Whistleblower protection: What you need to know

New Whistleblower Protections

What new legislation has been passed?


When does the legislation commence?

3. The amendments generally apply to disclosures made on or after the first day of the second quarter following royal assent (1 July 2019). Companies required to have a whistleblower policy have until 1 January 2020 to have this policy in place.

Who is eligible for protection under the new Whistleblower Law?

4. Whistleblowers eligible for protection under Whistleblower Law are:

   (a) current and former officers, employees and suppliers;

   (b) current and former employees of suppliers; and

   (c) a relative, dependant or spouse of any person who falls within one of these categories.

What disclosures are protected?

5. A whistleblower’s disclosures will be protected if they have reasonable grounds to suspect misconduct or an improper state of affairs or circumstances in relation to the company or a related body corporate. ‘Improper state of affairs’ is not defined, but the legislation includes examples of conduct that would qualify, including conduct in breach of the Corporations Act, the Banking Act 1959, or that constitutes an offence under any law of the Commonwealth that is punishable by imprisonment for 12 months or more.
What disclosures are excluded from protection?

6. Certain personal work related 'grievances' are excluded from the category of protected disclosures. Examples of these include:

   (a) an interpersonal conflict between the discloser and another employee;

   (b) a decision relating to the engagement, transfer or promotion of the discloser;

   (c) a decision relating to the terms and conditions of engagement of the discloser;

   (d) a decision to suspend or terminate the engagement of the discloser, or otherwise to discipline the discloser.

To whom may a protected disclosure be made?

7. Protected disclosure may be made to:

   (a) officers of the company or a related body corporate;

   (b) the company's auditors or a member of the audit team;

   (c) regulators (such as ASIC or APRA);

   (d) senior managers of the company or a related body corporate (being any person who 'makes or participates in making decisions that affect the whole, or a substantial part' of the company's business or who 'has the capacity to affect significantly' the company's financial standing); or

   (e) a person authorised by the company to receive protected disclosures.

What is the nature of the protection that a whistleblower is entitled to?

8. Whistleblowers have the right:

   (a) not to have their identity revealed, except as outlined below;

   (b) not to suffer any detriment as a result (either real or threatened); and

   (c) to receive compensation if they suffer detriment as a result of the disclosure.

9. A whistleblower is also not subject to any civil, criminal or administrative liability for making the disclosure.

10. 'Detriment' is broadly defined and includes dismissal, alteration of the person's employment position, discrimination, harassment, intimidation, harm (including psychological harm) and damage to the person's property, reputation, business or financial position.
Can a disclosure be anonymous?

11. Whistleblower Law permits anonymous disclosure and further protects the whistleblower's identity through imposing confidentiality restrictions on recipients of information.

12. While the identity of whistleblowers must remain anonymous, it is not unlawful to disclose information relating to the disclosure to the extent it is reasonably necessary to investigate the disclosure and provided reasonable steps are taken to reduce the risk that the whistleblower will be identified as a result.

13. There are also exemptions allowing disclosure:

   (a) with the consent of the whistleblower;

   (b) to certain regulatory authorities; or

   (c) to a legal practitioner for the purpose of obtaining legal advice or representation in relation to the operation of the Whistleblower Law.

When is a disclosure in the public interest protected?

14. A disclosure to a parliamentarian or a journalist will be protected where:

   (a) a protected disclosure has previously been made to a regulatory body;

   (b) 90 days have passed since the disclosure and the whistleblower does not have reasonable grounds to believe that action has been taken or is being taken to address the matters raised; and

   (c) the whistleblower has first informed the regulatory body that they intend to make a public interest disclosure.

When is an emergency disclosure protected?

15. A disclosure to a parliamentarian or a journalist will be protected where:

   (a) a protected disclosure has previously been made to a regulatory body;

   (b) there is an imminent risk of serious harm or danger to public health or safety or the financial system if the information is not acted upon immediately; and

   (c) the whistleblower has informed the regulatory body that they intend to make an emergency disclosure.

Who must have a whistleblower policy?

16. Broadly speaking, the following entities must have a compliant whistleblower policy:

   (a) a public company; and

   (b) a proprietary company that is a 'large proprietary company' within the definition of that term under the Corporations Act.
17. As of 1 July 2019, a proprietary company is a ‘large propriety company’ for a financial year if it meets at least two of the following thresholds:

(a) the consolidated revenue for the financial year of the company and any entities it controls is $50 million or more;

(b) the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $25 million or more; or

(c) the company and any entities it controls have 100 or more employees at the end of the financial year.

What must be in the whistleblower policy?

20. A compliant whistleblower policy must include:

(a) information about the protections available to whistleblowers, including protections under the legislation;

(b) information about to whom disclosures that qualify for protection may be made, and how they may be made;

(c) information about how the company will support whistleblowers and protect them from detriment;

(d) information about how the company will investigate disclosures that qualify for protection;

(e) information about how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection, or to whom such disclosures relate; and

(f) information about how the policy will be made available to officers and employees of the company.

What are the consequences of breaching the new whistleblower legislation?

21. Penalties for breaches of the Whistleblower Law are set out in the table below. Note that these penalties reflect significant increases to corporate and financial sector penalties imposed by the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2018 (Cth) in early 2019.

<table>
<thead>
<tr>
<th>Provision</th>
<th>Sanctions</th>
<th>Civil penalties (maximum)</th>
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<tbody>
<tr>
<td>Disclosing whistleblower’s identity</td>
<td>6 months imprisonment</td>
<td>For an individual, the greater of:</td>
</tr>
<tr>
<td>Except in limited authorising circumstances, a person must not disclose information that might identify a person who has made a disclosure under the Whistleblower Law.</td>
<td></td>
<td>• $1,050,000; and</td>
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<td></td>
<td></td>
<td>• three times the benefit derived and detriment avoided because of the contravention.</td>
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<td>For a corporation, the greatest of:</td>
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<td>• $10,500,000; and</td>
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<td></td>
<td></td>
<td>• three times the benefit derived and detriment avoided because of the contravention; and</td>
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<td>• 10% of annual turnover for the year prior to the contravention (up to a maximum of $525 million).</td>
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</tbody>
</table>
The Whistleblower Law also introduces a regime for compensation orders to be made against persons who cause detriment (e.g. dismissal, discrimination and property and reputational damage) to other persons on the basis of a disclosure (or potential disclosure) under the Whistleblower Law.

What about the Heavy Vehicle National Law (HVNL) and whistleblowing?

Sections 699 and 700 of the HVNL provide protections for whistleblowers.

Section 699 of the HVNL deals with discrimination against or victimisation of employees who act as whistleblowers. It sets out a number of offences:

(a) An employer must not dismiss an employee, or otherwise prejudice an employee in the employee’s employment, because the employee –

   (i) has helped or given information to a public authority or law enforcement agency in relation to a contravention or alleged contravention of the HVNL; or

   (ii) has made a complaint about a contravention of the HVNL to an employer, employee, union, public authority or law enforcement agency.

   Maximum penalty: $10,000

(b) An employer must not fail to offer employment to a prospective employee, or must not treat a prospective employee less favourably, for the same reasons as set out above.

   Maximum penalty: $10,000

Section 700 HVNL sets out additional orders a court may make upon convicting an employer of an offence against s 699. In addition to imposing a penalty, the court may also:

(c) order an employer to pay the employee or prospective employee damages;

(d) order an employee be reinstated or reemployed in the employee’s former position or in a similar position; or

(e) order the prospective employee be employed in the position for which the prospective employee applied, or a similar position.

If you have any questions or require assistance in relation to any matters raised in this guide, please contact Gillian Bristow.

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