

## Changes and Impacts of New Australian Whistleblowing Legislation

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 aims to create a single whistleblower protection regime in the *Corporations Act 2001* extending to the corporate, financial and credit sectors.

The Bill introduces a specific whistleblower protection regime for people who expose misconduct in tax affairs.

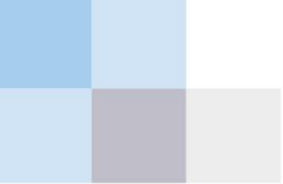
The legislation will apply to protected disclosures made on or after 1 July 2018, including disclosures about events occurring before that date. Whistleblowers will have access to compensation and enhanced protection against victimisation after 1 July 2018, regardless of when the disclosure was made.

### Changes

A study conducted by the Australian Council of Superannuation Investors (ACSI) found significant gaps when it examined whistleblower policies at Australia's 200 biggest listed companies. ACSI found that many whistleblowing systems did not offer anonymity, were not accessible outside of work hours or failed to make it clear that retaliation against whistleblowers was not acceptable.

The aim of the reform is to address the little practical effect of the Australian whistleblower landscape. In addition to harmonising the existing protections, the legislation is aimed at:

- A broader group of informants who fall within the protection regime, including former officers, employees and suppliers, associates of the entity and family members of employees;
- Introducing new statutory protections for whistleblowers in relation to consumer credit laws and taxation;
- Expanding current protections to take into account disclosures concerning corporate corruption, bribery, fraud, money laundering, terrorist financing or other serious misconduct;
- Abolishing 'good faith' requirement, effectively allowing anonymous disclosures and providing immunities to whistleblowers regarding the type of disclosure made;
- Adding new types of persons or entities to which a whistleblower may make a protected disclosure. This includes extension of protection to whistleblowers who make a report to a journalist or a politician and there is a risk of serious harm if the information is not acted on immediately. This may heighten the risk of reputational damage to an organisation;

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- Strengthening the protections and remedies for whistleblowers who are victimised for making a disclosure, including improving access to compensation for whistleblowers;
  - Requiring public companies and large private companies to have a whistleblower policy;
  - Affording whistleblowers the right to seek compensation for reprisals;
  - Protecting disclosures to a lawyer for the purposes of obtaining legal advice. The regime will cover disclosures made about organisations that are currently regulated by APRA and ASIC. The legislation has amended the *Corporations Act 2001* and repealed existing whistleblower provisions in other statutes in order to harmonise the overall regime. It has also directly amended the *Taxation Administration Act 1953* to include protections for whistleblowers who disclose serious issues relating to tax misconduct and fraud.

## Penalties

Under the new regime individuals and corporations face penalties for failing to set up a compliant whistleblower policy. Failure to comply with new confidentiality and victimisation provisions will be considered criminal offences. Courts will be required to preserve and protect a whistleblower's identity, unless it is in the interest of justice to do otherwise.

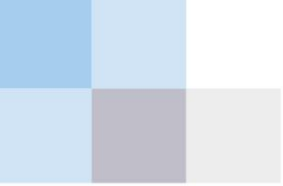
## Required policy changes to reflect legislation

The reforms require general changes to whistleblower policies, designed to improve culture and transparency in relation to disclosures of wrongdoing in the workplace.

- Clear application to employees, past employees, contractors, suppliers and family members of employees;
- A documented process for dealing with protected disclosures that ensures all disclosures are dealt with in a reasonable time;
- Processes in place to facilitate anonymous reporting; and
- A working system in place to ensure that the policy is distributed to anyone who may be an eligible whistleblower in relation to the organisation.

The Bill's explanatory memorandum makes clear that transparent whistleblower policies are essential to good corporate culture and governance and sets out that the policy must have information about:

- The protections available to whistleblowers;
- How and to whom an individual can make a disclosure;

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- How the company will support and protect whistleblowers;
  - How investigations into a disclosure will proceed;
  - How the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures;
  - How the policy will be made available; and
  - Any matters prescribed by the regulation.

Whistleblower policies should also include protections provided in the tax whistleblower regime inserted into the taxation law by Part 2 of the Schedule 1 to the Bill.

A study by the Australian Institute of Criminology (16 May 2018) revealed that whistleblowers expressed frustration and concern regarding procedural issues relating to the management of disclosures. They were often not clear about the nature and extent of protections that would be provided to them once a disclosure had been made. This was seen to be of critical importance in deciding whether or not to make a report in the first instance. The same study recommended that grievance procedures to deal with complaints about conduct exist in all workplaces and settings and that these procedures are appropriate to the specific work environment.

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