Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

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Date introduced: 7 December 2017
House: Senate
Portfolio: Treasury
Commencement: The substantive provisions commence on 1 July 2018.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at May 2018.
Key issues and provisions

Part 1—Amendment of the Corporations Act 2001
Disclosures qualifying for protection
Meaning of ‘disclosable matter’
Meaning of ‘eligible whistleblower’
Meaning of ‘regulated entities’
Meaning of ‘eligible recipients’
Emergency disclosures
Comment
Confidentiality of whistleblower’s identity
Comment
Immunity from liability for whistleblowers
Victimisation of a discloser
Compensation and remedies
Comment
Interaction between civil proceedings, civil penalties and criminal offences
Whistleblower policies

Part 2—Amendment of the Taxation Administration Act 1953
Part IVD—Protection for whistleblowers
Disclosures qualifying for protection
Meaning of ‘eligible whistleblower’
Meaning of ‘eligible recipients’
No provision for emergency disclosures
Confidentiality of whistleblower’s identity
Immunity from liability for whistleblowers
Victimisation
Comment
Compensation and remedies
Comment
Interaction between civil proceedings and criminal offences

Part 3—Other amendments

Concluding comments
Purpose of the Bill
The purpose of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (the Bill) is to:

- amend the *Corporations Act 2001* to consolidate and broaden the whistleblower protection regime for the corporate and financial sector
- amend the *Taxation Administration Act 1953* (TA Act) to create a whistleblower protection regime for disclosures of breaches of tax laws and tax avoidance.

Structure of the Bill
The Bill contains one Schedule consisting of three Parts:

- Part 1 amends the *Corporations Act* to strengthen and consolidate whistleblower protections for the corporate and financial sector
- Part 2 amends the *TA Act* to create a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct in relation to an entity’s tax affairs

Background
Whistleblowing is often referred to as public interest disclosure.\(^1\) It is generally acknowledged that whistleblowers perform an essential function in the community, ensuring that public officials are held to account and private actors operate within the confines of the law.\(^2\) Protection of whistleblowers is therefore integral to fostering transparency, promoting integrity and detecting misconduct.\(^3\)

Laws protecting whistleblowers aim ‘to protect disclosures which would otherwise breach the law such as the law of confidential information and of defamation’ and ‘provide legal remedies for whistleblowers if they suffer reprisals for making the disclosure’.\(^4\)

**Current whistleblower protection regimes**
Currently in Australia, whistleblowers are protected under three main pieces of legislation federally: the *Public Interest Disclosure Act 2013* (PID Act), the *Corporations Act* and the *Fair Work (Registered Organisations) Act 2009* (RO Act). An outline of these Acts is provided below.

**Public Interest Disclosure Act 2013**
The PID Act has broad coverage across the Commonwealth public sector, including application to the Australian Public Service, statutory agencies, Commonwealth authorities, the Defence Force, and contracted service providers for Commonwealth contracts.\(^5\)

The PID Act applies in the main to disclosures made within government—that is disclosures to authorised internal recipients. Whistleblowers can disclose directly to their supervisors, as well as to the ‘authorised internal recipient’ of the relevant agency. The authorised recipient can include the Commonwealth Ombudsman if considered appropriate.

In addition to internal disclosures, it is possible to make a disclosure externally (such as to the media or a member of parliament) providing certain conditions apply. A whistleblower is protected if he/she goes public in...

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1. Depending on the context, the Bills Digest uses the terms ‘whistleblower’ and ‘discloser’.
circumstances believing on reasonable grounds that an investigation into the internal disclosure was inadequate and if wider disclosure satisfies public interest requirements.  

Intelligence information can never be the subject of a public interest disclosure other than an internal disclosure and conduct engaged in by intelligence agencies and by public officials of these intelligence agencies which relates to the proper performance of their functions and powers is excluded from the PID scheme.

There is also provision for ‘emergency disclosures’. Where there is a substantial and imminent danger to health and safety or to the environment, the internal disclosure can be by-passed and disclosures can immediately be made public in accordance with specified conditions.

Should an individual covered by the PID Act make a public interest disclosure as defined, the PID Act provides protection for that individual from any civil, criminal or administrative liability and no contractual or other remedy or right may be enforced or exercised against the individual on the basis of that disclosure.

Conduct is disclosable if it falls within the broad concept of wrong doing in the public sector. The types of disclosable conduct include conduct:

- unreasonably results in a danger to the health or safety of one or more persons
- unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons
- contravenes an Australian law
- constitutes maladministration or
- involves wastage of government money.

In 2016, an independent statutory review of the effectiveness and operation of the PID Act, conducted by Philip Moss found that the PID Act had only been partially successful. This was due in part to its recent implementation and ineffective operation of the framework. The review also found that the mechanisms under the PID Act which facilitate investigation of wrongdoing were overly complex, and the categories of disclosable conduct were too broad. It was argued that there should instead be a focus on the most serious integrity risks.

The Moss Review’s recommendations included:

- strengthening the ability of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security to scrutinise and monitor the decisions of agencies, and increasing the number of investigative agencies
- strengthening the PID Act’s focus on significant wrongdoing and expanding the grounds for external disclosure
- redrafting the PID Act using a principles-based approach and
- providing better protections for witnesses and whistleblowers.

The Government response to these recommendations is pending.

Corporations Act 2001

Current protections for whistleblower disclosures in the corporate sector are contained in Part 9.4AAA of the Corporations Act, which was introduced as part of a range of corporate legislative reforms in 2004.
There are also protections for public interest disclosures concerning misconduct or an improper state of affairs or circumstances affecting the institutions supervised by the Australian Prudential Regulation Authority (APRA) in the following Acts:

- **Banking Act**
- **Insurance Act**
- **Life Insurance Act** and
- **Superannuation Industry (Supervision) Act**.\(^{14}\)

In summary, the protections for whistleblowers in Part 9.4AAA of the *Corporations Act* include protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure that the whistleblower has made. Part 9.4AAA also prohibits the victimisation of whistleblowers, which is a criminal offence under the Act. A whistleblower has the right to seek compensation if damage is suffered as a result of any victimisation.

The *Corporations Act* also includes a confidentiality protection for whistleblowers, making it an offence for a company, the company’s auditors, or an officer or employee of the company to reveal a whistleblower’s disclosed information or identity. Disclosure of this information to the Australian Securities and Investments Commission (ASIC), APRA, a member of the Australian Federal Police (AFP) or disclosure with the whistleblower’s consent is allowed.

Part 9.4AAA also outlines the categories of information disclosures that attract whistleblower protections under the Act, who can qualify as a whistleblower, who the disclosure should be made to, and the conditions in which such a disclosure must be made.

In order to receive protection under the *Corporations Act* as a whistleblower, the person disclosing misconduct within a company must:

- be an officer or employee of that company
- have a contract to provide goods or services to that company
- be an employee of a person that has a contract to provide goods or services to that company.\(^{15}\)

Protections for a whistleblower only apply if they make the disclosure of misconduct to ASIC, the auditor of the company in question, or certain persons within the company.\(^{16}\) The *Corporations Act* also provides that, in order to qualify for whistleblower protection, the person making a disclosure cannot do so anonymously, and must provide their name before making the disclosure.\(^{17}\) Further, the whistleblower must make the disclosure ‘in good faith’ and have reasonable grounds to suspect that the company, or an officer or employee of the company has, or may have, contravened a provision of the corporations legislation.\(^{18}\)

A whistleblower can only receive protection under the Act if they are reporting breaches of the *Corporations Act* and the *ASIC Act*, the regulations made under those Acts and the Insolvency Practice Rules.\(^{19}\)

Although the *Corporations Act* establishes an explicit and central role for ASIC as a receiver of whistleblower disclosures, it is silent on how the regulator should actually handle the information it receives from whistleblowers. Nor does the Act empower ASIC to act on behalf of whistleblowers.

**Fair Work (Registered Organisations) Act 2009**

In November 2016, the Parliament passed amendments to the *RO Act* which strengthened whistleblower protections for people who report corruption or misconduct in unions and employer organisations.\(^{20}\) These

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15. Paragraph 1317AA(1)(a) of the *Corporations Act 2001*.
17. Paragraph 1317AA(1)(c) of the *Corporations Act 2001*.
18. Paragraphs 1317AA(1)(d)–(e) of the *Corporations Act 2001*, Similar protections are available to a whistleblower in possession of information relating to contraventions of banking, insurance and superannuation legislation, under the *Banking Act*, the *Insurance Act*, the *Life Insurance Act* and the *Superannuation Industry (Supervision) Act*.
19. See definitions of *Corporations legislation, this Act* and *ASIC Act* at section 9 of the *Corporations Act 2001*.
amendments were part of an agreement negotiated by the Government to gain Senate crossbench support for legislation to establish the new Registered Organisations Commission and strengthen the governance of trade unions.  

The relevant provisions, found in Part 4A of Chapter 11 in the RO Act provide protections to persons — ‘the disclosers’ — ‘who disclose information about certain contraventions of the law’, including current and former officers, employees, members and contractors of organisations. Anonymous disclosures are allowed.

