

2016-2017

The Parliament of the  
Commonwealth of Australia

THE SENATE

*Presented and read a first time*

**Treasury Laws Amendment (Enhancing  
Whistleblower Protections) Bill 2017**

**No.     , 2017**

*(Treasury)*

**A Bill for an Act to amend the law in relation to  
whistleblowing, and for related purposes**



---

## Contents

1	Short title.....	1
2	Commencement.....	1
3	Schedules.....	2
<b>Schedule 1—Amendments</b>		<b>3</b>
Part 1—Amendment of the Corporations Act 2001		3
<i>Corporations Act 2001</i>		3
Part 2—Amendment of the Taxation Administration Act 1953		21
<i>Taxation Administration Act 1953</i>		21
Part 3—Other amendments		33
<i>Banking Act 1959</i>		33
<i>Insurance Act 1973</i>		33
<i>Life Insurance Act 1995</i>		34
<i>Superannuation Industry (Supervision) Act 1993</i>		35



# **A Bill for an Act to amend the law in relation to whistleblowing, and for related purposes**

The Parliament of Australia enacts:

## **1 Short title**

This Act is the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2017*.

## **2 Commencement**

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

---

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	1 July 2018.	1 July 2018

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

### **3 Schedules**

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendments**

### **Part 1—Amendment of the Corporations Act 2001**

#### *Corporations Act 2001*

##### **1 Section 9**

Insert:

*eligible recipient* has the meaning given by section 1317AAC.

*eligible whistleblower* has the meaning given by section 1317AAA.

*regulated entity* has the meaning given by section 1317AAB.

*State or Territory authority* means an authority or other body (whether incorporated or not) that is established or continued in existence by or under a law of a State or Territory.

##### **2 Section 1317AA**

Repeal the section, substitute:

#### **1317AA Disclosures qualifying for protection under this Part**

*Disclosure to ASIC, APRA or prescribed body*

- (1) A disclosure of information by an individual (the *discloser*) qualifies for protection under this Part if:
  - (a) the discloser is an eligible whistleblower in relation to a regulated entity; and
  - (b) the disclosure is made to any of the following:
    - (i) ASIC;
    - (ii) APRA;
    - (iii) a Commonwealth authority prescribed for the purposes of this subparagraph in relation to the regulated entity; and
  - (c) subsection (4) or (5) applies to the disclosure.

**Schedule 1** Amendments

**Part 1** Amendment of the Corporations Act 2001

---

Note: Section 1317AAD (emergency disclosure) and paragraph 1317AB(1)(c) (protection from self-incrimination etc.) may apply to a disclosure covered by this subsection.

*Disclosure to eligible recipients*

- (2) A disclosure of information by an individual (the **discloser**) qualifies for protection under this Part if:
- (a) the discloser is an eligible whistleblower in relation to a regulated entity; and
  - (b) the disclosure is made to an eligible recipient in relation to the regulated entity; and
  - (c) subsection (4) or (5) applies to the disclosure.

*Disclosure to legal practitioner*

- (3) A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part.

*Disclosable matters*

- (4) This subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to:
- (a) the regulated entity; or
  - (b) if the regulated entity is a body corporate—a related body corporate of the regulated entity.
- (5) Without limiting subsection (4), this subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information indicates that any of the following:
- (a) the regulated entity, or an officer or employee of the regulated entity;
  - (b) if the regulated entity is a body corporate—a related body corporate of the regulated entity, or an officer or employee of a related body corporate of the regulated entity;
- has engaged in conduct that:



- (c) constitutes an offence against, or a contravention of, a provision of any of the following:
  - (i) this Act;
  - (ii) the ASIC Act;
  - (iii) the *Banking Act 1959*;
  - (iv) the *Financial Sector (Collection of Data) Act 2001*;
  - (v) the *Insurance Act 1973*;
  - (vi) the *Life Insurance Act 1995*;
  - (vii) the *National Consumer Credit Protection Act 2009*;
  - (viii) the *Superannuation Industry (Supervision) Act 1993*;
  - (ix) an instrument made under an Act referred to in any of subparagraphs (i) to (viii); or
- (d) constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or
- (e) represents a danger to the public or the financial system; or
- (f) is prescribed by the regulations for the purposes of this paragraph.

Note: There is no requirement for a discloser to identify himself or herself in order for a disclosure to qualify for protection under this Part.

