Amendments to be moved on behalf of the Government

(Circulated by authority of the
Assistant Treasurer, the Hon. Stuart Robert MP)
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<td>APRA</td>
<td>Australian Prudential Regulation Authority</td>
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<td>Bill</td>
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<td>TAA 1953</td>
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General outline and financial impact

Enhancing Whistleblower Protections – Parliamentary Amendments

The Parliamentary Amendments to the Bill address the recommendations of the Report of the Senate Economics Legislation Committee and Senator Rex Patrick in his Dissenting Report.

The amendments also make consequential changes to penalties arising from the Penalties Bill.

Date of effect: The Parliamentary Amendments generally defer the commencement of the Bill from 1 July 2018 until the first day of the second quarter following Royal Assent.

Proposal announced: The amendments have not previously been announced.

Financial impact: The overall impact of the measure is estimated to have an unquantifiable gain to revenue.

Human rights implications: The amendments do not affect the analysis of human rights issued provided for in the Explanatory Memorandum to the Bill. See Statement of Compatibility with Human Rights — Chapter 2, paragraphs 2.1 to 2.5.

Compliance cost impact: The amendments do not alter the compliance cost impact outlined in the Explanatory Memorandum to the Bill.
Chapter 1
Enhancing Whistleblower Protections – Parliamentary Amendments

Outline of chapter

1.1 The Parliamentary Amendments to the Bill address the recommendations of the Report of the Senate Economics Legislation Committee and Senator Rex Patrick in his Dissenting Report.

1.2 The amendments also make consequential changes to penalties arising from the Penalties Bill.

Context of amendments

1.3 The Government introduced the Bill into the Senate on 7 December 2017. The Bill consolidates and broadens the existing protections and remedies for corporate and financial sector whistleblowers. The Bill also creates a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct relating to an entity’s tax affairs.

1.4 The Bill was referred to the Senate Economics Legislation Committee on 8 February 2018. The Committee reported to the Senate on 22 March 2018.

Summary of new law

1.5 The amendments:

- remove one category of ‘eligible recipients’ to whom a protected disclosure may be made: a whistleblower’s supervisor or manager;
- introduce a new category of eligible recipient: senior managers;
- replace the protection of emergency disclosures with two categories of protected disclosures:
  - an amended emergency disclosure category based on substantial and imminent danger to a person’s health and safety, or the natural environment, and
– a new public interest limb based on a broad public interest test;

• amend the definition of ‘journalist’ for the purposes of the emergency disclosure and public interest disclosure categories so the definition applies to all journalists working for the national broadcasters;

• exclude most disclosures of personal work-related grievances from protection;

• allow whistleblowers to make a claim for compensation when a body corporate breaches a duty it owes to the whistleblower to prevent a third person engaging in detrimental conduct (formerly labelled victimising conduct) towards them;

• remove due diligence as a complete defence to certain compensation orders and instead incorporate due diligence as a factor the courts may consider in making these compensation order;

• provide that a court making a compensation order must consider the period a person is likely to be without employment in circumstances where the detrimental conduct involved termination of employment;

• increase penalties in line with the penalty framework established under the Penalties Bill; and

• include a requirement for a post-implementation review of the amended whistleblower laws five years after the amendments commence.

1.6 The amendments generally apply to both the whistleblower regimes in the Corporations Act and the TAA 1953. However, the following amendments do not apply to the tax regime in the TAA 1953:

• the amendments to the list of eligible recipients – because the list of eligible recipients for the tax regime is different to the list in the corporations regime;

• the emergency and public interest disclosure amendments – because the tax regime does not contain equivalent provisions;

• the work-related grievance amendment – because the scope of the tax regime is already limited to disclosures about tax affairs.
1.7 The amendments increase consistency with other Commonwealth whistleblower legislation, namely the *Public Interest Disclosure Act 2013* and Part 4A of the *Fair Work (Registered Organisations) Act 2009*.

