

CHAPTER 4: ENFORCEMENT

383. Schedule 4 of the Bill contains amendments to the enforcement provisions in the Corporations Act. Within the Schedule the amendments are grouped as follows:

- Part 1 Protection for employees reporting breaches to ASIC
- Part 2 Disqualification of directors
- Part 3 Civil penalty provisions

PART 1: PROTECTION FOR EMPLOYEES REPORTING BREACHES TO ASIC

Overview

384. Item 1 inserts a proposed new Part into the Corporations Act, 'Part 9.4AAA — Protection for whistleblowers', after Part 9.4. The provisions in this Part establish a framework which is designed to encourage employees, officers and subcontractors engaged by a company to report suspected breaches of the corporations law to ASIC. The provisions will prohibit employers from victimising employees, officers or subcontractors when they report a suspected breach to ASIC in good faith and on reasonable grounds. Further, the provisions provide the relevant employee, officer or subcontractor with qualified privilege in relation to a protected disclosure of information provided to ASIC regarding a suspected breach of the law.

Protection for disclosures of information

385. A disclosure of information to ASIC regarding a suspected breach of the corporations legislation will be protected if the conditions outlined in proposed section 1317AA are met. This provision applies to a person who:

- is an officer of a company;
- is an employee of a company;
- has a contract for services with the company; or
- is an employee of a person who has a contract for services with the company.

386. Where a person who falls within one of these categories has reasonable grounds to suspect that either a company or a company officer or employee has breached a provision of the corporations legislation and discloses this to ASIC in good faith, that disclosure will be subject to the protections outlined in section 1317AB. Before disclosing the information however, the person must inform ASIC of their name (see proposed paragraph 1317AA(1)(c)).

387. It should be noted that any protected information provided to ASIC will attract the application of the confidentiality requirements contained in existing section 127 of the ASIC Act.

388. The protections which will be afforded to a person reporting a breach to ASIC include protection against:

- criminal and civil liability;
- the enforcement of contractual remedies;
- liability for defamation; and
- termination of contract.

389. In addition, the Bill prohibits any actual or threatened detriment being levelled against a person whose disclosure qualifies for protection under the Part (see proposed subsections 1317AC(1) and (2)). The type of detriment contemplated would include the termination of employment, a reduction in a person's terms and conditions of employment, demotion, or unfair or unequal treatment in the workplace. Where a person contravenes either proposed subsection 1317AC(1) or (2) they will commit an offence and where loss or damage is suffered by the victim as a result of the contravention, compensation may be available under proposed section 1317AD.

390. The protection provided under Part 9.4AAA extends to disclosures regarding suspected breaches of the current and previous provisions of the Corporations Act, ASIC Act and regulations made pursuant to these Acts. The application of the Criminal Code will also extend the protection afforded under the Part to disclosures made in relation to attempts, incitement or conspiracy to breach the law (proposed subsection 1317AA(2)).

Issue 4.1

Comments are sought on whether the Bill should provide protection in relation to disclosures made regarding contraventions of other legislation?

391. It should be noted that the application of Part 9.4AAA relies on the disclosure to ASIC being made in good faith. This differs to qualified privilege requirements currently contained in section 89 of the Corporations Act which provides qualified privilege where there is an 'absence of malice' in making the disclosure. The use of 'good faith' is intended to raise the threshold for obtaining qualified privilege. This is considered appropriate given the need to discourage malicious or unfounded disclosures being made to ASIC. Where a person has a malicious or secondary purpose in making a disclosure, it is considered that the good faith requirement would not be met.

PART 2: DISQUALIFICATION OF DIRECTORS

Increase of maximum period of disqualification in section 206D

392. The Cole Royal Commission into the Building and Construction Industry made a number of recommendations concerning fraudulent phoenix company activity. In particular it recommended that the periods of disqualification for directors contained in Part 2D.6 of the Corporations Act be increased.

393. Section 206D of the Corporations Act currently gives the Court power to disqualify persons from managing corporations for insolvency and non-payment of debts for a maximum period of 10 years. Item 3 of the Bill increases the maximum period of disqualification in section 206D from 10 to 20 years.

Extending the period of automatic disqualification

394. Section 206B of the Act provides for an automatic five year disqualification period from managing corporations for persons convicted of an offence specified in that provision. In addition to the amendments above, the Bill inserts proposed section 206BA which will allow Courts to disqualify persons for up to a further 15 years on application by ASIC.

395. ASIC must apply for an extended disqualification period prior to expiration of the first year of the automatic disqualification.

Clarification of the disqualified persons register

396. Item 4 proposes to clarify the required content of ASIC's register of banned and disqualified directors.

PART 3: CIVIL PENALTY PROVISIONS

Overview

397. The amendments to the Corporations Act contained in this Part of the Bill will:

- amend the maximum pecuniary payable by a body corporate in relation to a contravention of a financial services civil penalty provision;
- clarify that an application for a compensation order can be made in relation to contraventions of the civil penalty provisions regardless of whether a declaration of contravention has been made;
- encompass references to compensation orders in relation to financial civil penalty provisions in existing references to compensation orders in relation to corporation/scheme civil penalty provisions; and
- make a technical amendment.

Maximum financial services civil penalty

398. The maximum pecuniary penalty payable in relation to a contravention of a financial services civil penalty provision is currently \$200,000 (for individuals and bodies corporate)(section 1317G). While the maximum for an individual will remain \$200,000, the maximum for a body corporate will be altered to \$1 million (items 10 and 11).

Declarations of contravention and compensation orders

399. Amendments to sections 1317H, 1317HA and 1317J will ensure that persons and bodies corporate can apply for a compensation order in relation to contraventions of the civil penalty provisions, and such compensation orders to be made, regardless of whether a declaration of contravention in relation to those civil penalty provisions has been made (items 12, 13, 14 and 15). Applicants for a compensation order under sections 1317H and 1317HA will still have to prove both a contravention and that damage resulted from it.

References to compensation orders

400. The existing reference to a 'compensation order' in the definition of a 'civil penalty order' (in section 9) will be amended to include a compensation order with respect to a contravention of a financial services civil penalty provision (item 6). The existing reference is to a compensation order with respect to a contravention of a corporations/scheme civil penalty provision only.

401. To reflect the amended reference to a 'compensation order' and definition of a 'civil penalty order', Items 7, 8, 9 and 16 amend:

- the list of circumstances in which a company shall not indemnify an officer (paragraph 199A(2)(b) and subsection 199A(3)(note 1)); and
- the circumstances in which a court may relieve a person from liability (paragraph 1044A(2)(a) and subsection 1317S(1)).

402. The purpose of these amendments is to ensure that the Corporations Act is clear and internally consistent. They do not indicate a change of policy.

Technical amendment

403. A technical amendment to correct an erroneous cross-reference in the definition of a 'civil penalty order' in section 9 will be made (item 5).

Transitional arrangements

404. Proposed section 1459 of the Corporations Act (see item 1 of Schedule 12) provides that the amendments in Part 3 of Schedule 4 apply in relation to a contravention of a financial services civil penalty provision that occurs on or after the commencement day.