Guide to Australian Whistleblower Protections

December 2019

LIVE PERFORMANCE AUSTRALIA

Contents

1. ABOUT THIS GUIDE

1.1 Purpose of this Guide

On 1 July 2019, Australia's new whistleblower protection laws came into effect. These laws will apply to all entities governed by the *Corporations Act 2001* (Cth).

The laws require certain entities (i.e. public companies, large proprietary companies, trustees for registrable superannuation entities) to have in place whistleblower policies by 1 January 2020.

This Guide had been prepared to support affected individuals and organisations within the live performance industry in Australia to:

- Understand the new legislative regime on whistleblower protections under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) (the Amendment Act);
- Feel comfortable with raising concerns internally to enable their organisations to investigate and respond to allegations of misconduct or an improper state of affairs or circumstances within the company under Australia's whistleblower regime;
- Take steps to comply with the Amendment Act; and
- Implement effective whistleblower protection policies.

The types of conduct that whistleblowers may disclose under the whistleblower protections laws are explained further in this Guide.

1.2 Who does this Guide apply to?

This Guide applies to all 'Eligible Recipients', 'Eligible Whistleblowers' and 'Regulated Entities' within the meaning of the Amendment Act. The meaning of each of these terms will be explained later in this Guide.

1.3 Legal Status of this Guide

This Guide is not and does not seek to be a binding legal document.

It provides general information only and is not intended to be legal advice. You should confirm the legal requirements that apply to your organisation and/or seek legal advice about your organisation's specific situation as required.

2. THE LEGAL FRAMEWORK

2.1 Legislation

The Amendment Act simplifies and harmonises a previously complex and piecemeal framework of whistleblower protection laws. Specifically, the Amendment Act updates the following federal laws:

- *The Corporations Act 2001* (Cth) (the Corporations Act);
- *The Taxation Administration Act 1953* (Cth) (the Tax Administration Act);
- *The Banking Act 1959* (Cth) (the Banking Act);

- *The Insurance Act 1973* (Cth) (the Insurance Act);
- *Life Insurance Act 1995* (Cth) (the Life Insurance Act); and
- *Superannuation Industry (Supervision) Act 1993* (Cth) (the Superannuation Act).

The Amendment Act came into force on 1 July 2019.

2.2 Interplay between Legislative Instruments

The respective amendments stipulated by the Amendment Act are incorporated into each legislative instrument listed above.

The Corporations Act regulates the whistleblower protections regime of regulated companies, corporates and organisations in the private sector. The updates under the Corporations Act are consolidated across the Banking Act, Insurance Act, Life Insurance Act and Superannuation Act to create one regime to cover the corporate, credit and financial sectors.

The Tax Administration Act reflects a modified regime as it relates to an entity's tax affairs, functions and duties in the private sector.

The new whistleblower regime explored under this Guide does not govern the public sector. There is separate legislation that governs a whistleblower regime for the Commonwealth public sector, in particular, under the *Public Interest Disclosure Act 2013* (Cth). There are also State and Territory based public sector disclosure regimes.

2.3 Quick Definitions

- ***Regulated Entities***: Includes companies, corporations, banks (deposit taking institutions), insurance companies, non-operating holding companies or subsidiaries of a deposit taking institution or insurance company, superannuation companies or trustees of superannuation companies. It may also include not-for-profit incorporated organisations that meet the definition of a trading or financial corporation.
- ***Eligible Whistleblower***: Includes current and former employees, officers, contractors, suppliers, volunteers, or the employees, associates, relatives or dependents of any of the aforementioned.
- ***Eligible Recipients:*** An eligible recipient includes prescribed persons that are associated with a Regulated Entity – a director, secretary, or senior manager or any person with tax functions in a body corporate, an auditor, a registered tax agent, a person authorised by a superannuation entity such as an auditor or actuary, a trustee or authorised person in a trust, a partner in a partnership or a person authorised by the Regulated Entity to receive disclosures under the Tax Amendment Act, or any other person prescribed by the regulations.