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

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<tr>
<td><strong>Amendments specific to the Corporations Act</strong></td>
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</tr>
<tr>
<td>This category is removed.</td>
<td>The list of eligible recipients to whom a protected disclosure may be made includes a whistleblower’s supervisor or manager.</td>
</tr>
<tr>
<td></td>
<td>The list of eligible recipients to whom a protected disclosure may be made includes an officer of a body corporate or a related body corporate.</td>
</tr>
<tr>
<td>The list of eligible recipients to whom a protected disclosure may be made includes an officer or senior manager of a body corporate or a related body corporate.</td>
<td></td>
</tr>
<tr>
<td>A whistleblower may make a protected emergency disclosure or a protected public interest disclosure in certain circumstances.</td>
<td>A whistleblower may make a protected emergency disclosure in certain circumstances.</td>
</tr>
<tr>
<td>A whistleblower may make a protected emergency disclosure or a protected public interest disclosure to a journalist or parliamentarian. The definition of ‘journalist’ for the purposes of the amended emergency disclosure and new public interest disclosure categories is amended so the definition also applies to all journalists working for the national broadcasters.</td>
<td>A whistleblower may make a protected emergency disclosure to a journalist or parliamentarian. ‘Journalist’ is defined as a person working for a newspaper, magazine, television or radio service, or an equivalent electronic service operated on a commercial basis.</td>
</tr>
<tr>
<td>A disclosure of misconduct that is a personal work-related grievance of the whistleblower is only protected if the disclosure concerns alleged victimisation or the disclosure is made to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation of the whistleblower provisions.</td>
<td>A protected disclosure may include a disclosure of misconduct that is a personal work-related grievance of the whistleblower.</td>
</tr>
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</table>
### Detailed explanation of new law

#### Amendments specific to the Corporations Act

**Eligible recipients**

1.8 The amendments remove an individual’s manager or supervisor as a category of eligible recipients to whom the individual can make a protected disclosure. [*Amendment 4, subsection 1317AAC(1) of the Corporations Act]*

1.9 The amendments add a senior manager of a body corporate (or a related body corporate) to the list of eligible recipients. [*Amendment 3, subsection 1317AAC(1) of the Corporations Act]*

1.10 These amendments reduce the compliance burden on companies by narrowing the cohort of staff who are eligible to receive a whistleblower’s disclosure.
**Emergency disclosures**

1.11 The amendments refine the emergency disclosure provisions of the Bill. The requirement that a whistleblower wait ‘a reasonable period’ of time after making an initial disclosure to a regulator before making a protected emergency disclosure to a parliamentarian or journalist is removed. A whistleblower must now also ensure the extent of the information disclosed in the emergency disclosure is no greater than is necessary to inform the recipient of the substantial and imminent danger.  
   [Amendment 5, subsection 1317AAD(2) of the Corporations Act]

1.12 The grounds for making an emergency disclosure are revised. An emergency disclosure must be based on the whistleblower having reasonable grounds to believe the information disclosed concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment. The category of harm or danger to the financial system is removed as disclosures of this kind can be more appropriately covered by public interest disclosures. This amended definition is consistent with the Public Interest Disclosure Act 2013.  
   [Amendment 5, paragraph 1317AAD(2)(b) of the Corporations Act]

**Public interest disclosures**

1.13 The amendments introduce a new category of protected disclosure: public interest disclosures based on a general public interest test.  
   [Amendments 2 and 5, subsection 1317AAD(1) and the note to subsection 1317AA(1) of the Corporations Act]

1.14 A public interest disclosure to a journalist or parliamentarian qualifies for protection if:

- the whistleblower has previously disclosed the information to ASIC, APRA or other prescribed Commonwealth authority and that previous disclosure qualified for protection;
- at least 90 days has passed since the previous disclosure was made;
- the whistleblower does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the previous disclosure related;
- the whistleblower has reasonable grounds to believe that making a further disclosure of the information to a journalist or Member of Parliament would be in the public interest;
- the whistleblower has given written notification, including sufficient information to identify the previous disclosure, to the authority to which the previous disclosure was made that they intend to make a public interest disclosure of the information previously disclosed; and
• the extent of the information disclosed is no greater than is necessary to inform the recipient of the misconduct or improper state of affairs to which the previous disclosure related.

[Amendment 5, subsection 1317AAD(1) of the Corporations Act]

Definition of journalist

1.15 The definition of journalist for the purposes of the emergency and public interest disclosure provisions is amended. The amendment is to the electronic service limb of the definition. The definition is amended to cover journalists working for an electronic service operated on a non-commercial basis by a body that provides a national broadcasting service (within the meaning of the Broadcasting Services Act 1992). [Amendment 5, subsection 1317AAD(3) of the Corporations Act]

Personal work-related grievances

1.16 The amendments limit protection for disclosures about solely personal employment related matters, while preserving protection for disclosures about systematic issues or reprisals against a whistleblower. This implements Recommendation 5.1 of the Parliamentary Joint Committee, following recommendations of the Moss Report in relation to the Public Interest Disclosure Act 2013.

