

WHISTLEBLOWER POLICIES, GRIEVANCE AND COMPLAINT POLICES & DISPUTE RESOLUTION

(or “Let’s Talk Before Doing
Anything Destructive”)

Presented by Simon Mason, Senior Associate



Introduction



CORNEY & LIND
LAWYERS



VOCARE

LAW





A little about us...

Same

- Same team, same mission
- Still called to deliver Just, Redemptive Outcomes®
- General practice of law with a particular focus on not-for-profit & charity law.

Different:

- Name change - Vocare (pronounced vo-ka-ray); latin meaning "to be Called.
- Additional new office in North Ryde, Sydney.



Note

This training is provided for professional development purposes only. The material in this training does not constitute legal advice.

If you have a legal concern or matter you should consult with an appropriate practitioner.

TOPICS

- **Whistleblower Laws**
 - **Whistleblower Policy**
 - **Grievance and Complaint Policy**
 - **Dispute Resolution in Churches**
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Good governance and policy formation is about creating mechanisms to avoid conflict or concerns becoming legal issues.

Good policy has a normative effect on organisations promoting safety and certainty so issues can be resolved without recourse to legal remedies.





Who is this training for?

You are a director/member/officer/CEO/lead pastor of a company (or similar, including a church with a company structure) registered with the ACNC (most likely under the subtype of advancement of religion) and you are considering whether you need to revise your policy material.



Where no oxen are, the stable is clean.

Proverbs 14:4



What This Training Does Not Cover

- Grievances that escalate to legal threats or disputes
- Specific responses to a whistleblowing event
- Employment disputes
- Compliance obligations generally

About Me: Simon Mason



- BA (Psych), LLB, LLM (Hons), GDLP, TAE
- I am generalist lawyer who advises and represents clients in relation to employment matters, business structuring, contracts and contract disputes, commercial law, insurance, & review of government and regulator actions.
- I specialise in Church and Charity disputes.

Whistleblower Laws





What is a Whistleblower?

- A whistleblower is someone with inside knowledge of an organisation who reports misconduct or dishonest or illegal activity that may have occurred within that organisation.
- The whistleblower regime is an interventionist policy to provide protections to particular categories of information disclosed to particular audiences.
- The true purpose of the regime is actually downstream to incentivise businesses to implement their own whistleblowing policies and manage these matters internally.



Where is the Whistleblowing Regime Found?

- The *Corporations Act 2001* (Cth) ('Corporations Act') and the *Taxation Administration Act 1953* (Cth) both contain protections for whistleblowers.
- The Tax Administration whistle-blowing protections relate to "misconduct, or an improper state of affairs or circumstances, in relation to the tax affairs of (an) entity or an associate". We do not deal with the Tax Administration whistle-blowing protections in this training.



Which Companies are Affected?

- Most companies limited by guarantee are required to comply with Part 9.4AAA of the Corporations Act regarding whistleblower protections.
- This definition includes corporations (not necessarily CLGs) and letters patent bodies corporate. If in doubt as to whether you are covered, you should seek legal advice. If you are a Cth level entity there is a good chance you are covered.
- This regime is not switched off for charities.

