

SHEKEL BRAINWEIGH LTD.

WhistleBlower policy

Memorandum

Without prejudice

Date: 8 May 2019

To: Barak Nir, Chief Financial Officer of the company

From: Marisa Orr

Matter No: 1038917

Subject Applicability of new corporate whistleblower laws to foreign ASX-listed companies

1 Summary

1. Shekel Brainweigh Limited (**SBW**) should assume the new whistleblower regime under the *Corporations Act 2001* (Cth) (**Corporations Act**), which comes into effect on 1 July 2019 (**section 2**), will apply to it. Foreign corporations for the purposes of the Australian Constitution would seem to fall within the expanded list of the types of entities that are now subject to the provisions (**section 3**).
2. SBW should therefore comply with:
 - (a) the new whistleblower confidentiality requirements (**section 4**); and
 - (b) the prohibitions relating to victimisation (**section 5**);noting that significant consequences can attach to non-compliance with either of these provisions for SBW as well as its officers and employees.
3. SBW is not subject to the Corporations Act requirement to have a whistleblower policy (**section 6**). However, given the wide applicability of the Corporations Act whistleblower provisions and potential adverse consequences for non-compliance, we recommend SBW considers having a whistleblower policy as a means of mitigating this compliance risk.
4. SBW should also note the ASX's 4th Edition of the Corporate Governance Principles and Recommendations (**ASX Recommendations**) contains a new recommendation that ASX-listed entities have and disclose a whistleblower policy and ensure the board or a committee of the board is informed of any material breaches of the policy (**section 7**). The 4th Edition of the ASX Recommendations will only apply to SBW from 1 January 2020, but

ASX has encouraged its earlier adoption. Ultimately, any departures from the ASX Recommendations will require explanation in SBW's periodic reporting under the ASX Listing Rules.

2 Background on new corporate whistleblower regime

5. On 12 March 2019, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 received royal assent. This law takes effect on 1 July 2019 and, among other things, extends the existing corporate whistleblower regime in Part 9.4AAA of the Corporations Act. The classes of potential whistleblowers and recipients of disclosures, as well as the types of disclosable matters have been expanded. This means that a wide range of disclosures may qualify for statutory protection.
 6. The new whistleblower law is intended to standardise the protections available across sectors and encourage whistleblowers to more readily disclose information relating to actual or suspected non-compliance or misconduct with regards to, among others, corporate, financial and taxation laws. It enhances anonymity for whistleblowers and provides remedies, including compensation, should a whistleblower suffer detriment because of making a disclosure or if their identity is revealed. Whistleblowers cannot be subject to legal liability for making a disclosure (although, may be subject to civil, criminal or administrative liability for any personal misconduct revealed by the disclosure or investigation). See [Annexure A](#) for a summary of the key provisions under the new corporate whistleblower regime.
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3 Is SBW a “regulated entity” for the purposes of the revised Corporations Act whistleblower provisions?

7. The revised Corporations Act whistleblower provisions will apply to “regulated entities”. The definition of a “**regulated entity**” in new section 1317AAB of the Corporations Act includes, among others, “a company” and “a corporation to which paragraph 51(xx) of the Constitution applies”.
8. A “**company**” is one that has been registered under the Corporations Act. Although SBW is registered as a foreign company under the Corporations Act, commentators have taken the view that such foreign companies are not generally “companies” for the purposes of the section 9 definition.¹
9. A “**corporation to which paragraph 51(xx) of the Constitution applies**” refers to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”. The reference to “foreign corporations” here is separated from “formed within the limits of the Commonwealth” and “foreign corporation”, “foreign” or “corporation” are not defined in the Constitution. There is no case law on what is meant by “foreign corporation” for the purposes of the Constitution, which suggests the term is to be given its plain, ordinary and literal meaning. In this respect, the definitions for “corporation” and “foreign company” in the Corporations Act are arguably informative where:

¹ The definition of “company” is expanded for the purposes of certain limited provisions in the Corporations Act such that those provisions would apply to SBW. These are not relevant to the operation of the whistleblower provisions and therefore fall outside the scope of this memorandum.

- (a) “**corporation**” includes “any body corporate (whether incorporated in Australia or elsewhere”;
- (b) “**foreign company**” includes “a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories...”; and
- (c) “**body corporate**” is not exhaustively defined, but for which it is clearly irrelevant where the corporate vehicle was formed.

