New whistleblowing laws – are you ready?

Background

The Australian corporate whistleblowing regime was first introduced in 2004 and has subsequently expanded in a piecemeal way. It does not cover all of the field, has not been adjusted to reflect the changing remits of corporate regulators, and significant gaps in protection have arisen.

In 2014 a Senate committee recommended a review of Australia's corporate whistleblower framework to bring it closer to Australia's public sector whistleblower framework. In late 2016, the Federal Government released a national action plan under which it committed to strengthening whistleblower protections in the corporate sector.

So after much delay, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) (**Act**) was passed by the Federal parliament on 19 February 2019. In general terms the Act:

- amends the *Corporations Act 2001* (Cth) to strengthen and consolidate whistleblower protections for the corporate and financial sector;
- creates 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; and
- repeals the existing financial sector whistleblower regimes.

In practical terms the Act creates a significant compliance burden for corporations, with significant potential penalties for non-compliance. This article focusses on the new whistleblower protections to cover the corporate and financial sectors. Similar changes have been made to provide protections in relation to disclosures of tax affairs to the Australian Taxation Office (**ATO**).

The amendments introduced by the Act will commence operation from 1 July 2019.

The new whistleblower laws – the what, the who, and the how

Entities about which a qualifying disclosure may be made

All companies, regardless of size and type, are subject to these new provisions and may be the subject of a disclosure that qualifies for protection (called a "qualifying disclosure"). In addition, disclosures concerning banks, life insurers, general insurers, superannuation entities and trustees of superannuation entities are all covered by this new regime.

Conduct about which a qualifying disclosure may be made

The conduct that may be the subject of a **qualifying disclosure** includes information where the whistleblower has reasonable grounds to suspect:

- misconduct, or an improper state of affairs or circumstances in relation to a company (or a related company), including in relation to the tax affairs of that company (or an associate of that company) – this broad category could include not only unlawful conduct but also that which indicates a systemic issue that would assist the relevant regulator in performing its functions;
- conduct that represents a danger to the public or the financial system – this potentially covers a broad range of conduct that could pose a significant risk to the stability of, or confidence in, the financial system, whether or not it is in breach of any law;
- indicates contravention of any law administered by the Australian Securities and Investments Commission (**ASIC**) and/or the Australian Prudential Regulation Authority (**APRA**);
- the information may assist the eligible recipient, such as the ATO, to perform functions or duties in relation to the tax affairs of the company (or an associate of the company); or
- indicates an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more.

Who can make a qualifying disclosure?

A qualifying disclosure can now be made by an individual who is or has been in a relationship, such as employee, with the company about which the disclosure is made. These individuals are called "**eligible whistleblowers**". Previously it was necessary for a whistleblower to be a current officer, employee or contractor in order for a disclosure to be protected, meaning that past employees, for example, could not make a protected disclosure.

Eligible whistleblowers now include:

- past or current officers or employees;
- an individual who previously or currently supply services or goods (whether paid or unpaid);
- an employee of a person who previously or currently supplies services or goods (whether paid or unpaid);
- an individual who is or has been an associate of the company; or
- a relative or dependent of any of the above.

Motivation for disclosure is irrelevant

Previously, it was necessary for a disclosure to have been made in good faith in order to be protected. Practically that requirement often undermined the whistleblower protections, as whistleblowers often had other grievances or motivations against a company.

The motivation of the eligible whistleblower is now irrelevant and a whistleblower needs only to have a reasonable ground to suspect misconduct, an improper state of affairs or circumstances, conduct that represents a danger to the public or the financial system, or a contravention of laws.

How can a qualifying disclosure be made?

A disclosure may qualify for protection if it is made to:

- an **eligible recipient;**
- ASIC, APRA, or the ATO; or
- a lawyer for the purposes of obtaining legal advice or representation on the operation of the new whistleblower regime.

An eligible recipient is any of the following:

- an officer or senior manager of the company (or a related company) – the initial draft bill provided that disclosures should be allowed to be made to an even broader range of employees, "supervisors and managers";
- an auditor, or a member of an audit team conducting an audit, of the company (and includes both internal and external auditors);
- a registered tax agent or BAS agent who provides services to the company;
- any actuary appointed in relation to the company; and
- a person authorised by the company to receive disclosures that may qualify for protection – commonly called a "Whistleblower Protection Officer" or the like.

Public interest disclosures and emergency disclosures

The amendments create the new concepts of "public interest disclosure" and "emergency disclosure", which may be protected in certain circumstances.

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

- the whistleblower has previously disclosed the information to ASIC or APRA;
- 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 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.

