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TREASURY LAWS AMENDMENT (WHISTLEBLOWERS) BILL 2017

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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## **Glossary**

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

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
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>
Insurance Act	<i>Insurance Act 1973</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>
OGNAP	Open Government National Action Plan
Parliamentary Committee	Parliamentary Joint Committee on Corporations and Financial Services – Whistleblower Protectionsprotections 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>

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# **Chapter 1**

## ***Improving protection for whistleblowers in the corporate and financial sectors***

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### **Outline of chapter**

1.1 The exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017 amends

- the Corporations Act to create a whistleblower protection regime for the corporate and financial sector; and
- The TAA 1953 to create a whistleblower protection regime for disclosures of breaches of tax laws and tax avoidance.

1.2 Details of the changes concerning tax matters are set out in detail in Chapter 2.

### **Context of amendments**

1.3 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.

1.4 Often, corporate crime or other misconduct only comes to light because of individuals who are prepared to disclose it, sometimes at great personal and financial risk.

1.5 To reduce these risks and encourage disclosure, 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 corporate compliance and promote a more

ethical culture, because officers and employees know there is a higher likelihood that misconduct will be reported.

1.6 The Australian corporate whistleblowing regime was first introduced in 2004, but was expanded piecemeal. It has never covered 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, consumer credit laws offer no statutory protection for whistleblowers and there is no clear coverage in respect of disclosures concerning corporate corruption, bribery, fraud, money laundering, terrorism financing or other serious forms of misconduct. In Australia's tax laws, no whistleblower protection regime exists.

1.7 Where there are existing laws, they present a confusing web for whistleblowers to navigate. They also expose whistleblowers to unnecessary risks, for which they cannot be compensated adequately, or at all, when their disclosures fall in statutory gaps.

1.8 While there is limited data available, it is likely that the principal reasons that these laws have been rarely used in Australia are that:

- there is a lack of a single regime and other specific protections (such as a prohibition on victimisation and compensation arrangements); and
- there have been few if any prosecutions of offenders under existing whistleblowing regimes.

1.9 Because existing protections are inadequate or unclear, it seems whistleblowers are discouraged from sharing information due to well-founded fears of personal or professional reprisal.

1.10 By contrast, protections for whistleblowers in the public sector are more comprehensive because they were developed later, in a unified way, and have been widely, if not always appropriately, used. A recent review of this regime found many complaints focused upon employment grievances rather than serious misfeasance or misconduct in public office.

1.11 This Bill amends the Corporations Act and repeals the existing whistleblower laws in other financial system statutes. It also amends the TAA 1953. It will remedy the gaps in coverage in the corporate and financial sectors, improve the protections offered for whistleblowers, and harmonise the law in these sectors with that in the public sector.



## Existing laws

1.12 There are no whistleblower protections in Australia's tax laws. In the corporate context, Part 9.4AAA of the Corporations Act offers protections to corporate whistleblowers in respect of any disclosures about actual or potential contraventions of corporations legislation (defined as the Corporations Act and the ASIC Act). These 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.

1.13 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;
- make the disclosure in good faith to ASIC, the company's auditor, a company officer or senior manager, or a nominated person in the company;
- 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); and
- provide their names before making the disclosure (that is, the disclosure cannot be made anonymously).

1.14 Similar whistleblower protections to those set out in the Corporations Act are contained in the statutes administered by APRA (or its administration is shared with ASIC), namely:

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

1.15 Whistleblower protections are available for any contravention (actual or potential) of these Acts or if the disclosures concern misconduct or an improper state of affairs or circumstances affecting the entities that are regulated under them (including authorised deposit-taking institutions (ADIs), insurers and superannuation entities).

1.16 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.

1.17 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 role of actuaries for insurers and superannuation entities as well as the role of the trustee for superannuation entities.

1.18 Currently, there are no whistleblower protections under the National Consumer Credit Protection Act or the Data Collection Act.

## **Proposals for change**

1.19 While the Corporations Act has provided whistleblower protections since 2004 and the laws administered by APRA since 2007, they have been sparingly used and increasingly are seen as inadequate.

1.20 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 not require ASIC to reveal a whistleblower's identity without a court or tribunal order.

1.21 Similarly, an independent evaluation of G20 countries' whistleblowing laws concluded that Australia's whistleblower protections in the private sector are weak, and 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 law.

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

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

1.24 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.

1.25 The Parliamentary Committee process was an opportunity to examine the amendments made to the Registered Organisations Act in 2014 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

1.26 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.

1.27 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 whether any further consultation or legislative reforms are needed beyond this Bill, and has recently appointed an expert panel to assist its deliberations.

1.28 With regard to the private sector protections the Parliamentary Committee recommended:

- introducing a standalone consolidated Whistleblower Protection Act;
- establishing an independent a Whistleblower Protection Agency;
- expanding the categories of qualifying whistleblowers;
- broadening the definition of disclosable conduct;
- extending protections for recipients of disclosures;
- allowing anonymous disclosures;
- extending reporting channels - internal, regulatory, and external (including to the media and members of parliament);
- increased protection, remedies and sanctions for reprisals;
- improving access to compensation;
- conducting an inquiry into protections for reprisals against business;

- expanding obligations of law enforcement agencies on handling whistleblower matters;
- applying the provision of PID Act that clarify the options for courts/tribunals in apportioning liability for compensation between individuals and organisations to the private sector;
- introducing a rewards system;
- 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.

### **The Government's OGNAP commitment**

1.29 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.