To qualify for protection the disclosure has to be made either to the Registered Organisations Commission, Fair Work Ombudsman, Fair Work Commission or Australian Building and Construction Commission if the discloser suspects on reasonable grounds that it refers to 'disclosable conduct' defined broadly as an act or omission that:

- contravenes, or may contravene, a provision of the RO Act, the Fair Work Act 2009 or the Competition and Consumer Act 2010 or
- constitutes, or may constitute, an offence against a law of the Commonwealth.

The disclosure can be made via the discloser’s lawyer. Disclosures to other external parties do not qualify for protection.

The ‘reprisals’ contemplated by the whistleblower protections in the Act include the dismissal of an employee, injuring the employee in his or her employment, altering the employee’s position to his or her detriment, discriminating between an employee and other employees, harassment or intimidation of a person, harm or injury to a person (including psychological harm) and damaging a person’s property or reputation.

A person who takes a reprisal against a whistleblower can be pursued for civil or criminal remedies. On an application for civil remedies, a court can make any order it thinks appropriate if satisfied that a reprisal was taken or threatened (including compensation, reinstatement and ordering an apology). An applicant for such civil remedies is not limited to the Registered Organisations Commissioner but also includes the target of the reprisal, the General Manager of the Fair Work Commission, the Director of the Fair Work Building Industry Inspectorate or the Fair Work Ombudsman.

The criminal sanctions for taking or threatening to take a reprisal are imprisonment for two years or the imposition of a penalty of up to 120 penalty units, or both.

At the time of the passage of these amendments, then Senator Nick Xenophon, the leading negotiator from the Senate cross bench, was reported as describing the new whistleblower protections as going beyond anything seen before in the Commonwealth or in the states. He said the reforms should be a template which needed to be replicated into corporation and public sector law.

Professor A J Brown, one of the country’s leading authorities on whistleblower laws, who advised both Senator Xenophon and the Government on these amendments, was equally enthusiastic. When giving evidence to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry into whistleblower protections, Professor Brown described the amendments as ‘historic’, ‘significant improvements’ and that the

21. The Agreement was tabled in the Senate on 21 November 2016. It is set out in Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower protections, op. cit., Appendix 5.
22. Paragraph 337A(1)(b) and definition of disclosable conduct in section 6 of the Fair Work (Registered Organisations) Act 2009.
28. A J Brown, (Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University), Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors, 23 February 2016, p. 18. Details of the PJC inquiry are available on the Committee’s homepage.
precedents in that legislation would be an excellent starting point for further changes to the corporations regime.  

In a written agreement at this time between the Nick Xenophon Team (NXT) and the Government (the 2016 agreement), the Government agreed to support a parliamentary inquiry to examine the RO Act whistleblower protections ‘with the objective of implementing the substance and detail of those amendments to achieve an equal or better whistleblower protection and compensation regime in the corporate and public sectors’.  

The Agreement also provided that legislation would be introduced by December 2017 with a vote on the legislation no later than 30 June 2018.  

Reviews and inquiries

Calls for reform to the whistleblower provisions in the Corporations Act are not new and since 2004, when the provisions were first introduced, there have been a plethora of inquiries and reviews.  

The general consensus of these inquiries is that private sector protection of whistleblowers is piecemeal, inadequate, out-of-date and in urgent need of reform.  

Underlying the apparent inadequacies of Australia’s current corporate whistleblower framework, it appears whistleblowing in the corporate sector is rare. In a 2013 article in the Australian Business Law Review, Flinders University academics highlighted the fact that ‘virtually no use’ has been made of the Part 9.4AAA protections, and suggested:

In part this may be because the whistleblower provisions under the Corporations Act offer protection under limited circumstances only [...]. It may also be as a result of the fact that the negative implications of whistleblowing continue to outweigh potential benefits. The reasons why individuals do not blow the whistle, or regret it when they do, are many, but include reprisal, loss of employment if the employer consequently implodes, black-listing, publicity, psychological and emotional stress, and potential liability for contractual breaches. In the absence of clear incentives to disclose fraud, the regulatory value of private individuals as informants is heavily curtailed. It may be that not enough is currently being done to overcome disincentives and to encourage whistleblowing in the Australian corporate environment, and the failure of existing systems to protect Australian corporate whistleblowers sufficiently has been identified as offering evidence of the need for a different approach.  

The authors argue that consideration should be given to implementing a system of financial incentives or a ‘bounty system’ as exists in the United States. Such an approach may be a credible alternative to existing models that focus on protection rather than incentives.  

Comparative international studies which have included analysis of Australia’s whistleblower laws have drawn similar conclusions regarding the inadequacies of whistleblower protection legislation, particularly in the corporate sphere. An independent evaluation of G20 countries’ whistleblowing laws was undertaken in 2014 by leading Australian experts in this field. The study assessed the current state of whistleblower protection against a set of 14 criteria, developed from five internationally recognised sets of whistleblower principles recognised as constituting best practice. In respect of Australia’s laws, the evaluators concluded that although Australia’s whistleblower protections were fairly comprehensive for the public sector, they lagged international best practice for the private sector. The review suggested that in the private sector the scope of wrongdoing covered is ill-defined, anonymous complaints are not protected, there are no requirements for internal company investigations, and suggested:

29. Ibid.


31. Ibid.


34. Ibid.

procedures, compensation rights are ill-defined, and there is no oversight agency responsible for whistleblower protection. 36

Further evaluative research work has recently been conducted by Professor A J Brown and colleagues from the Whistling While They Work 2 research project. The project undertook a survey on the strength of organisational whistleblowing processes and procedures in Australia with the survey’s 699 respondents covering 10 public sector jurisdictions, five private industry sector groups and four not-for-profit sector groups. The analysis examined the self-reported presence of: incident reporting and tracking; support strategies for staff; risk assessment processes for reprisals; dedicated support staff; and remediation processes. Amongst other things, the results of the survey analysis indicate:

• public and private sector organisations are in many cases making significant efforts to improve whistleblower protections, although processes in the public sector are stronger than the private sector, and

• there is a need for clearer guidance and either statutory or industry requirements, or incentives, across key areas of whistleblowing processes especially for the private and not-for-profit sectors. 37

Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

On 30 November 2016, the Senate referred an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors to the Parliamentary Joint Committee on Corporations and Financial Services (PJC). 38 The Committee reported in September 2017 (the PJC Report). The Government supported this inquiry as part of the 2016 agreement with the cross-bench Senators. While there have been numerous other committee inquiries into whistleblower protection, the PJC Report is the most relevant in the context of the Bill currently before the Parliament. Details of the PJC inquiry are available on the Committee’s homepage.

The PJC made a detailed study of the three Acts (that is, the Corporations Act, the PID Act and the RO Act) noting the fragmented nature and the significant inconsistencies that exist, across both public and private sector whistleblower legislation.

The PJC used the best practice guidelines set out in the Breaking the Silence report as a systematic basis for conducting its inquiry and structuring the report. 39 Based on those criteria, the Committee’s key recommendations include:

• broadening the private sector protection and ensuring consistency by bringing all private sector legislation into a single Act (Recommendation 3.1)

• broadening the private sector definition of disclosable conduct to include:
  – a breach of any Commonwealth law, or
  – a breach any law of a state, or a territory where:
    • the disclosure relates to the employer of the whistleblower and the employer is an entity covered by the Fair Work Act or
    • the disclosure relates to a constitutional corporation (Recommendation 5.2)

• providing protections for both former and current staff that could make a disclosure, or are suspected of making a disclosure (Recommendation 6.2)

• providing appropriate protection for recipients of disclosures and those required to take action in relation to disclosure (Recommendation 6.4)

• adopting a tiered approach comprising:
  – internal disclosure

36. Ibid.
38. Details of the inquiry are available on the Committee’s homepage.
– regulatory disclosure and
– external disclosure (in appropriate circumstances) (Recommendations 8.5 and 8.6)\(^{40}\)

• protecting internal disclosures in the private sector, including in registered organisations
  (Recommendation 8.1)
• aligning thresholds for protection across the public and private sectors (Recommendations 6.1, 6.3 and 7.2)
• allowing for anonymous disclosures across the public and private sectors (Recommendation 7.1)
• protecting the confidentiality of the disclosures and the whistleblower's identity (Recommendation 7.3)
• aligning the public and private sector with the protections, remedies and sanctions for reprisals in the RO Act
  (Recommendation 10.2)
• establishing a Whistleblower Protection Authority (to be housed within a single body or an existing body) as a
  'one-stop shop' with oversight of the whistleblower regime with a range of investigatory powers
  (Recommendation 12.1)
• that the Whistleblower Protection Authority have the power to set and promote standards for internal
  disclosure procedures in the public and private sector (Recommendation 12.7)
• requiring the Whistleblower Protection Authority to provide annual reports to Parliament for both the public
  and private sectors in consistent format to facilitate comparison (Recommendation 12.8).\(^{41}\)

The PJC also examined the possibility of reward or bounty systems and took submissions from those arguing for
and against their introduction in Australia. The Committee considered the experiences of other jurisdictions,
noting particularly that reward systems exist in a number of jurisdictions similar to Australia, including the US
and Canada. In the PJC’s view a reward system would motivate whistleblowers to come forward with high
quality information. This information would otherwise be difficult to obtain. The Committee considers that a
reward system will also motivate companies to improve internal whistleblower reporting systems and to deal
more proactively with illegal behaviour.\(^{42}\)

The PJC recommended the implementation of a reward system that would place a cap on the reward being paid
to a whistleblower, be reflective of the information that is disclosed and be determined against a number of
criteria so as to mitigate against perceived negative consequences.\(^{43}\)

**Government reform and the Exposure Draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017**

In December 2016, the Government committed, as part of the Open Government National Action Plan
(OGNAP)\(^{44}\), to ensure appropriate protections are in place for people who report corruption, fraud, tax evasion
or avoidance, and misconduct within the corporate sector. The action plan includes a commitment to improve
whistleblower protections in the tax and corporate sectors:

We will do this by improving whistle-blower protections for people who disclose information about tax misconduct
to the Australian Taxation Office. We will also pursue reforms to whistle-blower protections in the corporate sector,
with consultation on options to strengthen and harmonise those protections with those in the public sector.\(^{45}\)

On 23 October 2017, the Government released for public consultation exposure draft legislation—the Treasury
Laws Amendment (Whistleblowers) Bill 2017 (Exposure Draft Bill) and related materials.\(^{46}\) The Exposure Draft Bill

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\(^{40}\) See also Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower protections*, op. cit., p. 97.

