

WHISTLEBLOWER PROTECTION LAWS - PROPOSED AMENDMENTS TO THE CORPORATIONS ACT

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Legal Briefings - By **Paul Wenk, Emily Debney, Amanda Lyras and Alice McDonald**

The Government has released draft legislation significantly amending whistleblower laws: *Treasury Laws Amendment (Whistleblowers) Bill 2017* (the **Bill**).

Through a series of interlocking amendments to various Acts, the Bill seeks to consolidate whistleblower protections in the corporate, financial and credit sectors into a single regime under the *Corporations Act 2001 (Cth)* (the **Act**).¹

The Bill seeks to give effect to a number of the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services report into Whistleblower Protections (**PJC Report**). It does this by:

- broadening the persons eligible for whistleblower protection under the Act. For example, they will now include former employees, contractors and relatives;
- expanding the range of disclosures protected under the Act. For example, disclosure of conduct which constitutes misconduct or an improper state of affairs or circumstances;
- requiring all public companies and large proprietary companies² to have an internal whistleblower policy which satisfies the requirements of the Act;
- imposing stringent obligations to maintain the confidentiality of a whistleblower's identity and introducing pecuniary penalties for disclosing a whistleblower's identity (other than to a regulator); and

- making it easier for whistleblowers to receive compensation by introducing a ‘reverse onus’ of proof.

See our article on the PJC Report: [Whistleblower protections](#).

OVERVIEW OF KEY REFORMS

The amendments protect *eligible whistleblowers* in relation to *protected disclosures* to a *whistleblower disclosee* and, in some cases, disclosures to journalists and members of parliament.³

Eligible whistleblowers: Eligible whistleblowers will now include past and present officers, employees, contractors, employees of a contractors, or associates of corporations. It will also include relatives of such people.

Protected disclosures: Protected disclosures will now include disclosures where the whistleblower has reasonable grounds to suspect that the disclosed information concerns misconduct, or an improper state of affairs or circumstances.

The Bill is silent as to what are reasonable grounds, and what is meant by *misconduct, or an improper state of affairs or circumstances* or its limits.

In a further broadening, the Bill specifically protects disclosures about conduct reasonably suspected to involve offences against particular legislation in the corporate, financial and credit sectors, Commonwealth offences punishable by imprisonment of 12 months or more, or conduct that represents a danger to the public or the financial system.

Good faith not required: It will no longer be necessary for the whistleblower to make their disclosure ‘in good faith’ in order to qualify for the protections under the Act. Accordingly, an ulterior motive for the disclosures will not prevent the application of the protections.

Anonymous disclosures: There is no longer a requirement for a whistleblower to disclose their identity in order to receive the protections;

Whistleblower disclosee: Disclosures can be made to a range of external entities including ASIC, APRA, and the AFP. It is unclear whether the regulator will inform the company of such disclosures and give the company an opportunity to respond.

Disclosure may also be made within a corporation. Such disclosures can be made to an auditor, actuary, director, company secretary, senior manager or other person authorised by the corporation to receive disclosures. Accordingly, not every disclosure to a person in the management chain will receive protection.

Disclosures to journalists and members of parliament: If a whistleblower has previously disclosed information to ASIC, APRA, or the AFP⁴ and a reasonable period of time has passed since that disclosure, the whistleblower is permitted to disclose information to a parliamentarian or journalist if the whistleblower believes on reasonable grounds that if the information is not acted on immediately there is an imminent risk of serious harm or danger to public health or safety, or to the financial system. It is hoped that guidance will be provided on what will constitute a 'reasonable period of time' for the purpose of these provisions.

Detriment suffered by whistleblowers: Broader types of detriment which may be suffered by whistleblowers has been specified. These reflect those under the Fair Work (Registered Organisations) Act 2009.⁵ They include, for example, damage to property, harassment, physical harm or injury.

IMPLICATIONS

REQUIREMENT TO HAVE A WHISTLEBLOWER POLICY

The amendments require public companies and large proprietary companies to have a policy that sets out:

- the protections available to whistleblowers, including under the Act;
- how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures; and
- any matters prescribed by regulation.

This policy must be made available to people who may be eligible whistleblowers in relation to the company. As a practical matter, corporations will need to consider how the whistleblower policy will be made readily available to such individuals. For example, it is unclear whether placing the policy on a corporation's website will be sufficient.

Corporations will need to review whistleblowing policies and internal communication processes (particularly HR policies) to ensure they meet the requirements of the new legislation. The broad definitions of protected disclosure and eligible whistleblowers mean that it is unlikely they will cover the wide range of conduct and people protected by the Bill.

Failure to comply with these policy requirements is an offence of strict liability carrying a penalty of AU\$63,000.

PENALTIES FOR DISCLOSURE OF WHISTLEBLOWER'S IDENTITY

Disclosure of a whistleblower's identity will also become a civil penalty offence. Contravention will carry a maximum civil penalty of AU\$200,000 for an individual and AU\$1 million for a corporation.

This aspect of the Bill is problematic, as technical breaches of the legislation can occur absent knowledge of these strict confidentiality requirements. The Bill also does not exempt disclosures to legal advisers from these strict confidentiality requirements, which means consent will need to be sought from a whistleblower in order for a person to obtain legal advice (or to on-disclose to any person on a 'need to know' basis who is not a regulator).

COMPENSATION FOR WHISTLEBLOWERS

Compensation will be available where a person engages in conduct that causes damage to any other person in the belief or suspicion that any person has or may make a protected disclosure and this belief or suspicion is a reason for their conduct.

In order to be eligible for compensation, the claimant need only prove that the defendant engaged in conduct, and that the claimant suffered damage because of that conduct. Assuming this is proved, in order to avoid liability, the defendant must prove that either they did not have the requisite belief or suspicion, or that it was not a reason for their conduct (ie. there is a reverse onus of proof).

It is not necessary for the claimant to prove that:

- a protected disclosure has *actually* been made;
- the defendant had actual knowledge of a disclosure; or
- the defendant intended their conduct to cause damage to the claimant.

In a related amendment, the Bill proposes to provide costs protection for whistleblower compensation claims. A claimant will only be ordered to pay costs in unsuccessful compensation claims if the claim is commenced vexatiously or without reasonable cause.

WHERE TO FROM HERE?

The Government's Expert Advisory Panel will now consider and advise the Government on how the draft legislation measures up against the recommendations in the PJC Report.

The second phase of the Expert Panel's work will involve consideration of the remaining recommendations in the PJC Report, which may include consideration of:

- establishment of a statutory Whistleblower Protection Authority;
- development of a rewards-based whistleblower incentive arrangements (similar to the US 'bounty' system); and
- carving out whistleblowing from the reach of confidentiality provisions in settlements.

The Government is moving ahead with the proposed legislation in line with its previous commitment under the Open Government National Action Plan to introduce legislation by December 2017.

SUBMISSIONS

Submissions on the Exposure Draft close on **3 November 2017**.

ENDNOTES

1. In addition to the *Corporations Act*, amendments have been proposed to the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and *Superannuation Industry (Supervision) Act 1993*. Similar amendments are proposed to the *Taxation Administration Act 1953* for whistleblowers in tax matters.
2. For meaning of 'large proprietary company' see section 45A(3) of the *Corporations Act*.
3. Disclosures to a legal practitioner are also protected if the disclosure is made for the purpose of obtaining legal advice.
4. Or other persons prescribed by regulation under the Act.
5. See section 337BA of the Fair Work (Registered Organisations) Act 2009.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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