### **1317AAA Eligible whistleblowers**

An individual is an *eligible whistleblower* in relation to a regulated entity if the individual is, or has been, any of the following:

- (a) an officer of the regulated entity;
- (b) an employee of the regulated entity;
- (c) an individual who supplies services or goods to the regulated entity (whether paid or unpaid);
- (d) an employee of a person that supplies services or goods to the regulated entity (whether paid or unpaid);
- (e) an individual who is an associate of the regulated entity;
- (f) for a regulated entity that is a superannuation entity:
  - (i) an individual who is a trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), custodian (within the meaning of that Act) or

- investment manager (within the meaning of that Act) of the superannuation entity; or
- (ii) an officer of a body corporate that is a trustee, custodian or investment manager of the superannuation entity; or
  - (iii) an employee of an individual referred to in subparagraph (i) or a body corporate referred to in subparagraph (ii); or
  - (iv) an individual who supplies services or goods to an individual referred to in subparagraph (i) or a body corporate referred to in subparagraph (ii) (whether paid or unpaid); or
  - (v) an employee of a person that supplies services or goods to an individual referred to in subparagraph (i) or a body corporate referred to in subparagraph (ii) (whether paid or unpaid);
- (g) a relative of an individual referred to in any of paragraphs (a) to (f);
  - (h) a dependant of an individual referred to in any of paragraphs (a) to (f), or of such an individual's spouse;
  - (i) an individual prescribed by the regulations for the purposes of this paragraph in relation to the regulated entity.

### **1317AAB Regulated entities**

Each of the following is a *regulated entity*:

- (a) a company;
- (b) a corporation to which paragraph 51(xx) of the Constitution applies;
- (c) an ADI (within the meaning of the *Banking Act 1959*), an authorised NOHC (within the meaning of that Act) or a subsidiary of an ADI or an authorised NOHC;
- (d) a general insurer (within the meaning of the *Insurance Act 1973*), an authorised NOHC (within the meaning of that Act) or a subsidiary of a general insurer or an authorised NOHC;
- (e) a life company (within the meaning of the *Life Insurance Act 1995*), a registered NOHC (within the meaning of that Act) or a subsidiary of a life company or a registered NOHC;

- (f) a superannuation entity or a trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity;
- (g) an entity prescribed by the regulations for the purposes of this paragraph.

### **1317AAC Eligible recipients**

- (1) Each of the following is an *eligible recipient* in relation to a regulated entity that is a body corporate:
  - (a) an officer of the body corporate or a related body corporate;
  - (b) an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate;
  - (c) an actuary of the body corporate or a related body corporate;
  - (d) a person authorised by the body corporate to receive disclosures that may qualify for protection under this Part;
  - (e) in relation to a disclosure of information by an individual who is an employee of the body corporate—a person who supervises or manages the individual.
- (2) Each of the following is an *eligible recipient* in relation to a regulated entity that is a superannuation entity:
  - (a) an officer of the superannuation entity;
  - (b) an auditor, or a member of an audit team conducting an audit, of the superannuation entity;
  - (c) an actuary of the superannuation entity;
  - (d) an individual who is a trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity;
  - (e) a director of a body corporate that is the trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity;
  - (f) a person authorised by the trustee or trustees (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity to receive disclosures that may qualify for protection under this Part.

(3) The regulations may prescribe persons or bodies that are *eligible recipients* in relation to all regulated entities, or in relation to a class or classes of regulated entities.

(4) Subsections (1), (2) and (3) do not limit each other.

### 1317AAD Emergency disclosure

(1) A disclosure of information (the *emergency disclosure*) by an individual (the *discloser*) qualifies for protection under this Part if:

(a) the discloser has previously made a disclosure of that information (the *previous disclosure*) that qualifies for protection under this Part under subsection 1317AA(1); and

(b) a reasonable period has passed since the previous disclosure was made; and

(c) the discloser 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; and

(d) after the end of the period referred to in paragraph (b), the discloser gave the body to which the previous disclosure was made a written notification that:

(i) includes sufficient information to identify the previous disclosure; and

(ii) states that the discloser intends to make an emergency disclosure; and

(e) the emergency disclosure is made to:

(i) a member of the Parliament of the Commonwealth, a State or a Territory; or

(ii) a journalist.

(2) In this section:

*journalist* means a person who is working in a professional capacity as a journalist for any of the following:

(a) a newspaper or magazine;

(b) a radio or television broadcasting service;

(c) an electronic service (including a service provided through the internet) that:

- (i) is operated on a commercial basis; and
- (ii) is similar to a newspaper, magazine or radio or television broadcast.

### **1317AAE Confidentiality of whistleblower's identity**

- (1) A person (the *first person*) contravenes this subsection if:
- (a) another person (the *discloser*) makes a disclosure of information (the *qualifying disclosure*) that qualifies for protection under this Part; and
  - (b) the first person discloses any of the following (the *confidential information*):
    - (i) the identity of the discloser;
    - (ii) information that is likely to lead to the identification of the discloser; and
  - (c) the confidential information is information that the first person obtained directly or indirectly because of the qualifying disclosure; and
  - (d) the disclosure referred to in paragraph (b) is not authorised under subsection (2) or (3).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

- (2) A disclosure referred to in paragraph (1)(b) is authorised under this subsection if it:
- (a) is made to ASIC; or
  - (b) is made to APRA; or
  - (c) is made to a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
  - (d) is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part; or
  - (e) is made to a person or body prescribed by the regulations for the purposes of this paragraph; or
  - (f) is made with the consent of the discloser.

