

> Corporate and financial services whistleblowing – FAQs

When do the new laws commence?

From 1 July 2019.

I don't work at a company – is my employer affected by these new whistleblower laws?

As well as companies, the new laws apply to:

- > a corporation to which paragraph 51(xx) of the Constitution applies (foreign corporations and trading or financial corporations formed within the limits of the Commonwealth);
- > an authorised deposit-taking institution (**ADI**) within the meaning of the *Banking Act 1959* (Cth) or a subsidiary of an ADI;
- > an authorised non-operating holding company (**NOHC**) within the meaning of the Banking Act or an unauthorised NOHC;
- > a general insurer (within the meaning of the *Insurance Act 1973* (Cth)) or a subsidiary of a general insurer;
- > an authorised NOHC within the meaning of the Insurance Act;
- > a life company (within the meaning of the *Life Insurance Act 1995* (Cth)) or a subsidiary of a life company; and
- > a registered NOHC within the meaning of the Life Insurance Act.

The new laws refer to these entities as **regulated entities**.

What are a company's key obligations under the new laws?

To encourage whistleblowers to come forward, the whistleblower protections have a strong focus on preserving the whistleblower's confidentiality and deterring others from engaging in detrimental conduct. Some regulated entities are also required to have a whistleblower policy in place by 1 January 2020.

Confidentiality

The identity of a whistleblower must be kept confidential, unless

- > the whistleblower consents to disclosure of their identity; or
- > their identity is disclosed to:
 - the Australian Securities and Investments Commission (**ASIC**);
 - the Australian Prudential Regulation Authority (**APRA**);
 - a member of the Australian Federal Police;
 - a legal practitioner, to obtain legal advice or legal representation in relation to the whistleblowing laws; or
 - anyone else prescribed by the regulations.

Information disclosed by the whistleblower that may lead to their identification may only be disclosed if it is reasonably necessary for the purposes of investigating the disclosure, and the first person takes all reasonable steps to reduce the risk that the discloser will be identified.

Detrimental conduct

Detrimental conduct is conduct that causes any detriment to a person and includes making threats to cause any detriment to that person. Detriment includes:

- > dismissal of an employee;
- > injury of an employee in their employment;

- > disadvantageous alteration of an employee's position or duties;
- > discrimination between employees;
- > harassment or intimidation of a person;
- > harm or injury to a person, including psychological harm;
- > damage to a person's property, reputation, business or financial position; or
- > any other damage to a person.

Companies, their employees and officers must not engage in detrimental conduct against a person if:

- > they believe or suspect that a person subject to the detrimental conduct may be a whistleblower; and
- > the belief or suspicion is partly or wholly the reason for the detrimental conduct.

A company may also be liable for a third person's detrimental conduct if it has a duty to prevent the third person from engaging in the detrimental conduct, or if the company has a duty to take reasonable steps to ensure the third person does not engage in the detrimental conduct, and the company fails to fulfil its duty in whole or in part.

Where an employer has taken reasonable precautions and exercised due diligence to avoid detrimental conduct, and has a whistleblower policy that it gave effect to, these circumstances may be taken into account by a court making an order in relation to the employer.

Policies

Public companies and large proprietary companies (including trustees of a registrable superannuation entity) need to have an updated whistleblower policy in place by 1 January 2020.

ASIC has promised that it will release guidance on the requirements for a whistleblower policy and plans to consult publicly in the second half of 2019.

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Are there any personal consequences for failure to comply with the new laws?

Yes. The confidentiality obligation and the obligation not to engage in detrimental conduct apply not only to regulated entities but to their employees and officers. Public and large private companies will also be liable where they fail to have a whistleblower policy in place by 1 January 2020.

