

PERSONAL AND INDIVIDUAL LIABILITY OF SENIOR OFFICERS

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Faculty**

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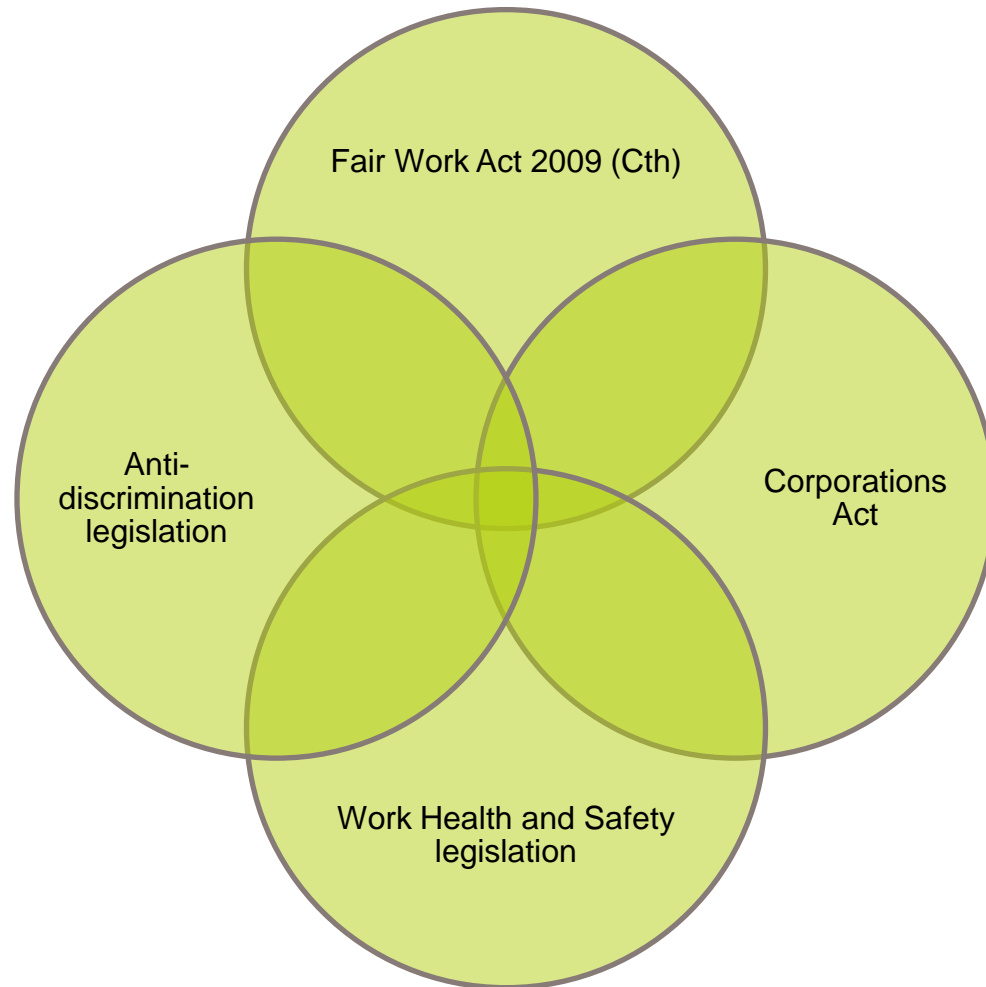
OVERVIEW

Last few years marked by expanding legislative liability of individuals for involvement in breaches of workplace laws by their employer/client. And increased vigour in prosecution by regulators.

Also increased penalties and 2018 High Court decision that individuals can be required to personally pay penalties.

- Legislation
 - Fair Work Act 2009 (Cth)
 - Accessorial liability
 - FWO prosecutions
 - Personal payment orders
 - Recent case law
 - Model Work Health and Safety Legislation
 - Occupational Health and Safety Act 2004 (VIC)
 - Duties of "officers" and workers" under health and safety laws
 - Penalties
 - Corporations Act (Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017
 - Anti-Discrimination laws

LEGISLATIVE SCHEMES



FAIR WORK ACT 2009 (CTH): AREAS OF POTENTIAL INDIVIDUAL LIABILITY

Adverse action -
workplace rights

Discrimination (s
351)

Underpayments of
enterprise
agreement
entitlements or
award

Breach of the NES
(e.g. notice of
termination, annual
or sick leave
entitlements)

Bullying (not
complying with an
anti-bullying order)

Failure to maintain
required employee
records

New Serious Breach Contraventions

FAIR WORK ACT (CONT)

