

AUX006_MORE PROTECTION FOR WHISTLE-BLOWERS

*The Whistle-blower protection provisions contained in Part 9.4AAA of the Corporations Act 2001(Cth) (**Act**) have been in operation for a number of years. However, they have been scarcely used due to their limitations and arbitrary conditions in order to trigger the operation of these laws or provisions. The new amendments are hoped to provide better protection for whistle-blowers and to address deficiencies with the current law.*

1 Introduction

The *Treasury Laws Amendment (Enhancing Whistle-blower Protection) Act 2018 (Cth) (Bill)* was introduced into parliament in an effort to encourage the use of these provisions and to increase transparency within corporations.

The amended provisions will be operative from 1 July 2019. The aim of these amendments is to encourage corporate accountability within the private sector and to increase protection for whistle-blowers who may qualify for protection under Part 9.4AAA.

2 Old and New Whistle-blower Provisions Compared

The current provisions only allow protection for current officers, employees and contractors of the regulated entity. However, the proposed provisions expand the definition of eligible whistle-blowers to past officers, employees and contractors, supplier and associates of the regulated entity, as well as their relatives and associates so that more people can claim protection under the Act. (see Table 2a)

To gain the benefit of protection under the new law, disclosures have to be made on the basis of an objective test requiring the whistle-blower to have 'reasonable grounds to suspect' misconduct or other disclosable matters. In comparison, the current law requires a disclosure to be made 'in good faith' to attract protection under the Act. This has created uncertainty for whistle-blowers, as accused companies can allege subjective or collateral motivation to defeat the 'good faith' requirement. Therefore, the new amendments will reduce uncertainty and risk for whistle-blowers.

The new provisions allow for disclosures to be made anonymously. This is in contrast to the existing provisions that requires a whistle-blower to provide a name when making a disclosure. New provisions will further protect whistle-blower by making it an offence for the eligible recipient to disclose confidential information obtained in the disclosure or to disclose information that identifies or could lead to the identification of the whistle-blower.

The new subsection 1317AB(1) protects the whistle blower from any civil, criminal or administrative liability and provides that no contractual or other remedy may be exercised against the person on the basis of the disclosure. The only exception is where the disclosure reveals information about discloser's own liability in relation to the conduct.

The new amendments also prohibit any act that threatens or causes detriment to a whistle-blower. This includes dismissal, injury, demotions, discrimination, harassment and more. The amended Act allows for various forms of relief for whistle-blowers who suffer detriment. In addition, whistle-blowers will not be liable for the costs of legal proceedings for compensation or any other remedy.

Under the new provisions, public companies and large Pty Ltd companies as defined by s 45A(3) of the Act must have a policy in place in relation to whistle-blower confidentiality and compliance. These policies must be made available to all officers and employees of the company. The penalty for failing to have a policy remains the same as the current law.

However, companies must also be aware that civil and criminal penalties have been increased for both corporations, Directors and individuals in respect of breaches of confidentiality of the identity and victimisation of a whistle-blower. It is also important to note that even though the new protection regime becomes operative from 1 July 2019, disclosures can be about matters which occurred before that date.

3 Conclusion

These new amendments are expected to increase transparency in corporate governance and encourage individuals to speak up about matters of public interest, financial misconduct or environmental issues without facing personal detriments. We trust the new provisions result in early detection and prevention of illegal phoenixing activities. <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/>

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2a 2019 Whistle-blower Criteria and Definitions

Criteria	Relevant Provisions	Definition
eligible whistle-blower	1317AA 1317AAA	A person who is, or has been, in a relationship with the regulated entity about which a disclosure is made. The following people are eligible whistle-blowers if they are, or have been: <ul style="list-style-type: none"> an officer, employee, or associate an individual (or their employee) who supplies services or goods (whether paid or unpaid) a relative or dependent of any of the above (this includes a spouse, parent or other linear ancestor, child or grandchild, and sibling) or an individual prescribed by the regulations
regulated entity	1317AA 1317AAB	Includes: <ul style="list-style-type: none"> a company a corporation to which paragraph 51(xx) of the <i>Constitution</i> applies an authorised deposit taking institution (ADI) or authorised non-operating holding company (NOHC) or their subsidiaries a general insurer or an authorised NOHC or their subsidiaries a life company or a registered NOHC or their subsidiaries a superannuation entity or a trustee of a superannuation entity an entity prescribed by the regulations
disclosable matter	1317AA(4) 1317AA(5)	A disclosable matter is information the whistle-blower has reasonable grounds to suspect: <ul style="list-style-type: none"> 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 any officer or employee) has engaged in conduct that constitutes an offence against, or a contravention of certain Acts or their instruments; or constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or represents a danger to the public or the financial system; or is other conduct as prescribed by the regulations
eligible recipient	1317AA 1317AAC	For a regulated entity that is a body corporate: <ul style="list-style-type: none"> an officer, auditor or actuary of the corporation or related corporation a person authorised by the corporation to receive disclosures and the supervisor or manager of a whistle-blower who is an employee of the corporation. The Minister has the power to prescribe additional persons or bodies as eligible recipients.

Further Information

If you want to know about how the new whistle-blower protection provisions may impact you, we would be pleased to meet with you. Your first consultation is free. Auxilium Partners has extensive experience in advising on Directors' disputes for small to medium sized business in Western Australia. Please contact Bob Jacobs or Paul Cockburn on (08) 9480 0619 or (08) 6436 3600

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