FOLEY'S LIST

THE NEW WHISTLEBLOWER REGIME;

Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth)

This paper accompanies a podcast presentation that Lucy Line, Barrister, recorded for Foley's List on 22 January 2020.

What is this new law? Why has it been enacted?

To understand why we have new laws in respect of whistleblowers, it is necessary first to reflect upon what has been happening in Australia over recent years regarding the finance and corporate sectors, misconduct, and whistleblowers.

The recent Banking and Finance Royal Commission you have probably heard about largely came about due to a whistleblower.

Mr Jeff Morris, formerly an executive at the Commonwealth Bank of Australia ("**CBA**"), testified in 2014 at a senate inquiry into ASIC's supervision of the CBA. Mr Morris had worked as a financial planner at the bank, had left the bank in 2013, and had become a whistleblower to ASIC about some of the CBA's activities. Mr Morris felt the stress of being a whistleblower – he has stated he felt the senators were thinking, as they listened to his testimony, "Oh, here we go, another nutter."[1]

It looks like Mr Morris' concerns were unwarranted as the senate inquiry into financial planning practices at the CBA and ASIC's response to the CBA's conduct did actually result in the Senate recommending in June 2014 that a royal commission was needed into both the CBA *and* ASIC. The senate inquiry report criticised both ASIC and the CBA, taking the position that ASIC had not done enough to handle "rouge financial planners" at CBA.[2]

Despite this, the Coalition Federal Government which was in power at the time resisted holding a royal commission.[3] The Coalition's subsequent victory at the next federal election 2016 meant a royal commission was further delayed, despite having the support of Labor, the Greens and some independents.

Ultimately, in November 2017, the then Prime Minister Turnbull did announce that a royal commission would be held, performing this policy "backflip" after large banks themselves called upon the Government to end ongoing uncertainty and help to restore the public's faith in the financial system by authorising a royal commission.[4]

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[1] S Letts, "The whistleblower, journo and politician who hauled the banks before a royal commission" ABC news online, 1 February 2019, accessible at: https://www.abc.net.au/news/2019-02-01/how-the-banking-royal-commission-was-born/10758404

[2] "Federal Government resisting call for royal commission into ASIC and Commonwealth Bank", ABC news online, 27 June 2014, accessible at: https://www.abc.net.au/news/2014-06-27/government-resists-call-for-royal- commission-into-asic-cba/5554394

[3] Ibid.

[4] L Sweeney and L Yaxley, "Malcolm Turnbull backflips on banking royal commission after big four call for inquiry to restore public faith", ABC news online, 30 November 2017, accessible at: https://www.abc.net.au/news/2017-11-30/banking-royal-commission-announced-by-pm-after-big-four- letter/9209926.

In 2018, Kenneth Hayne, formerly a Justice of the High Court, sat as Commissioner of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Public hearings into misconduct in that industry were conducted. In the Commission's final report, Commissioner Hayne found that in that industry, misconduct had been rewarded. He found, at page 2 of the final report:[5]

> Rewards have been paid regardless of whether the person rewarded should have done what they did. Second, entities and individuals acted in the ways they did because they could. Entities set the terms on which they would deal, consumers often had little detailed knowledge or understanding of the transaction and consumers had next to no power to negotiate the terms.

On 4 February 2019, the Federal Government released its response to the Royal Commission.[6]

In light of the Commission's scathing findings, the Government emphasised that it would take steps to enhance corporate accountability in Australia. Part of that would involve enacting legislation to protect whistleblowers in the corporate, credit and financial sectors.

The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* is that legislation. The Act amends the *Corporations Act 2001* to consolidate and broaden the existing protections and remedies for corporate and financial sector whistleblowers. It also amends the *Taxation Administration Act 1953* to create a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct relating to an entity's tax affairs. It also makes minor consequential amendments of the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and *Superannuation Industry (Supervision) Act 1993*.

On 19 February 2019, the Honourable Member of Parliament Meryl Swanson, a Labour Party member, gave the Second Reading Speech of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill. Ms Swanson spoke of how the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry found that would- be whistleblowers were reticent to "blow the whistle" on corrupt or wrong conduct because they could not be guaranteed protection unless they followed a stringent list of criteria. Member Swanson stated that the law needed to be reformed to encourage whistleblowing.

Ms Swanson outlined how pre-law reform, whistleblowers needed to identify themselves – they could not be anonymous – and they had to be a current employee of an organisation and report the conduct to the very organisation that was engaging in the conduct. Limiting whistleblowing to identified, current employees was a significant disincentive to would-be whistleblowers. It meant a real risk of being targeted professionally and personally by employers for "blowing the whistle".

