

WHISTLEBLOWER LEGISLATION CHANGES

IS YOUR ORGANISATION PREPARED?



Are You Ready? Deadline Looms for Whistleblower Changes

The Federal Government is due to amend whistleblower laws, through a series of interlocking amendments to various Acts, which will require organisations to comply with specific whistleblower protections from early 2019 onwards. Informed by the importance of the whistleblower's role as well as barriers to reporting, changes have been made to encourage and protect disclosures by those who have witnessed or suspect corporate wrongdoing.



Executive Summary

The proposed changes, yet to be debated, will consolidate whistleblower protections into a single regime under the Corporations Act 2001. It will require measures to be in place by early 2019, in order to avoid potential penalties for non-compliance. The changes apply to the corporate, financial and credit sectors.

The potential for employers to ostensibly support whistleblowers – yet in reality discourage disclosures – has been remedied by the following far-reaching changes to the legislation:

- ▶ The requirement for the existence of a current employment relationship between whistleblower and the relevant corporate entity will be removed- former employees, contractors and others will all have the ability to blow the whistle on perceived wrongdoing.
- ▶ Good faith will no longer be a requirement to qualify for protections under the Act- an ulterior motive for the disclosure will not prevent an application for the protections.
- ▶ The definition of detriment suffered by whistleblowers has been broadened to include damage to property, harassment, physical harm or injury.
- ▶ If a whistleblower has previously disclosed information to ASIC, APRA or the AFP and a reasonable period of time has passed without the information being acted on, the whistleblower is permitted to disclose the information to a journalist or parliamentarian.
- ▶ Protected disclosures will now include disclosures where the whistleblower has reasonable grounds to suspect that the disclosed information concerns misconduct or an improper state of affairs or circumstances.

The legislative changes to whistleblower protection also mandate that corporate entities provide clear, comprehensive and workable policies and procedures. It requires education and support of all relevant stakeholders regarding ways to make disclosures and to ensure that those making reports will be safe from reprisals.

The demands on corporations flowing from the changes to whistleblower protections via the [Treasury Laws Amendment \(Enhancing Whistle-blower Protections\) Bill 2017](#) are comprehensive.

Risk analysis must be carried out to determine the current state of whistleblower assistance and protection from harm within the organisation. Policies and procedures must be drafted or redeveloped to clearly set out:

- ▶ The protections afforded to whistleblowers;
- ▶ How the company will ensure fair treatment of whistleblowers;
- ▶ Any matters prescribed by legislation

Robust mechanisms for anonymous disclosures must be put in place and the policy must be readily available to eligible whistleblowers. Staff, contractors and leadership teams must be prepared for these changes to the landscape of corporate integrity.

For some organisations, the changes will merely serve to assist with minor enhancements to a strong existing system, while others will identify sizeable

deficiencies in the corporate understanding, policies, training and protective mechanisms currently in place for assisting whistleblowers.

Who Does This Affect?

The new regime mandates that all Australian public companies, large proprietary companies, and registrable superannuation entities have compliant whistleblower policies in place by early 2019.

According to section 45A of the Corporations Act the definition of a large proprietary company is as follows:

Large proprietary company

(3) A proprietary company is a large proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

(a) The consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is \$10 million or more;

(b) The value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is \$5 million or more;

(c) The company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

In terms of [Section 1317AAB](#) of the draft legislation, the definition of Regulated Entities also includes registered foreign companies, Authorised Deposit Taking Institutions, general and life insurers and superannuation entities.

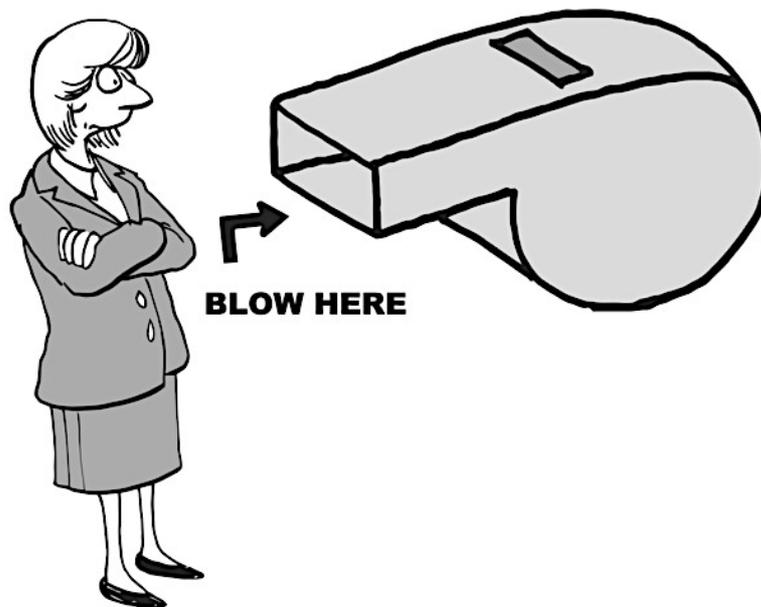
The features and mechanisms required by the legislative changes are considerable. Crucially, whistle-blowers must not only be supported, but also be protected from 'detriment' as this broad term is defined under the Act.