SBW is clearly both a “corporation” and “foreign company” for Corporations Act purposes and it seems logical to assume SBW is a “foreign corporation” within the meaning of paragraph 51(xx) of the Constitution. Alternatively, there is no basis on which to argue that it is not.

- 10. The Explanatory Memoranda to the new whistleblower law makes clear the intention to expand the types of entity about which disclosures qualifying for protection under the Corporations Act can be made but does not elaborate on the constitutional definition of “foreign corporation”.²
- 11. On balance, we consider it prudent to assume SBW as a foreign-incorporated company falls within paragraph 51(xx) of the Constitution and will therefore be classified as a “**regulated entity**” for the purposes of the revised Corporations Act whistleblower provisions.

4 Whistleblower confidentiality requirements

- 12. The Corporations Act confidentiality provisions relating to whistleblower identity information refer to “persons” rather than “companies” and therefore apply to SBW (which makes sense given the regime would seem to apply to foreign corporations).
- 13. Persons must keep confidential a whistleblower’s identity (including information likely to identify them) unless a disclosure is made to:
 - (a) ASIC, APRA or member of the AFP;
 - (b) a legal practitioner for the purposes of obtaining legal advice or representation on the operation of the whistleblower provisions;
 - (c) a person or body prescribed by regulations; or
 - (d) someone else with the whistleblower’s consent.³
- 14. There will be no offence if:
 - (a) the disclosure was not of the whistleblower’s identity;
 - (b) the disclosure was reasonably necessary for the purposes of investigating a matter falling for statutory protection; and

² See the Explanatory Memorandum (paragraphs 2.13-2.14 and 2.46-2.48), Revised Explanatory Memorandum and Supplementary Memorandum.

³ Section 1317AAE(1)-(2), Part 9.4AAA

- (c) the discloser took all “reasonable steps” to reduce the risk that the whistleblower would be identified.⁴
15. Apart from protecting the whistleblowers’ identity and information which may identify them, no provisions protect the information disclosed per se.
16. Breach of the confidentiality requirements can amount to either a criminal or civil offence with the following consequences:
- (a) **Criminal offence:** Maximum penalty of 60 penalty units (\$12,600) and/or 6 months imprisonment for an individual.⁵ A 10-times maximum fine multiplier applies to body corporates.⁶
- (b) **Civil penalty:** Maximum penalty of 5,000 penalty units (\$1,050,000) for an individual (or three times the benefit derived or detriment avoided) or 50,000 penalty units (\$10.5 million) for a body corporate (or three times the benefit derived or avoided, or 10% of the body corporate’s annual turnover up to a maximum of \$210 million).⁷

5 Prohibition against victimisation; compensation and other remedies for detrimental conduct

17. The Corporations Act victimisation provisions refer to “persons”, “body corporates” and officers and employees of “body corporates” and therefore apply to SBW.
18. A person is prohibited from causing, or intentionally or recklessly threatening to cause, detriment to another person when the reason, or part of the reason, for the victimiser’s conduct was their belief or suspicion that a person made, may have made, proposes to make or could make, a qualifying disclosure.⁸ Officers or employees involved in the body corporate’s victimisation of a person also commit an offence.⁹
19. “**Detriment**” includes (without limitation) dismissal, injury of an employee in his or her employment, alteration of an employee’s position or duties to his or her disadvantage, discrimination of an employee and other employees of the same employer, harassment or intimidation, harm or injury to a person (including psychological harm), and damage to a person’s property, reputation, business or financial position.¹⁰
20. Breach of the victimisation provisions can amount to either a criminal or civil offence with the following consequences:
- (a) **Criminal offence:** Maximum penalty of 240 penalty units (\$50,400) and/or 2 years imprisonment for an individual.¹¹ A 10-times maximum fine multiplier applies to body corporates.¹²