2.4 What is a Regulated Entity?

A wide spectrum of entities in the private sector are considered 'Regulated Entities' under Australian law. Regulated Entities must comply with whistleblower protections laws, including by responding appropriately if they are subject to disclosures that qualify for whistleblower protections in accordance with the Amendment Act.

In Australia, a Regulated Entity in the private sector broadly includes the following:

- Companies – public and private;
- Corporations;
- Banks;
- Insurance companies;
- Superannuation companies or trustees of superannuation companies.

Not-for-profit incorporated organisations that meet the definition of a trading or financial corporation are considered 'Regulated Entities'. According to ASIC, trading activities involve buying and selling goods or services. Financial activities involve commercial dealings or transactions in finance, such as borrowing, lending, investing or providing advice on financial matters. Where an organisation engages in trading or financial activity as a sufficiently significant proportion of its overall activities, it will meet the test for being a trading or financial corporation.

Most businesses in the private sector will be subject to the whistleblower protections laws introduced by the Amendment Act.

2.5 What is a Related Company?

A related company is a company that is connected to another company. For example, a holding company (head company) in a group of companies are related companies.

The legislation confirms that related companies, including non-operating holding companies and subsidiary companies, constitute 'Regulated Entities'.

This means that a whistleblower could make a disclosure in relation to misconduct in a company within a group of companies, even if they are associated with or work in a different company within the group.

2.6 Who is a Whistleblower?

There are different types of people who are considered 'Eligible Whistleblowers' under Australian law and will be protected against victimisation or retaliation for making a protected disclosure. In this Guide we will simply use the term 'whistleblower'.

In general terms, a whistleblower is a person within an organisation or who has contact with an organisation that is considered a Regulated Entity, and who reports misconduct or dishonest or illegal activity that has occurred within that Regulated Entity.

In Australia, a whistleblower is a person who is currently or has formerly been:

- An officer of a Regulated Entity, including company owners and board members;
- An employee of a Regulated Entity (e.g. producers, promoters, management, artistic directors, general managers, company managers, heads of department, cast, crew, creatives, interns, volunteers);
- An individual that supplies goods or services to a Regulated Entity, such as contractors, sub-contractors and secondees and their employees (including unpaid employees)
- An associate of a Regulated Entity;

- A relative of any individual referred to above;
- A dependent of any individual referred to above such as a spouse, de-facto partner or child.

2.7 Who is an Eligible Recipient?

There are different types of people that are considered 'Eligible Recipients' under Australian law. These are generally persons within a Regulated Entity who are in a position to take some action regarding information disclosed by a whistleblower.

Whistleblowers may disclose information that would be protected under the regime to an Eligible Recipient.

Whistleblowers may also disclose information to national regulators and authorities, such as Australian Securities and Investments Commission (ASIC), Australian Prudential Regulation Authority (APRA), the Australia Taxation Commissioner, the Australian Federal Police (AFP) or another prescribed Commonwealth authority, as relevant. Further, whistleblowers are entitled to disclose protected information to legal practitioners to obtain advice in relation to the protected information, the disclosure and the associated implications under the Amendment Act.

In Australia, an Eligible Recipient currently includes prescribed roles associated with a Regulated Entity:

- A Director, Secretary, Senior Manager or any person with tax functions in a Regulated Entity that is a body corporate;
- A member of a Regulated Entity's tax or audit team;
- A person authorised by a superannuation entity such as an auditor or actuary;
- A tax auditor or agent or an actuary;
- A trustee of a trust,
- A partner in a partnership; and
- Any person authorised by the Regulated Entity (e.g. Whistleblower Protection Officer) or any other prescribed person by law.

Eligible Recipients have obligations in relation to whistleblowers including preserving the protections offered to whistleblowers under the Amendment Act and maintaining the confidentiality of a whistleblower's identity.

3. PROTECTED DISCLSOSURES

3.1 What is a Protected Disclosure under Australian law?

The new whistleblower regime facilitates the making of protected disclosures about a wide range of matters that could have serious implications for a Regulated Entity.

