Australian Government
Sport Integrity Australia

SPORT INTEGRITY AUSTRALIA

SUMMARY PAPER

Whistleblower laws

WHISTLEBLOWER LAWS SUMMARY PAPER

1. This Summary Paper provides recommendations on how sporting organisations can comply with the recently updated whistleblower obligations under Part 9.4AAA of the *Corporations Act 2001.*
2. **The content of this Summary Paper is not legal advice. Sport Integrity Australia strongly recommend that organisations – and individuals – seek independent legal advice regarding the application of Part 9.4AAA of the *Corporations Act 2001*, including the obligations that it gives rise to, and the protections that it affords.**
3. This Summary Paper incorporates the following sections to assist sport organisations in understanding and complying with their obligations.
   a. Executive Summary - Schedule 1 - page 3.
   b. Recommendations - Schedule 2 - page 6.
   c. Analysis - Schedule 3 - page 8.
   d. Help Sheets - Schedule 4 - page 19.
   e. Hypothetical Scenarios and Answers - Schedule 5 - page 21.
   f. Penalties - Schedule 6 - page 32.
   g. Decision Tree | Compliance with Whistleblower Laws - Schedule 7 - page 33.
   h. Flowchart | Responding to Protected Disclosures - Schedule 8 - page 34.
4. It is important to note at the outset that:
   a. not all sport organisations are “regulated entities” and therefore subject to the whistleblower laws - see paragraphs 49 to 57; and
   b. not all sport organisations that are regulated entities, are required to adopt a whistleblower policy - see paragraph 109

For further information in relation to this Summary Paper, please contact: **contactus@sportintegrity.gov.au**

SCHEDULE 1 EXECUTIVE SUMMARY

Previous whistleblower laws

5. Under the *Corporations Act 2001* (**Corporations Act**) as it applied prior to 1 July 2019, the officers, employees and contractors (or their employees) of a company were entitled to make protected disclosures in relation to any alleged breaches of the Corporations Act by that company. The disclosures qualified for protection if they were made to ASIC, the company's auditor, a director or senior manager or a designated person within the company who was authorised to receive such disclosures.
6. Previously, the person making the disclosure was required, before making the allegation, to disclose their own name (i.e. it could not be an anonymous complaint), needed to have reasonable grounds to suspect the company or one of its officers or employees had breached the Corporations Act, and the disclosure was required to be made in good faith.
7. Where a person (**the Discloser**) made a protected disclosure under the Corporations Act, they were not subject to any civil or criminal liability for making the disclosure, and no contractual or other remedy was entitled to be enforced or exercised against them.
8. Where a protected disclosure was made, it was an offence for a person to victimise the Discloser (through engaging in conduct that caused any detriment to the Discloser), or threaten to victimise the Discloser, and officers or employees of the company could be held vicariously liable for offences by the entity itself against those prohibitions.
9. There was an express right for a Discloser to receive compensation under the Corporations Act, payable by an individual (or individuals) who breached the prohibitions against victimising a Discloser.
10. Finally, in its previous form, the Corporations Act included confidentiality requirements, under which individuals were prohibited from disclosing: (a) information in the protected disclosure; (b) the name of the Discloser; or (c) information likely to lead to the identification of the Discloser, unless it was a disclosure of the confidential information made to the Australian Securities & Investments Commission (**ASIC**), Australian Prudential Regulation Authority (**APRA**), the Australian Federal Policy (**AFP**), or someone else with the consent of the Discloser.
11. The effect of the previous confidentiality provisions was that a person who received a protected disclosure under the Corporations Act was unable to disclose that fact, or the name of the Discloser, to their senior manager, or the CEO (etc), unless with the express consent of the Discloser.
12. Accordingly, any sport organisation registered as a company was previously subject to whistleblower protection laws, although importantly for present purposes, a disclosure was only protected if it related to an alleged breach by the relevant entity of the Corporations Act.
13. This covered a particularly narrow range of disclosable matters, with breaches of the Corporations Act unlikely to be something employees of a sport organisation were broadly aware of, or acutely interested in. In our experience, it was rare for sport organisations to receive a disclosure under the previous whistleblower protections contained in the Corporations Act.

New laws

14. The new whistleblower laws were introduced into the Corporations Act through the ***Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*** **(Whistleblower Laws).**
15. The Whistleblower Laws repealed and replaced a majority of the existing Part 9.4AAA of the Corporations Act, which while maintaining a number of existing concepts, significantly expanded their scope and application in various ways.
16. The Whistleblower Laws commenced on 1 July 2019, with the requirement for a subset of regulated entities to adopt a whistleblower policy separately commencing from 1 January 2020 (see paragraph 107).

Changes to existing laws

17. The Whistleblower Laws introduced a number of material changes to the whistleblower protections that will apply to sport organisations. There were a significant number of additional changes, however they are unlikely to affect sport organisations as they primarily apply to superannuation entities or relate to compliance with legislation that does not apply to most, if not all, sport organisations (such as banking, insurance and superannuation compliance laws).
18. The following material changes, which are likely to impact sport organisations, were made to the whistleblower protections.
19. A protected disclosure may now be made in relation to any reasonable suspicion of:
    a. the regulated entity's misconduct, or an improper state of affairs or circumstances within the regulated entity;
    b. conduct that represents a danger to the public;
    c. conduct that constitutes an offence against any Commonwealth law punishable by imprisonment of 12 months or more; and
    d. breaches of the Corporations Act,

    meaning the types of disclosable matters are much broader than previously. In addition, there are a variety of offences within sports-related legislation (such as the *National Sports Tribunal Act 2019*) that will fall within paragraph (c) above.
20. There is an express exclusion whereby a "personal work-related grievance" is not caught by the whistleblower protections. Such a grievance is one where the information concerns a grievance about an individual's employment or former employment, has implications for the discloser personally, does not have significant implications to the regulated entity unrelated to the discloser, and does not concern conduct that would otherwise be caught by the whistleblower protections. Specific examples are provided in the notes to the legislation, which include interpersonal conflict between employees, decisions about an individual's employment, transfer, promotion, employment conditions, and decisions to terminate, suspend or otherwise discipline an employee.
21. Protected disclosures may be made by a wider range of individuals, including those previously protected (see paragraph 5 above), as well as their relatives or dependants, and individuals who provide voluntary services to a regulated entity.
22. An eligible whistleblower may make a "public interest disclosure" or an "emergency disclosure", to either a journalist or Parliamentarian, where (respectively) 90 days' have passed since the original disclosure[1] and action is not being taken, or where the information concerns a substantial and imminent danger to public health or safety. As a result, there is a real risk that disclosable matters will or could become public, should a sport organisation fail to adequately respond, or respond in a timely manner, to the relevant regulator's queries arising out of an initial protected disclosure.
23. Two important exceptions to the confidentiality provisions have been added:
    a. an additional permitted disclosure has been added for individuals receiving a protected disclosure, where an eligible recipient may disclose information to a legal practitioner for the purpose of obtaining legal advice or representation; and
    b. the confidentiality provisions do not apply where an eligible recipient discloses the confidential information (excluding the name of the discloser) for the purposes of investigating the matter, and takes all reasonable steps to reduce the risk the discloser will be identified as a result.
24. The victimisation prohibitions:
    a. have been broadened to incorporate a non-exclusive list of scenarios constituting "detriment", such as discrimination, harassment, intimidation, harm or injury, altered employment conditions, or damage to a person's property, reputation, business or financial position. There is also a catch-all provision covering "any other damage to a person", which could encompass a variety of sport-specific examples (see paragraph 99) ; and
    b. are extended to scenarios where victimisation or detrimental conduct occurs because the victimiser *believes* the other person has made a protected disclosure (previously detrimental conduct was only caught where an individual had *actually* made a protected disclosure).

1 But only where the protected disclosure is made to a regulator - not a regulated entity that is a company.

25. A reverse burden of proof has been introduced whereby individuals alleged to have engaged in detrimental conduct towards a whistleblower must now prove they did not undertake such conduct.
26. Public companies, which include companies limited by guarantee, must adopt a whistleblower protections policy, which must address six prescribed matters (see paragraph 110 below), on or before 1 January 2020.
27. Since the introduction of the new laws, ASIC has released a legislative instrument exempting any not-for-profit company limited by guarantee with annual consolidated revenue of less than $1 million.

