Australian Government

Australian Government response to the Senate Economics Legislation Committee report:

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

MARCH 2019

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

Government's Response to Committee's Recommendations:

Recommendation 1

The committee recommends that an explicit requirement for review be included in the bill.

The Government **agrees** with this recommendation.

A Government Amendment to the Treasury Laws Amendment (Enhancing Whistleblower Protections Bill) 2017 (Whistleblower Bill) provides for a statutory review after 5 years from commencement.

Recommendation 2

The committee recommends that the definition of journalist be reviewed.

The Government **agrees** with this recommendation.

A Government Amendment to the definition of journalist in the Whistleblower Bill clarifies that it includes journalists working for a national broadcasting service.

Recommendation 3

The committee recommends that the bill be passed.

The Government **notes** this recommendation.

Additional recommendation by the Australian Greens – Government response

Recommendation 1

That, following the imposition of a penalty against a wrongdoer by a Court (or other body that may impose such a penalty), a whistleblower protection body or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.

That such a reward should be determined within such body's absolute discretion within a legislated range of percentages of the penalty imposed by the Court (or other body imposing the penalty) against the whistleblower's employer (or principal) in relation to the matters raised by the whistleblower or uncovered as a result of an investigation instigated from the whistleblowing and where the specific percentage allocated will be determined by the body taking into account stated relevant factors, such as:

a) the degree to which the whistleblower's information led to the imposition of the penalty;

b) the timeliness with which the disclosure was made;

c) whether there was an appropriate and accessible internal whistleblowing procedure within the company that the whistleblower felt comfortable to access without reprisal;

d) whether the whistleblower disclosed the protected matter to the media without disclosing the matter to an Australian law enforcement agency or did, but did not provide the agency with adequate time to investigate the issue before disclosing to the media;

e) whether adverse action was taken against the whistleblower by their employer;

f) whether the whistleblower received any penalty or exemplary damages (but not compensation) in connection to any adverse action connected with the disclosure; and

g) any involvement by the whistleblower in the conduct for which the penalty was imposed, noting that immunity from prosecution, seeking a reduced penalty against the whistleblower etc. is dealt with by separate processes and that a reward would be regarded as a proceed of crime, if the whistleblower had been involved in criminal conduct (i.e. immunity or reduced penalty, not the reward is the benefit and incentive).

The Government **notes** this recommendation.

The introduction of whistleblower rewards was a recommendation of the Parliamentary Joint Committee on Corporations and Financial Services report into Whistleblower Protections (PJC Report).

The Government will respond separately to the recommendations of the PJC Report.

Dissenting Report: Additional recommendations by Sen. Rex Patrick – Government response

Recommendation 1

A whistleblower should be able to make a disclosure to any person of responsibility within an organisation but limit 'eligible recipients' to senior managers.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill provides protection to disclosures made to senior managers, rather than persons who manage or supervise an individual.

Recommendation 2

A whistleblower should be able to make a disclosure to an internal auditor.

The Government **agrees** with this recommendation.

The Supplementary Explanatory Memorandum expressly notes references to an auditor in the Whistleblower Bill include both internal and external auditors.

Recommendation 3

Disclosures that are only individual personal, employment or workplace grievances should not protected under this Act (unless they are a grievance raised under the civil remedy or victimisation provisions at s1317AC, AD) and this should be stated explicitly.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill exempts personal work-related grievances from protections under the *Corporations Act 2001*.

This Amendment does not apply to the whistleblower regime in the taxation laws because the scope of those provisions is already limited to disclosures about tax affairs.

Recommendation 4

If a disclosure of disclosable conduct has been made to a prescribed authority and after a reasonable time, no steps have been taken by that or any other agency (excluding where the whistleblower has elected to make an anonymous disclosure) whistleblowing protections shall apply if the same disclosure is subsequently made to a journalist if they have complied with the disclosure requirements of the Act.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill revises the emergency disclosure provision to align the whistleblower protections in the *Corporations Act 2001* with the *Public Interest Disclosure Act 2013* (PIDA).

That is, disclosures can be made to a journalist or a Member of the Parliament either as a public interest disclosure or an emergency disclosure. The thresholds for meeting either test are similar to PIDA and adapted to the corporate context as necessary.

Both types of disclosures require the whistleblower to have first made a disclosure to ASIC, APRA or a prescribed Commonwealth authority and then to subsequently provide written notification to that regulator of their intention to make either a public interest disclosure or emergency disclosure.

For a protected public interest disclosure, further threshold tests must be satisfied including a requirement that at least 90 days have passed since the previous disclosure was made and that the discloser does not have reasonable grounds to believe that action is being, or has been taken, to action the disclosure. There are no such requirements under the emergency disclosure provisions.

This Amendment does not apply to the whistleblower regime in the taxation laws, which do not contain equivalent provisions.

Recommendation 5

A 'reasonable time' for emergency disclosures should then be defined.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill defines a 'reasonable time' for public interest disclosures as 90 days since the disclosure was made. The revised emergency disclosure is not subject to a 'reasonable time' requirement.

