Australia has a new Whistleblower Protection Regime. Are you prepared?

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In brief

On 19 February 2019, Parliament passed the *Treasury Laws Amendment (Enhancing Whistleblowers Protections) Bill 2018* (**Bill**) which introduces a new and far reaching whistleblower protection regime for the private sector.

The new regime applies to all companies, banks, general insurers, life insurers, superannuation entities and other prescribed regulated entities. If the Bill receives Royal Assent by 1 April 2019, the legislation will come into operation as early as 1 July 2019.

Public and large proprietary companies will need to introduce or update whistleblower policies to meet the new legislative requirements. Additional safeguards will also need to be applied to internal and external investigations, having regard to the increased penalties for non-compliance with confidentiality and victimisation provisions.

In detail

Australia's whistleblower protection laws have long suffered criticism for being fragmented and narrowly-drafted, leaving whistleblowers feeling vulnerable rather than protected. The new regime aims to remedy the shortcomings of the former regime, improving protections offered to whistleblowers and harmonising the laws with those in the public sector.

The reforms affect all public and proprietary companies in respect of offences or misconduct in the corporate, financial services, banking, insurance, superannuation and taxation sectors, and strengthens the protections and remedies available to those who blow the whistle on private sector wrongdoing.

The new regime consolidates the various private sector whistleblower regimes into the *Corporations Act 2001* (Cth), and creates separate but largely consistent protections within the *Taxation Administration Act 1953* (Cth).

The new whistleblower protection regime has a number of key elements – most importantly, it:

- **requires public and large proprietary companies to establish a readily-available whistleblower policy** that is compliant with the legislation within 6 months after the legislation commences;

- **significantly expands the classes of people eligible for whistleblower protection after making a disclosure** to include both current and former company officers, employees, contractors and suppliers, plus their associates and specified family members;

- **broadens the types of wrongdoing that qualify for protection** to include conduct that represents a danger to the public or financial system, suspected contraventions of certain federal laws, and misconduct or an improper state of affairs or circumstances in relation to a regulated entity (but excludes personal work-related grievances);

- **expands who can receive a protected whistleblower's disclosure** to include designated individuals within a company, regulators, law enforcement bodies, auditors, actuaries and lawyers;

- **improves a whistleblower's access to compensation** by reversing the burden of proof once the whistleblower has pointed to evidence suggesting a reasonable possibility that a defendant has engaged in conduct that caused (or threatened to cause) detriment, and providing costs protection for whistleblower compensation claims; and

- **introduces enhanced protections for whistleblowers** by:

    - replacing the current 'good faith' test with a requirement that the whistleblower has objectively reasonable grounds to suspect wrongdoing;

    - allowing anonymous disclosures;

    - increasing penalties for individuals (up to $200,000) and corporates (up to $1 million respectively) for disclosing a whistleblower's identity or causing detriment to a whistleblower;

    - strengthening criminal and/or civil immunities for whistleblowers;

    - providing an avenue for public interest and emergency disclosures of misconduct to Parliament and/or journalists in some circumstances, including where a company has not acted on a qualifying disclosure within 90 days; and

    - expanding the orders that may be made by a court in favour of a person who has suffered loss, damage, or injury as a result of detrimental conduct, including against a body corporate that breaches an *existing* duty to prevent third parties from causing detriment to the whistleblower.

These changes form the first wave of reform and more reforms are to follow. Some of the more controversial reforms include the establishment of a whistleblowing oversight agency and the introduction of a US-style "bounty" rewards system, under which, for example, whistleblowers can receive up to 30% of any fine levied by the US Securities Exchange Commission above US$1 million for the disclosure of a violation of anti-corruption laws.[1] The Bill requires a post-implementation review of the law five years after the legislation commences.

[1] Section 21F of the Securities Exchange Act.

Unlike the position in the UK[2], a protected disclosure may be made in Australia without the whistleblower reasonably believing that the disclosure is in the public interest.

The takeaway

Public and large proprietary companies need to implement a compliant whistleblower policy in accordance with the new legislation.

Now is the best time to:

- review and revise your existing whistleblower policy so that it meets the letter and spirit of the new regime;
- ensure your avenues for reporting improper conduct are robust and operate effectively in practice;
- develop an anonymous reporting system;
- enhance measures to protect the identity of whistleblowers; and
- train relevant personnel to adequately respond to potential whistleblower scenarios.

Companies should expect greater whistleblowing activity as a consequence of the new legislation. While this represents a risk management issue, it also represents an opportunity for companies to enhance their corporate culture and demonstrate to regulators, investors and customers alike, that they are committed to accountability and integrity.

An effective whistleblower protection policy can facilitate self-reporting of corporate wrongdoing to regulatory authorities, which can result in favourable outcomes, in the form of deferred prosecutions or leniency in respect of any fines payable.

2 Section 43B of the UK Employment Rights Act.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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