In November 2016, the outgoing Fair Work Ombudsman, Natalie James, indicated that the FWO will actively continue to pursue individuals:

- ▶ *"...[in 2016] over 90% of the cases we put into court included an accessory as a respondent. Where we can prove to a court that a person has been materially involved in a breach of workplace laws, it is our view they should be held to account."*
- ▶ *"...we have alleged that ISS Group, a multi-national corporation...was an accessory to the underpayment of cleaners at the MCG...The cleaners were employed by contractors of ISS Group....we believe its [ISS] senior managers did not act, despite having knowledge that the cleaners were being paid insufficient hourly rates..."*
- ▶ *"Never has it been clearer that workplace compliance is everybody's business. We will continue to use all the tools at our disposal to prevent the deliberate and systemic exploitation of workers, including continuing to see how far section 550 of the Fair Work Act can go."*

FAIR WORK ACT (CONT.)

▶ Ancillary liability (s 550)

- » FWO's preferred method of prosecuting individuals

FAIR WORK ACT 2009 - SECT 550

Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Note: If a person (the *involved person*) is taken under this [subsection](#) to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see [subsection 557A\(5A\)](#)). Serious contraventions attract higher maximum penalties (see [subsection 539\(2\)](#)).

(2) A person is *involved in* a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

▶ Direct liability

- » s.793 additionally provides that conduct engaged in on behalf of the employer by an employee of the employer is taken to have been engaged in also by the employer.

FWO V HU (NO 2) [2018] FCA 1034

- ▶ Prosecution of a mushroom farming company and its director (Mr Marland)
- ▶ Accessorial liability under s.550 for breach of its labour hire company's (HSR Country Pty Ltd) underpayment of its pieceworkers (who picked the mushrooms).
- ▶ Question whether they were pieceworkers and were they casuals (did Marland have to know this when the contracts were entered into) to have "knowledge" of the underpayments
- ▶ Prosecution failed because not proven he knew they were casuals and though he knew they were not paid enough to meet compliant rates for an "average" picker he didn't know the rates paid were enough for an "average competent picker".

ACCESSORIAL LIABILITY - A SUMMARY

- Personal pecuniary penalties

- Against directors, managers, HR managers, people responsible for payroll and administration, and accounting firms

- For "knowing involvement" as an accessory

- Penalties up to \$12,600 for an individual, \$63,000 for a corporation
- For serious contraventions : \$126,000 for an individual, \$630,000 for a corporation.

FAIR WORK ACT (CONT) - RECENT CASES

Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown & Ors [2017] FCA 1301

Who

Corporate entity, Director and HR Manager

Conduct

- Underpaying staff and inaccurate record keeping.
- At the direction of the Director, the HR Manager falsified employee records following inquiries from the FWO about alleged underpayments

Penalties

\$301,920 against NSH (plus \$450,000 of back pay)

\$54,672 against the Director

\$21,760 against the HR Manager

Judgment

There is nothing wrong with sending the message that an employee should indeed resign if that is the only alternative to continuing to participate knowingly in illegal activity, ideally coupled with reporting the conduct, in a case such as this, to the FWO. That would rob a primary offender such as New Shanghai Charlestown and its guiding mind...of the means of having such conduct continue.."

FAIR WORK ACT (CONT) - RECENT CASES

FAIR WORK OMBUDSMAN V OZ CAREER SERVICES PTY LTD [2016] FCCA 105

Who?

Oz Career Services, a recruitment and labour hire company.
Director
HR Manager

Conduct

- Unlawful deductions : an "admin fee" and meal allowance from employee pay - over \$130,000!
- Falsification of employee records following a visit from a FWO inspector.

Penalties

Director : \$14,960
HR Manager : \$9,920
Corporate entity: in liquidation, no penalty...

Judgment

"I simply do not accept that the person running the human resources activities of [OzStaff] and intimately involved, as he clearly was, with award matters was not aware not only that the deductions were being made but that the records which were forwarded to [the FWO] not showing those deductions were false and misleading. He was clearly involved within the meaning of s.550 of the FW Act..."

FAIR WORK ACT (CONT)

2017 amendments to protect vulnerable workers and target franchisors/parent companies



1. Extended liability for holding companies and franchisors. Holding companies (and "officers") required to take "reasonable care" to prevent contraventions of FW Act and FW Act instruments.