SCHEDULE 2 RECOMMENDATIONS

Next steps

28. Sport organisations should, as a matter of priority and if they have not already done so, determine whether they are a regulated entity that is required to adopt a whistleblower policy from 1 January 2020. Any such organisation should use the template policy provided in conjunction with this Summary Paper, and formally adopt it as soon as practicable in 2020 (subject to the recommendations at paragraph 33 onwards).
29. Regulated entities were already subject to whistleblower protection requirements, however due to the significantly expanded scope and obligations, any sport organisation that is registered as a company should actively review and inform itself of the updated requirements.
30. Because the new laws provide that any officers or senior managers of the regulated entity are eligible recipients of a protected disclosure, regulated entities should consider undertaking training of relevant officers and employees in relation to whistleblower requirements, including in particular the confidentiality requirements.
31. As eligible recipients also include individuals authorised by the regulated entity to receive disclosures, sport organisations may consider appointing particular individuals as authorised to receive disclosures. Doing so may assist in centralising receipt of disclosures and increase the likelihood the entity deals with such disclosures in accordance with applicable statutory requirements.
32. Above all, any sport organisation registered as a company will need to be aware of its ongoing statutory requirements, the most important of which can be summarised at a high level as the following:
    a. ensure that all eligible recipients who receive a protected disclosure comply with their confidentiality requirements, and importantly, do not disclose the identity, or information likely to lead to identification, of the eligible whistleblower, to anyone else within the organisation, except with the consent of the eligible whistleblower; and
    b. ensure neither the sport organisation, nor its officers or employees, engage in detrimental conduct against an eligible whistleblower, or someone perceived or thought to be an eligible whistleblower.

Federated sports

33. The Whistleblower Laws apply specifically to regulated entities (as determined under the Act) and conduct and actions of officers and employees of that individual regulated entity. As a result, the template whistleblower policy that accompanies this paper is not suitable for adoption by all entities as a whole-of-sport policy (where some of the SSOs in a sport with a federated model are not companies and regulated entities). This is, in part, because the legal rights and protections provided to whistleblowers under the Whistleblower Laws would not be extended to a complaint made to an incorporated association - and any whistleblower protections described in the policy would not apply to a complaint made to an SSO, if that SSO is an incorporated association (and therefore the policy could be misleading or inaccurate). Instead, each sport organisation, including each entity within a sport's Australian framework (i.e. one or more of the NSO and SSOs, regions / districts / zones, and clubs) should determine whether it is a regulated entity - if so, it should adopt the policy; if not, it should not adopt the policy. Sport organisations may need to seek legal advice to assist them to determine whether they are regulated entities. Where an SSO is not a company and does not adopt the whistleblower policy, it could still receive similar complaints under its 'standard' complaints or member protection policy.
34. The whistleblower policy exclusively deals with protected disclosures, which must be dealt with in accordance with the Whistleblower Laws, and not other complaints or allegations that are not protected disclosures under the Corporations Act.
35. Therefore, only each regulated entity within a sport is subject to the Whistleblower Laws, and if required to adopt a whistleblower policy (see paragraph 107), must adopt its own policy. Non-regulated entities are not subject to the Whistleblower Laws.
36. There are a range of complaints about integrity-related matters that may arise in the broader sporting context. NSOs, in conjunction with their SSOs, should begin considering whether an overarching complaints procedure should be introduced, that would deal with non-protected disclosures and take these into account when preparing a whistleblower policy.
37. Sport organisations should consider and review relevant guidance provided by Sport Australia and/or Sport Integrity Australia on whistleblower policies and complaints procedures.

Key takeaways

38. Ensure you are familiar with the basics of the new whistleblower laws – e.g. **eligible whistleblower**, whether the matter is a **protected disclosure** or personal work-related grievance.
39. Ensure you are familiar with the **measures** of **how to protect the identity of whistleblowers**, including maintaining **confidentiality** requirements and **non-disclosure of the identity** of the whistleblower.
40. Ensure you are familiar with what a **"protected disclosure"** may or may not be and the difference between that and a personal work-related grievance.
41. Ensure you are ready to **respond** to potential whistleblower disclosures.

Dos and Don'ts

42. The following do's and don'ts are suggested for eligible recipients of protected disclosures.

DOs	DON'Ts
Take your role seriously	**Ignore the disclosure / complaint**
Be aware of your responsibilities: • understand how to identify a protected disclosure • check for consent from whistleblower as to whether you can disclose their identity, which will often assist with dealing with the protected disclosure and any required follow up • to protect confidentiality of whistleblower's protected disclosure (both the content and that a disclosure has been made)	Disclose whistleblower identity without prior consent
Ask whistleblower if they know of the regulated entity's policy; if not, direct them to it or provide a copy	Disclose details of the protected disclosure without prior consent
Ask whistleblower if you can tell the entity's designated "Whistleblower Officer" (as referred to in the whistleblower policy) or equivalent about the disclosure: • if YES - refer matter to Whistleblower Officer or equivalent • if NO - tell whistleblower that you will not disclose his or her identity but will recommend they refer the disclosure to the Whistleblower Officer (or equivalent) to be dealt with in accordance with regulated entity's policy	Do anything detrimental to the whistleblower
Seek legal advice about how to deal with a disclosure	Forget to remind the whistleblower about the regulated entity's policy and provide a copy or access if required
Respond without delay	Take too long to respond / take appropriate action

SCHEDULE 3 ANALYSIS

Overview of Whistleblower Laws

43. From 1 July 2019, the Whistleblower Laws commenced.
44. The whistleblower protections in Part 9.4AAA of the Corporations Act have been expanded to provide greater protections, including for whistleblowers who report misconduct about regulated entities and officers of regulated entities.
45. Australia adopted the amended Corporations Act to expand and consolidate the whistleblower protection regime covering the corporate, financial and tax sectors.
46. The new Whistleblower Laws aim to:
    a. protect whistleblowers;
    b. facilitate the early detection of misconduct through the extension of protections to a broader class of people and range of disclosures;
    c. encourage ethical whistleblowing; and
    d. discourage corporate wrongdoing.

Key matters arising from the new Whistleblower Laws	
Expanded scope of protected disclosures – e.g. misconduct and improper state of affairs or circumstances	Limited immunity for prosecution of whistleblowers
Expansion of who is an "eligible whistleblower" - e.g. existing and former officers, employees, contractors, relatives and dependants	Requirement for certain companies to have mandatory whistleblower protections policy in place and communicated to officers and employees by 1 January 2020
Expansion of range of "eligible recipients" – e.g. officers and senior managers	Strong protections for whistleblowers – e.g. against victimisation and detriment
Provision for anonymous disclosures	Protecting identity of whistleblowers and confidentiality of protected disclosures

Protecting and supporting whistleblowers

47. The Whistleblower Laws protect and support whistleblowers through:
    a. protecting a discloser's identity and confidentiality of the disclosure;
    b. protecting disclosers from detrimental acts or omissions;
    c. ensuring there is no criminal or civil liability for making a protected disclosure; and
    d. ensuring individuals who disclose wrongdoing can do so safely, securely and with confidence that they will be protected and supported.

Key terms

48. The following key terms are used throughout the Whistleblower Laws.

Key term	Summary meaning
Regulated entity	The types of entities that are subject to the Whistleblower Laws. Refer paragraph 49
Eligible whistleblower	The categories of individuals who are permitted to lodge a protected disclosure with respect to a regulated entity. Refer paragraph 71
Protected disclosure	A disclosure that qualifies as a whistleblower complaint under the Whistleblower Laws. Refer paragraph 58
Eligible recipient	The categories of individuals within or related to a regulated entity to whom a protected disclosure can be made. Refer paragraph 73
Company limited by guarantee	A type of not-for-profit company often used by sport organisations who are registered as a company. Corporations Act s 9: *a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up.*
Misconduct	One of the types of disclosable matters that a protected disclosure must relate to. Corporations Act s 9: *includes fraud, negligence, default, breach of trust and breach of duty.* Refer paragraph 64
Improper state of affairs or circumstances	One of the types of disclosable matters that a protected disclosure must relate to. Not defined in the Corporations Act and is intentionally broad. ASIC RG 270: *may not involve unlawful conduct in relation to a regulated entity, but may indicate a systemic issue that the relevant regulator should know about to properly perform its functions. May also relate to business behaviour and practices that may cause consumer harm.* Refer paragraph 64