### **Summary of new law for the corporate and financial sectors**

1.30 The new regime will strengthen, broaden, and harmonise the existing whistleblower protections and remedies set out in the corporate and financial sectors and will introduce new protections for disclosures about tax matters. It will do this by consolidating the existing financial sector whistleblower regimes into the Corporations Act whistleblower provisions, and enhancing these provisions by:

- making clearer the obligations of corporations (including ADIs, life insurers, and general insurers) and other entities (including superannuation entities);
- making clearer the legal rights and protections of whistleblowers; and
- extending the subject matter of disclosures qualifying for protection to include breaches of all laws administered by ASIC and APRA.

1.31 To achieve this, the amendments introduce the following defined terms into the Corporations Act:

- **eligible whistleblower** – covers the categories of whistleblower eligible for protection;
- **whistleblower regulated entities** – covers disclosures made about entities regulated by the Corporations Act, Banking Act, the Insurance Act, the Life Insurance Act and the Superannuation Industry (Supervision) Act;
- **disclosers** – defines the categories of whistleblowers by reference to their relationship with a whistleblower regulated entity (**eligible whistleblowers**);
- **whistleblower disclosees** – ASIC, APRA and the AFP, as well as certain categories of persons who are in a position of responsibility in relation to the entity that is the subject of the disclosure; and
- **whistleblower third party disclosees** – in particular defined situations, disclosures may be made to identified third parties such as members of Parliament and journalists.

1.32 The amendments address weaknesses in the existing regimes and implement improvements identified in the various reviews of Australia's corporate and financial sector whistleblower protections. They do so by:

- expanding 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;
- expanding the scope of conduct that may be the subject of protected disclosures;
- 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;
- allowing anonymous disclosures;
- enhancing requirements designed to protect a whistleblower's identity;
- providing immunities for whistleblowers in respect of information they disclose;

- expanding the range of persons or entities to which a whistleblower may make a protected disclosure;
- expanding the protections and redress for whistleblowers who suffer reprisal or retaliation in relation to a disclosure;
- improving access to compensation for whistleblowers who are the subject of such reprisals; and
- imposing on public companies and large proprietary companies a requirement to have a whistleblower policy.

1.33 The amendments will commence on the day this Bill receives Royal Assent and will apply to whistleblower disclosures made on or after 1 July 2018, including disclosures about events before this date. The amendments will also apply to conduct that victimises or causes damage to individuals after 1 July 2018 because of a protected disclosure, including where the disclosures have been made prior to this date.

### Comparison of key features of new law and current law concerning the corporate and financial sector

<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 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.	Whistleblower protections regimes covering corporate and financial system whistleblowers are found in the Corporations Act, the Banking 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.	Inconsistent protection for whistleblowers.
Introduces a single concept of 'whistleblower 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 'whistleblower disclosee'.	Each whistleblower regime concerns different categories of persons who might receive protected disclosures depending on the entities covered by that Act.
Introduces a single concept of 'whistleblower third party disclosee' which covers disclosure to members of Parliament or journalists 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 concerning the corporate and financial sector

### Extending the scope of the existing Corporations Act regime

#### *Whistleblower regulated entities*

1.34 The amendments expand the scope of the existing whistleblower protection provisions in Part 9.4AAA of the Corporations Act to create a single consolidated regime for whistleblower protection in the corporate and financial sectors. The new regime covers disclosures concerning companies, banks, life insurers, general insurers, superannuation entities and trustees of superannuation entities. [*Schedule 1, item 2, section 1317AAA*]

1.35 This new regime covers the entities and 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.

1.36 The amendments repeal each of those specific regimes, and replace them with the new regime in the Part 9.4AAA of the Corporations Act.

1.37 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.

## **Expanding the scope of disclosers qualifying for protection**

### *Eligible whistleblowers*

1.38 The existing Corporations Act whistleblower protections apply to disclosures made by:

- an officer of the company in respect of which the disclosure is made;
- an employee of the company in respect of which the disclosure is made;
- a person who has a contract for the supply of services or goods to the company; and
- an employee of a person who has a contract for the supply of services or goods to the company.

(existing section 1317AA(1)(a))

1.39 The amendments create a new concept of ‘eligible whistleblower’ to define individuals whose relationship with ‘whistleblower 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.

1.40 Under the new law, an ‘eligible whistleblower’ may be an individual who is:

- an officer of the whistleblower regulated entity;
- an employee of the whistleblower regulated entity;

- an individual who has a contract for the supply of services or goods to the whistleblower regulated entity;
- an employee of a person who has a contract for the supply of services or goods to the whistleblower regulated entity;
- an individual who is an associate of the whistleblower regulated entity;
- for a whistleblower regulated entity that is a superannuation entity—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;
- a spouse, child or dependant of any of the above; or
- an individual prescribed by the regulations in relation to a kind of whistleblower regulated entity.

*[Schedule 1, item 2, section 1317AAD]*

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

1.41 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.

1.42 The amendments expand the categories of protected persons to include a person who was formerly in an eligible whistleblower relationship with a whistleblower regulated entity. *[Schedule 1, item 2, paragraph 1317AA(1)(a); section 1317AAD]*

## **Persons to whom a protected disclosure may be made**

### *Whistleblower disclosees*

1.43 The existing corporate and financial sector whistleblower protection regimes have differing definitions of the persons to whom a protected disclosure may be made. To address this issue, the amendments introduce a new concept of ‘whistleblower disclosee’, which covers persons inside and outside the entity to whom a protected disclosure may be made. *[Schedule 1, item 2, section 1317AAB]*

1.44 The existing Corporations Act whistleblower provisions protect disclosures only if they are made to:

- ASIC; or
- the company's auditor or a member of the audit team conducting an audit of the company; or
- a director, secretary or senior manager of the company; or
- a person authorised by the company to receive disclosures that may qualify for protection.

(existing section 1317AA(1)(b)).

1.45 Reflecting the consolidation of the existing whistleblower regimes into one regime, the amendments expand the categories of both regulators and internal persons to which a protected disclosure may be made.