\(^{41}\) Ibid., pp. xiii—xx.

\(^{42}\) Ibid., p. 138.

\(^{43}\) Ibid., p. 138 and Recommendations 11 and 11.2. Arguments against rewards include the possibility of encouraging a litigation culture.

\(^{44}\) The Minister for Finance, Senator Mathias Cormann, when releasing the Open Government National Action Plan 2016-2018 stated that the
Plan contains 15 ambitious commitments focused on: transparency and accountability in business; open data and digital transformation;
access to government information; integrity in the public sector; and public participation and engagement. Australian Government,
Department of Prime Minister and Cabinet *Australia’s first open Government national action plan 2016–18*, December 2016.

\(^{45}\) Ibid., p. 12.

\(^{46}\) K O’Dwyer (Minister for Revenue and Financial Services), *Consultation on Whistleblowers Bill 2017*, media release, 23 October 2017. The
Exposure Draft Bill and consultation paper are available on the Treasury’s [website](http://www.treasury.gov.au).
was described as delivering on the Government’s commitments under the OGNAP and as announced in the 2016 Budget:

These reforms will, for the first time, create a single whistleblower protection regime in the Corporations Act, to cover the corporate, financial and credit sectors, and create a new whistleblower protection regime in the taxation law, to protect those who expose tax misconduct. 47

The Minister’s media release indicated that the Government’s recently formed Expert Advisory Panel on Whistleblower Protections 48 would assess the Exposure Draft Bill and the Panel’s advice, together with ‘advice and the feedback received from the consultation’ would be taken into account by the Government in ‘finalising the legislation for introduction to Parliament in the last sitting week of the year’. 49 At a later stage, the Expert Advisory Panel’s work would involve ‘considering the remaining recommendations in the PJC Report and providing further information and advice to Government, to assist it in formulating its response to the PJC Report’. 50

Submissions on the Exposure Draft Bill and consultation paper are available on the Treasury’s website. The Exposure Draft Bill, with some amendments, formed the basis for the Bill introduced into Parliament on 7 December 2017.

At this point it should be noted that three major PJC recommendations are missing from the Bill. These are:

• complete harmonisation of private sector whistleblower protections by combining such protections into one Act (Recommendation 3.1)
• the introduction of a rewards system or ‘bounties’ for eligible whistleblowers (Recommendations 11.1 and 11.2) and
• the introduction of a Whistleblower Protection Authority (Recommendation 12.1). 51

Committee consideration

Senate Economics Legislation Committee

On 8 February 2018, the Senate referred the Bill to the Senate Economics Legislation Committee for inquiry and report by 16 March 2018. 52 Details of the inquiry are available on the Committee’s homepage.

The Committee in its report made two recommendations for amendment of the Bill, namely that an explicit requirement for review be included in the Bill and that the definition of ‘journalist’ be reviewed. On balance, the Committee was satisfied that the Bill ‘is a move in the right direction and will be a valuable contribution to whistleblower protection’. 53 The Committee recommended that the Bill be passed.

Labor Senators provided additional comments on the Bill noting amongst other things that while the Government had committed to introducing a Bill that would be consistent with the PJC Committee recommendations, the Bill ‘falls far short’ of those recommendations. 54 They point to the issues with the Bill raised by submitters including the Law Council of Australia, Professor AJ Brown, Mr Jeff Morris and the Uniting Church. Labor Senators consider it unlikely that the Government will introduce legislation for further whistleblower reform in this term of the Parliament. They conclude their position to be that:

• the Government should release its response to the PJC report as soon as practically possible

47. Ibid.
48. K O’Dwyer (Minister for Revenue and Financial Services), Expert advisory panel on whistleblower protections, media release, 28 September 2017. The panel members are: Professor A J Brown, Dr David A Chaikin, Mr Michael Croker and Mr John Nguyen.
49. K O’Dwyer, Consultation on Whistleblowers Bill 2017, op. cit.
50. Ibid.
54. Ibid., Additional comments by Labor Senators, p. 29.
• the Government should release guidance on internal whistleblowing policies in a timely manner, particularly
given the concerns raised about the range of eligible recipients and
• noting the issues raised during the course of the inquiry, Labor Senators will continue to consult with
stakeholders on the Bill.\(^{55}\)

The Australian Greens, represented by Senator Peter Whish-Wilson, argued that the Bill is a missed opportunity.
In their additional comments, the Greens state:

> While the Bill does improve protections provided for whistleblowers—off a very low base—it has failed to do so
adequately or in a way that recognises the enormous toll that whistleblowing can have on an individual.\(^{56}\)

Noting what the Greens regard as the extent of the shortcomings in the Bill and the difficulty of addressing all
these issues through amendment, the Greens nevertheless are intending to seek amendment of the Bill in the
Senate to ‘better reflect the findings’ of the PJC report.\(^{57}\)

Centre Alliance Senator Rex Patrick, in a dissenting report, argued that the Bill is ambiguous and confusing and
the provisions ‘do not effectively protect whistleblowers, nor are they sufficiently workable for companies that
will be subject to them’. The Senator states:

> The Bill fails both the public and the whistleblower. If it is to deal effectively with protecting those who have or who
are revealing corporate misconduct, such as in the Commonwealth Bank of Australia’s (CBA’s) financial planning
arm in 2008 (Jeff Morris), Securinec (James Shelton), CBA’s Intelligent Deposit Machines and the recent and ongoing
revelations from the Banking Royal Commission, the Bill must be amended.\(^{58}\)

### Senate Standing Committee for the Scrutiny of Bills

The Senate Scrutiny of Bills Committee (Scrutiny Committee) raised two issues with the Bill.

#### Reversal of evidential burden of proof

The Bill amends the Corporations Act and TA Act to provide it is an offence for a person to disclose certain
information relating to the identity of a whistleblower (proposed sections 1317AAE (item 2) and 14ZZW
(item 15) respectively). The offences include exceptions where these offences do not apply. Defendants bear the
evidential burden in relation to these exceptions (see subsection 13.3(3) of the Criminal Code Act 1995). The
Scrutiny Committee requested the Treasurer’s advice as to ‘why it is proposed to use offence-specific defences
(which reverse the evidential burden of proof) in these instances’.\(^{59}\)

The Minister for Revenue and Financial Services, Kelly O’Dwyer, in response justified the use of offence specific
defences stating:

> The expanded corporate defence recognises the necessity of revealing particular information to undertake an
investigation, and that the reasonableness of steps taken to reduce the risk of disclosing a whistleblower’s identity
will depend on circumstances particular to the entity. These are matters peculiarly within the defendant entity’s
knowledge, and not available to the prosecution. For this reason, it is appropriate that the defendant entity bear
the burden of adducing evidence about these matters to make out the defence and that this be implemented as an
offence-specific defence rather than as an additional element of the offence.\(^{60}\)

The Committee thanked the Minister for her response and asked that the key information provided by the
Minister on this issue be incorporated into the Explanatory Memorandum to the Bill.\(^{61}\)

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55. Ibid. p. 37.
56. Ibid., Additional comments by Greens Senators, p. 39.
57. Ibid., p. 40.
58. Ibid., Senator Rex Patrick’s dissenting report, p. 43.
61. Ibid., p. 313.
**Henry VIII clause**

Proposed section 1317AI of the *Corporations Act*, at item 9 of the Bill requires certain classes of companies to have whistleblower policies and make these policies available to the company’s officers and employees. However, proposed section 1317AJ provides for ASIC to, by legislative instrument, make an order relieving specified classes of companies from all or particular whistleblower policy requirements. The Scrutiny Committee stated:

> A provision that enables delegated legislation to amend primary legislation (including amending the *operation* of primary legislation) is known as a Henry VIII clause. There are significant concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.  

The Scrutiny Committee sought the Treasurer’s more detailed justification for ASIC’s ‘broad powers to exempt classes of company from the operation of proposed section 1317AI’ and ‘whether it would be appropriate to amend the Bill to insert (at least high-level) rules or guidance concerning the exercise of ASIC’s powers’.  

