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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TREASURY LAWS AMENDMENT (ENHANCING WHISTLEBLOWER
PROTECTIONS) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ADI	Authorised deposit-taking institution
Anti-Money Laundering and Counter-Terrorism Financing Act	<i>Anti -Money Laundering and Counter -Terrorism Financing Act 2006</i>
AFP	Australian Federal Police
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ATO	Australian Taxation Office
Banking Act	<i>Banking Act 1959</i>
Commissioner	Commissioner of Taxation
Commonwealth	Commonwealth of Australia
Competition and Consumer Act	<i>Competition and Consumer Act 2010</i>
Corporations Act	<i>Corporations Act 2001</i>
Data Collection Act	<i>Financial Services (Collection of Data) Act 2001</i>
Discussion Paper	<i>Review of tax and corporate whistleblower protections in Australia</i> issued on 20 December 2016
Fair Work Act	<i>Fair Work Act 2009</i>
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
Human Rights (Parliamentary Scrutiny) Act	<i>Human Rights (Parliamentary Scrutiny) Act 2011</i>
ICCPR	International Covenant on Civil and Political Rights
Insurance Act	<i>Insurance Act 1973</i>

<i>Abbreviation</i>	<i>Definition</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Legislation Act	<i>Legislation Act 2003</i>
Life Insurance Act	<i>Life Insurance Act 1995</i>
National Consumer Credit Protection Act	<i>National Consumer Credit Protection Act 2009</i>
NOHC	Non-operating holding company
OGNAP	Open Government National Action Plan
Parliamentary Committee	Parliamentary Joint Committee on Corporations and Financial Services – Whistleblower Protections in the corporate, public and not-for-profit sectors
PID Act	<i>Public Interest Disclosure Act 2013</i>
Registered Organisations Act	<i>Fair Work (Registered Organisations) Act 2009</i>
Senate Economics References Committee	Senate Economics References Committee into Performance of the Australian Securities and Investments Commission
Superannuation Industry (Supervision) Act	<i>Superannuation Industry (Supervision) Act 1993</i>
TAA 1953	<i>Taxation Administration Act 1953</i>
TASA 2009	<i>Tax Agents Services Act 2009</i>

General outline and financial impact

Improving protection for whistleblowers in the corporate and financial sectors

The amendments in Part 1 of Schedule 1 to the Bill amend the whistleblower protections in the Corporations Act so that a single, strengthened whistleblower protection regime covers the corporate, financial and credit sectors.

This Part brings the whistleblower laws in other financial system statutes into the Corporations Act.

Date of effect: The amendments will apply to disclosures made on or after 1 July 2018.

The amendments also apply to conduct in breach of sections 1317AC, 1317AD and 1317AE, and any other provision of Part 9.4AAA to the extent that it relates to those sections, as in force immediately after the commencement time for a disclosure that:

- (a) was made before the commencement time; and
- (b) would be a disclosure protected by Part 9.4AAA, if the amendments made by Part 1 of Schedule 1 to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2017 had been in force at the time the disclosure was made.

Proposal announced: The Government committed in December 2016, as part of the Open Government National Action Plan, to ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. To achieve this, the Government committed to pursuing reforms to whistleblower protections in the corporate sector.

Financial impact: Minimal.

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 5.

Compliance cost impact: The estimated overall average compliance cost is \$15.4 million per year over ten years.

Summary of regulation impact statement

Regulation impact on business

Impact: These amendments will primarily affect companies and other entities that will be required to develop whistleblower policies and/or potentially deal with greater whistleblowing activity.

Main points:

There are three policy options available to the Government:

- Option 1: Maintain the status quo;
- Option 2: Reform whistleblower protections in the corporate sector only;
- Option 3: Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

Each option is expected to impose the following compliance costs per year:

- Option 1: no compliance costs;
- Option 2: \$15.6 million per year
- Option 3: \$15.4 million per year

There are no expected compliance costs for individuals or community organisations.

Better Protections for Tax Whistleblowers

The amendments in Part 2 of Schedule 1 to the Bill insert a comprehensive regime into the TAA 1953 for the protection of individuals who report breaches of the tax laws or misconduct.

Date of effect: The amendments apply in relation to disclosures made on or after 1 July 2018.

Proposal announced: The Government announced in the 2016-17 Budget that new arrangements to better protect individuals who disclose

information to the ATO on tax avoidance and other tax issues would be introduced. This announcement was reaffirmed in December 2016 when the Government committed to the Open Government National Action Plan.

Financial impact: Unquantifiable.

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 5.

Compliance cost impact: There are no compliance costs from the implementation of the tax whistleblower regime.

Summary of regulation impact statement

A regulation impact statement was not required in relation to the new tax whistleblower regime.

Chapter 1

Outline of whistleblower reforms

Outline of chapter

1.1 This Chapter describes the broad context for the amendments made by this Bill.

Context of amendments

1.2 Combating crime and misconduct is a longstanding aim of corporate, financial and tax law enforcement. Criminal conduct can be difficult to detect or prove satisfactorily in a court. It can be concealed by a complex web of transactions and falsified or misleading corporate records, and a proliferation of entities in corporate structures can make responsibility opaque.

1.3 Often such wrongdoing only comes to light because of individuals who are prepared to disclose it, sometimes at great personal and financial risk.

1.4 To reduce these risks and encourage disclosure of wrongdoing, Australia and many other countries have statutory whistleblower regimes with legally enforceable protections for people who make disclosures. These regimes recognise the critical role whistleblowing can play in the early detection and prosecution of misconduct in businesses and the avoidance or evasion of tax liabilities. The existence of strong statutory protections to encourage whistleblowing can improve compliance with the law and promote a more ethical culture because individuals know there is a higher likelihood that misconduct will be reported.

1.5 In Australia's tax laws, no whistleblower protection regime exists.

1.6 The Australian corporate whistleblowing regime was first introduced in 2004 and expanded in a piecemeal way. It does not cover the field and has not adjusted to reflect the regulatory remits of ASIC and APRA. As a result, significant gaps in protection exist. For example, no statutory protection exists for whistleblowers who report conduct in breach of consumer credit laws, and the coverage in respect of disclosures concerning corporate corruption, bribery, fraud, money laundering, terrorism financing or other serious forms of misconduct is scattered between the Corporations Act and financial sector laws or is not available.

1.7 The existing whistleblower regimes present a confusing web for whistleblowers to navigate, with differences and gaps in the protections available.

1.8 The private sector whistleblower laws have rarely been utilised by whistleblowers to seek protection or compensation, or by regulators to prosecute offences under them.

1.9 While existing protections remain inadequate or unclear, it is likely that whistleblowers will continue to be discouraged from disclosing information about wrongdoing. By contrast, protections for whistleblowers in the public sector are more comprehensive as they were developed in a unified way after the development of the private sector protections. The public sector protections have been more widely used.

Proposals for change

1.10 In 2014, the Senate Economics References Committee inquiry into the performance of ASIC recommended a review of Australia's corporate whistleblower framework to bring it closer to Australia's public sector whistleblower framework under the PID Act, and to introduce a number of amendments to the Corporations Act focusing on:

- extending the definition of whistleblowers by replicating the PID Act;
- strengthening protections by expanding the scope of disclosures and victimisation provisions to match the level of protections provided by the PID Act; and
- including provisions in the Corporations Act that would ensure ASIC and APRA cannot be required to reveal a whistleblower's identity without a court or tribunal order.

1.11 Similarly, an independent evaluation of G20 countries' whistleblowing laws concluded that many G20 countries' whistleblower protections in the private sector fall short of best practice. According to the evaluation report only one country with a legal framework comparable to Australia's had an effective whistleblower oversight body for the private sector: the United States. For Australia the following areas were identified for potential reform:

- broadening the definition of whistleblowers and the scope of wrongdoing covered;
- introducing protections for anonymous complaints;

- introducing external reporting channels and requirements for internal company procedures;
- improving compensation arrangements and protections against retaliation;
- establishing an oversight agency responsible for whistleblower protections; and
- improving the transparency of the law.

1.12 In late 2016, the Government released its first OGNAP. The OGNAP committed the Government to strengthening whistleblower protections in the corporate sector and harmonising them with those in the public sector by December 2017.

1.13 The Government's focus of the commitment in the OGNAP was a specific response to perceived shortcomings of the existing Corporations Act whistleblowers regime and related financial sector laws. It committed to immediate public consultation on a range of options and swift reform to these laws.

1.14 Around the same time, the Government also agreed to the establishment of an inquiry by a Parliamentary Committee into whistleblower protections in the corporate, public and not-for-profit sectors.

1.15 The Parliamentary Committee process was an opportunity to examine the amendments made to the Registered Organisations Act in 2016 to enhance whistleblower protections and, in the light of this, to undertake a comprehensive review of statutory whistleblowing frameworks across the private and public sectors. The objective of this process was to achieve an equal or better whistleblower protection and compensation regime in the corporate and public sectors as provided for in the Registered Organisations Act.

1.16 The public response to the Government's consultation process, which concluded in February 2017, overwhelmingly favoured amendment of the corporate whistleblower regime. In response, and having regard to its OGNAP commitment to introduce corporate sector amendments by 2017, the Government has developed this Bill.

1.17 In September 2017, the Parliamentary Committee finalised its report. The Committee concluded that whistleblower protections remained largely theoretical with little practical effect in both the public and private sectors. The Parliamentary Committee report made 35 recommendations to strengthen these regimes. The Government is considering the report and

recommendations, and has recently appointed an Expert Advisory Panel to assist its deliberations.

1.18 With regard to the private sector protections, the Parliamentary Committee recommended:

- introducing a standalone consolidated Whistleblower Protection Act covering the private sector;
- establishing an independent a Whistleblower Protection Agency;
- expanding the categories of qualifying whistleblowers;
- broadening the definition of disclosable conduct to include a contravention of any law of the Commonwealth;
- removing the ‘good faith’ requirement for whistleblower protection;
- extending protections for recipients of disclosures;
- allowing anonymous disclosures;
- extending the range of internal and regulatory disclosees, and allowing for protected disclosures to a registered organisation or a federal Member of Parliament or their office in certain circumstances;
- increasing protection, remedies and sanctions for reprisals;
- improving access to compensation;
- expanding the obligations of law enforcement agencies in their handling whistleblower matters;
- applying the provision of the PID Act that clarifies the options for courts and tribunals in apportioning liability for compensation between individuals and organisations to the private sector;
- introducing a rewards system for whistleblowers;
- consistency between laws covering the public and private sector on public interest disclosures; and

- implementing a statutory requirement for a post-implementation review of new whistleblower laws.

Changes made by this Bill

1.19 This Bill meets the Government's OGNAP commitment. It also meets some recommendations made by the Parliamentary Committee, which the Government could anticipate given the range of shortcomings previously identified with the corporate sector regime.

1.20 This Bill addresses gaps and uncertainties in the protections and remedies available to corporate and financial sector whistleblowers by bringing the whistleblower laws in other financial sector statutes into the Corporations Act, and creates a new regime for the protection of individuals who disclose wrongdoing in the tax sphere.

Summary of new law

1.21 This Bill amends:

- the Corporations Act to strengthen and consolidate whistleblower protections for the corporate and financial sector; and
- the TAA 1953 to create a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct in relation to an entity's tax affairs;
- repeals the financial sector whistleblower regimes and clarifies transitional arrangements.

1.22 Details of the amendments to the Corporations Act are set out in Chapter 2.

1.23 Details of the new tax whistleblower regime are set out in Chapter 3.

1.24 Details of the amendments to the existing financial sector whistleblower regimes are set out in Chapter 4.

1.25 Chapter 5 contains a statement of compatibility with human rights.

Chapter 2

Improving protection for whistleblowers in the corporate and financial sectors

Outline of chapter

2.1 This Chapter describes the amendments to the Corporations Act set out in Part 1 of Schedule 1 to this Bill.

2.2 The amendments create a consolidated whistleblower protection regime for the corporate and financial sectors.

Context of amendments

Existing laws

2.3 The existing Part 9.4AAA of the Corporations Act confers protections and remedies on corporate whistleblowers in respect of any disclosures about actual or potential contraventions of Corporations legislation.

2.4 These protections and remedies include:

- limited protection from civil or criminal liability for making the disclosure (for example, for defamation);
- constraints upon employer rights to seek contractual remedies against the whistleblower (including any contractual right to terminate employment) arising as a result of the disclosure;
- prohibitions upon victimisation of the whistleblower;
- a right of the whistleblower to seek compensation if damage is suffered as a result of victimisation; and
- prohibitions against the revelation of the whistleblower's identity or the information disclosed by the whistleblower, with limited exceptions.

2.5 These protections have been criticised as being limited and overly complex. Specifically, to qualify for protection a whistleblower must:

- be a current officer or employee of the company in question or a current contractor:
 - this has meant that past employees, contractors for example, who may have ceased their association with the company in question for a variety of reasons cannot make a protected disclosure;
- make the disclosure in good faith:
 - this requirement undermines whistleblower protections, as whistleblowers often have other grievances or motivations against a company, so may not be protected. The motivation for making a disclosure is not relevant to the policy reasons for protecting whistleblowers;
- have reasonable grounds to suspect that either the company, or some of its officers or staff, have breached (or might have breached) a provision of the Corporations legislation (that is, the protections are not available for disclosures relating to breaches of any other statute);
- this limited coverage means that actual and potential whistleblowers in the corporate and financial sectors would need to consult a number of Acts to know whether they are protected; and
- provide their names before making the disclosure:
 - this requirement has meant that anonymous disclosures are not protected.

2.6 Whistleblower protection regimes are contained in the statutes administered by APRA (or those where administration is shared with ASIC), namely:

- the Banking Act;
- the Insurance Act;
- the Life Insurance Act; and
- the Superannuation Industry (Supervision) Act.

2.7 While these are similar to the protections and remedies set out in the Corporations Act, there are important differences. Each of the whistleblower regimes in the above Acts (the financial sector whistleblower regimes) protects a disclosure of information concerning misconduct or an improper state of affairs or circumstances in relation to entities regulated under it.

2.8 Protections apply if the whistleblower considers the information disclosed may assist the recipient of the information to perform duties or functions in relation to the regulated entity. The regulated entities are:

- ADIs, authorised NOHCs and subsidiaries of authorised NOHCs;
- general insurers and authorised NOHCs;
- life companies and registered NOHCs; and
- superannuation entities.

2.9 Under the Banking Act for instance, a person may qualify for protection if the disclosure:

- relates to misconduct, or an improper state of affairs or circumstances in relation to an ADI, authorised NOHCs and subsidiaries of authorised NOHCs; and
- the person considers that the information may assist the recipient of the disclosure to perform his or her functions or duties.

2.10 Similar requirements are set out for insurers and superannuation entities in the Life Insurance Act, the Insurance Act and the Superannuation Industry Supervision Act, with some minor differences to reflect the role of actuaries for insurers and superannuation entities as well as the role of superannuation trustees.

2.11 Currently, there are no whistleblower protections for disclosures relating to misconduct in relation to the National Consumer Credit Protection Act or the Data Collection Act.

Summary of new law

2.12 Part 1 of Schedule 1 to this Bill consolidates the existing whistleblower protections and remedies for corporate and financial sector

whistleblowers while strengthening and broadening these protections in a substantial way. Broadly the amendments fall into four categories:

- the conduct that may be the subject of a disclosure that qualifies for protection and entities that can be the subject of such a disclosure;
- individuals who can make a qualifying disclosure;
- persons to whom a qualifying disclosure can be made; and
- remedies and processes available for whistleblowers.

Entities and conduct about which a qualifying disclosure may be made

2.13 The type of entity and the conduct that may be the subject of a disclosure that qualifies for protection (described hereunder as a ‘qualifying disclosure’) have been expanded.

2.14 Entities that may be the subject of a qualifying disclosure now include all corporations to which paragraph 51(xx) of the Constitution applies. These entities are defined in the new law as regulated entities.