2. Higher penalties for "serious contraventions" of civil remedy provisions, including record keeping.

3. Increased coercive investigative powers for the FWO.

FAIR WORK ACT (CONT)

*Australian Building & Construction Commission v
Construction Forestry Mining and Energy Union* [2018]
HCA 3

- ▶ Personal payment orders.
- ▶ Courts have the discretion to order an individual to personally pay a civil penalty pursuant to s 546(1).
- ▶ Stops an employer from indemnifying or reimbursing an employee for the costs of contravention.

THE COURT ORDERS THAT:

9. The second appellant pay the penalties in paragraphs 4-6 above (**Penalties**) personally in that he not, whether before or after the payment of the Penalties:
- (a) seek to have or encourage the first appellant in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the Penalties, whether in whole or in part; and
 - (b) accept or receive from the first appellant in any way whatsoever, any money or financial benefit referable to the payment of the Penalties, whether in whole or in part.

PENAL NOTICE

TO: THE CONSTURCTIONS, FORESTRY, MARITIME, MINING AND ENERGY UNION
AND JOSEPH MYLES

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO, YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

WHS LAWS IN AUSTRALIA



Harmonised legislation

- Work Health and Safety Act 2011 (Cth)
- Work Health and Safety Act 2011 (NSW)
- Work Health and Safety Act 2011 (QLD)
- Work Health and Safety Act 2011 (NT)
- Work Health and Safety Act 2011 (ACT)
- Work Health and Safety Act 2012 (SA)
- Work Health and Safety Act 2012 (TAS)

Non-harmonised jurisdictions

- Occupational Health and Safety Act 1984 (WA)
- Occupational Health and Safety Act 2002 (Vic)

Source: www.safedesignaustralia.com.au

PENALTIES FOR BREACHES OF THE WHS LEGISLATION

Category	Description	Maximum Penalty
Category 1	Most serious cases - breach of the primary (general) duty <u>involving recklessness</u> and serious harm (fatality or serious injury) to a person or a risk of such harm	Corporation = \$3 million Individual = \$600,000 or Imprisonment - up to five years Workers and other persons = \$300,000 or Imprisonment - up to five years
Category 2	Breach of the primary (general) duty where serious harm or the risk of it <u>without the element of recklessness</u>	Corporation = \$1,500,000 Individual officers = \$300,000 Workers and other persons = \$150,000
Category 3	Breach of the duty that does not involve high risk of serious harm	Corporation = \$500,000 Individual officer = \$100,000 Workers and other persons = \$50,000

PENALTIES FOR BREACHES OF THE VICTORIAN OHS ACT

	Maximum penalty (2018 FY)
Corporation	\$3,223,800 (20,000 penalty units)
Individual	\$290,142 (1,800 penalty units)

Section 32 - Reckless endangerment

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence and liable to—

- (a) in the case of a natural person, a term of imprisonment not exceeding 5 years, or a fine not exceeding 1800 penalty units, or both; and
- (b) in the case of a body corporate, a fine not exceeding 20,000 penalty units.

Case example: *Orbit Drilling Pty Ltd v The Queen; Smith v The Queen* [2012] VSCA 82

WHS LAWS - OFFICER'S AND SENIOR MANAGER'S DUTIES

State	Officer Liability
NSW, QLD, ACT, NT, Tas, SA - Harmonised WHS Legislation Section 17	Duty of Due Diligence
VIC - OHS Act 2004 (Section 144)	Managers (as employees) have liability if there is a company breach and the contravention is attributable to an officer failing to take reasonable care. Can be convicted or found guilty whether or not the body company is convicted or found guilty

OFFICER'S LIABILITY - WHS LAWS (CONT.)

Section 17

"If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation"