The Minister, in response, justified these powers stating:

> Given the range of corporate and business structures, the Bill permits ASIC a class order power to allow it to make class orders that strike a reasonable balance between promoting widespread self-regulation and protecting smaller entities from unnecessary regulation. These considerations will need to be assessed on a case by case basis. Additional rules or guidance are not appropriate as they may limit the utility of the class order powers, particularly in respect of unforeseen situations.

The Committee thanked the Minister for her response and asked that the key information provided by the Minister on this issue be incorporated into the Explanatory Memorandum to the Bill.

**Financial implications**

The Explanatory Memorandum states that the amendments in Part 1 of Schedule 1 to the Bill will have minimal financial impact, although the estimated compliance cost for the corporate sector is $15.4 million per year over ten years. The financial impact of the amendments in Part 2 of Schedule 1 is said to be unquantifiable and there are no compliance costs from the impact of the tax whistleblower regime.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights considered the Bill did not raise human rights concerns.

**Policy position of non-government parties/independents**

As noted above, Australian Labor Party Senators, Australian Greens Senator Peter Whish-Wilson and Centre Alliance Senator Rex Patrick, in their work for the Senate Committee inquiry into the Bill, raised a number of concerns, essentially arguing that the Bill is a minimalist approach and fails to adequately improve protections for whistleblowers. See above under the heading *Senate Economics Legislation Committee*.
Position of major interest groups

The Senate Economics Legislation Committee inquiry into the Bill received 33 submissions. These submissions are from a range of interested parties including key representatives of the legal, banking, tax and accounting professions, advocates of transparency and open government, as well as academics and other individuals. Some organisations and individuals made submission to the Treasury on the Exposure Draft Bill. As the Exposure Draft Bill and the Bill before Parliament are very similar, the views of submitters are relevant in this Digest.

While submitters were generally supportive of the need for private sector reform, there were a range of views about the specifics of the Bill. Some of the broader recommendations are set out here and the Keys issues and provisions section below provides further commentary on the more specific amendments.

Commonwealth Ombudsman

Based on experience in working with Commonwealth agencies and whistleblowers in relation to the PID Act, the Office of the Commonwealth Ombudsman (OCO) has formed the view that broad-based whistleblower schemes are very labour-intensive. The OCO’s submission to Treasury on the Exposure Draft Bill states:

For the OCO, an underestimated source of work has come from disclosers and agencies requiring independent and confidential support on how to action disclosures, the extent of whistleblower protections in practice, and investigative processes.

Based on this experience, a corporate whistleblower scheme is likely to present as a very substantial implementation task. Without the benefit of reliable demand estimates, the scale and scope of disclosures will test the capacity of corporate entities to manage disclosures sufficiently and in a way that gives broad, public assurance that the scheme is operating effectively. The potential complexity of the matters disclosed under any corporate scheme is likely to include resourcing and cost implications.70

The OCO also notes that the Exposure Draft Bill is silent on the institutional arrangements necessary to support the administration of the corporate scheme. (Note that this is also the case in the Bill before the Parliament.)

The OCO’s view is that without independent external oversight there could be conflict of interest issues:

In our view, it may be difficult for existing corporate regulators to assume this additional role without raising significant conflict of interest concerns for the public. That is because regulators such as ASIC have a regulatory and law enforcement role in relation to corporations. If they were also to administer the whistleblower scheme they would be provided with information under that scheme which was relevant to their regulatory function but which may not be able to be shared with the relevant parts of their agency, given the need to maintain the confidentiality of the information provided by the whistleblower.

Independent oversight and system-wide monitoring of corporate entities discharging responsibilities under a statutory scheme is recommended as is a resourced and independent complaint review mechanism.71

Transparency International Australia

Transparency International Australia (TI Australia) considers that the positive element of the Bill is that it ‘transforms a currently inadequate scheme into the beginning of an effective scheme’, but argues that the Government should be placing priority on a comprehensive reform package as outlined by the PJC Report rather than piecemeal legislative improvements.72 The submission states:

Domestic and international experience shows that whistleblower protections can be strong ‘on paper’ but meaningless in practice, unless the right support is provided to enable whistleblowers to activate their rights. It is also imperative that the scheme is sufficiently comprehensive, with appropriate support of administering agencies.

71. Ibid., p. 2.
and regulated entities, including an agency with the power and resources to properly refer and coordinate the responses to disclosures where multiple agencies may become involved. Both these elements are entirely missing from the Government’s proposed amendments [...] 

These facts reinforce our view that the Government should respond with a more comprehensive package before introducing any specific amendments to Parliament.75

TI Australia also supports the PJC recommendation that all private sector whistleblower protections should be placed in one set of rules (including those relating to tax, even if the identity of a tax entity for the rules is slightly broader than just corporate entities):

Anything less risks the proliferation of multiple rules which will only complicate matters both for whistleblowers, and for companies; and impede the practical effectiveness of protections. Even if the Government decides to continue to proceed with amendments to the Corporations Act as an interim measure before proceeding to a fully comprehensive approach, the tax whistleblowing provisions should be incorporated into that Act (including protections for financial services, credit, insurance, superannuation of whistleblowers) rather than left sitting in parallel. In the absence of compelling reasons, we consider that having parallel schemes is both unnecessary and unwise. We believe the Government should heed the Parliamentary Committee report on this as well as other matters, before proceeding with any legislation.74

Finally, it is TI Australia’s view that the absence of any significant new implementation roles and responsibilities being given to any agency (for example a whistleblowing agency, whether stand-alone or part of another agency) is a likely fatal gap in the proposed arrangements.75

Law Council of Australia

The Law Council of Australia strongly supports significant reform of whistleblowing laws in Australia and the broad thrust and intent of the Bill. However, the Law Council’s submission, like TI Australia, expresses concern that the Bill is not addressing the requirements for a comprehensive scheme, as identified by the PJC Report.76

The Law Council’s primary recommendation on the Exposure Draft Bill was that the Expert Advisory Panel and the Treasury assess that Bill against the Report to ensure a comprehensive whistleblower regime is achieved. The Law Council considered that this should occur prior to the introduction of the Bill into Parliament to ensure appropriate alignment of whistleblower laws.77

In its submission on the Bill now before the Parliament, the Law Council notes that the Bill does not currently address several of the issues for a comprehensive whistleblower regime, as identified by the PJC report including:

• the creation of a single Whistleblower Protection Act covering all areas of Commonwealth regulation beyond the Bill’s corporate financial service and tax entities
• access to non-judicial remedies
• an agency empowered to implement the regime such as a whistleblower protection authority and
• appropriate resourcing for effective implementation.78

The Law Council therefore encourages the Australian Government and the Treasury to continue to work towards a comprehensive whistleblower regime and to provide a prompt response to the PJC Report.

73. Transparency International Australia, Submission to the Senate Economics Legislation Committee inquiry into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, op. cit., p. 3; Transparency International Australia, Submission to the Treasury, op. cit., p. 1.
74. Ibid., p. 2.
75. Ibid.
76. Law Council of Australia, Submission to the Senate Economics Legislation Committee inquiry into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, 26 February 2018, [submission no. 32], 1 March 2018, p. 1
Further, the Law Council notes that there have been changes between the Exposure Draft and the Bill which are of concern including:

- the expanded definition of ‘eligible recipient’ now includes a person who supervises or manages the individual. In some organisations this may be relatively junior employees and this will place a substantial training and compliance burden on organisations. Given the very broad scope of disclosable conduct, it is the Law Council’s view that companies may be required to expend a lot of time responding to complaints which are outside the intended scope of the legislation. It argues that if this change is to proceed, clarification is needed to ensure that the obligations imposed are realistically achievable

- the change in the onus of proof in regard to orders for compensation and other remedies (the claimant only needs to adduce or point to evidence that suggests a reasonable possibility of the matters in proposed paragraph 1317AD(1)(a)—that is, it is not necessary for the claimant to prove the matters on the balance of probabilities). In this context, the Law Council notes for example that KPMG in its submission on the Exposure Draft suggested that there should be mandatory conciliation (similar to that contained in the Fair Work Act general protections regime) before a victimisation claim can be filed

- the manner in which the emergency disclosure provisions will work. That is, the notification process in proposed paragraph 1317AAD(1)(d) appears to serve no purpose as it does not require the discloser to notify the regulated entity or to give ASIC, APRA or the prescribed bodies, an opportunity to respond

- the matters which must be dealt with in whistleblower policies have been further expanded by the Bill, rather than confined.79

Professor AJ Brown

Professor Brown did not make a submission on the Exposure Draft Bill, perhaps because he now holds a position on the Government’s Expert Advisory Panel set up to advise the Government on the Exposure Draft Bill and the PJC Report.

