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WHITE PAPER

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The Age of the Corporate Informant: Australia Expands Private Sector Whistleblower Protections

Sweeping changes to corporate whistleblowing laws in Australia came into effect on 1 July 2019. The reforms provide for a range of additional protections to eligible whistleblowers, including a right of anonymity/confidentiality, immunity from suit, and an avenue to seek compensation if subjected to retaliation or detrimental conduct.

These protections fundamentally alter the way that public and large proprietary companies must investigate and respond to whistleblowing.

This *White Paper* explores the new reforms and provides guidance on mitigating risk in the process of investigating whistleblower disclosures. We also provide our predictions for how the enhanced protections will fit within the current climate for increased regulatory action.

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INTRODUCTION

Following an extensive phase of public consultation, the Australian government has introduced enhanced whistleblower protections for the private sector.[1] While some protections were available under the existing model, limited provisions were in place to incentivise corporate whistleblowing.

The new package of reforms is delivered under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) ("Act") which came into effect on 1 July 2019.

This *White Paper* provides guidance on the requirements of the Act. It also sets out our predictions for how the enhanced whistleblower protections are likely to fit within the current regulatory climate in Australia; particularly in the wake of the Financial Services Royal Commission.

WHO DO THE LAWS APPLY TO?

The expanded whistleblower protections come into effect through changes to the *Corporations Act 2001* (Cth) and *Tax Administration Act 1953* (Cth). They will apply to all public and large proprietary companies, banks and other deposit-taking institutions, insurers, and superannuation entities.

For a disclosure to be covered by the expanded protections a person must:

1. Be an Eligible Whistleblower;
2. Make a Protected Disclosure, by disclosing information where there are reasonable grounds to suspect that the information concerns misconduct or an improper state of affairs in relation the company/entity (or a related body); and
3. Make the disclosure to either a regulator or an Eligible Recipient

ELIGIBLE WHISTLEBLOWERS

A broad range of individuals may now qualify as an Eligible Whistleblower:

Internal Whistleblowers

Any current or former:

- Employees and officers;
- Associates of the entity (as defined in the *Corporations Act 2001*); or
- Superannuation trustee or investment managers (or an employee, officer, supplier, or independent contractor of such an entity)

External Whistleblowers

Any current or former suppliers or independent contractors (whether paid or unpaid)

Relatives and dependants of any of the individuals above can also be an Eligible Whistleblower. For example, it is possible for a spouse of an accountant who provides auditing services to fall within the protections under the Act. Companies can therefore expect unknown third parties to also fall within the ambit of the enhanced protections if they make a disclosure which qualifies for protection.

PROTECTED DISCLOSURES

A Protected Disclosure is made where an Eligible Whistleblower has reasonable grounds to suspect that the information disclosed concerns misconduct, or the improper state of affairs or circumstances, regarding the company/entity in question. This extends to conduct which:

- Contravenes the laws governing corporations, banks, insurers, and superannuation entities;
- Is an offence under any other Commonwealth law which carries a criminal penalty of at least 12 months imprisonment; and/or
- Represents a danger to the public or the financial system.

Although the new protections are only available for disclosures made after 1 July 2019, a disclosure may still qualify for protection if it concerns conduct which occurred before the commencement date.

Personal Work-Related Grievances

Importantly, disclosures will not qualify for whistleblower protection where they concern a personal work-related grievance. This generally extends to disclosures of information relating to the discloser's employment and having personal implications for the discloser, such as:

- An interpersonal conflict between the discloser and another employee;
- A decision relating to the employment of the discloser (such as a promotion or transfer); and
- A decision to take disciplinary action against the discloser.

However, the personal work-related grievances carve out itself includes a number of exceptions which will pose challenges for both potential whistleblowers and employers when assessing whether a disclosure qualifies for protection. For example, a disclosure that has "significant implications" for a company, such as one concerning a systemic issue, will not fall within the definition of a personal work-related grievance and can therefore qualify as a Protected Disclosure. A disclosure made about bullying or harassment carried out in front of another employee (as opposed to having been experienced by that employee directly) is also unlikely to fall within the carve out.