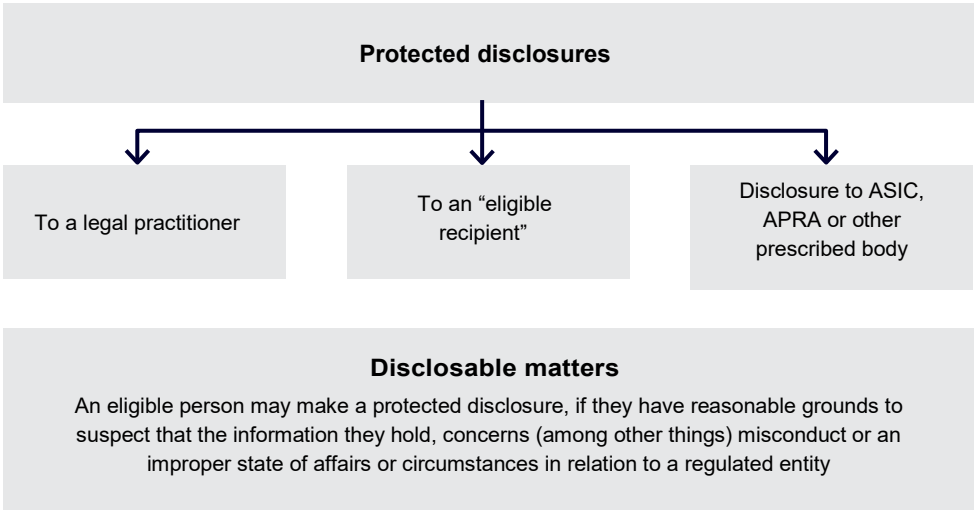
Key term	Summary meaning
Officer or senior manager	A category of individuals within a regulated entity who are eligible recipients (ie may receive protected disclosures). Corporations Act s 9 - "officer": *(a) a director or secretary of the corporation; or (b) a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to affect significantly the corporation's financial standing; or (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act …* "senior manager": *a person who: (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) has the capacity to affect significantly the corporation's financial standing.* Refer paragraph 73
Personal work-related grievance	A type of grievance that is excluded from the operation of the Whistleblower Laws. May sometimes appear to be a protected disclosure. Refer paragraph 83
Public Interest / Emergency Disclosure	A further permitted disclosure by an eligible whistleblower, to a journalist or member of Parliament, only permitted in certain, narrow circumstances and only after the original protected disclosure has been made. Only applies to disclosures to regulators - not a regulated entity that is a company. Refer paragraph 79

What is a regulated entity?

49. Each of the following is a "regulated entity" in accordance with section 1317AAB of the Corporations Act:
    a. company;
    b. a corporation to which paragraph 51(xx) of the Constitution applies;
    c. an ADI (within the meaning of the *Banking Act 1959*), an authorised NOHC (within the meaning of that Act) or a subsidiary of an ADI or an authorised NOHC;
    d. a general insurer (within the meaning of the *Insurance Act 1973*), an authorised NOHC (within the meaning of that Act) or a subsidiary of a general insurer or an authorised NOHC;
    e. a life company (within the meaning of the *Life Insurance Act 1995*), a registered NOHC (within the meaning of that Act) or a subsidiary of a life company or a registered NOHC;
    f. a superannuation entity or a trustee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity; or
    g. an entity prescribed by the regulations for the purposes of the paragraph.
50. As such, *all* companies, including companies limited by guarantee of any size and revenue, are regulated entities for the purposes of the Whistleblower Laws.
51. As a result:
    a. any sport organisation registered as a company is a regulated entity and therefore subject to the Whistleblower Laws; and
    b. even if a sport organisation is not required to have a whistleblower policy (see paragraph 109), it is still subject to the remainder of the whistleblower obligations applicable to a company.
52. Whether a sport organisation registered as an incorporated association is subject to the Whistleblower Laws will depend on whether the entity is a 'constitutional corporation' (the second type of entity listed in the regulated entity list).

53. A ‘constitutional corporation’ is one to which section 51(xx) of the Australian Constitution applies, which means an incorporated entity that is defined as a ‘trading corporation’.
54. The test for whether a particular entity is a constitutional corporation is based on the particular circumstances of the individual entity (and therefore will depend on the particular circumstances of the sport organisation registered as an incorporated association).
55. Despite this, there are a variety of cases that have held that sport organisations registered as an incorporated association are not constitutional corporations for the purposes of the *Fair Work Act 2009*, which uses the same definition of ‘constitutional corporation’ as the Corporations Act. Importantly however, the fact that sport organisations are usually not-for-profit is not, alone, sufficient to be considered ‘not trading’.
56. Relevant factors in determining that NSOs / SSOs and regions / districts / clubs are unlikely to be ‘constitutional corporations’ are that:
    a. ‘sales type activities’ do not form a substantial part of their activities;
    b. the entity is not primarily or substantially administered to make a profit, and the purposes of the organisation are much broader than commercial success; and
    c. any activities of a sport organisation that do fall within the ‘constitutional corporation’ remit are likely to comprise only a small proportion of the overall activities of the entity.
57. We recommend individual sport organisations that are not registered as a company seek legal advice as to whether they are a ‘constitutional corporation’, and therefore subject to the Whistleblower Laws, based on their individual circumstances.

What is a protected disclosure?



58. “Protected disclosures” qualifying for protection are outlined under section 1317AA of the Corporations Act.
59. A protected disclosure is a disclosure of information by an individual (the discloser) that qualifies for protection. There are three kinds of recipients for protected disclosures:
    a. to ASIC, APRA or other prescribed body (a Commonwealth authority prescribed in relation to the regulated entity);
    b. to an eligible recipient; and
    c. to a legal practitioner.

60. For a disclosure to be protected, the following must apply:
    a. the discloser is an eligible whistleblower in relation to a regulated entity;
    b. the disclosure is made to an eligible recipient in relation to the regulated entity, and
    c. the discloser has reasonable grounds to suspect the information concerns misconduct or an improper state of affairs or circumstances concerning the regulated entity or a related body corporate.
61. Protected disclosures may relate to matters beyond criminal breaches, including breaches of tax laws, ASIC laws and APRA laws.
62. Conduct that is not illegal but indicates systemic issues will also be disclosable - see paragraph 68.
63. Whistleblowers no longer have to reveal their identity before they can receive the protections of the Whistleblower Laws.

What is a disclosable matter?

Concerns misconduct, or an improper state of affairs or circumstances in relation to the regulated entity, or a related body corporate; or indicates that:

- the regulated entity (or related body corporate) or an officer or employee has engaged in conduct that breaches the Corporations Act, the ASIC Act, the Banking Act, the Data Collection Act, the Insurance Act, the Life Insurance Act, the National Consumer Credit Protection Act, or the Superannuation Industry (Supervision) Act, or regulations made under those laws;
- is an offence against any other law of the Commonwealth punishable by imprisonment for a period of 12 months or more;
- represents a danger to the public or the financial system; or
- is prescribed by regulations.

64. A disclosable matter is where a whistleblower has information, and reasonable grounds to suspect that, the information:
    a. concerns misconduct, or that an improper state of affairs or circumstances, have occurred or are occurring in relation to the regulated entity (or if the regulated entity is a body corporate) or a related body corporate[2]; or

       indicates that the regulated entity (or related body corporate) or an officer or employee of the regulated entity, has engaged in conduct that:

    b. breaches the Corporations Act, the ASIC Act, the Banking Act, the Data Collection Act, the Insurance Act, the Life Insurance Act, the National Consumer Credit Protection Act, or the Superannuation Industry (Supervision) Act, or regulations made under those laws;
    c. is an offence against any other law of the Commonwealth punishable by imprisonment for a period of 12 months or more;
    d. represents a danger to the public or the financial system; or
    e. is prescribed by regulations.
65. The broad categories of disclosable conduct are also intended to include conduct that may not be in contravention of particular laws. For example, “misconduct”, or “an improper state of affairs or circumstances” in relation to a regulated entity, may not involve unlawful conduct but may indicate a systemic issue that would assist the relevant regulator in performing its functions.
66. Section 9 of the Corporations Act defines “Misconduct” non-exhaustively to include fraud, negligence, default, breach of trust and breach of duty.

2 A “related body corporate” is a body corporate that is either the holding company or a subsidiary of the first entity, or a subsidiary of the first entity’s holding company. In a standard federated sporting structure, an NSO and SSO are not a holding company / subsidiary.

What disclosable matters are likely to apply to sport organisations?

