

Chapter 2

Content of the bill

Harmonising whistleblower regimes

2.1 The current protections in the *Corporations Act 2001* (the Corporations Act) cover a current officer, employee, or contractor of the company in question who makes a disclosure in good faith (and not, say, with a personal grievance) about a breach of corporations law. The whistleblower must provide his or her name.¹

2.2 The protections include limited protection from civil or criminal liability or contractual remedies for making the disclosure, prohibitions on victimisation and the right to seek compensation for damage from victimisation, and prohibitions on the revelation of the whistleblower's identity or the information disclosed (with some exceptions).

2.3 The financial sector whistleblower provisions are generally similar, and apply to disclosure concerning misconduct or impropriety in APRA-regulated entities.

2.4 This bill brings the corporations and financial sector whistleblower regimes into alignment (Schedule 3). The new arrangements in the Corporations Act will cover whistleblowers in the corporate and financial sectors.

2.5 The bill also extends protection to entities regulated by the *National Consumer Credit Protection Act 2005* and the *Financial Sector (Collection of Data) Act 2001* (Schedule 1, item 2, s. 1317AA(5)(c)), which at present do not include whistleblower protections.

Scope of disclosures that qualify for protection

2.6 At present the disclosures that are protected have to do with breaches of the particular Act that governs the entity. This bill expands the scope of disclosable matters.

2.7 Disclosable matters now include misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity, or to a related body corporate (Schedule 1, item 2, s. 1317AA(4)). It applies to conduct that is an offence against the Corporations Act, the Australian Securities and Investments Commission (ASIC) Act, or the financial legislation that has been brought into scope; and it also includes an offence against any other law of the Commonwealth that is punishable by 12 months' imprisonment, or represents a danger to the public or the financial system. The Explanatory Memorandum notes that some of the conduct covered here may not in fact be a breach of a law.² The bill also allows for regulation to prescribe other conduct (Schedule 1, item 2, s. 1317AA(5)).

1 Explanatory Memorandum, p. 14.

2 Explanatory Memorandum, p. 22.

Defining 'eligible whistleblower'

2.8 To be an eligible whistleblower, a person must have some relationship with the entity about which they are making a disclosure. The definition is intended to cover people who are likely to have information about matters which should be disclosed.³

2.9 An eligible whistleblower is an employee, supplier (or employee of a supplier) or associate of the entity; or a relative or dependant or spouse of such a person. Importantly, the definition is widened to cover individuals who are or have been in one of these relationships: thus, former employees and associates are now also protected (Schedule 1, item 2, s. 1317AAA). The bill allows for other categories of person to be prescribed by regulation.

2.10 In the case of superannuation entities, the bill also applies to trustees, custodians and investment managers of the entity.

Recipients of disclosures

2.11 Disclosures may be made to ASIC or APRA, or another prescribed Commonwealth authority, or to a lawyer for the purpose of obtaining advice (Schedule 1, item 2, s. 1317AA(1) and (3)). The Explanatory Memorandum notes that where legal advice is being sought, the individual may not be an eligible whistleblower and the matter may not be a disclosable matter. This is so that people can seek advice about whether they would be protected.⁴

2.12 Disclosures are also protected if they are made to an officer of the entity, or an auditor or actuary of the entity, or another person the entity has authorised to receive disclosures. They may also be made by an individual employee to their supervisor (Schedule 1, item 2, s. 1317AAC). The bill allows for other persons or bodies to be prescribed by regulation.

Emergency disclosure

2.13 The bill also provides for 'emergency disclosure' to a journalist or a member of Parliament. Such disclosure will be protected only if the disclosure has already been made to ASIC, APRA or a prescribed body and qualifies for protection, a reasonable period has passed since it was made, and there is now an imminent risk to public health or safety or to the financial system if the disclosure is not acted on immediately. The discloser must give the original recipient written notification of their intention to make an emergency disclosure (Schedule 1, item 2, s. 1317AAD).

2.14 The bill defines a journalist to be one who is working for a newspaper or magazine, a radio or television broadcasting service, or a similar service operated commercially through the internet. This is intended to rule out disclosures on social media or to 'self-defined' journalists.⁵

3 Explanatory Memorandum, p. 23.

4 Explanatory Memorandum, pp. 20–21.

5 Explanatory Memorandum, p. 28.

'Reasonableness'

2.15 At present, whistleblowers are required to make disclosures 'in good faith'..

2.16 This requirement has been replaced by a reasonableness test which requires that the whistleblower have reasonable grounds to suspect misconduct or an improper state of affairs (Schedule 1, item 2, s. 1317AA(4) and (5)).

2.17 The requirement to act in good faith has been removed on the basis that the Government wishes to encourage whistleblowers to come forward with information that will assist law enforcement efforts, regardless of the motivation of the whistleblower.

Confidentiality

2.18 The bill makes it an offence to reveal the identity of a whistleblower without the whistleblower's consent, except to regulatory or law enforcement authorities or in the course of investigation. The prohibition covers revealing information which would identify the whistleblower, but this is qualified by an exception where revealing the information is necessary for the investigation (Schedule 1, item 2, s. 1317AAE). It is not an offence in general to disclose information about the wrongdoing which has been disclosed by the whistleblower.

2.19 A note to this section in the bill states that in a prosecution for an offence the defendant 'bears an evidential burden'—that is, the burden of proof is on the person accused of revealing a whistleblower's identity.

2.20 There is no longer any requirement that a whistleblower provide his or her name in order to qualify for protection. Anonymous disclosures will now be protected.⁶

What protection is offered to whistleblowers?

