



Australian Government Releases Draft of Private Sector Whistleblower Protection Law

IN SHORT

The Situation: Currently, limited protections exist in Australia for private sector whistleblowers against victimization and detrimental treatment.

The Development: The Australian government has released draft law that establishes a whistleblower protection regime similar in structure to the regime in the *Public Interest Disclosure Act 2013* (Cth) that currently only covers the Australian public sector.

Looking Ahead: All Australian companies, banks, insurance companies and superannuation funds will need to review their governance structures to ensure compliance with the new laws from 1 July 2018.

On 23 October 2017 the Australian government released an exposure draft of the *Treasury Laws Amendment (Whistleblowers) Bill 2017* ("Bill"), which proposes amendments to the *Corporations Act 2001* (Cth) ("Corps. Act") to create a whistleblower protection regime that covers Australian companies, banks, insurers and superannuation funds. The draft Bill also introduces similar protections for breaches of taxation laws and tax avoidance.

Protections for Whistleblowers Who Make Disclosures

The draft Bill provides whistleblowers with broad protections against civil and criminal liability, victimisation and adverse action in employment where a whistleblower makes disclosures to:

- Public regulators (the Australian Securities and Investments Commission ["ASIC"] and Australian Prudential Regulation Authority ["APRA"]);
- The Australian Federal Police; or
- Auditors, actuaries, directors or persons responsible to receive disclosures.

Whistleblowers will be protected where they have reasonable grounds to suspect that an organisation:

- Is involved in conduct that represents a danger to the public or financial system;
- Is involved in misconduct or 'an improper state of affairs or circumstances';
- Has breached legislation regulating companies and the banking, insurance and financial services industries; or
- Has breached Commonwealth criminal laws.

Expanding the Definition of 'Eligible Whistleblowers'

Currently the Corps. Act protects officers, employees and independent contractors. The draft Bill expands the definition of 'eligible whistleblower' to include:

- Employees of individuals or companies who provide services or goods to the organisation;
- Trustees of superannuation funds; and
- The spouse, child or dependent of any eligible whistleblower.

Notably, if these laws are implemented, Australian companies can expect unknown third parties to make protected disclosures (e.g., the spouse of an accountant who provides consultant auditing services).

Protecting Disclosures to Members of Parliament or Journalists

The draft Bill also protects whistleblowers in the corporate sphere, but not in relation to taxation, who make disclosures to a journalist or a member of state or federal parliament where:

- They have first made a disclosure to a regulator or the federal police;
- A reasonable period of time has passed since that disclosure; and
- The whistleblower has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or the financial system.



If these laws are implemented, Australian companies can expect unknown third parties to make protected disclosures.



Claims for Compensation

The draft Bill entitles whistleblowers to commence claims for compensation. However, early recommendations for the regime to include a bounty or reward-based compensatory mechanism have not been acted upon. Compensation is only payable where a whistleblower can prove that they have suffered actual loss or damage.

Significantly, the draft Bill states that where an eligible whistleblower litigates a claim for compensation (and is unsuccessful), the court may only make an order that the whistleblower pay the defendant's legal costs where the proceedings were commenced vexatiously or without reasonable cause. In effect, this will give rise to a quasi "no-cost" jurisdiction for whistleblower compensation litigation similar to that which exists for employment-related claims made under the *Fair Work Act 2009* (Cth) ("FW Act").

We anticipate that this will result in increased employment related litigation for many large employers including both claims for compensation under the Corps. Act and claims under the FW Act where employees' allege they were treated adversely because they made complaints in relation to their employment.

Obligation to Publish Whistleblower Policies

The draft Bill provides that all Australian public companies and large private companies are required to publish a whistleblower policy by 1 January 2019. Such policies need to explain how companies will respond to disclosures and protect whistleblowers. Companies will need to distribute such a policy to all employees and provide appropriate training before 1 January 2019.

It is an offence under the draft Bill for an organisation not to have a whistleblower policy in place by 1 January 2019 (punishable by a fine of up to \$12,600).

Also, if an individual or organisation breaches the draft Bill by disclosing the identify of a whistleblower, penalties of up to \$200,000 (individual) or \$1 million (company) may be imposed. Directors and officers insurance policies that seek to indemnify individuals against liability to pay such a penalty are void and unenforceable (by reason of section 199A(2)(b) of the Corps. Act).

Broader Implications

We anticipate that this new regime will provide a strong incentive for eligible whistleblowers to call out risky or unscrupulous behaviour. For example, conduct associated with cartels, price fixing, bribery and corruption, wage fraud, labour exploitation, work health and safety risks and compliance with antimoney laundering and counterterrorism financing regulations.

Additional whistleblower activity will create opportunities for increased enforcement actions by a broad range of regulators, including ASIC, APRA, the Australian Competition and Consumer Commission, the Fair Work Ombudsman and Health and Safety Regulators.

Interested parties can make submissions about the draft Bill before 3 November 2017.

THREE KEY TAKEAWAYS

1. The draft Bill entitles a broad range of whistleblowers (including employees' family members) to make protected disclosures about conduct they believe represents a danger to the public or financial system.
2. All Australian public companies and large private companies are required to publish a whistleblower policy by 1 January 2019. Such policies need to explain how companies will respond to disclosures and protect whistleblowers.
3. Penalties and compensation orders can follow the victimization of a whistleblower or a failure to comply with the draft Bill. For example, if an individual or organisation discloses the identify of a whistleblower, penalties of up to \$200,000 (individual) or \$1 million (company) may apply.

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