*Internal whistleblower disclosees*

1.46 Under the new law each of the following is a whistleblower disclosee for a whistleblower regulated entity that is a 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 director, secretary or senior manager of the body corporate or a related body corporate; and
- a person authorised by the body corporate to receive disclosures that may qualify for protection.

*[Schedule 1, item 2, subsection 1317AAB(2)]*

1.47 For a disclosure concerning a superannuation entity, each of the following is a whistleblower disclosee for the superannuation entity:

- an auditor, or a member of an audit team conducting an audit, of the superannuation entity;
- the 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;
- a person authorised by the trustee or trustees (within the meaning of the Superannuation Industry (Supervision) Act) that may qualify for protection.

*[Schedule 1, item 2, subsection 1317AAB(3)]*

*Regulatory bodies to which a protected disclosure may be made*

1.48 While the existing Corporations Act whistleblower provisions provide that protected disclosures may be made to ASIC, the other existing regimes provide for disclosure to each of their respective regulators.

1.49 Reflecting the consolidation of the existing whistleblower regimes into one regime, the amendments expand the categories of regulatory bodies to which a protected disclosure may be made to include APRA and the AFP. *[Schedule 1, item 2, subsection 1317AAB(1)]*

*Power to prescribe additional regulatory whistleblower disclosees*

1.50 The amendments give the Minister the power to prescribe additional persons or bodies as whistleblower disclosees 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 a person may make protected disclosures to any new body or statutory officer created or tasked to administer or investigate whistleblower disclosures in the future. *[Schedule 1, item 2, paragraph 1317AAB(1)(d), subsection 1317AAB(4)]*

*Disclosures to the whistleblower's lawyer*

1.51 The amendments make clear that a disclosure is protected if the whistleblower makes a disclosure to his or her own lawyer for the purposes of obtaining legal advice. *[Schedule 1, item 2, subparagraph 1317AA(b)(iii)]*

1.52 Nothing in the amendments affects the law with respect to legal professional privilege.

*Whistleblower third party disclosees*

1.53 The amendments create a new concept of 'whistleblower third party disclosees' to whom a protected disclosure may be made in certain circumstances. *[Schedule 1, item 2, section 1317AAC]*

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

- the whistleblower has previously disclosed information to a regulatory body that is a whistleblower disclosee (as defined in the new 1317AAB(1));
- a reasonable period has passed since the disclosure was made; and
- 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.

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

1.55 This covers the unusual situation where a whistleblower has made a disclosure to ASIC, APRA and/or the AFP 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, ASIC, APRA and/or the AFP has not taken action to address the risk.

1.56 A whistleblower third party disclosee can be:

- a member of the Australian Parliament or a state or territory parliament; or
- a journalist, which is defined to mean a person who is working in a professional capacity as a journalist. *[Schedule 1, item 2, subsections 1317AAC(2) and (3)]*

1.57 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.

1.58 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.

## Disclosable conduct

### *Disclosable conduct under existing laws*

1.59 The existing corporate and financial sector whistleblower protection regimes have differing definitions of the types of misconduct that may be the subject of a protected disclosure (called ‘disclosable conduct’).

1.60 Under the Corporations Act, disclosable conduct includes only a disclosure about a contravention of a provision of the Corporations Act (existing subsection 1317AA(d)). This contrasts with the broader definitions of ‘disclosable conduct’ in both the Registered Organisations Act and the PID Act.

- Section 6 of the Registered Organisations Act defines disclosable conduct as an act or omission that contravenes, or may contravene, a provision of the Registered Organisations Act, the Fair Work Act or the Competition and Consumer Act or an act or omission that constitutes, or may constitute, an offence against a law of the Commonwealth.
- Disclosable conduct under the PID Act includes conduct that contravenes a law of the Commonwealth, a State or a Territory (Table Item 1 in section 29 of the PID Act).

1.61 The existing Corporations Act approach does not cover the same span of wrongdoing covered by the Banking Act, Life Insurance Act, Insurance Act and the Superannuation Industry (Supervision) Act, which cover ‘misconduct, or an improper state of affairs or circumstances’, in relation to the relevant entity. Further, the existing scope of disclosable conduct under the Corporations Act does not reflect the span of regulated conduct in Australia’s corporate and financial sector, as overseen by ASIC and APRA.

1.62 The new law broadens the categories of conduct that may be the subject of a protected disclosure. This ensures coverage of disclosures relating to the kinds of wrongdoing covered under the existing law, as well as a wide category of other misconduct. *[Schedule 1, item 2, section 1317AA]*

### *Scope of disclosures that are covered under the new law*

1.63 To be a protected disclosure, the disclosure must be of 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. *[Schedule 1, item 2, subsection 1317AA(2)]*

1.64 The amendments make clear that the misconduct set out in subsection 1317AA(2) includes other disclosable conduct that:

- is an offence against, or a contravention of, a provision 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; and/or
- is an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; and/or
- represents a danger to the public or the financial system; and/or
- is prescribed by regulations.

*[Schedule 1, item 2, subsections 1317AA(3)]*

1.65 These categories of conduct are not meant to limit the range of misconduct covered by new subsection 1317AA(2), but to make clear that certain forms of misconduct are clearly within the scope of the protections. This broad category is intended to cover other forms of conduct not specifically defined, but could include serious breaches of any Commonwealth, State or Territory law that are not criminal offences. Misconduct, or an improper state of affairs 'in relation to' an entity in this context covers misconduct by officers and employees of the entity, and an improper state of affairs brought about or contributed by such individuals.

1.66 The amendments make clear that disclosures about all forms of serious wrongdoing in a Commonwealth legal context are covered. By including express reference to criminal and civil breaches of the various financial system laws and offences against any other Commonwealth law with a penalty of 12 months' imprisonment or more, 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.