2.15 The conduct that may be the subject of a qualifying disclosure includes actual or suspected conduct by a regulated entity that is:

- misconduct, or an improper state of affairs or circumstances in relation to a regulated entity;
- contravention of any law administered by ASIC and/or APRA;
- conduct that represents a danger to the public or the financial system; or
- an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more.

Who can make a qualifying disclosure?

2.16 A qualifying disclosure can be made by an individual who is or has been in a relationship, such as employee, with the regulated entity about which the disclosure is made. These individuals are defined in the new law as eligible whistleblowers.

2.17 The motivation of the eligible whistleblower is no longer relevant, nor is the currency of the relationship.

Eligible recipients of a disclosure

2.18 The category of person to whom a qualifying disclosure may be made has been expanded and now includes a manager or supervisor of the whistleblower. These persons are defined in the new law as ‘eligible recipients’.

2.19 In certain emergency circumstances a disclosure made to a member of Parliament or journalist may qualify for protection (‘emergency disclosures’).

Protections and remedies for whistleblowers

2.20 The level of protection provided for whistleblowers by the new law has been increased by:

- strengthening the requirement of confidentiality of a whistleblower’s identity, including:
 - no longer requiring whistleblowers to identify themselves when making a disclosure;
 - ensuring that persons, including regulators, cannot be required to disclose the identity of a whistleblower to a court or tribunal without a court order;
- strengthening the immunities provided to whistleblowers and ensuring that information they disclose is not admissible in evidence against them in a prosecution;
- broadening and clarifying the prohibition against victimisation of whistleblowers and other individuals who suffer victimisation in relation to a disclosure, including:
 - adding a civil penalty option for prosecution for victimisation; and
 - adding a broad inclusive definition of ‘detriment’;
- providing that generally a court may not make a cost order against a whistleblower or other individual seeking remedies for victimisation, to ensure that such individuals are not

deterred from bringing proceedings by potential adverse costs orders; and

- requiring public companies, large proprietary companies and registerable superannuation entities to have whistleblower policies, and to make the policies available to their officers and employees.

2.21 The remedies and protections available to whistleblowers and other individuals who suffer detriment or a threat of detriment in relation to a qualifying disclosure have been expanded to include:

- making it easier for individuals who suffer detriment in relation to a protected disclosure to claim compensation;
- ensuring bodies corporate that are or were employers of a whistleblower or other individual who suffer detriment in relation to a protected disclosure, are liable if they contributed by act or omission to victimising conduct;
- extending the range of orders a court may make in respect of whistleblowers and other individuals who suffer victimisation in relation to the making of a protected disclosure, including injunctions and apologies;
- clarifying that a court may order reinstatement of a person whose employment is terminated, or purported to be terminated, in relation to the making of a protected disclosure;
- providing that a court may order exemplary damages if it thinks appropriate; and
- reversing the burden of proof in compensation claims once the claimant has adduced or pointed to evidence that suggests a reasonable possibility that a defendant has engaged in conduct that caused detriment or threatened to do so.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Corporations Act whistleblower protection regime covers all corporate and financial sector whistleblowers in entities regulated by one or more of	Whistleblower protections regimes covering corporate and financial system whistleblowers are found in the Corporations Act, the Banking

<i>New law</i>	<i>Current law</i>
the Corporations Act, the ASIC Act, the Banking Act, the Life Insurance Act, the Insurance Act, the Superannuation Industry (Supervision) Act, the National Consumer Credit Protection Act, and the Financial Sector (Collection of Data) Act.	Act, the Insurance Act, the Life Insurance Act and the Superannuation Industry (Supervision) Act. There are no whistleblower protections under the National Consumer Credit Protection Act and the Financial Sector (Collection of Data) Act.
Consistent protection is provided for whistleblowers across the corporate and financial sectors.	Inconsistent protection for whistleblowers.
Introduces a single concept of 'regulated entity'.	Each whistleblower regime concerns only disclosures about entities covered by that Act.
Introduces a single concept of 'eligible whistleblower'.	Each whistleblower regime concerns different categories of persons who might make protected disclosures depending on the entities covered by that Act.
Introduces a single concept of disclosable conduct.	Each whistleblower regime concerns different kinds of potentially protected disclosures depending on the entities covered by that Act.
Introduces a single concept of 'eligible recipient'.	Each whistleblower regime concerns different categories of persons who might receive protected disclosures depending on the entities covered by that Act.
Provides for an 'emergency disclosure' to a member of Parliament or journalist in specified circumstances.	No regime currently permits disclosure to members of Parliament or journalists under any circumstances.
Expressly allows for disclosures to lawyers for the purposes of obtaining legal advice.	No regime provides for disclosures to be made to a lawyer for the purpose of obtaining legal advice.

Detailed explanation of new law

Expanding the scope of disclosures qualifying for protection

2.22 The new law broadens the subject matter of disclosures that qualify for protection, to encompass and enhance those covered under the existing corporate and financial sector whistleblower regimes. [*Schedule 1, item 2 section 1317AA*]

2.23 Disclosures may qualify for protection if made by an individual (whistleblower) who is an eligible whistleblower in relation to the regulated entity in relation to which the disclosure is made. The entities that are regulated entities are discussed below. *[Schedule 1, items 1 and 2, section 9 and subsection 1317AA(1)]*

2.24 A disclosure may qualify for protection if made to:

- ASIC or APRA (or other Commonwealth body that is prescribed by regulations) *[Schedule 1, item 2 paragraph 1317AA(1)(b)]*;
- an eligible recipient (the categories of eligible recipient are discussed below) *[Schedule 1, item 2, subsection 1317AA (2)]*; or
- a lawyer for the purposes of obtaining legal advice or representation on the operation of the new whistleblower regime *[Schedule 1, item 2, subsection 1317AA(3)]*.

2.25 The matters that may be the subject of a qualifying disclosure, and the individuals who are eligible whistleblowers in relation to an entity are discussed below.

Disclosures to ASIC, APRA or prescribed body

2.26 A disclosure by an eligible whistleblower to ASIC, APRA, or other Commonwealth body prescribed by regulation, qualifies for protection if it is of information about a disclosable matter. The subject matters that can be disclosable matters are described below. *[Schedule 1, item 2, paragraph 1317AA(1)(c)]*

Disclosures to eligible recipients

2.27 A disclosure by an eligible whistleblower to an eligible recipient qualifies for protection if it is of information about a disclosable matter. The categories of eligible recipients in relation to a regulated entity are discussed below. *[Schedule 1, item 2, subsection 1317AA(2)]*

Disclosure to a legal practitioner

2.28 A disclosure to a legal practitioner for the purposes of obtaining legal advice or representation on the operation of the whistleblower regime qualifies for protection under the new law. *[Schedule 1, item 2, subsection 1317AA(3)]*

2.29 The disclosure does not have to be about a disclosable matter to be protected, and the individual does not have to be an eligible whistleblower in relation to a regulated entity that is the subject of the

disclosure. This ensures that a whistleblower or potential whistleblower can safely seek legal advice as to whether and what protections may apply to them.

Disclosable matters

2.30 A disclosable matter is information the whistleblower has reasonable grounds to suspect:

- concerns misconduct, or an improper state of affairs or circumstances in relation to the regulated entity (or if the regulated entity is a body corporate) a related body corporate; or *[Schedule 1, item 2, subsection 1317AA(4)]*
- indicates:
 - that the regulated entity (or related body corporate) or its officer or employee has engaged in conduct that constitutes an offence against, or a contravention of, the Corporations Act, the ASIC Act, the Banking Act, the Data Collection Act, the Insurance Act, the Life Insurance Act, the National Consumer Credit Protection Act, or the Superannuation Industry (Supervision) Act, or regulations made under those laws;
 - that an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more;
 - that represents a danger to the public or the financial system; or
 - as prescribed by regulation.

[Schedule 1, item 2, subsection 1317AA(5)]

2.31 The more specific categories of conduct set out in new subsection 1317AA(5) are not intended to limit the range of misconduct covered by new subsection 1317AA(4). Rather, they are set out to make clear that certain forms of conduct, including breaches of the Acts administered by ASIC and APRA, and serious offences against other Commonwealth laws, are clearly within the scope of the protections.

2.32 The broad categories of disclosable conduct are also intended to include conduct that may not be in contravention of particular laws. For example misconduct, or an improper state of affairs or circumstances in relation to a regulated entity, may not involve unlawful conduct but may

indicate a systemic issue that would assist the relevant regulator in performing its functions.

2.33 Information that indicates a danger to the public or a danger to the financial system is also a disclosable matter. This is intended to cover a broad range of conduct that poses significant risk to public safety or the stability of, or confidence in, the financial system, whether or not it is in breach of any law.

2.34 The amendments give the Minister a power to prescribe other conduct as disclosable conduct in regulations. The regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act. This power ensures that the law can respond promptly to protect disclosures of emerging categories of wrongdoing.

Subjective requirement replaced by objective ‘reasonableness’

2.35 The new law addresses conclusions of recent reviews that the requirement that a whistleblower makes a qualifying disclosure ‘in good faith’ creates uncertainty and risk for whistleblowers. It is common for companies accused of wrongdoing to allege subjective or collateral motivation of the whistleblower that may defeat a ‘good faith’ requirement in whistleblower protection laws.

2.36 The ‘good faith’ requirement is also inconsistent with the approach taken in the PID Act and Registered Organisations Act, as well as with best practice legislative approaches in other countries including the United Kingdom.

2.37 The amendments remove the concept from the requirements for making a qualifying disclosure, and ensure the protections and remedies are based on the objective reasonableness of the whistleblower’s grounds to suspect that information disclosed indicates misconduct or other disclosable matters. *[Schedule 1, item 2, subsections 1317AA((4) and (5))*

Expanding the individuals qualifying for protection

Eligible whistleblowers

2.38 The new law expands the categories of individual who can make a qualifying disclosure.

2.39 The amendments create a new concept of ‘eligible whistleblower’ to define individuals whose relationship with a ‘regulated entity’ may place them in a position to identify wrongdoing by that entity. Eligible whistleblowers include the categories of person identified above, as well as whistleblowers covered by the existing Banking Act, Life Insurance Act,

Insurance Act and Superannuation Industry (Supervision) Act.
[Schedule 1, item 2, section 1317AAA]

2.40 Under the new law, an ‘eligible whistleblower’ is an individual who is, or has been, in a relationship with an entity (the regulated entity) about which a disclosure is made. The listed relationships are intended to cover individuals likely to have information about misconduct or other disclosable matters in relation to the entity.

2.41 The following are eligible whistleblowers:

- an officer of the regulated entity;
- an employee of the regulated entity;
- an individual who supplies services or goods to the regulated entity (whether paid or unpaid);
- an employee of a person who supplies services or goods to the regulated entity (whether paid or unpaid);
- an individual who is an associate of the regulated entity;
- for a regulated entity that is a superannuation entity
 - an individual who is a trustee (within the meaning of the Superannuation Industry (Supervision) Act), custodian (within the meaning of that Act), or investment manager (within the meaning of that Act) of the superannuation entity;
 - an officer of a body corporate that is a trustee, custodian or investment manager of the superannuation entity;
 - an employee of any of the above;
 - an individual who supplies services or goods (whether paid or unpaid) to an individual who is a trustee, custodian or investment manager of the superannuation entity or to an officer of a body corporate that is a trustee, custodian or investment manager of a superannuation entity;
 - an employee of a person that supplies services or goods (whether paid or unpaid) to an individual who is a trustee, custodian or investment manager of the superannuation entity or to an officer of a body corporate that is a trustee

custodian or investment manager of a superannuation entity to a trustee, custodian or investment manager or a body corporate (whether paid or unpaid);

- a relative or dependent of any of the above (this includes a spouse, parent or other linear ancestor, child or grandchild, and sibling); or
- an individual prescribed by the regulations in relation to a type of regulated entity.

Where a superannuation entity is a body corporate, then the eligible whistleblowers include all of those that are eligible in respect of any other body corporate. *[Schedule 1, item 2, section 1317AAA]*

2.42 The categories of eligible whistleblowers are intended to ensure that the regime targets those individuals that are most likely to have reliable information about conduct of a regulated entity.

2.43 The Minister is provided with the power to prescribe new categories of whistleblower in relation to particular types of regulated entity to protect new categories of whistleblower who may become apparent. Regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act. This power ensures that the law can respond promptly to protect disclosures of emerging categories of wrongdoing. *[Schedule 1, item 2, section 1317AAA]*

Individuals formerly in a relationship with the body corporate or superannuation entity

2.44 Existing corporate and financial sector whistleblower protections apply to person in a current relationship with the company or entity about which the disclosure is made. This presents a gap in current protections, as it precludes former directors, officers and employees, contractors and closely related persons from making protected disclosures.

2.45 The amendments described above expand the categories of protected persons to include a person who was formerly in an eligible whistleblower relationship with a regulated entity. *[Schedule 1, item 2, section 1317AAA]*

Expanding the entities about which a protected disclosure may be made

Regulated entities

2.46 The consolidated regime created by the amendments cover disclosures previously covered by the whistleblower protection provisions in:

- the existing Part 9.4AAA of the Corporations Act;
- Part 6A, Division 1 of the Banking Act;
- Part 7, Division 5(A) of the Life Insurance Act;
- Part IIIA, Division 4(A) of the Insurance Act; and
- Part 29A, Division 1 of the Superannuation Industry (Supervision) Act.

2.47 This means that disclosures concerning companies, banks, life insurers, general insurers, superannuation entities and trustees of superannuation entities are all covered by the Corporations Act whistleblower regime. *[Schedule 1, item 2, section 1317AAB]*

2.48 The new consolidated regime does not alter the regulatory responsibilities of the regulators administering each of the Corporations Act, the ASIC Act, the Banking Act, the Life Insurance Act, the Insurance Act and the Superannuation Industry (Supervision) Act.

Persons and entities to which a qualifying disclosure may be made

2.49 As discussed above, a disclosure may qualify for protection if made by an eligible whistleblower to an eligible recipient.

Eligible recipient

2.50 The existing corporate and financial sector whistleblower regimes have differing definitions of the persons to whom a qualifying disclosure may be made, as appropriate to the entities they regulate. The new consolidated provisions introduce a new concept of ‘eligible recipient’ to describe these persons. *[Schedule 1, item 2, section 1317AAC]*

2.51 An eligible recipient is generally a person inside the entity about which a disclosure is made, but may also include an appointed auditor or a person authorised by the entity.

2.52 Each of the following is an eligible recipient for a regulated entity that is a body corporate:

- an officer of the body corporate or related body corporate;
- an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate;
- the actuary of the body corporate or a related body corporate;
- a person authorised by the body corporate to receive disclosures that may qualify for protection; and
- the supervisor or manager of a whistleblower who is an employee of the body corporate.

[Schedule 1, item 2, subsection 1317AAC(1)]

2.53 For a disclosure concerning a superannuation entity, each of the following is an eligible recipient for the superannuation entity:

- an officer of the superannuation entity;
- an auditor, or a member of an audit team conducting an audit, of the superannuation entity;
- an actuary of the superannuation entity;
- an individual who is a trustee (within the meaning of the Superannuation Industry (Supervision) Act) of the superannuation entity;
- a director of a body corporate that is the trustee (within the meaning of the Superannuation Industry (Supervision) Act) of the superannuation entity; and
- a person authorised by the trustee or trustees (within the meaning of the Superannuation Industry (Supervision) Act) that may qualify for protection.