1.17 A disclosure of a personal work-related grievance will remain protected if it concerns detriment to the discloser in contravention, or alleged contravention, of section 1317AC (whistleblower-related victimisation). [Amendment 6, paragraph 1317AADA(1)(b) of the Corporations Act]

1.18 A disclosure of a personal work-related grievance will also remain protected if it is made to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation of the whistleblower provisions. [Amendment 6, subsections 1317AA(3) and 1317AADA(1) of the Corporations Act]

1.19 The amendments define a disclosure concerning a personal work-related grievance as a disclosure of information that ‘concerns a grievance about any matter in relation to the discloser’s employment, or former employment, having (or tending to have) implications for the discloser personally’. [Amendment 6, paragraphs 1317AADA(1)(a) and (2)(a) of the Corporations Act]

1.20 However, a disclosure is not a personal work-related grievance if it:

• has significant implications for the regulated entity to which it relates, or another regulated entity, that do not relate to the discloser;
• concerns conduct, or alleged conduct, in contravention of specified corporate and financial services laws, or that constitutes an offence punishable by 12 months or more imprisonment under any other Commonwealth laws;

• concerns conduct that represents a danger to the public or the financial system; or

• concerns conduct prescribed by regulation.

[Amendment 6, paragraphs 1317AA(5)(c), (d), (e) and (f), and 1317AADA(2)(b) of the Corporations Act]

Compensation for breach of duty

1.21 A body corporate may be liable if it breaches a duty it has to prevent, or to take reasonable steps to prevent, a third person from engaging in conduct that causes any detriment to an actual or suspected whistleblower.

1.22 A court may make an order against the body corporate if:

• the third person engages in conduct that does cause detriment or constitutes the making of a threat to cause detriment to a whistleblower;

• any part of the reason for engaging in the conduct was a belief or suspicion that a whistleblower has made, may have made, or proposes to make a protected disclosure;

• the body corporate was under a duty to prevent the third person from engaging in the detrimental conduct or to take reasonable steps to ensure that person does not do so; and

• the body corporate fails in part or whole to fulfil that duty.

[Amendments 17, 19, 44 and 46, subsections 1317AD(2A) and 1317AE(1) of the Corporations Act, and subsections 14ZZZ(2A) and 14ZZZA(1) of the TAA 1953]

1.23 For example, the third person may be an officer or manager of the body corporate, who engages in conduct that victimises and causes detriment to an actual or suspected whistleblower. If the body corporate is under a duty to prevent this conduct, and fails to fulfil that duty, it may be subject to a court order.
1.24 For a claim based on a failure of a body corporate to fulfil a duty to prevent a third person engaging in detrimental conduct, or a duty to take reasonable steps to ensure a third person does not engage in it, the claimant needs to point to evidence that suggests a reasonable possibility that:

- the third person has engaged in conduct that has caused detriment or constitutes a threat of detriment; and
- the existence of the body corporate’s duty.

[Amendments 17 and 44, subparagraph 1317AD(2B)(a)(iii) of the Corporations Act and subparagraph 14ZZZ(2B)(a)(iii) of the TAA 1953]

1.25 If the claimant discharges that onus, the body corporate bears the onus of proving that the claim is not made out. [Amendments 17 and 44, paragraph 1317AD(2B)(b) of the Corporations Act and paragraph 14ZZZ(2B)(b) of the TAA 1953]

1.26 If the existence of a duty to take reasonable steps to prevent a person engaging in detrimental conduct is established, a body corporate may seek to establish that there were no reasonable steps that could have been taken to avoid the detrimental conduct that occurred. The court will consider whether any of the detriment could have been prevented or avoided by the reasonable fulfilment of the duty.

Liability of employers

1.27 The Bill provides for the liability of employers for detrimental conduct engaged in by an employee. The amendments provide that, in deciding whether to make an order in relation to an employer because of the conduct of their employee, the court may have regard to:

- whether the employer took reasonable precautions and exercised due diligence to avoid the detrimental conduct;
- if the employer has a whistleblower policy, the extent to which the employer gave effect to the policy; and
- any duty the employer was under to prevent the detrimental conduct, or to take reasonable steps to ensure the detrimental conduct was not engaged in.