⁴ Section 1317AAE(4), Part 9.4AAA

⁵ Schedule 3 Item 337A

⁶ Section 1311C, Part 9.4

⁷ Sections 1317E(1) & 1317G(1J), Part 9.4B

⁸ Section 1317AC(1)-(2), Part 9.4AAA

⁹ Section 1317AC(3), Part 9.4AAA

¹⁰ Section 1317ADA, Part 9.4AAA

¹¹ Schedule 3 Item 338

- (b) **Civil penalty:** Maximum penalty of 5,000 penalty units (\$1,050,000) for an individual (or three times the benefit derived or detriment avoided) or 50,000 penalty units (\$10.5 million) for a body corporate (or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover up to a maximum of \$210 million).¹³
21. A person is also prohibited from aiding, abetting, counselling, procuring, inducing, being knowingly concerned in, or conspiring with others to effect, detrimental conduct.¹⁴ A body corporate may be liable if it breaches a duty it is under to prevent, or take reasonable steps to prevent, a person from engaging in detrimental conduct to an actual, proposed, suspected or potential whistleblower.¹⁵ Potential court orders for detrimental conduct include monetary compensation for loss, damage or injury suffered, injunctions, orders for apologies and reinstatement of terminated employees, exemplary damages and any other order the court thinks appropriate.¹⁶

6 Whistleblower policy requirements

22. The requirement to have a whistleblower policy in new section 1317AI of the Corporations Act will not apply to SBW. It only applies to public companies and large proprietary companies and, as noted in paragraph 8 above, SBW is not a "company" for the purposes of the Part 9.4AAA provisions.
23. Notwithstanding paragraph 22 above, we recommend SBW considers implementing a whistleblower policy. Given the wide applicability of the Corporations Act provisions and potential adverse consequences for non-compliance, a whistleblower policy can be a useful tool for mitigating this compliance risk.
24. Preparing a policy often assists discussions about how the company will structure itself internally to comply with the new (and onerous) rules and can expose non-compliance risks (including, for example, how disclosures are investigated, who is involved and how information is shared and for what purpose). We would be happy to assist if required.

7 ASX Recommendations on whistleblowing

25. While not mandatory, SBW as an ASX-listed company should note the 4th Edition of the ASX Recommendations contains a new ASX Recommendation 3.3 on whistleblowing. The 4th Edition only takes effect for an ASX-listed company's first full financial year commencing on or after 1 January 2020, but ASX has encouraged its earlier adoption.¹⁷
26. ASX Recommendation 3.3 says a listed entity should have and disclose a whistleblower policy and ensure the board or a committee of the board is informed of any material breaches of the policy.
27. Box 3.3 of the new ASX Recommendation suggests what a listed entity might include in their whistleblower policy (**ASX Suggestions**). The ASX Suggestions are:

¹² Section 1311C, Part 9.4

¹³ Sections 1317E(1) & 1317G(1J), Part 9.4B

¹⁴ Section 1317AD, Part 9.4AAA

¹⁵ Section 1317AD(2A), Part 9.4AAA

¹⁶ Section 1317AE(1), Part 9.4AAA

¹⁷ See ASX's Step-by-step Guide on transitioning to the 4th Edition of the ASX Recommendations (March 2019), page 1.

- (a) linking the policy to the organisation's statement of values;
 - (b) clearly identifying the types of concerns that may be reported under the policy and how and to whom reports may be made (including to senior executives and the board);
 - (c) explaining how the confidentiality of the whistleblower's identity is safeguarded and the whistleblower is protected from retaliation or victimisation;
 - (d) outlining the processes to follow up and investigate reports made under the policy;
 - (e) providing for the training of employees about the whistleblower policy and their rights and obligations under it;
 - (f) providing for the training of managers and others who may receive whistleblower reports about how to respond to them; and
 - (g) stating that the policy will be periodically reviewed to check that it is operating effectively and whether any changes are required to the policy.
28. Any departures from the ASX Recommendations will require explanation in SBW's periodic reporting under the ASX Listing Rules (where SBW might consider the size of the company is a relevant factor).
29. As noted in paragraph 23, we consider a policy will assist SBW meet its obligations under the revised Corporations Act whistleblower provisions. If SBW were to take this approach, it would make sense to consider reflecting the ASX Suggestions at the same time.