Applicable penalties under the *Corporations Act 2001* (Cth) will be as follows:

Relevant conduct	Criminal penalties	Pecuniary penalties
Detrimental conduct	For an individual, \$50,400 (240 penalty units) or imprisonment for two years, or both. For a body corporate, \$504,000 (2400 penalty units).	For an individual, \$1,050,000 (5000 penalty units) or three times the benefit derived or detriment avoided. For a body corporate, (\$10,500,000) 50,000 penalty units, three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to \$525 million, 2.5 million penalty units).
Breach of confidentiality	For an individual, \$12,600 (60 penalty units) or imprisonment for six months, or both. For a body corporate, \$126,000 (600 penalty units).	For an individual, \$12,600 (60 penalty units). For a body corporate, \$126,000 (600 penalty units).
Failure to have a compliant whistleblower policy	For an individual, \$12,600 (60 penalty units). For a body corporate, \$126,000 (600 penalty units).	Not applicable.

Who qualifies as a whistleblower under the Corporations Act?

To qualify as a corporate whistleblower, a person will usually need to satisfy all of the below criteria. An exception is in relation to disclosures made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of whistleblowing laws.

Identity of the whistleblower

An eligible whistleblower has been broadly defined to capture a wide range of people. The term includes a past or present employee, officer, individual contractor, employee of a contractor or associate to the regulated entity.

In relation to a superannuation entity, they could be a trustee, custodian or investment manager or officer, employee of a body corporate that is a trustee, custodian or investment manager, or individual contractor or employee of a contractor to an individual or body corporate trustee, custodian or investment manager.

A whistleblower can also include a relative, a dependent or dependent of a spouse of any of the above individuals.

In instances of anonymous whistleblowing, the regulated entity will not be in a position to know whether the whistleblower fits any of the categories described above. However, the knowledge of a regulated entity is not relevant to the definition of an eligible whistleblower. Regulated entities are therefore advised to treat anonymous persons making disclosures as whistleblowers.

The subject matter of the information disclosed

Information where the discloser has reasonable grounds to suspect it concerns misconduct, or an improper state of affairs or circumstances in relation to a regulated entity (or a related body corporate, if the regulated entity is a body corporate) will fall within the whistleblower protections.

Without limiting this definition, a number of examples are provided where a discloser has reasonable grounds to suspect that the information indicates a regulated entity, officer or employee of the regulated entity has engaged in conduct that constitutes an offence against corporate and prudential legislation, constitutes an offence under another law of the Commonwealth punishable by 12 or more months of imprisonment, represents a danger to the public or the financial system, or is proscribed by the regulations.

Specific recipients named under the Corporations Act

A person who fits the above two categories will not be protected under whistleblowing laws unless they disclose to a specific recipient referred to in the Corporations Act. Eg disclosures made to the public via social media will not be protected.

In order to receive the benefit of whistleblowing protections, the eligible whistleblower must disclose to one of ASIC; APRA; a prescribed Commonwealth authority; or an eligible recipient, which, in relation to a body corporate (or related body corporate), includes:

- > an officer or senior manager;
- > an auditor or member of an audit team conducting an audit;
- > an actuary;
- > a person authorised by the body corporate to receive whistleblower disclosures.

Large companies will often authorise persons to receive whistleblower disclosures (through an external whistleblowing hotline, dedicated internal whistleblowing officers, and often both) to ensure that whistleblower complaints are dealt with efficiently and appropriately in the first instance.

Superannuation entities have their own definition of eligible recipient in the Corporations Act.

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Can whistleblowers remain anonymous?

Yes, unlike the old laws, the new laws will protect persons who make anonymous disclosures of information.

Does a whistleblower have to identify as a whistleblower before they are protected under the new laws?

No, an eligible whistleblower does not need to be aware, or communicate awareness, that they are a whistleblower in order to be protected.

Must a whistleblower act in good faith?

No, unlike the old laws, the new laws do not require whistleblowers to act in good faith. However, whistleblowers must have 'reasonable grounds' to suspect the information they are disclosing is misconduct or an improper state of affairs or circumstances. This means that vexatious and groundless claims will not be protected, but claims accompanied by an ulterior motive, such as spite or vengeance, should still be protected.

How are whistleblowers protected under the new laws?

Whistleblowers will be protected in the following ways:

Confidentiality

Maintaining the confidentiality of a whistleblower's identity seeks to limit the likelihood of them becoming the subject of detrimental conduct. As well as the offences and penalties described above in relation to breaches of confidentiality, the default position is that no one can be compelled to disclose to a court or produce a document to the court that reveals the whistleblower's identity, or information that is likely to lead to their identification. However, a court may dispense

with these protections if it is necessary to do so to give effect to the whistleblower regime, or if the court thinks it necessary in the interests of justice to do so.

