

Whistleblower Protections

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In order to encourage people to identify and call out misconduct and harm to consumers and the community, the Corporations Act 2001 (Cth) (**the Corporations Act**) provides a range of protections for whistleblowers.

The Corporations Act regulates those businesses incorporated as companies.

To qualify for protection under the Corporations Act, disclosures must meet criteria relating to:

- the company or organisation to whom the disclosure relates, and
- the discloser's relationship to the company or organisation, and
- who the disclosure is made to, and
- the subject of the disclosure.

Who is covered?

To qualify for protection under the Corporations Act, a disclosure must relate to:

- a company
- a bank
- a provider of general or life insurance
- a superannuation entity or superannuation trustee, or
- an incorporated association or other body that is a trading or financial corporation. This can include not-for-profit organisations.

Who can make disclosures?

To qualify for protection under the Corporations Act, the person making the disclosure (**the whistleblower**) must have a certain relationship with the company or organisation to which the disclosure relates.

The whistleblower must be:

- an officer of the company or organisation
- an employee of the company or organisation (or a related company or organisation)
- an individual who supplies goods or services to the company or organisation, or an employee of a person that supplies goods or services to the company or organisation
- an associate of the company or organisation, or
- a spouse, relative or dependant of one of the people referred to above.

Additional eligibility criteria exist for superannuation entities.

Who can receive a disclosure?

To qualify for protection under the Corporations Act, a disclosure must be made to:

- an officer or senior manager of the company or organisation (or a related company or organisation)
- an auditor, or member of the audit team, conducting an audit of the company or organisation (or a related company or organisation)
- an actuary of the company or organisation (or a related company or organisation)
- a person authorised by the company or organisation to receive whistleblower disclosures, such as an external whistleblowers hotline

- ASIC or APRA, or
- the whistleblowers' lawyer.

In limited circumstances, a disclosure may also be made to a journalist or member of the Commonwealth or a state or territory parliament.

Disclosures can be made anonymously.

Additional eligible recipients exist for superannuation entities.

What can be disclosed

To qualify for protection under the Corporations Act, the whistleblower must have reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs, in relation to the company or organisation (or a related company or organisation).

The terms misconduct and improper state of affairs are broadly defined, and can include conduct that:

- breaches the Corporations Act
- breaches any other law of the Commonwealth that is punishable by imprisonment of a period of 12 months or more, or
- represents a danger to the public or the financial system.

Protections for the whistleblower

Where a disclosure is made that meets all the above criteria, there are various protections available under the Corporations Act to the whistleblower:

- The whistleblower is entitled to have their identity, or information that is likely to lead to their identification, kept confidential unless they consent to its disclosure. An exclusion to this is that a company or organisation is typically entitled to disclose such information to ASIC, APRA, the AFP, or a lawyer for the purpose of obtaining advice about whistleblower protections.

- The whistleblower cannot be subject to any civil, criminal or administration liability (including disciplinary action) for making the disclosure.
- No contractual or other remedy may be enforced, and no contractual or other right may be exercised against the whistleblower on the basis of the disclosure.
- The whistleblower cannot have any detrimental action taken against them because they have made, may make or could make a whistleblower disclosure. In an employment context, detrimental action includes:
 - dismissal of an employee
 - injury to an employee in their employment
 - altering an employee's position or duties to their disadvantage
 - discriminating between the whistleblower and other employees
 - harassment or intimidation of an employee
 - harming or injuring an employee (including psychologically), or
 - damaging an employee's property, reputation, business or financial position.

In addition, protections under the Fair Work Act 2009 (Cth), such as general protections, may apply.

Additional requirement - Whistleblower policy

By 1 January 2020, certain companies and organisations are required to implement a compliant whistleblower policy.

This requirement applies to:

- Public companies
- Large proprietary companies which meet at least 2 of the following:
 - 100 employees or more
 - \$50 million or more in consolidated revenue
 - \$25 million or more in consolidated gross assets
- Proprietary companies that are trustees of registrable superannuation entities.

To assist you to comply with the Corporations Act, Employsure can provide you with a Whistleblower Policy. Note this policy is not intended for companies listed on the Australian Securities Exchange.

Penalties

The penalties associated with breaches of whistleblower protections under the Corporations Act are significant.

For any company or organisation covered by the whistleblower protections in the Corporations Act, breach of the confidentiality or victimisation obligations outlined above can result in up to 2 years imprisonment for an individual, and/or fines of \$1.05m or three times the benefit derived/detriment avoided. Breach of these provisions may also lead to fines against the company or organisation, of up to \$10.5m or three times the benefit derived, or detriment avoided, or up to 10% of the body corporates annual turnover (capped at \$525m).

For a company or organisation required to have a whistleblower policy in place, failure to have a compliant whistleblower policy in place by 1 January 2020 will be a criminal offence and carry a maximum fine of \$126,000.

Managing your obligations

Considering the significant penalties outlined above, it is important for any company or organisation that is covered by these provisions to take steps to manage their obligations.

Employsure recommends that you provide training to anyone eligible to receive a whistleblower disclosure on how to handle any such disclosures. Focus this training on the need to keep the identity of the whistleblower confidential, and to avoid taking detrimental treatment against the whistleblower.

Second, if you are obliged to have a whistleblower policy, ensure this is implemented promptly and that anyone eligible to receive a whistleblower disclosure is trained in how to apply this policy. Ensure this policy is available to officers and employees of your

company or organisation, and that current and future employees are trained on this existence of the policy.

If you receive a whistleblowing complaint, ensure that any investigation is thorough, objective, fair and independent.

Contact the Employsure Advice Service for further information regarding your obligations in relation to whistleblowers, or for a Whistleblower Policy.

Alternatively, if you require assistance implementing a whistleblowers structure in your company or organisation, we recommend you engage a third-party auditor to assist.