Where a superannuation entity is a body corporate, then the eligible recipients include all of those that are eligible in respect of any other body corporate. *[Schedule 1, item 2, subsection 1317AAC(2)]*

Power to prescribe additional eligible recipients

2.54 The amendments give the Minister the power to prescribe additional persons or bodies as eligible recipients in regulations. The

regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act. This power ensures flexibility to respond to emerging trends in disclosure of wrongdoing and to changes in the regulatory environment. It will also ensure that qualifying disclosures may be made to any new body or statutory officer created or tasked to administer or investigate whistleblower disclosures in the future. *[Schedule 1, item 2, paragraph 1317AAC(3)]*

Emergency disclosure

2.55 The amendments create a new concept of emergency disclosure, which may be made in certain emergency circumstances. *[Schedule 1, item 2, section 1317AAD]*

2.56 In some situations, wrongdoing may be of such gravity and urgency that disclosure to a journalist or a parliamentarian is justified. To allow for such circumstances, the amendments provide for protection of an emergency disclosure made to a such a third party when:

- the whistleblower has previously disclosed the information to ASIC or APRA (the previous disclosure);
- the whistleblower has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately;
- a reasonable period has passed since the disclosure was made; and
- after the end of the reasonable period, the whistleblower gives the body to which the disclosure was made a written notification that includes sufficient information to identify the previous disclosure and states that he or she intends to make an emergency disclosure.

[Schedule 1, item 2, subsection 1317AAD]

2.57 This is intended to cover the unusual situation where a whistleblower has made a disclosure to a regulator about a situation the whistleblower reasonably believes presents an imminent risk of serious harm and, after a period that is reasonable in all the circumstances, the regulator has not taken action to address the risk.

2.58 Emergency disclosures can be made to:

- a member of the Parliament of the Commonwealth or of a State or Territory parliament; or

- a journalist, defined to mean a person who is working in a professional capacity as a journalist for a newspaper, magazine, or radio or television broadcasting service, that is operated on a commercial basis and is similar to a newspaper, magazine or television broadcast.

[Schedule 1, item 2, subsection 1317AAD(2)]

2.59 In some circumstances a disclosure to a member of Parliament may be protected by Parliamentary privilege. The amendments are not intended to affect the operation of Parliamentary privilege.

2.60 In providing protection to disclosures to a journalist working in professional capacity, the amendments make clear that disclosure to any 'journalistic' or 'media' enterprise is not sufficient. This is intended to ensure that public disclosures on social media or through the provision of material to self-defined journalists are not covered by the protection.

Enhancing protection of a whistleblower's identity

Allowing anonymous disclosure

2.61 The existing corporate and financial sector whistleblower protection regimes require that a whistleblower provides his or her name when making a disclosure in order to qualify for protection. This contrasts with the Registered Organisations Act and the PID Act, which allow anonymous disclosures. Internationally, UK and US whistleblower laws provide for anonymous disclosures.

2.62 Most submitters supported the Discussion Paper's proposal to extend the Corporations Act protections to anonymous disclosures, and the Parliamentary Committee recommended that the law explicitly allow, and provide protections for, anonymous disclosures.

2.63 The amendments remove the requirement that the discloser provide his or her name when making a protected disclosure. This allows for anonymous disclosures. A note is included to ensure this is clear
[Schedule 1, item note to, section 1317AAE]

Prohibitions on on-disclosure of whistleblower identity, and clarifying that disclosure between regulatory agencies is allowed

2.64 The existing corporate and financial sector whistleblower protection regimes provide for confidentiality of a whistleblower's identity. They provide that it is an offence for the person to whom a qualifying disclosure is made to disclose a protected disclosure, the identity of the

discloser, or information that is likely to lead to the identification of the discloser.

2.65 The existing Corporations Act, Life Insurance Act, Banking Act, Superannuation Industry (Supervision) Act, and Insurance Act whistleblower regimes provide an exception to the offence of revealing a whistleblower's identity if the disclosure is made to:

- ASIC (Corporations Act);
- APRA (Banking Act, Life Insurance Act; Insurance Act, Superannuation Industry (Supervision) Act);
- the AFP (Corporations Act; Banking Act, Life Insurance Act, Insurance Act, Superannuation Industry (Supervision) Act);
or
- someone else with the consent of the whistleblower (Corporations Act, Banking Act, Life Insurance Act; Insurance Act, Superannuation Industry (Supervision) Act) (authorised disclosures).

2.66 Weaknesses and some lack of clarity in the existing protections have been identified by various reviews. They are:

- The existing offence of disclosing a whistleblower's identity applies if the offender discloses the information regarding the suspected or actual primary wrongdoing without necessarily revealing the identity of a whistleblower (existing paragraph 1317AE(1)(e)). This has inhibited sharing and investigation of disclosed wrongdoing by regulators and law enforcement authorities.
- Existing subsection 1317AE(2) creates an exception to the offence by authorising disclosures to ASIC, APRA or the AFP. However, it is unclear whether this information can be shared *between* these authorities for the purposes of investigating that offence.
- There is currently no express provision ensuring that a recipient of disclosure is not required to disclose information identifying a whistleblower to a court or tribunal. This contrasts with the PID Act as well as international whistleblower regimes.
- Consultation on the Exposure Draft version of this Bill revealed cases in which an internal whistleblower disclosure

of misconduct was not investigated by a regulated entity, on the basis that such investigation may lead to the identification of the whistleblower.

2.67 The amendments ensure that:

- it is not an offence, of itself, to disclose the information regarding the suspected or actual wrongdoing disclosed without revealing the whistleblower's identity; *[Schedule 1, item 2, paragraph 1317AAE(1)(b)]*
- it is not an offence to disclose the identity of a whistleblower, or information likely to lead to his or her identification to (or between) ASIC, APRA and the AFP; *[Schedule 1, item 2, paragraphs 1317AAE(2)(a),(b) and (c)]*
- it is not an offence to disclose the identity of a whistleblower, or information likely to lead to his or her identification to a legal practitioner for the purposes of obtaining legal advice or representation. *[Schedule 1, item 2, paragraph 1317AAE(2)(d)]*

2.68 The new law allows for additional persons or bodies to be prescribed by regulation, to allow for disclosure of the identity of a whistleblower to ensure that investigation of wrongdoing disclosed by whistleblowers is not impeded by the confidentiality requirement in future. Regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act. This would allow, for prescribing a body such as whistleblower protection authority, for the purposes of assisting a whistleblower or prosecuting victimisation. *[Schedule 1, item 2, paragraph 1317AAE(2)(e)]*

2.69 As in the existing law, it is not an offence to disclose the identity of a whistleblower, or information likely to lead to his or her identification with the consent of the whistleblower. *[Schedule 1, item 2, paragraph 1317AAE(2)(f)]*

2.70 The amendments also ensure that ASIC, APRA and the AFP can share information, including the identity of the whistleblower, with other Commonwealth, State or Territory authorities with functions or duties relevant to the wrongdoing disclosed. This ensures that wrongdoing disclosed by whistleblowers under the new regime can be properly investigated or otherwise addressed. *[Schedule 1, item 2, subsection 1317AAE(3)]*

2.71 With the exception of disclosures to or between regulators, the prohibition on disclosure of a whistleblower's identity (and the exceptions there to) applies equally to any person or body that receives the information following the original disclosure.

2.72 To ensure that regulated entities that receive a qualifying disclosure can investigate misconduct disclosed, the new law provides a further exception to the offence breach of confidentiality of a whistleblower's identity where:

- information that might lead to the identity of the whistleblower (the confidential information) is disclosed; and
- the disclosure of the confidential information is reasonably necessary for the purposes of investigating the conduct disclosed by the whistleblower; and
- all reasonable steps are taken to reduce the risk of the whistleblower being identified.

[Schedule 1, item 2, subsection 1317AAE(4)]

2.73 The exception does not apply where the actual identity of a whistleblower is disclosed. *[Schedule 1, item 2, subparagraph 1317AAE(4)(a)(i)]*

Extending immunities for whistleblowers

2.74 The existing financial sector whistleblower protection regimes, other than that in the Corporations Act, provide that information disclosed by a whistleblower is not admissible evidence against him or her other than in proceedings concerning the falsity of the information.

2.75 These provisions encourage disclosure of wrongdoing by removing the prospect of whistleblowers themselves being subject to prosecution for their involvement in that wrongdoing.

2.76 The amendments introduce a provision ensuring that information that is part of a protected disclosure is not admissible in evidence against a whistleblower in criminal proceedings or in proceedings for the imposition of a penalty, other than in proceedings concerning the falsity of the information. *[Schedule 1, item 3, paragraph 1317AB(1)(c)]*

Expanding protection from victimisation

Victimisation under the existing law

2.77 The existing Corporations Act provisions prohibit conduct that intentionally causes detriment to a whistleblower because he or she makes a protected disclosure. However, few, if any, prosecutions have been brought for this offence.

2.78 The existing requirement that the victimiser intended to cause detriment is inconsistent with the equivalent provisions in the PID Act and the Registered Organisations Act, which cover conduct engaged in in the belief or suspicion that the whistleblower proposes to make, or could make, a protected disclosure. The PID Act and the Registered Organisations Act do not include a requirement that the victimiser intended to cause detriment in order to commit the offence.

2.79 The existing offence of threatening to cause detriment applies if the victimiser intends the victim to fear that the threat will be carried out, or is reckless as to causing that fear. However the offence of actually causing detriment, applies only to intentional conduct. That is, it does not apply if the victimiser did not know, but should have known, that they were causing detriment.

2.80 The existing offence of actually causing detriment only applies where the victimiser knows that a disclosure qualifying for protection has actually been made. It does not apply to victimisation engaged in because of a belief or suspicion that a person has made or may in the future make such a disclosure.

2.81 These deficiencies have posed obstacles to charges being laid under the victimisation provisions of the existing Corporations Act regime.

2.82 In addition, both the Registered Organisations Act and the PID Act include a non-exclusive list of situations that are included in the meaning of 'detriment'. The Registered Organisations Act (see subsection 337BA(2) of the Registered Organisations Act; section 13(2) of the PID Act) defines 'detriment' as including (without limitation) any of the following:

- dismissal of an employee;
- injury of an employee in his or her employment;
- alteration of an employee's position to his or her detriment;
- discrimination between an employee and other employees of the same employer;
- harassment or intimidation of a person;
- harm or injury to a person, including psychological harm;
- damage to a person's property; or
- damage to a person's reputation.

The offence of victimisation under the new law

2.83 The amendments create a civil penalty provision to address victimisation of a person in relation to a qualifying disclosure. A civil penalty is a punishment for contravention in a civil court under the civil rules of procedure for the court, and the civil standard of proof applies. *[Schedule 1, item 10, subsection 1317E(1) (after table item 45)]*

2.84 The amendments also allow for criminal prosecution of victimisation. This ensures that the regulator can choose to prosecute contravention as an offence or as a civil penalty, as appropriate in the particular circumstances. *[Schedule 1, item 6, note at the end of subsections 1317AC(1), (2) and(3)]*

2.85 The amendments make clear that the offence applies where a person (the victimiser, described in the law as the ‘first person’) engages in conduct that causes any detriment to any other person in the belief or suspicion that a person has made, may make, proposes to make, or could make, a protected disclosure. *[Schedule 1, item 5, paragraph 1317AC(1)(c)]*

2.86 This clarifies that the offence of victimisation does not require:

- that a disclosure has actually been made,
- that the victimiser has actual knowledge that a disclosure or such a disclosure. The belief or suspicion that the whistleblower proposes to make, or could make, a disclosure is sufficient; or
- that the victimiser intends that the conduct cause detriment.

2.87 The amendments also confirm that the belief or suspicion that a disclosure may have been made or going to be made does not have to be the only reason the victimiser engaged in the proscribed conduct. *[Schedule 1, item 5, paragraph 1317AC(1)(d)]*

2.88 As is the case under the existing law, the victim may be the whistleblower or another person who suffers damage because of the conduct. This may be, for example, a person involved in receiving or investigating the disclosure, or a colleague, supporter, friend or family member of the whistleblower.

2.89 The amendments ensure that in civil penalty proceedings, as well as in proceedings for an offence, for threatening to cause detriment in relation to a qualifying disclosure, it is not necessary to prove that the person threatened actually feared that the threat would be carried out. *[Schedule 1, item 7, section 1317AC(5)]*

Detriment

2.90 The amendments introduce an inclusive definition of ‘detriment’ into the victimisation provision in the existing law. This follows the equivalent definition in the Registered Organisations Act but adds the additional items of damage to a person’s business or financial position any other damage to a person. *[Schedule 1, item 8, subparagraphs 1317AC(6)(i) and (j)]*

2.91 Under the new law, detriment includes, but is not limited to, any of the following:

- dismissal of an employee;
- injury of an employee in his or her employment;
- alteration of an employee’s position to his or her disadvantage;
- discrimination between an employee and other employees of the same employer;
- harassment or intimidation of a person;
- harm or injury to a person, including psychological harm;
- damage to a person’s property;
- damage to a person’s reputation;
- damage to a person’s business or financial position; and
- other damage to a person.

[Schedule 1, item 8, subsection 1317AC(6)]

Compensation

Compensation under the existing law

2.92 The right to compensation under the existing law has also suffered from deficiencies. In particular, it is arguably necessary to prove that the offence of victimisation has been committed before a victim of such conduct can seek compensation. As the standard of proof required to establish the offence of victimisation is the criminal standard (beyond a reasonable doubt), on one interpretation a person seeking compensation must prove his or her case on this standard.

2.93 An order could be made under the existing law for reinstatement of a whistleblower whose employment was terminated on the basis of a disclosure under the existing law. However this did not apply to other individuals whose employment may have been terminated because of a belief or suspicion that a disclosure had been made.

2.94 Remedies that can be sought by a person who suffered damage as a result of victimisation in relation to a qualifying disclosure under the existing law are limited.

Compensation and other remedies under the new law

2.95 The new law makes it easier for a whistleblower or other individual who is victimised in relation to a qualifying disclosure to seek compensation and introduces a range of other remedies.

2.96 Under the new law, a person can seek compensation for loss, damage or injury suffered because of the conduct of a person (the victimiser, described as the first person), where the first person engages in conduct that causes any detriment to another person or threatens to cause detriment to another person:

- believing or suspecting that a person made, may have made, proposes to make, or could make a qualifying disclosure; and
- the belief or suspicion is the reason, or part of the reason, for the conduct.

[Schedule 1, item 9, subsection 1317AD(1)]

2.97 This removes obstacles under the existing law to victims seeking compensation by removing the apparent requirement to prove that the offence has been committed.

2.98 The first person under this subsection may be an individual or a body corporate.

2.99 As for the offence of victimisation discussed above, the victim may be the whistleblower or another person who suffers damage because of the conduct. ***[Schedule 1, item 9, paragraph 1317AD(1)(b)]***

2.100 This Bill removes the requirement under the current law that the victimiser had actual knowledge of a disclosure. A belief or suspicion that a person has made, may have made, proposes to make, or could make a qualifying disclosure is sufficient. This is justified by the need to ensure that the provisions not only address victimisation of actual whistleblowing, but conduct which victimises a person because of the perception of

involvement in whistleblowing. *[Schedule 1, item 2, paragraphs 1317AD(1)(b) and (c)]*

2.101 If a body corporate is liable under the new subsection 1317AD(1), and an officer or employee of the body corporate is involved in the victimisation, the body corporate can be liable for conduct that has:

- aided, abetted, counselled or procured the conduct or the making of the threat;
- induced, whether by threats or promises or otherwise, the victimising conduct;
- was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the victimising conduct; or
- conspired with others to effect the victimising conduct.

[Schedule 1, item 9, subsection 1317AD(2)]

2.102 The new law also clarifies that a threat to cause detriment need not be express or unconditional, but may also be implied, or conditional. *[Schedule 1, item 9, subsection 1317AD(3)]*

2.103 In addition, it is not necessary for a person seeking an order to prove that he or she actually feared that the threat will be carried out. *[Schedule 1, item 9, subsection 1317AD(4)]*

Orders that may be made

2.104 The new law expands the orders that may be made in favour of a person who has suffered loss, damage, or injury as a result of victimising conduct. Where a court is satisfied that a person (the first person) has engaged in victimising conduct and another person has suffered loss, damage or injury as a result of the victimising conduct, it may make:

- an order requiring the first person to compensate the person who has suffered the victimising conduct;
- an order where the first person engaged in the victimising conduct in connection with his or her position as an employee:
 - requiring the first person and the first person’s employer each to compensate the person who has suffered the victimising conduct or any other person for loss, damage or injury for part of that loss, damage or injury; or

- requiring the first person and the first person’s employer jointly to compensate the person who has suffered the victimising conduct or any other person; or
- requiring the first person’s employer to compensate the person who has suffered the victimising conduct or any other person for loss, damage or injury for part of that loss, damage or injury;
- an order granting an injunction to prevent, stop or remedy the effects of the victimising conduct;
- an order requiring the first person to apologise for engaging in the victimising conduct;
- where the victimising conduct wholly or partly consists of termination of employment, an order that a person be reinstated in his or her position or a position at a comparable level;
- an order requiring the first person to pay exemplary damages; and/or
- any other order that the court thinks appropriate.