A disclosure will be protected under the whistleblower regime where:

1. The whistleblower is an Eligible Whistleblower in relation to a Regulated Entity; and
2. The disclosure is made about a Regulated Entity; and

3. The disclosure is made to:
    a. an Eligible Recipient; or
    b. ASIC, APRA, the Australia Taxation Commissioner, AFP or another prescribed Commonwealth authority, as relevant; or
    c. a legal practitioner to obtain advice; and
4. The whistleblower has reasonable grounds to believe that the information identifies misconduct, or an improper state of affairs or adverse circumstances in relation to a Regulated Entity; or
5. With respect to the Tax Administration Act, the whistleblower considers that the information may assist the Eligible Recipient to perform functions or duties related to the tax affairs of the Regulated Entity.

The Amendment Act provides a non-exhaustive list of matters about a Regulated Entity that if disclosed on reasonable grounds, would constitute a disclosure qualifying for protection under the new regime, including:

- Information concerning misconduct;
- Information concerning an improper state of affairs or circumstances;
- Conduct that constitutes an offence against, or a contravention of, any of the following Acts:
    - The Corporations Act;
    - The Banking Act;
    - The Insurance Act;
    - The Life Insurance Act;
    - The Superannuation Act;
    - The Australian Securities and Investments Commission Act 2001 (Cth);
    - The Financial Sector (Collection of Data) Act 2001 (Cth);
    - The National Consumer Credit Protection Act 2009 (Cth);
    - Any other legislative instrument made under an Act referred to in the Corporations Act 2001 (Cth) or *the Superannuation Industry (Supervision) Act* 1993 (Cth);
- Conduct that constitutes an offence under any other federal law that is punishable by imprisonment of 12 months or more;
- Conduct that represents a danger to the public or the financial system; or
- Other conduct, as prescribed by the Regulations accompanying any Act that is amended by the Amendment Act.

3.2 What conduct could this include?

Conduct qualifying for disclosure could include instances where a company officer (such as a Director, CEO, Board Member) has breached the Corporations Act by breaching their director duties to their company and company shareholders/members.

This includes situations where a Director or company officer:

- Inappropriately uses their position and company information to gain a material benefit for themselves or another person. Under the Corporations Act, it is illegal to trade using inside information, or communicate inside information to other people who will use this information to trade company shares i.e. insider trading;
- Misappropriating company money i.e. using company money to buy a new car for their personal use;
- Buying goods or services from their spouse in their position as a Director without advising the Board and following the procedures set out in the Corporations Act first i.e. the Board must receive member/shareholder approval and lodge materials with ASIC before buying goods or services from a Director's spouse;
- Trading while the Regulated Entity is insolvent;
- Failing to lodge required information with ASIC;
- Intentionally throwing out the Regulated Entity's documents;
- Altering or deleting the Regulated Entity's computer records;
- Signing a company document in another Board Member's name;
- Failing to disclose to the market information which could severely impact the price of shares of a public company listed on the Australian Stock Exchange.

3.3 Disclosures that are not considered protected disclosures

The new whistleblower regime does not apply to "personal work-related grievances". A person will therefore not qualify for protections under the new whistleblower regime when their disclosure is about a personal work-related grievance, for example:

- A personal conflict between two employees;
- A decision relating to an engagement, transfer or promotion;
- A decision relating to the terms and conditions of employment;
- A decision to suspend and terminate a person's employment; or
- Disciplinary processes.

Organisations should have adequate complaints handling procedures that are made available to their workers, so that workers are able to appropriately raise matters in relation to their employment with their employer.

3.4 Public interest and emergency disclosures made to Parliamentarians and Journalists

The new whistleblower protections regime recognises that in some instances, conduct may be of such gravity and urgency that a whistleblower is justified in making a protected disclosure to a member of parliament or to a journalist.

A journalist means a person acting in a professional capacity as a journalist for a newspaper or magazine, a radio or television service, an electronic service provided on a commercial basis or an electronic service provided by a national broadcasting service, or similar. This definition appears to indicate that a journalist will not include an independent social media commentator who is not affiliated with any of these categories.