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[5] "Final Report into Misconduct in the Banking, Superannuation and Financial Services Industry", Volume 1, February 2019, accessible at https://treasury.gov.au/sites/default/files/2019-03/fsrc-volume1.pdf

[6] "Restoring Trust in Australia's Financial System", published by the Australian Government, February 2019, accessible at https://treasury.gov.au/sites/default/files/2019-03/FSRC-Government-Response-1.pdf

Ms Swanson spoke of knowing a whistleblower who suffered from poor sleep and impacts from "blowing the whistle" that reverberated through that person's marriage, finances and mental health. She spoke of how whistleblowers took significant risks, and often paid for their choices, when choosing to come forward under the pre-reformed law. She argued that law reform was also needed to simplify the whistleblowing system, which was criticised as being too complex. She called for a fairer system.

The Honourable Member of Parliament Luke Gosling, also a Labor Party member, specifically mentioned whistleblower Jeff Morris when Mr Gosling gave a speech before the second reading of the Bill, proclaiming:[7]

> … whistleblowers were the unsung heroes of the recent Hayne royal commission. Too often, whistleblowers bear the personal cost of making public interest disclosures. The tragedy of their predicament lies in the fact that whistleblowers should never have been required to take such risks in the first place. Ideally, organisations and corporations should embrace those who identify and name the discontinuities between the espoused and the lived values and principles that lie at the very heart of all ethical failures. But, alas, we do not live in an ideal world; thus our need, as legislators, to now protect those who have the courage to declare that the emperor has no clothes. We need to do that. This bill goes towards doing that…

The Honourable Member of Parliament Ted O'Brien, a member of the Liberal Party, also spoke, stating:[8]

> Edmund Burke once said, 'The only thing necessary for the triumph of evil is for good men to do nothing.' In order for us to ensure that wrongdoing—evil, if you like—is made transparent, disclosed and acted upon, men and women must be empowered so they can speak up. That goes to the heart of what the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 is all about.

The Bill was passed on that day. It received Royal Assent on 12 March 2019.

What is a whistleblower?

To be an "eligible whistleblower" under the reformed law, one must meet four criteria (s 1317AAA *Corporations Act*):

(a) Who Is Blowing The Whistle?

Note – anonymity can be retained and protections are not restricted to current employees!

Eligible whistleblowers are, broadly, organisational "insiders" and those close to them, and may be any of the following (s 1317AAA):

- A current employee or former employee of an organisation/company the disclosure is about

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[7] Hansard, 19 February 2019, page 907, accessible at: https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/f39eb4a6-3718-4d51-8b1a-b396d70b6859/toc_pdf/House%20of%20Representatives_2019_02_19_6960_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/f39eb4a6-3718-4d51-8b1a-b396d70b6859/0009%22

[8] Hansard, 19 February 2019, page 910, accessible as above.

- An employee/former employee of a related company or organisation
- A company officer (i.e. director/company secretary) of the company/organisation
- A company officer (i.e. director/company secretary) of a related company/organisation
- A contractor or contractor's employee who has supplied goods and services (paid or voluntarily) to the company/organisation.
- An associate of the company/organisation
- A trustee/custodian/investment manager (or their own employees, officers, or goods and services providers) of a superannuation entity
- Spouses, relatives or dependants of one of the above

Whistleblowers do not have to formally register anywhere as whistleblowers to enjoy the protections of the law – they just have to "blow the whistle" in the manner stipulated below and they automatically enjoy protections under the law.

In Australia, there is no provision for whistleblowers to be paid or rewarded by authorities for their information.

Further, would-be whistleblowers do not get immunity for their own misconduct if they blow the whistle and their information implicates themselves or their own misconduct is subsequently uncovered. However, regulators and prosecutors may "go easy" on whistleblowers for their own part in broader misconduct and may decide not to take action against whistleblowers, or may take action against them but recommend reduced penalties, reflecting their cooperation with authorities.

(b) In Respect Of What Entities?

The "regulated entities" are set out in s 1317AAB *Corporations Act.*

The entity about which the disclosure is being made must be one of the following:

- A company
- A constitutional corporation
- A bank
- A provider of general insurance or life insurance
- A superannuation entity or superannuation trustee
- An incorporated association, including not-for-profits that trade, lend or borrow money, or provide financial services and their trading/financial activities make up a sufficient proportion of their overall activities.

Note – not all not-for-profits are subject to whistleblower protections! It depends whether they are a "trading or financial corporation" – see ASIC information sheet, "Whistleblower Protections for Not-For-Profit Organisations" for more information about what the test is for whether a not-for-profit is a "trading or financial corporation".

(c) To Whom is the Whistle Blown?

Who "eligible recipients" are is set out in s 1317AAC *Corporations Act*.