Professor Brown’s views are however well articulated in evidence to the PJC inquiry. Professor Brown strongly emphasised that one of the most important choices for the PJC and for the Government and the Parliament is whether whistleblower protection reform for the corporate and private sectors should be considered in a piecemeal sense or in a comprehensive sense. He states:

We have evidence now, I think, for the first time that in my mind confirms that from a business point of view, the logical path is a comprehensive overarching approach rather than a piece-by-piece, regulatory silo approach.80

In a detailed submission to the Senate Committee inquiry into the Bill, Professor Brown set out the key strengths and weaknesses of the Bill. He acknowledges that the Bill proposes many long overdue improvements to whistleblowing provisions within the Treasury portfolio and that the Bill would also succeed in at least partially implementing 15 out of the 35 recommendations of the PJC Report.81

However Professor Brown identifies five specific areas in which the Bill does not currently meet national or international standards of best practice, PJC recommendations and/or existing Government commitments and policy objectives. These areas are:

- separation of criminal and civil remedies (that is, the need for a clear separation between criminal liability for victimisation of whistleblowers and the different basis on which whistleblowers should be able to obtain compensation for detriment suffered as a result of whistleblowing)

- making civil remedies available for detriment flowing from a failure in duty to support or protect whistleblowers (irrespective of individual intent or belief) (proposed section 1317AD)

- a best practice version of the reverse onus of proof in compensation matters (proposed subsection 1317AE(2))

79. Ibid.
• a reasonable filter against individual personal and employment grievances matters (proposed subsection 1317AA(4))

• realistic and appropriate protection for third party (for example media/public) disclosure matters (proposed section 1317AAD). ⑧²

These matters are discussed more fully in the Key issues and provisions section of the Bills Digest.

Key issues and provisions

Part 1—Amendment of the Corporations Act 2001

Part 1 of Schedule 1 to the Bill contains amendments to the Corporations Act that aim to consolidate the existing whistleblower protections and remedies for corporate and financial sector whistleblowers while also strengthening and broadening these protections.

Disclosures qualifying for protection

Existing section 1317AA details the disclosures that qualify for protection under Part 9.4AAA of the Corporations Act. Item 2 would repeal and replace section 1317AA in order to broaden the types of disclosures that qualify for protection (referred to as qualifying disclosures).

Under proposed section 1317AA a disclosure may qualify for protection under Part 9.4AAA if:

• it is made by an ‘eligible whistleblower’ in relation to a ‘regulated entity’

• it concerns a ‘disclosable matter’ and

• it is disclosed to any of the following:
  – ASIC or APRA (or other Commonwealth body that is prescribed by regulations)
  – an ‘eligible recipient’, or
  – a legal practitioner for the purposes of obtaining legal advice or representation on the operation of the whistleblower regime.

The meaning of the terms ‘disclosable matter’, ‘eligible whistleblower’, ‘regulated entity’, and ‘eligible recipient’ are discussed below.

Meaning of ‘disclosable matter’

The matters that may be disclosed in order to qualify for protection are set out in in proposed subsections 1317AA(A) and 1317AA(S). A disclosable matter is information the whistleblower has reasonable grounds to suspect:

• concerns misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity or (if the regulated entity is a body corporate)—a related body corporate, or

• indicates that the regulated entity or related body corporate (or any officer or employee) has engaged in conduct that constitutes an offence against, or a contravention of the Corporations Act, the ASIC Act, the Banking Act, the Financial Sector (Collection of Data) Act 2001, the Insurance Act, the Life Insurance Act, the National Consumer Credit Protection Act 2009, or the Superannuation Industry (Supervision) Act, or instruments made under these laws, or

• constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or

• represents a danger to the public or the financial system, or

• is other conduct as prescribed by the regulations.

Comment

Unlike the current regime, disclosures do not have to be made in good faith, but only on the basis of an objective test requiring the discloser to have ‘reasonable grounds to suspect’ misconduct or other disclosable matters. As

⑧². Ibid., pp. 5–10.
the Explanatory Memorandum notes, recent reviews have all argued that a requirement that a whistleblower makes a disclosure ‘in good faith’ creates uncertainty and risk for whistleblowers.83

Disclosures may be made anonymously as confirmed in the Note at the end of proposed section 1317AA. In contrast, the existing regime requires a whistleblower to provide a name when making a disclosure.84

**Meaning of ‘eligible whistleblower’**

The meaning of ‘eligible whistleblower’ is important as it sets the boundaries for who may make disclosures that qualify for protection under Part 9.4AAA. The new law expands the categories of individuals who can make a qualifying disclosure. Under proposed section 1317AAA an ‘eligible whistleblower’ is an individual who is, or has been, in a relationship with an entity (the regulated entity) about which a disclosure is made. The following individuals are eligible whistleblowers if they are, or have been:

- an officer, employee, or associate of the regulated entity
- an individual (or their employee) who supplies services or goods to the regulated entity (whether paid or unpaid)
- for a regulated entity that is a superannuation entity
  - an individual who is a trustee, custodian or investment manager of the superannuation entity
  - an officer of a body corporate that is a trustee, custodian or investment manager of the superannuation entity
  - an employee of any of the above
  - an individual (or their employee) who supplies services or goods (whether paid or unpaid) to an individual who is a trustee, custodian or investment manager of the superannuation entity or to an officer of a body corporate that is a trustee custodian or investment manager of a superannuation entity
- a relative or dependent of any of the above (this includes a spouse, parent or other linear ancestor, child or grandchild, and sibling)85 or
- an individual prescribed by the regulations in relation to a type of regulated entity.

**Comment**

By way of comparison, the existing corporate and financial sector whistleblower protections apply to persons in a current relationship with the company or entity about which the disclosure is made. The Explanatory Memorandum argues that this presents a gap in current protections, as it precludes former directors, officers and employees, contractors and closely related persons from making protected disclosures. The amendments described above expand the categories of protected persons to include a person who was formerly in an eligible whistleblower relationship with a regulated entity.86

**Meaning of ‘regulated entities’**

Proposed section 1317AAB consolidates the list of entities currently regulated by the whistleblower protection regimes in the *Corporations Act* and other financial services legislation. Regulated entities are defined to be any of the following:

- a company
- a corporation to which paragraph 51(xx) of the *Constitution* applies (that is, a foreign corporation, or trading or financial corporation formed within the limits of the Commonwealth)
- within the meaning of the *Banking Act*—an authorised deposit taking institution (ADI) or authorised non-operating holding company (NOHC) or their subsidiaries87

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84. Subsection 1317AA(1)(c) of the *Corporations Act*.
86. Ibid.
87. A NOHC of a body corporate is a body corporate: of which the first body corporate is a subsidiary; that does not carry on a business (other than a business consisting of the ownership or control of other bodies corporate); and is incorporated in Australia. See definition in subsection 5(1) of the *Banking Act*. 
• within the meaning of the Insurance Act—a general insurer or an authorised NOHC or their subsidiaries
• within the meaning of the Life Insurance Act—a life company or a registered NOHC or their subsidiaries
• within the meaning of the Superannuation Industry (Supervision) Act—a superannuation entity or a trustee of a superannuation entity
• an entity prescribed by the regulations for the purposes of this section.

Meaning of ‘eligible recipients’

‘Eligible recipients’ are persons to whom a qualifying disclosure may be made, as appropriate to the entities they are involved with. Under proposed section 1317AACC the category of person to whom a qualifying disclosure may be made has been expanded and now includes a manager or supervisor of the whistleblower.

Each of the following is an eligible recipient for a regulated entity that is a body corporate:
• an officer, auditor or actuary of the body corporate or related body corporate
• a person authorised by the body corporate to receive disclosures and
• the supervisor or manager of a whistleblower who is an employee of the body corporate.

For a disclosure concerning a superannuation entity, each of the following is an eligible recipient:
• an officer, auditor or actuary of the superannuation entity
• an individual who is a trustee of the superannuation entity
• a director of a body corporate that is the trustee of the superannuation entity, and
• a person authorised by the trustee or trustees to receive disclosures that may qualify for protection.

Where a superannuation entity is a body corporate, then the eligible recipients include all of those that are eligible in respect of any other body corporate.

Proposed subsection 1317AAC(3) gives the Minister the power to prescribe additional persons or bodies as eligible recipients in regulations.

Emergency disclosures

This category of disclosure has significant cumulative requirements and preconditions as set out in proposed section 1317AADD. Importantly an emergency disclosure can only occur if there has been a previous disclosure to either ASIC or APRA or another prescribed Commonwealth authority and the following conditions apply:
• the whistleblower has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately
• a reasonable period has passed since the disclosure to ASIC or APRA was made, and
• after the end of the reasonable period, the whistleblower gives the body to which the disclosure was made a written notification that includes sufficient information to identify the previous disclosure and states that he or she intends to make an emergency disclosure.

The Explanatory Memorandum does not provide guidance on the meaning of reasonable period of time stating only that it be ‘reasonable in all the circumstances’.88

Emergency disclosures can only be made to:
• a member of the Parliament of the Commonwealth or of a state or territory Parliament, or
• a journalist, defined to mean a person who is working in a professional capacity as a journalist for a newspaper, magazine, radio or television broadcasting service, or an electronic service (including a service provided through the internet) that is operated on a commercial basis and is similar to a newspaper, magazine or, or radio or television broadcast.