Tax Disclosures

In the case of a tax-related disclosure the threshold for a Protected Disclosure is substantially lower. It extends to also include information which may assist the tax office in performing its functions and duties under Australian tax laws.

ELIGIBLE RECIPIENTS

Depending upon the nature of the entity in question (such as whether it is a body corporate or a superannuation entity) disclosures may be made by an Eligible Whistleblower to:

Disclosure to Regulator

- Australian Securities & Investment Commission ("ASIC")
- Australian Prudential Regulation Authority ("APRA")
- Any other Commonwealth authority later prescribed by the regulations (the Federal Police are no longer expressly mentioned, but may be provided for in the regulations)

Disclosure to Eligible Recipient

Any of the following personnel in relation to the company/entity in question:

- A director or officer;
- A senior manager;
- An auditor or member of the audit team;
- A trustee or director of a corporate trustee of a superannuation entity; and
- Any other person authorised by the company to receive Protected Disclosures.

EMERGENCY AND PUBLIC INTEREST DISCLOSURES

In limited circumstances, an Eligible Whistleblower can also qualify for protection under the expanded whistleblower laws where he/she makes an emergency or public interest disclosure to a journalist or a member of Parliament.

An emergency disclosure is available where a Protected Disclosure has previously been made to a regulator or prescribed body (such as ASIC or APRA), and the whistleblower has grounds to believe that the information concerns a "substantial and imminent danger" to the health or safety of a person or to the natural environment. An emergency disclosure must also be limited to disclosing information no greater than is necessary to inform the recipient of the substantial and imminent danger.

The concept of a public interest disclosure is a new addition to the Act (since its exposure draft). A public interest disclosure may be made where an Eligible Whistleblower:

- Has made a prior protected disclosure to a regulator or prescribed body;
- At least 90 days have passed since the disclosure;
- The whistleblower does not have reasonable grounds to believe that action is being taken to address the conduct or state of affairs in question, and has reasonable grounds to believe that making a further disclosure of the information would be in the public interest; and
- First gives the regulator or prescribed body a written notification of their intention to make a public interest disclosure.

WHISTLEBLOWER PROTECTIONS

If a disclosure falls within the ambit of the new regime, substantive protections will apply to protect the whistleblower against detriment arising from his or her disclosure.

Confidentiality of Identity

For many companies, the most fundamental protection under the new laws is a prohibition against any person disclosing a whistleblower's identity, or any information that is likely to lead to their identification (such as specific information about the whistleblower's position within the company or events which they took part in). This applies to anyone who has obtained the whistleblower's identity or identifying information either directly or indirectly as a result of a Protected Disclosure.

A breach of this prohibition will incur substantial civil penalties and can also give rise to criminal liability (punishable by fines and/or imprisonment).

The only exceptions to the general prohibition are:

Category	Exception
Self-Reporting	Where the identity or identifying information of a whistleblower is disclosed to ASIC, APRA, or the Federal Police
Obtaining Legal Advice	Where the information is disclosed to a lawyer for the purpose of obtaining legal advice about the whistleblower protections
Consent	Where the disclosure is made with the consent of the whistleblower
Limited Exception for Internal Investigations	Where the disclosure of identifying information (but, importantly, not the identity of the whistleblower) is reasonably necessary for the purpose of investigating a whistleblower disclosure made within the company, and, only if person takes all reasonable steps to reduce the risk of the whistleblower being identified as a result

Meeting the last of these exceptions will be critical for companies to ensure that they are able to properly investigate a whistleblower disclosure.

It will be important to identify internal disclosures that qualify for whistleblower protection immediately once they are made, and robust procedures will need to be in place to ensure that the proper measure of confidentiality is applied to the disclosure. For example, if a disclosure is made to a whistleblower's senior manager or to an authorised member of the Human Resources team, appropriate procedures will need to be in place to screen all identifying information from any internal company reporting to avoid breaching the anonymity obligation. This includes reports to the board or other members of senior management. Care will then need to be exercised to ensure that, if an internal investigation is conducted, all reasonable steps are taken to safeguard the anonymity of the whistleblower.

Given the potential complexity of this protection, and the exceptions to it, there will often be a need for in-house or external legal counsel to play an even greater role in internal investigation processes.