Disclosure must be made by a whistleblower to a:

- Officer (i.e. director or company secretary) of the company/organisation or a related entity
- Senior manager of the company/organisation or a related entity
- Auditor of the company/organisation or a related entity
- Actuary of the company/organisation or a related entity
- Person authorised by the company/organisation to receive whistleblower disclosures

Additionally, whistleblowers may choose to go straight to ASIC to make a disclosure, bypassing their organisation, or, if relevant, to the Australian Prudential Regulation Authority, or to the Australian Federal Police.

If the matter is in the "public interest" (a public interest disclosure) or concerns substantial and imminent danger to people or the natural environment (an emergency disclosure) s 1317AAD *Corporations Act* applies. This section provides that a whistleblower will also be protected if they make a report to a journalist, or to a member of State or Federal Parliament, *as long as* they have previously reported the matter to APRA or ASIC, at least 90 days have passed (for a public interest disclosure – there is no need to wait for an emergency disclosure), there are no reasonable grounds to believe that action is being taken, and they warn ASIC or APRA in writing that they intend to make a public interest disclosure.

Reports to the media or parliament should be no greater than necessary to inform them of the whistleblower's concerns – i.e. this is not an avenue to be the next Wikileaks.

Reporting matters to the press, parliamentarians or the public that are not in the "public interest", or which do not relate to emergencies, will not protect whistleblowers.

(d) What can be Disclosed?

An eligible whistleblower must make a disclosure of a "disclosable matter" (s 1317AA(4) *Corporations Act*).

A "disclosable matter" arises when a whistleblower has reasonable grounds to suspect the disclosure concerns misconduct or an improper state of affairs or circumstances relating to the company, i.e. that a reasonable person in that position would so suspect this.

Even if the whistleblower turns out to have incorrect information, they will still be protected by the law, as long as they did not deliberately make a false report.

"Misconduct" is defined in s 9 *Corporations Act* as including fraud, negligence, default, breach of trust and breach of duty.

Regarding what an "improper state of affairs or circumstances" means, this phrase is intentionally broad and so is not defined in the *Corporations Act*. Some examples of conduct that would likely constitute an "improper state of affairs or circumstances" would include:

- conduct that would involve an offence or breach of regulations
- conduct that represents a danger to the public or financial system
- insider trading
- insolvent trading
- fraud
- money laundering
- terrorism funding
- activities that exploit legal loopholes to harm the administration of government programs
- activities that pose the risk of harming consumers
- activities that do not constitute a breach of the law but are for some reason unethical

Benefits of the law reform

The Act means that whistleblowers enjoy more rights and protections. They do not need to do anything to avail themselves of these rights and protections apart from ensuring that they are an eligible whistleblower and they are reporting a disclosable matter in respect of a regulated entity to an eligible recipient.

"Blowing the whistle" within the ambit of the legislation means that whistleblowers are protected from civil claims, such as claims of breaches of confidentiality, breaches of employment contract and breaches of other contractual obligations. They cannot lawfully be subjected to detrimental treatment by their organisation as a result of "blowing the whistle".

Other main benefits for would-be whistleblowers are that they may retain their anonymity if they wish, they are not obliged to make an internal report to their own organisation before taking their complaint to an external regulator, like ASIC, and their identity (if disclosed) and information must be treated confidentially by the recipient.

Whistleblowers can largely rest assured that their identity will be protected if they wish. If a person fails to keep a whistleblower's identity (or information that could lead to the identification of a whistleblower's identity) confidential, without having received consent or authorisation to disclose it, a person will commit an offence (s 1317AAE *Corporations Act*). A civil penalty also attaches to a breach of this section.

Society at large and individual entities benefit from the law reform. While certain entities have an added regulatory burden of having to draft, implement, and monitor a whistleblower policy, the fact remains that entities can benefit reputationally and financially from ensuring transparency within their organisations and discouraging misconduct.

Risks arising as a result of the law reform

Even if an organisation is not required by the law to have a whistleblower policy in place, all organisations should be aware that they must not engage in, or even threaten, "detrimental conduct" to an actual, suspected or potential whistleblower for making (or possibly making in the future) a whistleblower disclosure. It is not necessary that the victim feared that any threat would actually be carried out.

"Detriment" includes dismissal, injury in employment, alteration of position or duties to the employee's disadvantage, discrimination between the employee and other employees of the employer, harassment, intimidation, harm, injury (including psychological injury) and damage to the victim's business, property, reputation, financial position, or other damage.

A victim can commence litigation for compensation or other remedies if they suffer detrimental treatment. In such a case, the burden of proof is shifting – the applicant needs only to adduce evidence that suggests a "reasonable possibility" of the matters to be proved, which, if satisfied, the respondent bears the burden of proving the claim is not made out (s 1317AD(2B) *Corporations Act*).

A court may order that a successful applicant be compensated for loss, damage or an injury they suffer as a result of the detrimental conduct, may grant an injunction to stop the detrimental conduct or remedy it, may order an apology, may order reinstatement of employment in the same or to a comparable position, or may order exemplary damages to be paid (s 1317AE *Corporations Act*).