67. There are two overarching categories of disclosable matters that we consider most likely to apply to sport organisations:
    a. information concerning misconduct or an improper state of affairs or circumstances, relating to the internal administration or ongoing operation of the sport organisation; or
    b. information concerning alleged offences by officers or employees of the sport organisation, under Commonwealth laws punishable by imprisonment for a period of 12 months or more.
68. Information under paragraph (a) could relate to fraudulent activity, bribes, financial crime, or systemic governance or regulatory failures in areas such as child protection. Allegations of breaches of match-fixing, anti-doping or breaches of integrity rules may also constitute disclosable matters under (a). Sport organisations may already have a range of integrity, anti-corruption or anti-match fixing policies in place. If this is the case, a disclosure may need to be dealt with in a manner that complies with these policies and the whistleblower laws and policy. Importantly, if an existing policy contradicts applicable requirements under the Whistleblower Laws, a sport organisation should ensure to comply with the Whistleblower Laws, irrespective of the other policy (and should seek to harmonise them as soon as possible). Each sport organisation should consider this issue when preparing and adopting a whistleblower policy.
69. A disclosable matter under (a) must concern misconduct, or an improper state of affairs or circumstances, "in relation to the regulated entity". In a federated sporting structure, it will therefore need to be determined which, if any, entity within the structure the misconduct or improper state of affairs or circumstances relates to, and whether that entity (or those entities) are regulated entities. For example:
    a. match-fixing allegations arising in a league administered by an NSO that is a regulated entity, is likely to constitute a disclosable matter;
    b. on the contrary, information concerning a team's alleged match-fixing is unlikely to be a disclosable matter, to the sport's NSO, where the conduct arises in a competition administered by an SSO, and involves state or club-level athletes, even where the applicable anti-match fixing policy was imposed by the NSO;
    c. information concerning alleged anti-doping rule violations by national-level athletes is much more likely to be "in relation to" the NSO, compared with an alleged anti-doping breach by a state or club level athlete who is not in the NSO's elite system or pathway;
    d. breaches of an NSO's integrity policy may be a disclosable matter, depending on the exact circumstances. Factors relevant to whether it is a disclosable matter will include the identity of the respondent, and how they are connected to the NSO, and whether the breach relates to the NSO and if so, how;
    e. conduct concerning, or arising out of, a league administered by the NSO is more likely to be "in relation to" the NSO; and
    f. there are likely to be circumstances where information is a disclosable matter to multiple regulated entities, such as where information concerns allegations of systemic salary-cap breaches by a club (that is itself a regulated entity), which participates in a league administered by a national body (that is also a regulated entity). In this case, a protected disclosure could potentially be made to one or both the regulated entities.

    In determining whether conduct that is the subject of a disclosure constitutes a disclosable matter, the sport organisation may need to seek legal advice.
70. Importantly, there are a variety of offences under sports-related legislation that fall within paragraph (b), with most offences under the *National Sports Tribunal Act 2019* punishable by at least 12 months imprisonment, including provision of false and misleading evidence, obstructing the tribunal, intimidating a witness or breaching applicable secrecy provisions.

Who is an eligible whistleblower?

71. An ***Eligible Whistleblower*** has the meaning given by section 1317AAA of the Corporations Act.

Eligible whistleblowers include persons who are or have been:

- Officers and employees of, and contractors of a company
- Individuals who supply services or goods to a company
- Employees of a person or entity who supplies services or goods to a company (whether paid or unpaid)
- Individuals who are associates of a company
- Relatives or dependents of any of the persons listed above.

72. Accordingly, a significant proportion of the eligible whistleblower categories cover individuals who are not currently employees of the sport organisation, meaning a protected disclosure could be made by any number of individuals with a link to a sport organisation.

Who is an eligible recipient of a disclosure?

73. Eligible recipients are defined in section 1317AAC of the Corporations Act to include the following categories of individuals.

Disclosures may be made to the following eligible recipients of a company:

- its officers and senior managers
- its auditor or a member of an audit team conducting an audit of a company
- its actuary (if it has one)
- a person authorised by it - for example, individuals from its Human Resources team or an authorised, external reporting service approved by the board, or a lawyer.

74. Importantly, the only internal people within a sport organisation who may receive protected disclosures are the officers and senior managers, or anyone specifically authorised to receive permitted disclosures, which should be specified within the whistleblower policy.
75. "Officers and senior managers" encompass the directors, company secretary and CEO of a sport organisation, as well as certain senior managers, if they either:
    a. make, or participate in making, decisions affecting the whole or a substantial part of the business of the organisation; or
    b. have the capacity to significantly affect the organisation's financial standing.
76. In the sporting context, we expect that for most sport organisations, there will be at least one level of senior management below the CEO (ie executive-level managers) who will constitute "senior managers" for the purposes of the Whistleblower Laws. For smaller NSOs and SSOs, this may only be one or two individuals in addition to the CEO.
77. While there may be limited instances where a coach of a senior team would fall within the definition of "senior manager", generally we consider this will be unlikely, due to that individual not participating in decisions that affect a "substantial" part of the overall business of the entity that administers the relevant team. An exception to this may be professional clubs (such as AFL, NRL, A-League), where the relevant entity exists primarily to administer the professional team.
78. ASIC has indicated that smaller regulated entities may consider authorising an independent whistleblowing service provider as an eligible recipient for directly receiving disclosures where it is financially viable for them to do so. It is important to note that the regulated entity remains responsible for meeting its legal obligations for outsourced functions, and should undertake appropriate due diligence before engaging an independent whistleblowing service.

Public interest / emergency disclosures

79. In accordance with section 1317AAD of the Corporations Act, there are limited circumstances where, once a protected disclosure has been made to a regulator (but not a company), a further disclosure may be made to a journalist or member of Parliament.
80. The preconditions for a "public interest disclosure" are that:
    a. at least 90 days' have passed since the original protected disclosure was made to a regulator (not a regulated entity that is a company);
    b. the eligible whistleblower does not have reasonable grounds to believe that action is being, or has been, taken;
    c. the eligible whistleblower has reasonable grounds to believe that making a further disclosure is in the public interest; and
    d. before making the further disclosure, the eligible whistleblower has given written notice to the regulator, both identifying the original protected disclosure, and informing it of the intention to make a public interest disclosure.
81. The preconditions for an "emergency disclosure" are that:
    a. the original protected disclosure was made to a regulator (not a regulated entity that is a company);
    b. the eligible whistleblower has reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons or the natural environment;
    c. before making the further disclosure, the eligible whistleblower has given written notice to the regulator, both identifying the original protected disclosure, and informing it of the intention to make an emergency disclosure; and
    d. the information disclosed is no greater than is necessary to inform the journalist or Parliamentarian of the substantial and imminent danger.
82. It is therefore important for sport organisations to be aware that, particularly in the case of public interest disclosures, there is a possibility the matter will become public knowledge if appropriate action is not taken by the regulator in response to the original protected disclosure. This increases the importance of a sport organisation providing timely and adequate responses to a regulator investigating a whistleblower complaint, to minimise the likelihood a public interest disclosure may be made by the eligible whistleblower due to a regulator being unable to proceed without information or responses from a sport organisation, which have not been supplied.

What is not a protected disclosure?

83. Protected disclosures must relate to disclosable matters, which are summarised in paragraph 64 onwards. The protections granted under the Whistleblower Laws do not extend to disclosures about personal employment or workplace grievances, such as interpersonal conflicts, or issues relating to transfer, promotion, or disciplinary decisions.

Personal work-related grievance

- Interpersonal conflict between the discloser and another employee;
- Decision about an individual's employment, transfer or promotion;
- Decision about the terms and conditions of an individual's employment;
- Decision to suspend or terminate the discloser's employment or otherwise discipline them.

What may NOT qualify as a personal work-related grievance

- A disclosure about a work-related grievance concerning another employee or contractor may be protected. A disclosure that relates partly to a personal work-related grievance and partly to a disclosable matter may qualify for protection.
- A disclosure about a personal, work-related grievance may be protected, if it also involves actual or alleged victimisation of the discloser or the reported victimisation against the discloser.
- A disclosure concerning a personal work-related grievance that is made to a legal practitioner may qualify for protection under subsection 1317AA(3).

84. If the individual is a current or former officer, employee or contractor of a regulated entity who has an employment dispute or work-related grievance, they may wish to complain about the matter. However, the whistleblower protections do **not** cover a report of alleged misconduct **solely** about an individual's work-related grievance.
85. Despite this:
    a. a disclosure concerning a personal work-related grievance that is made to a legal practitioner may qualify for protection under section 1317AA(3) of the Corporations Act;
    b. a disclosure about a work-related grievance concerning another employee or contractor may be protected. A disclosure that relates partly to a personal work-related grievance and partly to a disclosable matter may qualify for protection; and
    c. a disclosure about a personal, work-related grievance may be protected, if it also involves actual or alleged victimisation of the discloser or reported victimisation against the discloser.
86. Generally, a personal work-related grievance **will** include:
    d. an interpersonal conflict between the discloser and another employee;
    e. a decision about an individual's employment, transfer or promotion;
    f. a decision about the terms and conditions of an individual's employment; or
    g. a decision to suspend or terminate the discloser's employment or otherwise discipline them.

What happens in the case of false reporting?

87. Proceedings in respect of the falsity of the information are covered under section 1317AB(1)(c) of the Corporations Act.
88. Generally, if a person makes a protected disclosure, they are protected from legal liability for making the disclosure.
89. However, where it is shown that a person purporting to be a whistleblower has knowingly or recklessly made a false report of wrongdoing, then that conduct itself may be considered a serious matter and that person may be subject to disciplinary action, which may include dismissal in serious cases.
90. However, an entity needs to ensure that it does not unintentionally deter staff from making disclosures (e.g. disclosers who have some information leading to a suspicion, but not all the details).
91. If disciplinary action is taken in response to a false or vexatious disclosure, it would be taken under an existing policy or code of conduct of the sport organisation, as opposed to the whistleblower policy, which deals with protected disclosures (i.e. those that fall within the Whistleblower Laws).