[Schedule 1, item 9, subsection 1317AE(1)]

2.105 The amendments repeal the existing provision for reinstatement of a whistleblower’s employment. The new provision is broader, covering individuals other than the whistleblower. The new law also covers situations where there may not have been a disclosure but the individual is dismissed because of a belief or suspicion that a disclosure, may have been made, is proposed to be made, or could be made. *[Schedule 1, item 9, paragraph 1317AE(1)(e)]*

Onus of proof in compensation proceedings

2.106 In any proceeding where a person (the claimant) seeks an order under new subsection 1317AD(1) from another person (the other person):

- the claimant bears the onus of pointing to evidence that suggests a reasonable possibility that other person has engaged in conduct that has caused detriment or constitutes a threat of detriment; and
- if the claimant discharges that onus, the other person bears the onus of proving that the claim is not made out.

[Schedule 1, item 9, subsection 1317AE(2)]

2.107 This 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.

2.108 The new subsection 1317AE(2) will mean that an entity that engages in such conduct, rather than the victim, will bear the onus of proving that the disclosure was not in any part a reason for their conduct.

2.109 A court must not make an order against a person's employer if the employer took reasonable precautions and exercised due diligence to avoid the victimising conduct. *[Schedule 1, item 9, subsection 1317AE(3)]*

2.110 If the court makes an order requiring a person and the person's employer jointly to pay compensation, the person and the person's employer are jointly and severally liable to pay the compensation. *[Schedule 1, item 9, subsection 1317AE(4)]*

Interaction between civil proceedings, civil penalties and criminal offences

2.111 For the avoidance of doubt, a person may bring civil proceedings for compensation or other remedial order, or for a breach of the victimisation provisions, even if no prosecution for victimisation has been brought or if such a prosecution cannot be brought. *[Schedule 1, item 9, section 1317AF]*

Protecting the identity of whistleblowers and other victims in court proceedings

Identifying information not to be disclosed to courts

- 2.112 The amendments ensure that a person is not to be required to:
- disclose to a court or tribunal the identity of a whistleblower, or information that is likely to lead to the identification of the discloser; or
 - produce to a court or tribunal a document containing the identity of a whistleblower or information likely to lead to the identification of the discloser;

except where it is necessary to do so for the purposes of giving effect to this whistleblower regime, or where the court thinks it necessary in the interests of justice to do so. *[Schedule 1, item 9, section 1317AG]*

2.113 Under the common law and the Evidence Act, the general starting position concerning evidence is that relevant evidence should be admissible. The purpose of the exception to this principle is to ensure that the protection of a whistleblower's identity afforded by the law cannot be extinguished by discovery of documents or other processes in the context of court proceedings.

2.114 This provision reflects the protection of whistleblower identity in court proceedings in section 21 of the PID Act, and ensures that the identity of corporate and financial sector whistleblowers is aligned with those for public sector whistleblowers.

Costs

2.115 Legal costs can be prohibitive to any person seeking compensation for damage, and the risk of being ordered to pay the costs of other parties to the proceedings may deter whistleblowers and other victims of victimisation from bringing the matter to court.

2.116 The new law addresses this by protecting victims from an award of costs against them in court proceedings seeking compensation except in limited circumstances. The limited circumstances where the court may make such an order are where it is satisfied that:

- the victim instituted the proceedings vexatiously or without reasonable cause; or
- the victim's unreasonable act or omission caused the other party to incur the costs.

[Schedule 1, item 9, section 1317AH]

Requirement to have a whistleblower policy

2.117 The existing whistleblower provisions in the Corporations Act do not require companies to have or to implement internal systems to deal with whistleblower disclosures.

2.118 The amendments require public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a policy with information about:

- the protections available to whistleblowers;
- how and to whom an individual can make a disclosure;
- how the company will support and protect whistleblowers;
- how investigations into a disclosure will proceed;
- how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures;
- how the policy will be made available; and
- any matters prescribed by regulation.

[Schedule 1, item 9, subsection 1317AI(5)]

2.119 Transparent internal whistleblower policies are essential to good corporate culture and governance.

2.120 The requirement applies to all public companies and proprietary companies that have become large proprietary companies that are trustees of registrable superannuation entities for any financial year on any day in any later financial year that is at least six months after the last day of the first financial year. *[Schedule 1, item 9, subsection 1317AI(1)]*

2.121 Failure to comply with the requirement to have and make available a whistleblower policy is an offence of strict liability with a penalty of 60 penalty units (currently \$12,600 for an individual) which will be enforced by ASIC. *[Schedule 1, item 9, section 1317AI(4); Schedule 1, item 13, insert to Schedule 3]*

2.122 The requirement to have a whistleblower and to make it available to officers and employees, and the penalty that may be imposed for non-compliance, is designed to improve culture and transparency in relation to disclosures of wrongdoing in the workplace. Whistleblower policies are also intended to deter wrongdoing. The maximum penalty reflects the need to show the importance of the need for whistleblower policies and is proportional to the seriousness of a failure to implement a whistleblower policy.

2.123 Whistleblower policies are required to include information about protections that may be available to whistleblowers. They should also include those protections provided in the tax whistleblower regime inserted into the taxation law by Part 2 of Schedule 1 to this Bill. As public companies, large proprietary companies and registrable superannuation entities are required under the enhanced Corporations Act provisions to

have whistleblower policies, no such requirement is included in the tax whistleblower provisions.

2.124 The requirement that a proprietary company that is the trustee of a registerable superannuation entity must have a whistleblower policy does not refer to public companies because all public companies, including any public companies that are also superannuation trustees, are already covered by the requirement in subsection 1317AI(1).

2.125 Additional matters to be included in a whistleblower policy may be prescribed by regulation. This ensures that the whistleblower policies can adapt to developments in whistleblower protections and remedies in the future. Regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act.

Whistleblower policy exemption orders – class order for companies

2.126 The amendments provide a power to ASIC to make an order by legislative instrument in respect of a specified class of company, relieving companies in the class from the requirement to have a whistleblower policy. *[Schedule 1, item 9, section 1317AJ]*

2.127 Only large or public entities are required to have a whistleblower policy. This is intended to minimise the risk of any disproportionate regulatory burden that would result from making it a universal company requirement irrespective of company or business size.

2.128 The rationale for providing ASIC with a power to relieve certain classes of companies from this requirement is to provide it with flexibility in making a determination whether in some limited circumstances, the benefits of this requirement in encouraging good corporate culture and governance could be outweighed by reduced flexibility and unnecessarily high compliance costs.

Penalties for Contravention of Whistleblower Protections

2.129 Under the existing law it is an offence to disclose the identity of a whistleblower under most circumstances (section 1317AE). However, the prosecuting agency must prove the elements of the offence on the criminal standard, beyond a reasonable doubt. While evidence may indicate that a contravention of the law has occurred, this may not be sufficient to mount a prosecution.

2.130 The amendments make it a civil penalty contravention to disclose a whistleblower's identity, allowing for proceedings to be brought against an offender under the civil rules of procedure for the court, and applying the

civil standard of proof. *[Schedule 1, item 10, section 1317E(1) table items 45A and 45B]*

2.131 Contravention of the new section remains an offence. This ensures that the regulator can choose to prosecute contravention as an offence or as a civil penalty, as appropriate in the particular circumstances.

2.132 The maximum penalty is \$200,000 for an individual and \$1 million for a corporation. These maximum penalties reflect the seriousness of such disclosures, given the potential risk and detriment to which the whistleblower could be exposed. The penalties are intended to deter unauthorised disclosure of the identity of individuals who disclose wrongdoing. *[Schedule 1, item 11, subsection 1317G(1G)]*

Application and transitional provisions

2.133 The amendments will apply in relation to whistleblower disclosures made on or after 1 July 2018, including disclosures about events occurring before this date. *[Schedule 1, item 12, subsection 1644(1)]*

2.134 The amendments will also apply to victimisation of whistleblowers after 1 July 2018, and to a whistleblower's right to compensation and other remedies, in relation to disclosures that have been made prior to this date. *[Schedule 1, item 12, subsection 1644(2)]*

2.135 To allow sufficient time for public companies, large proprietary companies and registerable superannuation entities to comply with the requirement to have a whistleblowing policy, it will apply on and after 1 January 2019, or no later than six months after a proprietary company first becomes a large proprietary company. *[Schedule 1, item 12, subsections 1644(3) and (4) and item 9, section 1317AI(1)]*

REGULATION IMPACT STATEMENT

Background

2.136 The importance of protecting whistleblowers has been recognised for many years as a means of improving the compliance culture of corporations and improving detection of corporate crime. However, whilst legislative protections have formed part of the Corporations Act since 2004, they have been sparingly used and are increasingly perceived as inadequate

given recent advances in whistleblower protections in the public sector and overseas.

2.137 Independent reviews of corporate sector whistleblowing provisions in Australia have found that they lag those of the public sector and those of comparable overseas jurisdictions. An independent evaluation of G20 countries' whistleblowing laws in 2014, and a separate assessment of the same laws were undertaken by the Senate Economics References Committee (the Committee) as part of its Inquiry into the Performance of ASIC in 2014. They both found that the current corporate whistleblower protections are overly narrow and make it unnecessarily difficult for those with information to qualify for protections. The Committee recommended a comprehensive review of Australia's corporate whistleblower framework to bring it closer to Australia's public sector whistleblower framework under the PIDA. Refer to further details in section 1.

2.138 To remedy these inadequacies, the Government committed in December 2016, as part of the Open Government National Action Plan (OGNAP)¹, to ensuring appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. In order to achieve this, the Government committed to improving whistle-blower protections for people who disclose information about tax misconduct to the ATO. It also committed to pursuing reforms to whistleblower protections in other parts of the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector available under the PID Act.

2.139 The commitment in the OGNAP reaffirms the Government's announcement in the 2016-17 Budget to introduce greater protections for tax whistleblowers to further strengthen the integrity of Australia's tax system. Currently, there are no specific protections for tax whistleblowers, and the range of secrecy and privacy provisions relied upon are incapable of guaranteeing absolute protection.

2.140 Given the lack of protections for tax whistleblowers and the need to strengthen protections for other whistleblowers in the corporate sector the Government is progressing these reforms in parallel, including introducing them as part of the same legislation. This will ensure consistency in protections, where it makes sense to do so. Whilst the proposed protections for tax and other whistleblowers are largely consistent, there are some differences and so this regulatory impact analysis focuses on the corporate whistleblower protections only.

¹ <http://ogpau.pmc.gov.au/2016/12/07/australias-first-national-action-plan-submitted>

2.141 Separately, following the passage of amendments enhancing whistleblower protections in the *Fair Work (Registered Organisations) Act 2014* (RO Act), the Government referred to the Joint Parliamentary Committee on Corporations and Financial Services an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors (Parliamentary Inquiry). This Parliamentary Inquiry examined the RO Act whistleblower amendments with an objective of implementing the substance and detail of those amendments to achieve an equal or better whistleblower protection and compensation regime in the corporate and public sectors.

Corporate whistleblower protections available under the Corporations Act and the ASIC Act

2.142 The protections currently offered to corporate whistleblowers under Part 9.4AAA of the Corporations Act in respect of any disclosure about an actual or potential contravention of corporations legislation:

- confer statutory immunity on the whistleblower from civil or criminal liability for making the disclosure;
- constrain employer rights to enforce a contract remedy against the whistleblower (including any contractual right to terminate employment) arising as a result of the disclosure;
- prohibit victimisation of the whistleblower;
- confer a right on the whistleblower to seek compensation if damage is suffered as a result of victimisation; and
- prohibit revelation of the whistleblower's identity or the information disclosed by the whistleblower with limited exceptions.

2.143 These protections have been widely criticised as being limited and overly complex. Specifically, to qualify for protection a whistleblower must:

- be either a current officer or employee of the company in question or a current contractor (that is, protections do not apply to former employees or contractors);
- make the disclosure in good faith to ASIC, the company's auditor, or nominated persons within the company (that is, protections rely on a whistleblower's motivation in making the disclosure);

- have reasonable grounds to suspect that either the company, or some of its officers or staff, have breached (or might have breached) a provision of the Corporations Act or the Australian Securities and Investments Commission Act 2001 (ASIC Act) (that is, the protections do not apply for disclosures relating to breaches of any other act); and
- provide their names before making the disclosure (that is, the disclosure cannot be made anonymously).

Corporate whistleblower protections available under statutes within the remit of ASIC and APRA

2.144 Currently, there are no whistleblower protections under the *National Consumer Credit Protection Act 2009* (NCCP Act) or the *Financial Services (Collection of Data) Act 2001*.

2.145 Similar whistleblower protections to those set out in the Corporations Act are contained in the statutes within APRA's remit such as:

- the *Banking Act 1959*;
- the *Insurance Act 1973*;
- the *Life Insurance Act 1995*; and
- the *Superannuation Industry (Supervision) Act 1993*.

2.146 Whistleblower protections are available under these Acts if the disclosures concern misconduct or an improper state of affairs or circumstances affecting the institutions supervised by APRA (authorised deposit-taking institutions (ADIs), insurers and superannuation entities). Under the Banking Act for instance, a person may qualify for protection if the disclosure:

- relates to misconduct, or an improper state of affairs or circumstances in relation to the ADI; and
- the whistleblower considers that the information may assist the recipient of the disclosure to perform his or her functions or duties.

2.147 Similar requirements are set out for insurers and superannuation entities in the Life Insurance Act, the Insurance Act and the Superannuation Industry Act respectively, with some minor differences to reflect the roles

of the actuary for insurers and superannuation entities as well as the role of the trustee of the superannuation entity.

What is the policy problem?

2.148 Combating corporate crime is a longstanding law enforcement and public policy challenge. Corporate crime is estimated to cost Australia more than \$8.5 billion a year and account for approximately 40 per cent of the total cost of crime in Australia.²

2.149 Whistleblowing plays a critical role in uncovering corporate crime. It is a significant means of combating poor compliance cultures, as it ensures that companies, officers, and staff know that misconduct can be reported. Furthermore, the opaque and complex nature of corporate crime makes it difficult for law enforcement to detect misconduct. In many cases, corporate crime is only detected because individuals come forward, sometimes at significant personal and financial risk.

2.150 To reduce these risks and encourage disclosures, whistleblowers are often afforded legal protections in relation to their disclosure. If the protections are inadequate or unclear, a whistleblower may be discouraged from sharing information due to fears of personal or professional reprisal.

2.151 Organisational behaviour research tends to show that rates of reporting and/or other action on wrongdoing go up where organisations are forced or induced to introduce stronger ethics policies or programs, including reporting policies, in which employees have confidence, or employees believe they are subject to legislative protections in which they have some confidence. This second point is illustrated in *Whistling While They Work 1*³ where it was found that employee confidence in whistleblower protection legislation correlated strongly with lower 'inaction' in the face of perceived wrongdoing across 83 public sector organisations.

2.152 Further, in *Whistling While They Work 2*⁴ it was confirmed that employee reporting is the single most important way of wrongdoing being

² The estimates refer to figures quoted in Attorney General Department, 2016, *Improving enforcement options for serious crime: Consideration of a Deferred Prosecution Agreements scheme in Australia. Public Consultation Paper* (page 4) available at: <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf>

³ *Whistling While They Work 1*: Brown, Mazurski & Olsen 2008

⁴ *Whistling While They Work 2: Select Work-in-Progress Results*, 13 September 2017

brought to light especially on the part of managers and governance professionals. This is relative to other means, for example audits, management observation and internal controls. This is based on a sample of over 11,000 respondents from all employee classes from 38 organisations, public and private.

