

## Content in brief

### Significant amendments to:

- Corporations Act 2001
- Taxation Administration Act 1953
- Banking Act 1959
- Insurance Act 1973
- Life Insurance Act 1995
- Superannuation Industry (Supervision) Act 1993

### Action:

- Consider how the changes impact your organisation and review in detail if your organisation is ASX listed, large private entity or meets the set requirements
- Conduct review and GAP Analysis to determine required policy/procedure enhancements
- **Contact Your Call** for external reporting solutions, policy advisory, Officer training and resources or whistleblowing program consulting

### What does this mean?

The Treasury Laws Amendment (*Enhancing Whistleblower Protections*) Bill 2018 will:

- amend the Corporations Act 2001 to strengthen and consolidate whistleblower protections;
- amend the Corporations Act 2001 to broaden and strengthen whistleblower protections;
- amend the Taxation Administration Act 1953 to provide whistleblower protection for disclosures of tax law breaches or misconduct regarding an entity's tax affairs;
- repeal the existing financial sector whistleblower regime and implement transitional arrangements.

For the purposes of the Bill Spiel, our focus are the proposed changes to the Corporations Act 2001.

The most notable features the Bill:

- Enlarges the class of whistleblowers eligible for protection going so far as to include a relative or dependant of all individuals defined or of such an individual's spouse;
- Includes former employees and associates as eligible whistleblowers;
- Expands the scope of disclosable conduct but specifically excludes personal work-related grievances;
- Allows whistleblowers to remain anonymous;
- Restricts the class of persons in a company who may receive disclosures to an officer, senior manager, auditor, actuary or person authorised by the company;
- Creates an offence for breaching the confidentiality of a whistleblower's identity without their consent other than in the exceptions provided for and increases penalties for doing so;
- Makes it easier for a whistleblower to seek redress for victimisation and reverses the onus of proof in compensation claims;

- Replaces the current 'good faith' test with a reasonableness test which requires that the whistleblower have reasonable grounds to suspect misconduct
- Strengthens immunities for whistleblowers
- Provide a means for disclosures to be made to parliamentarians and journalists in matters of public interest or emergency
- Increase penalties up to \$200,000 for an individual and \$1 million for a body corporate
- Make it easier for whistleblowers to be compensated if they suffer victimisation, with a reverse onus of proof on the defendant
- Expands the orders that may be made by a court in favour of a person who has suffered loss, damage, or injury as a result of detrimental conduct
- Does not allow an order for costs against a claimant in court proceedings unless the proceedings are vexatious or without reasonable cause
- Requires public and large proprietary companies to have a compliant whistleblower policy by the set date and to make it available to their officers and employees (the set date was previously 1 January 2019 but extended to August 2019 (at the earliest) following the third reading of the Bill.)
- Amongst other things the policy must contain information about:
  - How and to whom disclosures may be made
  - What disclosures are protected
  - The protections and support available to a whistleblower
  - How disclosures will be investigated
  - How the company will ensure fair treatment of employees mentioned in the disclosure
  - How the policy is to be made available to officers and employees of the company

Whilst the proposed legislation is a long overdue step in the right direction, it is not without challenge in its language and application.

One submission to the Bill expressed the view that:

“The Bill effectively hides this whistleblowing legislation in a clutter of corporate and tax laws which should ensure that only the most legally aware or persistent whistleblower will ever find it.”

A telling observation was made by the Law Council of Australia which said that a whistleblower does not think in terms of legislation, but in terms of breaches of the law. They may not be able to work out which Act is being breached.

The challenge is in making the new provisions workable for your organisation.

These include:

- Determining whether the misconduct alleged is a 'disclosable matter' under the prescribed range of legislation, including the Corporations Act 2001, or 'an improper state of affairs or circumstances, in relation to the regulated entity.'
- Effectively investigating an anonymous disclosure.
- Keeping the identity of a whistleblower confidential at all times in dealing with a disclosure.

- Appropriate training of officers, senior managers and authorised persons who will be eligible recipients of disclosures.
- Putting provisions in place to provide the required protection and support to a whistleblower and persons named in a disclosure.