ASIC may investigate complaints by whistleblowers (or would-be whistleblowers) that they have suffered detriment because they made a whistleblower disclosure or because their employer considered they might make a whistleblower disclosure.

As discussed above, it is imperative that those to whom a disclosure is made keep the identity of the whistleblower confidential, unless they are authorised to disclose it or have consent to do so. For entities that are worried about the added regulatory burden of the law reform, and the prospect of dealing with floods of whistleblower disclosures in their organisation, they may consider engaging an external whistleblower hotline service. Such a service allows an entity's officers and employees to contact a third party and make disclosures to that service. For example, KPMG runs a service called FairCall, which will independently investigate whistleblower reports and will report back to their corporate clients with findings and recommendations.

What about whistleblower policies? Must every organisation have a policy?

Since 1 January 2020, all public companies, large proprietary companies and proprietary companies that are trustees of a registrable superannuation entity must have a whistleblower policy. They also must make their policy available to their employees and officers (s 1317AI *Corporations Act*). ASIC will enforce this and will, in its own words, "conduct surveillance activities to ensure compliance."[9]

Failure to comply with this requirement to have a whistleblower policy is an offence of strict liability (s 1317AI(4) *Corporations Act*) with a penalty of 60 penalty units (currently $12,600).

[9] RG 270.23, ASIC Regulatory Guide 270, November 2019, page 12.

Other organisations do not have to have a policy, but as a matter of good corporate governance and risk management, a board may voluntarily decide to implement a whistleblower policy. If you give general corporate law advice to entities, this may be something you choose to discuss with them. For example, an organisation may appreciate that encouraging whistleblowing may lead to crime within the organisation being identified and stopped early and financial loss reduced. It may also "nip problems in the bud" and reduce risks to an entity's reputation that arise as a result of widespread internal misconduct.

For corporate clients, consider whether they are required to have a whistleblower policy in place. If they already have a policy, it should be reviewed to ensure that it is compliant with the reformed laws.

If your client is an individual who is contemplating becoming a whistleblower, you can advise them about how they can do that while ensuring they stay protected under the new law – consider whether they wish to retain anonymity, whether you will correspond with the corporation or organisation on their behalf, to whom the whistle should be blown, and caution them that approaching the media or parliamentarians risks them not being protected, except in certain circumstances. Consider whether they wish to at first instance blow the whistle internally or whether they wish to make a report straight to a regulator, like ASIC or APRA.

My client wants a policy! Advising clients on drafting a whistleblowing policy

A mandatory whistleblower policy must contain the following content (s 1317AI(5) *Corporations Act*):

- it must set out the protections available to whistleblowers, including the protections available under the legislation
- how and to whom an individual can make a disclosure
- how the company will support whistleblowers and protect them from detriment
- how the company will investigate disclosures that qualify for protection under the legislation
- how the company will ensure the fair treatment of employees who are mentioned in whistleblower disclosures
- how the policy will be made available to officers and employees
- any matters prescribed by the regulations.

ASIC has published a helpful regulatory guide (Regulatory Guide 270) to assist with the drafting whistleblower policies, which is available on the ASIC website. It sets out what must be contained in a policy and also contains non-mandatory tips for good practice in respect of handling the whistleblowing process.

It notes there is no "one size fits all" policy (RG 270.34), and what a policy will contain will depend on the size, complexity and nature of an entity's business.

ASIC sensibly advises that any whistleblower policy should be easy to understand for its users, should employ plain English, avoid legal and industry jargon, have a table of contents and clear headings and may make use of diagrams and flowcharts (RG 270.33).

ASIC emphasises that the policy should encourage whistleblowing, should adopt a positive tone and encourage a "speak up" culture. These sentiments can be addressed early on in the policy's content, where the policy's purpose is outlined and the importance of whistleblowing to an entity is outlined. While a statement discouraging deliberate false reporting may be included, entities should ensure they do not use language that unintentionally deters reporting (RG 270.63).

ASIC also points out that adopting a whistleblower policy is just the beginning – the policy should be implemented consistently and applied (RG 270.28). Officers and staff need to be trained on the fact there is a policy and what its contents are. Copies of the policy should be posted on the entity's intranet, on noticeboards, and may be included in "starter packs" for new hires. An entity's board needs to monitor the policy and address any problems that occur with the internal whistleblowing procedure. ASIC recommends that a whistleblower policy be reviewed every two years.

It will be interesting to watch the impacts of the recent law reforms on the Australian corporate and financial sectors and to monitor whether whistleblower disclosures increase in volume. It will also be interesting to monitor how the courts interpret the new laws. I hope this paper served as a useful introduction to the whistleblower law reform.

Lucy Line, barrister at the Victorian Bar.