As well as these specific protections, a person may be able to apply for an order protecting the whistleblower's identity, under the rules of the court or tribunal.

Immunity

Conferring immunity on a whistleblower for certain types of legal action avoids some of the harm that a whistleblower might otherwise suffer as a result of making a disclosure. If a whistleblower makes a protected disclosure:

- > they are not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure;
- > no contractual or other remedy or right may be enforced or exercised against them on the basis of the disclosure; and
- > (in relation to disclosures to ASIC, APRA or prescribed body and public interest and emergency disclosures) the information contained in the disclosure is not admissible as evidence against the whistleblower in criminal or other penalty proceedings, except in relation to proceedings regarding the falsity of that information.

However, a whistleblower may still be subject to civil, criminal or administrative liability in relation to their conduct revealed by the disclosure.

Compensation for damage caused

While the new whistleblower laws do not provide for bounties or rewards to whistleblowers, damages may be available to them, or to any other person who has suffered loss as a result of detrimental conduct. This includes exemplary damages, which are not designed to compensate the loss but, rather, to punish a wrongdoer in cases of egregious misconduct.

A court may make orders directed at the person who engaged in the detrimental conduct, the employer of the person who engaged in the detrimental conduct or both.

A court can also make non-monetary orders, such as an injunction, apology, reinstatement of employment, or any other order the court thinks appropriate.

Can my company appoint more eligible recipients, such as a hotline managed by an external provider?

Yes. The Corporations Act allows regulated entities to do that. A number of our clients use external hotlines as one avenue for receiving whistleblower complaints.

What if someone complains about a recent promotion they missed out on? Is that whistleblowing?

No. The new laws specifically carve out 'personal work-related grievances', which includes information that has significant implications for the whistleblower personally where the conduct:

- > does not have significant implications for the regulated entity that do not affect the whistleblower personally;
- > is not an offence under specified legislation, including the Corporations Act, the *Australian Securities and Investments Commission Act 2001* (Cth), the Banking Act and various other prescribed pieces of legislation;
- > is not an offence under another law of the Commonwealth punishable by 12 months' imprisonment or more;
- > is not a danger to the public or the financial system; or
- > is not otherwise proscribed by the regulations.

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If my company does everything it can to prevent detrimental conduct, will it be liable if other employees victimise a whistleblower?

As discussed above, detrimental conduct encompasses a broad range of conduct, from physical injury to the alteration of an employee's duties to their disadvantage.

When determining whether or not to award a remedy, a court may take into account whether an employer took reasonable precautions and exercised due diligence to avoid detrimental conduct. Other relevant factors include whether 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. It is important to note that these factors are not expressed to be a defence (as they were in earlier versions of the Bill), but, rather, as factors that *may* be taken into account.

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My company has offices in other countries. How do the new whistleblower laws operate in relation to our operations overseas?

While the scope of the extraterritorial application of the new whistleblower laws is presently untested, it is likely to apply extraterritorially to the extent that there is a sufficient nexus with Australia. Whether there is a sufficient connection will depend on factors such as where the conduct occurred, the whistleblower's location, the location of the regulated entity, and/or the location of where the disclosure is made. Examples of where we think a court is likely to consider the new laws apply are:

- > an Australian whistleblower employee of an Australian company discloses conduct that occurred in an overseas branch;
- > an overseas whistleblower employee of an overseas branch of an Australian company discloses conduct that occurred overseas; and
- > an overseas whistleblower employee of an overseas subsidiary of an Australian company that is not registered in Australia discloses conduct that occurred in Australia.

How can Allens help further?

We can:

- > update your company's whistleblower policy;
- > assist you to update your company's processes and procedures in relation to whistleblower disclosures;
- > advise and assist your company in dealing with whistleblower disclosures as they arise, and with subsequent investigations;
- > advise on how the new provisions are likely to operate; and
- > present to and train your directors, executives and staff on how to comply with the whistleblower laws, and avoid heavy penalties in relation to breaches of confidentiality and detrimental conduct provisions.