Non-disclosure and confidentiality requirements

92. Section 1317AAE of the Corporations Act sets out the requirements for maintaining confidentiality of a whistleblower's identity
93. The Whistleblower Laws make it a criminal offence (which may also lead to civil penalties) to disclose the identity of a whistleblower without their consent, or to disclose information that is likely to lead to the identification of the whistleblower, subject to narrow permitted exceptions.
94. A regulated entity must not disclose any information that would suggest or reveal the identity of the whistleblower, without first obtaining their consent.
95. However, a whistleblower's identity may be disclosed without consent to ASIC, APRA, a member of the AFP or to a lawyer for the purpose of obtaining legal advice or representation in connection with the operation of the Whistleblower Laws.
96. In addition, a disclosure of information (other than the identity of the whistleblower) likely to lead to their identification is lawful if it is reasonably necessary to investigate a disclosable matter, and the regulated entity takes all reasonable steps to reduce the risk that the discloser will be identified as a result of the disclosure.

Protection from detriment

97. The Whistleblower Laws make it a criminal offence to cause or threaten detriment to a person because of a belief or suspicion that the person has made, may have made, or could make, a whistleblower disclosure.

98. Detrimental action includes, but is not limited to:

    h. dismissal;

    i. injury of an employee in his or her employment;

    j. alteration of an employee's position or duties to his or her disadvantage;

    k. discrimination between an employee and other employees of a regulated entity;

    l. harassment or intimidation; and/or

    m. other damage, including personal injury, or damage to the person's property, reputation or finances.

99. The catch-all provision dealing with "any other damage to a person" is sufficiently broad to capture a variety of sport-specific conduct, which could include systemic failure to select an individual or give that individual field time, offer them a materially reduced contract, demote them to a reserve grade team, or remove coaching or other financial or non-financial support.

100. It is important to be aware that the protections against detriment apply to circumstances where a regulated entity is aware a person *could have* or *may in future* make a protected disclosure, and also where the regulated entity is aware a person *has actually made* a protected disclosure.

101. Ensuring eligible whistleblowers are not subjected to detriment is particularly important, due to the potential penalties that apply to a breach (see Schedule 6), and also the fact that:

    n. eligible whistleblowers may make an application to the Court for compensation if they have suffered detrimental actions; and

    o. the officers and employees of a regulated entity can be held vicariously liable for any breaches that occur in relation to detrimental actions.

Protection of anonymity

102. ASIC RG 270 makes clear that a whistleblower policy must advise that disclosures may be made anonymously and still be protected under the Corporations Act.

103. Anonymous disclosures pose challenges for companies in responding to them - for example, how does the regulated entity know the disclosure is made by an eligible whistleblower? How does the regulated entity investigate the disclosure? How does the regulated entity communicate with the discloser?

104. These issues should be addressed in the regulated entity's policy or procedures for dealing with protected disclosures.

105. ASIC guidance for dealing with anonymous disclosures, and protecting anonymity, includes the following suggestions:

    p. communication with disclosers occurs through anonymous telephone hotlines and anonymised email addresses; and

    q. ensure an ability for a discloser to adopt a pseudonym for the purpose of their disclosure.

106. It is important to note that where a disclosure comes from an email address from which the person's identity cannot be determined, and the discloser does not identify themselves in the email, it should be treated as an anonymous disclosure.

Whistleblower policy

107. Section 1317AI *Corporations Act 2001* (Cth) requires certain regulated entities such as public companies to have a whistleblower policy in place, which sets out the matters listed in section 1317AI(5). This requirement applies from 1 January 2020.

108. At the time the Whistleblower Laws were introduced, this caught all companies limited by guarantee (and therefore most, if not all, sport organisations registered as a company), irrespective of their size or annual turnover.

109. Since the introduction of the Whistleblower Laws, ASIC has released a legislative instrument[3] under which any not-for-profit company limited by guarantee with annual consolidated revenue of less than $1 million is exempt from the requirement to adopt a whistleblower policy. As a result, a large number of sport organisations will, while remaining regulated entities and therefore subject to the Whistleblower Laws, be exempt from the requirement to adopt a policy. ASIC's power to exempt certain classes of entity is found in section 1317AJ of the Corporations Act.

110. Matters that must be dealt with in such a policy include protections available to whistleblowers, to whom disclosures may be made, how the entity will support whistleblowers, how investigations will occur, how fair treatment of employees mentioned in disclosures will be maintained, and how the policy will be made available to officers and employees of the regulated entity.

111. ASIC has also released a Regulatory Guide[4] that provides information about how regulated entities should adopt a whistleblower policy that complies with the legislative requirements, and good practice guidance on its contents.

112. Failure by an entity required to adopt a policy is a strict liability offence, with a maximum penalty of 60 penalty units (currently $12,600) for an individual or company.

3 ASIC Corporations (Whistleblower Policies) Instrument 2019/1146, 13 November 2019.
4 Regulatory Guide 270 - Whistleblower policies.

SCHEDULE 4 HELP SHEETS

Help Sheet #1

Whistleblower Protections Eligible Recipient

Script for Eligible Recipients - How to respond and determine if a matter is a Protected Disclosure

DAY 1–7 TRIAGE

1. Firstly, determine **DISCLOSURE.**
   - Disclosure might be written or verbal by the potential whistleblower
   - It might be a casual conversation, for example, "hey, I've noticed this manager bullying and giving his staff a hard time."

What to respond with if verbal

"*Thank you very much for telling me that it sounds serious. Can you please confirm what you are saying is "…" so I can understand in more detail".* (Listen carefully and take notes where necessary. Note the date, time and place of the disclosure). Ask discloser to provide disclosure in writing or to confirm your notes are accurate. Have them sign and date their agreement.

What to respond to if written

Thank you very much for informing me of this issue. Can you please confirm "… so I can understand in more detail". (Note the date, time and place of the disclosure).

2. Determine whether the individual is an **ELIGIBLE WHISTLEBLOWER.**
   - If **YES,** and you determine they are an **ELIGIBLE WHISTLEBLOWER** go to **step 3** and determine if it is a **PROTECTED DISCLOSURE.** Ensuring you do not expose the Whistleblower's identity.
   - If **NO**, advise the individual and refer them elsewhere as applicable – e.g. grievance policy or HR.

3. Determine if it is a **PROTECTED DISCLOSURE.**
   - If **YES**, and you are an **ELIGIBLE RECIPIENT**, advise the Whistleblower of the following:
     - that the Whistleblower policy applies; provide or confirm copy/access;
     - the disclosure will be reviewed;
     - that support is available; refer to Policy;
     - verify if the Whistleblower consents to be named; note in writing "yes" or "no";
     - protect confidentiality – i.e.:
       - do not disclose identify of Whistleblower without consent; and
       - do not disclose details of disclosure without consent.

4. Confirm with Whistleblower and with relevant person (e.g. Whistleblower Officer) that disclosure is being dealt with under whistleblower policy or other appropriate action is being taken and that your involvement is now at an end.

Important NOTE:

5. If a protected disclosure has been made the Whistleblower is entitled to:
   - **Confidentiality**: it is a criminal offence (and also civil penalties apply) to disclose the identity of a Whistleblower without their consent, or to disclose information that is likely to lead to the identification of the Whistleblower (except in certain circumstances).
   - **Protection from detriment and victimisation**: it is an offence to threaten, or engage in conduct that, causes detriment to a person due to a belief or suspicion that the person made, or proposes to make, a protected disclosure.

Help Sheet #2

What is a Protected Disclosure and what is a personal work-related grievance?

What is a Protected Disclosure?	What is a personal work-related grievance?
My boss bullied me for the 5th time and it is the 10th time it has happened within this workplace, by the same manager to other people. It is a toxic workplace and I feel unsafe.	I'm taking stress leave because my boss bullies me.
My boss put me on a final warning after I found he was falsifying company tax records.	I didn't deserve to be put on a final warning.
My work mate propositioned me. I'm the fifth woman in our office he has sexually harassed. We have all complained to HR and nothing has happened. All of us have lodged workers compensation claims after he threatened us if we complained.	My work mate propositioned me at the office after a drinks function.
My coach offered me a new contract worth 50% the previous one, and said I needed to take a cut because the club had secretly been over the salary cap last year and would be again this year if I didn't.	My coach offered me a new contract worth 50% the previous one and said my performances in the previous season just hadn't been at the level that I was previously being paid at.
I wasn't selected for the World Cup because senior management had circulated an internal memo stating that no one from my club should be selected, because the club was two weeks late paying its annual affiliation fee.	I wasn't selected for the World Cup because I hadn't met the eligibility criteria in the selection policy.

SCHEDULE 5 HYPOTHETICAL SCENARIOS AND ANSWERS

Scenarios

Example 1

One of the roles of the Chief Operating Officer of a national sports organisation (NSO) that is a company limited by guarantee, is running the national league of that sport.