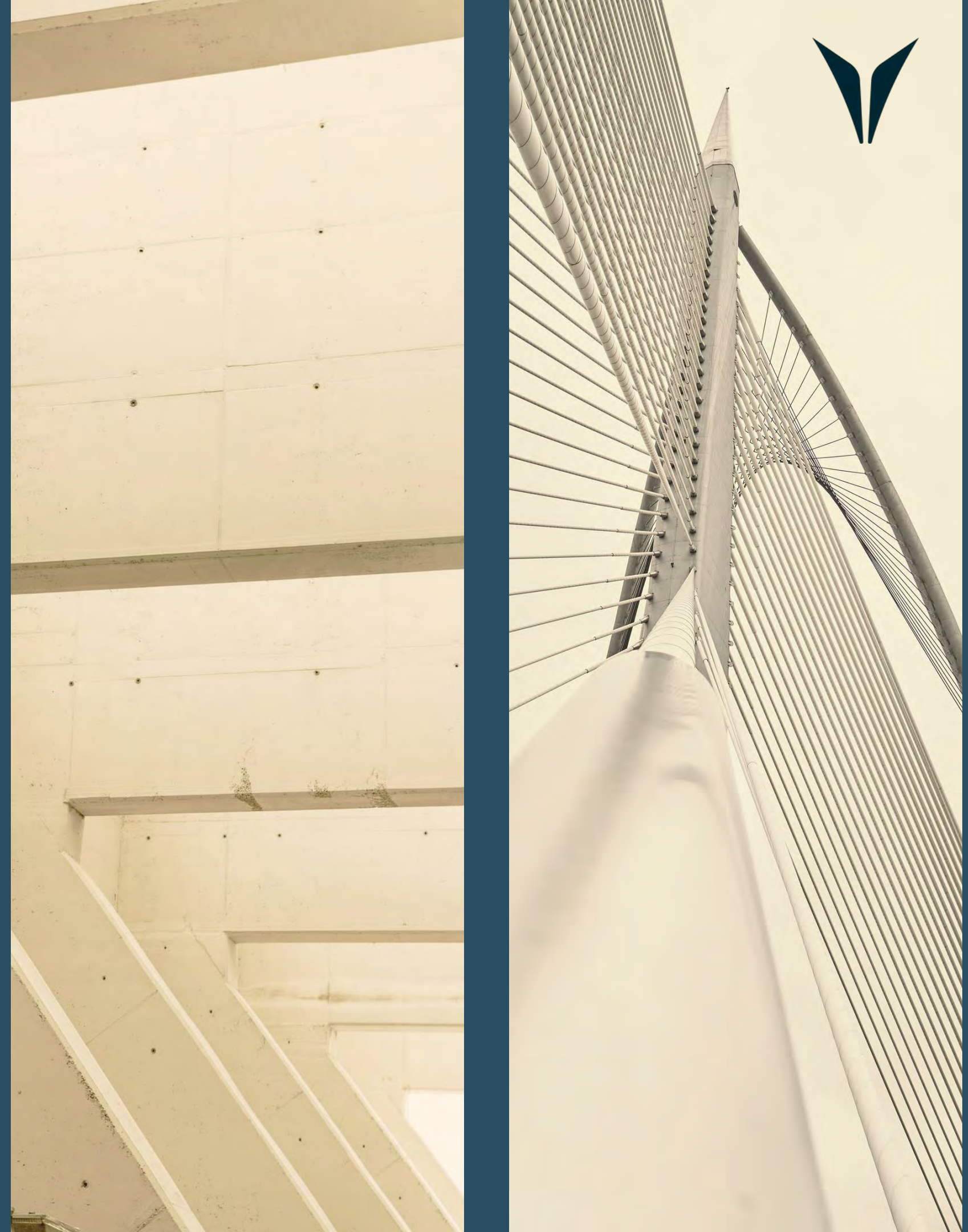


What is a Whistleblower?

- A whistleblower is someone with 'insider' knowledge of an organisation that reports on inappropriate, immoral, dishonest, fraudulent or criminal conduct ("Misconduct") that may have taken place within that organisation.
- The new laws have extended the type of information that qualifies as protected disclosure. Protection will be provided to disclosure made by a person who has "reasonable grounds to suspect" the information concerns "misconduct or an improper state of affairs".
- The "reasonable grounds" requirement replaces the previous "good faith" requirement.

Section 1317AA

- Sets out the types of disclosures that qualify for protection under Part 9.4AAA. These are:
 1. A disclosure to prescribed Commonwealth authorities (such as ASIC or APRA); or
 2. A disclosure to an "eligible recipient" or an officer of the "eligible recipient"; or
 3. A disclosure to a lawyer for the purposes of obtaining legal advice; AND
 4. The discloser has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity (or a related body corporate of the regulated entity).





Who can be a Whistleblower?