[Amendments 30 and 57, subsection 1317AE(3) of the Corporations Act and subsection 14ZZZA(3) of the TAA 1953]

1.28 These amendments replace provisions in the Bill requiring a court not to impose liability on an employer if the employer took all reasonable precautions, and exercised due diligence, to avoid the detrimental conduct.
1.29 These matters are not intended to limit the matters the court may take into account in deciding whether to make an order. For example, in considering whether an employer took reasonable precautions and exercised due diligence to avoid the detrimental conduct, the following matters may be relevant:

- any applicable industry standard, guidelines or policies relating to whistleblower support and protection;
- any relevant International Organization for Standardization or Australian Standard dealing with the protection of whistleblowers;
- any guidance published by ASIC or other relevant regulatory agencies.

1.30 This reflects the broad nature of a court’s inquiry into claims of victimisation and detriment generally. The relevance of any particular factor will depend on the circumstances of a specific case.

Review

1.31 The Minister must cause a review to be undertaken of the operation of the Corporations Act whistleblower regime, as amended, and the new tax whistleblower regime, as soon as practicable after five years after the commencement of the amendments. [Amendment 32, subsections 1317AK(1) and (2)]

1.32 The Minister must cause a written report about the review to be prepared, and must cause a copy to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report. [Amendment 32, subsections 1317AK(3) and (4)]

1.33 This follows a recommendation of the Senate Economics Legislation Committee and will allow for the examination of the effectiveness of the new regimes and whether any further changes should be made to protect and promote whistleblowing.

1.34 The review will also identify any unexpected regulatory burden and the extent to which the reforms have levelled the playing field for businesses. As the Senate Economics Legislation Committee noted:

while whistleblower protections may appear to increase the regulatory burden on business, if implemented carefully, it would only be a significant burden to businesses with significant misconduct problems and poor reporting cultures. Businesses that have no misconduct and already facilitate good reporting and disclosure will have no burden from whistleblower protections and will be more competitive with those businesses that were previously gaining an unfair advantage through misconduct.
Detriment and detrimental conduct

1.35 The amendments relabel victimising conduct as detrimental conduct to clarify that compensation is available for other detrimental conduct in addition to criminal victimising conduct. [Amendments 8, 10 to 16, 20 to 28, 35, 37 to 43, and 47 to 55, subsections 1317AD(1) and (2), and 1317AE(1) of the Corporations Act, and subsections 14ZZZ(1) and (2), and 14ZZZA(1) of the TAA 1953]

1.36 To this end, the amendments also move the definition of detriment to a stand-alone section. [Amendments 7, 9, 18, 31, 34, 36 and 45, subsection 1317AC(6), subparagraph 1317AD(1)(a)(i), section 1317ADA and paragraph 1317AI(5)(c) of the Corporations Act, and subsection 14ZZY(5), subparagraph 14ZZZ(1)(a)(i) and section 14ZZZA of the TAA 1953]

1.37 If the detrimental conduct involved terminating a person’s employment (including detrimental conduct that forces or forced the person to resign), the court ordering compensation must consider the period, if any, the person is likely to be without employment. This is a standard consideration a court would be required to make in these circumstances. This amendment does not limit the matters the court can consider when making an order. [Amendments 29 and 56, subsection 1317AE(2) of the Corporations Act and subsection 14ZZZA(2) of the TAA 1953].

Burden of proof

1.38 The amendments move the burden of proof provisions to sit with the provisions for compensation and other remedies. Consolidating these provisions makes the Bill clearer. [Amendments 17, 29, 44 and 56, subsections 1317AD(2A) and (2B), and 1317AE(2) of the Corporations Act, and subsections 14ZZZ(2A) and (2B), and 14ZZZA(2) of the TAA 1953]

The Penalties Bill consequential amendments

1.39 The Parliamentary Amendments make consequential changes to the Bill to support the Penalties Bill that was introduced into the House of Representatives on 24 October 2018.

1.40 The Penalties Bill introduces a stronger penalty framework to the Corporations Act in response to a number of recommendations from the ASIC Enforcement Review Taskforce report.

1.41 The Parliamentary Amendments increase some of the penalties applicable to contraventions of the whistleblower regime to make them consistent with the new penalty framework. Commensurate amendments are also made to the taxation law provisions of the Bill.