- (3) Without limiting subsection (2), a disclosure referred to in paragraph (1)(b) is authorised under this subsection if it:
- (a) is made by ASIC, APRA or a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); and
  - (b) is made to a Commonwealth authority, or a State or Territory authority, for the purpose of assisting the authority in the performance of its functions or duties.
- (4) Subsection (1) does not apply if:
- (a) the disclosure referred to in paragraph (1)(b):
    - (i) is not of the identity of the discloser; and
    - (ii) is reasonably necessary for the purposes of investigating a matter referred to in subsection 1317AA(4) or (5) to which the qualifying disclosure relates; and
  - (b) the first person takes all reasonable steps to reduce the risk that the discloser will be identified as a result of the disclosure referred to in paragraph (1)(b).

Note: In a prosecution for an offence, a defendant bears an evidential burden in relation to the matter in subsection (4): see subsection 13.3(3) of the *Criminal Code*.

### 3 Subsection 1317AB(1)

Repeal the subsection, substitute:

- (1) If a person makes a disclosure that qualifies for protection under this Part:
- (a) the person is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure; and
  - (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure; and
  - (c) if the disclosure qualifies for protection under this Part under subsection 1317AA(1) or section 1317AAD—the information is not admissible in evidence against the person in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information.

Note: Except as provided for by paragraph (c), this subsection does not prevent the person being subject to any civil, criminal or administrative liability for conduct of the person that is revealed by the disclosure.

#### **4 Subsection 1317AB(3)**

Repeal the subsection.

#### **5 Paragraphs 1317AC(1)(c) and (d)**

Repeal the paragraphs, substitute:

- (c) when the first person engages in the conduct, the first person believes or suspects that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part; and
- (d) the belief or suspicion referred to in paragraph (c) is the reason, or part of the reason, for the conduct.

#### **6 At the end of subsections 1317AC(1), (2) and (3)**

Add:

- Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

#### **7 Subsection 1317AC(5)**

After “subsection (2)”, insert “or proceedings in relation to a contravention of subsection (2)”.

#### **8 At the end of section 1317AC**

Add:

*Detriment*

- (6) In this section, *detriment* includes (without limitation) any of the following:
  - (a) dismissal of an employee;
  - (b) injury of an employee in his or her employment;

- (c) alteration of an employee's position or duties to his or her disadvantage;
- (d) discrimination between an employee and other employees of the same employer;
- (e) harassment or intimidation of a person;
- (f) harm or injury to a person, including psychological harm;
- (g) damage to a person's property;
- (h) damage to a person's reputation;
- (i) damage to a person's business or financial position;
- (j) any other damage to a person.

## 9 Sections 1317AD and 1317AE

Repeal the sections, substitute:

### 1317AD Compensation and other remedies—circumstances in which an order may be made

- (1) A court may make an order under section 1317AE in relation to a person (the *first person*) if:
  - (a) the first person engages in conduct (*victimising conduct*) that:
    - (i) causes any detriment (within the meaning of section 1317AC) to another person (the *second person*); or
    - (ii) constitutes the making of a threat to cause any such detriment to another person (the *second person*); and
  - (b) when the first person engages in the victimising conduct, the first person believes or suspects that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part; and
  - (c) the belief or suspicion referred to in paragraph (b) is the reason, or part of the reason, for the victimising conduct.
- (2) A court may make an order under section 1317AE in relation to a person (the *first person*) if:
  - (a) the first person is or was an officer or employee of a body corporate; and



- (b) paragraphs (1)(a), (b) and (c) of this section apply to the body corporate because of victimising conduct engaged in by the body corporate; and
- (c) the first person:
  - (i) aided, abetted, counselled or procured the victimising conduct; or
  - (ii) induced, whether by threats or promises or otherwise, the victimising conduct; or
  - (iii) was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the victimising conduct; or
  - (iv) conspired with others to effect the victimising conduct.

*Threats*

- (3) For the purposes of this section, a threat may be:
  - (a) express or implied; or
  - (b) conditional or unconditional.
- (4) In proceedings for the purposes of section 1317AE, it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

**1317AE Compensation and other remedies—orders that may be made**

- (1) For the purposes of subsections 1317AD(1) and (2), a court may make any of the following orders:
  - (a) an order requiring the first person to compensate the second person, or any other person, for loss, damage or injury suffered as a result of the victimising conduct;
  - (b) if the court is satisfied that the first person engaged in the victimising conduct in connection with the first person's position as an employee:
    - (i) an order requiring the first person to compensate the second person, or any other person, for a part of loss, damage or injury as a result of the victimising conduct, and an order requiring the first person's employer to compensate the second person, or any other person, for

