be limited to those listed at 1317AAD, and view this as arbitrarily limiting the Act’s effectiveness in detecting and deter wrongdoing or likely wrongdoing.

For example, an individual who observes the availability of a product in contravention of relevant regulation should be able to report this under similar provisions to those applying to an employee.

3. A) **Disclosees not mentioned at 1317 AAB** who play a formal role in supporting or assisting potential whistleblowers:
  - professional services providers,
  - healthcare providers and counselling services

Regnan notes the significant personal and professional burden often borne by whistleblowers, including *prior* to making - or deciding to make - disclosures. The ability of disclosers to access a variety of forms of advice, support and assistance, beyond legal assistance, should be plainly signalled within the Act.

**B) Disclosees not mentioned at 1317AAC with any formal role in investigating or disciplining wrongdoing,** for instance, professional bodies, journalists, or a member of parliament.

Broadening 1317AAC in order to accommodate a wider range of disclosees in cases of urgency, or after sufficient time passing is a welcome step, however again we see the formulation as unnecessarily limiting.

Regnan accepts the need to limit vexatious reporting, both to remain faithful to the aim of system integrity, and to facilitate its effective operation in practice. However some level of false positives (reports later judged without merit) should be accommodated as evidence of sufficient impact on the willingness of potential whistleblowers to come forward.

We recognise also that it is desirable that there be robust *internal* procedures to handle misconduct, and that these be used wherever possible. Regnan anticipates that establishing legislative provisions that extended coverage to a more comprehensive range of disclosures, disclosers and disclosees would provide a strong incentive to whistleblower-regulated entities to strengthen availability, awareness, and responsiveness of internal (or contracted third party) whistleblower arrangements, in order to avert the need for whistleblowers to seek other channels for concerns. We believe this would be a more effective way to stimulate effective whistleblower provisions than a direct requirement for policy or provisions.

We strongly welcome the proposed changes, and would welcome further extension of these provisions to other disclosures, disclosers and disclosees as discussed above, at this time or in future reviews.

Should you have any questions in relation to this submission, please contact me on (02) 9299 6999 or [pauline.vamos@regnan.com](mailto:pauline.vamos@regnan.com) or [susheela.peresdacosta@regnan.com](mailto:susheela.peresdacosta@regnan.com).

Yours sincerely



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