1.42 The amended penalty amounts are outlined in Table 1.1.
## Table 1.1 Amended penalties

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<th>Amended penalty</th>
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<td><strong>Civil Penalty provisions (Corporations Act)</strong></td>
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<tr>
<td>Breach of confidentiality of identity of whistleblower</td>
<td>For an individual, a pecuniary penalty of $200,000. For a body corporate, a pecuniary penalty of $1 million.</td>
<td>For an individual, 5,000 penalty units or three times the benefit derived or detriment avoided. For a body corporate, 50,000 penalty units, three times the benefit derived or detriment avoided, or 10 per cent of the body corporate’s annual turnover (up to 1 million penalty units). See paragraphs 1.99 and 1.100 of the Explanatory Memorandum to the Penalties Bill.</td>
</tr>
<tr>
<td><strong>Victimisation of whistleblower</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breach of confidentiality of identity of whistleblower</td>
<td>30 penalty units or imprisonment for six months, or both</td>
<td>60 penalty units or imprisonment for six months, or both</td>
</tr>
<tr>
<td>Victimisation of whistleblower</td>
<td>120 penalty units or imprisonment for two years, or both</td>
<td>240 penalty units or imprisonment for two years, or both</td>
</tr>
<tr>
<td>Failure to have whistleblower policy (Corporations Act only)</td>
<td>60 penalty units</td>
<td>60 penalty units (no change)</td>
</tr>
</tbody>
</table>

1.43 The amended penalties only commence and apply to conduct occurring after both the present Bill and the Penalties Bill have otherwise commenced. [Amendments 1 and 58, clause 2 to the Bill, subsections 1317E(1) and (3) and section 1644A of the Corporations Act, Schedule 3 to the Act, subsections 14ZZW(1), 14ZZY(1) and (2) of the TAA 1953, and item 38 of Schedule 1 to the Bill]

## Application and transitional provisions

1.44 The Bill as amended will commence on the first day of the second quarter following Royal Assent. [Amendment 1, clause 2 to the Bill]

1.45 The Bill will apply in relation to whistleblower disclosures made on or after commencement, including disclosures about events occurring before this date.
1.46 The amendments will also apply to victimisation of whistleblowers after commencement, and to a whistleblower’s right to compensation and other remedies, in relation to disclosures that have been made prior to this date.

1.47 To allow sufficient time for public companies, large proprietary companies and registerable superannuation entities to comply with the requirement to have a whistleblowing policy, it will apply on and after the day six months after commencement, and no later than six months after a proprietary company first becomes a large proprietary company.

[Amendment 33, subsection 1644(3) of the Corporations Act]

1.48 The original Bill provided that the provision dealing with whistleblower policies (section 1317AI of the Corporations Act) did not apply until the time public companies and large proprietary companies were required to have those policies (1 January 2019). The amendments provide that subsection 1317AI(5) applies prior to the time these companies must have a whistleblower policy (as amended). This facilitates the operation of the amendment described in paragraph 1.27 that provides a court may have regard to a company’s compliance with its whistleblower policy (including where a policy is not required).

[Amendment 33, subsection 1644(3) of the Corporations Act]

Corrections to the Explanatory Memorandum

1.49 At the end of the second dot point of paragraph 2.52 in the Explanatory Memorandum, the following is inserted:

- A reference to an auditor in the Bill includes both internal and external auditors.

1.50 After paragraphs 2.106 and 3.76 in the Explanatory Memorandum, the following is inserted:

- For example, a defendant may seek to establish that any detrimental conduct (or threats of such conduct) was not in any way a result of a belief or suspicion that the alleged victim was an actual or potential protected whistleblower. In evaluating these claims, a court may, for example, consider whether:

  - any protected disclosure or potential protected disclosure was in any way a factor in the causation of the detriment;

  - the same acts or omissions as caused the detriment would have been taken for independent and legitimate reasons in the absence of the any protected disclosure ever having been made or any issue about a potential protected disclosure ever arising; and
– if the actions are alleged to be taken for independent and legitimate reasons, a significant step in those actions had been taken prior to the disclosure issue arising.
Chapter 2
Statement of Compatibility with Human Rights

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

Enhancing whistleblower protections – Parliamentary Amendments

2.1 These amendments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

2.2 The Parliamentary Amendments to the Bill address the recommendations of the Report of the Senate Economics Legislation Committee and the Senator Rex Patrick in his Dissenting Report.

2.3 The amendments also make consequential changes to penalties arising from the Penalties Bill.

Human rights implications

2.4 The amendments do not affect the analysis of human rights issued provided for in the Explanatory Memorandum to the Bill.

Conclusion

2.5 This Bill as amended is compatible with human rights and the effect of the Bill on human rights issues is appropriate and proportional to the object of protecting individuals who disclose wrongdoing.