Clarity is key and all policies and procedures must be completely accessible and understood by stakeholders. This includes persons who might consider retaliating against a whistleblower. The notion of potential 'detriment' to a person who has blown the whistle must be understood by all within the organisation.

Existing Failures

During consultation and drafting of the new Bill, it became clear that existing whistleblower systems:

- ▶ Failed to provide anonymity;
- ▶ Failed to make it clear that there would be zero tolerance for retaliation;
- ▶ Were unable to be accessed by former employees and contractors;
- ▶ Often could not be accessed out of hours.



The Dilemma of a Whistle Blower

The results of these failures in the past were evident in the low incidence of successful opportunities to blow the whistle on corporate corruption. Employees and contractors were unsure of the right way to report, or the corporate culture might have been such that even the notion of 'ratting' on the corporation was portrayed as unthinkable.

Often, the lack of clear policies and procedures on whistleblowing left those wanting to disclose relevant information with the precarious task of establishing where exactly to go with information or suspicions of corruption.

A second problem with existing whistleblower mechanisms has been the inability or disinclination to protect anonymity. Having made the decision to make an internal report, whistleblowers were given no guarantees that their identity and privacy would be protected, leading to the real threat of reprisal such as ostracism, career limitation, verbal abuse and/or isolation. Current statistics indicate that 42% of employees don't report for fear of negative consequences, and 53% don't believe action will be taken if they do make a report.

Changes to Whistleblower Legislation

The bill aims to create an effective and streamlined legislative regime of whistleblower encouragement and protection, with notably extended reach to the corporate, financial and credit sectors. As an added benefit, it introduces a specific whistleblower protection regime for employees and others who expose misconduct in taxation affairs.

In sweeping changes, the bill updates and amends the following legislation:

- ▶ The [Corporations Act 2001](#) - to consolidate and broaden the existing protections and remedies for corporate and financial sector whistleblowers.

- ▶ The [Taxation Administration Act 1953](#) - to create a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct relating to an entity's tax affairs.
- ▶ The [Banking Act 1959](#), [Insurance Act 1973](#), [Life Insurance Act 1995](#) and [Superannuation Industry \(Supervision\) Act 1993](#), with a particular view to countering the fraud and misappropriation that has been an unfortunate and well-publicised aspect of these industries in recent times.

The Bill also brings into play a specific whistleblower protection regime for individuals who expose misconduct in taxation affairs.

Past and Present Wrongdoing

The proposed legislation will be applicable to protected disclosures made on or after 1 July 2018. Yet even more sweeping, this is set to include disclosures about *any* relevant events that occurred before that date. Significantly, whistleblowers will have access to compensation and enhanced protection against victimisation after 1 July 2018, regardless of when the alleged behaviour occurred.

Whistleblower Changes - Preparing for the Deadline

The Bill requires public companies and large private companies to put in place a raft of effective and accessible whistleblower mechanisms by early 2019. [Section 1317AI](#) for example, describes a complex and comprehensive set of requirements for organisations as boards and management attempt to create and implement defensible policy instruments.

Corporations might in the past have put in place a notional set of whistleblower policies and procedures, which were quickly filed and forgotten about. Similarly, an organisation might have developed a supportive-sounding whistleblower policy that unfortunately was not backed up by practical procedures that could be understood and accessed by all – the traditional lip service document.

Related failures in corporate whistleblower policies and procedures have included those, which are so stringent and convoluted that the average worker or contractor is deterred from bringing the issue forward. And the worst historical policy failure is of course a complete vacuum in relation to whistleblower policies.

In these cases, expectations of complete corporate 'loyalty' and/or looking away from signs of corruption can grow exponentially to create a toxic corporate culture. Similarly, a refusal to take governance issues seriously has historically created the kind of nightmarish backlash against whistleblowers that we see making the front pages of websites and newspapers.

In meeting the requirements for a robust and workable policy framework in accordance with Section 1317AI, organisations must take great care to develop substantively workable instruments and correlating procedures.

The whistleblower legislative amendments are demanding in nature. Some corporations will need to move their thinking and practices regarding whistleblower protection away from a state of 'window dressing' and into a strong and effective approach that passes muster at all levels of scrutiny. Under the new system, organisations will need to ensure their entire network of whistleblower policies, procedures and practices reflect the mandated changes in a comprehensive manner.