- a part of loss, damage or injury as a result of the victimising conduct; or
- (ii) an order requiring the first person and the first person's employer jointly to compensate the second person, or any other person, for loss, damage or injury suffered as a result of the victimising conduct; or
  - (iii) an order requiring the first person's employer to compensate the second person, or any other person, for loss, damage or injury as a result of the victimising conduct;
- (c) an order granting an injunction, on such terms as the court thinks appropriate, to prevent, stop or remedy the effects of the victimising conduct;
  - (d) an order requiring the first person to apologise to the second person, or any other person, for engaging in the victimising conduct;
  - (e) if the second person is or was employed in a particular position and the victimising conduct wholly or partly consists, or consisted, of the termination, or purported termination, of the second person's employment—an order that the second person be reinstated in that position or a position at a comparable level;
  - (f) if the court thinks it is appropriate—an order requiring the first person to pay exemplary damages to the second person, or any other person;
  - (g) any other order the court thinks appropriate.
- (2) In any proceeding where a person seeks an order under subsection (1) in relation to another person:
- (a) the person seeking the order bears the onus of adducing or pointing to evidence that suggests a reasonable possibility of the matters in paragraph 1317AD(1)(a); and
  - (b) if that onus is discharged—the other person bears the onus of proving that the claim is not made out.

Note: The onus mentioned in paragraph (2)(a) applies in relation to the matters in paragraph 1317AD(1)(a) whether those matters relate to the first person, as referred to in paragraph 1317AD(1)(a), or to a body corporate, as referred to in paragraph 1317AD(2)(b).

- (3) The court must not make an order under paragraph (1)(b) if the first person's employer establishes that it took reasonable precautions, and exercised due diligence, to avoid the victimising conduct.
- (4) If the court makes an order under subparagraph (1)(b)(ii), the first person and the first person's employer are jointly and severally liable to pay the compensation concerned.

**1317AF Interaction between civil proceedings, civil penalties and criminal offences**

To avoid doubt, a person may bring civil proceedings for an order under section 1317AE, or civil proceedings for a contravention of subsection 1317AC(1), (2) or (3), in relation to particular conduct, even if a prosecution for a criminal offence against section 1317AC in relation to that conduct has not been brought, or cannot be brought.

**1317AG Identifying information not to be disclosed etc. to courts or tribunals**

If a person (the *discloser*) makes a disclosure of information that qualifies for protection under this Part, the discloser or any other person is not to be required:

- (a) to disclose to a court or tribunal:
  - (i) the identity of the discloser; or
  - (ii) information that is likely to lead to the identification of the discloser; or
- (b) to produce to a court or tribunal a document containing:
  - (i) the identity of the discloser; or
  - (ii) information that is likely to lead to the identification of the discloser;

except where:

- (c) it is necessary to do so for the purposes of giving effect to this Part; or
- (d) the court or tribunal thinks it necessary in the interests of justice to do so.

Note: A discloser may also be able to apply to the court or tribunal, in accordance with the rules of the court or tribunal, for an order protecting the discloser's identity.

### **1317AH Costs only if proceedings instituted vexatiously etc.**

- (1) This section applies to a proceeding (including an appeal) in a court in relation to a matter arising under section 1317AE in which a person (the *claimant*) is seeking an order under subsection 1317AE(1).
- (2) The claimant must not be ordered by the court to pay costs incurred by another party to the proceedings, except in accordance with subsection (3) of this section.
- (3) The claimant may be ordered to pay the costs only if:
  - (a) the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause; or
  - (b) the court is satisfied that the claimant's unreasonable act or omission caused the other party to incur the costs.

### **1317AI Whistleblower policies**

- (1) A public company must:
  - (a) have a policy that sets out the matters referred to in subsection (5); and
  - (b) make that policy available to officers and employees of the company.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

- (2) A proprietary company that has been a large proprietary company for any financial year (the *first financial year*) must, on each day in each later financial year that is at least 6 months after the last day of the first financial year:
  - (a) have a policy that sets out the matters referred to in subsection (5); and
  - (b) make that policy available to officers and employees of the company.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

- (3) Without limiting subsection (2), a proprietary company that is the trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a registrable superannuation entity (within the meaning of that Act) must:
- (a) have a policy that sets out the matters referred to in subsection (5); and
  - (b) make that policy available to officers and employees of the company.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (5) The matters that a policy must set out for the purposes of paragraph (1)(a), (2)(a) or (3)(a) are:
- (a) information about the protections available to whistleblowers, including protections under this Part; and
  - (b) information about to whom disclosures that qualify for protection under this Part may be made, and how they may be made; and
  - (c) information about how the company will support whistleblowers and protect them from detriment (within the meaning of section 1317AC); and
  - (d) information about how the company will investigate disclosures that qualify for protection under this Part; and
  - (e) information about how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection under this Part, or to whom such disclosures relate; and
  - (f) information about how the policy is to be made available to officers and employees of the company; and
  - (g) any matters prescribed by the regulations for the purposes of this paragraph.