An **emergency disclosure** to a journalist or parliamentarian qualifies for protection if:

- the whistleblower has previously disclosed the information to ASIC or APRA;
- the whistleblower has reasonable grounds to believe that the information concerns a substantial and imminent danger the health or safety of one or more persons, or to the natural environment;
- the whistleblower has given written notification to the authority to which the previous disclosure was made that they intend to make a public interest disclosure of the information previously disclosed – there is no waiting time period; and
- no more information is disclosed than is reasonably necessary to inform the recipient of the substantial and imminent danger.

Public interest and emergency disclosures can be made only to a member of Federal parliament or of a State or Territory parliament, or a journalist (as defined).

It is important to note that public interest disclosures and emergency disclosures only operate where a whistleblower has made a disclosure to ASIC or APRA, and not where a disclosure has been made to an "internal" eligible recipient.

Anonymous disclosures

The existing whistleblower protection regimes generally require that a whistleblower provides his or her name when making a disclosure in order to qualify for protection.

The new provisions remove the requirement that the discloser provide his or her name when making a protected disclosure, allowing for anonymous disclosures. The amendments also require companies to take steps to protect the confidentiality of the disclosure's identity and significant penalties may be imposed where a company breaches those obligations.

The provisions ensure that:

- it is not an offence, of itself, to disclose the information regarding the suspected or actual wrongdoing disclosed without revealing the whistleblower’s identity;
- it is not an offence to disclose the identity of a whistleblower, or information likely to lead to his or her identification, to (or between) a regulator; and
- it is not an offence to disclose the identity of a whistleblower, or information likely to lead to his or her identification, to a legal practitioner for the purposes of obtaining legal advice or representation.

It is also not an offence to disclose the identity of a whistleblower, or information likely to lead to his or her identification, with the consent of the whistleblower.

Can we investigate?

To ensure that companies that receive a qualifying disclosure can properly investigate the misconduct disclosed, the new law provides a further exception where:

- information that might lead to the identification of the whistleblower is disclosed, but the actual identity of the whistleblower is not in fact disclosed;
- the disclosure of that information is reasonably necessary for the purposes of investigating the conduct disclosed by the whistleblower; and
- all reasonable steps are taken to reduce the risk of the whistleblower being identified.

Companies will need to carefully assess whether a matter has to be conducted as a protected disclosure (meeting the above requirements) or whether other investigate processes can be used (such as where the matter is a personal work-related grievance (see below)).

Protections and remedies for whistleblowers

The level of other protections provided for whistleblowers by the new laws have been increased by:

- strengthening the immunities provided to whistleblowers and ensuring that information they disclose is not admissible in evidence against them in any prosecution;
- broadening the prohibition against victimisation of whistleblowers and other individuals who suffer victimisation in relation to a disclosure; and
- requiring public companies, large proprietary companies and registerable superannuation entities to have whistleblower policies, and to make those policies available to their officers and employees (see comments below).

The remedies and protections available to whistleblowers and other individuals who suffer detriment (or a threat of detriment) in relation to a qualifying disclosure have been expanded to include:

- making it easier for individuals to claim compensation;
- ensuring companies that are or were employers of a whistleblower or other individual who suffer detriment, are liable if they contributed by act or omission to detrimental conduct;
- extending the range of orders a court may make in respect of whistleblowers and other individuals who suffer detriment, including injunctions and apologies;
- clarifying that a court may order reinstatement of a person whose employment is terminated, or purported to be terminated, in relation to the making of a protected disclosure;
- providing that a court may order exemplary damages if it thinks appropriate; and
- reversing the burden of proof in compensation claims once the claimant has pointed to evidence that suggests a reasonable possibility that a defendant has engaged in conduct that caused detriment or threatened to do so.

The concept of what is a "detriment" has also been expanded 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; and
- damage to a person’s property, reputation, or business or financial position.

Personal work-related grievances

The new provisions limit the protections for disclosures made about solely personal employment related matters (known as a personal work-related grievance), while preserving protection for disclosures about systematic issues or reprisals against a whistleblower.

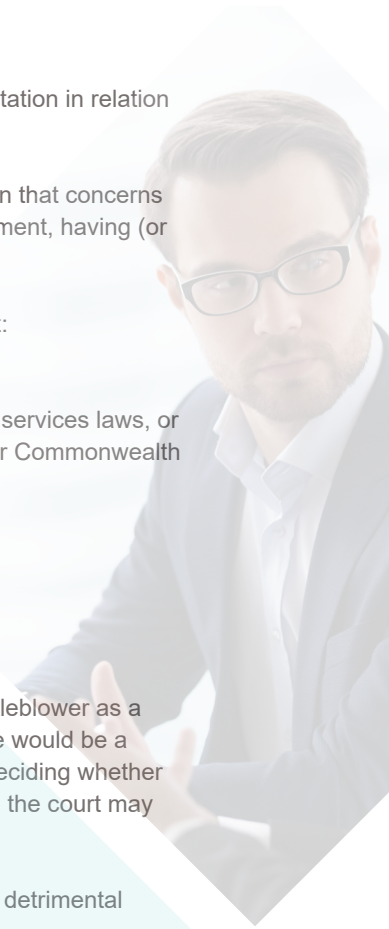
A disclosure of a personal work-related grievance will remain protected if:

- it concerns detriment to the discloser in contravention of the victimisation provisions; or
- 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.

