

Protections, remedies and liability under the Corporations Act whistleblower regime

by Practical Law Corporate and Practical Law Employment

Practice notes | **Maintained** | Australia

This note provides guidance on the protections available under the **whistleblower** regime established by Part 9.4AAA of the [Corporations Act 2001 \(Cth\)](#) when a disclosure qualifying for protection is made, may have been made, is proposed to be made or could be made. It also considers the remedies available, or penalties enforceable, where a person has suffered or been threatened with detriment because a qualifying disclosure has been made (often referred to as victimisation or retaliation), together with the persons who can be held liable for such contraventions. The note includes significant amendments made to the regime that came into effect on 1 July 2019 under the *Treasury Laws Amendment (Enhancing **Whistleblower** Protections) Act 2019* (Cth).

Scope of this note

This note considers the protections available under the **whistleblower** regime established by Part 9.4AAA of the [Corporations Act 2001 \(Cth\)](#) ([CA 2001](#)) (the **whistleblower** regime) when a disclosure qualifying for protection is made, may have been made, is proposed to be made or could be made.

It also considers the remedies available, or penalties enforceable, where a person has suffered or been threatened with detriment because a qualifying disclosure has been made (often referred to as victimisation or retaliation), together with the persons who can be held liable for such contraventions.

The focus of this note is private sector whistleblowing. It does not consider protections available under:

- The [Public Interest Disclosure Act 2013 \(Cth\)](#) ([PID Act](#)), which provides protections for Commonwealth public sector **whistleblowers**.
- The [Taxation Administration Act 1953 \(Cth\)](#) (see [Practice note, The whistleblower protection regime under the Taxation Administration Act](#)).
- The [Fair Work \(Registered Organisations\) Act 2009 \(Cth\)](#) (Registered Organisations Act).
- Whistleblowing protections found in state or territory legislation.

This note incorporates the strengthening and broadening of the [CA 2001](#) **whistleblower** regime introduced by the *Treasury Laws Amendment (Enhancing **Whistleblower** Protections) Act 2019* (Cth) (Enhancing **Whistleblower** Protections amendments), which came into effect on 1 July 2019. It should be read with:

- [Practice note, Protected whistleblower disclosures under the Corporations Act](#).
- [Practice note, Whistleblower policies and processes](#).

Except where otherwise specified, references to sections and Parts of, and Schedules to, legislation are to sections and Parts of, and Schedules to, the [CA 2001](#).

The whistleblower regime under the CA 2001

The **whistleblower** protection regime under Part 9.4AAA is designed to encourage **whistleblowers** to make disclosures regarding corporate crime and misconduct without fear of retaliation or victimisation. Disclosures qualifying for protection under the regime can be made internally to the relevant corporation, or externally to persons including the [Australian Securities and Investment Commission](#) (ASIC), and auditors and actuaries for the corporation.

To facilitate the regime's objectives, Part 9.4AAA:

- Defines when a **whistleblower** has made a qualifying disclosure (see [Qualifying disclosures under the CA 2001](#)).
- Provides protections to **whistleblowers**, and other persons, where a qualifying disclosure has been made, or a person believes or suspects that a qualifying disclosure has been made, may be made, is proposed to be made or could be made (see [Protections for qualifying disclosures under the CA 2001](#)).
- Introduces a number of remedies and liabilities where a person suffers, or is threatened with, detriment or retaliation due to a qualifying disclosure (whether believed or suspected to be made, proposed to be made, may be made or could be made) (see [Remedies](#) and [Liability](#)).

Qualifying disclosures under the CA 2001

When a disclosure qualifies for protection under Part 9.4AAA, including a consideration of key terms and phrases, is considered in detail in [Practice note, Protected whistleblower disclosures under the Corporations Act](#). Whether a disclosure qualifies for protection will depend on a variety of matters, including:

- Who has made and received the disclosure.
- The entity that the disclosure is about.
- The subject matter of the disclosure.

For the purpose of this note, the qualifying and protected disclosures identified in [Practice note, Protected whistleblower disclosures under the Corporations Act](#) will collectively be referred to as qualifying disclosures under the **whistleblower** regime.

Protections for qualifying disclosures under the CA 2001

Broadly, the protections available where a qualifying disclosure under the **whistleblower** regime has been made include:

- Protection of a **whistleblowers** identity (see [Protecting a whistleblower's identity](#)).
- Protecting a **whistleblower**, or other person, from a range of detrimental conduct (often referred to as victimisation or retaliation) because a person believes or suspects that a qualifying disclosure has been made,

may be made, is proposed to be made or could be made (see [Victimising or retaliating against a whistleblower, or other person](#)).

- Providing a **whistleblower** with a range of legal immunities for making a qualifying disclosure (see [Immunities](#)).
- Requiring certain companies to implement a **whistleblower** policy (see [Whistleblower policy](#)).

Remedies

Remedies available, or liability, for a contravention of the provisions in the **whistleblower** regime depends on the nature of the provision.

There are three different types of provision in the regime for the purposes of remedy and liability, namely a:

- [Civil liability provision](#).
- [Civil penalty provision](#).
- [Criminal liability provision](#).

Civil liability provision

The provision may be a civil liability (also known as a civil remedy) provision.

Remedies under a civil liability provision may be sought by the individual who has suffered detriment, or been threatened with detriment, when the provision has been contravened. Remedies are similar to those available for common law and equitable breaches, and include compensation for loss, damage or injury suffered; injunctive relief including reinstatement; and exemplary damages.

The standard of proof when establishing a contravention of a civil liability provision is the civil standard on the balance of probabilities.

Civil penalty provision

The provision may be a [civil penalty provision](#).

Only ASIC can apply for a declaration of a contravention of a civil penalty provision and seek orders (*section 1317J*). A court may order the payment of a pecuniary penalty for the contravention of a civil penalty provision and order its payment to ASIC.

The standard of proof when establishing a contravention of a civil penalty provision is the civil standard on the balance of probabilities.

The maximum pecuniary penalty a court can order for contravening a civil penalty provision in Part 9.4AAA is:

- for an individual, the greater of:
 - 5000 penalty units, and
 - three times the benefit derived and detriment avoided (if the court is able to determine the benefit and detriment avoided in accordance with *section 1311D*) (*section 1317G(3)*); and
- for a [body corporate](#), the greatest of:
 - 50,000 penalty units, and
 - three times the benefit derived and detriment avoided (if the court is able to determine the benefit and detriment avoided under *section 1311D*); and
 - 10% of the body corporate's annual turnover (up to a maximum of 2.5 million penalty units) (*section 1317G(4)*).

For more information on the value of penalty units, see [Checklist: Penalty unit values: comparison table](#).

Criminal liability provision

The provision may be a criminal liability provision, also referred to as an offence.

