

Corporate Whistleblower Policy Instructions for Final Bill to Amend the Corporations Act 2001 (reflecting consultation)

Section Number	Heading/Description	Section Status	Policy Instruction	Comments	Exposure Draft Reflects Instructions
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			<p>S 47C</p> <p>Amend defined terms as follows:</p> <p>S 47C</p> <p>Delete “whistleblower” reference in definition of whistleblower regulated entity so this becomes simply Regulated Entity</p>	<p>Panel recommendation to eliminate confusion arising from profusion of references to whistleblowers in new definitions and ensure Part 9.4AAA is easily understandable and navigable by lay people (ie non-lawyers)</p>	
<p>9</p>	<p>Inserts definitions of eligible whistleblower, whistleblower disclose, whistleblower regulated entity and S 47C</p>	<p>New</p>		<p>Amend</p>	
<p>1317AA</p>	<p>Disclosures qualifying for protection</p>	<p>Substituted</p>	<p>S 47C</p>	<p>Yes</p>	
<p>S 47C</p>					

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(1)(c)	Establishes link to subject matter that qualifies for protection as a disclosure	Substituted	Delete reference to subsection (2)
			Consequence of Panel recommendation to merge s.1317AA(2) and (3) – see below.
			Amend
			Note it is also possible in the alternative to merge the matters in subsection (2) and (3) with s.1317(1)(c) so it reads “(1) A disclosure qualifies if: ... [new (c)]”

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				<p><i>the disclosure is of information which the eligible whistleblower knows or has reasonable grounds to suspect that the information indicates that any of the following: ...”.</i></p>	
(2)	Identifies certain matters that may be the subject of disclosure	Substituted	<p>Delete heading above subsection (2)</p> <p>Delete subsection (2)</p> <p>Merge deleted text in subsection (2) with subsection (3) by adding deleted text to end of subsection (3)</p>	<p>Panel recommendation to eliminate confusion for whistleblowers and aid statutory interpretation</p>	<p>Amend</p>
<h1>s 22(a)(ii)</h1>					
(3)	Identifies additional matters that may be the subject of disclosure	Substituted	<p>Delete the heading above subsection (3) and substitute with heading “Disclosable Conduct”</p> <p>Delete prefatory words “Without limiting subsection 2,” in subsection (3)</p> <p>Substitute “discloser” with “eligible whistleblower” in the prefatory words in subsection (3)</p> <p>Add after subsection (3)(f) the words: “or has otherwise engaged in misconduct, or that there exists an improper state of affairs or circumstances in relation the</p>	<p>Consequence of Panel recommendation to merge subsections (2) and (3).</p> <p>See also Note above against subsection (1)(c) for alternate approach to merger of provisions</p> <p>Note: misconduct is a defined term in s.9 – it is an <i>inclusive</i> definition that currently expressly covers fraud, negligence, default, breach of trust and breach of duty - so is broad</p>	<p>Amend</p>

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			<p>entities referred to in (3)(a) or (b) above".</p> <p>Renumber subsection (3) as subsection (2)</p> <p>S 47C</p> <p>S 47C</p> <p>s 22(a)(ii)</p>	
<p>1317AAA</p>	<p>Establishes definition of and lists whistleblower regulated entities</p>	<p>New</p>	<p>Shift text of section 1317AAD which defines eligible whistleblower to s.1317AAA</p> <p>S 47C</p> <p>so that the definition of eligible whistleblower comes before the section defining whistleblower regulated entities and make that section 1317AAB</p> <p>S 47C</p> <p>Delete word "whistleblower" from definition of whistleblower regulated entity so the defined</p>	<p>Panel recommendation</p> <p>S 47C</p> <p>Amend</p>

term becomes Regulated Entity

Insert a regulations power to allow for list of regulated entities to be expanded later if necessary

Panel question 1: does the current draft s.1317AAA(b) – a corporation to which para 51(xx) Constitution applies -include a body corporate, as defined in s.9 of the Corporations Act. If it doesn't please add body corporate to the list of regulated entities so it is clear that companies being wound up or dissolved are included in the definition.

Please also amend provisions in part 9.4AAA so that there is a single term, used consistently across the part – currently company and body corporate are both used in this Part and it is unclear whether any difference between them is intended or not. From a policy perspective, we want the term which covers all companies and corporations to be used in each case so there is no confusion.

