

## WHISTLEBLOWER FACTSHEET

### Context of whistleblowing

As detailed in the Revised Explanatory Memorandum to the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (the Bill), Australia and many other countries have statutory whistleblower regimes with legally enforceable protections for people who make disclosures which recognise the critical role whistleblowing can play in the early detection and prosecution of misconduct in businesses. The existence of strong statutory protections to encourage whistleblowing can improve compliance with the law and promote a more ethical culture because individuals know there is a higher likelihood that misconduct will be reported.

### Enhanced Whistleblower Protections – Context of Amendments

The Government introduced the Bill to the Senate on 7 December 2017. The Bill was passed by both houses on 19 February 2019 and received royal assent on 12 March 2019. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (the Act) commences operation on 1 July 2019.

The new legislation expands the scope of disclosable matters, provides greater protections and remedies for eligible whistleblowers and increases the obligations on companies to comply. The reforms also broaden the whistleblower protection regime for disclosures regarding breaches of the tax laws or misconduct relating to an entity's tax affairs.

### Summary of new law

The amendments:

- > introduce a single concept of 'eligible whistleblowers' which expands the categories of individuals who can make protected disclosures: including current and former officers, employees, contractors and their relatives;
- > introduce a single concept of eligible recipients which narrows the categories of individuals to whom a protected disclosure may be made: including officers or senior managers and removing a whistleblower's supervisors or 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 the health or safety of one or more persons or to the natural environment;
  - a new public interest limb based on a broad public interest test;
- > require certain companies to have a whistleblowing policy;
- > 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 for anonymous disclosures
- > 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; and
- > increase penalties in line with the penalty framework established under the Penalties Bill.

## Which entities does the new law apply to?

See s.1317AAB of the Act

- a) The new law expands the entities about which a protected disclosure may be made which means it applies to more Australian businesses. The Act applies to regulated entities in the corporate, financial, superannuation, insurance and credit sectors. Under the Act, each of the following is a regulated entity: a company;
- b) a corporation to which paragraph 51(xx) of the Constitution applies;
- c) an Authorised Deposit Institution;
- d) a general insurer;
- e) a life insurance company;
- f) a superannuation entity or a trustee;
- g) an entity prescribed by the regulations.

## Who is an eligible whistleblower?

See s.1317AAA of the Act

An eligible whistleblower is a person who can make a protected disclosure. Under the Act, an individual is an eligible whistleblower in relation to a regulated entity if the individual is, or has been, any of the following:

- a) an officer of the regulated entity;
- b) an employee of the regulated entity;
- c) an individual who supplies services or goods to the regulated entity (whether paid or unpaid);
- d) an employee of a person that supplies services or goods to the regulated entity (whether paid or unpaid);
- e) an individual who is an associate of the regulated entity;
- f) for a regulated entity that is a superannuation entity:
  - i. an individual who is a trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), custodian (within the meaning of that Act) or investment manager (within the meaning of that Act) of the superannuation entity; or
  - ii. an officer of a body corporate that is a trustee, custodian or investment manager of the superannuation entity; or
  - iii. an employee of an individual referred to in subparagraph (i) or a body corporate referred to in subparagraph (ii); or
  - iv. an individual who supplies services or goods to an individual referred to in subparagraph (i) or a body corporate referred to in subparagraph (ii) (whether paid or unpaid); or
  - v. an employee of a person that supplies services or goods to an individual referred to in subparagraph (i) or a body corporate referred to in subparagraph (ii) (whether paid or unpaid);
- g) a relative of an individual referred to in any of paragraphs (a) to (f);
- h) a dependant of an individual referred to in any of paragraphs (a) to (f), or of such an individual's spouse;
- i) an individual prescribed by the regulations for the purposes of this paragraph in relation to the regulated entity.

## Who can disclosures be made to?

See s.1317AA of the Act

Disclosure of information by an individual qualifies for protection if the discloser is an eligible whistleblower and the disclosure is made to:

- > the Australian Securities and Investments Commission (ASIC);
- > the Australian Prudential Regulation Authority (APRA);
- > a prescribed Commonwealth authority;
- > an eligible recipient;
- > a legal practitioner to obtain legal advice or legal representation in relation to whistleblower protections;
- > a member of Parliament or a journalist (public interest and emergency disclosures only).

## Who is an eligible recipient?

See s.1317AAC of the Act

An eligible recipient is a person who can receive a protected disclosure. Under the Act, each of the following is an eligible recipient in relation to a regulated entity that is a body corporate:

- a) an officer or senior manager of the body corporate or a related body corporate;
- b) an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate;
- c) an actuary of the body corporate or a related body corporate;
- d) a person authorised by the body corporate to receive disclosures that may qualify for protection.

Under the Act, each of the following is an eligible recipient in relation to a regulated entity that is a superannuation entity:

- a) an officer of the superannuation entity;
- b) an auditor, or a member of an audit team conducting an audit, of the superannuation entity;
- c) an actuary of the superannuation entity;
- d) an individual who is a trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity;
- e) a director of a body corporate that is the trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity;
- f) a person authorised by the trustee or trustees (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity to receive disclosures that may qualify for protection under this Part.

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

## What are disclosable matters?

See s.1317AA of the Act

Disclosable matters are matters about which a protected disclosure can be made. Under the Act, disclosable matters are:

- > disclosure of information if the discloser (an eligible whistleblower in relation to a regulated entity) has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to:
  - a) a regulated entity or
  - b) if the regulated entity is a body corporate – a related body corporate of the regulated entity.

- > disclosure of information if the discloser (an eligible whistleblower in relation to a regulated entity) has reasonable grounds to suspect that the information indicates any of the following:
  - a) the regulated entity, or an officer or employee of the regulated entity;
  - b) if the regulated entity is a body corporate—a related body corporate of the regulated entity, or an officer or employee of a related body corporate of the regulated entity;has engaged in conduct that:
  - c) constitutes an offence against, or a contravention of, a provision of any of the following:
    - i. the Act;
    - ii. the ASIC Act;
    - iii. the *Banking Act 1959*;
    - iv. the *Financial Sector (Collection of Data) Act 2001*;
    - v. the *Insurance Act 1973*;
    - vi. the *Life Insurance Act 1995*;
    - vii. the *National Consumer Credit Protection Act 2009*;
    - viii. the *Superannuation Industry (Supervision) Act 1993*;
    - ix. an instrument made under an Act referred to in any of subparagraphs (i) to (viii); or
  - d) constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or
  - e) represents a danger to the public or the financial system; or
  - f) is prescribed by the regulations.

## Whistleblower policies

See s.1317AI of the Act

The following businesses will be required to have a whistleblower policy by 1 January 2020:

- > A public company;
- > A large proprietary company; and
- > A large proprietary company that is a trustee of a registrable superannuation entity.

A company is a large proprietary company for a financial year if it satisfies at **least 2** of the following criteria:

- > the consolidated revenue for the financial year of the company and the entities it controls (if any) is \$25 million or more;
- > the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is \$12.5 million or more; and/or
- > the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

The whistleblower policy must set out the following information:

- > the protections available to whistleblowers, including protections under the legislation
- > to whom disclosures that qualify for protection under this Part may be made, and how they may be made;

- > how the company will support whistleblowers and protect them from detriment;
- > how the company will investigate disclosures that qualify for protection;
- > how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection under this legislation, or to whom such disclosures relate;
- > how the policy is to be made available; and
- > any matters prescribed by the regulations.

## Contacting the Victorian Chamber of Commerce and Industry

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Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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