Only ASIC (or its delegate including the Commonwealth Department of Public Prosecutions, or another person authorised by the Minister) can commence a prosecution for a contravention of a criminal liability offence. The standard of proof when establishing a contravention of a criminal liability provision is the criminal standard of beyond reasonable doubt.

[Schedule 3 of the CA 2001](#) details the penalty imposed (imprisonment and/or penalty units) for contraventions of criminal liability provisions, and [section 4AA of the Crimes Act 1914 \(Cth\)](#) ([Crimes Act](#)) outlines the amount for a [penalty unit](#) (an amount subject to indexation that is currently \$222). The penalties for an individual who contravenes a **whistleblower** criminal liability provision range from 60 to 240 penalty units, and a maximum of six months to two years imprisonment. The penalties for a body corporate that contravenes a **whistleblower** criminal liability provision range from 600 to 2400 penalty units.

For more information on the value of penalty units, see [Checklist: Penalty unit values: comparison table](#).

Liability

Liability for contravening the protections in Part 9.4AAA rests with the person who engaged in the contravening conduct, and on other person's involved in the contravention as an accessory ([section 79](#)).

Where a person, including a body corporate or an individual, engages in conduct that contravenes the protections against victimisation or retaliation, other persons may also be deemed liable as accessories, or liable due to vicarious or deemed responsibility for the conduct of another (see [Liability for a contravention of the civil liability victimisation provision](#)).

Summary of protections, remedies and liability under Part 9.4AAA

The table below summarises:

- The protections under Part 9.4AAA when a qualifying disclosure is made.
- Whether the protection attracts a civil liability, civil penalty or criminal sanction.
- Who may be held liable for contravening the protection.
- Remedies or penalties for contravening the protection (including penalties for conduct that occurred before the commencement of the regime on 1 July 2019, and penalties for conduct that occurs wholly on or after 1 July 2019).
- Standing to commence an action.
- The limitation period for commencing an action.

Protection	Type of remedy or penalty provision	Liability	Remedies or penalty for contravening conduct	Standing to bring, and limitation period for commencing, an action.
Confidentiality of identity of whistleblower (s 1317AAE(1))	Civil penalty.	<p>Person engaging in the contravening conduct.</p> <p>Other persons involved in the contravention as accessories (s 79).</p>	<p>Civil penalty for contraventions from 1 July 2019 (s 1644):</p> <ul style="list-style-type: none"> • For an individual, the greater of 5000 penalty units (\$1.11 million) and three times the benefit derived and detriment avoided (s 1317AG(3)). • For a body corporate, the greater of 50,000 p enalty units (\$11.1 million), three times the benefit derived and detriment avoided, and 10% of the body corporate’s annual turnover (up to 2.5 	<p>ASIC.</p> <p>No later than six years after the contravention (s 1317K).</p>

			million penalty units) (s 1317G(4)).	
	Criminal offence.	<p>Person engaging in the contravening conduct.</p> <p>Other persons involved in the contravention as accessories (s 79).</p>	<p>Offence for conduct occurring after 1 July 2019:</p> <ul style="list-style-type: none"> For an individual, 60 penalty units (\$13,320) or imprisonment for six months, or both (s 1644, s 1644A, Sch 3 and s 1311B(2)). For a body corporate, 600 penalty units (\$133,200) (Sch 3 and s 1311C(2)). 	<p>ASIC, or its delegate.</p> <p>No later than five years after the act or commission constituting the offence, or at a later time with the Minister's consent (s 1316).</p>
Victimisation or threatened victimisation due to whistleblowing (s 1317AC(1), (2) and (3)).	Civil penalty.	<p>Person engaging in the contravening conduct, together with:</p> <ul style="list-style-type: none"> Officers and employees as accessories to the contravening conduct of a body corporate (s 1317AC(3)). Other persons involved in the contravention as accessories (s 79). 	<p>Civil penalty maximum for contraventions from 1 July 2019 (noting the disclosure may have occurred before 1 July 2019, s 1644):</p> <p>For an individual, the greater of 5000 penalty units (\$1.11 million) and three times the benefit derived and detriment avoided (s 1317AG(3)).</p> <ul style="list-style-type: none"> For a body corporate, the greater of 50,000 penalty units (\$11.1 million), three times the benefit derived and detriment 	<p>ASIC.</p> <p>No later than six years after the contravention (s 1317K).</p>

			<p>avoided, and 10% of the body corporate's annual turnover (up to 2.5 million penalty units) (s 1317G(4)).</p>	
	Criminal offence.	<p>Person engaging in the contravening conduct, together with:</p> <ul style="list-style-type: none"> • Officers and employees as accessories to the contravening conduct of a body corporate (s 1317AC(3)). • Other persons involved in the contravention as accessories (s 79). 	<p>Offence for conduct occurring after 1 July 2019 (noting the disclosure may have occurred before 1 July 2019, s 1644):</p> <ul style="list-style-type: none"> • For an individual, 240 penalty units (\$53,280) or imprisonment for two years, or both (s 1644, s 1644A, Sch 3 and s 1311B(2)). • For a body corporate, 2400 penalty units (\$532,800) (Sch 3 and s 1311C(2)). 	<p>ASIC, or its delegate.</p> <p>No later than five years after the act or commission constituting the offence, or at a later time with the Minister's consent (s 1316).</p>
Victimisation or threatened victimisation due to whistleblowing (s 1317AD(1), (2), (2A) and s 1317AE).	Civil liability.	<p>Person engaging in the contravening conduct, together with:</p> <ul style="list-style-type: none"> • Employees as accessories to contravening conduct of a body corporate. • A body corporate under a duty to prevent a third party from engaging in 	<p>A court may order any of the following remedies in respect of contravening conduct occurring after 1 July 2019 (noting the disclosure may have occurred before 1 July 2019, see s 1644(2)):</p> <ul style="list-style-type: none"> • Compensation. • Injunctive relief. • An apology. 	<p>Person who suffered, or was threatened with, detriment.</p>

		<p>contravening conduct.</p> <ul style="list-style-type: none"> An employer for acts of an employee that engages in contravening conduct. 	<ul style="list-style-type: none"> Reinstatement. Exemplary damages. Any other order the court thinks appropriate. 	
<p>Requirement to have a compliant whistleblower policy (s 1317A(1), (2) and (3)).</p>	Criminal offence.	<p>Body corporate engaging in the contravening conduct.</p> <p>Other persons involved in the contravention as accessories (s 79).</p>	<p>Offence for conduct from 1 January 2020:</p> <p>Strict liability offence attracting:</p> <ul style="list-style-type: none"> 60 penalty units (\$13,320) for an individual (Sch 3). 600 penalty units for a body corporate (\$133,200) (Sch 3 and s 1311C(1)(a)). 	<p>ASIC, or its delegate.</p> <p>No later than five years after the act or commission constituting the offence, or at a later time with the Minister's consent (s 1316).</p>

Protecting a whistleblower's identity

The **whistleblower** regime has a number of provisions intended to protect the identity of a **whistleblower** who has made a qualifying disclosure.