One morning, he receives an email from an individual identifying themselves as “Bob Richard”, alleging that a team currently participating in the league, the ‘Money Grabbers’, have allegedly engaged in match-fixing in the league. The Money Grabbers are owned by a private company.

Bob’s email does not make any requests, and simply sets out the allegations, along with copies of text messages allegedly between the captain of the Money Grabbers and a well-known bookie nicknamed John.

Upon receipt of the email, the Chief Operating Officer cross-checks the NSO’s records, and discovers that Bob is employed by the contractor used by the NSO for crowd-control services at league matches, and that Bob is therefore regularly in attendance at league matches.

Questions

- Is the NSO a regulated entity?
- Is Bob an eligible whistleblower?
- Is the Chief Operating Officer an eligible recipient?
- Is Bob’s email a protected disclosure?
- Is the company that owns the Money Grabbers a regulated entity?
- What happens if Bob emailed both the NSO and the company that owns the Money Grabbers?

Example 2

The Head of Integrity at an NSO, which is a company limited by guarantee, receives an anonymous email alleging one of the sport's high profile athletes, who is the current world champion in his pet event, deliberately took banned substances.

The athlete in question holds a scholarship with the NSO and is part of the national squad.

The email alleges that the athlete knowingly took the substances at a national team camp, in the presence of a team physio employed by the NSO.

Questions

- Is the NSO a regulated entity?
- Is the person who sent the email an eligible whistleblower?
- Is the Head of Integrity an eligible recipient?
- Is the email a protected disclosure?

Example 3

Michelle works in the membership department of a Sporting Organisation (SO) that is a company limited by guarantee. Her job is to maximise the number of memberships purchased by participants in the sport. Michelle reports to Diana, a manager.

Michelle uncovers evidence to suggest that Diana and another manager, Ava, are getting kickbacks from particular member clubs to generate false reports inflating the member numbers at those clubs.

Michelle contacts her General Manager, Garry to tell him about her suspicion. The email details what evidence she has of these “transactions” and makes a number of allegations against both Diana and Ava.

Michelle demands:

- an immediate investigation with the full protections for a whistleblower, and
- for Diana and Ava to be stood down during the investigation.

Questions

- Is Michelle’s employer a regulated entity?
- Is Michelle an eligible whistleblower?
- Is Garry an eligible recipient?
- Is Michelle’s complaint a protected disclosure?
- How does the SO respond to Michelle’s allegation?

Example 4

Kylie works in the sponsorship department for the SO. Her job is to manage the SO's relationships with its sponsors, including delivery of the required benefits, and investigate new opportunities. She reports to Naomi, the Head of Sponsorship.

Due to a combination of factors, Kylie hasn't been performing her role well and missed out recently on a promotion and pay increase she had been hoping for.

A week after Kylie had found out she was not going to be promoted, she wrote to the Head of Human Resources to complain that she had been unfairly treated by Naomi and that she deserves a promotion.

Kylie alleged that Naomi always misses their regular one-on-one reviews and that she failed to adequately explain why Kylie had not received the promotion.

Kylie demands:

- an immediate investigation with the full protections for a whistleblower;
- a promotion and pay rise; and
- for Naomi to be "held accountable" for treating her unfairly.

Questions

- Is Kylie an eligible whistleblower?
- Is the Head of Human Resources an eligible recipient?
- Is Kylie's complaint a protected disclosure?
- How does the SO respond to Kylie's complaint?

Example 5

Darren works in the Finance Department for the SO. Darren's job is to help prepare financial and accounting reports. Darren reports to Monica, the Finance Manager.

Darren has had a recent poor performance review by Monica and did not get the bonus or remuneration increase he was hoping for.

Two days after his performance review, Darren writes a 15 page complaint to the company's Chief Financial Officer, which he describes as a "Protected Disclosure" under the SO's Whistleblower Policy. The document complains about Darren's treatment by Monica, including his poor performance review. It also makes a number of allegations that Monica has, among other things, falsified reports to senior management, provided misleading information to the SO's auditor, missed reporting deadlines and failed to comply with requests from the ATO.

Darren demands:

- an immediate investigation with the full protections for a whistleblower, and
- Monica be sacked.

Questions

- Is Darren an eligible whistleblower?
- Is the Chief Financial Officer an eligible recipient?
- Is Darren's complaint a protected disclosure?
- How does the company respond to Darren's complaint?
- Would your answers change if Darren was a former IT contractor who was sacked by Monica?

Answers

Example 1 – Match-fixing

Questions & Answers

Is the NSO a regulated entity?

Yes - the NSO is a company limited by guarantee (a type of company) and is therefore a regulated entity. The NSO is a company to which the disclosure relates to, as it administers the league in which the alleged match-fixing is occurring.

Is Bob an eligible whistleblower?

Yes - Bob is an employee of a person (the security contractor) that supplies services to the regulated entity (the NSO). The reference to "person" in the whistleblower laws includes body corporates.

Is the Chief Operating Officer an eligible recipient?

A Chief Operating Officer (an eligible recipient must be an "officer or senior manager") would almost certainly participate in decisions that affect the whole or a substantial part of the NSO's operations; particularly as one of the job's roles is to run the league administered by the NSO. As such, as a senior manager the COO will be an eligible recipient of disclosures.

Is Bob's email a protected disclosure?

The evidence suggests match-fixing within the league administered by the NSO, which would likely prompt the Chief Operating Officer to hold reasonable grounds to suspect misconduct or an improper state of affairs or circumstances in relation to the NSO. As such, this complaint is a disclosable matter. As Bob is an eligible whistleblower and he has lodged his complaint about a disclosable matter with an eligible recipient (the COO) this will be a protected disclosure.

Is the company that owns the Money Grabbers a regulated entity?

Yes - as a private company, it is a regulated entity under the whistleblower laws.

What happens if Bob emailed both the NSO and the company that owns the Money Grabbers?

Because the private company owns the Money Grabbers, it is very likely that Bob's allegations would also be a disclosable matter with respect to that private company, *as well as* the NSO. If a protected disclosure was lodged with the private company, both it and the NSO would need to separately treat the email as a protected disclosure and comply with the whistleblower laws.

Unless Bob is an eligible whistleblower in relation to the private company however, that separate email will not constitute a protected disclosure to the private company. Bob is an eligible whistleblower for the NSO, as an employee of a person providing services to the NSO. If Bob does not fall under any of the "eligible whistleblower" categories in relation to the private company, that separate email will not constitute a protected disclosure.

Example 2 - anti-doping allegation

Questions & Answers

Is the NSO a regulated entity?

Yes - the NSO is a company limited by guarantee (a type of company) and is therefore a regulated entity.

Is the person who sent the email an eligible whistleblower?

As the person who sent the email remains anonymous, the NSO will not be able to initially determine whether they are an eligible whistleblower, and therefore whether the email constitutes a protected disclosure. As such, the NSO should treat the email as if it was a protected disclosure, to ensure the applicable confidentiality requirements under the whistleblower laws are complied with (if it is later determined to be a protected disclosure).

Is the Head of Integrity an eligible recipient?

The 'Head of Integrity' (an eligible recipient must be an "officer or senior manager") would likely participate in decisions that affect the whole or a substantial part of the NSO's operations. As such, as a senior manager the Head of Integrity will be an eligible recipient of disclosures.

Is the email a protected disclosure?

The NSO will not initially know whether the email is a protected disclosure, unless or until it can determine whether the discloser falls under one of the whistleblower categories. For this reason, the NSO should treat the email as a protected disclosure, pending further information being provided.

To be a protected disclosure, the information must be a disclosable matter, which in this instance would involve misconduct or an improper state of affairs or circumstances in relation to the NSO. There are two critical questions - whether the allegations constitute misconduct or an improper state of affairs, and if so, whether they are "in relation to" the NSO.

As the athlete is a national level competitor, is a scholarship holder of the NSO and in the national team, it is likely the allegations are "in relation to" the NSO. As the allegations involve a possible anti-doping breach, which potentially involved an employee of the NSO, it is likely that an 'improper state of affairs' has occurred.

To fully determine whether it is a protected disclosure, the NSO will need to ascertain the discloser's identity, either through their consent, or through asking whether they consider the email to be a protected disclosure, and if so, on what basis.

Example 3 - Michelle

Questions & Answers

Is Michelle's employer a regulated entity?

Yes - the SO is a company limited by guarantee (a type of company) and is therefore a regulated entity (the SO is the company which the disclosure is about).

Is Michelle an eligible whistleblower?

Yes - Michelle is an employee of the SO and is therefore an eligible whistleblower. (Michelle must be an employee of the company which the disclosure is about, or a related company).

Is Garry an eligible recipient?

