Article Information

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Incoming private-sector whistleblower protection laws – Preparing for the new rules

Whistle-blower protection laws applying to internal (and some external) disclosures are on the cards. The amendments will bring a new and aggressive protection regime into the Corporations Act 2001, replacing the relatively limited scheme that currently exists.

Unlike the current scheme, which has not had a significant impact, the new scheme will significantly alter the landscape in favour of claimants arguing that they have been victimised or exposed as a result of having made a legitimate disclosure of misconduct or breaches of the law. The amendments are contained in a bill currently before the Australian parliament and expected to be passed with bipartisan support, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*.

The amendments broaden the scope of disclosures that attract protection under the scheme, and make identification or other adverse conduct towards a whistle-blower unlawful. They significantly enhance the capacity to make claims for compensation for alleged victimisation, and make such claims 'plaintiff friendly' by reversing the ordinary onus of proof about what reasons prompted the adverse conduct, and allowing successful claimants to be awarded legal costs (while denying respondents the usual capacity to obtain costs against an unsuccessful claimant).

Whistle-blower claims under the Corporations Act will have much in common with protections which exist under work health and safety legislation and 'general protections' provisions in Part 3-1 of *Fair Work Act 2009* (Cth), each of which protect employees who make certain employment-related complaints.

Private-sector contractors may also be covered by already-existing anti-corruption schemes that apply to public-sector workers and to contractors in respect of government services they provide.

Other key features of the proposed new legislation are:

- Protected whistle-blowers will include current *and former* company officers, employees, service suppliers and their employees, and any or a *relative or dependent of any of the above*.
- The range of disclosures which would be protected are also broad and include "misconduct" or an "improper state of affairs" including but not limited to breaches of corporations or banking laws, offences punishable by 12 months' imprisonment or more, or conduct which represents a danger to the public or a financial system. This means conduct which is not unlawful (but is reasonably believed to be improper or misconduct) can be pursued through disclosure with the scheme protection applying.
- Disclosures can be made internally (including to an officer of the company, , a person authorised to receive disclosures, or an employee's manager or supervisor). As one recipient (say, a manager) is then unable to inform another eligible recipient (say, the trained and identified disclosure recipient) appropriate management of 'informal' disclosures is likely to be a significant practical challenge.
- Confidentiality of persons making a disclosure is protected, with failure to comply exposing organisations and individuals to the risk of both monetary penalties and criminal sanctions (including imprisonment).
- Damages can also be claimed for a wide range of detriments beyond merely compensation for loss of earnings or injury, and including for asserted damage to property, reputation, and business or financial position.
- The laws apply to all constitutional corporations (and other entities in limited categories, including superannuation providers and trustees). Public companies and large proprietary companies have an additional obligation to ensure a complying policy is in place by 1 January 2020, if the law is passed by Parliament.
- Importantly, the legislation does not mandate any particular response to whistleblower complaints, including that

there is no obligation to investigate complaints (although large proprietary companies and public companies are required to have a policy which, among other things, details how complaints will be investigated).

With the Banking Royal Commission drawing to a close and the obvious political value of enhanced whistleblower protections in response to the findings of that Royal Commission, one can anticipate that the laws are likely to pass parliament and commence operation prior to 2019 **(Note: the delated operation of the scheme has meant it commenced 1 July 2019, with an obligation to have a policy in place for most public and large proprietary companies from 1 January 2020)**.

In light of the way these laws operate, companies should now consider:

- Developing and disseminating a policy that enhances the ability to identify and respond consistently and responsibly to disclosures, but not to be driven by the discloser's views of what action is appropriate but to take them into account when identifying what from the corporation's perspective is the reasonable reaction. For public companies and large proprietary companies, a policy which complies with statutory requirements is mandatory, and on the current Bill this will need to be in place by 1 January 2019 **(Note: the delated operation of the scheme has meant it commenced 1 July 2019, with an obligation to have a policy in place for most public and large proprietary companies from 1 January 2020)**
- Ensuring the policy supports a process under which disclosures are invited and channelled to an appropriate person, so they can be managed by the organisation effectively and efficiently.