**1317AJ Exemption orders—class orders for companies**

- (1) ASIC may, by legislative instrument, make an order in respect of a specified class of company relieving companies in the class from all or specified requirements of section 1317AI.
- (2) The order may:
  - (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.

**10 Subsection 1317E(1) (after table item 45)**

Insert:

45A	subsection 1317AAE(1)	breach of confidentiality of identity of whistleblower
45B	subsections 1317AC(1), (2) and (3)	victimisation or threatened victimisation of whistleblower

**11 After subsection 1317G(1G)**

Insert:

*Whistleblower provisions*

- (1H) A Court may order a person to pay the Commonwealth a pecuniary penalty if:
  - (a) a declaration of contravention by the person has been made under section 1317E; and
  - (b) the contravention is of subsection 1317AAE(1) (confidentiality of whistleblower’s identity) or subsection 1317AC(1), (2) or (3) (victimisation or threatened victimisation of whistleblower).
- (1J) The maximum amount that the court may order the person to pay for contravening subsection 1317AAE(1) or 1317AC(1), (2) or (3) is:
  - (a) \$200,000 for an individual; or
  - (b) \$1 million for a body corporate.

## 12 In the appropriate position in Chapter 10

Insert:

### **Part 10.32—Transitional provisions relating to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2017**

#### **1644 Application of amendments**

- (1) The amendments made by Part 1 of Schedule 1 to the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2017* apply in relation to disclosures that:
  - (a) are made at or after the time that Part commences (the *commencement time*); and
  - (b) relate to matters that occur or occurred before, at or after the commencement time.
- (2) Without limiting subsection (1), 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, also apply at and after the commencement time in relation to 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.

#### *Whistleblower policies*

- (3) Section 1317AI, as inserted by item 9 of Schedule 1 to the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2017*, applies on and after 1 January 2019.
- (4) A reference to a financial year in subsection 1317AI(2), as inserted by that item, is a reference to a financial year that ends on or after 30 June 2018.

**13 Schedule 3 (table items 338 and 338A)**

Repeal the items, substitute:

337A	Subsection 1317AAE(1)	30 penalty units or imprisonment for 6 months, or both.
338	Subsection 1317AC(1), (2) or (3)	120 penalty units or imprisonment for 2 years, or both.
338A	Subsection 1317AI(1), (2) or (3)	60 penalty units.



## **Part 2—Amendment of the Taxation Administration Act 1953**

### ***Taxation Administration Act 1953***

#### **14 Subsection 2(1)**

Insert:

*eligible recipient* has the meaning given by section 14ZZV.

*eligible whistleblower* has the meaning given by section 14ZZU.

#### **15 After Part IVC**

Insert:

## **Part IVD—Protection for whistleblowers**

### **14ZZT Disclosures qualifying for protection under this Part**

- (1) A disclosure of information by an individual (the *discloser*) qualifies for protection under this Part if:
  - (a) the discloser is an eligible whistleblower in relation to an entity (within the meaning of the *Income Tax Assessment Act 1997*); and
  - (b) the disclosure is made to the Commissioner; and
  - (c) the discloser 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 or an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of the entity.
- (2) A disclosure of information by an individual (the *discloser*) qualifies for protection under this Part if:
  - (a) the discloser is an eligible whistleblower in relation to an entity (within the meaning of the *Income Tax Assessment Act 1997*); and

- (b) the disclosure is made to an eligible recipient in relation to the entity; and
  - (c) the discloser has 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 or an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of the entity; and
  - (d) the discloser considers that the information may assist the eligible recipient to perform functions or duties in relation to the tax affairs of the entity or an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of the entity.
- (3) A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part.

- (4) In this section:

***tax affairs*** means affairs relating to any tax imposed by or under, or assessed or collected under, a law administered by the Commissioner.

Note: There is no requirement for a discloser to identify himself or herself in order for a disclosure to qualify for protection under this Part.

#### **14ZZU Eligible whistleblowers**

An individual is an ***eligible whistleblower*** in relation to an entity (within the meaning of the *Income Tax Assessment Act 1997*) if the individual is, or has been, any of the following:

- (a) an officer (within the meaning of the *Corporations Act 2001*) of the entity;
- (b) an employee of the entity;
- (c) an individual who supplies services or goods to the entity (whether paid or unpaid);
- (d) an employee of a person that supplies services or goods to the entity (whether paid or unpaid);

- (e) an individual who is an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of the entity;
- (f) a spouse or child of an individual referred to in any of paragraphs (a) to (e);
- (g) a dependant of an individual referred to in any of paragraphs (a) to (e), or of such an individual's spouse;
- (h) an individual prescribed by the regulations for the purposes of this paragraph in relation to the entity.

