



## Précis Paper

### Whistleblower Protections in Australia

A discussion of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* which applies from 1 July 2019.

#### Discussion Includes

- Background to the legislation
- What constitutes a protected disclosure?
- Which organisations are effected by this legislation?
- Emergency disclosure
- The six-month lead in time
- What will the policy need to address?
- The range of protections
- What should businesses do when they receive a disclosure?

## Précis Paper

### Whistleblower Protections in Australia

1. In this edition of BenchTV, Justin Le Blonde (Partner, Kennedys) and Persephone Forster (Senior Associate, Kennedys) discuss the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* which applies from 1 July 2019 and will have ramifications for the private sector.

#### Background to the legislation

2. On the 12<sup>th</sup> of March 2019 the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* passed the Senate and received Royal Assent, which means that it will take effect from 1 July 2019
3. The legislation has been in the works for a number of years and been in ongoing consultation about the form it might take.
4. This initiative has come out of the Federal Government's Open Government Plan, and in February 2017 a lot of the consultation was very favourable towards passing a law of this type, as there has been a deficiency in the private sector in relation to whistleblowing, and this Act seeks to rectify that deficiency.
5. The public sector have had a public disclosure regime for many years which has worked quite effectively.
6. There were some provisions under the *Corporations Act 2001 (Cth)*, but those provisions didn't seem to be enlivened, and also there weren't as many safeguards for those who were blowing the whistle.
7. Community expectations around prudent financial management of corporations and publicly listed companies is at the forefront of the media at present.
8. The *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* shined light on these issues, and there is wider public expectation that there be some method for people with inside knowledge of what is going on within businesses to raise these issues in a manner that requires some responsiveness from the business itself, and if that is unsatisfactory, to then be able to make complaints outside of the business.
9. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* has some key terms in it that enable protection for whistleblowers. The term 'eligible whistleblower' is central to the Act, and is a term which is very broadly defined. It extends to employees and officers of the company; employees and officers of suppliers to that corporation or entity; relatives and dependents of employees and officers of the company and suppliers, and other interested parties.

10. A real difficulty that whistleblowers have faced in the past is isolation, scrutiny and ridicule, and they often find it very difficult to continue once they have made a whistleblowing complaint.
11. There was also a situation where common law principles in employment such as duty of faith and fidelity, which imposed a restriction on people to make such whistleblowing complaints.
12. Prior to *Commonwealth Bank of Australia v Barker [2013] FCAFC 83* trust and confidence had had application in Australia, which was another hindrance to making whistleblowing complaints.
13. From 1 July 2019, provided the whistleblower has reasonable grounds to suspect on information that there may have been a contravention of financial services legislation or regulation, or that there might be conduct within the business that amounts to a criminal offense where there's an imprisonment term in excess of 12 months, disclosure will be protected.
14. Where that information is disclosed to APRA, ASIC or an eligible recipient within the business itself, that would be a protected disclosure, and that has significant implications for the discloser. It means that the business cannot take detrimental action against them because they have made the disclosure.
15. Employers cannot lawfully dismiss a discloser who makes a protected disclosure because they have done so.
16. If there is detrimental action taken against that person, there will be scope under this Act to bring a claim for compensation in the courts, where a reverse onus of proof will apply to any proceedings. The business will then have to prove that detrimental action did not occur as a result of the person making the protected disclosure.
17. This new legislation has removed the good faith requirement which was found in the *Corporations Act 2001 (Cth)*. This enables people to make whistleblowing disclosures without feeling that they need to satisfy a particular test.

#### What constitutes a protected disclosure?

18. Not everything will constitute a protected disclosure under this legislation. Where someone may raise a grievance that relates to personal work-related matters or something in which they have a personal interest, it may be in those circumstances that a disclosure is not protected under this legislation. It is not an all-encompassing protection, rather it is directed towards financial mismanagement, breaches of Australian law and matters of wider public significance.
19. Under this new legislation, the discloser has the ability to not have to identify themselves, which is in contrast to the *Corporations Act* provisions where in order for the discloser to be investigated they did need to identify themselves.

20. This legislation will make it a lot easier for those wanting to make whistleblowing disclosures, lawyers and for those eligible recipients to actually understand what the guidelines and laws are in relation to whistleblowing in the private sector.

Which organisations are effected by this legislation?

21. The range of organisations effected by this legislation is quite broad. It includes large and small entities incorporated under the *Corporations Act*, superannuation businesses and authorised deposit-taking institutions.
22. Businesses will be considered a large business if they meet one of three criteria: They have more than 50 people, have a turnover of \$25 million or more, and gross assets of \$12.5 million or more. If you are a large business, you will be required to have an internal business policy that is freely available to all in the business and provides a clear framework for how disclosures are to be made and handled, and who the eligible recipient in the business is under the Act.
23. People within the business who are senior managers or officers of the company are automatically eligible recipients, but in addition businesses can nominate other authorised recipients. This all needs to be made clear in the policy.
24. If the business has not responded appropriately or sufficiently to a disclosure that is made, then the discloser can be protected when they make a disclosure to the media, within certain parameters.
25. This enables employees, who are unhappy with management's response to a matter they believe to be serious, to potentially be protected from various civil actions including termination of employment.