Recommendation 6

The emergency disclosure protections should extend to only as much information as is necessary to have the emergency disclosure acted upon.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill limits protections by requiring that the extent of information disclosed under a public interest disclosure is no greater than is necessary to identify the misconduct, or improper state of affairs or circumstances, or other relevant conduct. A similar Government Amendment limits protections in the case of emergency disclosures by requiring that the extent of information disclosed is no greater than is necessary to inform the recipient of the substantial and imminent danger.

Recommendation 7

Belief or suspicion requirement in s1317AD(1)(b)&(c) must be removed and replaced with a more general test that does not hinge on state of mind.

The Government **agrees in part** with this recommendation.

The operation of the compensation provision in subsection 1317AD(1) does not require the claimant to prove the state of mind of the defendant to bring forward a civil claim. To make clear the requisite burden of proof for a compensation order, the existing burden of proof provision has been amalgamated into the compensation provision (s1317AD).

Similarly, the burden of proof of the claimant under the tax regime does not require the claimant to prove the state of mind of the defendant to bring forward a civil claim and a corresponding Amendment has been made to the relevant compensation provision in the tax regime.

Recommendation 8

'Victimising conduct' in s1317AD(1)(a) must be removed and replaced with 'detrimental conduct'.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill replaces references to 'victimising conduct' with 'detrimental conduct' where applicable, and moves the definition of 'detrimental conduct' to a stand-alone provision to make clear conduct that causes detriment is not limited to victimisation. This Amendment was adopted in the corresponding provisions in the tax regime.

Recommendation 9

Conduct giving rise to remedies in s1317AD(1) must explicitly include a failure to fulfil 'a duty to support or protect the second person in relation to a disclosure they made and detriment was caused to the second person as a result of the failure of the first person in part or whole to fulfil that duty.' Section 1317AD(2)(c) must be modified in similar duty related terms.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill will allow whistleblowers under the corporate and tax regimes to claim compensation or other remedies for a breach of duty to them by a body corporate. It seeks to increase consistency where practicable of the compensation provisions in the Whistleblower Bill with those in the *Fair Work (Registered Organisations) Act 2009*.

Recommendation 10

Guidance must be provided to a court that 'duty to support or protect' includes responsibility to fulfil organisation's commitments under a s1317AI(5)(c) policy or any similar policy, and any applicable guidance or standards. This guidance can be added as a new subsection to s1317AD.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill makes clear the circumstances in which a court may make an order, including whether the employer took reasonable precautions, and exercised due diligence, to avoid the detrimental conduct; the extent to which the employer gave effect to its whistleblower policy; and any duty that the employer was under to prevent the detrimental conduct.

This Amendment was adopted in the corresponding provision in the tax regime.

The Supplementary Explanatory Memorandum outlines the factors that a court may have regard to when determining whether a duty to prevent the detriment arose and if the duty was breached.

Recommendation 11

The 'due diligence defence' in s1317AE(3) must be made consistent with the duty to support or protect and reduced to a mandatory or relevant consideration when deciding orders, so that the issue of whether or the extent to which the duty was fulfilled is considered, but is no longer a total defence.

The Government **agrees** with this recommendation.

A Government Amendment to the Whistleblower Bill removes due diligence as a total defence and makes it a consideration for a court when deciding a compensation order. This Amendment was adopted in a corresponding provision in the tax regime.

Recommendation 12

A claimant should be required to show:

a) they made a disclosure to which the Act applies;

b) they suffered detriment within the meaning of the Act (not simply a 'suggestion' of a 'reasonable possibility' that they have suffered detriment, as proposed); and

c) prima facie, either that the fact of their disclosure could have been a contributing factor in the detrimental act or omission (meaning any factor, which alone or in connection with other factors, tended to affect in any way the outcome); or, as above, the respondent was under a duty to provide support or take action in order to prevent, limit, avoid, or restrain others in respect of such detrimental outcomes resulting from the whistleblowing;

If the claimant burden is met, then the respondent is required to demonstrate by clear and convincing evidence (meaning, it must be highly probable or reasonably certain) that:

a) The respondent would have taken the same action in relation to the claimant, in the absence of the disclosure issue, for independent and legitimate reasons;

b) A significant step had already been taken toward implementing that course of action prior to the disclosure issue arising; and

c) All duties to support and protect the claimant in respect of their whistleblowing were discharged, or that none of the detriment suffered could possibly have been prevented by the proper and reasonable fulfilment of those duties.

The Government **does not agree** with this recommendation.

This recommendation would weaken the protections for whistleblowers by raising the evidential burden and so making it harder for whistleblowers to bring forward a claim for compensation.

It would also change the burden of proof for defendants from 'balance of probabilities' to 'highly probable or reasonably certain'. Such a high standard is an inappropriate burden on the defendant to disprove matters that the plaintiff has not been required to prove to any standard.