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Dear Ms Keall

### **Treasury Laws Amendment (Whistleblowers) Bill 2017 – Exposure Draft**

The Insurance Council of Australia (the Insurance Council) appreciates the opportunity to comment on the Exposure Draft *Treasury Laws Amendment (Whistleblowers) Bill 2017* (the draft Bill) and the related Exposure Draft Explanatory Materials (the draft EM). The existing legislative protections for whistleblowers play an important role in reinforcing corporate accountability and the Insurance Council supports measures to strengthen these protections where required.

The Insurance Council is supportive of streamlining the existing various whistleblower rules contained in legislation administered by the Australian Securities and Investments Commission (ASIC) and Australian Prudential Regulation Authority (APRA) into a single regime contained within the *Corporations Act 2001* (the Corporations Act). The Insurance Council's members are currently required to observe whistleblower rules under multiple pieces of legislation, and streamlining the rules will facilitate ease of compliance and consistency of application. We are also supportive of extending whistleblower protections to disclosures relevant to breaches of tax laws by creating a new regime under the *Tax Administration Act 1953* (the TAA).

While the Insurance Council welcomes the proposed reforms, we are concerned about the practical implications for regulated entities from aspects of the draft Bill, including the broadening of eligible whistleblowers, disclosees and the right to compensation.

#### ***Eligible whistleblowers***

The draft Bill expands the scope of disclosers qualifying for protection to include individuals formerly in a relationship with a whistleblower regulated entity; including former directors, officers, employees, contractors, suppliers and associates (as well as the spouse, child or dependent of these individuals). Expanding the categories of eligible whistleblowers will have the effect of encouraging disclosures, and we acknowledge this is a key objective of the proposed reform.

However, we are concerned that broadening the scope of eligible whistleblowers, in conjunction with enabling anonymous disclosures and removing the requirement for disclosures to be made in “good faith”, heightens the risk of malicious reporting and the associated administrative burden on regulated entities.

### *Third party disclosees*

Under the existing provisions, disclosures are protected if they are made to ASIC, APRA, the company’s auditor, or nominated persons within the company. The Insurance Council is concerned about the proposed expansion of disclosees to include third parties such as members of Parliament and journalists. As noted in the Insurance Council’s submission to the consultation earlier this year, the regulators are best placed to review disclosures, determine whether misconduct has occurred and commence litigation or stipulate sanctions where appropriate. We question the utility of broadening protections to disclosures made to third parties who would not be in a position to take similar action. We also note that an assessment of whether a financial services law has been breached is often a complex exercise, and the disclosure of technical information to third parties who may not be equipped to interpret this information could give rise to inaccurate and misleading assessments being made public.

The draft EM suggests that disclosures to third parties may be appropriate in situations where the whistleblower has made a disclosure to ASIC, APRA and/or the Australian Federal Police and this has not resulted in action being taken. We note that a regulator may take no action due to their assessment that no misconduct has occurred, and disclosure to third parties who have access to a broad public platform may cause unwarranted but significant reputational harm to regulated entities. In addition, whistleblowers are often not in a position to assess whether regulatory action has been taken.

We are particularly concerned that encouraging disclosures to the media increases the risk that the whistleblower is exposed to exploitation and victimisation outside of the regulated entity’s control. We note that there is insufficient clarity in the draft Bill around protections for disclosures made to third parties; for instance, it is unclear whether third party disclosees will be subject to civil or criminal penalties for failing to comply with the requirements around confidentiality of the whistleblower’s identity.

We are also concerned that the definition of “journalist” as a person who is working in a professional capacity is too broad, which heightens the risk of malicious disclosure through social media. While the draft EM suggests that the definition is not intended to capture self-defined journalists, we are concerned that under the current definition, there may be scope for such individuals to argue they are acting in a “professional capacity”.

### *Right to compensation*

Under the existing law, our understanding of the offence of “victimisation” prohibits conduct that intentionally causes detriment. The draft Bill makes it clear that the victimiser need not intend that the conduct cause detriment and removes the requirement for victims to prove that an offence has been committed. As such, it is our understanding that as long as the victim can prove that they suffered damage because of the regulated entity’s conduct, the onus is on the regulated entity to prove that a disclosure was not in any part a reason for their conduct.

We acknowledge that the proposed compensation amendments are intended to remove constraints or impediments for eligible whistleblowers. However, we are concerned about the impact on regulated entities in so far as the expanded access to compensation relates to unsubstantiated or malicious disclosures.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or [janning@insurancecouncil.com.au](mailto:janning@insurancecouncil.com.au).

Yours sincerely



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