### **14ZZV Eligible recipients**

- (1) Each of the following is an ***eligible recipient*** in relation to an entity (within the meaning of the *Income Tax Assessment Act 1997*):
  - (a) an auditor, or a member of an audit team conducting an audit, of the entity;
  - (b) a registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*) who provides tax agent services (within the meaning of that Act) or BAS services (within the meaning of that Act) to the entity;
  - (c) a person authorised by the entity to receive disclosures that may qualify for protection under this Part;
  - (d) a person or body prescribed for the purposes of this paragraph in relation to the entity.
- (2) If the entity is a body corporate, each of the following is an ***eligible recipient*** in relation to the entity:
  - (a) a director, secretary or senior manager (within the meaning of the *Corporations Act 2001*) of the body corporate;
  - (b) any other employee or officer (within the meaning of the *Corporations Act 2001*) of the body corporate who has functions or duties that relate to the tax affairs (within the meaning of section 14ZZT) of the body corporate.
- (3) If the entity is a trust, each of the following is an ***eligible recipient*** in relation to the entity:
  - (a) a trustee of the trust;
  - (b) a person authorised by a trustee of the trust to receive disclosures that may qualify for protection under this Part.

- (4) If the entity is a partnership, each of the following is an *eligible recipient* in relation to the entity:
- (a) a partner in the partnership;
  - (b) a person authorised by a partner in the partnership to receive disclosures that may qualify for protection under this Part.
- (5) Subsections (1), (2), (3) and (4) do not limit each other.

#### **14ZZW Confidentiality of whistleblower's identity**

- (1) A person (the *first person*) commits an offence if:
- (a) another person (the *discloser*) makes a disclosure of information (the *qualifying disclosure*) that qualifies for protection under this Part; and
  - (b) the first person discloses any of the following (the *confidential information*):
    - (i) the identity of the discloser;
    - (ii) information that is likely to lead to the identification of the discloser; and
  - (c) the confidential information is information that the first person obtained directly or indirectly because of the qualifying disclosure; and
  - (d) the disclosure referred to in paragraph (b) is not authorised under subsection (2).

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

- (2) A disclosure referred to in paragraph (1)(b) is authorised under this subsection if it:
- (a) is made to the Commissioner; or
  - (b) is made to a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
  - (c) is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part; or
  - (d) is made to a person or body prescribed by the regulations for the purposes of this paragraph; or
  - (e) is made with the consent of the discloser.
- (3) Subsection (1) does not apply if:

- (a) the disclosure referred to in paragraph (1)(b):
  - (i) is not of the identity of the discloser; and
  - (ii) is reasonably necessary for the purposes of investigating misconduct, or an improper state of affairs or circumstances, to which the qualifying disclosure relates; and
- (b) the first person takes all reasonable steps to reduce the risk that the discloser will be identified as a result of the disclosure referred to in paragraph (1)(b).

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the *Criminal Code*.

### **14ZZX Disclosure that qualifies for protection not actionable etc.**

- (1) If a person makes a disclosure that qualifies for protection under this Part:
  - (a) the person is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure; and
  - (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure; and
  - (c) if the disclosure was a disclosure of information to the Commissioner—the information is not admissible in evidence against the person in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information.

Note: Except as provided for by paragraph (c), this subsection does not prevent the person being subject to any civil, criminal or administrative liability for conduct of the person that is revealed by the disclosure.

- (2) Without limiting subsection (1):
  - (a) the person has qualified privilege in respect of the disclosure; and
  - (b) a contract to which the person is a party may not be terminated on the basis that the disclosure constitutes a breach of the contract.

## 14ZZY Victimisation prohibited

### *Actually causing detriment to another person*

- (1) A person (the **first person**) commits an offence if:
- (a) the first person engages in conduct; and
  - (b) the first person's conduct causes any detriment to another person (the **second person**); and
  - (c) when the first person engages in the conduct, the first person believes or suspects that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part; and
  - (d) the belief or suspicion referred to in paragraph (c) is the reason, or part of the reason, for the conduct.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### *Threatening to cause detriment to another person*

- (2) A person (the **first person**) commits an offence if:
- (a) the first person makes to another person (the **second person**) a threat to cause any detriment to the second person or to a third person; and
  - (b) the first person:
    - (i) intends the second person to fear that the threat will be carried out; or
    - (ii) is reckless as to causing the second person to fear that the threat will be carried out; and
  - (c) the first person makes the threat because a person:
    - (i) makes a disclosure that qualifies for protection under this Part; or
    - (ii) may make a disclosure that would qualify for protection under this Part.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### *Threats*

- (3) For the purposes of subsection (2), a threat may be:
-

- (a) express or implied; or
  - (b) conditional or unconditional.
- (4) In a prosecution for an offence against subsection (2), it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

*Detriment*

- (5) In this section, **detriment** includes (without limitation) any of the following:
- (a) dismissal of an employee;
  - (b) injury of an employee in his or her employment;
  - (c) alteration of an employee's position or duties to his or her disadvantage;
  - (d) discrimination between an employee and other employees of the same employer;
  - (e) harassment or intimidation of a person;
  - (f) harm or injury to a person, including psychological harm;
  - (g) damage to a person's property;
  - (h) damage to a person's reputation;
  - (i) damage to a person's business or financial position;
  - (j) any other damage to a person.