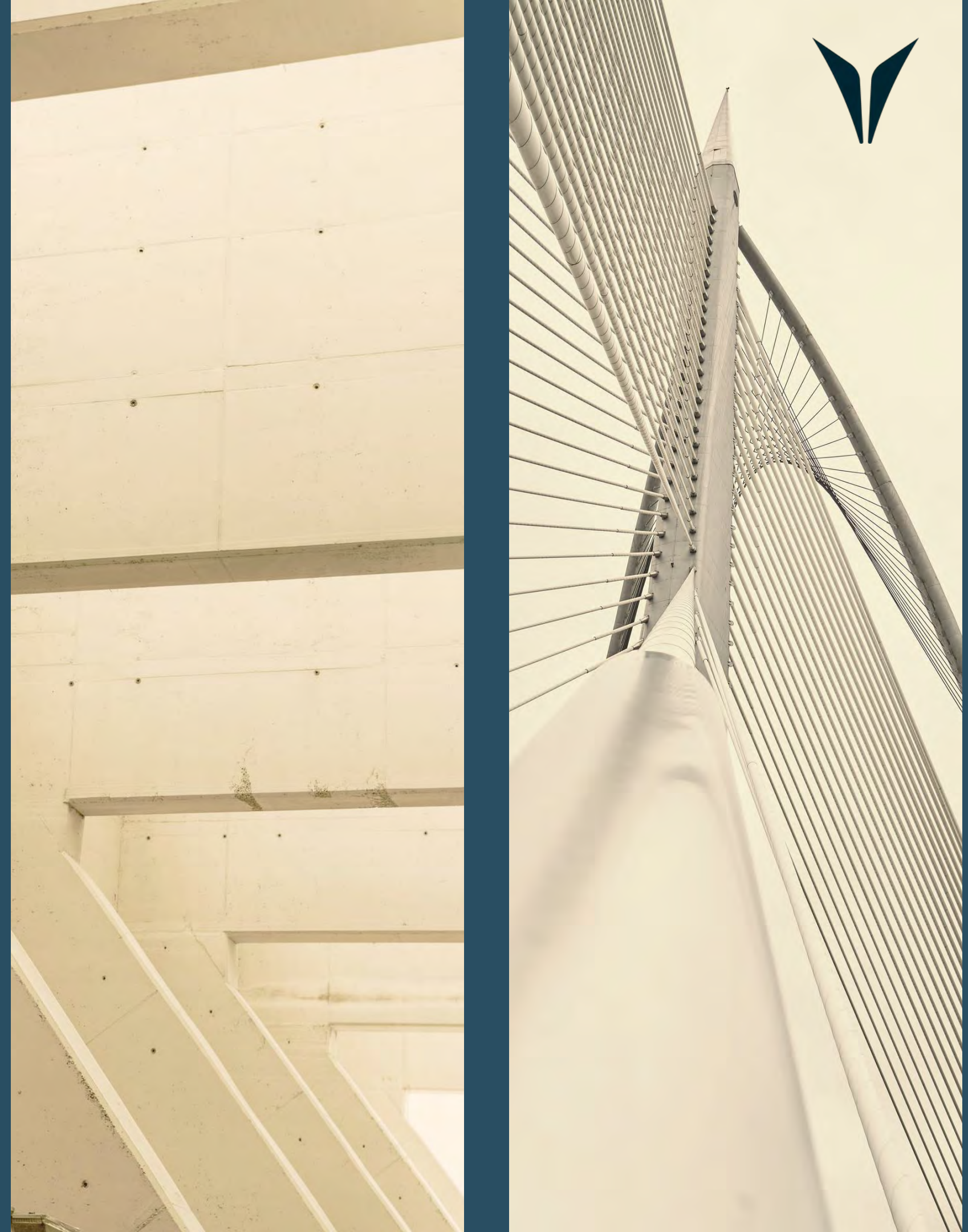
- An eligible whistleblower can be any of the following persons:
 - anyone directly involved in the organisation, such as an employee, Director or volunteer; or
 - someone externally associated with the organisation; or a family member of anyone directly or indirectly involved in the organisation; or
 - a person defined as an 'eligible whistleblower' under the Corporations Regulations 2001 (Cth).

