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A NEW ERA IN WHISTLEBLOWING

Companies must have the right policies and procedures in place as they gear up for tough new laws.

Whistleblower protections will soon to be extended to the private sector pending new laws effective 1 July 2019 with a six-month implementation period. It's important for ASX-listed companies to be across the new rules to ensure they comply.

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 consolidates previously separate regimes into a new *Corporations Act* regime. Aside from extending the new law to the private sector, it expands its coverage and broadens obligations for organisations that already have a whistleblower framework. The act also implements a new whistleblower tax regime through amendments to the *Taxation Administration Act 1953*.

Policy frameworks

Under the new laws all companies, ADIs, insurers and superannuation entities must have a whistleblower policy. Banking and financial services businesses are already required to have a whistleblower policy. Under the new legislation however, whistleblower protections cover an employee's relatives or dependants. Previously, the regime only applied to existing officers, employees and contractors.

The new laws include new, consolidated and expanded disclosures for misconduct, an improper state of affairs or circumstances, contraventions of legislative obligations and conduct that represents a danger to the public or financial system.

The laws also expand the group of people eligible to receive disclosures, including legal practitioners. Additionally, the new laws replace the current good faith

test with an objective test requiring a whistleblower to have "reasonable grounds to suspect", meaning the motivations of the whistleblower will no longer be relevant.

Importantly, public interest disclosures will be permitted to be given to members of parliament or the media, (excluding social media), if no action is taken or believed by the whistleblower to have been taken by the organisation after 90 days.

The law also allows for emergency disclosures to be made to the media or members of parliament where there is a risk of substantial or imminent danger to the health or safety of one or more persons, or to the natural environment. Civil and criminal penalties apply for disclosing a whistleblower's identity without consent or victimising a whistleblower.

The act provides a carve-out for personal, work-related grievances in the whistleblower protection provisions, except in specific circumstances, including victimisation of the whistleblower.

How to prepare

Organisations covered by the act need to adopt a whistleblower policy within six months of the start of the new law. Other provisions start immediately. So ASX-listed companies should begin developing or reviewing their policy and supporting processes as soon as possible.

Make sure processes for submitting a whistleblowing disclosure, as well as investigating, responding and acting on whistleblower disclosures, are well-designed. If an organisation misses the new 90-day window to take action, it risks the disclosure

being made to a parliamentarian or the media.

People are often only driven to make a whistleblower disclosure after they have exhausted all other avenues. So companies should take the opportunity to proactively review their governance framework to ensure it supports good conduct and proactive escalation of issues.

In particular, develop clear expectations around conduct, including bribery and corruption, conflict management and receipt of gifts. Ensure there are adequate arrangements to address risk and compliance as well as clear paths for employees to escalate concerns so the message reaches decision makers.

Corporate culture is critical. Companies should take the opportunity to check-in with the state of their corporate culture by reviewing recent culture surveys, feedback from exit interviews, previous whistleblower disclosures, customer complaints and incident reporting statistics. The organisation should consider whether employees are encouraged to raise issues and constructively challenge the way an organisation goes about its business; whether issues raised by employees are taken seriously and whether action is taken to address issues is timely.

Previous whistleblower disclosures provide valuable learning opportunities. It is prudent to review whether actions recommended to address issues raised in a past whistleblower disclosure were implemented. It is not uncommon to see organisations fail to follow through on agreed actions.

The impact of whistleblowing should not be underestimated. It can come at a significant cost to the individual, as previous whistleblower case studies have shown, and result in substantial reputational and regulatory damage for an organisation. Whistleblowing has a significant relationship to the overall health of an organisation's culture and its management of governance, risk and compliance.

Article written with assistance from special counsel Michelle Bradshaw.