Penalties For Failing to Comply

Under the new changes, civil and criminal penalties will apply if a company or its agents fail to deal with whistleblowing disclosures in strict accordance with the amended Act. The moment of disclosure is understood to be quite harrowing for the person who blows the whistle. Some of their concerns will include:

- ▶ Who will be privy to the substance of the disclosure;
- ▶ Whether anonymity is possible;
- ▶ Will there be reprisals and is there protection from retaliation; and
- ▶ How long will it take to hear about the next step.

The development of robust response plans, with proactive mechanisms to prepare all stakeholders for situations where the whistle has been blown on actual or suspected corruption, are essential. The amended legislation reflects our growing understanding of good governance in organisations large and small. Important information about corporate integrity can only come to light if courageous whistleblowers are encouraged and protected.

Penalties for failing to establish appropriate policies around these issues are considerable, with failure to comply with this aspect of the legislation constituting an offence under [subsection 1311\(1\)](#) of the Act. A lack of drive or knowledge about either the whistleblower changes or the timeframes for compliance will be viewed dimly by regulators. Failure to deal with a topic that might seem lightweight in some corporate quarters could well see the imposition of substantial financial penalties.

A Sobering Case In Point

Why has the federal government responded so decisively in relation to the protection and support of whistle-blowers? The growing evidence of the severe maltreatment of people who disclose corruption has not gone unnoticed by either the government or the voting public.

A case in point is that of [Origin Energy](#), where the treatment of a whistleblower brought the energy supplier to the forefront of Australia's public, corporate and financial consciousness – for all the wrong reasons.

Sally McDow, a former senior compliance manager with Origin Energy decided to call foul on a raft of corrupt, deceptive and dangerous practices she observed during her

tenure. Far from being given conscientious support, Ms McDow found herself at the mercy of a smear campaign including allegations of “making stuff up”, being a “faker” and “having a mental breakdown”. As a result, the experienced lawyer was too anxious to leave the house, and even her personal relationships have been negatively impacted.

Similar examples motivated changes to place the onus of action and protection upon organisations. What constitutes detriment to a whistleblower will include a broad and nuanced range of negative effects on career, health, family and reputation.

This ensures that Australian individuals who bravely blow the whistle on corrupt corporate practices will not be left with their life in tatters for doing what is, in the long run, one of the only ways to detect when corporate culture and behaviour is beginning to take a turn for the worse.

The Role Grapevine Can Play in Compliance

As a trusted and experienced workplace behaviour management consulting firm, WISE Workplace has been providing independent workplace investigation and training services since 2001. The WISE client-base includes multinational and national corporate entities, government departments and a high number of not-for-profit organisations.

At WISE, we are passionate about working with organisations to develop strong and effective governance mechanisms that provide proven outcomes. As part of this desire to provide practical solutions, we have developed a confidential whistleblower hotline



that creates clear avenues of communication, protection and appropriate action when a disclosure needs to be made.

Our knowledge of the legislative changes around whistleblower protection allows us to offer a substantive and robust solution that complies with these complex requirements.

The Grapevine Confidential Whistleblower [Hotline](#) provides employees with a safe and secure environment to report misconduct, corruption and abuse of power, enabling insightful management of complaints, risk reduction and the ability to bring about real cultural change.

The Grapevine call centre is located in Queensland, and is staffed by trusted, highly trained and experienced operators. The call centre is manned 24/7 and receives over 1,000 calls per week.

Grapevine offers:

- ▶ Expert assessment of all complaints within 48 hours.
- ▶ Updates outlining action taken.
- ▶ Regular reporting to nominated teams.
- ▶ Identification of any 'hot spots'.
- ▶ Two [levels of service](#) depending on organisational needs.

The service is customised for each client, and reports of wrongdoing can be made by phone or online, via a website. Anyone making a report can remain anonymous or leave contact details. Grapevine also allows reporters to access updates on the progress of their report, meeting the need for transparency around the whistleblowing process.

Is Your Organisation Prepared for the Changes?

All companies should be aware of the whistleblower legislation, so that they know how to respond to a disclosure. A failure to comply with legislation can lead to heavy penalties, including fines. If your organisation needs assistance with understanding these legislation changes, or would like to implement an anonymous whistleblower hotline, WISE can help.

Wise Workplace has the proven ability to provide strong governance solutions for corporations. Our Grapevine Confidential Whistleblower Hotline meets an important need for transparency within organisations, providing a unique and accessible way to assist compliance with the new legislative requirements.

Contact us today and ask about our obligation free cost proposal for implementing a whistleblower service in your organisation. To ensure compliance with the recent legislative changes on whistleblowing, speak with us about our helpful and comprehensive suite of [governance checks and solutions](#), including the well-regarded Grapevine service.



*WISE Workplace provides investigation services
and accredited workplace investigations training across
Australia to public and private entities.*

*For more information on WISE Workplace visit
www.wiseworkplace.com.au or call us on 1300 580 685*