It is important to note that a whistleblower can choose to both make a disclosure anonymously and remain anonymous throughout any investigation process.

What is Misconduct?

Section 1317AA(5) then goes on to provide examples of such misconduct/improper state of affairs or circumstances, as being:

- a. an offence or contravention of:
 - The Corporations Act 2001;
 - The ASIC Act;
 - The Banking Act 1959;
 - The Financial Sector (Collection of Data) Act 2001;
 - The Insurance Act 1973;
 - The Life Insurance Act 1995;
 - The National Consumer Credit Protection Act 2009;
 - The Superannuation Industry (Supervision) Act 1993;
- b. Any other Commonwealth offence punishable by 12 months imprisonment or more;
- c. Represents a danger to the public or the financial system; or
- d. Is otherwise prescribed by the regulations.





What Protections Are Provided in the Regime?

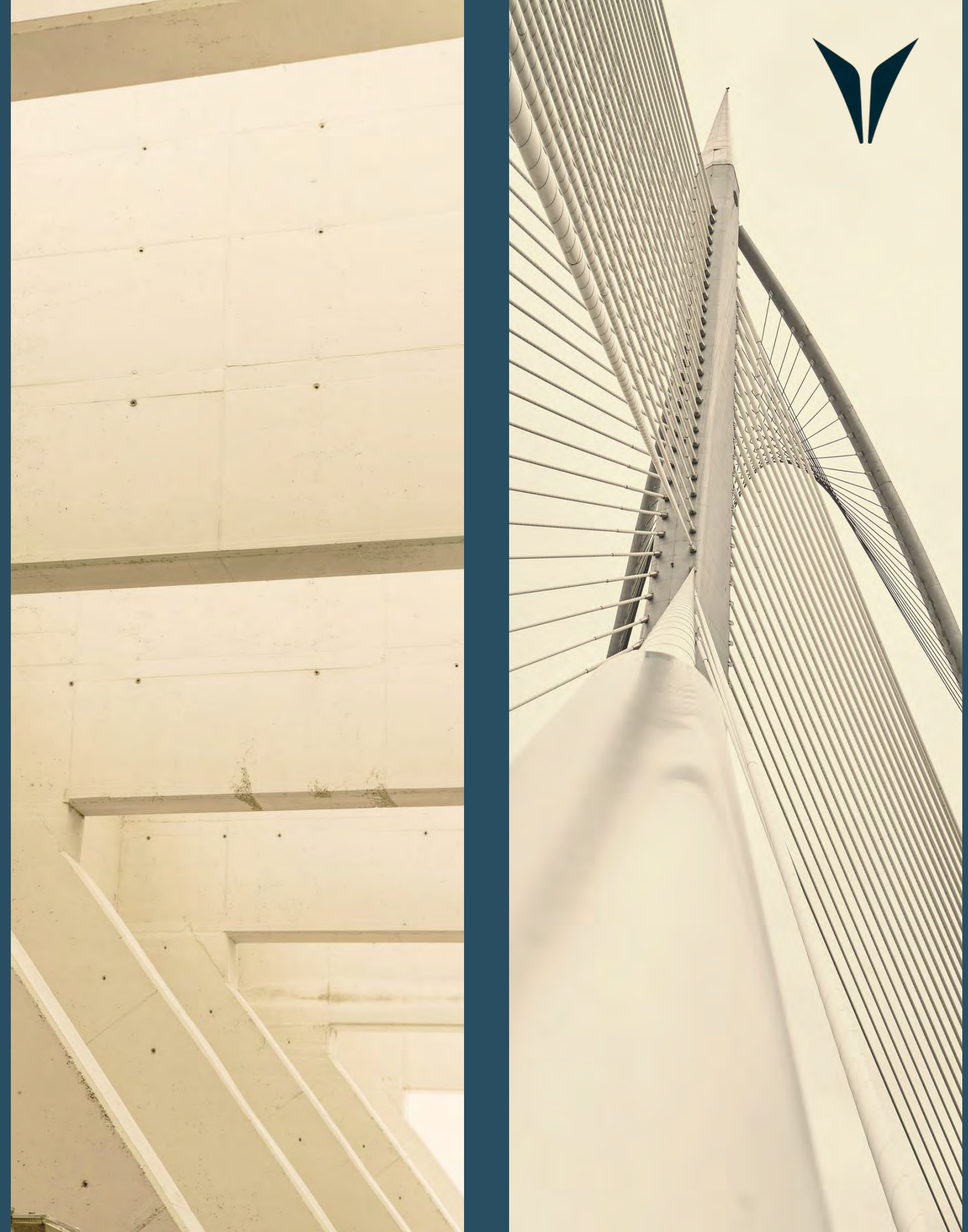
- The new laws expand the protections for whistleblowers against victimisation or retaliation. It is unlawful for a person to engage in conduct that causes or threatens to cause “detriment” to a whistleblower.
- “Detriment” is defined broadly under the Act to include dismissal, alteration to position, discrimination, harassment, damage to reputation, psychological harm or any other damage.
- Providing a whistleblower can demonstrate that they have suffered detriment, they can bring an action under the Act, whereby the Court has the discretion to award a broad range of remedies including:
 - Compensation to the whistleblower
 - Criminal sanctions;
 - Civil penalties; or
 - Reinstatement.