1.67 A danger to the public or a danger to the financial system is intended to cover the broad range of conduct which may not be immediately apparent as a contravention of the law, but which poses significant risk to public safety or the stability of or confidence in the financial system. This is a broad concept that includes but is not limited to contraventions of the law. For example, it could include failure to comply with reporting obligations under the Anti-Money Laundering and Counter-

Terrorism Financing Act. It would also include emerging forms of misconduct not covered under existing law such as exploitation of a loophole in the law that creates vulnerability in a government program.

1.68 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 emerging categories of wrongdoing.

### **Subjective requirement replaced by objective ‘reasonableness’**

1.69 Recent reviews have concluded that the requirement in the current law that to qualify for protection a whistleblower makes a 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 in order to defeat whistleblower protection laws.

1.70 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.

1.71 The amendments remove the concept of ‘good faith’, and ensure the protections are based on the objective reasonableness of the whistleblower’s grounds to suspect that information disclosed indicates wrongdoing.

1.72 The amendments require that the discloser has reasonable grounds to suspect one of the following:

- that misconduct or an improper state of affairs exists in relation to:
  - the whistleblower regulated entity; or
  - if the whistleblower regulated entity is a body corporate – a related body corporate of the whistleblower regulated entity; or [Schedule 1, item 2, subsection 1317AA(2)]
- that the information disclosed indicates that disclosable conduct may have been engaged in by:
  - the whistleblower regulated entity, or an officer or employee of the whistleblower regulated entity; or



- if the whistleblower regulated entity is a body corporate— a related body corporate of the whistleblower regulated entity, or an officer or employee of a related body corporate of the whistleblower regulated entity. [*Schedule 1, item 2, subsection 1317AA(3)*]

## **Enhancing protection of a whistleblower's identity**

### *Allowing anonymous disclosure*

1.73 The existing corporate and financial sector whistleblower protection regimes do not protect anonymous disclosures, while such disclosures are protected under both the Registered Organisations Act and the PID Act. Internationally, UK and US laws provide for anonymous whistleblowers.

1.74 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.

1.75 The amendments remove the requirement that the discloser to provide his or her name when making a protected disclosure, allowing for anonymous disclosures. [*Schedule 1, item 2, subsection 1317AA*]

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

#### *The existing situation*

1.76 The Corporations Act's whistleblower provisions provide limited protections to prevent revelation of the whistleblower's identity, and are unclear regarding the exceptions for authorised disclosures between regulators for the purposes of investigating the primary offence.

1.77 The existing corporate and financial sector whistleblower protection regimes provide that it is an offence for the person to whom a protected 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.

1.78 There are weaknesses in the existing provisions:

- The offence of disclosing a whistleblower's identity appears to apply also if the offender discloses the information regarding the suspected or actual primary offence without necessarily revealing the identity of a whistleblower (see

subparagraph 1317AE(1)(e)(i)). This has inhibited investigation of the primary offence by regulators and law enforcement authorities. The prohibited disclosure should apply only to identifying information that is likely to enable the identification of the whistleblower (see section 20(1)(b) of the PID Act).

- Subsection 1317AE(2) creates an exception to the offence for the purpose of providing information regarding the suspected or actual primary offence to regulators and law enforcement authorities. However, it is unclear whether this information can be shared *between* these authorities for the purposes of investigating that offence. It should be permissible for the whistleblower's identity to be passed between regulators without the consent of the whistleblower if the regulator or law enforcement agency believes that the information will be used for proper purposes in investigating the complaint, and that the agency who receives it will maintain the confidentiality of the whistleblower's identity.
- 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 (see section 21), as well as international whistleblower regimes.

1.79 The amendments make clear that:

- it is not an offence, of itself, to disclose the information regarding the suspected or actual primary offence without revealing the whistleblower's identity. [*Schedule 1, item 7, subsection 1317AE(1)*]
- it is not an offence to provide information regarding the suspected or actual primary offence to (or between) regulators and/or the AFP if it reveals the identity of whistleblower;
- regulators and the AFP may share information, including the identity of the whistleblower, for the purposes of investigating the information in the disclosure. [*Schedule 1, item 7, subsection 1317AE(2)*]

1.80 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.

1.81 Currently the 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).

1.82 The amendments ensure that all of these bodies are authorised disclosees. This ensures that a whistleblower's protection does not depend on to which of these regulatory bodies a disclosure is made. [*Schedule 1, item 7, subsection 1317AE(2)*].

***Protecting the identity of whistleblowers and other victims in court proceedings***

*Prohibition on publishing name of discloser or victim*

1.83 The amendments make it clear that courts are prohibited from publishing the name of a discloser or a victim in relation to proceedings relating to the individual in that capacity.

1.84 This exception to the principle of open justice has been recognised as appropriate in whistleblower laws in recognition of the great personal and financial risk suffered by individuals who disclose wrongdoing. The prohibition is intended to protect whistleblowers and others who risk suffering retaliation as a result of a disclosure, and to ameliorate the disincentive to reporting wrongdoing posed by this risk. However, if the court thinks it is necessary in the interests of justice to do so, it may make an order that the prohibition on publishing a person's name does not apply. [*Schedule 1, item 7, section 1317ADA*]

*Identifying information not to be disclosed etc to courts*

1.85 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.

*[Schedule 1, item 7, section 1317ADB]*

1.86 This provision reflects the protection of whistleblower identity in court proceedings in section 21 of the PID Act. These provisions 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.

## **Expanding access to compensation for whistleblowers who suffer reprisal**

### *Victimisation and reprisal and compensation under the existing law*

1.87 The existing Corporations Act provisions prohibit conduct that intentionally causes detriment to a whistleblower because he or she makes a protected disclosure (see existing section 1317AC(1)), and give the whistleblower a right to seek compensation from the person who engages in the conduct (the victimiser) if the whistleblower suffers damage as a result as a result of such victimisation (see existing section 1317AD). The amendments do not seek to define concepts of reprisal or victimisation, or detriment.