National and international evaluations of corporate whistleblower protections

2.153 The assessment of Australia's corporate whistleblower protections, undertaken by the Senate Economics References Committee as part of its Inquiry into the Performance of ASIC in 2014, concluded that "a strong case exists for a comprehensive review of Australia's corporate whistleblower framework, and ASIC's role therein."⁵

2.154 Witnesses to the Inquiry expressed concern over the Corporations Act's narrow definitions of who might be considered a whistleblower and the type of disclosures that could attract whistleblower protections; the absence of any requirement in the Act for internal whistleblowing processes within companies; and the fact that the Act does not mandate a role for ASIC in protecting whistleblowers.

2.155 The Committee recommended a review of Australia's corporate whistleblower framework to bring it closer to Australia's public sector whistleblower framework under the PIDA and introduce a number of amendments to the Corporations Act focusing on:

- extending the definition of whistleblowers expand the definition of a whistleblower to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners;
- expand the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate;
- allowing anonymous disclosures;

⁵ Senate Standing Committee on Economics, 2014, *Performance of the Australian Securities and Investments Commission*, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index

- remove the requirement that a whistleblower must be acting in 'good faith' in disclosing information. Consistent with PIDA, replace with a requirement that a disclosure is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing regardless of what the whistleblower believes;
- strengthening protections by strengthening the victimisation provisions to match the level of protections provided by the PIDA and including provisions in the Corporations Act that would ensure ASIC and APRA cannot be required to reveal a whistleblower's identity without a court order.

2.156 Similarly, in 2014 an independent evaluation of G20 countries' whistleblowing laws⁶ concluded that although Australia's whistleblower protections were comprehensive for the public sector, they lagged international best practice for the private sector. It identified the following areas for potential reform:

- broadening definition of whistleblowers and the scope of wrongdoing covered;
- introducing protections for anonymous complaints;
- introducing external reporting channels and requirements for internal company procedures;
- improving compensation arrangements and protections against retaliation;
- establishing an oversight agency responsible for whistleblower protections; and
- improving the transparency of the legislation.

2.157 In November 2016, the Parliamentary Inquiry was established to review the whistleblower protections in the corporate, public and not-for-profit sectors with the objective of recommending that the new whistleblower protections in the RO Act are implemented in the corporate and public sectors. In many respects the new whistleblower protections in the RO Act represented the new standard for whistleblower protections in Australia.

⁶ [Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, 2015, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*](#)

2.158 Using the whistleblower protections in the RO Act as the standard, the committee made 35 recommendations to improve whistleblower protections in the public and private sectors.⁷ Some of the key recommendations address inadequacies identified with the existing whistleblower protections in the following areas:

- protecting whistleblowers from reprisals and holding those responsible for reprisals to account;
- effectively investigating alleged reprisals;
- whistleblowers being able to seek redress for reprisals; and
- the fragmented and inconsistent nature of whistleblower legislation. It was found that significant inconsistencies exist not only between various pieces of Commonwealth public and private sector whistleblower legislation, but also across the various pieces of legislation that apply to different parts of the private sector.

2.159 The reforms described in this regulatory impact statement have been developed having regard to the recommendations made by the above national and international evaluations of Australia's corporate whistleblowing regime.

Why is government action needed?

2.160 Shifting technologies and the global nature of business are contributing to the increasing complexity and sophistication of corporate misconduct. In this evolving setting, the knowledge of those working within an organisation provides an important, and in some cases the only, route to detection and prosecution of corporate crime.

2.161 As a result of the inadequacies detailed above, the current legal settings give whistleblowers in the corporate sector little incentive to come forward with their information.

2.162 In addition, because whistleblower protections are spread across multiple statutes, their application is complicated and their coverage is

⁷ Parliamentary Joint Committee on Corporations and Financial Services, 2017, *Whistleblower Protections* available at: http://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report

fragmented. To be certain of protection, a whistleblower is required to possess sophisticated knowledge of Australia's legal system, specifically, the precise Act which the organisation has contravened. This potential for uncertainty is compounded by the fact that, under the current protections, the whistleblower is unable to seek legal advice while retaining their statutory protections, as lawyers are not included in the list of persons to whom a whistleblower can make a protected disclosure. Additionally, there are categories of people with potentially valuable knowledge who are excluded from protection; for example, former employees or an organisation's accountant.

2.163 Government action is needed to ensure that the legislative settings:

- actively protect whistleblowers;
- encourage them to make disclosures;
- provide an early warning system for regulators;
- facilitate investigation of the disclosures made; and
- afford procedural fairness to those who may be subject of a disclosure.

2.164 The main objective of this proposal is to remedy these shortcomings of the current legislation and meet Government's commitment made as part of the OGNAP to ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.⁸

2.165 Public consultation (held in line with the OGNAP commitment) seeking stakeholders views on the adequacy of the current protections for whistleblowers in the corporate sector highlighted an urgent need for a Government action in this area and overwhelming support for the reforms proposed (see for more on consultation section 5).

Policy options

2.166 There are three policy options available to the Government.

⁸Open Government Partnership – Australia, Australia's First National Action Plan available at: <https://ogpau.pmc.gov.au/2016/12/07/australias-first-national-action-plan-submitted>

- Option 1 – Maintain the status quo.
- Option 2 – Reform whistleblower protections in the Corporations Act only.
- Option 3 – Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

Option 1 - Maintain status quo

2.167 This policy option does not involve a legislative change.

Option 2 - Reform whistleblower protections in the Corporations Act only

2.168 This policy option involves strengthening protections available to whistleblowers under the Corporations Act only. The Corporations Act is amended to:

- expand the categories of whistleblowers qualifying for protection to include former officers, employees and suppliers as well as associates of the entity in relation to which the disclosure is made, and specified family members of employees, officers and others of a regulated entity;
- eliminating the 'good faith' requirement for disclosures so that generally the motivation of whistleblowers cannot be taken into account in determining whether a disclosure ought to qualify for protection or not;
- allow anonymous disclosures;
- enhance requirements designed to protect a whistleblower's identity;
- expanding the range of persons or entities to which a whistleblower may make a protected disclosure including to lawyers for the purpose of obtaining legal advice;
- expand the protections and redress for whistleblowers who suffer reprisal or retaliation in relation to a disclosure;

- improve access to compensation for whistleblowers who are the subject of such reprisals; and
- introduce a requirement that public companies, large proprietary companies and superannuation trustees have a whistleblower policy, which will include company-specific information about the protections available to whistleblowers, as well as how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures.
 - Transparent internal whistleblower policies are essential to good corporate culture and governance. It will encourage whistleblowers to come forward as they will have confidence that they will be protected for making the disclosure. It encourages companies to take action to investigate and resolve reports of misconduct. This change also aligns the Corporations Act with the PIDA and the RO Act pursuant to which the development of such procedures is mandatory.

Option 3 – Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

2.169 This policy option involves strengthening the Corporations Act provisions (as in Option 2) and also extending the proposed Corporations Act protections to other specified statutes falling within the remit of ASIC and APRA including:

- the *Australian Investments and Securities Commission Act 2001*;
- the *National Consumer Credit Protection Act 2009*;
- the *Banking Act 1959*;
- the *Insurance Act 1973*;
- the *Life Insurance Act 1995*;
- the *Superannuation Industry (Supervision) Act 1993*; and

- the *Financial Sector (Collection of Data) Act 2001*.

2.170 In addition, the scope of protected disclosures is expanded to include information that the discloser has reasonable grounds to suspect:

- indicates misconduct, or an improper state of affairs or circumstances, by a whistleblower regulated entity or related body corporate of a whistleblower regulated entity;
- is an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or
- represents a danger to the public or the financial system.

2.171 The amendments make it clear that disclosures about the broad set of serious wrongdoing in a corporation or a financial sector entity are within the scope of the protection. This could include serious breaches of any Commonwealth, State or Territory law that are not criminal offences.

Cost benefit analysis of each option and impact analysis

Option 1 - Maintain status quo

2.172 Making no legislative change would result in Australia continuing to lag behind both domestic and international best practice.

2.173 If protections for corporate whistleblowers remain unchanged, there are no additional compliance costs for the businesses affected. However, the current corporate whistleblower protections remain sparingly used and there remains little to no incentive for insiders to share vital information with regulators and law enforcement agencies. With very few insiders stepping forward, the investigation and prosecution of corporate crime in Australia remains difficult, costing Australia approximately \$8.5 billion a year.

Option 2 - Reform whistleblower protections in the Corporations Act

2.174 This policy option involves strengthening protections available to whistleblowers under the Corporations Act, aligning them with the PIDA and the RO Act and with what is considered to be international best practice. The reforms are designed to encourage whistleblowers to come forward by ensuring protections are in place for people who report such activities in corporations covered by the Corporations Act. This would in

turn be expected to reduce misconduct over time (see further discussion below).

2.175 However, by amending the Corporations Act only (in isolation of other statutes which relate to banking, insurance and superannuation) the reforms have very limited scope as they guarantee protections for whistleblowers making the disclosures in relation to breaches of the Corporations Act only. Disclosures related to the breaches of the NCCP Act continue to lack protections. Also, the protections for whistleblowers available under legislation within APRA's remit remain unchanged. They would also not cover broader types of misconduct that a regulated entity may engage in.

2.176 This fragmented legislative setting continues to result in inconsistent approaches to handling disclosures between different statutes and regulators and requires whistleblowers to consult a number of statutes or seek legal advice in order to understand their eligibility for protection.

2.177 Possible outcomes from the implementation of Option 2 include the following.

- **Whistleblowers:** will benefit from increased protections and better access to compensation, but may need to consult a number of statutes or seek legal advice in order to understand their eligibility for protection.
- **Companies:** will bear the costs of developing whistleblower policies (if they don't already have one) and potentially dealing with greater whistleblowing activity. However, companies may benefit from being made aware of inappropriate behaviour within the company so that they can take action to investigate and remedy. Also, by better supporting whistleblowers the company will be able to demonstrate its commitment to good corporate practices and improved culture.
- **Regulators:** will, through a potential increase of valuable disclosures, be able to more effectively take early action to investigate and prosecute corporate misconduct.
- **Public:** may, as investors and customers, face slight increases in the costs of products and services, if the costs to companies of developing whistleblower policies are passed on. However, this is considered unlikely as the estimated costs calculated in this regulatory impact assessment for an average company are relatively small. Customers may also benefit from higher standards of behaviour by companies.

Furthermore, the public would be expected to benefit from potential decreased levels of corporate misconduct over time and overall increase in confidence in the financial system.

2.178 Most of the proposed reforms (discussed in detail in Section 3 – Option 2) do not result in any additional compliance cost, as they build on the existing legislation and correct existing deficiencies. An exception to this is a requirement for public companies, large proprietary companies and superannuation trustees to have a whistleblower policy.

2.179 There are approximately 33,000 of these companies in Australia. We estimate that the whistleblower policy requirement will impose certain one-off implementation costs on these companies as well as annual training costs.

2.180 As there is a range in size and complexity of the companies to whom this will apply, the estimated costs are based on an expected average. Also it is expected that the average company already has a base structure in place for compliance and ethics policies and training and so development of a whistleblower policy in accordance with the proposed reforms will leverage this base.

2.181 Based on the average company, the estimated costs include the administrative time required to developing the policy (20 hours), legal advice in developing the policy (five hours), and the production of informative materials for staff members (four hours). In addition, it is estimated that each company with the whistleblower policy requirement will devote ongoing time to familiarising themselves with this legal requirement (four hours per year). Following these time estimates and a standardised labour cost, it is estimated that Option 2 will result in an overall compliance cost of \$15.6 million per year over ten years.

Table 2.1: Average annual regulatory costs (from business as usual)

<i>Change in costs (\$ million)</i>	<i>Business</i>	<i>Community organisations</i>	<i>Individuals</i>	<i>Total change in costs</i>
Total, by sector	\$15.6 million	\$0	\$0	\$15.6 million

2.182 Given the proposed reforms significantly strengthen the protections for whistleblowers in the corporate sector, it is not unreasonable to suggest that there could be a corresponding reduction in the cost of corporate crime as detection and prosecution of the corporate crime improves over time. This is due to whistleblowers being more willing to report misconduct because they feel better protected and are better informed about a company's whistleblowing policies.

2.183 Overseas evidence suggests that whistleblowing is important in uncovering corporate crime. A recent European Commission study⁹ outlined the economic case for whistleblower protection in the European Union. It focused on the public procurement sector, a major component of the economy and an attractive hotspot for corruption. In this context, whistleblower protection can encourage the reporting of corrupt practices, resulting in less misuse of public funds. It found that the overall costs for setting up and maintaining whistleblower protection are quite low in comparison with the potential benefits.

2.184 This study referenced the 2016/17 Global Fraud Report¹⁰ which is based on a survey and in-depth interviews with senior executives worldwide about their experience with fraud. It reports that the percentage of fraud uncovered, thanks to whistleblowers, was equal to 44 per cent in Canada, 49 per cent in the US, 53 per cent in Italy and 50 per cent in the UK, against a global average of 44 per cent.

2.185 Using the results of these studies as a guide, and considering that corporate crime is estimated to cost Australia more than \$8.5 billion a year, it is reasonable to suggest that these reforms to significantly strengthen the protections for whistleblowers could have a large impact on combatting corporate crime.

Option 3 – Reform and consolidate into the Corporations Act whistleblower protections currently available to whistleblowers across the financial system under legislation within the remit of ASIC and APRA and expand protections to disclosures of corporate misconduct more generally.

2.186 This policy option extends the proposed expanded Corporations Act protections to other specified statutes falling within the remit of ASIC and APRA as well as corporate misconduct more broadly (as described by Section 3 – Option 3). The corporate whistleblower protections for disclosures made with respect to breaches of financial system legislation within the remit of ASIC and APRA are consolidated into one statute: the Corporations Act. In addition, the Corporations Act whistleblower protections will be extended to disclosures that relate to misconduct, or an improper state of affairs or circumstances, contraventions of any law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or represents a danger to the public or the financial

⁹ Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, written by Milieu Ltd July – 2017

¹⁰ Kroll, Global Fraud Report 2016-17

system. These reforms will reduce the gaps and inconsistencies that currently exist in the corporate whistleblower protection regime.

2.187 This regime is designed to work for the whistleblower and address the previously identified issues by creating a less fragmented whistleblower protection regime with broader protections for disclosures. In addition to all of the benefits of Option 2, Option 3 ensures a consistent approach to whistleblower protections in the financial system and more broadly, and greater certainty of protection for whistleblowers who are guided now by a single statute when inquiring about their protections. This reduces the risk of a whistleblower having no statutory protection if he/she discloses misconduct that is not captured by the existing, fragmented regime.

2.188 It simplifies the existing legislative regime by combining in one statute (the Corporations Act) the whistleblower protections currently spread across the statutes listed above. This approach:

- eliminates the gaps in protections in the existing law which result from this piecemeal approach;
- removes confusion as to which law applies;
- reduces compliance costs for industry; and
- ensures consistency of approach in the financial system as a whole.

2.189 Possible outcomes from the implementation of Option 3 include the following.

- **Whistleblowers:** will benefit, not only from increased protections and improved access to compensation but also a greater certainty about their legal position.
- **Companies:** will bear the costs of developing whistleblower policies (if they don't already have one) and potentially dealing with greater whistleblowing activity. However, those costs may be reduced by the decrease in complexity of whistleblower protections across the corporate sector.
- **Regulators:** will, through a potential increase of valuable disclosures, be able to more effectively take early action to investigate and prosecute corporate misconduct. ASIC and APRA may need to process a greater number of disclosures as they receive disclosures on a broader range of misconduct from across the corporate and financial sectors. However, the

reforms allow for an increased cohesion in approach to sharing information about disclosures across regulators.