A public interest disclosure may be made where:

- A disclosure has previously been made to a regulatory body such as ASIC, APRA or AFP; and
- 90 days has passed since the disclosure was made and the whistleblower does not have reasonable grounds to believe that action is being, or has been taken, to address the matters raised in the disclosure; and
- The whistleblower has informed the regulatory body that they intend to make a public interest disclosure.

An emergency disclosure may be made where:

- The disclosure has been made to a regulatory body such as ASIC, APRA or AFP; and
- There is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately; and
- The whistleblower has informed the regulatory body that they intend to make an emergency disclosure.

Public interest or emergency disclosures are permitted in limited disclosures relating to the corporate, banking and finance sectors. They are not contemplated under the Tax Administration Act.

This suggests that there is a view that public interest or emergency disclosure would not be justified in circumstances relating to tax affairs or audits, but would be justified in circumstances relating to conduct that affects the public at large. An example of such conduct includes misconduct by a CEO of a bank or conduct that results in a public emergency, for example, a company polluting a public waterway with toxic material.

4. REASONABLE GROUNDS REQUIREMENT

4.1 Do disclosures have to be made in good faith?

A whistleblower is no longer required to make a disclosure in 'good faith' to obtain the protections prescribed under the new whistleblower regime.

A whistleblower's motivation when making a disclosure is irrelevant to the question of whether they should be protected under the regime.

Instead, a requirement for a disclosure to be made on 'reasonable grounds' is provided under the Amendment Act.

4.2 Reasonable Grounds

A whistleblower must have 'reasonable grounds' in order to make a disclosure protected by law. This means that the whistleblower must hold a reasonable belief that the relevant conduct occurred or the relevant circumstances exist. However, the disclosure does not ultimately have to be true to constitute a disclosure made on 'reasonable grounds'.

Therefore, under the new regime, it will be sufficient that the person making the disclosure has objectively reasonable grounds to suspect misconduct, contravention or conduct amounting to an offence.

Regulated Entities should encourage people to come forward, must take all reports made very seriously and should respond accordingly on each occasion. Regulated Entities wishing to adopt best practice should emphasise that complaints made with reasonable belief will not result in disciplinary action, even if a subsequent investigation finds the complaint to be untrue.

5. PROTECTIONS FOR WHISTLEBLOWERS

5.1 Detrimental Conduct

The law protects whistleblowers or their associates against victimisation and retaliation in response to a whistleblower making a protected disclosure.

Specifically, a person cannot engage in detrimental conduct in circumstances where they know, believe or suspect a protected disclosure has been made, and their knowledge, belief or suspicion is the reason, or part of the reason for the detrimental conduct.

Detrimental Conduct includes, for example:

- Dismissing a whistleblower;
- Altering a whistleblower's position;
- Discriminating against a whistleblower;
- Harassing a whistleblower; or
- Damaging a whistleblower's reputation.

Detrimental conduct also extends to indirect conduct by persons who aided, abetted, counselled or procured the detrimental conduct, induced the detrimental conduct, were in any way knowingly concerned in or party to the detrimental conduct, or conspired with others to affect the detrimental conduct.

5.2 Third Party and Employer Liability for Detrimental Conduct

The consequences of engaging in detrimental conduct may also extend to a third party in circumstances where that party is responsible for the conduct of another person and fails to take reasonable steps to prevent the other person from engaging in detrimental conduct.

Although the full scope of this provision is unclear under the Amendment Act, it is clear that employers may be implicated where their employees take detrimental action against a whistleblower.

An employer is more likely to be liable for detrimental conduct threatened or performed by an employee if it is found that they had a duty to prevent the conduct or to take reasonable steps to prevent it and:

- Did not take reasonable precautions to prevent the detrimental conduct; or
- Did not have or did have, but did not implement, a policy dealing with whistleblower protections.

5.3 Protections for whistleblowers against legal proceedings

The law protects whistleblowers against civil and criminal proceedings and remedies.

In addition, certain information disclosed by whistleblowers cannot be used in legal proceedings against a whistleblower, unless the proceedings relate to the falsity of the information.