1.88 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 latter provisions do not include a requirement that the victimiser intended to cause detriment (subsection 337BA(1)(b) of the Registered Organisations Act; paragraph 13(1)(b) of the PID Act).

1.89 Existing subsection 1317AC(2), which creates the 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, subsection 1317AC(1), which creates the offence of actually causing detriment, applies only to intentional conduct (paragraph 1317AC(1)(c)). That is, it does not apply if the victimiser should have known that they were causing detriment.

1.90 The existing offence of actually causing detriment only applies where the victimiser knows that a disclosure qualifying for protection has actually been made. Existing subsection 1317AC(1) 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.

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

1.92 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 (see paragraph 1313AD(a), which requires that a person has contravened subsection 1317AC(1), (2), or (3)). As the standard of proof required to establish the offence of victimisation is the criminal standard of beyond a reasonable doubt, on one interpretation a person seeking compensation must prove his or her case on this standard.

1.93 In addition, the Registered Organisations Act and the PID Act both include a non-exclusive list of situations that are included in the meaning of 'detriment'. The Registered Organisations 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;
- damage to a person's reputation.

(subsection 337BA(2) of the Registered Organisations Act; section 13(2) of the PID Act)

***The offence of victimisation under the new law***

1.94 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 (the *victim*) 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, subsection 1317AC(1)(c)]

1.95 This clarifies that to establish the offence of victimisation has been committed:

- it is not necessary that a disclosure has actually been made, or
- that the victimiser has actual knowledge that a disclosure of such a disclosure and, for this purpose, the belief or suspicion that the whistleblower proposes to make, or could make, a disclosure is sufficient.

1.96 The amendments also make clear that the victimiser need not intend that the conduct cause detriment. [Schedule 1, item 5, subsection 1317AC(1)(d)]

1.97 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 supporter, friend or family member of the whistleblower.

#### *Confidentiality of the whistleblower's identity*

1.98 The amendments make it a civil penalty contravention to disclose a whistleblower's identity. 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 to which the whistleblower could be exposed. [Schedule 1, item 9, subsections 1317G(IH) and (IJ)]

#### *Detriment*

1.99 The amendments introduce an inclusive definition of 'detriment' into section 1317AC to align it with the equivalent definition in the Registered Organisations Act, and add an additional item to the list of injury that constitutes 'detriment', that is, damage to a person's business or financial position.

1.100 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.

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

#### ***Compensation under the new law***

1.101 The amendments ensure that a person (the ***victim***) can seek compensation for damage suffered because of the conduct of a person (the victimiser, described in the new law as the ***first person*** ), where:

- when the victimiser engages in the conduct, the victimiser believes or suspects that a person made, may have made, proposes to make, or could make a disclosure that qualifies for protection, and
- the belief of suspicion is the reason, or part of the reason, for the conduct.

*[Schedule 1, item 7, subsection 1317AD(1)]*

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

1.103 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 7, paragraph 1317AD(1)(b)]*

1.104 The new law also follows the amendments to the victimisation provision, by removing the 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 7, paragraphs 1317AD(1)(c) and (d)]*.

1.105 In addition, the new law clarifies that a body corporate is liable to compensate a victim where its officer or employee has engaged in conduct that has aided, abetted, counselled or procured the conduct or the making of the threat. *[Schedule 1, item 7, subsection 1317AD(2)]*

*Onus of proof in compensation proceedings*

1.106 The amendments provide, in any proceeding where a person (the claimant) seeks compensation under this section from another person (the other person):

- the claimant bears the onus of proving that he or she has suffered damage because of the first person's conduct; and
- if the claimant discharges that onus—the other person bears the onus of proving that a reason for the conduct was not a belief or suspicion that the claimant or any other person made, may have made, proposes to make or could make a protected disclosure.

*[Schedule 1, item 7, subsection 1317AD(4)]*

1.107 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 whistleblower, citing reasons other than the disclosure for their actions.

1.108 The new subsection 1317AD(4) 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.

*Costs*

1.109 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.

1.110 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 7 subsections 1317ADC(2) and (3)].*

### **Providing immunity for whistleblowers**

1.111 The existing financial sector whistleblower protection regimes other than that in the Corporations Act provide that information disclosed by a whistleblower is not admissible in evidence against him or her other than in proceedings concerning the falsity of the information (see section 52B(4) of the Banking Act, section 156B(4) of the Life Insurance Act, subsection 38B(4) of the Insurance Act, and subsection 336B(4) of the Superannuation Industry (Supervision) Act).

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

1.113 The new law introduces 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)]*

### **Requiring large public companies to have a whistleblower policy**

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

1.115 The amendments require public companies and large proprietary companies to:

- have a policy with 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, and any matters prescribed by regulation; and
- make this policy available to people who may be eligible whistleblowers in relation to the company.

*[Schedule 1, item 7, section 1317AF]*

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

1.117 The requirement applies to all public companies and proprietary companies that have become large proprietary companies 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 7, subsection 1317AF(2)]

1.118 Failure to comply with the requirement to have 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 7, subsection 1317AF(3); Schedule 1, item 11, insert to Schedule 3]

1.119 Whistleblower policies are required to include information about protections that may be available to whistleblowers. They should 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 and large proprietary companies are required under the enhanced Corporations Act provisions to have whistleblower policies, no such requirement is included in the tax whistleblower provisions.

### **Exemption orders – class order for companies**

1.120 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 7, section 1317AG]

1.121 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.