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88. Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, p. 27.
The Explanatory Memorandum explains that the definition of journalist is intended to ensure that disclosure to any ‘journalistic’ or ‘media’ enterprise is not sufficient and public disclosures on social media or through the provision of material to self-defined journalists are not covered by the protection.89

Comment
A number of submitters commented on the equivalent provision in the Exposure Draft Bill. For example TI Australia argues this provision falls very far short of international best practice:

While we support an approach where public disclosures should generally only attract the protections if an effort has first been made to bring it to the attention of a relevant regulatory or law enforcement agency, the provision as currently drafted does not adequately cover circumstances where these protections can and will sometimes be needed.90

TI Australia’s position remains, as previously submitted, that:

All Australian whistleblower protection laws should extend to whistleblowers who reasonably make their concerns public—for example because there is no safe mechanism for internal or regulatory reporting, their employer fails to respond reasonably to their disclosure, or other reasonable circumstances—including availability of a statutory public interest defence to civil or criminal proceedings in those situations.91

TI Australia also notes that the PJC Report recommended a test based on a simplified or more ‘objective’ version of the PID Act tests – which include:

- provision for emergency disclosures without first going to a regulatory agency, in dire circumstances such as described in s.1317AA(c),
- provision for further public disclosure where any public interest disclosure has not been responded to within a reasonable time (not just ‘emergency’ ones)
- provision for further public disclosure where a public interest disclosure has been responded to, but the response is ‘inadequate’.92

TI Australia agrees with the PJC that these types of circumstances should be included in what is ‘reasonable’, and notes that the amendments are currently a long way from that standard.

TI Australia’s submission also points to some of the high profile whistleblowing cases such as Commonwealth Bank whistleblower Jeff Morris, which in its view should receive protection but would not be covered by the emergency disclosure provisions in the Bill:

For example, the amendments as currently proposed would not cover some of the major whistleblowing incidents in recent Australian history, where it is widely agreed and indeed applauded that whistleblowers did go public, after inadequate action by regulators. This includes the Secrecy / Note Printing Australia foreign bribery matters, and the related to Commonwealth Bank Financial Planning services and similar matters. These are exactly the types of situations which must be covered by these rules, if we genuinely wish that both companies and regulators improve their practices to ensure that such public disclosure is not required.93

In contrast to TI Australia and the PJC Report, some submitters question the need to provide protection to disclosures to external bodies. For example the Australian Bankers Association and the Insurance Council of Australia have concerns about expanding the whistleblower escalation process to Members of Parliament and journalists.94 The Australian Bankers Association submission on the Exposure Draft Bill states:

The existing (and proposed) framework entitles a whistleblower to raise concerns with a regulator – Australian Securities and Investment Commission (ASIC), Australian Prudential Regulation Authority (APRA) and the Australian

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89. Ibid., p. 28.
90. Transparency International Australia, Submission to the Treasury, op. cit., p. 3.
91. Ibid.
92. Ibid.
93. Ibid.
Federal Police (AFP) – which are the appropriate bodies to address “an imminent risk of serious harm or danger to public health or safety, or to the financial system”. It is inappropriate to establish a parallel process outside existing regulatory and law enforcement frameworks.

Regulators are required to thoroughly, impartially and confidentially investigate disclosures and act in the best interests of the public. Similar standards and requirements are not mandatory for the media.95

The Law Council supports the provision as drafted. It considers that it is appropriate that a disclosure should first be made to a regulator or the AFP before any disclosure can be made to a member of parliament or a journalist.96

Confidentiality of whistleblower’s identity

Part 9.4AAA of the Corporations Act includes provisions aimed at protecting the identity of persons making disclosures. The Bill repeals and replaces these provisions with the intention of clarifying and expanding these protections.97

Under proposed subsection 1317AAE(1), at item 2 of the Bill, it is an offence for a person to whom a qualifying disclosure is made to disclose confidential information obtained in the disclosure. Confidential information is information that identifies the discloser or information likely to lead to the identification of the discloser.

Proposed subsection 1317AAE(2) sets out exceptions to this offence, which include where the disclosure is made to:

- ASIC, APRA or the AFP
- a legal practitioner for the purpose of obtaining legal advice in relation to the operation of the whistleblower provisions
- a person or body prescribed by the regulations, or
- any person where the disclosure is made with the consent of the discloser.

Proposed subsection 1317AAE(3) clarifies that exceptions also apply where information is passed from ASIC, APRA or the AFP to Commonwealth and state and territory authorities for the purpose of assisting the authority in the performance of its functions or duties. This would include information passed between ASIC, APRA and the AFP.

Proposed subsection 1317AAE(4) provides that it is not an offence to disclose information likely to lead to a whistleblower’s identification where:

- the disclosure is reasonably necessary for the purposes of investigating a ‘disclosable matter’, and
- the person takes all reasonable steps to reduce the risk that the whistleblower will be identified as a result of the disclosure.

The exception does not apply where the actual identity of a whistleblower is disclosed (subparagraph 1317AAE(4)(a)(i)).

The defendant bears an evidential burden in relying on this particular exception.98

Proposed section 1317AG, at item 9 of the Bill, provides that if a person (the discloser) makes a qualifying disclosure, the discloser or any other person is not required to disclose personal identifying information in court.

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97. Existing section 1317AE deals with confidentiality requirements and is to be repealed by Item 9.
98. Generally, where a burden of proof is placed on a defendant it is an evidential burden only (Criminal Code Act 1995, subsection 13.3(1)). The evidential burden can be discharged by the defendant adducing or pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist (Criminal Code, subsection 13.36(1)). The effect of imposing an evidential burden on a defendant is to defer the point in time at which the prosecution must discharge its legal burden to disprove the exemption. That is, if the defendant discharges his or her evidential burden, only then is the prosecution required to negate the existence of the exemption beyond reasonable doubt.
proceedings except where necessary for the purposes of Part 9.4AAA or where the court or tribunal thinks it necessary in the interests of justice to do so.

Comment

The Law Council considers that the confidentiality provisions for protecting a whistleblower’s identity are appropriate and are likely to be effective. However it also argues the offence of disclosing confidential information should not stifle bona fide internal investigations by corporations of information disclosed through internal whistleblowing. In the Law Council’s view the legislation should encourage internal whistleblowing and resolution as the preferred route of resolution of whistleblower claims. The submission states:

This section should make it clear that bona fide internal investigation of whistleblowing disclosures by the provision of confidential information matters to authorised employees with responsibility for investigating whistleblowing and officers who are decision-makers within a corporation is permitted on a need-to-know basis and is not restricted by the section. 99

Immunity from liability for whistleblowers

Existing section 1317AB deals with immunity from liability for whistleblowers and items 3 and 4 make amendments to this section to expand and clarify when these immunities apply. Proposed subsection 1317AB(1) protects a person who makes a qualifying disclosure from any civil, criminal or administrative liability and provides that no contractual or other remedy may be exercised against the person on the basis of the disclosure. In addition, if the disclosure qualifies for protection 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.

A note confirms that the immunity provided in this section does not affect the discloser’s own liability in relation to the conduct that is revealed by the disclosure.

Victimisation of a discloser

Existing section 1317AC deals with victimisation and reprisals. It prohibits conduct that intentionally causes detriment to a whistleblower, or threatens to cause any detriment, because he or she makes a protected disclosure. The Explanatory Memorandum explains that the existing requirement that the victimiser intended to cause detriment is inconsistent with equivalent provisions in the PID Act and the RO Act which cover conduct engaged in in the belief or suspicion that the whistleblower proposes to make or could make a protected disclosure. The Explanatory Memorandum argues that this deficiency amongst others has posed obstacles to charges being laid under the victimisation provisions of the existing Corporations Act.100

Items 5–8 and 10 make amendments aimed at addressing these deficiencies. Item 5 repeals and replaces paragraphs 1317AC(1)(c) and (d) with the effect that an offence applies where a person (the victimiser) engages in conduct that causes any detriment to any other person in the belief or suspicion that the person or any other person had made, may make, proposes to make or could make a protected disclosure. The belief or suspicion about a disclosure or possible disclosure must be part of the reason for the victimising conduct but does not have to be the only reason.

Item 8 introduces a new definition of ‘detriment’ into the existing victimisation provision (proposed subsection 1317AC(6)). Detriment is defined to include 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

100. Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, p. 32.
• damage to a person’s property, reputation, business or financial position and
• any other damage to a person.

This follows the equivalent definition in the RO Act but adds the additional items of damage to a person’s business or financial position and any other damage to a person.\textsuperscript{101}

**Item 10** amends **subsection 1317E(1)** with the effect of creating a civil penalty provision to address victimisation of a person in relation to a qualifying disclosure. **Item 6** adds notes to section 1317AC clarifying that the prohibitions on victimisation can be either offence or civil penalty provisions. The Explanatory Memorandum states that this ensures that the regulator can choose to prosecute contravention as an offence or as a civil penalty, as appropriate in the particular circumstances.\textsuperscript{102}

**Compensation and remedies**

Existing section 1317AD deals with compensation in relation to victimisation. It is to be repealed and replaced by **item 9. Proposed subsection 1317AD(1)** provides that a whistleblower or other individual who is victimised can seek compensation for loss, damage or injury suffered because of the conduct of a person (the victimiser), where the victimiser engages in conduct that causes or threatens to cause any detriment to another person:

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

In relation to the threat to cause detriment, the threat need not be express or unconditional but may also be implied or conditional. Nor is it necessary for a person seeking an order to provide that he or she actually feared that the threat will be carried out (**proposed subsections 1317AD(3) and 1317AD(4)**).

