

Corporate and Tax Whistleblower Reforms

WHAT IS IT?

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 has passed, introducing a new legislative framework for general corporate misconduct and tax whistleblowing in Australia under the *Corporations Act 2001* (Cth) and the *Taxation Administration Act 1953* (Cth) (**New Whistleblower Provisions**). These changes apply to 'regulated entities', including companies, authorised deposit-taking institutions and superannuation entities (**Regulated Entities**).

WHY HAVE THESE CHANGES BEEN PROPOSED?

Current whistleblower laws are complex, patchy and rarely utilised. The New Whistleblower Provisions aim to encourage more whistleblowing, and as a consequence, improve compliance with the law and promote a more ethical culture within organisations. The provisions do this by broadening existing protections and remedies for corporate whistleblowers, and creating new protections for tax whistleblowers.

WHAT ACTION IS THE AUSTRALIAN GOVERNMENT TAKING?

- The new provisions take effect on 1 July 2019.
- ASIC has indicated that guidance will be published on aspects of the New Whistleblower Provisions, including its expectations relating to whistleblower policies.
- ASIC also indicated in its 2018 – 2022 Corporate Plan that it will be focussed on how corporations deal with whistleblower complaints as part of its wider focus on corporate culture within the organisations it regulates.

WHAT ACTION SHOULD CORPORATIONS TAKE?

- For those corporations required to have a whistleblower policy, create or update your policy to comply with the New Whistleblower Provisions. At a minimum, your policy should include: what to report, how to report (and to whom), the protections available when reporting (including support for whistleblowers and protection from retaliation), how you will investigate reports, how you will ensure fair treatment of employees the subject of reports and how the policy will be made available to officers and employees.
- For those corporations with an overseas presence, consider how the New Whistleblower Provisions interact with requirements in the other jurisdictions.
- Train your staff on how to deal with whistleblower complaints in a manner that complies with the New Whistleblower Provisions.
- Consider what changes may need to be made to procedures and systems to facilitate compliance with, or to manage the compliance burden imposed by, the New Whistleblower Provisions.
- Consider, from a practical perspective, how these changes might impact other governance arrangements, including procedures relating to conducting investigations, HR policies and policies relating to interacting with regulators.
- Consider, more broadly, how your whistleblower framework fits into your organisation's culture objectives and assessment process.

We are advising clients on all of these aspects and would be delighted to discuss our experience with you.

How do the new whistleblower provisions seek to achieve this?



GENERAL CORPORATE WHISTLEBLOWING

1 A whistleblower's identity, and any information likely to lead to the identification of the whistleblower, will now be better protected where the whistleblower discloses:

- certain information (information concerning misconduct or an improper state of affairs or circumstances relating to a Regulated Entity)
- to certain persons (principally: officers, senior managers of the Regulated Entity or a related entity, auditors, actuaries or somebody authorised to receive the information).

2 This protection is provided by the creation of an offence for a person who discloses either a whistleblower's identity, or any information likely to lead to the identification of the whistleblower, save for when:

- the identity of the whistleblower is disclosed with the consent of the whistleblower, is provided to ASIC, APRA or the AFP, or is given to a lawyer in order to obtain legal advice or representation in relation to the New Whistleblower Provisions; and
- information likely to lead to the identification of the whistleblower (but not the whistleblower's identity) is disclosed because it is reasonably necessary for the purpose of investigating the matter, and the person takes all reasonable steps to reduce the risk that the whistleblower will be identified.

3 The legislation also improves access to compensation for any whistleblower subject to detrimental conduct, reprisal or retaliation as a result of their disclosure. By introducing a reverse onus of proof, the Regulated Entity must now prove that any detrimental conduct was not in response to the disclosure made. A court hearing the claim for compensation can take into account reasonable precautions and due diligence conducted by the Regulated Entity to avoid detrimental conduct as a mitigating factor in relation to the award of a remedy.

4 Public companies and large proprietary companies must have a whistleblower policy in place that contains, at a minimum, certain information prescribed by the Whistleblower Provisions. This policy must be available to employees and officers by 1 January 2020.

5 The existing requirement that a whistleblower make allegations of misconduct in 'good faith' is abolished. Instead, the provisions require that a whistleblower must only have 'reasonable grounds to suspect' misconduct has occurred, or that an improper state of affairs or circumstances exists in relation to the Regulated Entity.

6 The new provisions permit whistleblowers to make disclosures to journalists or parliamentarians in certain circumstances where the whistleblower has already made a protected disclosure to ASIC or APRA, and where the whistleblower provides written notice to the original recipient of the information that they intend to make the disclosure. Similarly, a 'public interest disclosure' can be made under certain circumstances, most notably where the

whistleblower has reasonable grounds to believe the further disclosure would be in the public interest. An 'emergency disclosure' can also be made where the whistleblower has reasonable grounds to believe the information concerns a substantial and imminent danger to a person's health or safety, or to the natural environment.

7 'Personal work related grievances' are excluded from the protections of the whistleblowing regime, except in specific circumstances, including when the disclosure has 'significant implications' for the Regulated Entity or another Regulated Entity, and such implications do not relate to the whistleblower.



TAX WHISTLEBLOWING

Many of the protections available to general corporate whistleblowers also apply to whistleblowers disclosing misconduct or an improper state of affairs or circumstances in relation to the tax affairs of entities captured by the regime. A key difference between the two regimes is that the ambit of information to be protected under the tax regime is in some respects wider, including information the discloser considers may 'assist' the Commissioner of Taxation to perform his or her 'functions or duties under a taxation law' in relation to an entity, or associate to an entity. The tax whistleblower protections also do not carve out personal work related grievances (most likely because they are unlikely to arise in relation to tax affairs) or allow for emergency or public interest disclosures.



How can we assist



- > Review of existing whistleblowing policy
- > Preparing 'best practice' and compliant whistleblowing policy
- > Developing additional internal procedures to implement the policies
- > Advice on managing differing requirements across multiple jurisdictions (using the Allens, Linklaters network where appropriate)

- > Developing or reviewing investigations protocol
- > Assisting with investigations when issues arise
- > Crisis management

- > Review of existing training processes
- > Train the trainer
- > Online training modules
- > In-depth classroom training for managers and relevant support functions

- > Advising on whistleblowing governance arrangements, including internal division of responsibility
- > Developing processes to ensure that whistleblowing themes are identified and escalated while maintaining confidentiality
- > Audit of the operation of your whistleblower framework
- > Assistance with creating a healthy 'speak up' culture
- > Broader culture and governance reviews

> Contacts



Rachel Nicolson
 Partner, Melbourne
 T +61 3 9613 8300
 Rachel.Nicolson@allens.com.au



Peter Haig
 Partner, Melbourne
 T +61 3 9613 8289
 Peter.Haig@allens.com.au



Paul Nicols
 Partner, Sydney
 T +61 2 9230 4414
 Paul.Nicols@allens.com.au



Christopher Kerrigan
 Managing Associate, Sydney
 T +61 2 9230 4208
 Christopher.Kerrigan@allens.com.au



Simon Dewberry
 Partner, Melbourne
 T +61 3 9613 8110
 Simon.Dewberry@allens.com.au



Veronica Siow
 Partner, Sydney
 T +61 2 9230 4135
 Veronica.Siow@allens.com.au