Immunity in criminal and other proceedings

2.21 A whistleblower is not subject to any civil, criminal or administrative liability for making a disclosure, and no action can be taken against him or her under a contract, for example an employment contract or a supply contract with the company the disclosure relates to. Information that is protected by this act will not be able to be used against the whistleblower in criminal proceedings or proceedings where a penalty is imposed (Schedule 1, item 2, s. 1317AB(1)). This clarifies and extends existing protections.

2.22 However, a note in the bill makes it clear that a person can still be subject to civil, criminal or administrative liability for conduct that is revealed by the disclosure.

Protection from victimisation

2.23 The bill makes it easier for a whistleblower to seek redress for victimisation.

6 Explanatory Memorandum, p. 28.

2.24 The bill allows for civil or criminal prosecutions for victimisation. This occurs where the victimiser causes detriment to another person in the belief or suspicion that the person, has made, or may make a disclosure. Thus there is no requirement that the disclosure has actually taken place, nor that the victimiser actually knows about a disclosure; nor is there a requirement to prove that the victimiser intended to cause the detriment, nor that the disclosure is the only reason for the detriment (Schedule 1, items 5–7, s. 1317AC).

2.25 The detriment can be to another person: it does not have to be to the whistleblower, but can also be to a colleague, supporter, friend or relative. This is already the case in existing law.⁷

2.26 The bill provides that detriment includes dismissal, disadvantage or discrimination in employment, harassment or intimidation, harm or injury (physical or psychological), and any damage to a person including their property, reputation or financial position. Detriment is not limited to these categories of harm.

Compensation

2.27 By making it easier to prove victimisation, the bill makes it easier for a whistleblower (or their associate) to seek compensation for loss, damage or injury. In addition, a claim for compensation can be made without the offence of victimisation having been proved. The claim can be against an individual or a body corporate, and the body corporate can also be liable for conduct that assisted or was involved in the victimising conduct (Schedule 1, item 9, s. 1317AD).

2.28 As well as orders for compensation, a court can grant an injunction to stop the victimising conduct, or an order requiring an apology or reinstatement or exemplary damages, or any other order the court thinks appropriate.

2.29 The bill reverses the burden of proof in compensation claims. The claimant for compensation simply has to point to evidence that suggests a 'reasonable possibility' that the victimisation has taken place. Once that is done, the defendant entity which will bear the evidential and the ultimate legal burden of disproving the claim—that is, that the defendant entity did not believe or suspect that the whistleblower may have made a disclosure that qualifies for protection, and that the belief or suspicion was not the reason, or part of the reason, for the victimising conduct (Schedule 1, item 9, s. 1317AE (2)). This will no doubt be a difficult onus for a defendant entity to discharge, as it will have to prove a negative proposition concerning its own state of mind. If the claim is made against a person and their employer, there will be no order against the employer if it took reasonable steps to avoid the victimising conduct (s. 1317AE (3)).

2.30 The whistleblower's identity is to be protected in court proceedings (s. 1317 AG).

2.31 The bill also removes the risk to whistleblowers of an adverse costs order being made against them. The claimant cannot be ordered to pay the costs of the

7 Explanatory Memorandum, p. 33.

defendant entity on a party-party basis, unless the claimant has vexatiously initiated the proceedings or where the claimant's behaviour has otherwise unreasonably caused the other party to incur costs (s. 1317 AH).

Whistleblower policy

2.32 The bill requires public companies, large proprietary companies and companies that are trustees of superannuation entities to have a whistleblower policy, and to make that policy available to officers and employees of the company.

2.33 The policy has to set out information about the protections available to whistleblowers and what disclosures are protected, how the company will support whistleblowers and investigate disclosures, and how the company will ensure fair treatment of employees who are mentioned in disclosures (Schedule 1, item 9, s. 1317AI).

Penalties

2.34 At present victimisation and disclosing a whistleblower's identity are offences and a contravention has to be proved to the criminal standard, beyond reasonable doubt. The bill maintains criminal liability for these offenses. It reverses the onus of proof for the former in favour of the whistleblower, and also makes both offences civil penalty provisions, with contraventions attracting a maximum penalty of \$200,000 for an individual and \$1 million for a corporation (Schedule 1, items 10 and 11, s. 1317E(1) and s. 1317 (G)).

Amendment of the Taxation Administration Act 1953

Overview

2.35 Part 2 of Schedule 1 of the bill amends the *Taxation Administration Act 1953* in ways that are broadly similar to the amendments to the Corporations Act. It creates a regime to protect individuals who report non-compliance with tax laws or misconduct in relation to an entity's tax affairs.⁸

2.36 A disclosure may be made by an eligible whistleblower to the Commissioner of Taxation or to an eligible recipient. Eligible recipients explicitly include internal auditors and registered tax agents and BAS agents. The bill does not specify that a person who supervises or manages a whistleblower is an eligible recipient.

2.37 There is no provision for emergency disclosure, largely because tax affairs are confidential and the Commissioner of Taxation has indicated that public disclosures would very likely compromise its investigation of a whistleblower's disclosure, but also because the time lags involved in tax collection mean that the occasions when they might be justified do not arise.

2.38 While whistleblowers are not subject to liability or contractual action for making a disclosure, there is no immunity from an assessment of the whistleblower's own taxation if it is revealed by the disclosure. There can also be an administrative

8 Explanatory Memorandum, pp. 65–6.

penalty. However, the Commissioner may treat it as a voluntary disclosure when assessing an administrative penalty.