A disclosure concerning a personal work-related grievance means the disclosure of information that concerns a grievance about any matter in relation to the whistleblower's employment, or former employment, having (or tending to have) implications for the whistleblower personally.

However, a disclosure is not a personal work-related grievance (and will be fully protected) if it:

- has significant implications for the company to which it relates;
- 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; or
- concerns conduct that represents a danger to the public or the financial system.



Liability of employers for the actions of their officers and employees

The new provisions provide that employers can be held liable for detrimental conduct to a whistleblower as a result of the actions by one of its officers or employees. While it was initially proposed that there would be a "due diligence defence", that defence was removed from the Act and the Act provides that, in deciding whether to make an order in relation to an employer because of the conduct of their officer or 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.

These matters are not intended to limit the matters the court may take into account in deciding whether to make an order. In considering whether an employer took reasonable precautions and exercised due diligence to avoid the detrimental conduct, the following matters may also be relevant:

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

Requirement to have a whistleblower policy

The existing whistleblower provisions do not require companies to have or to implement internal systems to deal with whistleblower disclosures.

The Act requires public companies and large proprietary companies (those who meet at least two of the following criteria: consolidated revenue of $25M or more, consolidated assets of $12.5M or more, or 50 or more employees) to have a whistleblower policy. That policy must contain 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 from detriment;
- how investigations into a disclosure will proceed;
- how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures; and
- how the policy will be made available.

The Act requires those companies to have a compliant policy in place by 1 January 2020. The requirement to have a whistleblower policy and to make it available to officers and employees, and the penalty that may be imposed for non-compliance, is designed to improve corporate culture and transparency in relation to disclosures of wrongdoing in the workplace.

Additional matters to be included in a whistleblower policy may be prescribed by regulation. This ensures that the whistleblower policies can adapt to developments in whistleblower protections and remedies in the future.

Interestingly, this requirement to have a policy was not extended more broadly to all companies, regardless of type or size, so as to avoid creating a disproportionate regulatory burden.

Failure to comply with the requirement to have and make available a whistleblower policy is an offence of strict liability with a penalty of $126,000 for a company.

Penalties for breach of whistleblower protections

It will now be a civil penalty contravention to disclose a whistleblower's identity or to victimise a whistleblower, to be proven applying the civil standard of proof (on the balance of probabilities). Contravention of the new section remains an offence however, so that the regulator can choose to prosecute any contravention as an offence or as a civil penalty, as appropriate.

Penalties vary depending on a contravention, but as a guide, the penalties for breaching the confidentiality of the identity of a whistleblower or victimising a whistleblower are:

- for an individual - 5,000 penalty units ($1.050M), or if a court can determine the benefit derived or detriment avoided, three times that amount; and
- or a body corporate – the greater of 50,000 penalty units ($10.5M), three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to 2.5 million penalty units ($525M)).

Application

The amendments will apply in relation to whistleblower disclosures made on or after 1 July 2019, including disclosures made after that date in relation to events occurring before that date. The amendments will also apply to victimisation of whistleblowers after 1 July 2019, and to a whistleblower's right to compensation and other remedies, in relation to disclosures that have been made prior to this date.

Implications for companies – how to prepare your organisation for compliance

Given the significant compliance burden for employers, and the hefty penalties for non-compliance, we strongly recommend that companies start preparing for the introduction of the new provisions as soon as possible.

In making their preparations, employers should consider the following:

- putting in place a new or revising an existing whistleblower policy to comply with the new legislative position – it is highly unlikely that any existing policy will meet these new requirements;
- ensuring that the Board fully understands the new whistleblowing regime and the financial and non-financial risks that can arise from non-compliance;
- ensuring that employees are aware of how they can make a complaint if they wish to do so and that they are protected from victimisation;
- educating and training senior managers and officers to ensure that any disclosures that are made are handled appropriately; and
- implementing a system that enables the investigation of complaints, in particular anonymous complaints, while meeting the protections put in place by these new provisions.

Gadens can assist organisations prepare for commencement of the new whistleblower provisions, including by reviewing existing whistleblowing policies or drafting new policies and conducting training for senior managers on the new protections.

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