*Your Call can assist client organisations with policy reviews/development, training and other services – see 'what to do next'.*

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## Important dates

The original Bill was to take effect on 1 July 2018 and required companies to have whistleblower policies in place by 1 January 2019.

Following its third reading it was passed with amendments in the Senate on 6 December 2018 and referred back to the House of Representatives for assent. (The House will next sit on 12 February 2019 which is the earliest opportunity for the Bill to come before the House.)

If the House assents to the Bill in its current form, the earliest date the new provisions will come into force is 1 July 2019 and whistleblower policies will be required to be in place at the earliest in August 2019.

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## To whom does this apply?

The new provisions apply to the relevant entities under the following Acts which the Bill amends.

- Corporations Act 2001
- Taxation Administration Act 1953
- Banking Act 1959
- Insurance Act 1973
- Life Insurance Act 1995
- Superannuation Industry (Supervision) Act 1993

They apply to all companies.

However only public and large proprietary companies are required to have a whistleblower policy. (A large proprietary company is one that has at least two of the following criteria: consolidated revenue of at least \$25 million, consolidated gross assets of at least \$12.5 million or at least 50 employees within the company and the entities it controls.)

Companies and organisations which are not caught by this definition should nevertheless consider the view expressed by the Australian Institute of Company Directors in deciding whether to have a whistleblower policy and the content thereof.

The institute stated:

**“We believe that strong protections for whistleblowers support good governance outcomes and are therefore in the interests of business, whistleblowers and the broader public.”**

We can add integrity and strengthening risk management to that list. In our view the new requirement with respect to the whistleblower policy should be embraced, to the extent relevant and appropriate, by all companies who share that view.

## To whom can disclosures be made?

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To qualify for protection a disclosure must be made to one of the following people or bodies:

- ASIC
- APRA
- An officer or senior manager of the company
- An auditor, or member of an audit team conducting an audit into the company
- An actuary of the company
- A person authorised by the company to receive protected disclosures
- A lawyer, for the purpose of legal representation or legal representation regarding the whistleblower protections
- In cases which are in the public interest or matter of emergency only, to a parliamentarian or a journalist

## What to do next

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Establish whether and how the new provisions apply to you. As a first step, conduct a GAP Analysis, seek legal counsel and/or contact Your Call.

Whilst only public and large proprietary companies will be required to have a whistleblower policy, all companies should adopt a whistleblower policy as a matter of good governance to ensure the requirements in the legislation are observed.

A thorough review will include:

- Reviewing/drawing a compliant whistleblower policy (*Companies must check whether the whistleblower policy is at odds with existing internal policies and human resources practices. See client services below.*)
- Determining how best to make the policy available to officers and employees of the company.  
*See client services below.*
- Determining how the company will support whistleblowers and protect them from victimisation.
- Establishing how and to whom protected disclosures may be made
- Determining and providing practical training to the officers, senior managers and others who will receive disclosures.  
*See client services below.*
- Providing those who are to receive disclosures with training so they know how to respond if a protected disclosure is made. (A failure to comply with the legislation can lead to heavy penalties.)  
*See client services below.*
- Determining how the company will support whistleblowers and protect them from detriment.
- Establishing how the company will investigate disclosures.  
*See client services below.*
- Determining how to ensure fair treatment of employees who are mentioned in disclosures or to whom such disclosures relate.
- Ensuring employees are aware of the whistleblower system in place.

## CLIENT SERVICES – HOW TO ENSURE BEST PRACTICE

Your Call is pleased to be providing client organisations with access to services to assist in achieving compliance and best practice.

Services include:

- Best-practice external reporting software & services
- Whistleblowing Program advisory
- Policy drafting, version reviews and advisory
- Disclosure Officer eLearning programs
- Disclosure Officer in-person training sessions
- Advanced Employee eLearning module (incl. bystander training, policy specifics and reporting processes)
- Investigation Management eLearning module
- Advanced Investigation Management in-person training session

### SPEAK TO AN EXPERT

For more information  
simply contact the team at  
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[whistleblowing.com.au](http://whistleblowing.com.au)

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pioneer whistleblowing service and today is trusted  
by some of the largest global organisations.

