WHISTLE WHILE YOU WORK

Date: 15 March 2019

Australia Labour, Employment and Workplace Safety Alert

By: Michaela Moloney, Christa Lenard, Katie Sweatman, Caroline Carnegie

On 12 March 2019, royal assent was given to the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018*, which amends several pieces of legislation, notably the *Corporations Act 2001* (Cth). These amendments come into force on 1 January 2020.

The amendments to the Corporations Act are intended to harmonise the protections and remedies available to whistleblowers, as well as introduce a requirement for certain companies to implement whistleblower policies.

Relevantly, the changes enable a current or former employee, officer or contractor engaged by a regulated entity to make a qualifying disclosure. They may do so anonymously, unlike under the current regime, and their motivation behind a disclosure will not be relevant.

Further, the bodies to which a qualifying disclosure can be made will be broadened and will include ASIC and APRA. Unlike the current laws, if a disclosure is made in the public interest or in circumstances of emergency, an eligible recipient may also include a Member of Parliament or a journalist.

As part of the increased protection of whistleblowers, the information provided in a qualifying disclosure will not be admissible as evidence in a prosecution against them. The changes also strengthen the prohibition against the victimisation of whistleblowers, and others who are victimised in relation to a disclosure, and make it easier for them to bring related compensation claims.

Conduct that can be the subject of a qualifying disclosure will include actual or suspected conduct by a regulated entity that is:

- a contravention of any law administered by ASIC and/or APRA
- conduct that represents a danger to the public or the financial system
- misconduct or improper affairs or circumstances that relate to a regulated entity
- an offence under Commonwealth law that is punishable by imprisonment for a period of 12 months or more.

Subject to approval, the Government has proposed to amend the definition of "large proprietary company" with effect from the commencement of the 2019-2020 financial year to a company which meets at least two of the following three thresholds within a given financial year:

- AUD50 million or more in consolidated revenue
- AUD25 million or more in consolidated gross assets
- 100 or more employees.

The definition of regulated entity has also been expanded to include foreign and trading or financial corporations.

WHAT DO AFFECTED BUSINESSES NEED TO DO NOW?

The amendments require public companies, large proprietary companies and registerable superannuation entities to have whistleblower policies in place and to ensure that these policies are distributed to their officers and employees. The requirement to have a whistleblowing policy in place will be operative from 1 January 2020, and thereafter no later than six months after a proprietary company first becomes a large proprietary company.

These policies will need to include information about:

- the protections available to whistleblowers
- how a disclosure can be made and to whom it can be made
- the support and protection that the company will provide to a whistleblower
- the company process for investigations following a disclosure
- how those mentioned in disclosures will receive fair treatment.

Failure to comply with these policy requirements will be a strict liability offence and will be enforced by ASIC.

In developing whistleblower policies, careful attention will need to be given to drafting in order to mitigate against staff, consumer and other stakeholder grievances that are not intended to be captured by the amendments being made under the guise of a qualifying whistleblower disclosure. In this regard, a "personal work-related grievance" will not be regarded a qualifying disclosure to which the whistleblower protections apply.

A personal work-related grievance is one which concerns the discloser's employment, or former employment, provided that the grievance does not disclose the commission of an offense under prescribed legislation. Some of the types of grievances that are envisaged to be captured by this carve out include:

- an interpersonal conflict between the discloser and another employee
- a decision relating to the engagement, transfer or promotion of the discloser
- a decision relating to the terms and conditions of engagement of the discloser
- a decision to suspend or terminate the engagement of the discloser, or otherwise to discipline the discloser.

Conversely, companies captured by the amendments must ensure that they adopt and implement processes that will ensure that legitimate disclosures are properly handled and not disclosed to people within the company without a legitimate need to know, exposing the company to contraventions and enforcement action.

In the event that a discloser is subject to detrimental conduct in connection with their disclosure, Courts will have broad powers to make orders to compensate the discloser for loss suffered by them, to grant an injunction to stop particular conduct, to award exemplary damages and to otherwise make any order the Court sees fit.

WHAT CAN K&L GATES DO TO ASSIST?

K&L Gates has extensive experience in responding to and investigating whistleblower and protected disclosures under existing private and public sector legislation.

Our team is well placed to support companies who will be subject to these expanded whistleblower protections to:

- draft and implement compliant whistleblower policies, ensuring that these interact appropriately with existing complaints and grievance procedures
- develop and implement training for staff to recognise and appropriately handle whistleblower disclosures in accordance with the Corporations Act and whistleblower policies
- investigate and report upon whistleblower disclosures that may be made under the new requirements.

KEY CONTACTS

MICHAELA MOLONEY
PARTNER

MELBOURNE
+61.3.9640.4430
MICHAELA.MOLONEY@KLGATES.COM

