

# POLICY BULLETIN

## TAX WHISTLEBLOWER PROTECTIONS

13 June 2019

New tax whistleblower protections impose obligations on tax agents, corporate officers and senior managers, trustees, partners and employees with functions related to tax affairs.

### 1. OBLIGATIONS FOR ELIGIBLE RECIPIENTS

From 1 July 2019, individuals who receive tax-related disclosures from employees, contractors and other eligible whistleblowers will need to protect the identity of the whistleblower and ensure that they are not victimised or suffer detriment as a result of the disclosure.

The new laws include criminal offences and civil remedies where a person actually causes or threatens to cause detriment to the whistleblower.

#### Introduction

The tax whistleblower protections contained in the [Treasury Laws Amendment \(Enhancing Whistleblower Protections\) Act 2019](#) will commence on 1 July 2019. The new laws introduce protections and remedies under Part IVD of the [Taxation Administration Act 1953](#) (TAA).

The ATO has issued [advice](#) on its website which provides general guidance on the new laws and whistleblower protections.

This policy bulletin contains further information as it relates to CPA Australia members who are likely to be in a position to be eligible recipients and subject to the provisions contained in the TAA. It also includes clarification of the interaction of the whistleblower protections and existing legislation and regulations.

It does not address the whistleblower provisions introduced into the *Corporations Act 2001*. Our INTHEBLACK article [Protections for whistleblowing set to be strengthened: what this means for accountants](#) provides insights on those changes.

#### Eligible recipients

Eligible recipients are defined in section 14ZZV and include:

- an auditor, or a member of an audit team conducting an audit of the entity
- a registered tax agent or BAS agent who provides services to the entity
- a person authorised by the entity to receive disclosures
- a person or body prescribed in the regulations

- if the entity is a body corporate, a director, secretary or senior manager of the body corporate or other employee or officer who has functions or duties that relate to the entity's tax affairs
- if the entity is a trust, a trustee of the trust or a person authorised by the trustee to receive disclosures
- if the entity is a partnership, a partner or a person authorised by the partner to receive disclosures.

In practice, this means that members in business and public practice may find themselves as eligible recipients of a disclosure or disclosures that qualify for protection.

Eligible recipients will need to ascertain whether the discloser satisfies the eligible whistleblower conditions defined in section 14ZZU. If satisfied, then the eligible recipient will then need to determine whether the disclosure qualifies for protection.

## Disclosures

Defined in section 14ZZT, disclosures qualify for protection where:

- the discloser is an eligible whistleblower in relation to an entity
- the disclosure is made to an eligible recipient in relation to the entity
- the discloser has reasonable grounds to suspect the information indicates misconduct, or an improper state of affairs or circumstances, in relation to the tax affairs of the entity or an associate of the entity
- the discloser considers that the information may assist the eligible recipient to perform functions or duties in relation to the tax affairs of the entity or an associate.

The law only requires that the discloser has reasonable grounds for suspicion and that they consider the information may assist. There is no materiality or significance threshold before a disclosure qualifies for protection.

## Disclosures qualifying for protection not actionable

Section 14ZZX ensures that the person making a disclosure cannot be subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure and no contractual or other remedy may be enforced or exercised against the person on the basis of the disclosure.

Further, a contract to which the person is a party may not be terminated on the basis that the disclosure constitutes a breach of contract.

## Confidentiality of whistleblower's identity

If the identity or information that is likely to lead to the identification of the discloser is disclosed, and it was obtained directly or indirectly because of the qualifying disclosure, an offence is committed as set out in section 14ZZW.

The penalty is imprisonment for 6 months or 30 penalty units, or both.

The subsection does not apply if the disclosure is not of the identity of the discloser and is reasonably necessary to investigate misconduct or an improper state of affairs to which the misconduct relates. All reasonable steps must be taken to reduce the risk that the discloser will be identified.

## Victimisation prohibited

Actually or threatening to cause detriment to a person who has made, may have made, proposes to make or could make a disclosure is an offence.

The penalty is imprisonment for 2 years or 120 penalty units, or both.

Section 14ZZY sets out the elements of each offence.

## Detriment

Detriment can include dismissal, injury, disadvantageous alteration of position or duties, discrimination, harassment, intimidation, harm or damage (section 14ZZZAA).

## Compensation and other remedies

A court may make an order in the circumstances set out in section 14ZZZ which includes where a person was an officer or employee of a body corporate and where he or she:

- aided, abetted, counselled or procured the detrimental conduct, or
- induced, whether by threats or promises or otherwise, the detrimental conduct, or
- was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the detrimental conduct; or
- conspired with others to effect the detrimental conduct.

More broadly, a court can make an order if a person engages in conduct that causes detriment or makes a threat where they believe or suspect that the other person may have made, proposes to make or could make a disclosure and that is the reason, or part of the reason for the detrimental conduct.

The order can require compensation for loss, damage or injury suffered as a result for the detrimental conduct, grant an injunction, reinstatement of employment at a comparable level, exemplary damages or any other order the court thinks appropriate (section 14ZZZA).

## Disclosure to receive legal advice

An individual is protected where information is disclosed to a legal practitioner for the purpose of obtaining legal advice or representation in relation to the whistleblower laws (Part IVD of the TAA).

## 2. DISCLOSURES FOR TAX PROFESSIONALS

Eligible whistleblowers include registered tax agents as:

- an individual who supplies [or supplied] services or goods to the entity (whether paid or unpaid)
- an employee of a person that supplies [or supplied] services or good to the entity (whether paid or unpaid).

Registered tax agents, like other eligible whistleblowers, are able to on-disclose to the Commissioner information disclosed to them in their capacity as an eligible recipient, as well as if they receive information regarding entities for whom they supply (or have supplied) services even if the individual is not an eligible whistleblower, without breaching their confidentiality requirement in the [Tax Agent Services Act 2009](#) (TASA) Code of Conduct.

[APES 110 Code of Ethics for Professional Accountants](#) contains provisions relating to managing non-compliance with laws and regulations (NoCLAR). NoCLAR provisions within the Code provides the process for a practitioner to determine an appropriate course of action with respect to an identified or imminent breach which is likely to have a significant effect on the financial statements or financial reporting of the entity or individual. However, like the new whistleblowing regime, it does not require mandatory reporting. Members should also refer to [APES 220 Taxation Services](#).

While the new laws do not change the current requirements for disclosure, they provide an avenue for registered tax agents and BAS agents to disclose information to the Commissioner which may assist the performance of his or her functions or duties under a taxation law.

From the 1 July 2019, registered tax agents, including members of professional bodies, who report in accordance with the whistleblower requirements cannot be penalised. More specifically, the eligible whistleblower cannot be subject to any liability (including disciplinary action) under the TASA or professional requirements including those related to client confidentiality insofar as it relates to the disclosure.

It should be noted that the new laws do not make reporting to the Commissioner mandatory. If the registered tax agent determines the most appropriate course of action is to disclose information that qualifies for protection to the Commissioner, then they will be protected.

CPA Australia recommends seeking legal advice before proceeding with a disclosure under the whistleblower laws.