1.122 The rationale for providing ASIC with a power to relieve certain classes of companies from this requirement is to provide it with flexibility making a determination that 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.

### **Consequential amendments**

1.123 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 15, 16, Divisions 1 and 2 of Part VIA of the Banking Act, items 18, 19 Subdivisions A and B of Division 4 of Part IIIA of the Insurance Act, item 21,22 of Subdivision A and B of Division 5 of Part 7 of Life Insurance Act, item 24, Division 1 of Part 29A of Superannuation Industry (Supervision Act)]

## Application and transitional provisions

1.124 The amendments will apply to whistleblower disclosures made on or after 1 July 2018, including disclosures about events occurring before this date. *[Schedule 1, item 10, subsection 1644 (1)]*

1.125 The amendments will also apply to victimisation of whistleblowers after 1 July 2018, and to a whistleblower's right to compensation, even in relation to disclosures that have been made prior to this date. *[Schedule 1, item 10, subsection 1644 (2)]*

1.126 To allow sufficient time for public companies and large proprietary companies 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 10, subsections 1644 (3) and (4) and item 7, subsection 1317AF(2)]*

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## Chapter 2

# Better Protections for Tax Whistleblowers

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### Outline of chapter

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

2.2 All legislative references in this Chapter are to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise indicated.

### Context of amendments to the tax law

2.3 In its 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).

2.4 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 1 come into force.

### Summary of new law

2.5 Part 2 of Schedule 1 to this Bill amends the TAA 1953 to create a regime to protect and compensate individuals who report cases of non-compliance with the tax law or tax avoidance.

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

- the entities (*whistleblower entity*), or their associates, about which a protected disclosure may be made;
- who can be a whistleblower (*eligible whistleblower*);

- the entities (*whistleblower disclosees*) to which an eligible whistleblower may make a protected disclosure;
- the protections provided to a whistleblower from legal action for making a protected disclosure;
- 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 or could be made), and the types of conduct that constitute detriment;
- the remedies available for any retaliatory action against the whistleblower or other person, including compensation for damage suffered, and the onus of proof in proceedings claiming compensation;
- protections to maintain the confidentiality of a whistleblower's identity, including:
  - protections provided to a whistleblower (or another 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.

2.7 A broad definition of eligible whistleblower ensures that the protections apply to individuals who by virtue of their relationship with an entity may be in a position to identify tax wrongdoing by that entity.

### Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Introduces protections for tax whistleblowers where, broadly, they are an eligible whistleblower and disclose to a whistleblower disclose about a whistleblower entity, or its associates.	Any person can make such a disclosure to the ATO. However there is no specific regime protecting tax whistleblowers.
Eligible whistleblowers are not required to identify themselves when disclosing information.	The ATO accepts anonymous disclosures.

Introduces specific protections and immunities against victimisation of eligible whistleblowers.	No specific protections against retaliation or victimisation of whistleblowers.
Introduces a compensation regime for eligible whistleblowers.	No specific compensation regime is available if a whistleblower is victimised.
Introduces protections for an eligible whistleblower's identity.	No specific protections of a whistleblower's identity.

## Detailed explanation of new law

2.8 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 avoidance.

### Disclosures qualifying for protection

2.9 The new tax whistleblower regime sets out the circumstances in which a disclosure relating to non-compliance with the tax law or tax avoidance will qualify for protection.

2.10 Broadly, a disclosure must be made by an *eligible whistleblower*, to a *whistleblower disclosee*, about a *whistleblower entity* or its associates, and the whistleblower must have reasonable grounds to suspect the relevant tax wrongdoing. [Schedule 1, item 13, section 14ZZT]

#### *Subject matter of disclosure eligible for protection*

2.11 To be eligible for protection a whistleblower must have reasonable grounds to suspect that the information in his or her disclosure indicates that whistleblower entity or an associate of the entity has:

- not complied with a taxation law; and/or
- avoided tax.

[Schedule 1, item 13, section 14ZZT]

2.12 This ensures that the protections in the tax whistleblower regime apply to disclosures of information relating to any non-compliance with the tax law, as well as tax avoidance conduct. [Schedule 1, item 13, subsections 14ZZT(2) and (3)]

2.13 The tax law contains numerous general anti-avoidance provisions, including Part IVA of the ITAA 1936 and Division 165 of the GST Act. These provisions require the Commissioner to make a determination before being applied. The phrase ‘avoided tax’ has been used to clarify that disclosures about behaviour that may fall under the anti-avoidance provisions in the tax law fall within the scope of the new regime.

***Whistleblower entities***

2.14 ‘Whistleblower entity’ is broadly defined as any ‘entity’ (within the meaning of that term in the ITAA 1997) other than a body politic. [Schedule 1, item 12, subsection 2(1)]

2.15 This ensures that disclosures about the conduct or affairs of individuals, bodies corporate, partnerships, other unincorporated associations or bodies of persons, trusts, superannuation funds, and approved deposit funds can be protected. Whistleblower entities are generally described as ‘entities’ below.

***Disclosure to a legal practitioner***

2.16 As well as providing for disclosures to specified whistleblower disclosees, the new law makes it clear that an individual is protected for a disclosure to his or her lawyer that is made for the purposes of seeking legal advice. [Schedule 1, item 13, subparagraph 14ZZT(1)(b)(ii)]

2.17 Nothing in the new regime is intended to affect legal professional privilege.

***Whistleblower disclosees***

2.18 To qualify for protection the disclosure must be made to a whistleblower disclosee as defined in the new law. [Schedule 1, item 13, section 14ZZU]

2.19 A whistleblower disclosee may be:

- the Commissioner; or
- an auditor, or a member of an audit team conducting an audit, of the whistleblower entity; or
- a person or body prescribed for the purposes of this paragraph in relation to the whistleblower entity; or
- a listed person connected to the whistleblower entity that is likely to be in a position to investigate and take action in response to the disclosure.