**14ZZZ Compensation and other remedies—circumstances in which an order may be made**

- (1) A court may make an order under section 14ZZZA in relation to a person (the **first person**) if:
- (a) the first person engages in conduct (**victimising conduct**) that:
    - (i) causes any detriment (within the meaning of section 14ZZY) to another person (the **second person**); or
    - (ii) constitutes the making of a threat to cause any such detriment to another person (the **second person**); and
  - (b) when the first person engages in the victimising conduct, the first person believes or suspects that the second person or any other person made, may have made, proposes to make or

- could make a disclosure that qualifies for protection under this Part; and
- (c) the belief or suspicion referred to in paragraph (b) is the reason, or part of the reason, for the victimising conduct.
- (2) A court may make an order under section 14ZZZA in relation to a person (the *first person*) if:
- (a) the first person is or was an officer (within the meaning of the *Corporations Act 2001*) or employee of a body corporate; and
- (b) paragraphs (1)(a), (b) and (c) of this section apply to the body corporate because of victimising conduct engaged in by the body corporate; and
- (c) the first person:
- (i) aided, abetted, counselled or procured the victimising conduct; or
- (ii) induced, whether by threats or promises or otherwise, the victimising conduct; or
- (iii) was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the victimising conduct; or
- (iv) conspired with others to effect the victimising conduct.

*Threats*

- (3) For the purposes of this section, a threat may be:
- (a) express or implied; or
- (b) conditional or unconditional.
- (4) In proceedings for the purposes of section 14ZZZA, it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

**14ZZZA Compensation and other remedies—orders that may be made**

- (1) For the purposes of subsections 14ZZZ(1) and (2), a court may make any of the following orders:



- (a) an order requiring the first person to compensate the second person, or any other person, for loss, damage or injury suffered as a result of the victimising conduct;
- (b) if the court is satisfied that the first person engaged in the victimising conduct in connection with the first person's position as an employee:
  - (i) an order requiring the first person to compensate the second person, or any other person, for a part of loss, damage or injury as a result of the victimising conduct, and an order requiring the first person's employer to compensate the second person, or any other person, for a part of loss, damage or injury as a result of the victimising conduct; or
  - (ii) an order requiring the first person and the first person's employer jointly to compensate the second person, or any other person, for loss, damage or injury suffered as a result of the victimising conduct; or
  - (iii) an order requiring the first person's employer to compensate the second person, or any other person, for loss, damage or injury as a result of the victimising conduct;
- (c) an order granting an injunction, on such terms as the court thinks appropriate, to prevent, stop or remedy the effects of the victimising conduct;
- (d) an order requiring the first person to apologise to the second person, or any other person, for engaging in the victimising conduct;
- (e) if the second person is or was employed in a particular position and the victimising conduct wholly or partly consists, or consisted, of the termination, or purported termination, of the second person's employment—an order that the second person be reinstated in that position or a position at a comparable level;
- (f) if the court thinks it is appropriate—an order requiring the first person to pay exemplary damages to the second person, or any other person;
- (g) any other order the court thinks appropriate.

- (2) In any proceeding where a person seeks an order under subsection (1) in relation to another person:
- (a) the person seeking the order bears the onus of adducing or pointing to evidence that suggests a reasonable possibility of the matters in paragraph 14ZZZ(1)(a); and
  - (b) if that onus is discharged—the other person bears the onus of proving that the claim is not made out.

Note: The onus mentioned in paragraph (2)(a) applies in relation to the matters in paragraph 14ZZZ(1)(a) whether those matters relate to the first person, as referred to in paragraph 14ZZZ(1)(a), or to a body corporate, as referred to in paragraph 14ZZZ(2)(b).

- (3) The court must not make an order under paragraph (1)(b) if the first person's employer establishes that it took reasonable precautions, and exercised due diligence, to avoid the victimising conduct.
- (4) If the court makes an order under subparagraph (1)(b)(ii), the first person and the first person's employer are jointly and severally liable to pay the compensation concerned.

#### **14ZZZB Identifying information not to be disclosed etc. to courts or tribunals**

If a person (the *discloser*) makes a disclosure of information that qualifies for protection under this Part, the discloser or any other person is not to be required:

- (a) to disclose to a court or tribunal:
  - (i) the identity of the discloser; or
  - (ii) information that is likely to lead to the identification of the discloser; or
- (b) to produce to a court or tribunal a document containing:
  - (i) the identity of the discloser; or
  - (ii) information that is likely to lead to the identification of the discloser;

except where:

- (c) it is necessary to do so for the purposes of giving effect to this Part; or
- (d) the court or tribunal thinks it necessary in the interests of justice to do so.