The regime:

- Allows for **whistleblowers** to make anonymous disclosures (see [Allowing anonymous disclosures](#)).
- Subject to a handful of exceptions that authorise disclosure of a **whistleblower's** identity (including with the **whistleblower's** consent), makes it an offence for a person to whom a qualifying disclosure is made to disclose:
 - the identity of the disloser; or
 - information that is likely to lead to the identification of the disloser.
- (See [Confidentiality](#).)
- Prohibits the disclosure of a whistleblower's identity by the recipient of a qualifying or protected disclosure to a court or tribunal (see [Protecting the identity of whistleblowers and other victims in court proceedings](#)).

Allowing anonymous disclosures

Prior to the Enhancing **Whistleblower** Protections amendments, the [CA 2001](#) required that a **whistleblower** provide their name when making a disclosure in order to qualify for protection. A number of interested parties advocated in Parliament that the requirement for a **whistleblower** to disclose their identity to obtain protection was a strong disincentive to making a disclosure. It was also noted that the requirement contrasted with other schemes allowing for anonymous **whistleblower** disclosures, including:

- Domestic **whistleblower** schemes for public sector employees and unions (see the [PID Act](#) and Registered Organisations Act).
- Corporate **whistleblower** schemes in the United Kingdom and United States.

([Corporate whistleblowing in Australia](#), Senate Economics References Committee Issues Paper.)

The Enhancing **Whistleblower** Protections amendments removed the requirement in Part 9.4AAA that the discloser provide their name when making a protected disclosure, and the **whistleblower** regime now allows for anonymous disclosures (see *section 1317AAE*).

Anonymity can create difficulties for the investigation of a disclosure by regulators and companies because the ability to substantiate allegations may be impaired by a lack of evidence. However, Parliament considered that anonymous disclosures in this category would at least provide “intelligence” to the company or the regulator. Anonymous disclosures are considered further in [Practice note, Whistleblower policies and processes](#).

Confidentiality

Unless sharing the information is expressly authorised under Part 9.4AAA, it is both an offence and [civil penalty provision](#) for any person to disclose the following confidential information obtained, directly or indirectly, because of a qualifying disclosure:

- The identity of the **whistleblower**.
- Information that is likely to lead to the identity of the **whistleblower**.

(*Section 1317AAE(1)*.)

For a consideration of when sharing the identity of a **whistleblower** is expressly authorised under Part 9.4AAA, see:

- [Authorised disclosure of confidential information to government agencies, legal practitioners and with consent](#).
- [Authorised disclosure to facilitate investigation of qualifying disclosure](#).

It is not an offence or civil penalty contravention to disclose information regarding a qualifying disclosure without revealing the **whistleblower's** identity.

Authorised disclosure of confidential information to government agencies, legal practitioners and with consent

The **whistleblower** regime allows for the sharing of confidential information where sharing is consistent with the aim of encouraging **whistleblower** disclosures and investigation of those disclosures.

Accordingly, disclosure of confidential information regarding a **whistleblower's** identity is authorised where the disclosure is made:

- To the [Australian Prudential Regulation Authority](#) (APRA), ASIC or a member of the Australian Federal Police (AFP).
- By APRA, ASIC or a member of the AFP to a Commonwealth authority or a state or territory authority, for the purpose of assisting the authority in the performance of its functions and duties. The [EM to the Enhancing Whistleblower Protections amendments](#) notes this exception to confidentiality ensures that wrongdoing disclosed can be properly investigated or otherwise addressed; however, with the exception of disclosures to or between regulators, the prohibition on the disclosure of a whistleblower's entity applies equally to any Commonwealth, state or territory authority that receives the information following the original disclosure (at [2.81]).
- To a legal practitioner for the purpose of obtaining advice or representation in relation to the operation of the regime. It is arguable that this exception extends to permitting disclosure by a company for the purpose of obtaining legal advice on the subject matter of a **whistleblower** disclosure, which will likely be required in the case of serious misconduct or reports regarding compliance and regulatory breaches.
- To a person or body prescribed by the regulations (currently there are none).
- With the consent of the **whistleblower**.

(Section 1317AAE(2) and (3).)

Authorised disclosure to facilitate investigation of qualifying disclosure

A difficulty identified under the **whistleblower** regime in place prior to the Enhancing **Whistleblower** Protections amendments was that a person who received a disclosure could not pass the information disclosed to another person without the consent of the **whistleblower** (excluding police and certain regulators). This was the case, even if it was necessary to investigate the disclosure that had been made.

Under the amendments, to ensure entities receiving a qualifying disclosure can investigate its subject matter, it is not unlawful to disclose information relating to a qualifying disclosure, provided that:

- The information disclosed is not of the identity of the **whistleblower**.
- It was reasonably necessary to disclose the information to investigate the disclosure.
- Reasonable steps have been taken to reduce the risk that the **whistleblower** will be identified as a result of disclosing the information.

(Section 1317AAE(4).)

In a prosecution for the offence of contravening confidential information, the defendant bears the burden of establishing any disclosure of confidential information was in accordance with the exception in *section 1317AAE(4)* (see the legislative note at the end of *section 1317AAE(4)*).

Penalties for contravention of requirement for confidentiality

A contravention of the requirement to keep a **whistleblower's** identity confidential under *section 1317AAE* is both an offence and a civil penalty contravention, allowing ASIC to choose which prosecution to commence depending on the particular circumstances. While there is no civil liability provision for a **whistleblower** to seek remedies for an unauthorised disclosure of their identity, remedies could be pursued by an individual who has suffered, or been threatened with, detriment because of an unauthorised disclosure of their identity under the civil liability victimisation provision (see [Civil liability victimisation provision](#)).

For the maximum penalties for both the offence and civil remedy contravention, see the table in [Summary of protections, remedies and liability under Part 9.4AAA](#).

Protecting the identity of whistleblowers and other victims in court proceedings

Except where it is necessary to do so to give effect to the **whistleblower** regime, or where a court thinks it necessary in the interests of justice to do so, Part 9.4AAA ensures that a person cannot be required to:

- Disclose to a court or tribunal the identity of a **whistleblower**, or information that is likely to lead to the identification of a **whistleblower**.
- Produce to a court or tribunal a document containing the identity of a **whistleblower** or information likely to lead to the identification of the discloser.

(*Section 1317AG*.)