Under **proposed subsection 1317AD(2)** compensation can also be sought in relation to victimisation by body corporates and their officers and employees.

**Proposed section 1317AE** provides that in such proceedings, the Court may make a range of orders including amongst others an order requiring the victimiser to compensate the person for loss, damage or injury suffered as a result of victimising conduct.

If satisfied the victimising conduct occurred in connection with the person’s position as an employee, the court may require the victimiser and his/her employer each or jointly to compensate the person who suffered the detriment or any other person for loss, damage or injury.

Under **proposed subsection 1317AE(3)** the court must not make an order against the victimiser’s employer if the employer took reasonable precautions and exercised due diligence, to avoid the victimising conduct.

The section also provides other remedies in relation to victimisation including court orders granting injunctions, requiring apologies, granting exemplary damages and any orders the Court considers appropriate. The court also has the power to order reinstatement where a person has been dismissed from their employment because they or another person made a protected disclosure.

In such proceedings the person claiming compensation bears the onus of pointing to evidence that suggests a reasonable possibility that the other person has engaged in conduct that has caused detriment or constitutes a threat of detriment.

If the claimant discharges that onus the other person bears the onus of proving that the claim is not made out. The Explanatory Memorandum justifies the reversal of the onus of proof stating:

This reversal of the onus of proof recognises the well documented propensity of organisations that are the subject of a disclosure of wrongdoing to accuse and victimise the whistleblower, citing reasons other than the disclosure for their actions...

\textsuperscript{101}. See subsection 337BA(2) of the *Fair Work (Registered Organisations) Act 2009*.

\textsuperscript{102}. *Explanatory Memorandum*, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, p. 33.
In matters arising in court proceedings under section 1317AE, a person claiming compensation cannot be ordered to pay costs of the other party unless:

- the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause, or
- the court is satisfied that the claimant’s unreasonable act or omission caused the other party to incur the costs (proposed section 1317AH).

Comment

Professor Brown in evidence to the PJC inquiry supported similar provisions in the RO Act and the PID Act stating that one of the advances of this recent legislation is to ‘at least protect whistleblowers who are applicants for remedies from exposure to having to meet the costs of their employer or the other side if they are unsuccessful, other than in circumstances where it is vexatious’. He stated:

That in and of itself is a step forward, but it does not deal with the reality of just how difficult it is to assert one’s entitlements in this situation.

In effect, it is a public interest costs rule, which at least means that the whistleblower is insulated from potentially having to meet the costs of the other side.

Professor Brown’s evidence continues suggesting that a rewards system could address the problems of the potentially enormous costs of whistleblowing.

In contrast, the law firm Herbert Smith Freehills in its submissions on the Bill and the Exposure Draft Bill expressed concern that these costs provisions may result in unmeritorious claims being brought which cause respondents to incur significant and unnecessary legal costs.

Interaction between civil proceedings, civil penalties and criminal offences

Proposed section 1317AF is a clarifying provision that deals with the interaction between civil proceedings, civil penalties and criminal offences. It provides that a person may bring civil proceedings for compensation or other remedial orders, or for a breach of the victimisation provisions, even if no prosecution for victimisation has been brought or if such a prosecution cannot be brought.

Whistleblower policies

Proposed section 1317AI requires public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy and make that policy available to officers and employees. The whistleblower policy must set out information about:

- the protections available to whistleblowers
- how and to whom an individual can make a disclosure
- how the company will support and protect whistleblowers
- how investigations into a disclosure will proceed
- how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures

103. Ibid., p. 38.
106. Under section 45A of the Corporations Act, a proprietary company is defined as large for a financial year if it satisfies at least two of the following paragraphs:
- the consolidated revenue for the financial year of the company and any entities it controls is $25 million or more
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $12.5 million or more, and
- the company and any entities it controls have 50 or more employees at the end of the financial year.
• how the policy will be made available and
• any matters prescribed by regulation.

Failure to comply with the requirement to have and make available a whistleblower policy is an offence of strict liability with a penalty of 60 penalty units (currently $12,600).

Proposed section 1317AJ would allow ASIC to make an order relieving a specified class of company from all or specific requirements regarding whistleblower policies.

Part 2—Amendment of the Taxation Administration Act 1953

Background

As already noted, the Government announced in the 2016-17 Budget new protections for individual who disclose information to the Australian Taxation Office on tax avoidance behaviour and other tax issues. Part 2 of Schedule 1 to the Bill proposes amendments aimed at implementing this policy. In particular item 15 inserts a new Part IVD—Protection for whistleblowers into the TA Act to implement a whistleblower protection regime.

New Part IVD is similar in most respects to the revised Corporations Act regime described above. While the PJC Report recommended that a comprehensive corporate and private sector whistleblower regime be established that would include tax matters, the Bill instead proposes a separate taxation scheme to run in parallel with the Corporations Act scheme. The Explanatory Memorandum appears not to indicate why the option of a single consolidated scheme has not been considered.

Part IVD—Protection for whistleblowers

Disclosures qualifying for protection

Proposed section 14ZZT of the TA Act details the disclosures that qualify for protection under Part IVD of the TA Act (referred to as qualifying disclosures or protected disclosures). It provides that a disclosure made by an ‘eligible whistleblower’ in relation to an ‘entity’ is eligible for protection under Part IVD in the following circumstances:

• where it is disclosed to the Commissioner of Taxation (Commissioner) and 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 of the entity

• where it is disclosed to an ‘eligible recipient’, in relation to the entity and:
  – 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 associate
  – 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 of the entity

• where it is disclosed to a legal practitioner for the purposes of obtaining legal advice or representation on the operation of the whistleblower regime.

‘Entity’ is broadly defined in the Income Tax Assessment Act 1997 (ITAA97) and includes for example individuals, companies, partnerships, trusts and superannuation entities. Qualifying disclosures may be made anonymously as confirmed in the Note at the end of section 14ZZT.

The meaning of the terms ‘eligible whistleblower’ and ‘eligible recipient’ are discussed below.


108. The Explanatory Memorandum explains that an associate of the entity is defined broadly in section 318 of the Income Tax Assessment Act 1936. Ibid., p. 70.

109. See section 960-100 of the ITAA97, Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, p. 69.
Comment

The Tax Committee of the Law Council is concerned with the ‘reasonable grounds to suspect’ condition referred to above. It argues that the decision to adopt the objective reasonableness test in place of a good faith requirement could be problematic in the context of taxation matters. The submission states:

Particularly where the tax whistleblower laws have been deliberately drafted to ensure that general anti-avoidance provisions are captured [...] the Tax Committee notes that it will be a very difficult matter to determine whether a whistleblower has reasonable grounds in an allegation of Part IVA / tax avoidance. This could only ever be determined after a full tax audit has been conducted by the Australian Taxation Office, at which point working out whether the original application was reasonable or not seems otiose.110

Meaning of ‘eligible whistleblower’

The meaning of ‘eligible whistleblower’ is important as it sets the boundaries for whom may make disclosures that qualify for protection under Part IVD. Under proposed section 14ZZU an ‘eligible whistleblower’ is an individual who is, or has been, in a relationship with an entity about which a disclosure is made. The following are eligible whistleblowers:

- an officer, employee or associate of the entity
- an individual (or their employee) who supplies services or goods to the entity (whether paid or unpaid)
- a spouse, child or dependant of any individual referred to above
- an individual prescribed by the regulations in relation to the entity.

Meaning of ‘eligible recipients’

Eligible recipients are generally internal to the entity about which the disclosure is made or have a relationship with that entity that is relevant to its tax affairs. Under proposed section 14ZZV each of the following is an eligible recipient in relation to an entity:

- an auditor, or a member of an audit team conducting an audit of the entity
- a registered tax agent or BAS agent who provides services to the entity
- a person authorised by the entity in relation to the operation of the whistleblower regime
- a person or body prescribed in the regulations
- if the entity is a body corporate, a director, secretary or senior manager of the body corporate or other employee or officer who has functions or duties in relation to the entity’s tax affairs
- if the entity is a trust, a trustee of the trust or a person authorised by the trustee to receive whistleblower disclosures or
- if the entity is a partnership, a partner or a person authorised by the partner to receive whistleblower disclosures.

No provision for emergency disclosures

In contrast to the Corporations Act amendments, the proposed TA Act whistleblower provisions are notable for not including provisions to protect emergency disclosures to a journalist or a member of Parliament. The Explanatory Memorandum gives several reasons for this omission:

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

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

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

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

In addition, providing protection for disclosures of taxpayer affairs to a journalist or a member of parliament may encourage vexatious disclosures, particularly in relation to taxpayers who are individuals.111

Confidentiality of whistleblower’s identity

Proposed section 14ZZW deals with the protection of a whistleblower’s identity. To a degree it replicates the equivalent amendments to the Corporations Act.

Under proposed subsection 14ZZW(1) it is an offence for a person to whom a qualifying disclosure is made to disclose confidential information obtained in the disclosure. Confidential information is information that identifies the discloser or information likely to lead to the identification of the discloser. The penalty for this offence is imprisonment for six months and/or 30 penalty units ($6,300).112

Proposed subsection 14ZZW(2) sets out exceptions to this offence, which include where the disclosure is made to:

- the Commissioner
- the AFP
- a legal practitioner for the purpose of obtaining legal advice in relation to the operation of the whistleblower provisions
- a person or body prescribed by the regulations or
- any person where the disclosure is made with the consent of the discloser.