Protection Against Liability

Whistleblowers will qualify for immunity against being subjected to any civil, criminal, or administrative liability for making a Protected Disclosure. This extends to the enforcement of any contractual or other rights that might ordinarily apply (such as obligations of confidentiality), but does not prevent a whistleblower from being the subject of liability for any conduct that is revealed by their disclosure.

Right to Compensation

A whistleblower will be entitled to bring a claim for compensation if they have suffered loss or damage as a result of any actual or threatened detrimental conduct (retaliation) due to their whistleblower disclosure. This protection also applies to potential whistleblowers who are considering making a Protected Disclosure.

The definition of detrimental conduct under the Act encompasses a broad range of potential avenues for retaliation. It includes:

- Dismissal from employment;
- Demotion or discrimination between the whistleblower and other employees at the same company or entity;
- Harassment or intimidation;
- Injury, psychological harm, or damage to property;
- Reputational damage; and/or
- Financial harm.

A range of compensation orders are available under the expanded regime, such as monetary compensation, injunctive relief to prevent or remedy the effects of the detrimental conduct, an apology, reinstatement of employment, and even exemplary damages.

A significant aspect of this protection is that a whistleblower will now be immune to adverse costs orders if he or she unsuccessfully brings a claim for compensation. This means that, unless the claim was brought vexatiously (without any merit), a whistleblower cannot be ordered to pay a defendant's legal costs of the proceedings.

PUBLICATION OF WHISTLEBLOWER POLICIES

Under the new reforms, all public and large proprietary companies operating in Australia are required to publish a whistleblower policy and make that policy available to all officers and employees of the company.

We touched on the requirements for a compliant whistleblower policy in our previous *Commentary*.[2] The policy must contain an explanation of the whistleblower protections that are available under the new laws together with information about how, and to whom, protected disclosures may be made. The policy must also contain information about how the company will investigate whistleblower disclosures and ensure the fair treatment of any employees that are mentioned in a disclosure.

Policies issued prior to the new reforms are unlikely to comply with these requirements, and will need to be reviewed and updated. It is imperative that the implementation of new whistleblower policies are coupled with additional training to ensure that key personnel are properly equipped to navigate the obligations arising under the new laws.

Compliant whistleblower policies must be in place by 1 January 2020. Failing to have a proper policy in place will attract significant monetary penalties.

GOVERNMENT REVIEW

The Act requires that the Australia government review the operation of the whistleblower protection laws once the current package of reforms have been in place for five years. This will ultimately involve a written report being tabled in Parliament and may result in further amendments.

IMPACT OF THE REFORMS: MITIGATING RISK AND FUTURE PREDICTIONS

The enhanced protections bring Australia one step closer to the comprehensive regime that applies to securities violations in the United States. There is little doubt that Australian companies will now see additional inside information being passed to the regulators by corporate whistleblowers.

In the wake of the Financial Services Royal Commission, there has been an increased focus on corporate misconduct at all levels—from the chairman to branch employees. As a result, there will likely be individuals in many organisations considering whether conduct which previously seemed insignificant (or was ignored) is problematic and should be reported. The new whistleblower laws potentially provide a vehicle for such disclosures. ASIC is also likely to promote the new protections as part of its arsenal to gather evidence of misconduct, and ultimately, pursue regulatory actions given the Royal Commission's recommendations about its enforcement approach.

As mentioned above, the new obligation of anonymity presents a number of serious challenges for internal investigations, which now need to be handled in a way which does not compromise a whistleblower's "cover". Although obtaining consent for the disclosure of the whistleblower's identity is one workaround that is available, most individuals who come forward are unlikely to want the company or senior management to know that they are a whistleblower. It will therefore be imperative that any investigation ensures not only the confidentiality of a whistleblower's identity, but also the confidentiality of any information that is likely to identify the whistleblower.

Companies in the United States have taken a number of steps to ensure that investigations are properly conducted while maintaining confidentiality, including providing employees with anonymous reporting mechanisms and forming a separate internal investigations group within the legal department to review allegations of misconduct by whistleblowers and other sources. The group, which is kept independent from all other

corporate functions, conducts investigations under privilege and follows procedures designed to maintain whistleblower confidentiality, minimise retaliation risks, and guard against any perceptions of bias. This is particularly important in situations where the risk of identification is high because the whistleblower has raised concerns about someone in his or her direct reporting line or about matters which only a few people within the company would have knowledge.