The [EM to the Enhancing Whistleblower Protections amendments](#), which introduced the evidentiary protection for **whistleblowers** into Part 9.4AAA, notes that under the common law and the [Evidence Act 1995 \(Cth\)](#), the general starting position is that relevant evidence should be admissible. The purpose of introducing the statutory exception to this general principle is to ensure the protection for a **whistleblower's** identity when a qualifying disclosure is made in Part 9.4AAA cannot be extinguished by discovery of documents or other processes in the context of court proceedings (at [2.135]).

Victimising or retaliating against a whistleblower, or other person

The **whistleblower** regime protects individuals from victimisation and/or retaliation when a qualifying disclosure has been made, is believed to have been made or could be made, and includes sanctions should such actions occur.

Victimising or threatening a **whistleblower**, or another person, is both a civil penalty provision and criminal offence under the **whistleblower** regime (see [Victimisation as an offence and civil penalty](#)). This ensures the

regulators can choose, depending on the particular circumstances of the matter, to prosecute the conduct as either:

- An offence, imposing monetary sanctions or imprisonment, and requiring a higher standard of proof.
- A civil penalty, imposing significant monetary sanctions, and requiring a lesser standard of proof.

Victimising a **whistleblower**, or another person, is also a civil liability provision, allowing a person who has suffered detriment, or been threatened with detriment because a qualifying disclosure has been made or could be made, to seek remedies (see [Civil liability for victimisation](#)). A person may seek remedies under a civil liability provision regardless of whether a prosecution has been commenced for the offence or civil penalty provision of victimisation (*section 1317AF*).

Commonality across the offence, civil penalty and civil liability victimisation provisions

Broadly, all the victimisation provisions (whether the offence, civil penalty or civil liability) have the following features:

- All are underpinned by a key concept that victimisation or retaliation has occurred when a person has suffered, or been threatened with, detriment (see [Detriment](#)).
- The victim may be the **whistleblower**, or it may be another person who suffers damage because of the victimiser's conduct (such as, for example, a person involved in receiving or investigating the disclosure, or a colleague, supporter, friend or family member of the **whistleblower**).
- There is no need to establish a disclosure has actually been made, or that the respondent had actual knowledge of the disclosure. A belief or suspicion a person has or could make a protected disclosure is sufficient.
- The belief or suspicion held by the victimiser that a disclosure may have been made, or is going to be made, need not be the only reason the victimiser engaged in the unlawful conduct.
- Employees can be liable as accessories to victimising or retaliatory conduct engaged in by a [body corporate](#).
- Where a threat of detriment has been made, it is not necessary to prove that the person threatened actually feared the threat would be carried out. Threats of detrimental conduct can be express or implied, conditional or unconditional.

Detriment

Detriment, and engaging in detrimental conduct, is a concept that underpins both the offence and civil penalty provision of victimisation, and the civil liability provision of victimisation.

The term detriment is defined broadly and includes (without limitation):

- Dismissal of an employee.
- Injury of an employee in their employment.

- Alteration of an employee’s position or duties to their disadvantage.
- Discrimination between an employee and other employees of the same employer.
- Harassment or intimidation of a person.
- Harm or injury to a person, including psychological harm.
- Damage to a person’s property.
- Damage to a person’s reputation.
- Damage to a person’s business or financial position.
- Any other damage to a person.

(Section 1317ADA.)

Adverse action

The first four items of detriment in *section 1317ADA* are identical to the terms used to define [adverse action](#) against an employee by an employer under the general protections provisions of Part 3-1 of the *Fair Work Act 2009* (Cth) ([FW Act](#)).

The terms have been the subject of extensive judicial consideration in industrial law, and are considered in detail in [Practice note, Actions and conduct that are adverse action](#).

Types of harm or detriment experienced by whistleblowers

In a House of Representatives inquiry into whistleblowing protections within the Australian Government Public Sector ([Report of the Inquiry into whistleblowing protection within the Australian public sector](#), February 2009) it was reported the types of treatment and harm, or detriment, often experienced by **whistleblowers** includes:

• Threats, intimidation, harassment or torment.	• Undermined authority.	• Heavily scrutinised work.
• Ostracism by colleagues.	• Questioning of motives.	• Unsafe or humiliating work.
• Forced to work with wrongdoers.	• Financial loss.	• Essential resources withdrawn.
• Missed promotion.	• Poor performance report.	• Involuntary transfer.
• Reference denied or poor reference given.	• Training denied.	• Given little or no work.
• Overworked.	• Made to see a psychiatrist or counsellor.	• Disciplinary action.

<ul style="list-style-type: none"> • Forced to take leave. 	<ul style="list-style-type: none"> • Harassment of friends, colleagues or family. 	<ul style="list-style-type: none"> • Property destroyed, damaged or stolen.
<ul style="list-style-type: none"> • Lost entitlements. 	<ul style="list-style-type: none"> • Dismissal. 	<ul style="list-style-type: none"> • Suspension.
<ul style="list-style-type: none"> • Demotion. 	<ul style="list-style-type: none"> • Put on probation. 	<ul style="list-style-type: none"> • Assault or physical harm.

Victimisation as an offence and civil penalty

The **whistleblower** regime creates both an offence and civil penalty for a person, referred to in this note as a victimiser, to either:

- Cause actual detriment to another person (see [Actually cause detriment to another person](#)).
- Threaten to cause detriment to another person (see [Threaten to cause detriment to another person](#)).

The victimiser may be a company or an individual. If the victimiser is a company, any officer or employee of the company who is involved in causing or threatening to cause the detriment will also be in contravention of the offence or civil penalty provision (see [Accessory liability of officers and employees \(offence\)](#)).

Penalties, including imprisonment, may be imposed for a contravention of the offence and civil penalty victimisation provision (see [Penalties](#)).

Actually cause detriment to another person

Under the **whistleblower** regime, it is unlawful for a person (the victimiser) to engage in conduct that causes detriment to the **whistleblower**, or another person, in the belief or suspicion that a person has made, may make, proposes to make or could make, a protected disclosure (see [Detriment](#) and *section 1317AC(1)(c)*).

Threaten to cause detriment to another person

Under the **whistleblower** regime, it is unlawful for a person (the victimiser) to threaten another person (the threatened person) with causing detriment to the threatened person, or another person, because a **whistleblower** has made, or may make, a qualifying disclosure (see [Detriment](#)). To contravene this provision, the victimiser must either:

- Intend the threatened person to fear that the threat will be carried out.
- Be reckless as to causing the threatened person to fear that the threat will be carried out.

(*Section 1317AC(2)*.)

A threat may be express or implied, conditional or unconditional (*section 1317AC(4)*).

The concept of threatening to cause detriment is also mirrored in the adverse action provisions of Part 3-1 of the FW Act, which makes it unlawful to threaten to take adverse action against an employee for a prohibited reason ([section 343\(2\), FW Act](#)). Case law considering “threat” in the context of adverse action under the [FW Act](#), which could provide guidance to how the term will be applied under Part 9.4AAA, has found:

- The meaning of threaten is to menace or warn beforehand of an intention to inflict harm.
- The words used must communicate that detrimental conduct will be taken, rather than a possibility that such action will be taken.
- It is not necessary for the threat to be communicated directly to the person, and it may be communicated to a third party.

