McGrathNicol

Australia's new whistleblower regime

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 became law on 1 July 2019. The legislation imposes a number of significant compliance obligations on all Australian corporations with additional obligations for publicly listed and large proprietary companies.

What has changed?

The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* is not standalone legislation. Its effect is to make several significant whistleblower protection amendments to the *Corporations Act 2001*. The previous whistleblower provisions of the *Corporations Act* became law in 2004 and had limited scope relative to the new provisions.

One of the most significant changes to be introduced by the new Act is the type of conduct that, if reported by an eligible whistleblower (or which could potentially be reported by an eligible whistleblower), will trigger whistleblower protection obligations for the corporation and for employees and others connected with the corporation. Under the previous legislation, only contraventions (by the corporation itself or an officer or employee of the corporation) of a "provision of the Corporations legislation" would qualify for protection. For example, a report by an employee of a straight forward case of occupational theft would not have qualified for protection because, on the face of it, theft does not represent a breach of the Corporations legislation.

Disclosures that qualify for protection are now broader in the amended *Corporations Act* and include "misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity" (Section 1317AA). This means that any report of behaviour that would be considered 'misconduct' by an ordinary person would be likely to qualify for protection (Section 1317AADA provides an exception to this general principle for information provided by a discloser about "personal work-related grievances").

Some of the other new provisions from 1 July 2019 include:

- **broadening the classes of people a corporation must protect as whistleblowers** to include suppliers and relatives of eligible whistleblowers and now including people who were formerly in those classes (Section 1317AAA);
- **mandating protection of a whistleblower even if the whistleblower seeks to remain anonymous** – under the previous provisions, the discloser was required to provide his/her name prior to making the disclosure in order to qualify for protection (Section 1317AA);
- **creating a public interest and emergency disclosure option** that provides for protection of an eligible whistleblower who makes a qualifying disclosure to a member of parliament or to a journalist in circumstances where the discloser believes, on reasonable grounds, that a previous report has not been acted upon (Section 1317AAD);
- **making a corporation liable to pay compensation for detrimental conduct by an employee in defined circumstances** – under the previous provisions, only the individual engaging in the detrimental conduct was liable to pay compensation (Section 1317AD);
- **providing for a range of other orders that can be made by a court** including: an order for an injunction to stop the detrimental conduct, an order that a person engaging in detrimental conduct make an apology to the person subjected to the detrimental conduct and an order for reinstatement of an eligible whistleblower who has been terminated (Section 1317AE); and
- **providing a defence for corporations who are sued** by an eligible whistleblower who has been subjected to detrimental conduct if the corporation "took reasonable precautions, and exercised due diligence, to avoid the detrimental conduct" (Section 1317AE).

Does my company need a whistleblower policy?

The new provisions require publicly listed and large proprietary companies to develop and communicate a whistleblower policy. From 1 July 2019, a large proprietary company is defined in the *Corporations Act* as a company that meets at least two of the following criteria:

- consolidated revenue of $50 million;
- gross assets of $25 million or more, and
- 100 employees.

By 1 January 2020, publicly listed and large proprietary companies will be required to have such a policy and "make that policy available to officers and employees of the company". (Section 1317AI).

A company that is required to have a whistleblower policy but which fails to do so will commit an offence under the *Corporations Act*.

The *Corporations Act* is specific about what is to be included in a whistleblower policy:

- ☑ protections available to whistleblowers;
- ☑ to whom disclosures that qualify for protection may be made;
- ☑ how a qualifying disclosure may be made;
- ☑ how the company will support whistleblowers and protect them from detriment;
- ☑ how the company will investigate disclosures that qualify for protection;
- ☑ how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection; and
- ☑ how the whistleblower policy is to be made available to officers and employees of the company.

What do I need to do?

Corporations should take steps to ensure that they comply with the new legislation and ensure this compliance program is in place as soon as possible. There are three key things all Australian companies should do as a matter of priority:

Develop and communicate a whistleblower policy

Raise awareness

Open the channels of communication

1 Develop and communicate a whistleblower policy

While publicly listed companies and large proprietary companies are required to implement and "make available" a whistleblower policy, the new provisions impose important compliance obligations on all corporations regardless of size.