Proposed subsection 14ZZW(3) provides that it is not an offence to disclose information likely to lead to a whistleblower’s identification where:

- the disclosure is reasonably necessary for the purposes of investigating misconduct, or an improper state of affairs or circumstances to which a qualifying disclosure relates, and
- the person takes all reasonable steps to reduce the risk that the whistleblower will be identified as a result of the disclosure.

The exception does not apply where the actual identity of a whistleblower is disclosed (subparagraph 14ZZW(3)(a)(i)).

The defendant bears an evidential burden in relying on this particular exception.

Immunity from liability for whistleblowers

Proposed section 14ZZX deals with immunity from liability for whistleblowers. Proposed subsection 14ZZX(1) protects a person who makes a qualifying disclosure from any civil, criminal or administrative liability and provides that no contractual or other remedy may be exercised against the person on the basis of the disclosure. In addition, if the disclosure qualifies for protection 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. This immunity applies only in relation to disclosures to the Commissioner.

112. Under section 4AA of the Crimes Act 1914, a penalty unit is equivalent to $210.
A note confirms that the immunity provided in this section does not affect the discloser’s own liability in relation to the conduct revealed by the disclosure.

**Proposed subsection 14ZZX(2)** provides the discloser with qualified privilege in respect of the disclosure. This means that the whistleblower is not, in the absence of malice, liable to an action for defamation in respect of the disclosure.\(^{113}\) It also provides that a contract to which the discloser is a party must not be terminated on the basis that the disclosure constitutes a breach of contract. This provision appears to differ to the *Corporations Act* and the *PID Act*. The revised Part 9.4AAA in the *Corporations Act* does not include a provision dealing with privilege and the *PID Act* provides absolute privilege.\(^{114}\)

**Victimisation**

**Proposed section 14ZZY** deals with the offence of victimisation of a whistleblower or another person in relation to the making of a protected disclosure.

**Proposed subsection 14ZZY(1)** provides that it is an offence for a person (the victimiser) to victimise another person by engaging in conduct that causes detriment, where the conduct is based on a belief or suspicion that a person had made, may make, proposes to make or could make a protected disclosure. The belief or suspicion about a disclosure or possible disclosure must be part of the reason for the victimising conduct but does not have to be the only reason.

**Proposed subsections 14ZZY(2) and (3)** create a similar offence in relation to threats to cause detriment to the whistleblower or other person. The threat may be express or implied, conditional or unconditional.

The definition of detriment (**proposed subsection 14ZZY(5)**) is identical to the equivalent provision proposed in the *Corporations Act*.\(^{115}\)

The maximum penalty for these offences is two years imprisonment and/or 120 penalty units ($25,200).\(^{116}\)

**Comment**

By way of comparison, unlike the *Corporations Act*, victimisation in **proposed section 14ZZY** is a criminal offence but is not a civil penalty provision.\(^{117}\)

In explaining the equivalent victimisation provision in the *Corporations Act* the Explanatory Memorandum states that it ensures that the regulator can choose to prosecute contravention as an offence or as a civil penalty, as appropriate in the particular circumstances.\(^{118}\) There is no equivalent explanation for why the victimisation provision in **proposed section 14ZZY** in the *TA Act* does not include a choice of either an offence or a civil penalty.

**Compensation and remedies**

**Proposed sections 14ZZZ and 14ZZZA** deal with compensation and remedies for whistleblowers. They essentially replicate the equivalent provisions in Part 1 of Schedule 1 dealing with the corporate sector.\(^{119}\)

**Proposed subsection 14ZZZ(1)** provides that a whistleblower or other individual who is victimised can seek compensation for loss, damage or injury suffered because of the conduct of a person (the victimiser), where the victimiser engages in conduct that causes or threatens to cause any detriment to another person:

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

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114. Subsection 10(2) of the *PID Act*.
115. See proposed subsection 1317AC(6) of the *Corporations Act*, at Item 8 of the Bill.
116. Under section 4AA of the *Crimes Act 1914*, a penalty unit is equivalent to $210.
117. See above at p. 22 of the Bills Digest. Item 10 amends subsection 1317E(1) of the *Corporations Act* with the effect of creating a civil penalty provision to address victimisation of a person in relation to a qualifying disclosure. Item 6 adds notes to section 1317AC clarifying that the prohibitions on victimisation can be either offence or civil penalty provisions.
119. See proposed sections 1317AD and 1317AE of the *Corporations Act*, at Item 9 of the Bill.
Under **proposed subsection 14ZZZ(2)** compensation can also be sought in relation to victimisation by body corporates and their officers and employees.

**Proposed section 14ZZZA** provides that in such proceedings, the court may make a range of orders including amongst others an order requiring the victimiser to compensate the person for loss, damage or injury suffered as a result of victimising conduct.

If satisfied the victimising conduct occurred in connection with the person’s position as an employee, the court may require the victimiser and his/her employer each or jointly to compensate the person who suffered the detriment or any other person for loss, damage or injury.

**Proposed subsection 14ZZZA(2)** provides that the person seeking the order for compensation bears the onus of adducing or pointing to evidence that suggests a reasonable possibility that the other person has engaged in conduct that has caused detriment or constitutes a threat of detriment. If that onus is discharged, the other person bears the onus of proving the claim is not made out.

Under **proposed subsection 14ZZZA(3)** the court must not make an order against the victimiser’s employer if the employer took reasonable precautions and exercised due diligence, to avoid the victimising conduct.

The section also provides other remedies in relation to victimisation including court orders granting injunctions, apologies, exemplary damages and any orders the court considers appropriate. The court also has the power to order reinstatement where a person has been dismissed from their employment because they, or another person, made a protected disclosure.

In matters arising in court proceedings under proposed section 14ZZZA, **proposed section 14ZZZC** provides a person claiming compensation cannot be ordered to pay costs of the other party unless:

- the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause, or
- the court is satisfied that the claimant’s unreasonable act or omission caused the other party to incur the costs (**proposed subsection 14ZZZC(3)**).

**Interaction between civil proceedings and criminal offences**

**Proposed section 14ZZZD** is a clarifying provision dealing with the interaction between civil proceedings and criminal offences. It provides that a person may bring civil proceedings for compensation or other remedial orders under section 14AZZA even if no prosecution for victimisation has been brought or if such a prosecution cannot be brought under section 14ZZY. Unlike the equivalent provision in Part 1, the provision does not provide that a breach of the victimisation provision can be a civil penalty provision. The Explanatory Memorandum does not explain why the provision differs in this respect.

**Proposed section 14ZZZB** provides that if a person (the discloser) makes a qualifying disclosure, the discloser or any other person is not required to disclose personal identifying information in court proceedings except where necessary for the purposes of proposed Part IVD or where the court or tribunal thinks it necessary in the interests of justice to do so. It essentially replicates the equivalent amendment in the **Corporations Act**.

**Part 3—Other amendments**

**Part 3** of **Schedule 1** to the Bill contains consequential amendments that would remove the existing whistleblower protection regimes from the **Banking Act**, the **Insurance Act**, the **Life Insurance Act**, and the **Superannuation Industry (Supervision) Act**. These regimes have been consolidated in the amendments to the **Corporations Act** contained in Part 1.

**Concluding comments**

There is a general consensus that current private sector protection of whistleblowers is piecemeal, inadequate and in urgent need of reform.

The Bill proposes a range of significant amendments that are considered essential features of best practice whistleblowing legislation. Based broadly on the **RO Act** regime, it includes enhanced provisions that would allow anonymous disclosures, extend the scope of eligible whistleblowers, provide stronger protection and compensation provisions for victims, allow emergency external disclosures (although to a very limited degree),

120. See **proposed section 1317AG** of the **Corporations Act**, at Item 9 of the Bill.
require larger companies to have strong whistleblower policies, and introduce for the first time a tax whistleblower protection regime.

However, as has been identified by key stakeholders, there is disappointment that the Bill fails to take up some of the key recommendations of the recent PJC Report into private sector whistleblowing. In particular the Bill does not provide for a single comprehensive private sector scheme, it does not create a Whistleblower Protection Authority and it does not include a rewards or bounty system. The Government has indicated that its recently appointed Expert Advisory Panel on Whistleblower Protections will address the full set of PJC Report recommendations at a later date.

A question for the Parliament in considering this legislation might be: should the Bill in its current form be passed and then at a later stage introduce further amendments that might address the full set of PJC recommendations? Or alternatively, should the legislation be postponed until a more fully comprehensive whistleblower reform package is prepared, that is assuming that the Government would accept the PJC recommendations?

As has been frequently noted, whistleblower protection provisions can be strong 'on paper' but meaningless in practice unless whistleblowers feel confident that the right support is available to protect them. Arguably, the key PJC recommendations omitted from the Bill are features that would make a difference in providing greater protection for whistleblowers and would also motivate companies to improve internal whistleblower reporting systems and to deal more proactively with illegal behaviour.