(See [Practice note, Actions and conduct that are adverse action: Threatening and organising adverse action.](#))

It is not necessary for both the offence and civil penalty provision of threatening to cause detriment to another person to prove that the threatened person actually feared that the threat would be carried out (*section 1317AC(5)*).

Accessory liability of officers and employees (offence)

If the victimiser is a company, any officer or employee of the company who is involved in causing or threatening to cause the detriment will also be in contravention of the offence or civil penalty provision (*section 1317AC(3)*). Other persons may also be involved in a contravention of the offence or civil penalty provision as an accessory ([section 79](#)).

The provision deeming liability of an officer or employee for a body corporate's contravention of the civil liability victimisation provision provides express detail regarding when an employee will have been involved in the body corporate's contravention (see [Accessory liability of officers and employees \(civil liability\)](#)).

Penalties

A contravention of the protections against victimising a person, or threatening to victimise a person, due to a belief or suspicion that a qualifying disclosure has or will be made is both an offence and a civil penalty contravention, allowing ASIC to choose which prosecution to commence depending on the particular circumstances.

For the maximum penalties for both the offence and civil remedy contravention, see the table in [Summary of protections, remedies and liability under Part 9.4AAA](#).

Civil liability for victimisation

Prior to the Enhancing **Whistleblower** Protections amendments, for an individual to seek civil liability for detriment suffered because a qualifying disclosure had been made required the individual to prove the offence of victimisation had occurred. Accordingly, an employee needed to prove victimisation at the higher criminal standard of proof (beyond reasonable doubt) rather than the lower civil standard (on the balance of probabilities), to seek any compensation for loss, damage or injury suffered because of victimisation.

Civil liability victimisation provision

The **whistleblower** regime introduced by the Enhancing **Whistleblower** Protections amendments created a civil liability victimisation provision.

The civil liability victimisation provision allows a person to seek remedial orders where a victimiser engages in conduct that causes any detriment to a person, or threatens to cause detriment to a person:

- Believing or suspecting that a person made, may have made, proposes to make or could make, a qualifying disclosure.
- The belief or suspicion is the reason, or part of the reason, for the conduct.

(Referred to as detrimental conduct, *section 1317AD(1)*.)

The civil liability victimisation provision has broadly the same elements as the offence and civil penalty victimisation provision in establishing detrimental conduct, with key differences in the provision being:

- Where the victimiser has made a threat to cause detriment to another person, there is no requirement to establish the intent of the victimiser in making the threat under the civil liability provision, as required in the offence and civil penalty provision (see [Threaten to cause detriment to another person](#)).
- There are a broader range of persons who may be held liable for the conduct of a victimiser under the civil liability provision (see [Liability for a contravention of the civil liability victimisation provision](#)).
- A person who suffers detriment, or is threatened with detriment, may seek a range of remedial orders under the civil liability provision (see [Orders that may be made by a court](#)).
- Once a victim has established a reasonable possibility that a person has caused them detriment, or threatened them with detriment, the onus of proof under the civil liability provision switches to that person to prove their detrimental conduct, or threatened detrimental conduct, or the conduct of another person for whom they are liable, was not engaged in due to a belief or suspicion that a person made, may have made, proposes to make or could make a qualifying disclosure (see [Reverse onus of proof](#)).
- There is an exception against the general common law principle in civil proceedings that costs follow the event (see [Cost orders](#)).

Liability for a contravention of the civil liability victimisation provision

A court may make remedial orders for compensation and other remedies for a contravention of the civil liability victimisation provision against:

- A person (which can be an individual or a body corporate) who has contravened the civil liability victimisation provision.
- An officer or employee of a body corporate who is found liable as an accessory to a contravention of the civil liability victimisation provision by a body corporate (see [Accessory liability of officers and employees \(civil liability\)](#)).

- A body corporate who is found liable for a third party's contravention of the civil liability victimisation provision (see [Third-party liability](#)).
- An employer who is found vicariously liable for the actions of an employee who has contravened the civil liability victimisation provision (see [Vicarious liability of employers](#)).

Accessorial liability of officers and employees (civil liability)

If a body corporate has contravened the civil liability victimisation provision, and an officer or employee of the body corporate is involved in the body corporate's detrimental conduct, the officer or employee can also be found liable for the conduct as an accessory.

Under the **whistleblower** regime, an order may be made under the civil liability victimisation provisions against an officer or employee of a body corporate if:

- The body corporate has engaged in conduct (detrimental conduct) that contravenes the civil liability victimisation provision.
- The officer or employee is involved in the detrimental conduct by either:
 - aiding, abetting, counselling or procuring the conduct or the making of the threat;
 - inducing, whether by threats or promises or otherwise, the detrimental conduct;
 - in any way, by act or omission, directly or indirectly, being knowingly concerned in, or party to, the detrimental conduct; or
- conspiring with others to effect the detrimental conduct.

(*Section 1317AD(2).*)

While *section 1317AD* does not use the words "involved in" when describing the conduct giving rise to liability under that provision, the limbs laid out in *section 1317AD(2)(c)* are identical to those of accessorial liability under [section 79](#) and under common law. See also the identical consideration of when an officer or employee is involved in a contravention as an accessory under:

- The [FW Act](#) (see [Practice note, Liability of accessories under the Fair Work Act](#)).
- The [Australian Consumer Law](#) (see [Practice note, Accessorial liability](#)).

Third-party liability

Under the **whistleblower** regime, an order may be made under the civil liability victimisation provisions against a body corporate for a third party's contravention of the civil liability victimisation provision.

Such an order is permissible where the body corporate has an existing duty to prevent the third party from engaging in, or to take reasonable steps to ensure the third person does not engage in, the detrimental conduct,

and fails in part or whole to fulfil that duty (for what constitutes detrimental conduct, see [Civil liability victimisation provision](#)) (*section 1317AD(2A)*).

The [EM to the Enhancing Whistleblower Protections amendments](#), which introduced the provision, gives the example that a third party may be an officer or manager of the body corporate, who engages in conduct that victimises and causes detriment to an actual or suspected **whistleblower**. The EM notes that if the body corporate is under a duty to prevent this conduct, and fails to fulfil that duty, it may be subject to a court order.

To establish this type of third-party liability against a body corporate, a claimant would need to establish both:

- The third party's contravention of the civil liability victimisation provision.
- The body corporate's duty to prevent the conduct.

If the claimant discharges this onus, the body corporate will then bear the onus of proving that the claim is not made out (see [Reverse onus of proof](#)).