**THIS DUTY CANNOT BE DELEGATED OR
TRANSFERRED TO OTHERS**

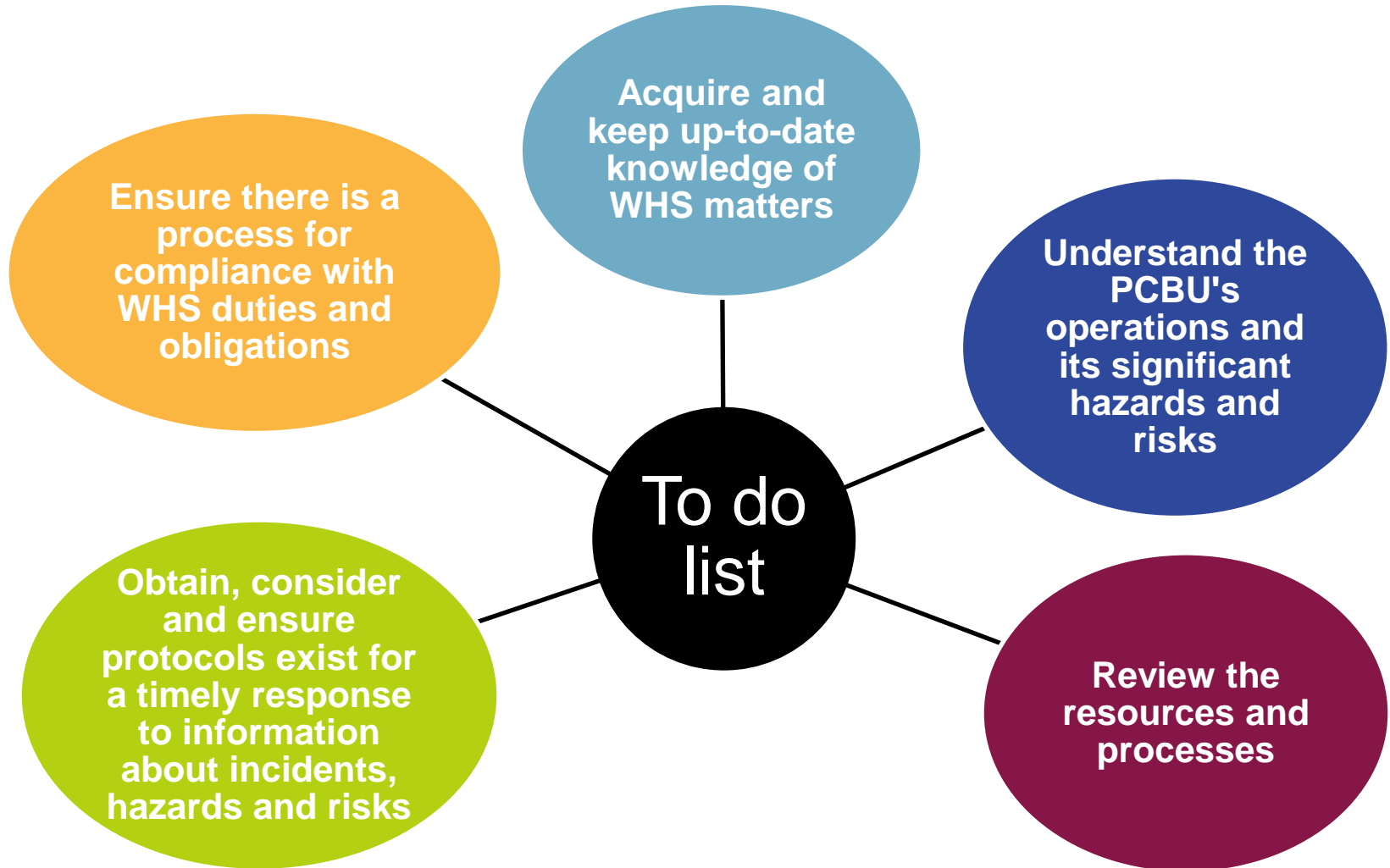
WHO IS AN OFFICER?

- ▶ Discussion of meaning of 'officer' - means a person who makes or participates in making, decisions that affect the whole or a substantial part, of a business or undertaking.
- ▶ *Morley v ASIC* [2010] NSWCA 331 (James Hardie case) says:
 - » participation in making decisions is a question of fact and degree
 - » there must be a real contribution to the making of the decision (more than merely making administrative arrangements)
 - » counselling against a decision may amount to participation (though may be a defence)
 - » participation in decisions may involve some frequency or repetition
 - » a person can participate in making a decision even if another person (e.g. a board of directors) is the ultimate decision maker

MACKIE V AL-HASANI AND KENOSS CONTRACTORS [2015] ACTIC 1



WHAT DOES AN OFFICER NEED TO DO



OFFICER'S LIABILITY - WHS LAWS (CONT.)

What are reasonable steps?

- ▶ No definition in legislation - what is reasonable depends on the particular circumstance, including the role and influence able to be exercised by an officer
- ▶ Reliance on advice from others will be reasonable if an officer can establish the credible receipt of information and advice from qualified/appropriate people, provided there is evidence of proactive inquiry by the officer

NEW: INDUSTRIAL MANSLAUGHTER PROVISIONS (QLD ONLY)

Offence Requirements (34C and 34D)

1. A worker dies, either whilst carrying out work for the PCBU, or after sustaining an injury whilst performing work for the PCBU; and
2. The PCBU's conduct (act or omission) causes the workers death; and
3. The PCBU is negligent in engaging in the conduct that causes the worker's death.

