ONE ASIA LAWYERS

Whistleblower Protection in Australia - Part 1

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One Asia Lawyers Group
Australia and New Zealand office

1. Applicable laws and regulations

Whistleblower protection in Australia is set out in Part 4.9AAA of the Corporations Act 2001 (Cth) (the "Act"). The Act was substantially amended[1] in 2019 to introduce a more robust whistleblower protection system to encourage reports of misconducts in public companies. In addition, on 24 February 2021, the Australian Securities and Investments Commission (ASIC) announced a whistleblower immunity policy, which encourages reports of misconducts relating to financial services[2].
This newsletter is the first part of an introduction to whistleblower protection in Australia, explaining what "report" is covered by the Act with some of the key concepts.

2. Qualifying Disclosure

Qualifying disclosure under the Act is defined as a disclosure by an Eligible Whistleblower of information about a misconduct of a Regulated Entity to (i) ASIC, the Australian Prudential Regulation Authority (APRA) or any other designated federal government agency, (ii) an Eligible Recipient, or (iii) a lawyer for advice in relation to the Act.

The types of misconducts that can be reported include misconduct and improper state of affairs or circumstances. As the Act does not define what an improper state of affairs or circumstances is, a wide range of conducts and circumstances may be covered. Examples of misconduct and improper state of affairs or circumstances include, but are not limited to, an entity (and its directors, officers, employees or associated companies) engaging in a violation of the Act or certain financial laws and regulations, an illegal act punishable by imprisonment for more than 12 months, or any other act that is considered a risk to the public or financial system.

Prior to the amendment in 2019, there was a requirement that a disclosure be made in "good faith", which previously rendered whistleblowers ineligible for the protection under the Act if their disclosure was proved to be not made in good faith based on their past conducts or motives. The amendment removed this subjective element and instead requires that disclosure have "reasonable grounds" to suspect that the information concerns misconducts of the Regulated Entity. With regard to the existence of "reasonable grounds", a recent judgment[3] has held that the determining factor is what a whistleblower knew at the time of the disclosure, and that matters unknown to the whistleblower at the time of the disclosure or allegations regarding the purport or effect of the reported act are irrelevant in determining whether the whistleblower qualify for protection. As a company, it is important to obtain as much information as possible about the facts known to a whistleblower at the time of their reporting to the company and make an objective decision on whether the whistleblower protection applies to the disclosure.

3. Eligible Whistleblower

Eligible Whistleblowers covered by the protection under the Act include (i) officers and employees

[1] Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 <https://www.legislation.gov.au/Details/C2019A00010>
[2] ASIC has announced a policy of granting immunity from civil penalty or criminal proceedings to persons who conspired with others to engage in a misconduct concerning financial services if they meet requirements such as reporting to ASIC and cooperating with investigations. Further details can be found on ASIC's website below.
<https://asic.gov.au/about-asic/dealing-with-asic/asic-immunity-policy/>
[3] Quinlan v ERM Power Ltd & Ors [2021] QSC 35

of Regulated Entities, (ii) persons who supply goods or services to Regulated Entities and their employees, (iii) directors and secretaries of related companies of Regulated Entities, and (iv) relatives of (i) to (iii) above.

4. Regulated Entities

Regulated Entities are broadly defined to include companies, banks, insurance companies and superannuation entities that are incorporated or registered in Australia. Disclosure of information concerning misconducts of officers, employees and related companies of these entities will also be covered by the protection[4].

5. Eligible Recipients

Eligible Recipients are also defined broadly to include persons appointed by an entity to receive whistleblowing reports (whether internal or external), directors and secretaries of an entity (note that in Australia “directors” include registered directors as well as de facto directors acting in the capacity of a director), other officers (such as those who participate in the decision making process of the company or have influence over the decisions of the company, trustees and liquidators), senior managers (people who participate in decision-making affecting all or a substantial part of the business) and internal and external auditors. This does not include employees and junior managers. Therefore, even if a director or a member of management who is not a whistleblowing contact receives a report, they may be subject to confidentiality obligations and other obligations to protect whistleblowers under the Act. It is thus important to always ensure that they know how to respond when it happens.
We will discuss the obligations to protect whistleblowers in more detail in the second part of this newsletter.

In the second part, we will explain what kind of protection obligations to be imposed for qualified whistleblowers, what companies should be careful about and exceptions.

One Asia Lawyers Australia and New Zealand Office

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Author

Miki Kato

One Asia Australia and New Zealand Office

Miki is admitted to practice law in Australia. At One Asia Lawyers, Miki assists clients with various corporate legal matters in Australia, New Zealand, Singapore and Malaysia such as contract drafting/review, legal research, legal due diligence and contract negotiations.

If you have any queries regarding this article, please contact at miki.kato@oneasia.legal.

[4] Corporations Act 2001 section 1317AA(4)(b) and (5)(b)