The [EM to the Enhancing Whistleblower Protections amendments](#) gives no guidance on when a body corporate is under a duty to prevent a third party's conduct in respect of civil liability victimisation, and there is no guidance in the **whistleblower** regime about the source, or scope, of the body corporate's duty. Until there is judicial guidance, or additional clarity from the legislature, there is a question as to when and how this provision will apply. By way of comparison, we note that federal anti-discrimination legislation imposes similar liability on employers for the conduct of directors, employees and agents in respect of preventing their contraventions under anti-discrimination legislation. For instance:

- The [Age Discrimination Act 2004 \(Cth\)](#) (*ADA*) and [Disability Discrimination Act 1992 \(Cth\)](#) (*DDA*) expressly impose third-party liability by stating any conduct engaged in by a director, employee or agent of an employer within the scope of their actual or ostensible authority is taken to have been engaged in by the employer for the purpose of the Acts (see [section 57\(2\), ADA](#) and [section 123\(2\), DDA](#)).
- The [Racial Discrimination Act 1975 \(Cth\)](#) (*RDA*) and [Sex Discrimination Act 1984 \(Cth\)](#) (*SDA*) expressly impose third-party liability by stating an employer will be taken to have done an unlawful act under the legislation of an employee or agent if the employee or agent does the act in connection with their duties as an employer or employee.
- (See [Practice note, Liability of employers and others under federal anti-discrimination legislation.](#))

The **whistleblower** regime under the [CA 2001](#) contains no similar deeming provision for imposing any third-party duty on a body corporate, and currently it is difficult to determine the source of the duty owed by body corporates to third parties in respect of preventing detrimental conduct. Arguably, the reference may be to duties owed arising from other legislation, such as anti-discrimination and equal opportunity legislation, work health and safety legislation, or duties under an industrial instrument or contract of employment or contract for service.

Practical Law will provide further guidance on this issue once there has been judicial consideration of the source and scope of a body corporate's duty to prevent a third party's conduct under the **whistleblower** regime.

Vicarious liability of employers

If the person engaging in detrimental conduct is an employee, and a court is satisfied their conduct was in connection with their position as an employee, their employer is effectively deemed to be liable for their conduct. In these circumstances the court may make orders that the employer compensate the victim of the employee's detrimental conduct for any loss, damage or injury sustained either in part and separate to the contravening employee, jointly with the contravening employee, or wholly without any orders against the contravening employee (for more information, see [Orders against employers for the detrimental conduct of employees](#)).

Reverse onus of proof

In material on its website, ASIC acknowledged the difficulty in establishing whether conduct alleged to be victimisation was due to whistleblowing, or was done for some other cause. Acts of reprisal can be subtle and indirect, and not necessarily be in an obvious form, such as termination of employment or disciplinary action, but may materialise as petty harassment, spreading rumours, ostracism or the setting up of employees to fail ([Guidance for whistleblowers, ASIC](#)). It can be difficult for **whistleblowers**, or other persons suffering detriment, to establish the reason why a person engaged in detrimental conduct.

Following the Enhanced **Whistleblower** Protections amendments, the **whistleblower** regime includes a reverse onus of proof when a person seeks remedies for the civil liability victimisation provision. Where a person seeks remedies for a contravention of the civil liability victimisation provision, the person (the claimant) bears the onus of adducing or pointing to evidence that suggests a reasonable possibility that the person claimed to have engaged in the conduct either:

- Caused a detriment to the claimant.
- Made a threat to cause a detriment to the claimant.

If the claimant discharges that onus, the person alleged to have engaged in the conduct (the respondent) will then bear the onus of proving the detrimental conduct established was not engaged in due to a belief or suspicion that a person made, may have made, proposes to make or could make a qualifying disclosure (*section 1317AD(2B)*).

The same reverse onus applies when establishing that a third party, or a body corporate, contravened the civil liability victimisation provision when determining the liability of a body corporate for the actions of the third party, or an officer or employee as an accessory to the contravening conduct of a body corporate (*section 1317AD(2B)*). However, where the contravention relates to establishing third-party liability for a contravention of the civil liability victimisation provision under *section 1317AE(2A)*, before the onus switches to the body corporate, the claimant must establish both of the following:

- A third party has engaged in conduct that has caused a detriment or constitutes a threat of detriment.
- The existence of the body corporate's duty.

(See [Third-party liability](#) and *section 1317AE(2B)(a)(iii)*.)

Reverse onus of proof under the FW Act

The general protections provisions in Part 3-1 of the FW Act contain a similar reversal of the onus of proof once an applicant has established that:

- A respondent engaged in an action prohibited by the Part.
- The applicant held a ground or attribute protected by the Part.

If the applicant establishes a prohibited action and protected ground or attribute, the onus shifts to the respondent to show that the prohibited action engaged in was not taken because of the protected ground or attribute held by the applicant.

Case law considering the onus of proof in general protections claims may provide guidance on how the reverse onus of proof will be applied under Part 9.4AAA. In respect of the general protections, for a respondent to displace the shifted onus, the courts have found it will usually be necessary for the relevant decision-maker for taking the action, or decision-makers, to provide evidence. If the evidence of the decision-maker is accepted as being reliable, and provides for a reason other than a prohibited reason for taking the prohibited action, this will discharge the shifted onus. In considering the decision-maker's reasons for taking the action, the court will have regard to contemporaneous documentary evidence supporting the reasons, and sworn evidence of the decision-maker. Failing to lead evidence of the decision-maker for the reason, or reasons, for taking a particular action has led to courts finding they were unable to discharge the onus.

For a consideration of the reverse onus of proof as applied under the general protections provisions of Part 3-1 of the FW Act, see:

- [Practice note, Decision-maker's reasons and the reverse onus of proof](#).
- [CaseTracker, Decision-maker's reasons and the reverse onus of proof](#).

Orders that may be made by a court

Where a court is satisfied a person has contravened the civil liability provision, or is liable for the actions of another person who has contravened the provision, and another person has suffered loss, damage or injury as a result of the detrimental conduct, it may make an order:

- Requiring the person to compensate the victim (see [Compensation](#)).
- Where the victimiser is an employee, requiring their employer to compensate the victim (see [Orders against employers for the detrimental conduct of employees](#)).
- Other remedial orders (see [Other remedial orders](#)).

(*Section 1317AE(1)(a)-(g)*.)

Compensation

A court may make an order requiring the person who caused loss, damage or injury to a person for a contravention of *section 1317AD(1)* to compensate the victim (*section 1317AE(1)(a)*). Importantly, there must be a relevant nexus between the loss, damage or injury suffered and the detrimental conduct identified in the contravention.

Where the detrimental conduct identified in the contravention consists of terminating, or purporting to terminate, a person's employment (including *constructive dismissal* where a person is forced to resign), in making an order requiring the person (or their employer) to compensate the victim, the court must consider the period (if any) the person is likely to be without employment as a result of the detrimental conduct (*section 1317AE(2)*).