The implications for failing to take appropriate action to protect whistleblowers from detrimental conduct can include an order that the corporation pay compensation. While the Act is silent about how compensation would be calculated, Section 1317AE stipulates that an eligible whistleblower who has been subjected to detrimental conduct would be compensated "for loss, damage or injury suffered as a result of the detrimental conduct". If the eligible whistleblower has lost his or her job and is unable to find other suitable employment and, in addition, has suffered psychological and emotional trauma, the compensation awarded could be significant. As noted above however, a corporation that takes "reasonable precautions, and exercised due diligence, to avoid the detrimental conduct" has a potential defence against an order for compensation.

The stakes are high – corporations who fail to take appropriate steps to protect whistleblowers, are exposed to potential loss associated with compensating whistleblowers who are subjected to detrimental conduct by another employee or by the corporation itself. It makes sense for all corporations regardless of size, to implement a whistleblower policy in order to ensure that the risks of non-compliance are mitigated. Developing and implementing a whistleblower policy is an effective way of ensuring the company has complied with the obligations imposed by the new legislation.

2 Raise awareness

Corporations, regardless of any obligation to implement and communicate a whistleblower policy, need to ensure that all personnel (officers, senior managers and employees) are aware of their options for raising concerns about misconduct and of the repercussions of failing to comply with the new whistleblower provisions. All personnel need to be aware that subjecting an eligible whistleblower to detrimental conduct or unauthorised disclosure of the identity of an eligible whistleblower could constitute an offence under the *Corporations Act*.

The awareness raising program should be clear about the procedure for making a qualifying disclosure internally to the corporation which is specified under Section 1317AAC(1) as "an officer or senior manager of the body corporate or a related body corporate". It should ensure also that the corporation's personnel in those categories fully understand their legal obligations in the event that an eligible whistleblower approaches them with a qualifying disclosure particularly in relation to:

- the types of disclosure that qualify for protection;
- their duty of confidentiality in relation to the identity of the discloser (and the exceptions to the general rule);
- the organisation's duty to protect an eligible whistleblower;
- the consequences for failing to protect an eligible whistleblower; and
- such an awareness raising program should be delivered by way of regular communication appropriate to the nature and geographic spread of the organisation and its business operations.

3 Open the channels of communication

The Act does not specify any requirement as to the channels by which a qualifying disclosure can be made to an eligible recipient other than in the framework for a whistleblower policy at Section 1317AI which stipulates such a policy must include "information about to whom disclosures that qualify for protection under this Part may be made, and how they may be made". While not therefore a compliance issue, it makes logical business sense for there to be a range of reporting options including:

- internal reporting through the normal organisational structure in the ordinary course;
- one or more alternative internal reporting channels (e.g. to Legal, Internal Audit, HR or Compliance); and
- one or more external reporting channels.

How McGrathNicol can help

In our experience, a significant proportion of organisational wrongdoing comes to the attention of stakeholders, regulators or investigation agencies as a result of someone, in the form of a whistleblower from the rank and file of the organisation, coming forward. There have been many high-profile examples in recent years of serious misconduct that is well known within the organisation, not coming to the attention of management or the board because people with knowledge of the circumstances fear retribution if they do.

The new whistleblower regime will:

- encourage more people to come forward with reports of corporate wrongdoing;
- encourage people who would have come forward in due course to come forward earlier; and
- more effectively protect people who come forward and thereby assist the company to comply with its Human Resources and Occupational Health and Safety obligations.

The new whistleblower provisions represents a major step forward in the more effective control of misconduct within Australian corporations and by Australian corporations. Australian corporations need however to look beyond mere compliance with the legislation and recognise the compelling good governance business case for having an effective whistleblower protection program.

McGrathNicol has many years' experience in assisting clients to develop, implement and communicate misconduct reporting systems including:

- developing and implementing whistleblower policies;
- whistleblower awareness raising; and
- implementing a range of alternative reporting channels.