Section 1317AADA

provides that...

"personal work related grievances" of the discloser are not caught,

unless it is a disclosure to a lawyer for the purpose of obtaining legal advice in relation to Part 9.4AAA, or it concerns a contravention of the Victimisation provisions in section 1317AC.



Case Law



ASIC v Terracom Limited & Ors (2023)

- This is ASIC's first suit against a company for breach of the whistleblowing provisions.
- ASIC is alleging that in responding to whistleblowing matters the Defendant breached the protections provision (s1317AC) relating to detriment in a series of publications in response to the whistleblowing event.
- Specifically, the respondent "represented or implied that Williams was a dishonest person and/or a person willing to make false and unfounded accusations of serious wrongdoing for his own personal commercial".

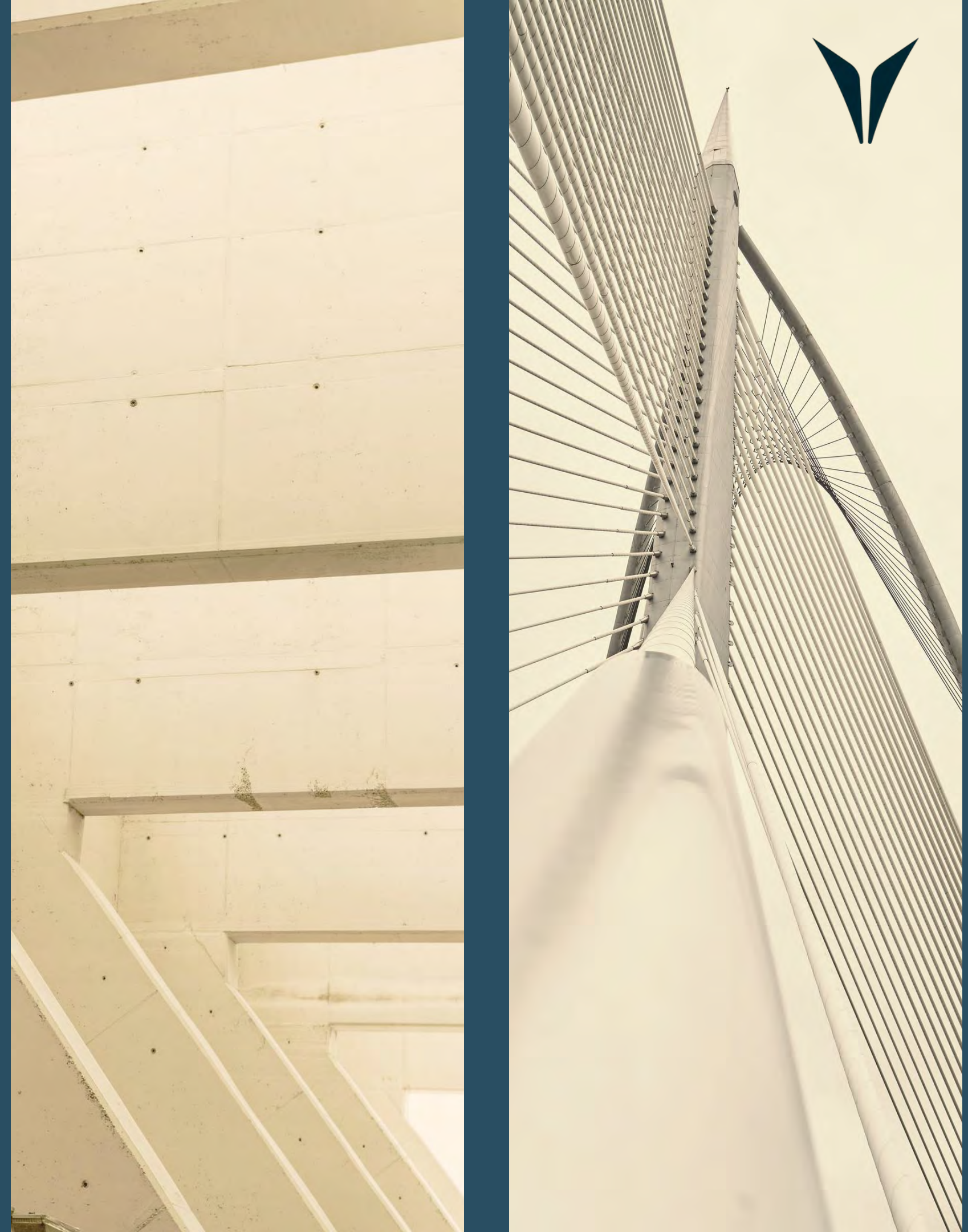


Future Directions for the Whistleblower Protections

- Currently, there are minimal protections for Commonwealth employees (ie. Richard Boyle re the ATO, David McBride re the Afghan files).
- A dedicated whistleblower protection authority is proposed, currently, which would provide a consolidated agency for disclosure and review of compliance obligations.
- Whistleblower Protection Authority Bill 2025 (No. 2) is presently before parliament and provides for the appointment of the Whistleblower Protection Commissioner and establishes the Whistleblower Protection Authority.