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Annexure A

New corporate whistleblower regime – 1 July 2019

TOPIC	SUMMARY
Who can make a disclosure?	<p>Individuals who are current and former:</p> <ul style="list-style-type: none"> (a) officers and employees; (b) goods and services suppliers (whether paid or unpaid), including their employees; (c) associates; (d) trustees, custodians or investment managers of a superannuation entity, including their officers, employees, suppliers and their employees (whether paid or unpaid); (e) relatives and dependants of the individuals in (a)–(d) (including a dependant of any such individual’s spouse); and (f) (individuals otherwise prescribed by regulations.¹⁸
Who can receive the disclosure?	<ul style="list-style-type: none"> (a) ASIC, APRA or other Commonwealth bodies prescribed by regulations; (b) an “eligible recipient” (being officers, senior managers, audit team and actuaries of the regulated entity or a related body corporate, a person authorised by the regulated entity to receive protected disclosures or, in the case of a regulated superannuation entity, its officers, audit team, actuaries, trustees (including directors) and authorised persons); or (c) legal practitioners for the purposes of obtaining legal advice or representation on the operation of the whistleblower provisions.¹⁹
The disclosure	<p>Whistleblower must have reasonable grounds to suspect that the information they are disclosing concerns misconduct or an improper state of affairs or circumstances in relation to the entity or a related body corporate.</p> <p>Without limitation, that includes disclosures where there are reasonable grounds to suspect that the information indicates that the entity, a related body corporate, or their officers or employees have engaged in conduct that:</p> <ul style="list-style-type: none"> (i) (contravenes certain Commonwealth legislation in the corporate,

¹⁸ Section 1317AAA, Part 9.4AAA

¹⁹ Section 1317AA(1)–(3) & 1317AAC, Part 9.4AAA

TOPIC	SUMMARY
	<p>financial and credit sectors;</p> <ul style="list-style-type: none"> (ii) constitutes a Commonwealth criminal offence that is punishable by imprisonment of 12 months or more; (iii) represents a danger to the public or financial system; or (iv) is otherwise prescribed by regulations.²⁰ <p>Disclosures solely concerning “personal work-related grievances” are excluded unless they:</p> <ul style="list-style-type: none"> (a) have significant implications for the entity to which the information relates (and the entity is does not relate to the individual); (b) concerns the matters in (i)-(vi) above; or (c) concerns whistleblower victimisation.²¹
<p>Public interest disclosures</p>	<p>Provides for a “public interest disclosure” to a member of Parliament or journalist if the whistleblower:</p> <ul style="list-style-type: none"> (a) previously made a qualifying disclosure to ASIC, APRA or other Commonwealth body prescribed by regulations; (b) notified them of their intention to make a public interest disclosure after at least 90 days has passed, with no reasonable grounds to believe that action is being, or has been, taken to address the disclosed matters; and (c) has reasonable grounds to believe that making a further disclosure would be in the public interest. <p>The extent of information disclosed must be no greater than is necessary to inform the recipient of the conduct or improper state of affairs or circumstances the subject of the disclosure.²²</p>
<p>Emergency disclosures</p>	<p>Provides for an “emergency disclosure” to a member of Parliament or journalist if the whistleblower:</p> <ul style="list-style-type: none"> (a) previously made a qualifying disclosure to ASIC, APRA or other Commonwealth body prescribed by regulations; (b) notified them of their intention to make an emergency disclosure;

²⁰ Section 1317AA(4)–(5), Part 9.4AAA

²¹ Section 1317AADA, Part 9.4AAA

²² Section 1317AAD(1), Part 9.4AAA

TOPIC	SUMMARY
	<p>and</p> <p>(c) 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 to the natural environment. The extent of information disclosed must be no greater than is necessary to inform the recipient of the substantial and imminent danger.²³</p>
Anonymity	Anonymous disclosures qualify for protection. ²⁴
Good faith	No requirement for disclosure to be made in good faith, but disclosures must be based on reasonable grounds. ²⁵
Confidentiality requirements	<p>Whistleblower's identity (including information likely to identify them) must be kept confidential unless made to:</p> <ul style="list-style-type: none"> (a) ASIC, APRA or member of the AFP; (b) a legal practitioner for the purposes of obtaining legal advice or representation on the operation of the whistleblower provisions; (c) a person or body prescribed by regulations; or (d) someone else with the whistleblower's consent.²⁶ <p>There will be no offence if:</p> <ul style="list-style-type: none"> (a) the disclosure was not of the whistleblower's identity; (b) the disclosure was reasonably necessary for the purposes of investigating a disclosable matter; and (c) the discloser took all "reasonable steps" to reduce the risk that the whistleblower would be identified.²⁷ <p>Apart from protecting the whistleblowers' identity and information which may identify them, no provisions protect the information disclosed per se.</p>
Disclosures in court or tribunal proceedings	<p>Persons cannot be required to disclose to courts or tribunals the identity of whistleblowers (or information likely to identify them) except where:</p> <ul style="list-style-type: none"> (a) it is necessary to do so to give effect to the whistleblower provisions;