"causes" =
substantially
contributes

no 'mistake'
defence

captures
"senior
officers"

record
penalties

WHO IS A "SENIOR OFFICER"?

"Any person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer."

Who	Maximum penalty (2018 FY)
Corporate entity	\$13,055,000
Individual	20 years' imprisonment

DUTIES AS A "WORKER" OR "EMPLOYEE"

HARMONISED WHS ACT

28 Duties of workers

While at work, a worker must:

- (a) take reasonable care for his or her own health and safety, and
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act, and
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

OHS ACT (VIC)

25. Duties of employees

(1) While at work, an employee must—

- (a) take reasonable care for his or her own health and safety; and
- (b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace; and
- (c) co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations.

Penalty: 1800 penalty units.

- (2) While at work, an employee must not intentionally or recklessly interfere with or misuse anything provided at the workplace in the interests of health, safety or welfare. Penalty: 1800 penalty units.

DUTIES AS A "WORKER" OR "EMPLOYEE" (CONT.)

R v Tormey, Unreported, VCC, 1995

- ▶ Defendant was a manager at an Inghams factory.
- ▶ Directed employees to install a power unit in the ceiling of the factory.
- ▶ Court found that the defendant failed to take reasonable care for the health and safety of persons in the workplace.
- ▶ Unnecessary to prove he was an officer.

Note also: Brodie Panlock prosecution

DISCRIMINATORY CONDUCT / VICTIMISATION - HEALTH AND SAFETY

Model WHS Provisions

Sections 104 - 107

Section 110 - reverse onus of proof

Section 111 - offender : could be a manager required to pay compensation

Victorian OHS ACT

Section 76 (criminal) Section 78A (civil action)

Section 77 - reverse onus of proof

Note: also Fair Work Act and discrimination legislation.

FWC BULLYING

Important for managers to be aware of bullying laws because:

- ▶ Bullying applications are made against the alleged "bully/bullies", not just the employer.
- ▶ Performance reviews and management are often a flashpoint for bullying claims.
- ▶ Stop bullying orders (note: no compensation)
- ▶ Sting is in s.789FG

A person to whom an order under section 789FF applies must not contravene a term of the order (60 penalty units).

QUEENSLAND ANTI-DISCRIMINATION ACT

Potential for individual liability in respect of a breach of the Anti-Discrimination Act 1991 (QLD)

122 Request or encouragement of contravention

A person must not request or encourage another person to contravene the Act.

123 Liability for contravention

If—

- (a) a person requests or encourages another person to contravene the Act; and
- (b) the other person acts, or attempts to act, on the request or encouragement;

both are jointly and severally civilly liable for the contravention, and a proceeding under the Act may be taken against either or both.

PROPOSED AMENDMENTS TO WHISTLEBLOWER PROVISIONS

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

The proposed laws consolidate existing private sector whistleblower schemes and broaden the coverage of the existing whistleblower protections by extending the definitions of persons who can make a protected disclosure (an 'eligible whistleblower'), the matters about which a protected disclosure can be made and the persons who can receive a protected disclosure. Laws will extend to any constitutional corporation for the purposes of s.51 (xx) of the Constitution (includes Universities? state statutory corporations such as CFA/MFB?)

PROPOSED AMENDMENTS TO WHISTLEBLOWER PROVISIONS

Protections

The legislation provides considerable protections for whistleblowers in relation to confidentiality of their identity and victimisation. Whistleblowers are also given immunity from suit.

- ▶ Confidentiality: the legislation makes it an offence to disclose the identity of a discloser, including information that is likely to lead to the identification of the discloser, without the consent of the discloser. There are limited exceptions to this prohibition (disclosing to ASIC, APRA, a legal practitioner or the AFP).
- ▶ Victimisation: it is an offence to victimise a discloser by causing detriment to the discloser because they made a disclosure. This provision is largely consistent with the existing protections from victimisation although the definition of detriment has been broadened to include dismissal, injury or prejudice to an employee in their employment, discrimination and a range of other actions. There is a reverse onus of proof.
- ▶ A discloser can claim compensation for contraventions of these provisions while ASIC can seek civil penalties for contraventions by a body corporate and/or person.

Compensation for victimising conduct (1317AE)

WHAT CAN YOU DO/NOT DO?

- ▶ Don't turn a blind eye
- ▶ Be properly informed
- ▶ Seek assurances and ask questions (in writing if possible)
- ▶ Seek advice
- ▶ Audits?
- ▶ In the case of bullying claims - be proactive
- ▶ If Whistleblowers - check the legislation!