*[Schedule 1, item 13, subsections 14ZZU]*

2.20 Where the disclosure is made about a whistleblower entity who is an individual, a disclosure must be made to the Commissioner for it to be protected.

2.21 Where the whistleblower entity is a body corporate, a protected disclosure may be made to a director, secretary or senior manager of the whistleblower entity, or to a person authorised by the body corporate to receive disclosures that may qualify for protection under this Part. *[Schedule 1, item 13, subsection 14ZZU(2)]*

2.22 If a whistleblower entity is a trust, a trustee of the trust is a whistleblower disclosee in relation to the trust. *[Schedule 1, item 13, subsection 14ZZU(3)]*

2.23 If a whistleblower entity is a partnership, a partner in the partnership is a whistleblower disclosee in relation to the partnership. *[Schedule 1, item 13, subsection 14ZZU(4)]*

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

### **Example 2.1: Body corporate whistleblower disclosee**

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 is also to a specified whistleblower disclosee and therefore qualifies for protection.

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

2.25 Individuals (eligible whistleblowers) qualify for protection in relation to a disclosure they make about a whistleblower entity, or an associate of the whistleblower entity, by reference to their current or former relationship with the whistleblower entity. *[Schedule 1, item 13, paragraph 14ZZT(1)(a); section 14ZZV]*

2.26 The following individuals are eligible whistleblowers in relation to a whistleblower entity:

- an officer of the entity;



- an employee of the entity;
- an individual who has a contract for the supply of services or goods to the entity;
- an employee of a person who has a contract for the supply of services or goods to the entity;
- an individual who is an associate (in 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 any individual referred to above or a dependent of the individual's spouse.

*[Schedule 1, item 13, section 14ZZV]*

2.27 The tax law attaches significance to the association between legal persons or other entities. By incorporating the definition of 'associate' in section 318 of the ITAA 1936, the new regime ensures that a wide range of persons who may be in a position to know about tax wrongdoing by an entity are protected.

2.28 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 of tax misconduct by persons or bodies with which they had a prior relationship. *[Schedule 1, item 13, paragraph 14ZZT(1)(a)]*

2.29 Additional categories of persons may be prescribed by the regulations as an eligible whistleblower in relation to a kind of whistleblower entity. This allows the law to adapt to protect individuals in emerging categories of entity relationships who are in a position to identify and disclose tax wrongdoing. *[Schedule 1, item 13, paragraph 14ZZV(h)]*:

**Example 2.2: Eligible whistleblower has a previous association with the entity**

Greg is a former contractor with William Rays, a high wealth individual. During his time working for Mr Rays, Greg became aware of activity undertaken by Mr Rays that he suspects is symptomatic of tax avoidance. One year after working with Mr Rays, Greg decides to disclose the information to the ATO. He qualifies for protection as he is a former contractor of the subject of the disclosure and has an honest belief on reasonable grounds that the relevant information pertains to a breach of tax law.

**Example 2.3: 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.

2.30 In contrast to the Corporations Act whistleblower protections (see Chapter 1), the tax whistleblower regime does not protect disclosures to third parties such as the media or a member of Parliament. This is for two reasons. The first is the sensitive nature of taxpayer information, the confidentiality of which is generally protected by the law and as a matter of public policy. This prohibits ATO officers from disclosing any information about a taxpayer's affairs. In consequence a whistleblower would have no way of knowing whether the ATO had acted on the disclosure and would be unable to satisfy the 'reasonable time' criterion which is a necessary precondition to maintain protection for any disclosure to parliamentarians or the media under the Corporations Act amendments in this Bill.

2.31 The confidentiality of taxpayer information is a critical element of the tax system. It assists the ATO in conducting its audit and investigative functions effectively. Premature public disclosures could result in compromising complex investigations by the ATO and other enforcement bodies along with subsequent prosecutions. Public disclosures could also result in 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. This is particularly the case in relation to entities with complex tax affairs, as any disclosure may comprise limited or incomplete information.

2.32 Secondly, protecting third party disclosures is also more likely to encourage vexatious disclosures, particularly in relation to taxpayers who are individuals. For these policy reasons, the tax whistleblower provisions do not provide protection for third party disclosures in respect of taxation matters.

**Example 2.4: 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 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

### *Whistleblower immunities*

#### *Disclosure that qualifies for protection not actionable etc*

2.33 Consistent with the existing Corporations Act, the new law ensures that eligible whistleblowers are not subject to any civil or criminal proceedings 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 13, paragraphs 14ZZW(1)(a) and (1)(b)]

2.34 This protection is commonly provided by whistleblower protection laws to ensure that an individual cannot be sued for example for breach of confidence, or for a breach of a confidentiality clause in a contract, by the entity (for example the employer of the whistleblower) for making a disclosure of wrongdoing.

#### *Information provided in the disclosure not admissible against the whistleblower*

2.35 Reflecting the enhancements to the Corporations Act and the existing financial sector whistleblower provisions, 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 if the disclosure was made to the Commissioner. [Schedule 1, item 13, paragraph 14ZZW(1)(c)]

2.36 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 13, paragraph 14ZZW(1)(c)]

2.37 The immunity does not prevent the Commissioner from issuing an assessment of taxation or from imposing penalties on the whistleblower in respect of that individual's own tax liability – in cases where the disclosure also reveals information about the whistleblower's own tax affairs.

2.38 In such cases, the Commissioner may treat the disclosure as a voluntary disclosure for the purpose of imposing administrative penalties.