Emergency disclosure

26. There is also a provision for what is described as an emergency disclosure. When there is an issue which poses a national security threat or a risk to the public, one can make a disclosure to the media in those circumstances.

The six-month lead in time

27. Businesses will have a six-month lead-in time once this legislation takes effect. The requirement to have a policy in place that sets out how businesses will deal with these matters and respond to them must be in place by January 2020.
28. A protected disclosure can be made to a lawyer for the purpose of seeking legal advice on a discloser's rights under this legislation, and for the purpose of seeking compensation if they believe they have suffered detriment as a result of actions

taken by their employer, supplier or associated business, because they have made this disclosure.

**What will the policy need to address?**

- 29. The legislation will not apply to work related grievances, for which most prudent businesses will have a separate policy.
- 30. The definition of detrimental conduct within the act is quite broad. It can include being treated differently, not having access to promotions or salary increases that might arguably have otherwise been available to that person, and dismissal.
- 31. The legislation is mindful not to incentivise vexatious disclosures. If a discloser pursues a claim for compensation because they have suffered detriment as a result of their disclosure, they cannot have costs awarded against them unless the proceedings are instituted vexatiously.
- 32. Businesses will need to ensure that when they are investigating these matters that that they maintain the discloser's secrecy in communications, such as emails. There are penalties, sanctions and repercussions that may occur if the identity is revealed.

**The range of protections**

- 33. Prior to this legislation, Australia did not have any protections in place for whistleblowers in respect of breaches of consumer credit law, corporate corruption, bribery, fraud, money laundering or even taxation.
- 34. The legislation makes provision for anonymous disclosures and the management of anonymous disclosures. Previously, there have been instances where businesses have said that they have received an anonymous disclosure and as a result cannot receive any further details, therefore they are not going to do anything about it.
- 35. A person does not necessarily have to be an employee or contractor engaged by the business to be a discloser. Simply having a contract with the business would give rise to the ability to make a disclosure under this regime, and significantly even if the entity against which the disclosure is made has contractual rights against the discloser, these rights cannot be enforced because someone has made a disclosure under this Act.
- 36. Businesses will need to be aware of all that is covered by the term 'detriment' and how it affects their contractual rights.

**What should businesses do when they receive a disclosure?**

37. Businesses that receive a disclosure should maintain confidentiality and adhere to the Act.
38. Disclosures should be treated with full seriousness, not be discounted and have a proper investigation. This may require the need to investigate the matter by appointment of a lawyer or a third party to ensure the independence of the investigation.
39. The discloser should be kept up to date with how the investigation is progressing. If not, they may feel that other things are occurring outside of their knowledge, or it may impact on their health and safety, and general well-being. It may also cause a reluctance to come to work. It must be made clear to all participants that there cannot be any retaliatory actions taken or any attempts to try and circumvent the process.
40. Caution must be taken in the preparation of a report. The temptation of recipients to have some input into the report can have bad consequences, as it is meant to be an independent investigation.
41. The discloser should have assistance in better formulating or articulating their disclosure.

## **BIOGRAPHY**

### **Justin Le Blond**

**Partner, Kennedys - Sydney**

Justin was admitted in 2005 and practices principally in employment liability, industrial relations and workplace safety law. Prior to joining Kennedys in November 2017, Justin worked at a leading national law firm.

He represents a range of clients including insurers, large corporates and SMEs, and all levels of government, and is known for his litigation expertise.

Justin advises on effective employee management, the protection of confidential information and intellectual property, executive dispute mitigation, misconduct in the workplace, and the changing landscape of Australian labour law. His unique experience in insolvency and criminal law is invaluable to external appointments, work health & safety prosecutions, investigative matters and regulatory audits.

A Committee Member of the Industrial Relations Society of NSW, Justin has been consistently named in Best Lawyers Australia for Labour and Employment law.

### **Persephone Forster**

**Senior Associate, Kennedys - Sydney**

Persephone is a Senior Associate in Kennedys' Sydney office. An industrial and employment law specialist, Persephone's expertise covers the full spectrum of employment and workplace issues.

Persephone represents government and private clients across industry sectors including banking, tourism, health, transport and logistics and professional services.

She advises on enterprise bargaining, award and agreement interpretation, managing complex workforce change, dispute resolution, the extra-territorial application of Australian employment law, protecting data and intellectual property, enforcing restraints of trade, payroll tax, engaging independent contractors and mergers and acquisitions.

Persephone's practice balances regular appearances in superior courts and industrial tribunals with corporate training and providing strategic advice to executives, managers and HR business partners.

## **BIBLIOGRAPHY**

### **Cases**

*Commonwealth Bank of Australia v Barker [2013] FCAFC 83*

### **Legislation**

*Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*  
*Corporations Act 2001 (Cth)*