- **Public:** may, as customers, face slight increases in the costs of products and services, if the costs to companies of developing whistleblower policies are passed on. However, this is considered unlikely as the estimated costs calculated in this regulatory impact assessment for an average company are relatively small. Compared to Option 2, more customers will benefit from higher standards of behaviour by companies, as whistleblowers can now also make protected disclosures relevant to the National Consumer Credit Protection Act (which currently does not provide for protections) as well as any corporate misconduct more generally. Furthermore, the public is expected to benefit from decreased levels of corporate misconduct.

2.190 Similar to Option 2, with an exception of a requirement for public companies, large proprietary companies and superannuation trustees to have whistleblower policies, the proposed amendments do not result in any compliance cost, as they build on the existing legislation and correct existing deficiencies.

2.191 The compliance cost calculation for Option 3 largely follows Option 2. However, there is one key difference. Under Option 2, corporate whistleblower provisions are spread across multiple statutes relating separately to banking, insurance and superannuation. Option 3 simplifies this regime by consolidating whistleblower protections across the financial system and corporate activities more generally. Therefore, for the 33,000 eligible companies, the regime under Option 3 will be easier to interpret and it is assumed that, compared to Option 2, fewer legal services will be purchased by companies when developing their policy (four hours of legal advice in developing the policy compared to five hours). Apart from the differences in legal services costs, regulatory cost calculations for Option 3 are identical to Option 2. The estimated overall compliance cost is \$15.4 million per year over ten years.

Table 2.2: Average annual regulatory costs (from business as usual)

Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	\$15.4 million	\$0	\$0	\$15.4 million

2.192 The slightly lower compliance cost is likely to be accompanied by a further decline in corporate crime (compared to Option 2), as this policy option extends the proposed expanded Corporations Act protections to all

financial sector statutes falling within the remit of ASIC and APRA as well as corporate misconduct more broadly. This is because the simplified legislative regime which combines whistleblower protections that are currently spread across the number of statutes, as well as providing for protections for disclosures of corporate misconduct more generally, gives whistleblowers greater certainty and removes confusion as to which law applies. As a result, more whistleblowers may make protected disclosures. Therefore, it is likely that Option 3 will improve the prospects of prosecution and will potentially further reduce the incidence and cost of corporate crime.

Consultation plan

2.193 Treasury consulted extensively on this proposal publically and with each of the key regulatory agencies.

2.194 On 20 December 2016, the Minister for Revenue and Financial Services released the *Review of tax and corporate whistleblower protections in Australia* consultation paper. The paper sought public comment to assist the Government with the introduction of appropriate protections for tax whistleblowers and in assessing the adequacy of existing whistleblower protections in the corporate sector. Thirty-six submissions were received in response to this consultation; all were generally supportive of the proposals.

2.195 In addition, the Parliamentary Joint Committee on Corporations and Financial Services undertook an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. A vast majority of seventy-five submissions responding to the Inquiry supported reforms strengthening the whistleblower regime in Australia.

2.196 In its final report, tabled on 13 September 2017, the Inquiry concluded that existing whistleblower protections are ineffective and made 35 recommendations to strengthen them. Amongst others, the Parliamentary Inquiry recommended a single statute for Commonwealth private sector whistleblowing legislation (including tax).

2.197 The proposed reforms have regard to submissions made to both consultation processes as well recommendations made by the Parliamentary Inquiry. They also take into account recommendations made by the national and international evaluations of Australia's corporate whistleblowing regime.

2.198 Option 3, in particular, goes a significant way to address the concern of the Parliamentary Inquiry of the fragmented and inconsistent nature of whistleblower legislation including across the various pieces of

legislation that apply to different parts of the private sector. The tax whistleblower reforms mentioned earlier in this statement are being progressed in parallel to these corporate and financial sector reforms to ensure consistency in protections, where it makes sense to do so.

2.199 On 23 October 2017, the proposed reforms were released for public consultation as the *Treasury Laws Amendment (Whistleblowers) Bill 2017*. The Bill contains provisions related to both corporate and financial sector whistleblowers (consistent with Option 3), and tax whistleblowers. Thirty-nine submissions were received. Submissions were received from a broad range of stakeholders, including professional and industry bodies, legal and accounting firms, civil society groups, academics and individuals.

2.200 Feedback to the draft Bill was supportive overall and it was recognised that strengthened legislative protections for whistleblowers play an important role in reinforcing corporate accountability and encouraging whistleblower disclosures. In particular there was support for:

- Streamlining the existing various whistleblower rules contained in legislation administered by ASIC and APRA into a single regime contained within the Corporations Act. Feedback indicated that this would address the issue that existing whistleblower legislation is disjointed and unnecessarily complex, rendering it ineffective in encouraging whistleblowers to come forward and report misconduct and wrongdoing. For example:
 - It was broadly noted that regulated entities 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.
- The inclusion of provisions which recognise the need for an individual to consult with a lawyer and the enforcement of the anonymity of whistleblowers.
- Introducing a whistleblower policy requirement. Some comments included:
 - A number of stakeholders, including an academic, a law firm and a large listed company asserted that the introduction of the mandatory requirement for large companies to have a whistleblower policy is a positive reform. This requirement will assist entities in developing robust corporate governance systems while also providing

a mechanism and useful guidance to individuals who may wish to report suspected or actual illegal activity.

- A law firm noted that there is presently no requirement for corporations to have an internal policy for dealing with whistleblowers. Therefore, it is likely that in many cases, better internal procedures for dealing with whistleblowers could allow for a more mutually-beneficial outcome for the whistleblower and the organisation. At the very least, the requirement to have a whistleblower policy will ensure that employees are made aware of the protections available to whistleblowers under the Whistleblowers Bill.
- One professional body asserted that as a matter of good practice, all companies should have sound internal whistleblowing policies and procedures that aim to detect, address and ultimately prevent corporate wrongdoing. One of the central goals of the whistleblowing framework should be to encourage companies to make internal disclosure easy and safe for whistleblowers. This will help to ensure that misconduct is addressed as early as possible, ideally before it becomes the subject of regulatory intervention. Although it is not necessary to include a statutory requirement for a whistleblower policy, the components in the draft legislation are not unreasonable.
- Another professional body agreed that it is appropriate for large companies to have a whistleblower policy. However, extending the requirement to all public companies is not necessary, given that some public companies may be very small.

2.201 There was broad support for the draft Bill in expanding the scope of eligible whistleblowers and of disclosees, as well as improving access to compensation.

2.202 However, some stakeholders expressed uncertainty regarding how the new law may be interpreted and how regulated entities would be expected to handle disclosures. For example, a number of stakeholders expressed a concern that employees' workplace grievances appeared to be captured in the draft legislation. This feedback was addressed in the Explanatory Memorandum by making it clear that workplace grievances are not within the scope of protected whistleblower disclosures.

2.203 Other feedback sought clarification as to how large companies will satisfy the requirement of making their whistleblower policy available to all eligible whistleblowers. In response to this, the legislation was amended to require that whistleblower policies are to be made available to employees and officers only.

2.204 In addition, Treasury conducted targeted consultation with an experienced industry stakeholder on the regulatory impact of the whistleblower policy requirement. The regulatory cost estimates were refined in this statement following these discussions as follows:

- Increase to the estimated average time for staff to familiarise themselves with the new policy from three hours to four hours each year; and
- Decrease the estimated average hours to produce materials to inform employees about the whistleblower policy from five hours to four hours.

Option selection and conclusion

Preferred option

2.205 Having considered:

- recommendations made by the national and international evaluations of Australia's corporate whistleblowing regime,
- national and international best practice,
- evidence received and recommendations made by the Parliamentary Inquiry, and
- results of the Treasury and Parliamentary Inquiry consultation processes,

2.206 Treasury's preferred option is **Option 3**.

2.207 This option:

- strengthens protections for whistleblowers and provides them with greater legal certainty;

- simplifies the existing legislative regime as it combines in one statute the financial system legislation within the remit of ASIC and APRA, as well as expanding protections to corporate misconduct more generally; and
- meets commitments made publically by the Government.

2.208 Option 3 also results in expected lower compliance costs to industry compared to Option 2 and is more likely to improve the detection of corporate crime in Australia.

Implementation, evaluation and review

2.209 Legislation is required to implement this proposal. The reforms will be introduced as part of the *Treasury Laws Amendment (Whistleblowers) Bill 2017*.

2.210 These reforms will address recommendations made by the Parliamentary Inquiry to strengthen whistleblower protections.

2.211 Prior to introduction of legislation into Parliament in December 2017, the exposure draft legislation was released for public consultation. Also, the Government established an Expert Advisory Panel to review and provide feedback on the draft legislation.

2.212 There was broad support for these reforms to strengthen whistleblower protections. There was a minority view that not all public companies needed to have a whistleblower policy. However given the broad support on the requirement to have whistleblower policy, no amendments were made to reduce the companies in scope. A small amendment was made to ensure that all superannuation trustees were captured. This did not materially alter the number of companies in scope upon which the estimated costings are based.

2.213 The draft legislation was amended to require that whistleblower policies are to be made available to employees and officers only. No other amendments were identified as being needed to ensure that the implementation of the reforms will not impose undue compliance costs for industry.

2.214 The success of the whistleblower protection reforms will be identified by:

- an increase in protected whistleblower disclosures which instigate or materially assist investigation and prosecution of corporate crime; and
- better protections for whistleblowers including access to compensation if they are the subject of reprisal action due to their disclosure.

Chapter 3

Better Protections for Tax Whistleblowers

Outline of chapter

3.1 Part 2 of Schedule 1 to this Bill will insert a comprehensive regime for the protection of individuals who report breaches or suspected breaches of the tax law and/or tax misconduct.

3.2 All legislative references in this Chapter are to the TAA 1953 unless otherwise indicated.

Context of amendments to the tax law

3.3 In the 2016-17 Budget, the Government announced that it will introduce new arrangements to better protect individuals who disclose information to the ATO on tax avoidance behaviour and other tax issues. Currently there is no specific legislative regime for the protection of such individuals (tax whistleblowers).

3.4 The new tax whistleblower regime is intended to encourage individuals to disclose such information by providing them with protections that are broadly consistent with those that will be provided by the Corporations Act after the amendments described in Chapter 2 come into force. The new regime is not intended to encourage individuals to make frivolous or vexatious disclosures, or to disguise personal or professional grievances as disclosures qualifying for protection.

Summary of new law

3.5 Part 2 of Schedule 1 to this Bill amends the TAA 1953 to create a regime to protect and compensate individuals who report breaches or suspected breaches of the tax law or misconduct in relation to an entity's tax affairs. This may include non-compliance with tax laws or tax avoidance behaviour.

3.6 The new regime sets out the circumstances in which such disclosures will qualify for protection, including:

- the kinds of disclosures that will qualify for protection;

- who can make a protected disclosure (eligible whistleblower);
- protections for disclosures to the ATO or a legal practitioner;
- other entities (eligible recipients) to which an eligible whistleblower may make a disclosure that qualifies for protection;
- protections to maintain the confidentiality of a whistleblower's identity, including:
 - protections provided to a whistleblower (or other person who suffers damage) in respect of court proceedings; and
 - the circumstances in which a person commits the offence of disclosing a whistleblower's identity.
- the protections provided to a whistleblower from legal action for making a disclosure that qualifies for protection;
- the offence of causing or threatening to cause detriment to a whistleblower or another person in the belief or suspicion that a disclosure has been made (or may have been, proposes to or could be made), and the types of conduct that constitute detriment;
- the remedies available for conduct that causes damage to a whistleblower or other person due to a disclosure or belief of a disclosure being made, including compensation for damage suffered, and the onus of proof in proceedings claiming compensation;
- protections to ensure that information that might reveal the identity of a whistleblower is not required to be disclosed to a court or tribunal; and

3.7 protection against costs orders for a whistleblower or other claimant seeking compensation or other remedies in court proceedings. Except where otherwise stated, the new tax whistleblower regime provides parallel protections, remedies and offences to those set out in the Corporations Act as amended by Part 1 of Schedule 1 to this Bill. In some cases the language of the law differs because of the legislative context.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Introduces protections and remedies for tax whistleblowers who make a protected disclosure about breaches or suspected breaches of the tax laws or misconduct in relation an entity's tax affairs.	Any person can make a disclosure regarding an entity's tax affairs to the ATO. However there is no specific regime protecting tax whistleblowers or providing remedies for individuals who suffer victimisation or other damage in relation to making such disclosures.
Eligible whistleblowers are not required to identify themselves in order to qualify for protection.	The ATO accepts anonymous disclosures.
Introduces protections to prevent disclosure of an eligible whistleblower's identity.	No specific protections of a whistleblower's identity.
Eligible whistleblowers are protected from civil, criminal and administrative liability in relation to a disclosure that qualifies for protection.	No equivalent.
It is an offence for a person to cause detriment to another person in relation to a disclosure (including a potential disclosure) that qualifies for protection.	No equivalent.
A court may award compensation to a person who suffered damage in relation to a disclosure that qualifies for protection.	No equivalent.

Detailed explanation of new law

3.8 Part 2 of Schedule 1 to this Bill amends the TAA 1953 to create a regime for protecting and compensating individuals who report information indicating non-compliance with the tax law or tax misconduct.

3.9 The new tax whistleblower regime is set out in Part IVD of the TAA 1953.

Disclosures qualifying for protection

3.10 The new tax whistleblower regime sets out the circumstances in which a disclosure of information by an individual will qualify for protection.

3.11 The disclosure must be made by an eligible whistleblower (in relation to an entity), to the Commissioner or to an eligible recipient. These terms are discussed below.

Subject matter of disclosure eligible for protection

3.12 A disclosure to the Commissioner qualifies for protection if the eligible whistleblower considers that the information may assist the Commissioner to perform his or her functions or duties under a taxation law in relation to the entity about which the disclosure is made (or an associate of the entity). *[Schedule 1, item 15, subsection 14ZZT(1)]*

3.13 A ‘taxation law’ is an Act of which the Commissioner has the general administration (section 995-1 of the ITAA 1997), a legislative instrument made under such an Act, or the TASA 2009 or regulations made under the TASA 2009. This includes, for example, income taxes (including capital gains tax), the Goods and Services Tax and the Fringe Benefits Tax.

3.14 A whistleblower may also make a disclosure qualifying for protection to an eligible recipient. These can generally be described as recipients who are in a position to take some action in relation to the issues raised in a disclosure.

3.15 In order to qualify for protection under the tax whistleblower regime, the eligible whistleblower must have reasonable grounds to suspect that the information indicates misconduct or an improper state of affairs or circumstances, in relation to the tax affairs of the entity, and may assist that eligible recipient to perform their functions or duties in relation to those tax affairs. *[Schedule 1, item 15, paragraphs 14ZZT(2)(c) and (d)]*

3.16 Tax affairs is defined only for the purposes of section 14ZZT as affairs relating to all taxes imposed by or under, or assessed or collected under, all laws administered by the Commissioner. It is useful to note that the ITAA97 definition of tax affairs will not apply. *[Schedule 1, item 15, subsection 14ZZT(4)]*

3.17 This framework ensures that an eligible whistleblower need not have knowledge of specific taxation laws or particular duties or functions of

the Commissioner or an eligible recipient in order to make a protected disclosure.

3.18 All that is required is that an eligible whistleblower has reasonable grounds to suspect that the relevant information indicates tax misconduct and that it would assist the Commissioner or the eligible recipient in performing their duties if they knew about it. This would not include information about purely workplace related issues that do not suggest misconduct or an improper state or affairs or circumstances in relation to the entity's tax affairs.

3.19 Such information may include details of non-compliance with a tax law, tax evasion, a scheme set up to avoid tax, unexplained wealth, or any other tax-related misconduct.