The introduction of robust procedures for investigating whistleblower complaints will be critical to effectively managing the confidentiality requirements while ensuring that investigations are properly conducted and sufficiently documented to avoid subsequent second-guessing by the regulators or potential litigants. Such procedures should provide guidance on issues such as communications with whistleblowers during the course of the investigation (on both related and unrelated matters) and communications regarding the investigation with the audit committee or other board committees, senior executives, and the company's external auditors and consultants. For example, it is important that the company's interactions with the whistleblower on unrelated issues, such as compensation and performance evaluations, can be shown to have been handled completely independently and without reference to the existence of any whistleblower complaint.

From an employment perspective, we expect to see an increase in litigation due to the availability of compensation, immunity from suit, and costs protection under the expanded regime. This will particularly be the case where employees feel that they have been subjected to adverse action due to either a complaint which they have made in the course of their employment, or being mentioned in a whistleblower disclosure.

There is also an inherent tension between the new right of anonymity and any statutory or contractual obligations to afford procedural fairness to employees or executives who are the subject of a whistleblower complaint. We can envisage scenarios where a company may be prohibited from putting the content of a whistleblower disclosure to an employee accused of misconduct where doing so would reveal information which is likely to identify the whistleblower in question (and thus, contravene the obligation of confidentiality). These competing obligations will need to be balanced on a case by case basis, depending on the nature of any potential misconduct disclosed and the extent to which it is fact sensitive to the whistleblower's identity. But generally speaking, undertaking a comprehensive investigation may reveal further corroborative information which can be put to the employee in a way which avoids breaching either the anonymity or procedural fairness obligations.

As part of the future review provided for under the Act, the new regulatory landscape may see the Australian government also consider adopting a "'reward" based model for whistleblower compensation. This model has proven successful in the United States, where the U.S. Securities and Exchange Commission's ("SEC") program under the Dodd-Frank Act offers awards to eligible whistleblowers who provide information which leads to successful enforcement actions with a total civil penalty in excess of US$1 million. Awards under the program have been seen as high as US$30 million and serve as a significant motivation for individuals to divulge insider knowledge of securities or fraud violations. When compared against ASIC and adjusted for population difference, the SEC received, on average, around 90% more whistleblower tips between FY 2016 and FY 2018.

FIVE KEY TAKEAWAYS

1. Australia's new corporate whistleblower laws, under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth), recently took effect on 1 July 2019.
2. For many companies the most significant aspect of the reforms will be the general prohibition against disclosing the identity, or any information likely to identify, a whistleblower (unless one of the limited exceptions apply). The anonymity obligation presents a number of serious challenges for internal investigations, which will need to be handled in a way which avoids compromising a whistleblower's "cover".
3. Based on the Firm's experience with similar anonymity obligations in the United States, we expect that companies will need to establish clear lines of responsibility for handling whistleblower disclosures and preserving whistleblower anonymity. Divorcing internal investigations from other corporate functions should also be considered to mitigate against any risks of retaliation and perceptions of bias.

4. All public and large proprietary companies are required to publish a whistleblower policy by 1 January 2020. The policy must address the protections that will be available to whistleblowers, and also explain how the company will investigate and respond to any protected disclosures. It is imperative that this is coupled with additional training provided to key personnel to ensure they are properly equipped to comply with the obligations that arise under the new laws.
5. Looking ahead, we anticipate that the enhanced protections will encourage additional whistleblowers to come forward; arming regulators with further ammunition to take enforcement actions. In the wake of the Financial Services Royal Commission, ASIC in particular is likely to promote these new protections to gather evidence of misconduct and ultimately to pursue actions in the financial services sector and elsewhere. We also expect to see an increase in employment-related litigation due to the availability of compensation, immunity from suit, and costs protection under the expanded regime.

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ENDNOTES

1 We commented on an early exposure draft of the reforms in 2017. A link to our initial *Commentary* is available here.

2 A link to our initial *Commentary* is available here.

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