5.4 Protections for whistleblowers against breach of contract

A contract cannot be terminated on the basis that a protected disclosure made by a whistleblower in accordance with the standards of the new regime constitutes a breach of that contract.

6. WHISTLEBLOWER REMEDIES

6.1 Remedies

If a whistleblower suffers any detriment or damage because they have made a protected disclosure, the whistleblower may claim remedies such as compensation, an injunction, an apology or re-instatement to their previous job (if they are dismissed).

Further, whistleblowers that pursue compensation in court due to suffering a detriment or threatened detriment as a result of making a protected disclosure, will generally be protected against an order for costs.

Whistleblowers would only be exposed to an adverse costs order in court if it was found that they instituted proceedings in relation to the detriment vexatiously or without reasonable cause, or their unreasonable act or omission caused the other party to incur costs.

6.2 Onus of Proof in Whistleblower Remedies

The new whistleblower regime introduces a reverse onus of proof in favour of whistleblowers.

If a whistleblower brings evidence that points to the existence of detrimental conduct, the onus of proof will rest with the person defending a claim of detrimental conduct to demonstrate that the detrimental conduct did not occur.

In most instances this will require senior decision makers or company directors to demonstrate that the reason for making an adverse decision or taking an adverse action in relation to a whistleblower was not in any way related to the making of a protected disclosure.

7. CONFIDENTIALITY

7.1 Do Whistleblowers have to identify themselves?

Whistleblowers no longer need to provide their identity for their disclosure to qualify as a protected disclosure or to obtain the protections prescribed under the new whistleblower regime.

The confidentiality requirements under the whistleblower regime makes it an offence to reveal or disclose a whistleblower's identity without their permission. Organisations must take steps to ensure that the whistleblower's identity is protected, should a whistleblower wish to remain anonymous.

7.2 Confidentiality Requirements

A person who receives a disclosure cannot pass on the name of the whistleblower, or any information that would likely lead to the identification of the whistleblower, to any person (other than the police or certain regulators such as ASIC or APRA) without the consent of the person making the disclosure.

Information relating to the disclosure may only be disclosed provided that it is reasonably necessary to carry out investigations, the disclosure does not include the identity of the whistleblower and reasonable steps have been taken to reduce the risk that the whistleblower will be identified by the information disclosed.

8. WHISTLEBLOWER PROTECTIONS POLICY

The legislation requires the following entities to have in place a whistleblower policy:

- public companies – including public companies limited by guarantee. This includes charities or not-for-profits structured as public companies limited by guarantee with an annual (consolidated) revenue of $1 million or more.
- large proprietary companies – companies that meet **at least two** of the following criteria:
    a. Has consolidated revenue (which includes revenue of entities it controls) of $50 million or more for the financial year;
    b. The value of the company's consolidated gross assets (which includes gross assets of entities it controls) is $25 million or more at the end of the financial year; and
    c. The company (and entities it controls) has 100 or more employees.
- trustee company of a superannuation entity.

The policy must be made available to officers and employees of the company and set out at a minimum:

- information about the protections available to whistleblowers;
- information about the persons or entities to whom disclosures that qualify for protection may be made, and how they may be made;
- information about how the company will support whistleblowers and protect them from detriment;
- information about how the company will investigate disclosures that qualify for protection;
- 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;
- information about how the policy is to be made available to officers and employees of the company;
- any other matters prescribed that are prescribed by the regulations.

Relevant public and trustee companies are required to have implemented a whistleblower policy that complies with the above by no later than 1 January 2020.

If a small propriety company becomes a large proprietary company after 1 January 2020, it has 6 months to implement a whistleblower policy.

9. USEFUL LINKS AND RESOURCES

Live Performance Australia

- Template Short Form Whistleblower Policy

Australian Securities and Investments Commission (ASIC)

- Regulatory Guide 270 – Whistleblower policies: https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-270-whistleblower-policies/
- Whistleblowing: https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/

Australian Charities and Not-for-profits Commission

- Whistleblower protections factsheet: https://www.acnc.gov.au/tools/factsheets/whistleblower-protections