

## Article Information

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## New Whistleblowing laws passed

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The long awaited reforms to Australian whistleblower legislation was passed on 19 February 2019. We outline the significance of the reforms and what they signify for companies and individuals.

On 19 February 2019, the long awaited reforms to Australian whistleblower legislation was passed by Parliament. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) (**Whistleblower Act**) will mostly take effect three months after the Act receives Royal Assent, which could be as early as 1 July 2019.

The significance of the Whistleblower Act lies in its ability to harmonise current whistleblower regimes under federal law, expand protections and remedies and create a regime for tax-related misconduct and contraventions.<sup>[1]</sup> The amendments will apply to disclosures made on or after the commencement of the Act which may extend to matters that may have occurred before commencement.<sup>[2]</sup> However, matters relating to compensation and remedies will apply retrospectively to disclosures made prior to commencement.<sup>[3]</sup>

The main ramifications include:

- requiring public companies<sup>[4]</sup> and large proprietary companies<sup>[5]</sup> to entrench mandatory whistleblower policies with mandatory content;<sup>[6]</sup>
- the facilitation of protected disclosures relating to misconduct, including the existence of an ‘improper state of affairs’;<sup>[7]</sup>
- providing protection to a wider range of people than under the previous draft;<sup>[8]</sup>
- providing protections to eligible whistleblowers on the basis that the disclosure was made to an ‘eligible recipient’, which includes officers and senior managers;<sup>[9]</sup>
- allowing for anonymous disclosures;
- the exclusion of most personal work based grievances from protection;<sup>[10]</sup>
- allowing for ‘emergency’ or ‘public interest’ disclosures to be made directly to the Media or Parliament in the most extreme cases;<sup>[11]</sup>
- expanding the remedies available to whistleblowers who suffer backlash by improving access to compensation;<sup>[12]</sup>
- the provision of a reverse onus of proof where an individual seeks compensation, once they have established they suffered detriment.<sup>[13]</sup>

There are significant penalties for both corporations and individuals who are in contravention of the Whistleblower Act. Civil penalties under the Corporations Act include breach of confidentiality<sup>[14]</sup> or victimisation/threatened victimisation of whistleblower<sup>[15]</sup> which can result in:

- 5,000 penalty units (\$1.050M) or three times the benefit derived/detriment avoided for an individual, and
- 50,000 penalty units (\$10.5M), three times the benefit derived/detriment avoided or 10% of annual turnover (up to 2.5 million penalty units) for a body corporate<sup>[16]</sup>

Criminal offences under the Corporations Act for:

- a breach of confidentiality or identity of a whistleblower<sup>[17]</sup> may result in:
  - during the transition period, 30 penalty units (\$25, 200) or six months imprisonment, or both, and<sup>[18]</sup>
  - For conduct after commencement six months imprisonment,

- the victimisation or threatened victimisation of a whistleblower<sup>[19]</sup> may result in:
  - during the transition period, 120 penalty units (\$25,200) or two years imprisonment, or both, and <sup>[20]</sup>
  - for conduct after the commencement, two years imprisonment<sup>[21]</sup>

Failure to implement a whistleblower policy<sup>[22]</sup> is a strict liability offence resulting in 60 penalty units (currently \$12,600).<sup>[23]</sup>

The Labor Party has announced that additional whistleblower laws would be introduced if they were elected. The Labor Party will encourage workers to blow the whistle on any dishonest or criminal activities that their employers are involved in.<sup>[24]</sup> If a penalty is imposed on the company or employer, the whistleblower will retain a percentage of that penalty fee as a reward.<sup>[25]</sup> Rewards will be capped at \$250 000 or one per cent of the penalty fee.<sup>[26]</sup> This is significantly lower than the reward provided in the United States, where whistleblowers may receive up to 30% of the total monetary recovery as a reward.

The Labor Party has pledged \$3 million for the plan, which may include an office to support whistleblowers, the Office of the Commonwealth Ombudsman, which would also act as a support centre.<sup>[27]</sup> The new whistleblowing laws will be reformed under Labor's new regime, and if elected in May they would come into effect in July. The Federal Government dismissed Labor's proposal, with Industrial Relations Minister, Kelly O'Dwyer labelling the plan "wacky".<sup>[28]</sup>

The significance of the Whistleblower Bill lies in its ability to harmonise current regimes under federal law and expand protections and remedies for whistleblowers.