Garry is a General Manager of the SO. A General Manager (Garry must be an "officer or senior manager") would most likely participate in decisions that affect the whole or a substantial part of the SO's operations. As such, as a senior manager he will be an eligible recipient of disclosures.

Is Michelle's complaint a protected disclosure?

The evidence suggests corruption or bribery at the SO, which may prompt Michelle to hold reasonable grounds to suspect misconduct or an improper state of affairs or circumstances in relation to the SO. As such, this complaint is a disclosable matter. As Michelle is an eligible whistleblower and she has lodged her complaint about a disclosable matter with an eligible recipient (Garry) this will be a protected disclosure.

NOTE: Conduct may not always be illegal, but can be a systemic problem within the company.

How does the SO respond to Michelle's allegation?

1. Firstly, determine DISCLOSURE.
2. What to respond to if written:

Thank you very much for informing me of this issue. Can you please confirm "… so I can understand in more detail".

(Note the date, time and place of the disclosure).

3. Determine whether Michelle is an ELIGIBLE WHISTLEBLOWER.
   - If YES, and you determine they are an ELIGIBLE WHISTLEBLOWER go to step 4 and determine if it is a PROTECTED DISCLOSURE. Ensuring you do not expose the Whistleblower's identity.
4. Determine if it is a PROTECTED DISCLOSURE.
   - If YES, and you are an ELIGIBLE RECIPIENT, advise the Whistleblower (Michelle) of the following:
     - that the Whistleblower policy applies; provide or confirm copy/access;
     - the disclosure will be reviewed;
     - that support is available; refer to Policy (i.e..EAP);
     - verify if the Whistleblower consents to be named; note in writing "yes" or "no"; and
     - protect confidentiality – i.e.:
       - do not disclose identify of Whistleblower without consent; and
       - do not disclose details of disclosure without consent.
5. Confirm with Whistleblower (Michelle) and with relevant person (e.g. Whistleblower Officer) that disclosure is being dealt with under the policy or other appropriate action is being taken and that your involvement is now at an end.
   - Garry should firstly seek Michelle's permission to disclose her identity. Garry should direct the allegation to the person responsible and trained for investigating whistleblowing disclosures, such as the SO's Whistleblower Officer.
   - **NOTE:** While the discloser must hold or have held one of the suggested roles to access the protections, they DO NOT have to ID themselves or their roles and they CAN raise their concerns anonymously.

Example 4 - Kylie

Questions & Answers

Is Kylie an eligible whistleblower?

Yes - Kylie is an employee of the SO and is therefore an eligible whistleblower.

Is the Head of Human Resources an eligible recipient?

Yes, probably - the head of Human Resources is someone who likely participates in decisions that affect the whole or a substantial part of the SO's operations. As such, the Head of Human Resources may be a senior manager and therefore an eligible recipient of disclosures.

Is Kylie's complaint a protected disclosure?

No - Kylie's complaint regarding Naomi's behaviour is better categorised as a personal work-related grievance as it concerns a grievance that has implications for her personally, rather than for the SO. Personal work-related grievances are not disclosable matters and as such the complaint will not be a protected disclosure. The matters raised by the complainant do not suggest misconduct or an improper state of affairs in relation to the SO.

How does the SO respond to Kylie's complaint?

- After determining that Kylie's complaint may not be a protected disclosure, you should advise Kylie that the complaint is not a protected disclosure and refer her to Human Resources (or equivalent) where Kylie should be directed to make a grievance complaint under the SO's grievance policy, if she wishes.
- EAP should also be offered.
- A record of the complaint should be kept with correspondence.

Example 5 – Darren

Questions & Answers

Is Darren an eligible whistleblower?

Yes - Darren is an employee of the SO and is therefore an eligible whistleblower.

Is the Chief Financial Officer an eligible recipient?

Yes - the Chief Financial Officer is a senior manager as someone who participates in decisions that affect the whole or a substantial part of the SO's operations or affect the SO's financial standing. As a senior manager, the Chief Financial Officer will be an eligible recipient of disclosures.

Is Darren's complaint a protected disclosure?

Darren's complaint seems to have been prompted by his poor performance review, which may be considered a personal work-related grievance. However, Darren's complaint includes allegations relating to the falsification of reports to a senior manager, providing misleading information to auditors among other things. These are matters which suggest potential unethical behaviour, misconduct, or an improper state of affairs in relation to the SO and are therefore disclosable matters. The complaint is therefore a protected disclosure. This is despite some aspects of it being better characterised as a personal work-related grievance.

How does the SO respond to Darren's complaint?

If you are not sure that the complaint is a protected disclosure, you should treat the disclosure as if it were.

1. Firstly, determine **DISCLOSURE**.
2. What to respond to if **written**:

   Thank you very much for informing me of this issue. Can you please confirm "… so I can understand in more detail". (Note the date, time and place of the disclosure).
3. Determine whether Darren is an ELIGIBLE WHISTLEBLOWER.

   If YES, and you determine they are an ELIGIBLE WHISTLEBLOWER go to step 4 and determine if it is a PROTECTED DISCLOSURE. Ensuring you do not expose the Whistleblower's identity.
4. Determine if it is a PROTECTED DISCLOSURE.
   - If YES, and you are an ELIGIBLE RECIPIENT, advise the Whistleblower (Darren) of the following:
     - that the Whistleblower policy applies; provide or confirm copy/access;
     - the disclosure will be reviewed;
     - that support is available; refer to Policy (i.e. EAP);
     - verify if the Whistleblower consents to being named; note in writing "yes" or "no";
     - protect confidentiality – i.e.:
       - do not disclose identify of Whistleblower without consent; and
       - do not disclose details of disclosure without consent.
5. Confirm with Whistleblower (Darren) and with relevant person (e.g. Whistleblower Officer) that disclosure is being dealt with under whistleblower policy or other appropriate action is being taken and that your involvement is now at an end.

   The Chief Financial Officer should firstly seek permission from Darren to disclose his identity for the purpose of the investigation. If Darren has not consented to his identity being disclosed, the Chief Financial Officer must ensure that the information contained in his disclosure is not disclosed unless reasonably necessary for investigating the issues, and the information does not include Darren's identity or information relating to Darren's identity that is likely to lead to the identification of Darren. The Chief Financial Officer should direct the allegation to the person responsible and trained for investigating whistleblowing disclosures, such as the Whistleblower Officer.

Would your answers change if Darren was a former IT contractor who was sacked by Monica?

No - individuals who supply services or goods to the SO, such as IT contractors are eligible whistleblowers. Further, neither employees or contractors have to be currently employed or contracted by the SO in order to be an eligible whistleblower, as former employees and contractors are also eligible whistleblowers.

Eligible Whistleblowers include persons who are or have been:

- officers[5] and employees[6] of, and contractors[7] of the SO;
- individuals who supply services or goods to the SO;
- employees of a person or entity who supplies services or goods to the SO (whether paid or unpaid)[8];
- individuals who are associates[9] of the SO; and
- relatives or dependents of any of the persons listed above[10].

5 Officer (usually that means a director or company secretary) of the company or organisation your disclosure is about, or a related company or organisation.
6 Employee of the company or organisation your disclosure is about, or a related company or organisation.
7 Includes an individual contractor, but not a corporate contractor who has supplied goods or services to the SO, or a related company or organisation. This can be either paid or unpaid and can include volunteers.
8 An employee of a contractor to the SO is included.
9 "Associate" means a director or secretary of the company or of any related body corporate of the company, or a person acting in concert with someone who is themselves an associate.
10 Spouse, relative or dependant of one of the categories of people referred to above.