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<p>1317AAB</p> <p>Establishes definition of and lists whistleblower disclosees</p>	<p>New</p>	<p>Panel recommendation to reduce confusion for lay people created by profusion of terms which include “whistleblower”</p> <p>Panel recommendation to delete word “senior” so that whistleblower disclosures to immediate managers are protected.</p>	<p>Amend</p>
<p>Delete term “whistleblower disclosee” wherever it appears in this section and substitute with term “eligible recipient”. Make similar amendments to the rest of Part 9.4AAA so that eligible recipient is used in lieu of whistleblower disclosee.</p> <p>Delete the words “a director, secretary or senior manager” in current draft s.1317AAB(2)(c) and substitute with the words “an officer or manager”, so the definition of officer in s.9 can be utilised</p>	<p>Delete subsection (1)(c)</p> <p>Renumber s.1317AAB as 1317AAC (or alternate number as per note in comments column against 1317AAA above)</p>	<p>Panel recommendation to reduce confusion for lay people created by profusion of terms which include “whistleblower”</p> <p>Panel recommendation to delete word “senior” so that whistleblower disclosures to immediate managers are protected.</p>	<p>s 22(a)(ii)</p>
<p>Amend Note in current draft</p>	<p>Amend Note in current draft</p>	<p>Amend Note in current draft</p>	<p>Amend Note in current draft</p>

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		s.1317AAB so that it contains corrected section numbering references		
1317AAC	Establishes definition of and lists whistleblower third party disclosees	New Delete term “whistleblower third party disclosees” wherever it appears in this section and substitute with term “ emergency recipient ”. Make similar amendments to the rest of Part 9.4AAA so that emergency recipient is used in lieu of whistleblower third party disclosee.		Amend
Renumber s.1317AAC as 1317AAD				
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(3)	New	Insert in subsection (3) at the end of the definition of journalist the words “and is employed in that capacity by a national newspaper or media”	The current draft definition of journalist does not adequately fulfil the policy intention to exclude non-broadcast or social media. Panel agrees	Amend
Insert a new term:		<u>Note</u> : it is unnecessary to include		

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	<p>Media has the same meaning as in s.738ZG(10)</p>	<p>a definition of national newspaper because it is a defined term in s.9</p>
<p>1317AAD</p>	<p>Establishes a definition of and lists eligible whistleblowers</p>	<p>Partially new and partially Substituted</p>
<p>Amend</p>	<p>Panel recommendation</p>	<p>Panel recommendation</p>
<p>S 47C</p>	<p>Delete the prefatory words and substitute with "Any person who in relation to a regulated entity is currently or was formerly any of the following: ..."</p> <p>Insert into (b) and (d), volunteers or add a new subsection to cover volunteers who are not formally employed by the company or the contractor</p> <p>Delete in subsection (g) the words "a spouse or child" and substitute</p>	<p>S 47C</p>

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			the words “a spouse, child or other close relative”	S 47C	
1317AB	Establishes limited immunity from suit and qualified privilege	Existing with modifications			Yes
N/A			Move existing s.1317AE so that it follows immediately after existing 1317AB and before existing 1317AC	Policy intention is that the three key protections offered to whistleblowers (1 being limited immunity from suit, the other two being the creation of offences (and no also civil penalties) to prevent them suffering any loss or injury as a result of making the disclosure follow each other in sequence in Part 9.4AAA	Amend
1317AC	Establishes offence of victimisation	Existing with modifications to subsection (1)(c) and (d), and addition of definition of detriment	Amend section to make it a civil penalty in addition to an offence by carving intention out of subsections (1) and (2) and adding a note that both of these subsections are a civil penalty provisions and that 1317S also applies. Note that s.337BD of the RO Act as a model for this change.	Panel agrees Current amended draft section does not fulfil policy intention that this offence also be enforceable as a civil penalty in the alternative to an offence to encourage regulators to take action for breach of the provision. Panel s 22(a)(ii) agree The civil penalty can be	Amend

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committed unintentionally eg because it could be committed by someone whose state of mind cannot be attributed to the company or by omission because the company failed to have in place systems, policies and procedures to ensure all staff and contractors were operating in a safe working environment. It is axiomatic that a working environment is unsafe if staff or contractors can be victimised.

Amend

Detriment is defined in amended s.1317AC. If only the word “damage” is included in s.1317AD courts and litigants may be confused about whether detriment is also intended to be covered. Panel agrees.