<sup>[1]</sup> Georgie Farrant and Michael Michalandos, *Parliament Passes Whistleblowing Bill* (19 February 2019) *Baker McKenzie* < <https://www.bakermckenzie.com/en/insight/publications/2019/02/parliament-passes>>

<sup>[2]</sup> *Corporations Act 2001* (Cth) s 1644(1), introduced by the Whistleblower Bill s 12.

<sup>[3]</sup> *Corporations Act 2001* (Cth) s 1644(2), introduced by the Whistleblower Bill s 12.

<sup>[4]</sup> *Corporations Act 2001* (Cth) s 1317AI(1), introduced by the Whistleblower Bill s 9

<sup>[5]</sup> *Corporations Act 2001* (Cth) s 1317AI(2), introduced by the Whistleblower Bill s 9.

<sup>[6]</sup> The content as set out in *Corporations Act 2001* (Cth) s 1317AI(5), introduced by the Whistleblower Bill s 9.

<sup>[7]</sup> *Corporations Act 2001* (Cth) ss 1317AA and *Taxation Administration Act 1953* (Cth) s 14ZZT, introduced by the Whistleblower Bill ss 2, 15.

<sup>[8]</sup> Eligible whistleblower is defined at *Corporations Act 2001* (Cth) s 1317AAA and, at a high level, includes an entity's officers, employees, contractors, associates and superannuation trustees. Also see *Taxation Administration Act 1953* (Cth) s 14ZZU, introduced by the Whistleblower Act s 15.

<sup>[9]</sup> Eligible recipient is defined at *Corporations Act 2001* (Cth) s 1317AAC. Importantly, a 'senior manager' or 'officer' of a company - both concepts under the *Corporations Act* ([section 9](#)) - are a narrower class as compared with all employees, managers or supervisors of eligible whistleblowers. See also *Taxation Administration Act 1953* (Cth) s 14ZZV, as introduced by the Whistleblower Bill s 15. This is a significant change from earlier drafts of the legislation, and should ensure that adequately responsible people have this responsibility, rather than it sitting with more junior employees.

<sup>[10]</sup> *Corporations Act 2001* (Cth) ss 1317AADA, introduced by the Whistleblower Bill s 2.

<sup>[11]</sup> *Corporations Act 2001* (Cth) ss 1317AAD, introduced by the Whistleblower Bill s 2.

<sup>[12]</sup> *Corporations Act 2001* (Cth) ss 1317AA and *Taxation Administration Act 1953* (Cth) s 14ZZT, introduced by the Whistleblower Act ss 2, 15.

<sup>[13]</sup> *Corporations Act 2001* (Cth) ss 1317AD, 1317AE.

<sup>[14]</sup> *Corporations Act 2001* (Cth) s 1317AAE, as introduced by the Whistleblower Bill s 2.

<sup>[15]</sup> *Corporations Act 2001* (Cth) s 1317AC.

<sup>[16]</sup> Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 cl 117 (new *Corporations Act 2001* (Cth) s 1317G), amended by Senate amendment (1) on 18 February 2019.

[17] *Corporations Act 2001* (Cth) s 1317AAE as introduced by the Whistleblower Bill ss 2, 15.

[18] *Corporations Act 2001* (Cth) sch 3, as to ss 1317AAE(1) and as introduced by the Whistleblower Bill s 13;.

[19] *Corporations Act 2001* (Cth) s 1317AC as introduced by the Whistleblower Bill s 13

[20] *Corporations Act 2001* (Cth) sch 3, as to ss 1317AC(1), (2) and (3) and as amended by the Whistleblower Bill s 13.

[21] *Corporations Act 2001* (Cth) sch 3, as to ss 1317AC(1), (2) and (3) and as amended by the Whistleblower Bill s 35.

[22] *Corporations Act 2001* (Cth) s 1317AI, introduced by the Whistleblower Bill s 9.

[23] *Corporations Act 2001* (Cth) sch 3, as to ss 1317AI(1), (2) and (3) and as introduced by the Whistleblower Bill ss 13 and 35.

[24] Adam McCleery, 'Would you Snitch on your Manager For Cash? Radical New Plan to Pay Workers Hundreds of Thousands of Dollars for Dobbing in Dodgy Bosses', *Daily Mail* (Online), 3 February 2019.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] ABC News, 'Labor's plan to pay rewards to whistleblowers dismissed by Government which says it's already doing enough' (3 February 2019)

<https://www.abc.net.au/news/2019-02-03/whistleblower-reward-plan-from-labor-wacky-government-says/10775244>.