Eligible whistleblowers

3.20 An individual (eligible whistleblower) qualifies for protection in relation to a disclosure he or she makes about an entity, or an associate of the entity, by reference to his or her current or former relationship with the entity. *[Schedule 1, item 15, section 14ZZU]*

3.21 'Entity' is broadly defined (see section 960-100 of the ITAA 1997), and includes for example individuals, companies, partnerships, trusts and superannuation entities. The following individuals are eligible whistleblowers in relation to a particular entity:

- an officer of the entity (within the meaning of the Corporations Act);
- an employee of the entity;
- an individual who supplies services or goods to the entity (whether paid or unpaid);
- an employee of a person who supplies services or goods to the entity (whether paid or unpaid);
- an individual who is an associate (within the meaning of section 318 of the ITAA 1936) of the entity;
- a spouse or child of any individual referred to above;
- a dependant of an individual referred to above or a dependant of the individual's spouse; and

- an individual prescribed by the regulations in relation to the entity.

[Schedule 1, item 15, section 14ZZU]

3.22 The categories of eligible whistleblowers are intended to ensure that the regime targets those individuals who are most likely to have reliable information about the tax affairs of an entity.

3.23 The power to prescribe new categories of eligible whistleblower in relation to a type of entity is provided so that categories of individual not currently included in the categories of eligible whistleblowers, but whose relationship with a type of entity may put them in a position to identify and disclose wrongdoing, can be protected.

3.24 Regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act. This power ensures that the law can respond promptly to protect disclosures of emerging categories of wrongdoing.

3.25 An individual does not have to be a current employee, officer, contractor, associate, spouse, etc. to qualify as an eligible whistleblower. The law also applies to protect individuals who make disclosures in relation to entities with which they had a prior relationship. *[Schedule 1, item 15, section 14ZZU]*

3.26 Individuals who supply services or goods to the entity will cover a registered tax agent or BAS agent of the entity. Volunteers, interns and other unpaid workers qualify as eligible whistleblowers in circumstances where they supplied services or goods to the entity. *[Schedule 1, item 15, paragraph 14ZZU(d)]*

3.27 An ‘associate’ of an entity is defined broadly in section 318 of the ITAA 1936). Associates are included in the categories of eligible whistleblower to ensure that a wide range of such individuals are protected if they make a disclosure in relation to an entity. For example, this will cover shareholders of a company and beneficiaries or unitholders of a trust. *[Schedule 1, item 15, paragraph 14ZZU(e)]*

3.28 The law provides a regulation-making power to add categories of persons to the list of eligible whistleblowers in the future. This allows the law to adapt to accommodate emerging categories of individuals who may be able to identify and disclose potential tax wrongdoing. Regulations are subject to Parliamentary scrutiny through the disallowance procedure in section 42 of the Legislation Act. *[Schedule 1, item 15, paragraph 14ZZU(h)]*

Example 3.1: Eligible whistleblower has a previous association with the entity

Greg previously supplied services to William Rays, a high wealth individual. During his time working for Mr Rays, Greg became aware of conduct undertaken by Mr Rays that he suspects is designed to avoid GST. One year after working with Mr Rays, Greg decides to disclose the information to the ATO.

Greg qualifies for protection as he is a former contractor of the subject of the disclosure and he considers that the information may assist the Commissioner to perform his or her functions or duties under a taxation law.

Example 3.2: Protected disclosure about an associate of the entity

Lyn is an employee of Company A. Company A is an associate of Company B because Company A is reasonably expected to act in accordance with the wishes of Company B. Company A is not involved in the day-to-day running of Company B, the companies lodge separate tax returns and have separate auditors. Lyn becomes aware that Company B is not correctly reporting its sales income, in breach of the taxation laws. Lyn discloses this information to a member of Company A's audit team.

Lyn is eligible for protection in respect of this disclosure.

Eligible recipients

3.29 A disclosure made by an eligible whistleblower may qualify for protection if it is made to an eligible recipient.
[Schedule 1, item 15, section 14ZZV]

3.30 Eligible recipients are generally internal to the entity about which the disclosure is made, or have a relationship with that entity that is relevant to its tax affairs. An eligible recipient may be:

- an auditor, or a member of an audit team conducting an audit, of the financial or tax affairs of an entity. This would include both internal and external auditors but would not include, for example, auditors engaged in auditing an entity's compliance with environmental laws;
- a registered tax agent or BAS agent who provides services to the entity;
- a person authorised by the entity in relation to the operation of the whistleblower regime;

- a person or body prescribed in the regulations;
- if the entity is a body corporate, a director, secretary or senior manager of the body corporate or other employee or officer who has functions or duties in relation to the entity's tax affairs;
- if the entity is a trust, a trustee of the trust or a person authorised by the trustee to receive whistleblower disclosures; or
- if the entity is a partnership, a partner or a person authorised by the partner to receive whistleblower disclosures.

[Schedule 1, item 15, section 14ZZV]

3.31 The categories of eligible recipient are intended to ensure that, in addition to making disclosures to the Commissioner, disclosures can be made to other persons that are in a position to take appropriate action, including recipients appointed by an entity to receive disclosures from whistleblowers. This is designed to give eligible whistleblowers the opportunity to raise their concerns 'internally' if they so choose.

3.32 Enabling all entities to authorise persons to be eligible recipient provides flexibility for external entities to be authorised eligible recipients of disclosures. This recognises that some entities may contract out the receipt of disclosures to third parties. *[Schedule 1, item 15, subsections 14ZZV(1)(c), (2) and (3)]*

3.33 A single disclosure of particular information can be made to any one or more of the eligible recipients in no particular order. The best person or entity to receive and act on the disclosure will depend on the circumstances and the wishes of the whistleblower.

Example 3.3: Body corporate eligible recipient

Kathryn is an employee of a large multinational corporation. She possesses information that she believes on reasonable grounds shows that the corporation has been avoiding tax by understating its sales in Australia.

Kathryn discloses the information to the senior manager of the entity and so is eligible for protection. Kathryn later decides to also disclose the information to the ATO. The second disclosure also qualifies for protection.

Disclosure to a legal practitioner

3.34 The new law also permits an eligible whistleblower to make a disclosure qualifying for protection to his or her lawyer for the purposes of obtaining legal advice or representation in relation to the operation of the tax whistleblower regime. This is not intended to have any effect on legal professional privilege [*Schedule 1, item 15, subsection 14ZZT(3)*]

3.35 The disclosure does not have to be about a disclosable matter to be protected, and the individual does not have to be an eligible whistleblower in relation to a entity that is the subject of the disclosure. This ensures that a whistleblower or potential whistleblower can safely seek legal advice as to whether and what protections may apply to them.

Example 3.4: Disclosure to a legal practitioner

Di lives in the same street as Fiona who operates a small local business. This business has operated for many years and appears to make a modest income.

Recently Fiona purchased two new prestige motor vehicles and took her family on an expensive holiday in the Bahamas. These events are uncharacteristic for Fiona and Di suspects that Fiona may not be complying with the tax laws in relation to the operation of her business.

Di would like to make a disclosure to the ATO and seeks advice from her lawyer as to how the whistleblower protection provisions would apply to her. Although Di does not meet the test for an eligible whistleblower, her identity would still be protected by these provisions.

Di's disclosure to her lawyer and her identity would remain protected by these provisions regardless of whether or not she decides to proceed with a disclosure to the ATO.

No provision for emergency disclosures

3.36 In contrast to the Corporations Act whistleblower regime, the tax whistleblower regime does not protect emergency disclosures to a journalist or a member of Parliament.

3.37 The tax secrecy laws would prevent a whistleblower from knowing whether the ATO had acted on the disclosure. This would mean that the 'reasonable period' criterion - which is a precondition to maintain protection for any disclosure to parliamentarians or journalists under the Corporations Act amendments in this Bill – would be difficult to meet in practice.

3.38 The provision for emergency disclosure in the Corporations Act whistleblower regime is intended to operate only in situations where there is an imminent risk of serious harm or danger to public health or safety or to

the financial system that may be prevented by the disclosure. The disclosure of taxpayer information to a journalist or a member of Parliament would be unlikely to meet these conditions.

3.39 The confidentiality of taxpayer information is a critical element of the tax system and public disclosures could compromise complex investigations by the ATO and other enforcement bodies. They could also cause the release of commercially sensitive, misleading or incomplete information into the public domain, and unwarranted reputational damage for entities and shareholders if, following an investigation, no breach of tax laws or under-payment of tax is found. The possibility of misleading information being disclosed is particularly relevant in relation to disclosures based on limited or incomplete information about entities with complex tax affairs.

3.40 In addition, providing protection for disclosures of taxpayer affairs to a journalist or a member of parliament may encourage vexatious disclosures, particularly in relation to taxpayers who are individuals.

Example 3.5: Disclosures to third parties

Andrew believes his current employer, a multinational enterprise, is avoiding tax through the use of artificial arrangements involving related offshore entities, and has disclosed this to the ATO.

Andrew regularly contacts the ATO seeking updates on the action taken in response to his disclosure. However, the taxpayer confidentiality laws prevent the ATO from divulging taxpayer information to Andrew. Andrew decides to provide the relevant information to a newspaper which subsequently publishes it. As a consequence Andrew loses his job and is unable to get another job in his field because his former employer won't provide him with a reference.

Andrew's disclosure to the media is not eligible for protection under the tax whistleblower protection laws, and he is unable to use those laws to seek compensation.

Protections for whistleblowers

Confidentiality of the whistleblower's identity

Offence to disclose whistleblower's identity

3.41 Under the tax whistleblower regime it is an offence for a person to disclose an eligible whistleblower's identity or information that is likely to lead to the identification of the whistleblower (confidential information).
[Schedule 1, item 15, section 14ZZW]

3.42 This protection is designed to protect eligible whistleblowers from victimisation, career damage, or other harm as a result of making a protected disclosure, and is common to most whistleblower laws. It is also consistent with the policy intent of permitting anonymous disclosures.

3.43 The prohibition on disclosure of a whistleblower's identity (and the exceptions thereto) applies equally to any person or authority who receives the information following the original disclosure.

3.44 The penalty for this offence is imprisonment for 6 months or 30 penalty units, or both. These maximum penalties reflect the seriousness of such disclosures, given the potential risk to which the whistleblower could be exposed. The penalties are intended to deter unauthorised disclosure of the identity of individuals who disclose wrongdoing.

Exceptions to offence of disclosing whistleblower's identity

3.45 Disclosure of a whistleblower's identity is not an offence in the following limited circumstances:

- if it is made to the ATO or the AFP;
- if it is made to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation of the tax whistleblower regime;
- if it is made to a person or body prescribed by regulation; or
- if it is made with consent of the whistleblower.

[Schedule 1, item 15, subsection 14ZZW(2)]

Example 3.6: A whistleblower's consent to share their identity

Simon is a senior manager in the claims section of Imy Insurance Ltd. In the past few months he has undertaken additional responsibilities and has noticed suspicious transactions with Imy Insurance Ltd and Livy Finance Pty Ltd (an associated entity). Simon suspects that Imy and Livy are undertaking arrangements to avoid their tax obligations.

Simon would like to make a disclosure to Imy's internal auditor. Before meeting with the internal auditor, Simon asks Andrew, another manager from the section, to attend the meeting with him for support.

Simon can give consent for the discussion to take place with Andrew in the room.

3.46 The ATO, AFP or other authorised person or body must treat the disclosure as if they were the original receiver of the information. That is,

they must protect the identity of the whistleblower and treat the information disclosed as confidential. This does not prevent on-disclosures between these bodies, because such on-disclosures fall within the exception contained in subsection 14ZZW(2).

3.47 In addition, a narrow exception to the offence is provided to ensure that entities that receive a disclosure are not inhibited from properly investigating the information provided by the whistleblower. *[Schedule 1, item 15, subsection 14ZZW(3)]*

3.48 This exception does not allow a person to directly disclose the identity of an eligible whistleblower as part of such an investigation, as his or her identity should not be necessary for the purposes of investigating the substance of the disclosure. *[Schedule 1, item 15, subparagraphs 14ZZW(3)(a)(i) and (ii)]*

3.49 However, the investigation may require circulating information that could indirectly reveal an eligible whistleblower's identity. For example, a disclosure may contain information known only to a small number of people within an organisation. The exception is intended to apply in these circumstances as long as reasonable steps have been taken to reduce the risk that the whistleblower's identity will be revealed. *[Schedule 1, item 15, subparagraph 14ZZW(3)(a)(ii)]*

Example 3.7: Internal investigation of disclosure while protecting the identity of whistleblower

Following on from example 3.6 above, the internal auditor decides to investigate the information provided by Simon.

Given Simon's recent change in responsibilities, which made him aware of transactions between Imy Insurance Ltd and Livy Finance Pty Ltd, there is a possibility that his identity may be revealed by the investigation.

The internal auditor is therefore required to take all reasonable steps to reduce the risk that Simon's identity will be revealed. To ensure this outcome, the internal auditor commences an audit of all related finance entities.

Whistleblower immunities

Disclosure that qualifies for protection not actionable

3.50 The new law ensures that eligible whistleblowers are not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure, and that no contractual or other remedy may be enforced against them on the basis of the disclosure. *[Schedule 1, item 15, paragraphs 14ZZX(1)(a) and (b)]*

3.51 This protection is commonly provided by whistleblower protection laws to ensure that an individual making a disclosure cannot be sued by an entity (such as his or her employer), for example, for a breach of a confidentiality clause in a contract. Providing immunity from administrative liability (including disciplinary action) will ensure that a registered tax agent or BAS agent that makes a protected disclosure about a client's tax affairs will not be sanctioned for breaching the confidentiality obligations contained in the Code of Professional Conduct (contained in Division 30 of the Tax Agent Services Act).
[Schedule 1, item 15, paragraph 14ZZX(1)(a)]

Information provided in the disclosure not admissible against the whistleblower

3.52 The new law provides a 'use immunity' for individuals by preventing potentially incriminating information that is part of their disclosure from being admissible in evidence against them in criminal proceedings or in proceedings for the imposition of a penalty. This immunity applies only in relation to disclosures made to the Commissioner.
[Schedule 1, item 15, paragraph 14ZZX(1)(c)]

3.53 An exception to the immunity allows the information to be used in evidence against the person in proceedings in respect of the falsity of the information. *[Schedule 1, item 15, paragraph 14ZZX(1)(c)]*

3.54 The immunity does not prevent the Commissioner from issuing an assessment of taxation or imposing an administrative penalty in respect of an eligible whistleblower's own tax liability – in cases where the disclosure also reveals information about the whistleblower's personal tax affairs.

3.55 In such cases, the Commissioner may treat the disclosure as a voluntary disclosure for the purpose of imposing an administrative penalty.

Example 3.8: Voluntary disclosure impacting a whistleblower's own tax affairs

Brian is studying accounting and works casually as a chef at Winnie's Restaurant for which he gets paid cash in hand.

Winnie asks Brian to help her with the business accounts for the restaurant. Looking at Winnie's accounts Brian learns the restaurant is avoiding personal income tax and company tax, and is in breach of its superannuation guarantee scheme obligations. Brian decides to disclose the information to the ATO, including the income he earned as a chef (which he did not include in his own tax return).

As Brian's disclosure qualifies for protection the information he disclosed is not admissible against him in criminal proceedings or proceedings for the imposition of a penalty. However, as he

disclosed his untaxed income voluntarily the ATO may treat his disclosure as a voluntary disclosure in determining his liability for penalties in respect of the unpaid tax.

Qualified privilege

3.56 To ensure protection for whistleblowers against defamation proceedings, the new law provides eligible whistleblowers with qualified privilege in respect of the disclosure. This means that the whistleblower is not, in the absence of malice, liable to an action for defamation in respect of the disclosure. *[Schedule 1, item 15, paragraph 14ZZX(2)(a)]*

Contracts may not be terminated for disclosure

3.57 The tax whistleblower regime protects an eligible whistleblower from the termination of his or her employment or of another contract to which he or she is a party. The new law expressly provides that a contract to which an eligible whistleblower is a party may not be terminated on the basis that his or her disclosure constitutes a breach of the contract. *[Schedule 1, item 15, paragraph 14ZZX(2)(b)]*

Example 3.9: Contract protections for whistleblowers

Isabel is contracted to supply cakes to a number of local cafés. She becomes aware that one café is overstating the cost of her cakes in order to claim a larger tax deduction and makes a protected disclosure to the ATO. The café manager becomes aware of Isabel's disclosure and tries to terminate the contract on the grounds that the disclosure constitutes a breach of the contract.