**Example 2.5: 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*

2.39 To ensure protection for whistleblowers against defamation proceedings, the new law provides eligible whistleblowers with qualified privilege in respect of the disclosure. This aligns with the protection afforded by the Corporations Act amendments described in Chapter 1, and 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 13, paragraph 14ZZW(2)(a)*]

*Contracts may not be terminated for disclosure*

2.40 Consistent with the Corporations Act whistleblower provisions as enhanced, the tax whistleblower regime protects a whistleblower from termination of employment, or of other contract to which he or she is a party. The new law expressly provides that a contract to which a 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 13, paragraph 14ZZW(2)(b)*]

2.41 In addition, the law specifically provides that in the event of a termination of employment on the basis that an employee has made a protected disclosure, the court may make an order for reinstatement. [*Schedule 1, item 13, subsections 14ZZW(2) and 14ZZW(3)*]

**Example 2.6: 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 14ZZW 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***

2.42 The new regime makes it an offence to victimise another person because of a whistleblower disclosure. 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 making a disclosure. *[Schedule 1, item 13, section 14ZZX]*

2.43 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. The new law ensures that the offence of victimisation applies to conduct by a person (the first person) that causes any detriment to any other person, where, at the time of engaging in the conduct, the first person believes or suspects that a second person has made, may have made, or proposes to make or could make a protected disclosure. *[Schedule 1, item 13, subsection 14ZZX(1)]*

2.44 The offence applies where the belief or suspicion was the reason, or *part of* the reason for engaging in the conduct.

2.45 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 13, subsections 14ZZX(2) and 14ZZX(3)]*

2.46 The new law also makes it clear that 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 13, subsection 14ZZX(4)]*

### ***Detriment***

2.47 The new tax whistleblower regime defines 'detriment' broadly, consistently with the Corporations Act as amended by the amendments described in Chapter 1.

2.48 '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 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;
- damage to a person's reputation; and
- damage to a person's business or financial position.

*[Schedule 1, item 13, subsection 14ZZX(5)]*

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

#### *Compensation for whistleblowers*

2.50 The new tax whistleblower regime provides for compensation for damage suffered, as in the Corporations Act regime. The provisions ensure that an individual can seek compensation for victimisation where a person (the first person) engages in victimisation because they believe or suspect that the individual or another person has made, proposes to make, or could make, a disclosure. *[Schedule 1, item 13, section 14ZZY]*

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

#### *Onus of proof in compensation proceedings*

2.52 Under the new law, in any proceeding where a person (the **claimant**) seeks compensation under this section from another person (the **other person**):

- the claimant bears the onus of proving that he or she has suffered damage because of the first person's conduct; and
- if the claimant discharges that onus, the other person bears the onus of proving that a reason for the conduct was not a belief or suspicion that the claimant or any other person

made, may have made, proposes to make or could make a protected disclosure.

*[Schedule 1, item 13, subsection 14ZZY(4)]*

2.53 As discussed in Chapter 1 in relation to the amendments to the Corporations Act provisions, this reversal of the onus of proof recognises the common situation whereby entities about which wrongdoing is disclosed attack the discloser and cite reasons other than the disclosure for their actions.

2.54 The new provision will mean that the entity that engages in the conduct that causes damage, rather than the victim, will bear the evidentiary onus in this situation.

#### ***Protection of a whistleblower's identity***

2.55 Consistent with the approach in the Corporations Act whistleblower provisions and with whistleblower protection law best practice, the new regime sets out rules to protect the identity of whistleblowers.

#### ***Offence to disclose whistleblower's identity***

2.56 The new law provides that it is an offence to disclose the identity of a whistleblower, or information that is likely to lead to the identification of a whistleblower (the confidential information), where the confidential information was obtained because of the disclosure. *[Schedule 1, item 13, section 14ZZZC]*

2.57 An exception to this offence ensures that the whistleblower's identity can be provided to the ATO, the AFP or to a person or body that the whistleblower has consented to the information being shared with. This ensures that the wrongdoing that is the subject matter of the disclosure can be properly investigated, and that these agencies can share information for this purpose. *[Schedule 1, item 13, subsection 14ZZZC(2)]*

2.58 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.

2.59 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, that they must protect the identity of the whistleblower and treat the information disclosed as confidential as per the provisions of the tax whistleblower laws. This does not prevent disclosures between these bodies, because such disclosures fall within the exception in subsection 14ZZZC(2).

2.60 A whistleblower who makes a protected disclosure is not obliged to provide his or her name or other identifying information to the disclosee in order to receive the protections afforded by the new regime. Nor does the regime affect the ability of any person to make anonymous disclosures of tax wrongdoing to the ATO.

***Protection of whistleblowers in court proceedings***

2.61 As in the enhanced whistleblower provisions in the Corporations Act, the new tax whistleblower provisions provide that courts are prohibited from publishing the name of a discloser or a victim in proceedings in relation to the individual in that capacity. *[Schedule 1, item 13, section 14ZZZ]*

2.62 As discussed in Chapter 1, this exception to the principle of open justice has been recognised as appropriate in whistleblower laws in recognition of the great personal and financial risk suffered by individuals who disclose wrongdoing. The prohibition is intended to protect whistleblowers and others who risk suffering retaliation as a result of a disclosure, and to ameliorate the disincentive to reporting wrongdoing posed by this risk. However, if the court thinks it is necessary in the interests of justice to do so, it may make an order that the prohibition on publishing a person's name does not apply. *[Schedule 1, item 13, section 14ZZW(3)]*

2.63 Consistent with the enhanced Corporations Act whistleblower protections, the new law also 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.

*[Schedule 1, item 13, section 14ZZZA]*

*Costs*

2.64 As in the enhanced Corporations Act whistleblower protections (see Chapter 1), the new law protects victims from having an award of costs made 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 13, subsection 14ZZZB(3)]*

## **Application**

2.65 The amendments apply to disclosures made on or after the commencement of the new Part IVD of the TAA 1953.