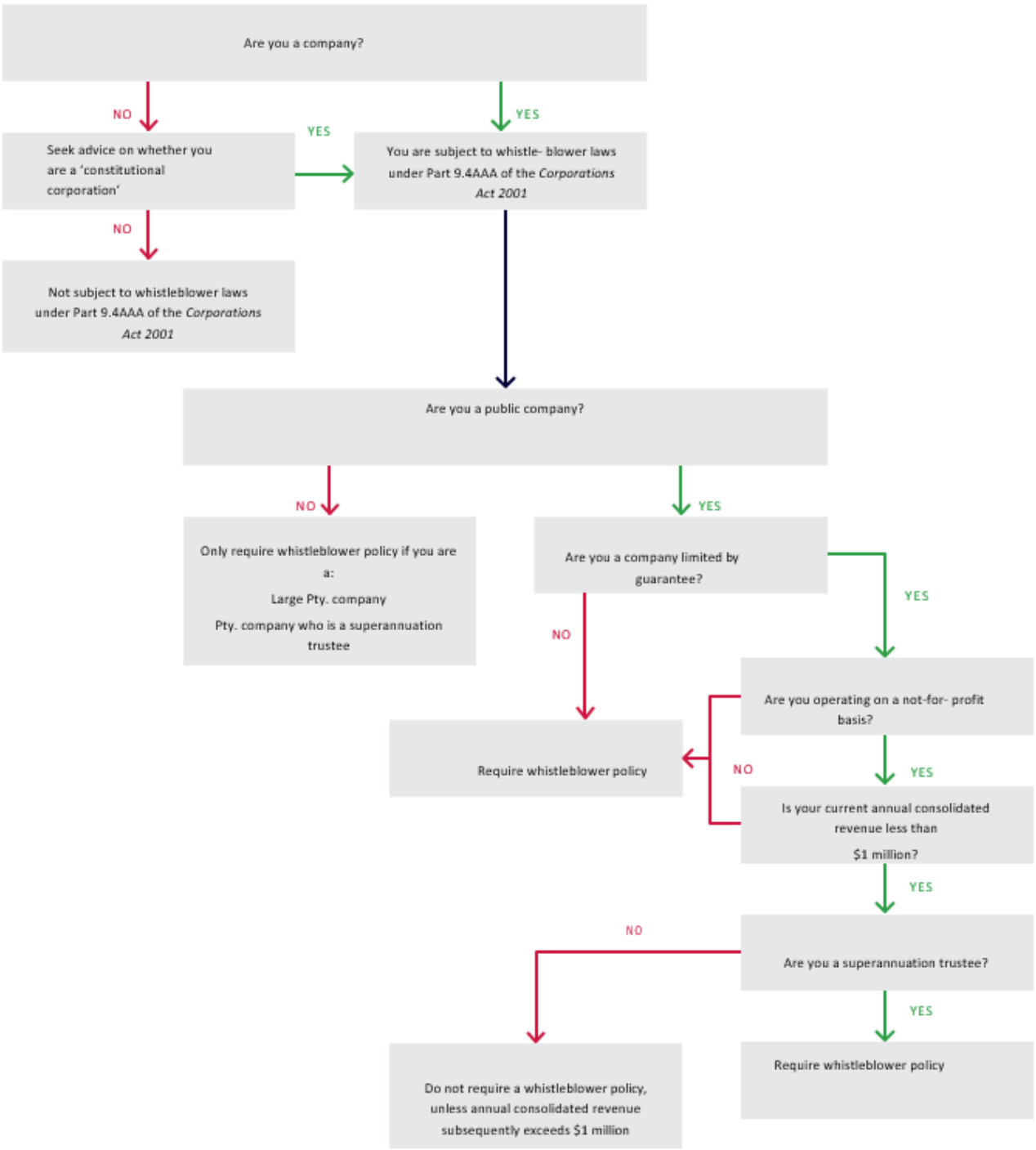
SCHEDULE 6 PENALTIES

The following penalties can apply for breaches of the Whistleblower Laws.

Contravention	Penalty
Civil penalty provisions	
Breach of confidentiality of identity of whistleblower **[s. 1317AAE(1) CA 2001]** & Victimisation or threatened victimisation of whistleblower [s. 1317AC(1), (2) and (3) CA 2001]	For an individual, 5,000 penalty units **[$1.050M]** or three times the benefit derived, or detriment avoided **[see s. 1317E(3)** table and **s. 1317G(3) CA 2001]** For a body corporate, 50,000 penalty units **[$10.5M],** three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to 2.5 million penalty units [$525M]) **[see s. 1317E(3) table and s. 1317G(4) CA 2001]**
Criminal penalties	
Breach of confidentiality of identity of whistleblower **[s. 1317AAE(1) CA 2001]**	For an individual: 6 months imprisonment or 60 penalty units **[$12,600]** or both **[**see **Schedule 3 and s. 1311B CA 2001]** For a body corporate: 600 penalty units **[$126,000] [see Schedule 3 and s. 1311C CA 2001]**
Victimisation or threatened victimisation of whistleblower **[s. 1317AC(1), (2) and (3) CA 2001]**	For an individual: 2 years imprisonment or 240 penalty units **[$50,400]** or both **[see Schedule 3 and s. 1311B CA 2001]** For a body corporate: 2,400 penalty units **[$504,000] [see Schedule 3 and s. 1311C CA 2001]**
Failure to have a whistleblower policy/not having the policy available to officers and employees **[s. 1317AI(5) CA 2001]**	60 penalty units **[$12,600] [Schedule 3 CA 2001]**
Other consequences	
Victimisation or threatened victimisation of whistleblower **[s. 1317AC(1), (2) and (3) CA 2001]**	**Compensation orders:** A court may award compensation for damage caused, or make non-monetary orders such as an injunction, apology, reinstatement or any other order the court thinks appropriate **[s. 1317AD CA 2001]**

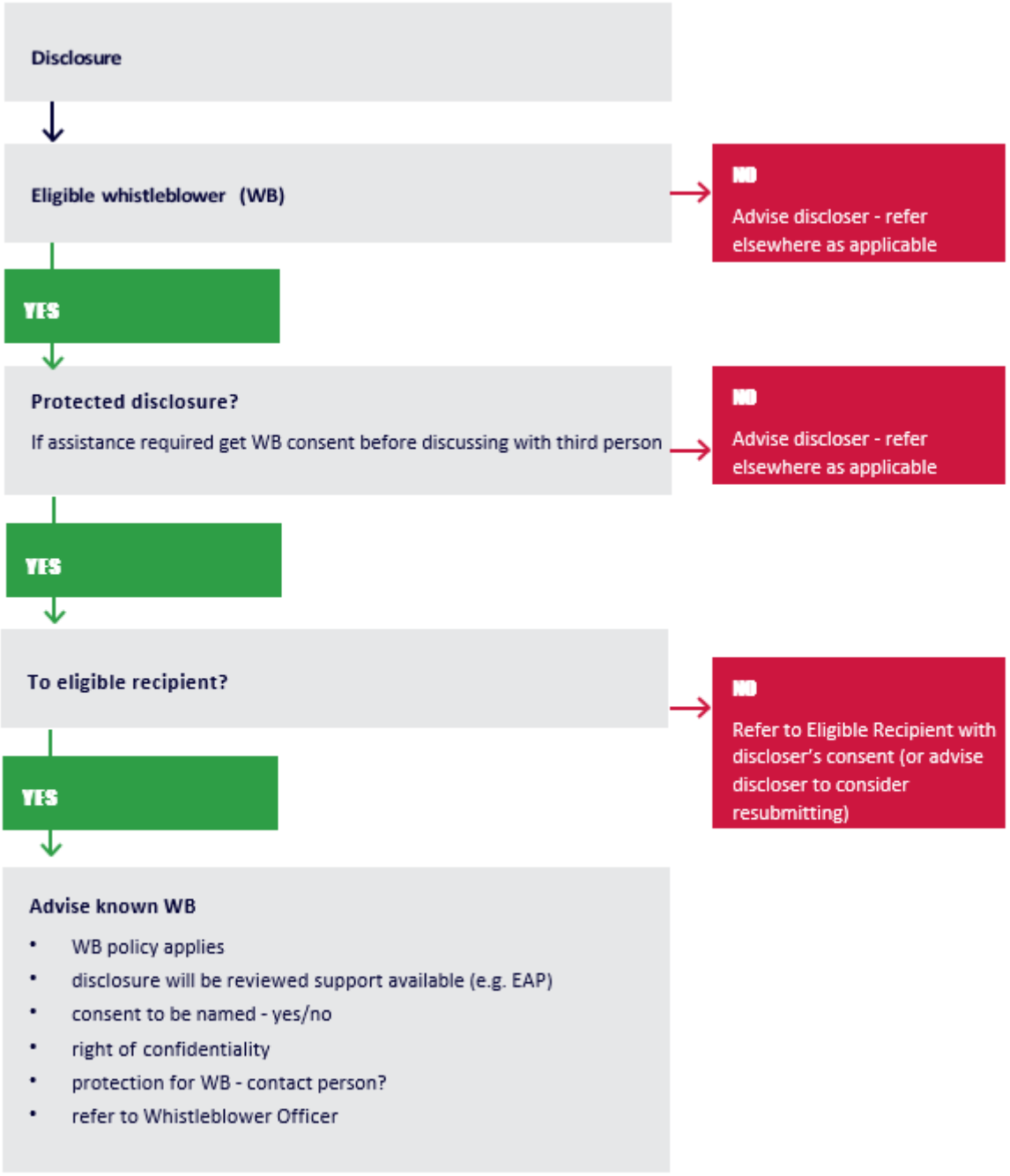
Note penalty unit = $210 [*s. 4AA Crimes Act 1914*]

SCHEDULE 7 DECISION TREE - IS YOUR SPORT ORGANISATION SUBJECT TO THE WHISTLEBLOWER LAWS?



SCHEDULE 8 FLOWCHART - RESPONDING TO PROTECTED DISCLOSURES

Triage



Review/Investigate