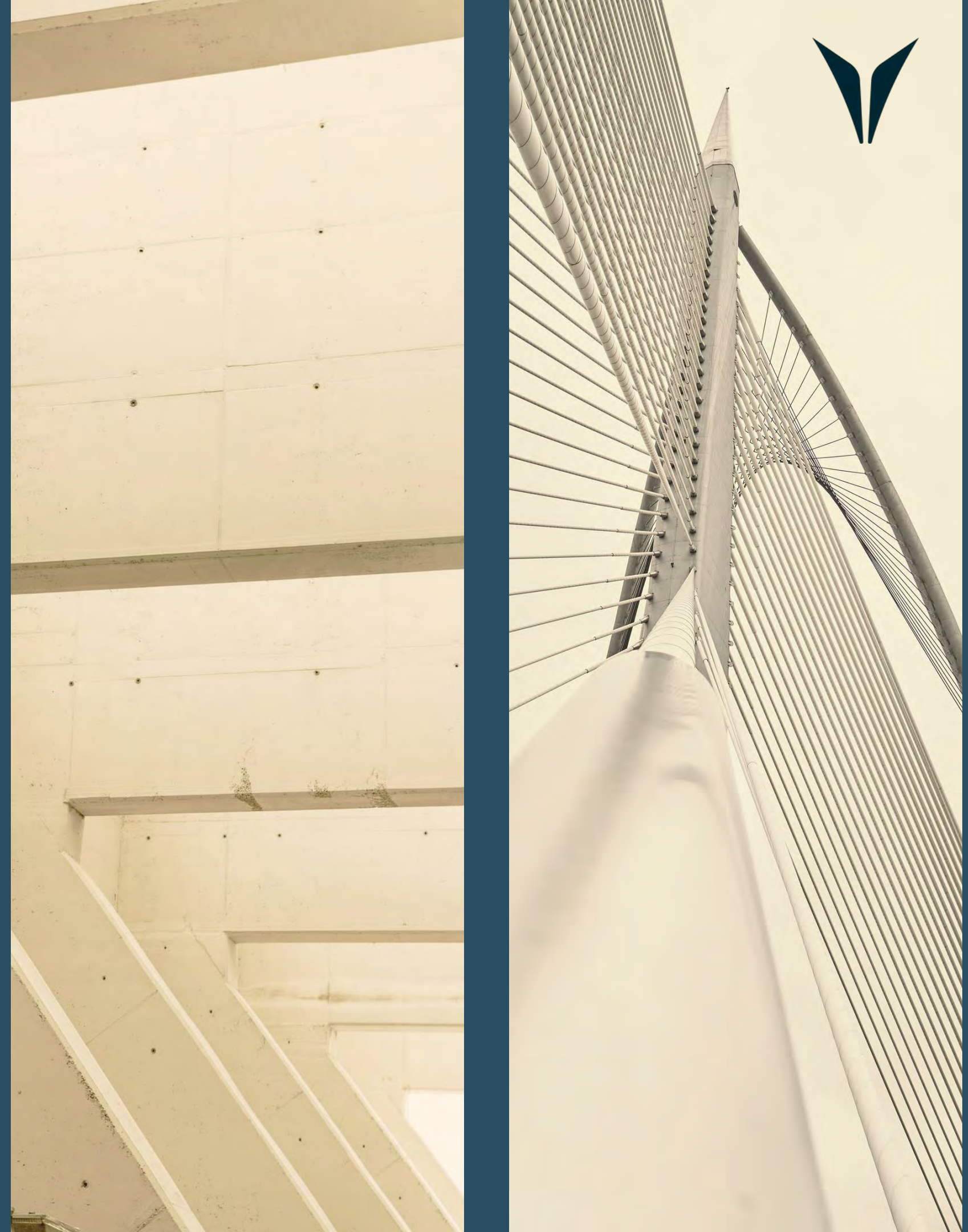
ASIC's RG270 Guide for Whistleblower Policies

- The requirement for companies to have whistleblower protections is regulated by the Australian Securities & Investments Commission ('ASIC').
- In November 2019, ASIC published Regulatory Guide 270 Whistleblower Policies (RG 270 Guide) to provide clear guidance on what should be included in whistleblower policy to comply with Part 9.4AAA of the Corporations Act.
- There are examples clauses in the RG270 Guide which are very helpful for generating a whistleblower policy.



ASIC's RG270 Guide for Whistleblower Policies (cont.)

- Whistleblower policies are not strictly required for registered charities with a consolidated revenue of less than \$1 million per year.
- However, we recommend that all charities structured as a company limited by guarantee consider adopting a whistleblower policy to assist in ensuring best practice responses to whistleblower complaints and compliance with the whistleblower protection regime more generally.
- A proactive policy is more efficient and cost effective than reactive legal advice.



Whistleblower Policy





What are purposes and benefits of having a whistleblower policy?

- There are several significant benefits of having a whistleblower policy:
 - Encouraging eligible persons to disclose misconduct of which they become aware;
 - Ensuring that eligible persons who disclose allegations of misconduct or other wrongdoing can do so safely, securely and with confidence that they will be protected and supported;
 - Establishing a culture within an organisation of highly ethical conduct, integrity and good commercial practice;
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 - Supporting an organisation's values, code of conduct and good standing and reputation in the community;
 - Deterring wrongdoing and other inappropriate conduct within an organization;
 - Manage whistleblowing events internally before they are placed in the public.



What must a whistleblower policy contain?

- Pursuant to section 1317A1 a whistleblower policy must contain the following:
 - Information about the protections available to whistleblowers;
 - Information about to whom disclosures that qualify for protection may be made, and how they may be made;
 - Information about how the company will support whistleblowers and protect them from detriment; Information about how the company will investigate disclosures that qualify for protection;
 - Information about how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection, or to whom such disclosures relate;
 - Information about how the policy is to be made available to officers and employees of the company; and
 - Any other matters prescribed by the Corporations Regulations 2001 (noting no other matters are presently prescribed).