Similar considerations are required by courts when awarding compensation for contraventions of civil remedy provisions under the [FW Act](#). In respect of compensation under the [FW Act](#), the courts have found that a person seeking compensation must adduce evidence of:

- An appropriate causal connection between the contravention and the loss.
- The extent of loss suffered. When considering future loss, for instance loss flowing from a contravention that involved dismissal, the courts have considered:
 - how long the employee would have remained in that employment, and the determination of the value of the likely income stream;
 - applying a discount for contingencies and vicissitudes; and
 - reducing the amount by the employee's mitigated loss (that is, their actual earnings since dismissal). The courts have also considered whether the employee has taken appropriate steps to mitigate their loss.

The approach of courts to awarding compensation to employees for contraventions of civil remedy provisions under the [FW Act](#) is considered in detail in [Practice note, Compensation for contraventions of a civil remedy provision](#).

Other remedial orders

Additionally, where the court is satisfied a person has contravened the civil liability victimisation provision, or is liable for the action of another person who has contravened the provision, it may make an order:

- Granting an injunction to prevent, stop or remedy the effects of the detrimental conduct.
- Requiring the person to apologise for engaging in the detrimental conduct.
- Where the detrimental conduct wholly or partly consists of termination of employment, that a person be reinstated in their position or a position at a comparable level.
- If the court thinks it is appropriate, requiring the payment of exemplary damages.
- Any other order that the court thinks appropriate.

(*Section 1317AE(1)(c)-(g)*.)

Again, the range of remedies available to a court for a contravention of the civil liability victimisation provision is similar (with the exception of orders for exemplary damages) to the range of remedies available to courts for contraventions of civil remedy provisions under the [FW Act](#). For a detailed consideration of the courts approach to ordering injunctive relief under the [FW Act](#), including reinstatement of an employee to their former position or at a comparable level, see Practice notes:

- [Remedies for civil remedy contraventions under the Fair Work Act](#).
- [Injunctive relief for contraventions of a civil remedy provision](#).

Orders against employers for the detrimental conduct of employees

In circumstances where a court is satisfied that an employee contravened the civil remedy victimisation provision in connection with their employment, a court may make an order requiring:

- The employee and the employer to separately compensate the victim for a part of any loss, damage or injury resulting from the employee's detrimental conduct.
- The employee and the employer to jointly compensate the victim for loss, damage or injury resulting from the employee's detrimental conduct. If the court makes an order requiring a person and the person's employer to jointly pay compensation, the person and the person's employer are jointly and severally liable to pay the compensation ([EM to the Enhancing Whistleblowers Protections amendments](#) at [2.132]).
- Only the employer compensate the victim for loss, damage or injury resulting from the employee's detrimental conduct.

(Section 1317AE(1)(b).)

When making an order for compensation against an employer, the court may have regard to a number of matters (see [Matters the court will take into account when making orders against employer](#)).

In connection with employment

As noted in [Third-party liability](#), the [RDA](#) and [SDA](#) contain similar concepts imposing liability on employers for unlawful acts of discrimination engaged in by employees in connection with their employment. The use of the words "in connection with employment" in the [RDA](#) and [SDA](#) has been interpreted broadly, and is said to show an intention that the victimisers' acts are connected with or have a nexus to their employment.

Importantly for the purposes of victimisation and retaliation, employees out of hours conduct can be held to be in connection with their employment (see [Practice note, Liability of employers for out of hours conduct](#)).

Matters the court will take into account when making orders against employer

In deciding whether to make an order for an employer to compensate a person for loss, injury or damage suffered as a result of an employee's detrimental conduct, a court may have regard to:

- Whether the employer took reasonable precautions and exercised due diligence to avoid the detrimental conduct (see [Reasonable precautions and exercising due diligence](#)).
- If the employer had a **whistleblower** policy (whether or not it was required to implement a compliant **whistleblower** policy under Part 9.4AAA, see [Whistleblower policy](#)), the extent to which the employer gave effect to that policy.
- Any duty the employer was under to prevent the detrimental conduct, or to take reasonable steps to ensure that the detrimental conduct was not engaged in (see [Third-party liability](#)).

(Section 1317AE(3).)

Reasonable precautions and exercising due diligence

The [EM to the Enhancing Whistleblower Protections amendments](#), which introduced the ability to make orders against employers for detrimental conduct engaged in by an employee, states that the matters in [section 1317AE\(3\)](#) are not intended to limit what a court may take into account when making an order against an employer. The EM gives the example that, when considering whether an employer took reasonable precautions and exercised due diligence to avoid the detrimental conduct, the following matters might also be relevant:

- Any applicable industry standard, guidelines or policies relating to **whistleblower** support and protection. An example of this could be material published by the Australian Stock Exchange (ASX) for listed companies.
- Any relevant International Organisation for Standardisation or Australian Standard dealing with the protection of **whistleblowers**.
- Any guidance published by ASIC or other relevant regulatory agencies.

([EM to the Enhancing Whistleblower Protections amendments](#) at [2.130].)

An identical concept reducing the extent of liability of an employer for the actions of a director, employee or agent is contained in anti-discrimination legislation. For instance, under the [ADA](#) and [DDA](#), an employer will not be taken to have engaged in the unlawful conduct of a director, employee or agent if it took reasonable precautions and exercised due diligence to avoid the conduct from occurring ([section 57\(2\), ADA](#) and [section 123\(2\), DDA](#)). Under the [ADA](#) and [DDA](#), the term has been interpreted as being an objective test based on the particular employer, worked out on a "case-by-case" basis. Broadly, and as potential guidance for the application of the term under Part 9.4AAA, the case law has suggested to reduce liability, an employer must actively implement measures to minimise the risk of the unlawful conduct occurring. Actions recognised under discrimination law that an employer could take to minimise its liability for unlawful conduct include:

- Having a relevant workplace policy.
- Ensuring all employees have a copy of the policy.

- Ensuring that the policy adequately reflects Australian legal requirements.
- Making clear the sanctions the employer will impose for breaching the policy requirements.
- Regularly training staff on the requirements of the policy.
- Having procedures in place to deal with disclosures, and grievances regarding the policy.

Many of the actions that could reduce an employer's liability for the actions of its officers or employees under Part 9.4AAA are reflected in the requirements for a compliant workplace policy under the **whistleblower** regime (see [Whistleblower policy](#)). For more information on the liability of employers under anti-discrimination legislation, and avoiding liability by taking reasonable precautions and exercising due diligence, see [Practice note, Liability of employers and others under federal anti-discrimination legislation](#).

Cost orders

The ordinary rule for the award of costs in civil litigation is that a court has a broad and general discretion to order an unsuccessful party pay an amount towards the costs of the successful party.