Note: A discloser may also be able to apply to the court or tribunal, in accordance with the rules of the court or tribunal, for an order protecting the discloser's identity.

#### **14ZZZC Costs only if proceedings instituted vexatiously etc.**

- (1) This section applies to a proceeding (including an appeal) in a court in relation to a matter arising under section 14ZZZA in which a person (the *claimant*) is seeking an order under subsection 14ZZZA(1).
- (2) The claimant must not be ordered by the court to pay costs incurred by another party to the proceedings, except in accordance with subsection (3) of this section.
- (3) The claimant may be ordered to pay the costs only if:
  - (a) the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause; or
  - (b) the court is satisfied that the claimant's unreasonable act or omission caused the other party to incur the costs.

#### **14ZZZD Interaction between civil proceedings and criminal offences**

To avoid doubt, a person may bring civil proceedings under section 14ZZZA in relation to conduct even if a prosecution for a criminal offence against section 14ZZY in relation to the conduct has not been brought, or cannot be brought.

#### **14ZZZE Compensation for acquisition of property**

- (1) If the operation of this Part would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia or the Supreme Court of a State or Territory for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.



## **Part 3—Other amendments**

### ***Banking Act 1959***

#### **17 Part VIA (after the heading)**

Insert:

Note: For protections for whistleblowers, see Part 9.4AAA of the *Corporations Act 2001*.

#### **18 Division 1 of Part VIA**

Repeal the Division.

#### **19 Division 2 of Part VIA (heading)**

Repeal the heading.

#### **20 Application**

Despite the repeal of Division 1 of Part VIA of the *Banking Act 1959* by item 18, that Division continues to apply, at and after the commencement of this item, in relation to:

- (a) disclosures of information made before that commencement; and
- (b) conduct referred to in subsection 52C(1) of the *Banking Act 1959*, as in force immediately before that commencement, that is engaged in before that commencement; and
- (c) a threat referred to in subsection 52C(2) of the *Banking Act 1959*, as in force immediately before that commencement, that is made before that commencement.

### ***Insurance Act 1973***

#### **21 Division 4 of Part IIIA (after the heading)**

Insert:

Note: For protections for whistleblowers, see Part 9.4AAA of the *Corporations Act 2001*.

#### **22 Subdivision A of Division 4 of Part IIIA**

Repeal the Subdivision.

**23 Subdivision B of Division 4 of Part IIIA (heading)**

Repeal the heading.

**24 Application**

Despite the repeal of Subdivision A of Division 4 of Part IIIA of the *Insurance Act 1973* by item 22, that Subdivision continues to apply, at and after the commencement of this item, in relation to:

- (a) disclosures of information made before that commencement; and
- (b) conduct referred to in subsection 38C(1) of the *Insurance Act 1973*, as in force immediately before that commencement, that is engaged in before that commencement; and
- (c) a threat referred to in subsection 38C(2) of the *Insurance Act 1973*, as in force immediately before that commencement, that is made before that commencement.

***Life Insurance Act 1995***

**25 Division 5 of Part 7 (after the heading)**

Insert:

Note: For protections for whistleblowers, see Part 9.4AAA of the *Corporations Act 2001*.

**26 Subdivision A of Division 5 of Part 7**

Repeal the Subdivision.

**27 Subdivision B of Division 5 of Part 7 (heading)**

Repeal the heading.

**28 Application**

Despite the repeal of Subdivision A of Division 5 of Part 7 of the *Life Insurance Act 1995* by item 26, that Subdivision continues to apply, at and after the commencement of this item, in relation to:

- (a) disclosures of information made before that commencement; and
- (b) conduct referred to in subsection 156C(1) of the *Life Insurance Act 1995*, as in force immediately before that

- commencement, that is engaged in before that commencement; and
- (c) a threat referred to in subsection 156C(2) of the *Life Insurance Act 1995*, as in force immediately before that commencement, in relation to such disclosures, that is made before that commencement.

### ***Superannuation Industry (Supervision) Act 1993***

#### **29 Part 29A (after the heading)**

Insert:

Note: For protections for whistleblowers, see Part 9.4AAA of the *Corporations Act 2001*.

#### **30 Division 1 of Part 29A**

Repeal the Division.

#### **31 Division 2 of Part 29A (heading)**

Repeal the heading.

#### **32 Application**

Despite the repeal of Division 1 of Part 29A of the *Superannuation Industry (Supervision) Act 1993* by item 30, that Division continues to apply, at and after the commencement of this item, in relation to:

- (a) disclosures of information made before that commencement; and
- (b) conduct referred to in subsection 336C(1) of the *Superannuation Industry (Supervision) Act 1993*, as in force immediately before that commencement, that is engaged in before that commencement; and
- (c) a threat referred to in subsection 336C(2) of the *Superannuation Industry (Supervision) Act 1993*, as in force immediately before that commencement, that is made before that commencement.