What to Do If You Are Subject to A Whistleblower Event

- ASIC's Report 758: Good practices for handling whistleblower disclosures, published in March 2023, sets out ASIC's observations as to how organisations could best be handling whistleblower disclosures received under the Corporations Act regime.
- ASIC considers an entity's Board responsible for oversight of the handling of disclosures, including formally establishing Board or Board Committee oversight of the whistleblower policy and program in order to sufficiently manage risk.

Grievance and Complaint Policy





Grievance and Complaint Policy/Policies

- There is no strict legal basis to implement a grievance and/or complaint policy although there are downstream cultural and reputational benefits.
- A grievance handling policy basically outlines how an organisation deals with grievances raised by its employees.
- A complaint policy sets out how an organisation deals with complaints raised by its stakeholders.
- Generally, there can be some utility to combining the two policies.



Benefits of a Grievance Policy

- Principally, this is about maintaining employee confidence and good faith in the organization.
- This can also avoid later complaints under Anti-discrimination legislation (State and Federal) and also bullying allegations under the Fair Work Anti-bullying laws.
- There are normative benefits:
 - Capture issues that may overlap with whistleblowing issues;
 - Minimise staff turnover (and the risks of a Fair Work Commission action);
 - Improve the workplace and promote transparent and accessible leadership.



Benefits of a Complaint Policy

- Principally, this is about maintaining stakeholder confidence and good faith in the organisation.
- There are normative benefits:
 - Reputation management;
 - Stakeholder management: donors, students, congregants, parents, etc can all express concerns through an established; and,
 - The 'soft' benefit of catching issues early.



Grievance and Complaint Policy Processes

- There are necessary norms associated with Grievance and Complaint Policy Processes:
 - If a decision is required, it should be by a disinterested party.
 - If an investigation is required it should be undertaken by an independent party who permits natural justice.
- Litigation in the charity sector rarely proceeds on the basis of commercial interests but on the basis of perceived unfairness.

Dispute Resolution in Churches





Dispute Resolution Mechanism

- Dispute Resolution Mechanisms are about diffusing potential legal issues between key decision-makers in the organisation (rather than stakeholders generally).
- Under your governing document (or constitution) you may have a number of decision makers that are critical to the organisation, including:
 - Directors and officers;
 - Members (potentially with various membership tiers);
 - Directors of the Sole Corporate Members;
 - Responsible persons (per the ATO guidance) in various roles;
 - Regulated individuals (ie. Supervisors in ELCs).



Benefits of Dispute Resolution Mechanisms

- Key Stakeholders may have rights in relation to their position:
 - Members may allege members oppression or launch derivative claims;
 - Directors have rights under the Corporations Act;
 - Certain roles may be protected under the governing rules.



Dispute Resolution and Legal Rights

- A Dispute Resolution Mechanism stipulates specific processes that must be completed before litigation commences.
- If litigation does commence and the required dispute resolution process has not occurred, a party may have the right to defend on that basis.
- Dispute Resolution processes do not prevent litigation but may minimise the risk of litigation occurring.
- Formally, unless a deed of settlement is entered, a party may still have rights to litigate. Whether or not a deed is necessary relates to the nature of the risk.



Potential Dispute Resolution Options

- Mediation
 - Can include peacewise mediation
- Referral to oversight body for review/investigation/recommendations
 - This can include denominational or movement oversight body
- Referral to a legal professional for a legal opinion/ non-binding arbitration



Creating a Culture of Feedback and Safety

- At a high level, policies exist to provide guidance to the norms and values of an organisation.
- There is no point implementing policy if the it runs counter to the inherent values of an organisation.
- Given that Churches can be leader and vision focused, there can be a tendency to minimise feedback.
- However an alternate visional value for churches can be to embrace a culture of feedback and safety.



VOCARE
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Thank you.

Simon Mason
Senior Associate

simon.mason@vocarelaw.com.au
1300 862 529
vocarelaw.com.au