Unless an exception applies (see [Instituted vexatiously or without reasonable cause](#)), the court's general discretion to order the payment of costs by either the claimant or the defendant cannot be exercised where:

- The proceedings relate to a matter arising under *section 1317AE* (which relates to the court's ability to make orders for contravening, or being held liable for a contravention of, the civil liability victimisation provision).
- The person (the claimant) is seeking an order for compensation under *section 1317AE(1)*. Note the general discretion to award costs can be exercised by a court if the application is only seeking other remedies, such as injunctive relief.

(*Section 1317AH.*)

This exception to the ordinary rule for the award of costs is to ensure that persons who are subject to detrimental conduct as a result of a qualifying disclosure are not deterred from bringing proceedings seeking compensation due to possible adverse costs implications. Unless an exception applies, where the victim is seeking compensation, the parties will bear their own cost of litigation.

Instituted vexatiously or without reasonable cause

The only exception to costs protection in civil liability victimisation proceedings seeking compensation is where proceedings are either:

- Instituted vexatiously or without reasonable cause.
- The court is satisfied that the claimant's unreasonable act or omission has caused the other party to incur costs.

(*Section 1317AH(3).*)

The exception to the award of costs in civil liability victimisation mirrors the exception to the award of costs found in the [FW Act, Section 570 of the FW Act](#) limits a court's general discretion to order the payment of costs in proceedings relating to a matter arising under the [FW Act](#). However, using the exact same terminology as Part 9.4AAA, a court may order costs in [FW Act](#) proceedings where it is satisfied the proceedings have been instituted vexatiously or without reasonable cause, or the court is satisfied the claimant's unreasonable act or omission has caused the other party to incur costs. The terms as applied under the [FW Act](#) have been subject to extensive judicial consideration, and are considered in detail in [Practice note, Costs orders by courts in Fair Work Act proceedings](#).

Immunities

Whistleblowers are granted certain immunities from liability, including that:

- The **whistleblower** is not subject to civil, criminal or administrative liability.
- No contractual or other remedy can be enforced against the **whistleblower**, for example, termination provisions in their employment contract.

Without this immunity, further to disciplinary consequences that could arise out of common law or equitable duties an employee owes to their employer, or under a [modern award](#) or [enterprise agreement](#), a **whistleblower** is also potentially exposed to other sanctions for making a disclosure through action for:

- Breach of the [Australian Privacy Principles](#) in [Schedule 1 of the Privacy Act 1988](#).
- Breach of confidence.
- Breach of an employer's workplace policies, such as a code of conduct.
- Defamation.
- Injurious falsehood.

(*Section 1317AB(1)(a) and (b).*)

Inadmissibility in evidence

To encourage disclosure of wrongdoing by removing the prospect of **whistleblowers** themselves being subject to prosecution for their involvement in that wrongdoing, information disclosed by a **whistleblower** is not admissible against them, other than in proceedings concerning the falsity of the information (*section 1317AB(1)(c)*). It is intended that this immunity will encourage disclosure of wrongdoing by removing the prospect of **whistleblowers** themselves being subject to prosecution for their involvement in that wrongdoing ([EM to the Enhancing Whistleblower Protections amendments](#) at [2.86]).

Whistleblower policy

Prior to the Enhancing **Whistleblower** Protections amendments to Part 9.4AAA, it was not mandatory for a company to have a **whistleblower** policy or process. The Australian Securities Exchange's Corporate Governance Council issued advice to listed companies regarding internal whistleblowing disclosures, and ASIC also provided advice on how companies should handle disclosures and the procedures they might consider establishing to manage this; however, implementing their advice was voluntary.

A number of submissions received by various Parliamentary committees considering amendments to the whistleblowing regime in Part 9.4AAA, prior to the introduction of the Enhancing **Whistleblower** Protections amendments, argued for the introduction of a statutory requirement for companies to establish internal **whistleblower** systems (see, for instance, the [Senate Economics References Committee Issues Paper, Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence](#)). It was submitted that to encourage the importance of an open culture of reporting misconduct, corporations should implement internal **whistleblower** disclosure systems that:

- Provide employees with confidence that reports of misconduct will be treated with appropriate seriousness.
- Where necessary, properly investigate disclosures, and resolve these without harm to the **whistleblower** or others.

The Enhancing **Whistleblower** Protections amendments to Part 9.4AAA established a requirement for certain companies, including [public companies](#) and [large proprietary companies](#), to implement a **whistleblower** protection scheme under a compliant **whistleblower** policy that:

- Facilitates the reporting of serious wrongdoing by eligible **whistleblowers**.
- Details how reports of wrongdoing will be investigated.
- Provides information about how the company will support and protect **whistleblowers** and others from detriment, and information about the protections available to **whistleblowers**.

(Section 1317AI.)

A failure by a company required to implement a compliant **whistleblower** policy is a strict liability offence (see [Summary of protections, remedies and liability under Part 9.4AAA](#)).

For a:

- Detailed consideration of **whistleblower** policies and processes, see [Practice note, Whistleblower policies and processes](#).
- Template **whistleblower** policy, that meets the requirements for a compliant **whistleblower** policy under the [CA 2001](#), see [Standard document, Whistleblower Policy](#).

ASIC guidance

ASIC has also released guidance for companies, company officers and company auditors on complying with the [CA 2001 whistleblower](#) regime, as follows:

- [ASIC Regulatory Guide 270: Whistleblower policies](#), which sets out ASIC's guidance to help entities required to have a **whistleblower** policy to establish a policy that complies with their legal obligations and contains ASIC's good practice guidance on implementing and maintaining a **whistleblower** policy.
- [Information Sheet: Whistleblower rights and protections \(INFO 238\)](#), which explains who is a **whistleblower** under the law, how a **whistleblower** can access the legal rights and protections, what protections are available to **whistleblowers** under the law and when the **whistleblower** protections may not be available.
- [Information Sheet: How ASIC handles whistleblower reports \(INFO 239\)](#), which explains ASIC's role in relation to **whistleblowers**, how ASIC deals with information from **whistleblowers**, how ASIC pursues alleged breaches of the **whistleblower** protections and ASIC's communications with **whistleblowers**.
- [Information Sheet: Company officer obligations under the whistleblower protection provisions \(INFO 247\)](#), which summarises the obligations of company officers and senior managers under the **whistleblower** provisions. It provides guidance for companies on complying with the **whistleblower** provisions.
- [Information Sheet: Company auditor obligations under the whistleblower protection provisions \(INFO 246\)](#), which summarises the obligations of company auditors and members of internal or external audit teams under the **whistleblower** provisions. It also provides guidance for auditors, audit firms and audit teams on complying with the **whistleblower** provisions.

END OF DOCUMENT