The court may apply 14ZZX which prohibits a contract from being terminated on the grounds that the act of making a disclosure constitutes a breach of the contract.

Victimisation of whistleblowers prohibited

3.58 Prohibiting victimisation is a key feature of whistleblower protection law best practice. It recognises the important role whistleblowers play in exposing wrongdoing, and the significant personal detriment that they may suffer as a result of their disclosures. *[Schedule 1, item 15, section 14ZZY]*

3.59 As well as the whistleblower, other people such as those involved in the disclosure or investigation of the disclosure, or who assist or support a whistleblower, may also suffer detriment as a result of victimisation.

3.60 It is an offence for a person to victimise a whistleblower or another person by engaging in conduct that causes detriment, where the conduct is based on a belief or suspicion a person has made, may have

made, proposes to make or could make a disclosure that qualifies for protection. This ensures that the offence applies where the belief or suspicion was the reason, or *part of* the reason for engaging in the conduct. *[Schedule 1, item 15, subsection 14ZZY(1)]*

3.61 Consistent with the compensation provisions discussed below, conduct is intended to include both actions and inaction and also apply to entities whose employees victimise a whistleblower.

3.62 The offence of victimisation also covers threats to cause detriment to the whistleblower, or a person who assists or supports a whistleblower. The threat may be express or implied, conditional or unconditional. *[Schedule 1, item 15, subsections 14ZZY(2) and (3)]*

3.63 In a prosecution for the offence of victimisation, it is not necessary to prove that the person threatened actually feared that the threat would be carried out. *[Schedule 1, item 15, subsection 14ZZY(4)]*

Detriment

3.64 The new tax whistleblower regime defines ‘detriment’ broadly, consistently with the Corporations Act provisions as amended by the amendments described in Chapter 2.

3.65 ‘Detriment’ includes, but is not limited to:

- dismissal of an employee;
- injury of an employee in his or her employment;
- alteration of an employee’s position or duties to his or her disadvantage;
- discrimination between an employee and other employees of the same employer;
- harassment or intimidation of a person;
- harm or injury to a person, including psychological harm;
- damage to a person’s property;
- damage to a person’s reputation;
- damage to a person’s business or financial position; and
- any other damage to a person.

[Schedule 1, item 15, subsection 14ZZY(5)]

3.66 The detriment may be to the whistleblower or to another person.

Compensation and other remedies for whistleblowers

Circumstances in which an order may be made

3.67 The new tax whistleblower regime provides for compensation and a range of other remedies for a whistleblower or other individual who is victimised in relation to a disclosure qualifying for protection (qualifying disclosure).

3.68 Under these provisions, a person can seek compensation for loss, damage or injury suffered because of the conduct of a person (the victimiser, described as the first person), where:

- the first person engages in conduct that causes any detriment to another person or constitutes the making of a threat to cause detriment to another person (the second person);
- when the first person engaged in the conduct, the first person believed or suspected that the second person or any other person made, may have made, proposes to make, or could make, a qualifying disclosure; and
- the belief or suspicion is the reason, or part of the reason, for the conduct.

[Schedule 1, item 15, subsection 14ZZZ(1)]

3.69 The first person under this subsection may be an individual or a non-individual entity, such as a body corporate.

3.70 As for the offence of victimisation discussed above, the victim may be the whistleblower or another person who suffers damage because of the conduct. *[Schedule 1, item 15, paragraph 14ZZZ(1)(b)]*

3.71 There is no requirement that the victimiser had actual knowledge of a disclosure. A belief or suspicion that a person has made, may have made, proposes to make, or could make a qualifying disclosure is sufficient. *[Schedule 1, item 15, paragraphs 14ZZZ(1)(b) and (c)]*

3.72 If a body corporate is liable under subsection 14ZZZ(1), and an officer or employee of the body corporate is involved in the victimisation, the body corporate can be liable for conduct that has:

- aided, abetted, counselled or procured the conduct or the making of the threat;
- induced, whether by threats or promises or otherwise, the victimising conduct; or
- was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the victimising conduct; or
- conspired with others to effect the victimising conduct.

[Schedule 1, item 15, subsection 14ZZZ(2)]

3.73 A threat to cause detriment need not be express or unconditional, but may also be implied, or conditional. *[Schedule 1, item 15, subsection 14ZZZ(3)]*

3.74 In addition, it is not necessary for a person seeking an order to prove that he or she actually feared that the threat will be carried out. *[Schedule 1, item 15, subsection 14ZZZ(4)]*

Orders that may be made

3.75 The orders that may be made in favour of a person who has suffered loss, damage, or injury as a result of victimising conduct align with the Corporations regime once amended. Where a court is satisfied that a person (the first person) has engaged in victimising conduct and another person has suffered loss, damage or injury as a result of the victimising conduct, it may make an order:

- requiring the first person to compensate the person who has suffered the victimising conduct: *[Schedule 1 item 15, paragraph 14ZZZA(1)(a)]*
- where the first person engaged in the victimising conduct in connection with his or her position as an employee:
 - requiring the first person and the first person’s employer each to compensate the person who has suffered the victimising conduct for loss, damage or injury for part of that loss, damage or injury *[Schedule 1, item 15, subparagraph 14ZZZA(1)(b)(i)]*; or
 - requiring the first person and the first person’s employer jointly to compensate the person who has suffered the victimising conduct *[Schedule 1, item 15, subparagraph 14ZZZA(1)(b)(ii)]*; or

- requiring the first person’s employer to compensate the person who has suffered the victimising conduct for loss, damage or injury for part of that loss, damage or injury; *[Schedule 1, item 15, subparagraph 14ZZZA(1)(b)(iii)]*
- an order granting an injunction to prevent, stop or remedy the effects of the victimising conduct; *[Schedule 1, item 15, paragraph 14ZZZA(1)(c)]*
- an order requiring the first person to apologise for engaging in the victimising conduct; *[Schedule 1, item 15, paragraph 14ZZZA(1)(d)]*
- where the victimising conduct wholly or partly consists of termination of employment, an order that a person be reinstated in his or her position or a position at a comparable level; *[Schedule 1, item 15, paragraph 14ZZZA(1)(e)]*
- an order requiring the first person to pay exemplary damages; or *[Schedule 1, item 15, paragraph 14ZZZA(1)(f)]*
- any other order that the court thinks appropriate. *[Schedule 1, item 15, paragraph 14ZZZA(1)(g)]*

Onus of proof in compensation proceedings

3.76 In any proceeding where a person seeks an order under subsection 14ZZZA(1) from another person:

- the person seeking the order bears the onus of adducing or pointing to evidence that suggest a reasonable possibility that the other person has engaged in conduct that has caused detriment or constitutes a threat of detriment; and
- if that onus is discharged, the other person bears the onus of proving that the claim is not made out.

[Schedule 1, item 15, subsection 14ZZZA(2)]

3.77 This 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.

3.78 The reversal of onus will mean that an entity that engages in such conduct, rather than the victim, will bear the onus of proving that the disclosure was not in any part a reason for their conduct.

3.79 A court must not make an order against a person's employer if the employer took reasonable precautions and exercised due diligence to avoid the victimising conduct. *[Schedule 1, item 15, subsection 14ZZZA(3)]*

3.80 If the court makes an order requiring a person and the person's employer jointly to pay compensation, the person and the person's employer are jointly and severally liable to pay the compensation. *[Schedule 1, item 15, subsection 14ZZZA(3)]*

3.81 A whistleblower's right to compensation and the liability of the first person is determined by the courts.

Protection of whistleblowers in court proceedings

3.82 Consistent with the enhanced Corporations Act whistleblower protections described in Chapter 2, the new law ensures that a person is not to be required to:

- disclose to a court or tribunal the identity of a whistleblower, or information that is likely to lead to the identification of the discloser; or
- produce to a court or tribunal a document containing the identity of a whistleblower or information likely to lead to the identity of the discloser;

except where it is necessary to do so for the purposes of giving effect to this whistleblower regime, or the court thinks it necessary in the interests of justice to do so. *[Schedule 1, item 15, section 14ZZZB]*

3.83 Under the common law and the Evidence Act, the general starting position concerning evidence is that relevant evidence should be admissible. The purpose of the exception to this principle is to ensure that the protection of a whistleblower's identity afforded by the law cannot be extinguished by discovery of documents or other processes in the context of court proceedings.

3.84 This provision reflects the protection of whistleblower identity in court proceedings in section 21 of the PID Act, and ensures that the identity of corporate and financial sector whistleblowers is aligned with those for public sector whistleblowers.

Costs

3.85 As in the enhanced Corporations Act whistleblower protections described in Chapter 2, the new law protects a person (the claimant) who is seeking an order under the compensation provisions from having an award

of costs made against them, except in limited circumstances. *[Schedule 1, item 15, subsection 14ZZZC]*

3.86 The limited circumstances where the court may make such an order are where it is satisfied that:

- the claimant instituted the proceedings vexatiously or without reasonable cause; or
- the claimant's unreasonable act or omission caused the other party to incur the costs.

[Schedule 1, item 15, subsection 14ZZZC(3)]

Interaction between civil proceedings and criminal offences

3.87 For the avoidance of doubt, a person may bring civil proceedings for compensation or other remedial order even if no prosecution for victimisation has been brought or if such a prosecution cannot be brought. *[Schedule 1, item 15, section 14ZZZD]*

Compensation for acquisition for property

3.88 The new law includes a compensation provision to manage constitutional risk arising from paragraph 51(xxxi) of the Constitution.

3.89 If the legal immunity provisions of the tax whistleblower legislation are found to constitute an acquisition of property, otherwise than on just terms, the Commonwealth will be obliged to pay reasonable compensation, the quantum of which can be determined by a court. A corresponding provision already exists in the Corporations Act. *[Schedule 1, item 15, section 14ZZZE subsections (1) and (2)]*

3.90 Any payments under this section are to be made out of money appropriated by Parliament by another Act. The amendments confirm that such a payment is not a payment the Commissioner is required or permitted to pay out of the Consolidated Revenue Fund. *[Schedule 1, item 15, subsections 14ZZZE(3) and (4)]*

Application

3.91 The amendments will apply in relation to whistleblower disclosures made on or after 1 July 2018, including disclosures about events occurring before this date. *[Schedule 1, item 16]*

Chapter 4 Other amendments

Amendments to the existing financial sector whistleblower regimes

Repeals

4.1 As a result of the consolidation of the various existing corporate and financial sector whistleblower regimes into the Corporations Act, the Bill repeals provisions dealing with whistleblowers in:

- the Banking Act;
- the Life Insurance Act;
- the Insurance Act; and
- the Superannuation Industry (Supervision) Act.

[Schedule 1, items, 18, 19, 22, 23, 26, 27, 30 and 31]

Transitional provisions

4.2 Despite the repeal of these provisions, they continue to apply, at or after the commencement of the amendments made by Schedule 1 to this Bill, in relation to:

- disclosures of information made before that commencement; and
- conduct that causes detriment to another person (victimisation) engaged in before that commencement referred to in:
 - subsection 52C(1) of the Banking Act;
 - subsection 38C(1) of the Insurance Act;
 - subsection 156C(1) of the Life Insurance Act; or
 - subsection 336C(1) of the Superannuation Industry (Supervision) Act

as in force immediately before that commencement, that is engaged in before that commencement; and

- a threat conduct that causes detriment to another person (victimisation) engaged in before that commencement referred to in:
 - subsection 52C(2) of the Banking Act;
 - subsection 38C(2) of the Insurance Act;
 - subsection 156C(2) of the Life Insurance Act; or
 - subsection 336C(2) of the Superannuation Industry (Supervision) Act.

[Schedule 1, items, 20, 24, 28 and 32]

4.3 Notes are added in place of the repealed provisions as signposts to the new law. *[Schedule 1, items, 17, 21, 25 and 29]*

Chapter 5

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

5.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act .

Overview

5.2 Schedule 1 to this Bill amends the TAA 1953 and the Corporations Act to introduce new tax whistleblower protections and amend the corporate whistleblower protections.

5.3 The Bill amends the TAA 1953 to implement the Government's 2016-17 Budget announcement on introducing better protections for individuals who disclose information to the ATO on tax avoidance behaviour and other tax issues in order to strengthen the integrity of Australia's tax system.

5.4 The Bill also amends the Corporations Act to respond to recent independent reviews of the corporate sector whistleblowing provisions, the Senate Economics Reference Committee's 2014 inquiry into the Performance of the Australian Securities and Investment Commission and as part of the Government's commitment to the Open Government National Action Plan.

5.5 Where the new law applies it will:

- broaden the scope of individuals eligible for protection;
- allow for anonymous disclosures;
- provide protections to the identity of tax and corporate whistleblowers;

- broaden the scope of persons eligible to receive a whistleblower disclosure; and
- improve access to compensation or other remedies as a result of victimisation following a whistleblower disclosure.

Human rights implications

5.6 This Bill engages the following human rights:

- The right to freedom of opinion and expression – article 19 of the ICCPR;
- The right to a fair hearing – article 14 of the ICCPR; and
- The right not to be subjected to arbitrary or unlawful interference - article 17 of the ICCPR.

The right to freedom of opinion and expression

5.7 The amendments would engage the right to freedom of opinion and expression as contained in article 19 of the ICCPR.

5.8 Amongst other things, article 19 states that individuals must have the ‘freedom to seek, receive and impart information and ideas of all kinds’. Under article 19(3), the right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations prescribed by law, must pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.

5.9 The amendments in this Bill restrict the right to disclose the identity of a whistleblower. This restriction is common to existing whistleblower protection regimes in Australia and internationally. It is necessary to reduce the risks and detriment suffered by individuals who expose wrongdoing. The restrictions are proportional to those risks, and to the importance whistleblowers play in exposing wrongdoing that may otherwise not be identified by management of an entity or by regulatory authorities.

The right to a fair hearing

5.10 Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals. Further, in the determination of an individual’s rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial

tribunal established by law. This requires that each party be given the opportunity to contest the arguments and evidence adduced by the other party.

5.11 The amendments in this Bill engage this right by ensuring that the identity of a whistleblower, which is protected for the reasons described above, cannot be exposed by means of court processes such as discovery of documents or subpoena. Without this additional protection individuals may be deterred from exposing wrongdoing within their organisations or to regulators, for fear of their identity being disclosed, for example, in a prosecution of the wrongdoer.

5.12 The amendments in this Bill provide that a person shall not be required:

- to disclose to a court or tribunal
 - the identity of the whistleblower, or
 - information that is likely to lead to the identity of the whistleblower; or
- to produce to a court or tribunal a document containing:
 - the identity of the whistleblower; or
 - information that is likely to lead to the identification of the whistleblower;

except where:

- it is necessary to do so for the purposes of giving effect to the whistleblower protection regimes amended and created by the amendments in this Bill; or
- the court thinks it necessary in the interests of justice to do so.

5.13 The amendments make provision for a court or tribunal to order disclosure of a whistleblower's identity if it is necessary in the interests of justice. This ensures that the restriction can be balanced with the interests of justice.

5.14 The provisions ensuring that a whistleblower's identity person cannot be required to be disclosed in legal proceedings are designed to protect individuals who disclose wrongdoing from risk and detriment, and

are appropriate and proportional to the objects of the amendments made by this Bill.

The right not to be subjected to arbitrary or unlawful interference

5.15 Article 17 of the ICCPR provides that:

- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- Everyone has the right to the protection of the law against such interference or attacks.

5.16 The amendments made by this Bill enhance the protection of individuals from arbitrary or unlawful interference with their privacy, family, home and correspondence, and from unlawful attacks on their honour and reputation. Such interference and attacks have been identified by numerous reviews as common responses to the disclosure of wrongdoing, and it is the object of the amendments to enhance protection from this harm.

Conclusion

5.17 This Bill is compatible with human rights and the amendments made by it that human rights issues are appropriate and proportional to the object of protecting individuals who disclose wrongdoing.