Panel recommendation

Amend

The current draft does not fulfill the policy intention. The intention was that the claimant only have to establish a prima facie case ie that a disclosure had been made and that detriment had followed, and no more,

1317AD (1) Establishes statutory right to compensation for eligible whistleblower and any other persons who suffer loss or injury from the protected disclosure being made

Substituted

Delete the word “victim” everywhere it appears in this section and substitute with the word “claimant”

(4) Shifts onus of proof to defendant

New

Delete subsection (4)(a) and substitute with the claimant bears the onus of proving that the claimant made a disclosure that was protected under this Part and that the claimant suffered detriment

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<p>before the onus shifted to the defendant. As currently drafted, the claimant has to show more than this, including things that may not be within the knowledge of the claimant. Panel agrees.</p>	<p>Amend</p> <p>S 47C</p>	<p>Add notes to Exmo to make clear that: (1) this section establishes vicarious liability ie makes the company liable for all acts or omissions of its officers and employees if they engage in conduct constituting a breach of the victimisation and confidentiality provisions, and that nothing in this section or</p>
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1317ADC	Prevents usual costs order in Court proceedings being imposed upon unsuccessful claimants	New	Yes
1317AE(1), (2)	Prohibits disclosure of the identity of the whistleblower	Substituted	Amend

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s 47C

s 22(a)(ii)

s 22(a)(ii)

Note this is a companion to 1317AA(1)(b)(iii).

Insert in subsection (2) after existing draft 1317AE(2)(e) a new (f) is made for the purpose of obtaining legal advice, and provided that the information is disseminated to a lawyer in a form that will not breach subsection

(1)(b) unless the whistleblower consents in accordance with subsection (2)(e).

Insert new subsection (3) to provide that

- (a) information contained in the protected disclosure may disseminated further for the purpose of the company investigating the subject matter of the disclosure,

Current draft does not fully reflect policy. Amendments necessary to avoid confusion and limit potential for abuse (where company declines to investigate citing need to avoid committing an offence under s.1317AE). Panel s 22(a)(ii) agree.

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- (c) it is not a breach of this section [1317AE] if the subject matter of the protected disclosure is disseminated further for the purpose of investigating the subject matter, or enforcing the provisions in this Part, or enforcing the law generally, provided that

the information is disseminated in a form or fashion that will not breach subsection (1)(b), unless the whistleblower consents in accordance with subsection (2)(e).

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S 22(a)(ii)

Renumber 1317AE and move section to follow after existing 1317AB – see comments above

1317AF	Requires large companies to have a whistleblower	New	Amend section to include minimum additional policy requirements –	Panel recommendations	Amend
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policy

see below

Suggested (existing highlighted)

(4) The matters that a policy must set out for the purposes of paragraphs (1)(a) and (2)(a) are:

(a) to whom and how disclosures may be made, internally and externally, and including anonymously and/or confidentially; and

(b) how whistleblowers will be supported by the company, commensurately with their circumstances and the nature of the disclosure; and

(c) how disclosures will be investigated or otherwise resolved – including how the company will ensure fair treatment of employees of the company who are the subject of disclosures, or to whom such disclosures relate; and

(d) information about the legal protections available to whistleblowers, including statutory protections and remedies, and how the company will ensure such remedies are made available;

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			and (e) any matters prescribed by the regulations.			
1317AG	Empowers ASIC to make class orders relieving companies from compliance with 1317AF	New	<div style="background-color: #cccccc; padding: 20px; text-align: center;"> <h1>S 47C</h1> </div>		Yes	
1317E(1)	Lists civil penalties under Act	Existing but modified to add 1317AE -- breach of confidentiality as a CP		Amend to add 1317AC -- victimisation as a civil penalty	Draft legislation does not fully reflect policy requirements. Panel s 22(a)(ii) agrees	Amend
1317G(1H)	Empowers Courts to impose a penalty upon	New				Yes

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<p>persons for breaching 1317AE – confidentiality provision</p>				
<p>N/A Empower Courts to impose a penalty upon persons for breaching 1317AC – victimisation provision</p>	<p>Does not exist currently</p>	<p>Insert in 1317G a new provision which mirrors 1317G(1H) to extend Court power to make declarations and impose pecuniary penalties on persons for breaching victimisation</p>	<p>Draft legislation does not fully reflect policy requirements. Panel s 22(a)(ii) agrees</p>	<p>Amend</p>
<h1>S47C</h1>				
<p>1644</p>	<p>Establishes transitional arrangements for legal operation of revised Part 9.4AAA</p>	<p>New</p>		<p>Yes</p>
<p>Schedule 3 – 338B</p>	<p>Adds pecuniary penalty for breach of 1317AF – requirement to have a whistleblower policy</p>	<p>New</p>		<p>Yes</p>

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<p>Schedule 3 - 338</p>	<p>Sets out criminal penalty for breach of victimisation provision</p>	<p>Existing</p>	<p>Increase criminal penalty so it is the same as under the PIDA (s.19) and RO Act (s.337BE) to 2 years or 120 PU or both</p>	<p>s 22(a)(ii) Amend</p>
<p>Schedule 3 - 338A</p>	<p>Sets out criminal penalty for breach of confidentiality provision</p>	<p>Existing</p>	<p>Increase criminal penalty so it is the same as under the PIDA (s.20) (there is no equivalent provision under the RO Act) to 6 months or 30 PU or both</p>	<p>Amend</p>