²³ Section 1317AAD(2), Part 9.4AAA

²⁴ Section 1317AA(5), Part 9.4AAA

²⁵ Section 1317AA(4)-(5), Part 9.4AAA

²⁶ Section 1317AAE(1)-(2), Part 9.4AAA

²⁷ Section 1317AAE(4), Part 9.4AAA

TOPIC	SUMMARY
	<p>or</p> <p>(b) the court or tribunal thinks it necessary in the interests of justice.²⁸</p>
<p>Victimisation / Detrimental conduct</p>	<p>Prohibits a person from causing, or intentionally or recklessly threatening to cause, detriment to another person when the reason, or part of the reason, for the victimiser’s conduct was their belief or suspicion that a person made, may have made, proposes to make or could make, a qualifying disclosure.</p> <p>Officers or employees involved in the company’s victimisation of a person also commit an offence.</p> <p>Prohibits a person from aiding, abetting, counselling, procuring, inducing, being knowingly concerned in, or conspiring with others to effect, detrimental conduct.</p> <p>A body corporate may be liable if it breaches a duty it is under to prevent, or take reasonable steps to prevent, a person from engaging in detrimental conduct to an actual, proposed, suspected or potential whistleblower.</p> <p>“Detriment” includes (without limitation) dismissal, injury of an employee in his or her employment, alteration of an employee’s position or duties to his or her disadvantage, discrimination of an employee and other employees of the same employer, harassment or intimidation, harm or injury to a person (including psychological harm), and damage to a person’s property, reputation, business or financial position.²⁹</p>
<p>Compensation and other remedies for detrimental conduct</p>	<p>Monetary compensation for loss, damage or injury suffered, injunctions, orders for apologies and reinstatement of terminated employees, exemplary damages and any other order the court thinks appropriate.³⁰</p>
<p>Establishing detrimental conduct</p>	<p>Onus of proof reversed – once a person has established they have suffered detriment, it is for the alleged victimiser to prove that they did not victimise the whistleblower.³¹</p>
<p>Whistleblower policy</p>	<p>These provisions will not apply to SBW – see section 6 for more information.</p>

²⁸ Section 1317AG, Part 9.4AAA

²⁹ Sections 1317AC–AD & 1317ADA, Part 9.4AAA

³⁰ Section 1317AE(1), Part 9.4AAA

³¹ Section 1317AD(2B), Part 9.4AAA

TOPIC	SUMMARY
<p>Penalties / imprisonment for breach of the Corporations Act whistleblower provisions</p>	<p><i>Breach of confidentiality of whistleblower's identity:</i></p> <p><i>Criminal offence:</i> Maximum penalty of 60 penalty units (\$12,600) and/or 6 months imprisonment for an individual.³² A 10-times maximum fine multiplier applies to body corporates.³³</p> <p><i>Civil penalty:</i> Maximum penalty of 5,000 penalty units (\$1,050,000) for an individual (or three times the benefit derived or detriment avoided) or 50,000 penalty units (\$10.5 million) for a body corporate (or three times the benefit derived or avoided, or 10% of the body corporate's annual turnover up to a maximum of \$210 million).³⁴</p> <p><i>Victimisation or threatened victimisation:</i></p> <p><i>Criminal offence:</i> Maximum penalty of 240 penalty units (\$50,400) and/or 2 years imprisonment for an individual.³⁵ A 10-times maximum fine multiplier applies to body corporates.³⁶</p> <p><i>Civil penalty:</i> Maximum penalty of 5,000 penalty units (\$1,050,000) for an individual (or three times the benefit derived or detriment avoided) or 50,000 penalty units \$10.5 million for a body corporate (or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover up to a maximum of \$210 million).³⁷</p>

³² Schedule 3 Item 337A

³³ Section 1311C, Part 9.4

³⁴ Sections 1317E(1) & 1317G(1J), Part 9.4B

³⁵ Schedule 3 Item 338

³⁶ Section 1311C, Part 9.4

³⁷ Sections 1317E(1) & 1317G(1J), Part 9.4B